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**ORAL ARGUMENT NOT YET SCHEDULED**

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No. 11-1141 (and consolidated cases)

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

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AMERICAN CHEMISTRY COUNCIL

*Petitioner,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

*Respondent.*

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**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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**REPLY BRIEF OF INDUSTRY PETITIONERS**

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## TABLE OF CONTENTS

TABLE OF CONTENTS .....	iv
TABLE OF AUTHORITIES .....	vi
GLOSSARY OF TERMS .....	ix
STATUTES AND REGULATIONS .....	1
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	2
I. THE ENERGY ASSESSMENT IS UNLAWFUL .....	2
A. EPA has No Authority to Adopt the Energy Assessment.....	2
B. EPA Failed to Follow Prescribed Standard-Setting Methods in Establishing the EA.....	6
C. The EA is Not a GACT Management Practice Standard.....	10
II. EPA HAS A DUTY TO ACCOUNT FOR MALFUNCTIONS WHEN SETTING STANDARDS UNDER § 112(d) OF THE CLEAN AIR ACT. ....	11
A. Malfunctions Are Foreseeable and Reasonably Likely to Recur.....	12
B. Malfunctions Are a Relevant Aspect of Source Operation. ....	13
C. EPA and Environmental Intervenors Fail to Distinguish This Court’s Precedent.....	14
D. GACT Standards Must Account for Malfunctions. ....	15
E. Malfunctions May Be Addressed Through Work Practice or Management Practice Standards. ....	17
III. EPA AND ENVIRONMENTAL INTERVENORS MISSTATE THE SCOPE OF INDUSTRY PETITIONERS’ ARGUMENTS.....	20
CONCLUSION .....	22

CERTIFICATE OF COMPLIANCE ..... 24  
CERTIFICATE OF SERVICE ..... 25

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Chevron U.S.A., Inc. v. NRDC</i> , 467 U.S. 837 (1984) .....	11
<i>Mingo Logan Coal Co. v. EPA</i> , No. 10-0541, 2014 WL 4828883 (D.D.C. Sept. 30, 2014).....	5
<i>Nat’l Ass’n of Clean Water Agencies v. EPA</i> , 734 F.3d 1115 (D.C. Cir. 2013).....	11, 21, 22
<i>Nat’l Lime Ass’n v. EPA</i> , 627 F.2d 416 (D.C. Cir. 1980).....	18
<i>Nat’l Mining Ass’n. v. EPA</i> , 59 F.3d 1351 (D.C. Cir. 1995).....	3, 4, 16
<i>NRDC v. EPA</i> , 859 F.2d 156 (D.C. Cir. 1988).....	13
<i>Portland Cement Association v. Ruckelshaus</i> , 486 F.2d 375 (D.C. Cir. 1973).....	20
<i>Sierra Club v. EPA</i> , 167 F.3d 658 (D.C. Cir. 1999).....	13
<i>Sierra Club v. EPA</i> , 551 F.3d 1019 (D.C. Cir. 2008).....	11, 15, 18, 20
<i>Smith v. City of Jackson</i> , 544 U.S. 228 (2005) (O’Connor, J., concurring) .....	13
<b>STATUTES</b>	
42 U.S.C. § 7411, CAA § 111 .....	15
*42 U.S.C. § 7412, CAA § 112 .....	3, 4, 5, 6, 7, 9, 10, 11, 15, 16, 17, 20, 21, 22

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

**REGULATIONS**

40 C.F.R. Part 63 Subpart JJJJJJ, Table 1.....	19
40 C.F.R. Part 63 Subpart JJJJJJ, Table 2.....	2, 6
40 C.F.R. § 63.2.....	12, 13
40 C.F.R. § 63.7(e)(1) .....	14
40 C.F.R. § 63.342(f)(1)(i).....	19
40 C.F.R. § 63.803(a)(1) .....	19
40 C.F.R. § 63.7700(c).....	19
40 C.F.R. § 63.11200.....	19
40 C.F.R. § 63.11214(d) .....	18
40 C.F.R. § 63.11237 .....	2

**FEDERAL REGISTER NOTICES**

58 Fed. Reg. 42,760 (Aug. 11, 1993) .....	12
*76 Fed. Reg. 15,554 (Mar. 21, 2011).....	9, 12, 13

**OTHER AUTHORITIES**

Anthony Wright & Michaela Martin, EPA-HQ-OAR-2006-0790-0023, Results from the U.S. DOE (Department of Energy) 2006 Save Energy Now Assessment Initiative: DOE's Partnership with U.S. Industry to Reduce Energy Consumption, Energy Costs and Carbon Dioxide Emissions (Sept. 17, 2007).....	8
CIBO, EPA-HQ-OAR-2006-0790-1783 Comment on Proposed Rule (Aug. 20, 2010).....	6
EPA, EPA-HQ-OAR-2006-0790-2330, Response to Public Comments on the Proposed Area Source Rule, Vol. 2 (Mar. 21, 2011) .....	6
EPA, EPA-HQ-OAR-2006-0790-2330, Response to Public Comments on the Proposed Area Source Rule, Vol. 3 (Mar. 21, 2011) .....	14, 19

EPA, EPA-HQ-OAR-2006-0790-2336, Climate Wise – Wise Rules for Industrial Efficiency (July 1998) ..... 8

ERG, EPA-HQ-OAR-2006-0790-0049, MACT Floor Analysis for the Industrial, Commercial, and Institutional Boilers National Emission Standards for Hazardous Air Pollutants – Area Source (Apr. 2010) ..... 8

Mary Johnson, EPA-HQ-OAR-2006-0790-2515, Beyond-the-Floor Analysis for Mercury and Carbon Monoxide Area Source Industrial/Commercial/Institutional Boilers (Dec. 2012)..... 8

S. Rep. No. 101-228 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3535..... 16

South Carolina Manufacturers Alliance, EPA-HQ-OAR-2006-0790-2196, Comment on Proposed Area Source Rule (Aug. 23, 2010)..... 6



**GLOSSARY OF TERMS**

CAA	Clean Air Act
EA	Energy Assessment
EPA	U.S. Environmental Protection Agency
GACT	Generally Available Control Technology
HAP	Hazardous Air Pollutants
MACT	Maximum Achievable Control Technology
NESHAP	National Emission Standards for Hazardous Air Pollutants

## STATUTES AND REGULATIONS

The Regulatory Addendum provides regulatory text not otherwise provided in the briefs of Industry Petitioners and Intervenor-Respondents, Environmental Petitioners and Intervenor-Respondents, and Respondent U.S. Environmental Protection Agency (“EPA” or “the Agency”).

### SUMMARY OF ARGUMENT

Two aspects of the Area Source rule lack a basis in the Clean Air Act (“CAA”) and constitute arbitrary and capricious action by EPA. EPA and Environmental Interveners offer no arguments that demonstrate otherwise.

In establishing the Energy Assessment (“EA”), EPA lacked authority to regulate beyond the area source boiler category and to set a beyond-the-floor Maximum Achievable Control Technology (“MACT”) standard without first setting a MACT floor. Further, EPA disregarded statutory requirements for setting a beyond-the-floor standard. EPA also lacked authority and acted arbitrarily in setting the EA as a work practice and management practice standard. The Court should vacate the EA.

EPA’s treatment of malfunction periods in the rulemaking was contrary to law and arbitrary because EPA failed to set either numeric or work and management practice standards that account for those periods. EPA set numeric standards that are not achievable, in defiance of the statute, and refused to set work and management

practice standards as required by the statute. The Court should vacate and remand the numeric standards as applied to malfunction events.

## ARGUMENT

### I. THE ENERGY ASSESSMENT IS UNLAWFUL.

#### A. EPA has No Authority to Adopt the Energy Assessment.

EPA has latitude to define source categories, but once it defines a source category, the standards adopted must apply only to operations and activities that belong to the defined source category. *See* Ind. Pet'rs' Br. at 20.

Here, EPA unambiguously defined the source category to include industrial, commercial and institutional boilers – nothing more and nothing less. EPA contends that it limited the scope of the standards to portions of the source that “directly affect emissions from the boiler.” *See* Resp't Br. at 49. Yet, the EA extended the reach of the Boiler Rule well beyond these bounds, including, for example, any manufacturing operations of any stripe that put energy demand on an industrial boiler.<sup>1</sup> This unlawful overreach extends the scope of the standard beyond operations that belong to that source category.

EPA's responses are unavailing. EPA first argues that, even though it defined the source category to include only industrial commercial and institutional boilers,

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<sup>1</sup> The EA covers “major energy use systems” including “hot water systems; building envelope; and lighting; or other systems that use steam, hot water, process heat, or electricity provided by the affected boiler,” as well as architectural and engineering plans, facility operations and maintenance procedures. Ind. Pet'rs' Br. at 19-20 (citing 40 C.F.R. § 63.11237; Table 2 to Subpart JJJJJJ, 40 C.F.R. Part 63.).

Congress did not limit EPA's authority to those specific types of combustion equipment. *See* Resp't Br. at 49. EPA points to § 112(d)(2), which provides that EPA should consider in setting MACT standards the possibility of reducing hazardous air pollutant ("HAP") emissions from affected sources through "process changes, substitution of materials, or other modifications." CAA § 112(d)(2)(A).

EPA fails to note, however, that § 112(d)(2) unambiguously specifies that such "process changes..." may be considered in determining what standards are "achievable for new or existing sources *in the category or subcategory* to which such emission standard applies." CAA § 112(d)(2) (emphasis added). That category here includes only boilers. Thus, § 112(d)(2) does not give the Agency license to regulate outside of a defined source category.<sup>2</sup>

EPA next asserts that § 112 gives it authority to regulate any aspect of any "area source." *See* Resp't Br. at 49-53. In essence, EPA argues here that source category boundaries really do not matter when it sets MACT standards because HAP major and area source determinations are made without regard to source category boundaries. *See id.* at 50 (citing *Nat'l Mining Ass'n. v. EPA*, 59 F.3d 1351, 1355-57 (D.C. Cir. 1995) ("*NMA*").

EPA is mixing apples and oranges. The issue in *NMA* was how to define whether a given facility is a "major" or an "area" source of HAP under § 112. *NMA*,

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<sup>2</sup> Section 112(c)(1) requires EPA to list categories and subcategories of sources that emit HAPs. Section 112(c)(2) then requires that EPA establish standards for those categories and subcategories under § 112(d).

59 F.3d at 1356, 1361. In arguing that *NMA* means “the regulated entity under section 7412 that is generally subject to MACT regulations is the entire facility or installation, not a specific piece of operating equipment like a Boiler,” Resp’t Br. at 49-50, EPA confuses (1) defining *the status of a source, i.e.,* major or area, for regulation generally under § 112 (at issue in *NMA*), with (2) defining the *scope of a specific MACT rule* that regulates a given source category (at issue here).

Environmental Intervenors sow the same confusion. *See* Env’tl Int.-Resp’t Br. at 11. Environmental Intervenors’ description of this statutory framework is upside down. They speak of EPA “*grouping area sources* based on whether they have a boiler.” Env’tl Int.-Resp’t Br. at 12. Congress’s unmistakable construct is the opposite: EPA must *group boilers* and other HAP-emitting units into categories, one feature of which is their location at an area source. Once EPA defined that category (“Area Boilers were identified as such a source category...” Resp’t. Br. at 5), EPA’s rule then may only cover the sources in that category.

Congress did not direct EPA to write emission standards for *area sources*. As EPA itself explains,

EPA is required to list categories and subcategories of sources that emit HAPS. 42 U.S.C. § 7412(c). Source categories, such as Area Boilers, are identified in the lettered subparts of 40 C.F.R. Part 63 (Area Boilers are in Subpart JJJJJ) and subcategories are identified in the rulemaking for each category.

Resp't Br. at 5. As such, EPA did not promulgate a rule regulating *area sources*, nor a *facility with a boiler*, nor could it, as the regulatory unit under § 112 is a source category or subcategory. See CAA § 112(d)(1). In a source category that EPA has defined as including only area source boilers, the clear statutory language does not give EPA authority to reach upstream or downstream (see Env't'l Int.-Resp't Br. at 13; Resp't Br. at 48) of the affected boiler to pull in under the boiler rule other HAP-emitting units. Such units may be regulated only if EPA establishes a source category that encompasses them.<sup>3</sup>

Regulating equipment and systems not in the source category leads to illegal results. For example, § 112 gives EPA authority to regulate HAP sources, but the EA's indiscriminate coverage includes numerous non-HAP sources, such as hot water systems, air conditioning and lighting. Another example shows how facility-wide application robs the EA of all legal justification: when a source conducts the EA and chooses to undertake energy efficiency measures at the facility, these measures might not reduce HAP emissions from the boiler. That is because, as set forth in detail in industry comments on the proposed EA, a facility could decide to apply any energy efficiency gains to increase production or to increase utilization somewhere else at the

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<sup>3</sup> *Mingo Logan Coal Co. v. EPA* lends no support to a claim of authority upstream or downstream of the 112-regulated source, contrary to Environmental Intervenors' claim. Env't'l Int.-Resp't Br. at 13. *Mingo Logan Coal*, a Clean Water Act permitting case, is about federal versus state authority and which Clean Water Act provision is used to regulate water quality. It has nothing to do with EPA's authority to define CAA § 112 source categories. See *Mingo Logan Coal Co. v. EPA*, No. 10-0541, 2014 WL 4828883 at \*18 (D.D.C. Sep. 30, 2014).

facility. *See, e.g.*, South Carolina Manufacturers Alliance, EPA-HQ-OAR-2006-0790-2196 at 3-4 (Aug. 23, 2010) (JA\_\_\_\_); CIBO, EPA-HQ-OAR-2006-0790-1783 at 24-25 (Aug. 20, 2010) (JA\_\_\_\_). EPA acknowledged the possibility that fuel savings may be applied to increase production, but dismissed the concern, simply restating its generalized conclusions. *See* EPA, EPA-HQ-OAR-2006-0790-2330, Response to Public Comments on the Proposed Area Source Rule, Vol. 2 at 458, 459 (Mar. 21, 2011) (JA\_\_\_\_).

EPA is to define and regulate all listed categories of major sources and, where warranted, specified categories of area sources. EPA has broad discretion in defining source categories. But once it defines them, EPA unambiguously must limit the scope of each standard to operations and activities within the defined source category. EPA failed to do so here, making the EA unlawful.

**B. EPA Failed to Follow Prescribed Standard-Setting Methods in Establishing the EA.**

Even assuming *arguendo* that EPA had authority to regulate beyond the defined source category, the EA would nonetheless be unlawful because EPA did not follow the CAA's required standard-setting procedures. *See* Ind. Pet'rs' Br. at 21-26.

The EA is a work practice standard, yet EPA failed to invoke § 112(h) as authority or make the requisite § 112(h) showings (*e.g.*, that it is technically and economically impracticable to measure HAP emissions from sources). *See* Ind. Pet'rs' Br. at 25-26; *see also* 40 C.F.R. Part 63, Subpart JJJJJJ Table 2 (characterizing the EA as

a work practice standard). EPA counters this argument with an *ipse dixit* – the EA is not a work practice standard because “EPA makes no claim that it is.”<sup>4</sup> Resp’t Br. at 47 n.9. Nonsense. What EPA calls it is irrelevant. The EA is a work practice standard because there is no plausible claim that it is a numeric emissions limitation. EPA’s failure to invoke § 112(h) and justify its application here is fatal to the EA.

Further, EPA adopted the EA as a beyond-the-floor standard without first having made a MACT floor determination for the EA. Ind. Pet’rs’ Br. at 21. This is a violation of the mandatory two-step MACT standard-setting process. *Id.* EPA responds by pointing to the MACT floor determinations it made in the context of setting the numeric MACT emissions limitations. Resp’t Br. at 54. EPA asserts that the MACT floor determinations for the numeric limits also may be pressed into service as a floor determination for the EA. *Id.* For two reasons, EPA’s argument is misplaced.

First, the statute plainly requires each MACT standard to be supported by its own MACT floor determination. *See* Ind. Pet’rs’ Br. at 21-22. Because EPA

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<sup>4</sup> For their part, Environmental Intervenors argue the opposite – that the EA is a work practice standard but EPA is not obligated to make the required statutory showings. *See* Env’tl Int.-Resp’t Br. at 15. They argue that because EPA crafted the EA “in addition to” – not “in lieu of” – numeric standards, as required by § 112(h), EPA was already operating outside of the statutory constraints. Thus, none of the prerequisites for that type of standard apply. *Id.* This is a meritless argument. No provision in the CAA or principle of law permits EPA to invoke statutory authority to create a standard, while at the same time declaring itself free to ignore the statutory requirements for that very standard.



conducted no MACT floor determination to support the EA, the EA cannot be a beyond-the-floor standard.

Second EPA's MACT floors were based on stack testing data from affected boilers. EPA used statistical methods to calculate numeric MACT floors using these data. EPA then conducted a beyond-the-floor analysis of these numeric MACT floors and concluded that more stringent numeric limits were not justified. *See* ERG, EPA-HQ-OAR-2006-0790-0049, MACT Floor Analysis for the Industrial, Commercial, and Institutional Boilers National Emission Standards for Hazardous Air Pollutants – Area Source (Apr. 2010) (JA\_\_\_\_); Mary Johnson, EPA-HQ-OAR-2006-0790-2515, Beyond-the-Floor Analysis for Mercury and Carbon Monoxide Area Source Industrial/Commercial/Institutional Boilers (Dec. 2012) (JA\_\_\_\_). Thus, the numeric MACT floors clearly served as the basis for the final numeric MACT standards. In contrast, there is no logical or practical nexus between the numeric, emissions-standard-based MACT floors and the work-practice-based EA.<sup>5</sup>

EPA also asserts that it adequately considered costs, non-air quality energy and environmental impacts, and other relevant factors in setting the beyond-the-floor EA

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<sup>5</sup> In actuality, the EA is a non-regulatory energy efficiency analytic tool that EPA and the U.S. Department of Energy have used as “partners” with industry “to stimulate the voluntary reduction of greenhouse gas emissions...” but which EPA now re-brands as a mandatory CAA requirement for hazardous air pollutants. *See* EPA, EPA-HQ-OAR-2006-0790-2336, Climate Wise – Wise Rules for Industrial Efficiency at 1 (July 1998) (JA\_\_\_\_); Anthony Wright & Michaela Martin, EPA-HQ-OAR-2006-0790-0023, Results from the U.S. DOE (Department of Energy) 2006 Save Energy Now Assessment Initiative: DOE's Partnership with U.S. Industry to Reduce Energy Consumption, Energy Costs and Carbon Dioxide Emissions, (Sept. 17, 2007).

standard. *See* Resp't Br. at 55-56. Not so. EPA does not even feign to identify which pollutants would be further reduced or by what amount or estimate how much more reduction is achievable. EPA admits it could not quantify HAP emission reductions from the energy assessment. *See id.* (EPA did not impose any "theoretical beyond-the-floor emissions reductions of HAPs through" the EA; sources "are expected" to modify equipment; lower fuel costs "are expected"). EPA even admitted the arbitrariness of its emission reduction claim with its meaningless justification that the assessment requirement is only "directionally sound." 76 Fed. Reg. 15,554, 15,568 (Mar. 21, 2011) (JA\_\_\_\_).

Even if EPA had identified HAP emission reductions, the EA would still be unlawful because it applies to *all* affected sources in *all* subcategories, and the costs and non-air quality health and environmental benefits of going beyond the floor for *each* subcategory of boilers must, by definition, be different. EPA claims costs are fully considered because the beyond-the-floor EA requires sources to consider costs. *See* Resp't Br. at 55-56. But Congress directed that *EPA* must consider costs in deciding *whether to set* a beyond-the-floor standard. *See* CAA § 112(d)(2).<sup>6</sup>

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<sup>6</sup> EPA argues that it did conduct the statutory analysis. Resp't Br. at 55. Environmental Intervenors argue that EPA did not conduct the analysis because it did not have to. Env't'l Int.-Resp't Br. at 16. According to Environmental Intervenors, EPA can ignore the § 112(h) factors because any EA-related emission reductions are voluntary and therefore "beyond the scope of the [§ 112(h)] analysis." *Id.* The EA is either a mandatory § 112 standard that EPA must establish within the § 112 statutory constraints or it is a voluntary measure and EPA cannot compel its completion under § 112.

Perhaps most glaringly, EPA has not demonstrated that the EA will produce emissions reductions. Congress spoke in definite terms: § 112(d)(2)(A) standards “shall require” emissions reductions through “application of” “measures...which – (A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications.” EPA makes clear that “nothing requires an area source to implement pollutant-reducing practices identified in the assessment” and that owners are only “expected to voluntarily use the results of the assessment.” Resp’t Br. at 46. EAs, thus, offer only hoped-for emission reductions.

**C. The EA is Not a GACT Management Practice Standard.**

In their opening brief, Industry Petitioners challenged EPA’s claim that the EA is alternatively a § 112(d)(5) Generally Available Control Technology (“GACT”) management practice. GACT and MACT standards share the common statutory root of § 112(d)(2), which requires emission reductions. CAA § 112(d)(2)(A). Satisfaction of § 112(d)(2) would, at a minimum, require EPA to *demonstrate* that the *requirement* – conducting an EA – *will result* in HAP reductions. EPA cannot do that because implementing efficiency measures is *voluntary*. Rather than apply the analytic rigor demanded by § 112 standard-setting procedures, EPA resorts throughout the rule and its briefs to conclusory statements such as, for example, the EA will “inevitably” lead to emission reductions. Resp’t Br. at 48. EPA’s attempt to declare that a study of fuel efficiency measures constitutes the § 112(d) standards envisioned by Congress fails

because reducing HAP emissions is the CAA touchstone for any § 112(d) standard, yet the EA does not require any emissions reductions.

## **II. EPA HAS A DUTY TO ACCOUNT FOR MALFUNCTIONS WHEN SETTING STANDARDS UNDER § 112(d) OF THE CLEAN AIR ACT.**

When EPA sets MACT floors, they must be based on what best performers actually achieve. CAA § 112(d)(2), (3). Because *Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008) (“*General Provisions Decision*”), requires that some kind of § 112-compliant standard apply at all times, EPA acknowledges that it must establish standards that apply during all phases of operation: startup, normal operations, shutdown, and malfunctions. Resp’t Br. at 36. By declaring it has no duty to consider malfunctions when setting these standards, EPA unlawfully interprets § 112 as allowing it to set standards that apply at all times based on what the best performing sources have achieved *most of the time*. See, e.g., Resp’t Br. at 43.

EPA’s position that it need not factor malfunctions into MACT standards is not entitled to deference because the statute is not ambiguous and EPA provides virtually no textual analysis for its decision. Even if the statute were ambiguous, EPA’s interpretation is still not reasonable under *Chevron*. See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984). Moreover, EPA’s standards are not supported by any evidence, let alone substantial evidence, that best performers achieve them during malfunctions. *Nat’l Ass’n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1138 (D.C. Cir. 2013) (“*NACWA*”).

**A. Malfunctions Are Foreseeable and Reasonably Likely to Recur.**

EPA's prime justification for refusing to factor malfunctions into its MACT standards is that malfunctions are not "foreseeable" events that can "reasonably be expected to recur." Resp't Br. at 28. But, EPA has always acknowledged that properly designed and operated equipment can fail in ways that cause exceedances of standards. *See* 76 Fed. Reg. at 15,561 (JA\_\_\_); 58 Fed. Reg. 42,760, 42,777 (Aug. 11, 1993) (JA\_\_\_). Thus, EPA has known for years that malfunctions *are* foreseeable and reasonably expected to recur. This is why EPA's rules have addressed malfunctions since 1973. Ind. Pet'rs' Br. at 29.

Here, EPA never attempted to investigate the effect of malfunctions on emission levels. For example, EPA made no attempt to analyze the malfunction data that it has. Ind. Pet'rs' Br. 29-30. Thus, EPA's complaint that Industry Petitioners point to no evidence that could form the basis for numeric emission standards, work practices, or management practices (Resp't Br. at 41, 43) rings hollow. Besides, EPA does not have to establish numeric standards – it can establish work practice standards.

To justify its lack of effort, EPA states that "it is difficult to apply the concept of a best performing source to sources that are malfunctioning." Resp't Br. at 29. This statement ignores EPA's definition of malfunction. A malfunction is something that any source, including a best performing source, cannot reasonably prevent. 40 C.F.R. § 63.2. Likewise, EPA's claim that accounting for malfunctions would

condone malfeasance (Resp't Br. at 33) directly contradicts EPA's definition of "malfunction," which excludes even "careless operation," much less misconduct. 40 C.F.R. § 63.2. Moreover, this limited discussion of how malfunctions relate to best performers lacks sufficient statutory analysis to warrant deference. *See, e.g., Smith v. City of Jackson*, 544 U.S. 228, 265 and n.2 (2005) (O'Connor, J., concurring) (a regulation is not entitled to deference where the agency has not provided an explication of the statutory text, or has not "done so in a reasonable or persuasive manner."). Ignoring malfunctions that happen even at best performers also goes against case law. *See, e.g., Sierra Club v. EPA*, 167 F.3d 658, 665 (D.C. Cir. 1999); *NRDC v. EPA*, 859 F.2d 156, 208 (D.C. Cir. 1988) ("A technology-based standard discards its fundamental premise when it ignores the limits inherent in the technology.").

#### **B. Malfunctions Are a Relevant Aspect of Source Operation.**

Contrary to Environmental Intervenors' assertions, Industry Petitioners have taken issue with EPA's rationale that malfunctions are not a "distinct operating mode." *Env'tl Int.-Resp't Br.* at 9. In making this determination, EPA is simply asserting that malfunctions are part of normal operations, and thus malfunction emissions "do not need to be factored into development of CAA section 112(d) standards." 76 Fed. Reg. at 15,577 (JA\_\_\_). Industry Petitioners addressed this erroneous assertion in their brief. *Ind. Pet'rs' Br.* 28-40. Not only has the Court consistently rejected that assertion (*Ind. Pet'rs' Br.* at 33-34) but EPA regulations

specify that malfunctions are not representative of normal operation. 40 C.F.R. § 63.7(e)(1). Moreover, simply claiming that malfunctions are part of “normal operations” does not justify EPA’s position that malfunctions can be ignored when setting emission limitations based on what best performers achieve in practice.

Emissions during malfunctions have never been representative of normal operations – whether they are or are not a distinct operating mode is irrelevant. And EPA put nothing in the record to support its new counter-factual perspective that a malfunction is not a “period of operation.” The facts have not changed: during a malfunction event, some equipment is in operation – that is what causes there to be emissions. Industry Petitioners provided examples of technology or management practices that address malfunctions of any sort, leaving the site-specific adaptation to the regulated source, as is typical for standards based on “management practices.” *See* EPA, EPA-HQ-OAR-2006-0790-2330, Response to Public Comments on the Proposed Area Source Rule, Vol. 3 at 191, 234, 247 (Mar. 21, 2011) (JA\_\_\_); Ind. Pet’rs’ Br. at 39.

**C. EPA and Environmental Intervenors Fail to Distinguish This Court’s Precedent.**

Both EPA and Environmental Intervenors argue that the Court’s numerous decisions requiring EPA to factor malfunctions into technology-based standards are inapplicable. Resp’t Br. at 34-38; Env’tl Int.-Resp’t Br. at 5-7. However, regardless of what CAA provision the Court was addressing, it has always indicated that EPA

should account for malfunctions in technology-based standards. *See* Ind. Pet'rs' Br. at 33-36. Notably, neither EPA nor Environmental Intervenors point to any technical difference in malfunctions by sources subject to § 111 standards from those subject to § 112 standards. The logic of these cases applies to all § 112 standards, including GACT.

Furthermore, there is nothing in the *General Provisions Decision* or in the 1977 or 1990 CAA Amendments that alters EPA's duty to consider malfunctions. Nowhere in the legislative history has Congress expressed dissatisfaction with EPA addressing malfunctions, either through alternative standards or exemptions (as had been done from 1973 until the *General Provisions Decision* in 2008) or directed EPA to disregard malfunctions when setting standards. In particular, there is no evidence that Congress's insertion of the word "continuously" into the definition of "emission standards" was meant to erase EPA's well-established duty to consider malfunctions. *See* Ind. Pet'rs' Br. at 35-36.

#### **D. GACT Standards Must Account for Malfunctions.**

EPA and Environmental Intervenors launch a series of attacks on the need to address malfunctions through application of GACT. All must fail. As with respect to MACT standards, neither EPA nor Environmental Intervenors provide the legal basis for their claim that EPA may choose to ignore malfunctions when establishing GACT.



EPA rightly claims broad discretion under § 112(d)(5) for standard-setting for area sources, *see* Resp't Br. at 42, but no amount of discretion lets EPA do no standard at all. CAA § 112(d)(1). Once EPA has chosen GACT, it must issue standards in the form of generally available control technology or management practices. *See* CAA § 112(d)(5). Because § 112 requires continuous standards and malfunctions are unavoidable, accounting for malfunctions in GACT is not discretionary. EPA must do so, but here EPA failed to establish *any* § 112 standard that accounts for malfunctions.<sup>7</sup>

Further, Industry Petitioners argue that § 112 standards must be generally achievable with “available control measures.” Ind. Pet'rs' Br. at 29. Achievability is a key requirement of § 112, and nothing in the statute vitiates this requirement for GACT standards. To argue otherwise would mean that GACT standards may be unachievable – an absurd reading. Congress could not have intended § 112(d)(5) to require unachievable standards. Congress specifically designed § 112(d)(5) standards to be “less stringent” than MACT standards. *See* S. Rep. No. 101-228 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3535. *See also* *NMA*, 59 F.3d at 1353-54 (noting GACT standards may be “less rigorous” than MACT standards).<sup>8</sup> Neither EPA nor

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<sup>7</sup> Industry Petitioners do not seek an exemption or allowance for malfunctions. *See* Ind. Pet'rs' Br. at 36. Industry Petitioners seek only to have EPA fulfill its duty to account for periods of malfunctions in standard setting.

<sup>8</sup> Environmental Intervenors try to distort this argument by claiming that Industry Petitioners ignored the “generally available” language of § 112(d)(5) and instead insist on “generally achievable” standards. *Env'tl Int.-Resp't Br.* at 4. Contrary to

Environmental Intervenors claim that GACT can be achieved during periods of malfunction.

Finally, Environmental Intervenors' claim that GACT cannot be based on periods when control technology is not being operated is flatly wrong. That is the point of the "management practice" aspect of GACT standards – to ensure that sources are governed by standards at all times, including when numeric standards are inappropriate for any number of reasons, including when all equipment is not fully operational. EPA has discretion to choose between control technology and management practices for GACT.

**E. Malfunctions May Be Addressed Through Work Practice or Management Practice Standards.**

The CAA provides EPA at least two ways to establish emission limits: numeric standards, or work practices if it is "not feasible to prescribe or enforce" a numeric standard. CAA § 112(h)(1). This phrase includes the impracticability of measuring pollutants due to technological and economic limitations. For area sources, EPA may also issue management practices. CAA § 112(d)(5). Thus, the impracticability of monitoring emissions during malfunctions allows EPA to use work practice or

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Environmental Intervenors' claim, Industry Petitioners describe and refer to the "generally available" legal standard of § 112(d)(5), throughout the brief, *see* Ind. Pet'rs' Br. at 5, 5-6, 6 and 29), including making it the centerpiece of the argument. Ind. Pet'rs' Br. at 29 (Heading A). Taken in context, the descriptor "generally achievable" simply emphasizes that § 112(d) standards must reflect the realities of boiler operations, per congressional intent.

management practice standards to meet its obligation to establish § 112-compliant standards for malfunctions, just as it did for periods of startup and shutdown. *See* 40 C.F.R. § 63.11214(d). EPA's claim that it does not know how to set work practice or management practice standards "consistent with the provisions of subsection (d)," Resp't Br. at 40-41, is a matter to be evaluated through the rulemaking process once it is established that EPA must factor malfunctions into its technology-based standards.<sup>9</sup>

Besides, EPA did not abandon its approach of applying non-numeric requirements during malfunctions because it was unworkable. Indeed, EPA argued its efficacy as recently as 2008. *See General Provisions Decision* at 1027-28. Rather, EPA abandoned that approach because EPA (improperly) decided it had no duty to factor malfunctions into its standards. Resp't Br. at 25. By applying technology-based standards derived from normal operations to malfunctions, EPA is assuring periods of non-compliance and ensuing enforcement proceedings.

EPA clearly knows how to set work practice standards for widely divergent sources and operating conditions – EPA did that in this very rule for periods of startup and shutdown. EPA tackled the problem by writing a broadly applicable standard that allows for source-by-source differences: minimize emissions according to the manufacturer's recommended procedures is the work practice. *See* 40 C.F.R. § 63.11214(d). This work practice for startup and shutdown periods applies to coal,

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<sup>9</sup> EPA inappropriately tries to make it industry's duty in the first instance to give EPA a "roadmap" of how to do its job. *See* Resp't Br. at 32. That is EPA's burden, not ours. *See Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 433 (D.C. Cir. 1980).

biomass, and oil-fired boilers, which are so distinct operationally that they require separate subcategories for numeric standards. *See* Table 1 to Subpart JJJJJ of Part 63; 40 C.F.R. § 63.11200. Thus, boiler functions share enough similarity for EPA to craft generic management practices to minimize emissions regardless of boiler type or subcategory. EPA makes the problem seem insurmountable (Resp't Br. at 43) but EPA has succeeded at this challenge multiple times, in this rule as discussed, and in many other rules. *See, e.g.*, 40 C.F.R. § 63.803(a)(1), National Emission Standards for Wood Furniture Manufacturing Operations (sources must have a plan that “defines environmentally desirable work practices”); 40 C.F.R. § 63.342(f)(1)(i), National Emission Standards for Chromium Emissions From Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks (sources must operate “in a manner consistent with good air pollution control practices”); 40 C.F.R. § 63.7700(c), National Emission Standards for Hazardous Air Pollutants for Iron and Steel Foundries (work practice is to minimize the amount of organics and HAP metals used by the foundry).

EPA and Environmental Intervenors claim that GACT management practices would not reduce HAP. But Industry Petitioners provided examples of work or management practices that would reduce HAP: requiring pre-determined malfunction plans with provisions to minimize emissions and return to system stability as expeditiously as possible and establishing an acceptable threshold of exceedances over a period of time. *See* EPA, EPA-HQ-OAR-2006-0790-2330, Response to Public Comments on the Proposed Area Source Rule, Vol. 3 at 191, 234, 247 (Mar. 21, 2011)

(JA\_\_\_); Ind. Pet'rs' Br. at 39. EPA dismissed these possibilities without explanation. EPA cannot now claim that there is nothing to be done about malfunctions when it failed to account for the practical solutions provided by commenters.

Finally, EPA offers enforcement discretion as the solution to malfunctions. *See* Resp't Br. at 44. This does not satisfy the requirement to apply a continuous emission standard to boiler operations. *See General Provisions Decision* at 1027. Nor does it satisfy Congress's HAP emission reduction purpose for § 112. A post-hoc case-by-case evaluation of emission circumstances as EPA intends to handle all malfunction periods will not prevent or reduce emission of HAP. Moreover, this regulatory scheme shifts the question of what is technically achievable "to the enforcement stage, an approach not contemplated" by statute. *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 398 n.91 (D.C. Cir. 1973).

### **III. EPA AND ENVIRONMENTAL INTERVENORS MISSTATE THE SCOPE OF INDUSTRY PETITIONERS' ARGUMENTS.**

EPA claims that Industry Petitioners challenged EPA's malfunction approach only as arbitrary and capricious and not on grounds of EPA's authority. Resp't Br. at 26. That is false. Industry Petitioners argued that EPA "must factor malfunctions into its technology-based standard setting process *under the CAA*," Ind. Pet'rs' Br. at 33 (emphasis added), and thus summarized that argument: "EPA failed to follow statutory requirements and set either numeric or work and management practice-based standards that account for boiler malfunction events." *See id.* at 16. Industry

Petitioners also explained how this Court interprets the CAA to require the same. *See id.* at 33-34. These arguments mirror the arguments raised in the major source Boiler MACT case, which interprets the same statutory provisions. *See* Boiler MACT Ind. Pet'rs' Br. at 34-45. EPA's attempt to artificially narrow the scope of this Court's review must be rejected.

Environmental Intervenors claim that Industry Petitioners' argument that EPA must account for malfunctions in MACT standards is foreclosed because all MACT numeric standards for area source boilers have been remanded. Env'tl Int.-Resp't Br. at 3. This is wrong. This remand is specifically limited to "the question of whether the UPL is an appropriate statistical method for small data sets..." *See* EPA's Motion for Partial Voluntary Remand at 5 (Feb. 28, 2014), ECF No. 1482092. The remand has no bearing on the question of whether EPA must account for malfunction periods in setting § 112 standards. The standards pending remand remain in effect and in any event, this Court need not review the underlying MACT numeric standards to determine the extent of EPA's statutory obligation.

Environmental Intervenors also argue that Industry Petitioners failed to argue that numeric standards must reflect boiler emissions during the worst foreseeable circumstances, as emphasized by this Court's decision in *NACWA*. *See* Env'tl Int.-Resp't Br. at 4 n.1. This is false. Industry Petitioners argued that this Court requires EPA to (1) account for malfunctions and (2) issue continuous standards. Ind. Pet'rs' Br. at 33-35. Standards issued according to those CAA requirements would thereby

take into account malfunctions, which often are the worst foreseeable circumstances. This aspect of *NACWA* was directly raised in the major source brief (Boiler MACT Ind. Pet'rs' Br. at 36) and is equally relevant to the same legal argument regarding the § 112(d) standards in the Area Source rule.

### CONCLUSION

For the foregoing reasons, Industry Petitioners respectfully request that the Court (1) vacate the energy assessment requirement; and (2) vacate and remand the Rule's numeric emission standards as applied to malfunction events.

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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 Reply Brief of Industry Petitioners contains 5,397 words as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the 5,600 word limit set by the Court.

Dated: January 21, 2015

/s/ Lisa Marie Jaeger  
Lisa Marie Jaeger

**CERTIFICATE OF SERVICE**

I certify that the foregoing Reply Brief of Industry Petitioners was electronically filed with the Clerk of the Court on January 21, 2015, using the CM/ECF system and thereby served upon all ECF-registered counsel.

/s/ Lisa Marie Jaeger  
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