Attachment A

No. 14-1112

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

In re: Murray Energy Corp., Petitioner, **v.** **Environmental Protection Agency,** Respondent.

On Petition for Extraordinary Writ to the
U.S. Environmental Protection Agency

AMICUS CURIAE BRIEF OF THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENT

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November 10, 2014

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MISCELLANEOUS

GLOSSARY

EPA	U.S. Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards

INTEREST OF AMICI

The undersigned states (State Amici) support the Environmental Protection Agency's authority to complete its ongoing rulemaking to limit carbon dioxide emissions from fossil-fueled power plants, the largest source of those emissions. State Amici have a compelling interest in preventing and mitigating climate change harms to people and the environment from such emissions, including increased heat-related deaths, damaged coastal areas, disrupted ecosystems, more severe weather events, and longer and more frequent droughts. *See Massachusetts v. EPA*, 549 U.S. 497, 521 (2007); 74 Fed. Reg. 66,496, 66,523-66,536 (Dec. 15, 2009).

State Amici have fought to reduce greenhouse-gas emissions from existing fossil-fueled power plants. Several State Amici brought the petition that led to *Massachusetts*, 549 U.S. 497, brought public-nuisance claims against the largest owners of fossil-fueled power plants, *American Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011), and also sued EPA to promptly establish carbon dioxide standards under section 111 of the Clean Air Act, 42 U.S.C. § 7411. *New York v. EPA* (D.C. Cir. No. 06-1322).[1] State Amici have also enacted their own greenhouse-gas emission limitations. *See, e.g.*, Del. Code Ann. tit. 7, § 6043 &

[1] Amici for Petitioner here, West Virginia et al., are also challenging State Amici's and EPA's settlement of the *New York v. EPA* case under the theory that voiding the settlement agreement would block EPA from completing the rulemaking at issue here. State Amici dispute that notion (and the merits of the lawsuit), and have intervened in the case. *See* Doc. #1515118 in *West Virginia v. EPA* (D.C. Cir. No. 14-1146) (granting motion to intervene).

Del. Admin. Code tit. 7, § 1147 (implementing 9-state Regional Greenhouse Gas Initiative); Cal. Code Regs. tit. 17, §§ 95800 et seq.; Wash. Rev. Code § 80.80.040. State Amici thus have a compelling interest in the rulemaking here, which would require *all* states to do their share to reduce power plant greenhouse gas emissions.

SUMMARY OF ARGUMENT

Murray Energy Corp. (Murray), a coal mining company, seeks an extraordinary writ to block EPA from finalizing its proposed rule, which would limit carbon dioxide emissions from fossil-fueled power plants. 79 Fed. Reg. 34,830 (June 18, 2014) (Clean Power Rule). Murray's challenge is both premature and meritless. Murray could seek judicial review of the final rule, and it suffers no injury from EPA's mere consideration of the rule. Accordingly, Murray has not established that this Court has jurisdiction to interfere with a pending rulemaking.

Moreover, nothing in the Clean Air Act clearly and specifically prohibits EPA from considering the Clean Power Rule, as would be required to sustain an extraordinary writ. Murray asserts that the Act unambiguously requires EPA to choose to regulate either hazardous air pollutants (such as mercury) or greenhouse gases emitted from power plants—not both. But Murray's interpretation cannot be reconciled with the language, structure, and history of the statute.

Murray's flawed challenge to EPA's pending rulemaking, if accepted, would harm the environment and the health of State Amici's residents by delaying

critically needed reductions of greenhouse gases from the largest sources of that pollution. The writ should be denied.

ARGUMENT

I. This Court Lacks Jurisdiction and Extraordinary Relief Is Not Available When Petitioner Suffers No Immediate Injury and Could Seek Judicial Review of the Final Rule.

Because the Clean Air Act requires final agency action for judicial review, this Court lacks jurisdiction to issue the requested writ. 42 U.S.C. § 7607(b)(1); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). Murray has failed to identify any "uniquely compelling justification" that would permit it to skirt this bedrock jurisdictional rule. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963).

First, there is no dispute here that Murray, like every other interested party, has robust opportunities to participate in the ongoing rulemaking,[2] and that judicial review of the final rule is available. 42 U.S.C. § 7607(b)(1). Murray's ability to pursue its arguments through "the statutorily prescribed method of review" forecloses its attempt to evade that prescribed method here. *Greater Detroit Res. Recovery Auth. v. EPA*, 916 F.2d 317, 323 (6th Cir. 1990).

Second, Murray has failed to show that EPA's mere consideration of the Clean Power Rule imposes legal obligations on or otherwise injures Murray's legal

[2] In fact, EPA has specifically solicited comments on the very same issue Murray raises here. *See* 79 Fed. Reg. at 34,853.

rights sufficient to grant this Court jurisdiction. Murray thus cannot rely on *Leedom v. Kyne*, in which the Supreme Court permitted a challenge to a nonfinal action when the agency "did not contest" that its action had "worked injury." 358 U.S. 184, 187 (1958).[3]

Finally, as explained below, Murray cannot identify "a specific prohibition in the Act," *Leedom*, 358 U.S. at 188, that would bar EPA from even considering the Clean Power Rule. Murray has thus failed to identify any "uniquely compelling circumstances" (Pet. at 28) that would support either this Court's jurisdiction or the extraordinary relief that Murray seeks here.

II. The Text, Structure, and History of the Clean Air Act Confirm EPA's Authority to Regulate Carbon Dioxide Emissions from Power Plants Under Section 111(d).

Murray's request for an extraordinary writ is predicated on the claim that section 111(d), 42 U.S.C. § 7411(d), of the Act specifically prohibits regulation of all non-hazardous pollutants from a source category if any hazardous pollutant is already regulated from that source category under section 112. *See* Pet. at 1, 23, 28. That reading effectively nullifies section 111(d), given that section 112 regulates

[3] Nor is an extraordinary writ necessary to save States from "huge amounts of burdensome work now to develop plans," WV Am. Br. at 1. Allowing the mere planning for the anticipated finalization of a federal rule to be the basis for judicial intrusion into an ongoing rulemaking would dramatically expand the extraordinary writ procedure. Even if that were a cognizable injury, which it is not, the proposed Rule would allow States to obtain one- or two-year extensions if necessary to prepare plans in compliance with the Rule's emission limitations. *See* 79 Fed. Reg. at 34,952 (proposed 40 C.F.R. § 60.5755).

emissions of hazardous pollutants from over one hundred source categories. Nothing in the text, structure, or history of section 111(d) supports this radical interpretation. Accordingly, there is no "definite" and undisputed statutory prohibition here that would justify an extraordinary writ. *Leedom*, 328 U.S. at 189 (quotation marks omitted).

A. Murray's Interpretation Fails to Give Effect to Both of the 1990 Amendments to Section 111(d).

Murray's argument is based on the language of section 111(d) as it appears in the U.S. Code. But, as Murray acknowledges (Pet. 18-20), the U.S. Code language does not reflect the fact that two amendments to section 111(d) were enacted into law in 1990—including a Senate amendment that cannot be reconciled with Murray's interpretation.

Understanding the two amendments requires a brief background on section 111(d)'s place in the Clean Air Act's comprehensive scheme. Section 111(d) is one of the Act's three primary avenues to regulate existing stationary sources. The two other avenues—the National Ambient Air Quality Standards (NAAQS) of sections 108 and 110, 42 U.S.C. §§ 7408, 7410; and the hazardous-air-pollutants program of section 112, *id.* § 7412—address emissions of certain listed pollutants. Section 111(d), by contrast, more broadly authorizes EPA to establish standards for any emissions from existing sources that endanger public health or welfare but that are

not regulated under the other two programs.[4] Thus, these provisions collectively "establish[] a comprehensive program for controlling and improving the nation's air quality." *See Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (internal quotation omitted).

Before the 1990 amendments, section 111(d)(1) required that state plans address "any air pollutant which is not included on a list published under Section 7408(a)," *i.e.*, NAAQS, "or 7412(b)(1)(A) of this title," a cross-reference to the previous version of section 112's hazardous-air-pollutants program. *See* 42 U.S.C. § 7411(d) (West 1977). Section 111(d) thus functioned to mandate the regulation of air pollutants from existing stationary sources that were not otherwise covered by the NAAQS or the hazardous-pollutants program. In 1990, after EPA's delays in listing (and thereby regulating) hazardous air pollutants "proved to be disappointing," *Sierra Club v. EPA*, 353 F.3d 976, 979–80 (D.C. Cir. 2004), Congress extensively amended section 112 to change its regulatory approach. Rather than relying on EPA's listing of hazardous air pollutants to trigger their regulation under section 112—something EPA had rarely done—Congress instead listed 189 hazardous air pollutants itself and directed EPA to list categories of major sources and area sources for each of these pollutants and then to establish

[4] Section 111(b) mandates standards for new and modified sources, and section 111(d) mandates standards for existing sources if those standards "would apply if [the existing sources] were a new source." 42 U.S.C. § 7411(b), (d).

emission standards for each source category. 42 U.S.C. § 7412(b)(1), (c)(1), (d)(1).

Congress amended section 111(d)'s preexisting reference to section 112 to conform it to these structural changes. However, different conforming language from the House and Senate bills amending section 111(d) was included in the final legislation without being reconciled in conference. Both amendments were signed into law by the President and appear in the Statutes at Large, but only the House amendment appears in the U.S. Code.

The Senate amendment simply replaces the former cross-reference to § 7412(b)(1)(A), which was eliminated during the 1990 amendments, with a new cross-reference to that section's replacement, § 7412(b): it thus requires section 111(d) standards for existing sources for "any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or section 112(b)." Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990) (amendment underlined). Neither Murray nor its amici dispute that the Senate amendment preserves section 111(d)'s longstanding role to regulate pollutants (such as carbon dioxide) that are not otherwise regulated under the NAAQS or the hazardous-air-pollutants program.

By contrast, the House amendment replaces the section 112 cross-reference with different language: it requires section 111(d) standards for existing sources for "any air pollutant (i) for which air quality criteria have not been issued or which is

not included on a list published under section 108(a) or emitted from a source category which is regulated under section 112 of this title." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990) (amendment underlined). As explained below, see *infra* Point II.C, that language can also be read to preserve section 111(d)'s application to non-NAAQS and non-hazardous air pollutants such as carbon dioxide. But even if the House amendment were interpreted in the way that Murray urges here, that language would not control. Because both amendments were enacted into law, it is necessary to consider the effect of the Senate amendment, which would indisputably authorize the Clean Power Rule. *See* 79 Fed. Reg. at 34,844; *see also Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 872 (D.C. Cir. 1979) (where Congress "drew upon two bills originating in different Houses and containing provisions that, when combined, were inconsistent in respects never reconciled in conference . . . it was the greater wisdom for [EPA] to devise a middle course . . . to give maximum possible effect to both").

Murray and its amici argue instead that EPA was required to *ignore* the Senate amendment because it did not appear in the U.S. Code and was labeled as a "conforming" amendment, while the House amendment was "substantive." Pet. at 20; WV Am. Br. at 7-12. But it is well-established that the text of the Statutes at Large (which contain both amendments enacted by Congress and signed by the President) governs when it is inconsistent with the U.S. Code. *United States Nat'l*

Bank of Oregon v. Indep. Ins. Agents of America, 508 U.S. 439, 448 (1993).[5]

And here there is no basis to treat one amendment as more "substantive" than another. As explained above, the substantive changes Congress made in 1990 were to section 112, not to section 111(d). The amendments at issue here alter section 111(d)'s cross-reference to section 112 in response to the structural changes to section 112. And both amendments appeared under similar catch-all headings in the House Conference Report, adopted by the House and Senate (H.R. Conf. Rep. 101-952, at 70, 122 (1990)): "Conforming Amendments" (Senate) and "Miscellaneous Guidance" (House) (excerpts in *Att. A*). *See* Pub. L. No. 101-549, §§ 108, 302(a), 104 Stat. 2399, 2467, 2574 (1990). Moreover, the legislative history indicates that Congress *intended* the Senate's amendment to section 111(d) to be in the final bill. After the House amended the Senate's bill and deleted the Senate's seven "Conforming Amendments" (including the revision to section 111(d)), the Conference Committee added the Senate's conforming amendments back in to the final bill. *Compare* S. 1630, 101st Cong. (as passed by House, May 23, 1990) *with* Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990).

[5] West Virginia's suggestion that the Office of Law Revision Counsel's entry into the U.S. Code of only the House amendment shows *Congress*'s intent that the Senate amendment be discarded, WV Am. Br. at 11–12 n.6, is erroneous. The fact that the Revisor was unable to execute the Senate amendment because the House amendment, which appeared earlier in the legislation, had already resulted in striking the same text, does not change the longstanding principle of law that the Statutes of Large, not the U.S. Code, controls when the text of the two differs.

B. Public Policy, EPA's Longstanding Practice, and Other Provisions of the Act Undermine Murray's Interpretation.

Murray's interpretation of section 111(d) also has far-reaching consequences that cannot be reconciled with the Clean Air Act's broad protective purposes. Sources that emit hazardous air pollutants, and that thus could be regulated under section 112, also emit a broad range of other pollutants, including carbon dioxide. Under Murray's reading of section 111(d), EPA would have to choose *either* section 112 to address dangers associated with hazardous air pollutants like mercury, *or* section 111(d) to address the "serious and well recognized" climate-change harms caused by carbon dioxide emissions from power plants, as well as the harms from emissions of other harmful pollutants such as sulfuric acid mist and fluoride compounds. *See Massachusetts*, 549 U.S. at 521; 79 Fed. Reg. at 34,833. But it cannot choose both, according to Murray.

It makes no sense that Congress would have directed EPA to make such a choice in a statute designed to protect public health and welfare. The Act's principal purpose to "protect and enhance the quality of the Nation's air resources," 42 U.S.C. § 7401(b)(1), would hardly be served if EPA were limited to regulating only one set of dangerous pollutants, but not another, from the most significant polluters in the country. In particular, Murray would exclude the largest sources of carbon dioxide from regulation under section 111(d) by virtue of the fact that those sources—such as power plants, petroleum refineries, and cement

plants—are already regulated under section 112 due to their emission of hazardous air pollutants. This new gap in regulation would undermine an obvious function of section 111(d) that the Supreme Court recognized in *AEP v. Connecticut*: namely, to "provide[] a means to seek limits on emissions of carbon dioxide from domestic power plants."[6] 131 S. Ct. at 2537-38.

Nothing in the legislative history of the 1990 amendments suggests that Congress intended such a radical result when it replaced section 111(d)'s cross-reference to the hazardous-air-pollutant program.[7] In both the House and the Senate, these minor changes to section 111(d) were made without any debate or discussion, strongly suggesting that the purpose of both amendments was to preserve section 111(d)'s role to fill the gap where emissions are unregulated under the other programs. Silence in legislative history accompanying a subtle legislative change indicates that Congress did not intend to alter significantly the preexisting scheme. *See United States v. Neville*, 82 F.3d 1101, 1105 (D.C. Cir. 1996). As the Supreme Court has stated, Congress "does not . . . hide elephants in mouseholes."

[6] West Virginia's claim here that a footnote in *AEP* supports its reading of section 111(d), WV Am. Br. at 4-5, is unfounded. Neither the meaning of section 111(d)(1)(A) nor the two 1990 amendments were at issue before the Court.

[7] Indeed, in compiling the legislative history of the 1990 amendments, the Congressional Research Service transcribed the Clean Air Act, as amended, by including both the House and Senate versions of the amendments to section 111(d) with the notation that the amendments are "duplicative" and simply use "different language [to] change the reference to section 112." *A Legislative History of the Clean Air Act Amendments of 1990*, Vol. 1, at 46 & n.1 (1993) (excerpt in *Att. A*).

Whitman, 531 U.S. at 468. This Court should thus reject the "anomalous effect" of Murray's reading of section 111(d), which would force EPA to select only one set of harmful pollutants to regulate based "simply on the fortuity that [these pollutants] share [] a source." *Desert Citizens Against Pollution v. EPA*, 699 F.3d 524, 527-28 (D.C. Cir. 2012).

Murray's interpretation is also inconsistent with EPA's longstanding regulation (both before and after the 1990 amendments) of source categories under section 111(d) and section 112.[8] EPA's practice is supported by the plain language of other provisions of section 112 as amended in 1990, which further evidence Congress's understanding that different emissions from the same source categories could be regulated under both sections 111 and 112.[9] For example, Congress directed EPA to keep its lists of source categories "consistent" between sections

[8] *See, e.g.*, 61 Fed. Reg. 9,905 (Mar. 12, 1996) & 40 C.F.R. pt. 63, subpt. AAAA (regulating landfills under section 111(d) for methane and non-methane organic compounds and under section 112 for vinyl chloride, ethyl benzene, toluene, and benzene); 42 Fed. Reg. 12,022 (Mar. 1, 1977) & 40 C.F.R. pt. 63, subpt. BB (regulating fluorides from phosphate fertilizer plants under section 111(d) and regulating hydrogen fluoride and other pollutants under section 112).

[9] Petitioner misconstrues the holding of *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), as deciding that when a source is listed under section 112, EPA has no authority to regulate that source under section 111(d). Pet. at 7. The *New Jersey* court did not reach that question at all. Instead, because it determined that EPA's delisting of power plants from section 112 was improper, and "under EPA's own interpretation" it could not use section 111(d) to regulate mercury (a section 112-listed hazardous air pollutant) from this section 112-listed source category, the section 111(d) rule was invalid. 517 F.3d at 583.

111 and 112. 42 U.S.C. § 7412(c)(1); *see also id.* § 7412(d)(7) ("No emission standard or other requirement promulgated under this section shall be interpreted . . . to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411").

Murray nonetheless insists that its interpretation should prevail because of congressional intent to avoid "double regulation." But Congress' intent to avoid "double regulation" is maintained by precluding use of section 111(d) to regulate emissions from existing sources if those same emissions are being regulated under section 112. Murray cannot demonstrate that Congress intended to sacrifice comprehensive public health protections by forgoing regulation of harmful but *non-hazardous* air pollutants from source categories that happen to also emit a *hazardous* air pollutant.

C. Murray's Interpretation Is Not Compelled by the Language of the House Amendment.

In any event, the premise of Murray's argument—that the House amendment supports its exclusive interpretation of section 111(d)—is flawed. As stated above, for sources subject to regulation under section 111(b), the House amendment revises section 111(d)(1)(A) by requiring performance standards:

> for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or emitted from a source category which is regulated under section 112 [*i.e.*, the hazardous-air-pollutants program].

Murray reads the underlined language to preclude section 111(d) standards for *non-hazardous* air pollutants that are emitted from a source regulated under section 112. But as the United States explains, the literal text of House amendment is susceptible to multiple readings, defeating Murray's contention that the language specifically prohibits regulation of carbon dioxide. *See* U.S. Resp. at 28-30.

In addition, the House amendment could be reasonably interpreted as simply preserving section 111(d)'s role to regulate emissions not regulated by the NAAQS or the hazardous-air-pollutants program. For example, the phrase "which is regulated under section 7412" could be read as modifying both "any air pollutant" and "source category," thus referring to those emissions that are actually subject to section 112 emissions standards because (a) the *pollutant* is "regulated under section 7412"—i.e., listed as a hazardous air pollutant, *and* (b) the *source category* for that pollutant is "regulated under section 7412"—i.e., listed as a source category subject to section 112 regulation. Read this way, the House amendment is a shorthand way of cross-referencing section 112 to clarify that section 111(d) only precludes regulation of a pollutant from a specific source category (*e.g.*, mercury from power plants) if those emissions are actually regulated under section 112—thus providing no prohibition on standards for non-hazardous air pollutants such as carbon dioxide that are not subject to section 112 emission standards. Indeed, under this reading, the House amendment would also authorize section 111(d)

standards for listed hazardous air pollutants as well, so long as they are emitted from *sources* that are not regulated under section 112 for those pollutants.

In contrast to Murray's interpretation, this interpretation of the House amendment would preserve section 111(d)'s role in the Act's comprehensive scheme by authorizing standards for emissions not otherwise regulated under the Act. And under this reading of the House amendment, there would be no bar to EPA's promulgation of carbon-dioxide standards under section 111(d). Because the House amendment thus does not compel Murray's position here, its argument would fail even if the Senate amendment were not considered.

CONCLUSION

For the foregoing reasons, Petitioners' writ is both improperly before this Court and meritless. The writ must be denied.

Dated: November 10, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amicus Curiae Brief of States in Support of Respondent was filed on November 10, 2014 using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Michael J. Myers
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ATTACHMENT A:

Excerpts from Legislative History

H.R. Conf. Rep. 101-952 (1990), pp. 1, 70-73, 182-83 (relevant passages underlined)

Congressional Research Service, A Legislative History of the Clean Air Act, Vol. 1 (1993), pp. 1, 42-50 (relevant passages underlined)

101ST CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
101-952

CLEAN AIR ACT AMENDMENTS OF 1990

CONFERENCE REPORT

TO ACCOMPANY

S. 1630

OCTOBER 26, 1990.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1990

35-412

"(A) is authorized to treat Indian tribes as States under this Act, except for purposes of the requirement that makes available for application by each State no less than one-half of 1 percent of annual appropriations under section 105; and

"(B) may provide any such Indian tribe grant and contract assistance to carry out functions provided by this Act.

"(2) The Administrator shall promulgate regulations within 18 months after the date of the enactment of the Clean Air Act Amendments of 1990, specifying those provisions of this Act for which it is appropriate to treat Indian tribes as States. Such treatment shall be authorized only if—

"(A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

"(B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

"(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act and all applicable regulations.

"(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

"(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

"(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 105.".

SEC. 108. MISCELLANEOUS GUIDANCE.

(a) TRANSPORTATION PLANNING GUIDANCE.—Section 108(e) of the Clean Air Act is amended by deleting the first sentence and inserting in lieu thereof the following: "The Administrator shall, after consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, and with State and local officials, within nine months after enactment of the Clean Air Act Amendments of 1989 and periodically thereafter as necessary to maintain a continuous transportation-air quality planning process, update the June 1978 Transportation-Air Quality Planning Guidelines and publish guidance on the development and implementation of transportation and other measures necessary to demonstrate and maintain attainment of national ambient air quality standards.".

(b) TRANSPORTATION CONTROL MEASURES.—Section 108(f)(1) of the Clean Air Act is amended by deleting all after "(f)" through the end of subparagraph (A) and inserting in lieu thereof the following:

"(1) The Administrator shall publish and make available to appropriate Federal, State, and local environmental and transporta-

tion agencies not later than one year after enactment of the Clean Air Act Amendments of 1990, and from time to time thereafter—

"(A) information prepared, as appropriate, in consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, regarding the formulation and emission reduction potential of transportation control measures related to criteria pollutants and their precursors, including, but not limited to—

"(i) programs for improved public transit;

"(ii) restriction of certain roads or lanes to, or construction of such roads or lanes for use by, passenger buses or high occupancy vehicles;

"(iii) employer-based transportation management plans, including incentives;

"(iv) trip-reduction ordinances;

"(v) traffic flow improvement programs that achieve emission reductions;

"(vi) fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit service;

"(vii) programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use;

"(viii) programs for the provision of all forms of high-occupancy, shared-ride services;

"(ix) programs to limit portions of road surfaces or certain sections of the metropolitan area to the use of non-motorized vehicles or pedestrian use, both as to time and place;

"(x) programs for secure bicycle storage facilities and other facilities, including bicycle lanes, for the convenience and protection of bicyclists, in both public and private areas;

"(xi) programs to control extended idling of vehicles;

"(xii) programs to reduce motor vehicle emissions, consistent with title II, which are caused by extreme cold start conditions;

"(xiii) employer-sponsored programs to permit flexible work schedules;

"(xiv) programs and ordinances to facilitate non-automobile travel, provision and utilization of mass transit, and to generally reduce the need for single-occupant vehicle travel, as part of transportation planning and development efforts of a locality, including programs and ordinances applicable to new shopping centers, special events, and other centers of vehicle activity;

"(xv) programs for new construction and major reconstructions of paths, tracks or areas solely for the use by pedestrian or other non-motorized means of transportation when economically feasible and in the public interest. For purposes of this clause, the Administrator shall also consult with the Secretary of the Interior; and

"(xvi) program to encourage the voluntary removal from use and the marketplace of pre-1980 model year light duty vehicles and pre-1980 model light duty trucks.".

(c) RACT/BACT/LAER CLEARINGHOUSE.—Section 108 of the Clean Air Act (42 U.S.C. 7408) is amended by adding the following at the end thereof:

"(h) RACT/BACT/LAER CLEARINGHOUSE.--The Administrator shall make information regarding emission control technology available to the States and to the general public through a central database. Such information shall include all control technology information received pursuant to State plan provisions requiring permits for sources, including operating permits for existing sources.".

(d) STATE REPORTS ON EMISSIONS-RELATED DATA.—Section 110 of the Clean Air Act (42 U.S.C. 7410) is amended by adding the following new subsection after subsection (o):

"(p) REPORTS.—Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development effectiveness, need for revision, or implementation of any plan or plan revision required under this Act.".

(e) NEW SOURCE STANDARDS OF PERFORMANCE.—(1) Section 111(b)(1)(B) of the Clean Air Act (42 U.S.C. 7411(b)(1)(B)) is amended as follows:

(A) Strike "120 days" and insert "one year".

(B) Strike "90 days" and insert "one year".

(C) Strike "four years" and insert "8 years".

(D) Immediately before the sentence beginning "Standards of performance or revisions thereof" insert "Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard.".

(E) Add the following at the end: "When implementation and enforcement of any requirement of this Act indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.".

(2) Section 111(f)(1) of the Clean Air Act (42 U.S.C. 7411(f)(1)) is amended to read as follows:

"(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) before the date of the enactment of the Clean Air Act Amendments of 1990 and for which regulations had not been proposed by the Administrator by such date, the Administrator shall—

"(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after the date of the enactment of the Clean Air Act Amendments of 1990;

"(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within

4 years after the date of the enactment of the Clean Air Act Amendments of 1990; and

"(C) propose regulations for the remaining categories of sources within 6 years after the date of the enactment of the Clean Air Act Amendments of 1990.".

(f) SAVINGS CLAUSE.—Section 111(a)(3) of the Clean Air Act (42 U.S.C. 7411(f)(1)) is amended by adding at the end: "Nothing in title II of this Act relating to nonroad engines shall be construed to apply to stationary internal combustion engines.".

(g) REGULATION OF EXISTING SOURCES.—Section 111(d)(1)(A)(i) of the Clean Air Act (42 U.S.C. 7411(d)(1)(A)(i)) is amended by striking "or 112(b)(1)(A)" and inserting "or emitted from a source category which is regulated under section 112".

(h) CONSULTATION.—The penultimate sentence of section 121 of the Clean Air Act (42 U.S.C. 7421) is amended to read as follows: "The Administrator shall update as necessary the original regulations required and promulgated under this section (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990) to ensure adequate consultation.".

(i) DELEGATION.—The second sentence of section 301(a)(1) of the Clean Air Act (42 U.S.C. 7601(a)(1)) is amended by inserting "subject to section 307(d)" immediately following "regulations".

(j) DEFINITIONS.—Section 302 of the Clean Air Act (42 U.S.C. 7602) is amended as follows:

(1) Insert the following new subsections after subsection (r):

"(s) VOC.—The term 'VOC' means volatile organic compound, as defined by the Administrator.

"(t) PM–10.—The term 'PM–10' means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers, as measured by such method as the Administrator may determine.

"(u) NAAQS AND CTG.—The term 'NAAQS' means national ambient air quality standard. The term 'CTG' means a Control Technique Guideline published by the Administrator under section 108.

"(v) NO_x.—The term 'NO_x' means oxides of nitrogen.

"(w) CO.—The term 'CO' means carbon monoxide.

"(x) SMALL SOURCE.—The term 'small source' means a source that emits less than 100 tons of regulated pollutants per year, or any class of persons that the Administrator determines, through regulation, generally lack technical ability or knowledge regarding control of air pollution.

"(y) FEDERAL IMPLEMENTATION PLAN.—The term 'Federal implementation plan' means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.".

(2) Section 302(g) of the Clean Air Act (42 U.S.C. 7602(g)) is amended by adding the following at the end: "Such term includes any precursors to the formation of any air pollutant, to the extent

7003 of the Solid Waste Disposal Act, sections 1445 and 1431 of the Safe Drinking Water Act, sections 5 and 7 of the Toxic Substances Control Act, and sections 113, 114, and 303 of this Act.

"(10) PRESIDENTIAL REVIEW.—The President shall conduct a review of release prevention, mitigation and response authorities of the various Federal agencies and shall clarify and coordinate agency responsibilities to assure the most effective and efficient implementation of such authorities and to identify any deficiencies in authority or resources which may exist. The President may utilize the resources and solicit the recommendations of the Chemical Safety and Hazard Investigation Board in conducting such review. At the conclusion of such review, but not later than 24 months after the date of enactment of the Clean Air Act Amendments of 1990, the President shall transmit a message to the Congress on the release prevention, mitigation and response activities of the Federal Government making such recommendations for change in law as the President may deem appropriate. Nothing in this paragraph shall be interpreted, construed or applied to authorize the President to modify or reassign release prevention, mitigation or response authorities otherwise established by law.

"(11) STATE AUTHORITY.—Nothing in this subsection shall preclude, deny or limit any right of a State or political subdivision thereof to adopt or enforce any regulation, requirement, limitation or standard (including any procedural requirement) that is more stringent than a regulation, requirement, limitation or standard in effect under this subsection or that applies to a substance not subject to this subsection.

"(s) PERIODIC REPORT.—Not later than January 15, 1993 and every 3 years thereafter, the Administrator shall prepare and transmit to the Congress a comprehensive report on the measures taken by the Agency and by the States to implement the provisions of this section. The Administrator shall maintain a database on pollutants and sources subject to the provisions of this section and shall include aggregate information from the database in each annual report. The report shall include, but not be limited to—

"(1) a status report on standard-setting under subsections (d) and (f);

"(2) information with respect to compliance with such standards including the costs of compliance experienced by sources in various categories and subcategories;

"(3) development and implementation of the national urban air toxics program; and

"(4) recommendations of the Chemical Safety and Hazard Investigation Board with respect to the prevention and mitigation of accidental releases.".

SEC. 302. CONFORMING AMENDMENTS.

(a) Section 111(d)(1) of the Clean Air Act is amended by striking "112(b)(1)(A)" and inserting in lieu thereof "112(b)".

(b) Section 111 of the Clean Air Act is amended by striking paragraphs (g)(5) and (g)(6) and redesignating the succeeding paragraphs

accordingly. Such section is further amended by striking "or section 112" in paragraph (g)(5) as redesignated in the preceding sentence.

(c) Section 114(a) of the Clean Air Act is amended by striking "or" after "section 111," and by inserting ", or any regulation of solid waste combustion under section 129," after "section 112".

(d) Section 118(b) of the Clean Air Act is amended by striking "112(c)" and inserting in lieu thereof "112(i)(4)".

(e) Section 302(k) of the Clean Air Act is amended by adding before the period at the end thereof ", and any design, equipment, work practice or operational standard promulgated under this Act.".

(f) Section 304(b) of the Clean Air Act is amended by striking "112(c)(1)(B)" and inserting in lieu thereof "112(i)(3)(A) or (f)(4)".

(g) Section 307(b)(1) is amended by striking "112(c)" and inserting in lieu thereof "112".

(h) Section 307(d)(1) is amended by inserting

"(D) the promulgation of any requirement for solid waste combustion under section 129," after subparagraph (C) and redesignating the succeeding subparagraphs accordingly.

SEC. 303. RISK ASSESSMENT AND MANAGEMENT COMMISSION.

(a) ESTABLISHMENT.—There is hereby established a Risk Assessment and Management Commission (hereafter referred to in this section as the 'Commission'), which shall commence proceedings not later than 18 months after the date of enactment of the Clean Air Act Amendments of 1990 and which shall make a full investigation of the policy implications and appropriate uses of risk assessment and risk management in regulatory programs under various Federal laws to prevent cancer and other chronic human health effects which may result from exposure to hazardous substances.

(b) CHARGE.—The Commission shall consider—

(1) the report of the National Academy of Sciences authorized by section 112(o) of the Clean Air Act, the use and limitations of risk assessment in establishing emission or effluent standards, ambient standards, exposure standards, acceptable concentration levels, tolerances or other environmental criteria for hazardous substances that present a risk of carcinogenic effects or other chronic health effects and the suitability of risk assessment for such purposes;

(2) the most appropriate methods for measuring and describing cancer risks or risks of other chronic health effects from exposure to hazardous substances considering such alternative approaches as the lifetime risk of cancer or other effects to the individual or individuals most exposed to emissions from a source or sources on both an actual and worst case basis, the range of such risks, the total number of health effects avoided by exposure reductions, effluent standards, ambient standards, exposures standards, acceptable concentration levels, tolerances and other environmental criteria, reductions in the number of persons exposed at various levels of risk, the incidence of cancer, and other public health factors;

(3) methods to reflect uncertainties in measurement and estimation techniques, the existence of synergistic or antagonistic effects among hazardous substances, the accuracy of extrapolat-

103d Congress
1st Session

COMMITTEE PRINT

S. PRT. 103–38
Vol. I

A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990

TOGETHER WITH

A SECTION-BY-SECTION INDEX

PREPARED BY THE

ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION

OF THE

CONGRESSIONAL RESEARCH SERVICE

OF THE

LIBRARY OF CONGRESS

FOR THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS U.S. SENATE

VOLUME I

NOVEMBER 1993

Printed for the use of the Senate Committee on Environment and Public Works

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U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1993

48–657

For sale by the U.S. Government Printing Office

fere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this Act.

(m) SANCTIONS.—The Administrator may apply any of the sanctions listed in section 179(b) at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 179(a) in relation to any plan or plan item (as that term is defined by the Administrator) required under this Act, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this Act relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 179(a) to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 179(a), such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) SAVINGS CLAUSES.—

(1) EXISTING PLAN PROVISIONS.—Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before the date of the enactment of the Clean Air Act Amendments of 1990 shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this Act.

(2) ATTAINMENT DATES.—For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State—

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on the date of the enactment of the Clean Air Act Amendments of 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of the date of the enactment of the Clean Air Act Amendments of 1990 or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) RETENTION OF CONSTRUCTION MORATORIUM IN CERTAIN AREAS.—In the case of an area to which, immediately before the date of the enactment of the Clean Air Act Amendments of 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of

section 172(b)(6) (relating to establishment of a permit program) (as in effect immediately before the date of enactment of the Clean Air Act Amendments of 1990) or 172(a)(1) (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 172(c)(5) (relating to permit programs) or subpart 5 of part D (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(o) INDIAN TRIBES.—If an Indian tribe submits an implementation plan to the Administrator pursuant to section 301(d), the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 301(d)(2). When such plan becomes effective in accordance with the regulations promulgated under section 301(d), the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) REPORTS.—Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development effectiveness, need for revision, or implementation of any plan or plan revision required under this Act.

[42 U.S.C. 7410]

STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

SEC. 111. (a) For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

For the purpose of subparagraphs (A) (i) and (ii) and (B), a standard of performance shall reflect the degree of emission limitation and the percentage reduction achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. For

the purpose of subparagraph [1] (1)(A)(ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited, as determined under regulations promulgated by the Administrator, to a source which burns such fuel.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in title II of this Act relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 or any amendment thereto, or any subsequent enactment which supersedes such Act, or (B) which qualifies under section 113(d)(5)(A)(ii) of this Act, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.[2]

(b)(1)(A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator

[1] So in original public law. Probably should be "paragraph".
[2] For related provisions, see section 301 of the Powerplant and Industrial Fuel Use Act of 1978 (as amended by Public Law 97-35 (sec. 1021)).

shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this Act indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h), nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A) (i) and (ii) shall be promulgated not later than one year after enactment of this paragraph. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

(c)(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards.

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

(d)(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for

any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) [or emitted from a source category which is regulated under section 112] [or 112(b)] [1] but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 with respect to an implementation plan. In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

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

(f)(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) before the date of the enactment of the Clean Air Act Amendments of 1990 and for which regulations had not been proposed by the Administrator by such date, the Administrator shall—

(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after the date of the enactment of the Clean Air Act Amendments of 1990;

(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after the date of the enactment of the Clean Air Act Amendments of 1990; and

(C) propose regulations for the remaining categories of sources within 6 years after the date of the enactment of the Clean Air Act Amendments of 1990.

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

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

* [1] The amendments, made by section 108(g) and 302(a) of P.L. 101-549, appear to be duplicative; both, in different language, change the reference to section 112.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In making any determination under clause (ii), the Administrator shall take into account any previous failure of such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technological systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amounts without use of such system.

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

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

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

Any such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and section 113.

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

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

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

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

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

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

and that such failure cannot be corrected.

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

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

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

whichever is earlier.

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

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

(B) An extension granted under this paragraph shall set forth emission limits and a compliance schedule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize emissions. Such schedule shall be treated as a standard of performance for purposes of subsection (e) of this section and section 113.

[42 U.S.C. 7411]

SEC. 112. HAZARDOUS AIR POLLUTANTS.

(a) DEFINITIONS.—For purposes of this section, except subsection (r)—

(1) MAJOR SOURCE.—The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. The Administrator may establish a lesser quantity, or in the case of radionuclides different criteria, for a major source than that specified in the previous sentence, on the basis of the potency of the air pollutant, persistence, potential for bioaccu-

mulation, other characteristics of the air pollutant, or other relevant factors.

(2) AREA SOURCE.—The term "area source" means any stationary source of hazardous air pollutants that is not a major source. For purposes of this section, the term "area source" shall not include motor vehicles or nonroad vehicles subject to regulation under title II.

(3) STATIONARY SOURCE.—The term "stationary source" shall have the same meaning as such term has under section 111(a).

(4) NEW SOURCE.—The term "new source" means a stationary source the construction or reconstruction of which is commenced after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source.

(5) MODIFICATION.—The term "modification" means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.

(6) HAZARDOUS AIR POLLUTANT.—The term "hazardous air pollutant" means any air pollutant listed pursuant to subsection (b).

(7) ADVERSE ENVIRONMENTAL EFFECT.—The term "adverse environmental effect" means any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

(8) ELECTRIC UTILITY STEAM GENERATING UNIT.—The term "electric utility steam generating unit" means any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale shall be considered an electric utility steam generating unit.

(9) OWNER OR OPERATOR.—The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(10) EXISTING SOURCE.—The term "existing source" means any stationary source other than a new source.

(11) CARCINOGENIC EFFECT.—Unless revised, the term "carcinogenic effect" shall have the meaning provided by the Administrator under Guidelines for Carcinogenic Risk Assessment as of the date of enactment. Any revisions in the existing Guidelines shall be subject to notice and opportunity for comment.

(b) LIST OF POLLUTANTS.—

(1) INITIAL LIST.—The Congress establishes for purposes of this section a list of hazardous air pollutants as follows: