ORAL ARGUMENT NOT YET SCHEDULED

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

No. 13-1212

WILDEARTH GUARDIANS,
Petitioner,
v.

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

WYOMING MINING ASSOC., et al.,
Respondent-Intervenors.

Petition for Review of Final Agency Action of the
United States Environmental Protection Agency

CORRECTED PETITIONER'S OPENING [PROOF] BRIEF

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Dated: October 25, 2013

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. THE PARTIES

This case involves a petition for review of final agency action, not an appeal from a ruling of the district court. WildEarth Guardians is the Petitioner. The U.S. Environmental Protection Agency and Administrator Gina McCarthy are the Respondents. The nonfederal Intervenor-Respondents are the National Mining Association, Wyoming Mining Association, and Peabody Energy Corporation.

II. RULINGS UNDER REVIEW

Petitioner seeks review of the final agency action by the U.S. Environmental Protection Agency and Administrator McCarthy entitled "Notice of Final Action on Petition From Earthjustice To List Coal Mines as a Source Category and To Regulate Air Emissions From Coal Mines," EPA Docket Number EPA-HQ-OAR-2013-0358, 78 Fed. Reg. 26,739 (May 8, 2013).

III. RELATED CASES

Petitioner is not aware of any related cases before this Court.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the undersigned counsel of record for Petitioner certifies that to the best of her knowledge and belief there are no parent companies, subsidiaries or affiliates of WildEarth Guardians which have any outstanding securities in the hands of the public.

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* Petitioner chiefly relies on these authorities in this brief.

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
AR	Document numbers in administrative record
BLM	U.S. Bureau of Land Management
EPA	Environmental Protection Agency
Guardians	Petitioner WildEarth Guardians
NAAQS	National Ambient Air Quality Standard
NO_2	Nitrogen dioxide
NO_x	Nitrogen oxides
NSPS	New Source Performance Standard
$PM_{2.5}$	Particulate matter less than 2.5 microns in diameter
PM_{10}	Particulate matter less than 10 microns in diameter
ppm	Parts per million
VOC	Volatile organic compound

JURISDICTIONAL STATEMENT

I. Subject Matter and Appellate Jurisdiction

The Environmental Protection Agency ("EPA") has jurisdiction to list coal mines as a category of stationary sources of air pollution that endanger public health or welfare pursuant to 42 U.S.C. § 7411(b)(1)(A). EPA also has jurisdiction to establish federal standards of performance for sources within the newly listed stationary source category pursuant to 42 U.S.C. §§ 7411(b)(1)(B), (d)(1).

This Court has jurisdiction to review EPA's final agency action denying a petition for rulemaking. 42 U.S.C. §§ 7607(b)(1), (d)(1)(C). The Clean Air Act requires Petitions for Review to be filed within 60 days of publication of EPA's final decision in the Federal Register. *Id*. at § 7607(b)(1). EPA published its denial of WildEarth Guardians' ("Guardians") petition for rulemaking on May 8, 2013. 78 Fed. Reg. 26,739 (May 8, 2013). Guardians timely filed its Petition for Review of EPA's denial of the rulemaking petition on July 8, 2013.

II. Guardians Has Standing

To establish standing, a party must show that it has suffered an injury-in-fact, *i.e.,* a concrete and particularized, actual or imminent invasion of a legally protected interest; that the injury is fairly traceable to the challenged action of the defendant; and that a favorable decision will likely redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). A plaintiff's members'

"reasonable concerns" of harm caused by pollution from the defendant's activity directly affecting those affiants' recreational, aesthetic, and economic interests establishes injury-in-fact. *Friends of the Earth v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 183-84 (2000).

Guardians has standing to challenge EPA's final decision denying Guardians' Petition for Rulemaking. *See* Declarations of Jeremy Nichols ("Nichols Decl."), Ex. 1, and Mike Eisenfeld ("Eisenfeld Decl."), Ex. 2. Guardians is a non-profit environmental organization that works to safeguard the Earth's climate and air quality. *See* Nichols Decl. ¶ 3 [JA___]. Guardians has standing as an organization because: its members Mr. Nichols and Mr. Eisenfeld have standing to sue in their own right; the interests at stake are germane to Guardians' purpose; and neither the claim asserted, nor the relief sought requires Mr. Nichols or Mr. Eisenfeld to participate directly in this lawsuit. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

Here, Mr. Nichols, a member and employee of Guardians, has suffered an injury sufficient to demonstrate standing. Mr. Nichols frequently recreates in the West Elk Mountains of the North Fork Valley in western Colorado, a valley that contains three active coal mines that all vent methane gas through venting wells drilled above the mines—West Elk Mine, Elk Creek Mine, and Bowie Mine. Nichols Decl. ¶¶ 12-14 [JA___]. He has observed that the development and

operation of these venting wells from coal mining leave a significant impact on the natural landscape where he recreates. *Id.* ¶ 14 [JA___]. Furthermore, while hiking in the area Mr. Nichols has come across methane venting wells that were actively venting, making him fear for his safety, given that methane can be an explosive gas. *Id.* Mr. Nichols is also concerned with health impacts from contact with methane venting wells because he is aware that methane can increase ozone levels in the immediate area, and that ozone exposure can have serious impacts to respiratory health. *Id.* ¶¶ 16-17 [JA___]. Mr. Nichols concerns for his health and safety from exposure to methane emissions diminishes his recreational enjoyment of hiking in the West Elk Mountains and the North Fork Valley. *Id.* ¶ 17 [JA___].

Mr. Nichols also frequently recreates in the Powder River Basin of northeastern Wyoming and southeastern Montana, especially the Thunder Basin National Grassland north of Douglas, Wyoming, because it contains vast tracts of undisturbed prairie, remote drainages, wildlife, and incredible geology. *Id.* ¶ 19 [JA___]. There are several large surface coal mines in the Powder River Basin that encroach upon the Thunder Basin National Grassland, including the Antelope Mine, North Antelope-Rochelle Mine, School Creek Mine, and Black Thunder Mine. *Id.* There is a constant blackish to brownish haze hovering over these large surface coal mines, observable to Mr. Nichols when he recreates on the Thunder Basin National Grassland. *Id.* ¶ 20 [JA___]. He has observed that this haze is

linked to the constant and intensive disturbance to the land by coal mining. *See*, *e.g.*, *id*. ¶ 21 [JA___]. Mr. Nichols becomes concerned for his health when he sees particulate matter and nitrogen dioxide coming off of the mines because he is aware of the health problems associated with breathing these air pollutants. *Id*. ¶¶ 22-26 [JA___].

Mr. Nichols' injuries are caused by EPA's decision not to regulate coal mines as a stationary source of air pollution, which will allow the coal mines in the North Fork Valley and the Powder River Basin to continue to pollute the air in and around the areas where Mr. Nichols recreates. *Id*. ¶¶ 29-33 [JA___]. The requested relief would redress his injuries by curtailing the amount of air pollution at these mines, or at the very least reducing the risk of harmful levels of pollution in and near these mines. *Id*.

Mr. Eisenfeld, also a member of Guardians, has also suffered an injury sufficient to demonstrate standing. Mr. Eisenfeld lives in Farmington, New Mexico, which is 15-20 miles east of the San Juan and Navajo Coal Mines respectively. Eisenfeld Decl. ¶ 5 [JA___]. He can see these coal mines from Farmington, and frequently observes particulate clouds and a general haze hovering over the mining operations. *Id*. ¶ 7 [JA___]. Mr. Eisenfeld also observes this air pollution from the San Juan and Navajo Mines while recreating on public lands west of Farmington. *Id*. Mr. Eisenfeld has also observed particulate

pollution from the Lee Ranch and El Segundo Coal Mines on his frequent trips to Chaco Culture National Historical Park, which is located approximately 50 miles south of Farmington. *Id*. ¶ 9 [JA___]. The air pollution he observes from all of these mines depreciate his enjoyment of scenery and his recreational experience. *Id*. ¶¶ 8, 10 [JA___]. Mr. Eisenfeld is also concerned about the health effects of the air pollution from the San Juan and Navajo Mines given the proximity of these mines to Farmington. *Id*. ¶ 8 [JA___]. As a result, he avoid recreating on public lands adjacent to these mines on high wind days. *Id*.

Mr. Eisenfeld's injuries are caused by EPA's decision not to regulate coal mines as a stationary source of air pollution, which will allow the San Juan, Navajo, Lee Ranch, and El Segundo coal mines to continue to pollute the air in and around the areas where Mr. Eisenfeld recreates. *Id*. ¶¶ 12-16 [JA___]. The requested relief would redress his injuries by curtailing the amount of air pollution at these mines, or at the very least reducing the risk of harmful levels of pollution in and near these mines. *Id*.

Both Mr. Nichols and Mr. Eisenfeld, as members of Guardians, also suffered concrete harm from the deprivation of their procedural right under the APA to receive a substantive response from EPA on the Petition. As the Supreme Court explained in *Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007), "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some

possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."

Because Mr. Nichols and Mr. Eisenfeld, members of Guardians, have standing to bring this action in their own right, the organization satisfies the first element of the Supreme Court's *Hunt* test. Nichols Decl. ¶ 36 [JA___]; Eisenfeld Decl. ¶ 17 [JA___]. Guardians also satisfies the second and third *Hunt* requirements, because the interests of Guardians' members at stake are germane to the organization's purpose, and none of the claims Guardians asserts in this Petition for Review requires its members to participate as individuals in this litigation. Accordingly, Guardians has standing to bring this action.

STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), the statutes and regulations at issue in this Petition for Review are reproduced in the Addendum to this Opening Brief.

STATEMENT OF ISSUES

1. Whether EPA's denial of Guardians' Petition on the grounds that the Agency has other priorities and cannot commit to a substantive review of the Petition violates the Clean Air Act and/or is unsupported by the record, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

2. Whether EPA's failure to list coal mines as a source category and to regulate air emissions from coal mines violates the Clean Air Act and/or is

unsupported by the record, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

STATEMENT OF THE CASE

This Petition seeks review of EPA's final decision entitled "Notice of Final Action on Petition From Earthjustice To List Coal Mines as a Source Category and To Regulate Air Emissions From Coal Mines," 78 Fed. Reg. 26,739 (May 8, 2013). Guardians and other environmental groups petitioned EPA to exercise its authority under Section 111 of the Clean Air Act to: (1) list coal mines as a category of stationary sources that emit air pollution which may reasonably be anticipated to endanger public health or welfare; (2) establish federal standards of performance for new and modified sources within the newly listed stationary source category for coal mines; and (3) establish federal standards of performance to address methane emissions from existing sources within the newly listed stationary source category for coal mines.

This rulemaking is necessary because air pollution from coal mining activities poses myriad negative impacts to public health and the environment. It is undisputed that coal mines release air pollution that causes or contributes to the endangerment of public health and welfare. The rulemaking petition sought to spur the development of cost-effective controls to reduce harmful air emissions from existing and future coal mining.

EPA denied the rulemaking petition citing limited resources and ongoing budget uncertainties. Specifically, EPA said that it could not commit to conducting the process necessary to determine whether coal mines should be added to the list of source categories under Section 111(b)(1)(A) of the Clean Air Act. 42 U.S.C. § 7411(b)(1)(A). In so doing, EPA did not base its denial on a determination as to whether emissions from coal mines could reasonably be anticipated to endanger public health or welfare, the standard for making such a determination under Section 111(b)(1)(A). Because EPA declined to determine whether coal mines should be listed as a source category, and EPA's duty to set performance standards is triggered by listing coal mines as a source category, EPA denied as moot the requests that the agency set performance standard for new and existing coal mines under Section 111(b)(1)(B). 42 U.S.C. § 7411(b)(1)(B). EPA's denial of the rulemaking petition on grounds outside the scope of the Clean Air Act is arbitrary, capricious, and contrary to law.

STATEMENT OF FACTS

I. LEGAL BACKGROUND: NEW SOURCE PERFORMANCE STANDARDS UNDER THE CLEAN AIR ACT

Congress adopted the Clean Air Act "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare . . . ." 42 U.S.C. § 7401(b)(1). To meet this purpose, Congress directed EPA to establish nationwide uniform emission standards for new or modified sources of air

pollution in Section 111 of the Clean Air Act. *See generally* 42 U.S.C. § 7411. In contrast to the section of the Clean Air Act aimed at setting ambient air standards—that is, national ambient air quality standards ("NAAQS") for the total ambient level of designated "criteria" pollutants in the air (*see* 42 U.S.C. §§ 7408-7410)—Section 111 establishes technology-based emission standards for industrial source categories, known as "new sources performance standards" (hereafter, "NSPS" or "performance standard"). These NSPS help states attain the NAAQS for criteria air pollutants and also help prevent new pollution problems from arising from other pollutants for which EPA has not designated a NAAQS. NSPS ensure that emissions control technologies are built into equipment when a source is constructed or modified, regardless of the area's level of air quality, rather than the more costly process of attempting to retrofit an existing source later should ambient air quality worsen over time.

Under the NSPS provision, the Administrator has the authority to list new categories of stationary sources if "in [her] judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7411(b)(1)(A). The Administrator is statutorily required to continually revise the published list "from time to time." *Id*. The Administrator is required to include *any* source that emits air pollution that she

determines causes or contributes significantly to endangerment of public health or welfare. *Id*.

The Clean Air Act defines "stationary source" as "any building, structure, facility or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3). An "air pollutant" is defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g).

Once a new stationary source is added to the list, the Clean Air Act requires that the Administrator establish federal "standards of performance" for new and modified sources, within one year of the listing. 42 U.S.C. § 7411(b)(1)(B). These proposed regulations are subject to a written comment period and the Administrator must promulgate final regulations for new and modified facilities no more than a year later. *Id*. "Standard of performance" is defined as "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 . . . the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1).

Concurrent with establishing "standards of performance" for new and modified sources, the Clean Air Act also requires the Administrator to establish

standards of performance for existing sources, otherwise known as "designated facilities." These standards for existing sources are only to address a "designated pollutant," an air pollutant for which EPA has not established a NAAQS, that is emitted from a facility not already listed as a source category under Section 112, and that would otherwise be regulated under Section 111 if the existing source was a new source. 42 U.S.C. § 7411(d)(1)(A)(i) and (ii); 40 C.F.R. § 60.21(a).

Standards of performance for existing sources are to be implemented and enforced by States, and must be based on an "emission guideline" published by the Administrator in accordance with 40 C.F.R. § 60.22. An emission guideline must reflect "the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated for designated facilities, and the time within which compliance with emission standards of equivalent stringency can be achieved." 40 C.F.R. § 60.22(b)(5). A State must adopt and submit to the Administrator a plan for the control of "designated pollutants" from "designated facilities" within nine months of the Administrator's publication of final emission guidelines. 40 C.F.R. § 60.23(a).

EPA has developed NSPS for scores of stationary pollution sources, including for a subset of facilities that are often constructed at coal mines. *See* 40 C.F.R. § 60.254 ("Standards for coal processing and conveying equipment, coal

storage systems, transfer and loading systems, and open storage piles."). However, EPA has not established NSPS for coal mines.

II. AIR POLLUTION FROM COAL MINING FACILITIES

The coal mining sector is responsible for releasing a number of air pollutants that cause or contribute significantly to air pollution and, as a result, may "reasonably be anticipated to endanger public health and welfare." *See* 42 U.S.C. 7411(b)(1)(A). The coal mining sector includes: (1) underground mines, which extract coal from deep within the ground; (2) surface coal mines for coal seams located closer to the surface that can be extracted through strip mining and mountain-top removal; and (3) abandoned underground coal mines. AR 0001 at 8-10 [JA___].[1] Activities at these coal mines emit a range of harmful air pollutants including particulate matter, nitrogen oxides, methane, and volatile organic compounds. Each day that coal mines go unregulated under the NSPS provisions, these pollutants are emitted without appropriate, readily-available safeguards under the Clean Air Act.

[1] Documents in the administrative record labeled with document number EPA-HQ-OAR-0358-#### will be cited as AR ####.

A. Particulate Matter

Coal mining operations release particulate matter,[2] which is a criteria pollutant for which EPA has established NAAQS. 40 C.F.R. §§ 50.6, 50.7, and 50.13. According to EPA, health effects associated with short-term exposure to PM_{10} include "aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions), increased respiratory symptoms in children, and premature mortality." 71 Fed. Reg. 61,144, 61,178 (Oct. 17, 2006). EPA has also determined that health effects associated with short-term exposure to $PM_{2.5}$ include "changes in lung function and increased respiratory symptoms, as well as new evidence for more subtle indicators of cardiovascular health." *Id*. at 61,152. According to EPA, coal mining activities that can lead to the release of particulate matter, at least in the western United States, include blasting, truck loading, bulldozing, dragline operation, vehicle traffic, grading, and storage piles. AR 0001 at 10 [JA___] (citing Volume I of EPA's A-42 Compellation of Air Pollutant Emission Factors).

Recent environmental analyses prepared by the U.S. Bureau of Land Management ("BLM") attest to the fact that coal mining operations—both underground and surface—can release significant amounts of particulate matter.

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[2] EPA has defined two types of particulate matter: (1) particulate matter less than 10 microns in diameter ("PM_{10}"), and (2) particulate matter less than 2.5 microns in diameter ("$PM_{2.5}$").

AR 0008[3] Ex. 5 at 3-38 to 3-64 [JA___] (BLM Draft Environmental Impact Statement for Wright Area Coal Lease Applications) and Ex. 6 at 125 [JA___] (BLM Final Environmental Impacts Statement for Pit 14 Coal Lease by Application). In some cases, particulate matter from coal mining has caused or contributed to exceedances of the PM_{10} NAAQS. For instance, BLM reports that "[f]rom 2001 through 2006, there were a total of nine exceedances of the 24-hour PM_{10} particulate standards associated with the Black Thunder, Jacobs Ranch, and North Antelope Rochelle mines" in Wyoming's Powder River Basin and "[i]n 2007, a total of three 24-hour PM_{10} exceedances were reported at these three mines." AR 0008 Ex. 5 at 3-39 [JA___].

EPA previously recognized that monitoring and modeling data for the Powder River Basin "suggests potentially significant project-specific and cumulative PM_{10} impacts caused by existing and future development" and expressed concern that recent modeling "projects exceedances of both PM_{10} and $PM_{2.5}$ for both annual and 24-hour NAAQS in Wyoming in 2015." AR 0008 Ex. 8 at 3 [JA___] (EPA Comments on Draft EIS for West Antelope II Coal Lease Applications); Ex. 9 at 2 [JA___] (EPA Comments on Draft EIS for South Gillette Area Coal Lease Applications). EPA advocated for more rigorous control of PM_{10} and $PM_{2.5}$ from coal mining operations in the Powder River Basin and urged BLM

[3] AR 0008 consists of the 16 exhibits attached to the Petition.

to "add additional mitigation measures to reduce fugitive dust emissions" and to "detail mitigation and monitoring measures that will be undertaken to minimize exposure to particulates." AR 0008 Ex. 10 at 125 [JA___] (EPA Comments on Draft EIS for Wright Area Coal Lease Applications) and Ex. 9 at 2 [JA___]. Moreover, there are a number of particulate matter emission control measures already in use at some coal mines, so technologies exist to achieve significant emissions reductions from these sources. AR 0001 at 23 [JA___] and AR 0008 Ex. 5 at 3-60, 3-63 [JA___].

B. Nitrogen Oxides

Nitrogen oxides ("NO_x") are a group of gases that are known to be ground-level ozone[4] and $PM_{2.5}$ precursors, and that include nitrogen dioxide ("NO_2"), a criteria pollutant for which EPA has established a NAAQS. 75 Fed. Reg. 6,474-6,537 (Feb. 9, 2010).[5] BLM has noted that NO_2 "may cause significant toxicity because of its ability to form nitric acid with water in the eye, lung, mucous

[4] Ground-level ozone is a harmful air pollutant that is also the key ingredient of smog. Ozone is designated a "criteria air pollutant" pursuant to Section 108 of the Clean Air Act and EPA has promulgated a NAAQS to limit ozone throughout the United States pursuant to Section 109 of the Clean Air Act, 42 U.S.C. § 7409. According to EPA, ozone "can reduce lung function and inflame airways, which can increase respiratory symptoms and aggravate asthma or other lung diseases," and can increase "the risk of premature death from heart or lung disease." AR 0001 at 6 [JA___] (citing EPA Fact Sheet).

[5] NO_2 is considered by the EPA to be a primary indicator of NO_x emissions. *See* 75 Fed. Reg. 6,490.

membranes, and skin," that acute exposure to NO_2 "may cause death by damaging the pulmonary system," and that "chronic or repeated exposure to lower concentrations of NO_2 may exacerbate preexisting respiratory conditions, or increase the incidence of respiratory infections." AR 0008 Ex. 5 at 3-65 [JA___].

Sources of NO_x at coal mines include fugitive emissions from overburden and coal blasting events; tailpipe emissions from mining equipment; and point source emissions from stationary engines, coal-fired hot water generators, and natural-gas fired heaters. AR 0008 Ex. 5 at 3-66 [JA___]. The formation of NO_2 from blasting operations can be especially threatening to public health. As BLM explains:

> Blasting that is done to assist in the removal of material overlying the coal (the overburden) can result in emissions of several products, including NO2, as a result of the incomplete combustion of nitrogen-based explosives used in the blasting process. When this occurs, gaseous, orange-colored clouds may be formed and they can drift or be blown off mine permit areas.

Id. at 3-65 [JA___]. Orange nitrogen dioxide clouds produced by mining operations can often be observed and operators often warn the public of the potential for orange clouds in the Powder River Basin. *See* AR 0001 at 15-18 [JA___] (photographs of orange clouds from mines).

NO_x and NO_2 emissions from coal mining can be significant. For example, BLM projects NO_2 emissions from coal mining operations related to pending lease proposals in northeastern Wyoming to be as high as 4,743 tons/year by 2017 at the

Black Thunder Mine, 1,450 tons/year by 2013 at the Jacobs Ranch Mine, and 2,988 tons/year by 2015 at the North Antelope Rochelle Mine. AR 0008 Ex. 5 at 3-70, 3-71, and 3-73 [JA___].

EPA has expressed concern with NO_x and NO_2 emissions from coal mining in the Powder River Basin. The agency characterized emissions of these pollutants from coal mining in the Powder River Basin as a major health concern:

> EPA is . . . concerned about the proximity of the mining operation to homes and school bus stops. Children may be especially susceptible to the health effects of NO_2 and fine particulates. Children have greater exposure to air pollution because of their faster breathing rates and the amount of time spent playing outdoors. Particulates and NO_2 can aggravate asthma, irritate airways, and cause coughing and breathing difficulties.

AR 0001 at 19 [JA___] and AR 0006 Ex. 9 at 2 [JA___]. EPA also noted that the NO_2 emissions from the Black Thunder Mine "alone are very high and may contribute to visibility impairment and ozone formation." AR 0001 at 14 [JA___] and AR 0008 Ex. 10 at 127-28 [JA___]. In terms of emissions reductions, some coal mines have voluntarily reduced NO_2 emissions "through the use of borehole liners and changing their blasting agent blends." AR 0008 Ex. 5 at 3-75 [JA___]. EPA has recognized that other mitigation measures may be effective at reducing NO_2 emissions including reduced blast sizes, changed composition of explosive agents, and changed placement of blasting agents. AR 0008 Ex. 10 at 128 [JA___].

C. Methane

Methane is one of six greenhouse gases that EPA has determined will "endanger both the public health and the public welfare of current and future generations." 74 Fed. Reg. 66,496 (Dec. 15, 2009). Methane is the second most emitted greenhouse gas, after carbon dioxide, and is more than 20 times more potent than carbon dioxide in terms of its heat trapping capabilities. AR 0001 at 6 [JA___] (citing EPA document on methane). In 2004, methane accounted for 14.3% of the total anthropogenic greenhouse gas emission load. AR 0008 Ex. 2 at 5 [JA___] (2007 IPCC Climate Change Report). High concentrations of methane are "the unambiguous result of human activities." 74 Fed. Reg. 66496, 66517 (Dec. 15, 2009). EPA's recent endangerment finding on greenhouse gases explains that with respect to greenhouse gases, it is "not a close case in which the magnitude of the harm is small and probability, great, or the magnitude large and the probability small. In both magnitude and probability, climate change is an enormous problem. The greenhouse gases that are responsible for it, including and especially methane, "endanger public health and welfare within the meaning of the Clean Air Act." 74 Fed. Reg. 18,904 (April 24, 2009).

In addition, methane also contributes to the formation of ground-level ozone pollution. In part due to global increases in methane emissions, background ozone concentrations have "roughly doubled since preindustrial times." AR 0008 Ex. 3

at 3988 [JA___] (article on health benefits of mitigating ozone pollution). Recent studies have recommended reducing methane to reduce global background ozone levels and better protect public health. *Id*.

The coal mining industry is the fourth largest emitter of methane in the United States. AR 0006 at ES-13 [JA___] (Inventory of U.S. Greenhouse Gas Emissions and Sinks). Although methane escapes during the processing, transport, and storage of coal, 90 percent of the emissions come from the actual coal mining process. AR 0001 at 7 [JA___] (citing EPA Technical Support Document for Proposed Rule for Mandatory Reporting of Greenhouse Gases). Methane is emitted from all three categories of coal mines: surface mines, underground mines, and abandoned mines. *Id*. (citing EPA methane emissions inventory for coal mines). Underground mines emit the largest portion of methane into the atmosphere. AR 0001 at 8 [JA___]. According to EPA, active underground mines produce 61 percent of all coal mine methane emissions. *Id*. With surface mines, methane escapes to the surface as the overburden is removed to expose the coal. AR 0001 at 9 [JA___]. In 1997, EPA estimated that, even though surface mines accounted for over 61 percent of the coal production in the United States, they only accounted for 14 percent of coal mine methane emissions. *Id*. More recent data shows that emissions from surface mines account for 22 percent of coal mine fugitive emissions. AR 0001 at 9 [JA___].

Even after coal extraction from an underground mine ceases, that mine still actively emits methane into the atmosphere. These emissions can be significant. EPA has estimated that abandoned underground coal mines can emit eight percent of the total coal mine methane emissions and post mining operations emit as much as 22 percent. AR 0001 at 10 [JA___]. EPA has reported that there are several thousand abandoned coal mines throughout the United States and as many as 400 continue to emit methane. *Id*.

There are a number of systems of emission reductions to address methane emissions from coal mines. It is currently technologically feasible for methane to be captured or flared from coal mines instead of allowing methane to be released directly into the atmosphere. AR 0001 at 22 [JA___] (citing EPA's coal mining methane emissions inventories and EPA's study of opportunities for methane recovery from coal mines). EPA has already concluded that recovering methane from coal mines would significantly reduce the amount of greenhouse gases emitted into the atmosphere because every ton of methane recovered is equal to approximately more than 20 tons of carbon dioxide emissions.[6] AR 0001 at 8 [JA___] (citing EPA's study of opportunities for methane recovery from coal

[6] EPA has also estimated that if just the largest gassy underground mines captured and recovered all of their methane, the United States could keep from 173,700 to 540,400 metric tons of methane out of the atmosphere each year (the equivalent of at least 3,647,700 to 11,348,400 metric tons of carbon dioxide). AR 0001 at 8 [JA___] (citing EPA's study of opportunities for methane recovery from coal mines at 1-4, 1-5).

mines at 2-7). Furthermore, flaring is a viable option if methane capture is not technologically feasible. *See* AR 0008 Ex. 15 at 2 [JA___] (describing that flaring is used at six active mines in the United Kingdom).

D. Volatile Organic Compounds

Volatile organic compounds ("VOCs") are precursors to ground-level ozone, a criteria air pollutant for which EPA established a NAAQS, as discussed in note 4 above. VOCs are often vented along with methane from coal mining operations. EPA's own national emission inventory shows that coal mines can be large sources of VOC emissions. According to 2002 inventory data, coal mining and other similar operations released more than 1,790 tons of VOCs in the United States. AR 0001 at 13 [JA___] (showing table of coal mine VOC emissions in the U.S.).

EPA has expressed concern with VOC emissions from coal mines. For example, EPA noted that a recently proposed coal mine in western Colorado, the Red Cliff mine, would vent methane that "may have low concentrations of nonmethane organic compounds." AR 0008 Ex. 11 at 6 [JA___] (EPA Comments on Proposed Red Cliff Mine Project). EPA recognized that "given the high methane emission rates associated with the mine, the NMOC [non-methane organic compound] emission rates may be considerable." *Id*.

III. THE RULEMAKING PETITION

On behalf of Guardians and three other environmental organizations,

Earthjustice filed a Petition for Rulemaking on June 16, 2010. The Petition requested that EPA take action that would result in decreasing levels of harmful air pollution from coal mining facilities including:

(1) List coal mines as a category of stationary sources that emit air pollution which may reasonably be anticipated to "endanger public health or welfare" in accordance with 42 U.S.C. § 7411(b)(1)(A);

(2) Establish federal "standards of performance" for new and modified sources within the newly listed stationary source category for coal mines in accordance with 42 U.S.C. § 7411(b)(1)(B); and

(3) Concurrently establish federal "standards of performance" to address emissions of methane from existing facilities within the newly listed stationary source category for coal mines in accordance with 42 U.S.C. § 7411(d)(1) and 40 C.F.R. § 60.22.

AR 0001 at 2-3 [JA___]. The Petition was expressly submitted pursuant to the rulemaking provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(e), and the Clean Air Act, 42 U.S.C. § 7411. The Petition contained evidence and analysis supporting the relief requested, and demonstrated that air pollution from coal mines may reasonable be anticipated to endanger public health and welfare. The Petition also requested that EPA provide a substantive response within 180 calendar days. AR 0001 at 25 [JA___].

On December 27, 2010, and before EPA had responded to the Petition, Guardians provided EPA with additional information about levels of harmful air pollution from coal mining activities in the Powder River Basin in northeastern Wyoming and southeastern Montana—one of the largest coal producing regions in the United States. AR 0007 [JA___] (Guardians' Supplemental Information Letter). This Supplemental Letter included information that: (1) NO_x levels from coal mining on 12 pending Federal coal leases may be as high as 21,074 tons/year AR 0007 at 2-3 [JA___], making coal mining the single largest source of NO_x emissions in Campbell County, Wyoming (even overshadowing coal-fired power plant NO_x emissions in the County); (2) exceedances of the NAAQS for NO_2, PM_{10}, and $PM_{2.5}$ are occurring under current mining conditions, and BLM predicts such exceedances will continue to occur through 2020 with development of new coal leases, *id*. at 4 [JA___]; (3) coal mining is projected by BLM to directly cause up to 18 total days of impaired visibility when visibility degradation is greater than 10 percent at surrounding Class I areas[7] and 40 days where degradation is greater

[7] Class I areas under the Clean Air Act include national wilderness area greater than 5,000 acres and national parks greater than 6,000 acres. 42 U.S.C. § 7472. The Clean Air Act allows almost no air quality degradation in Class I areas, and Class I areas also receive stronger protections with respect to visibility. *See* 42 U.S.C. § 7475 and 42 U.S.C. § 7491. According to BLM, Badlands National Park, the Cheyenne Indian Reservation, and Wind Cave National Park will experience the greatest visibility impairment from coal mining activities in the Powder River Basin. AR 0007 at 8-9 [JA___].

than five percent, *id*. at 9 [JA___]; and (4) coal mining is exacerbating exceedances of the ozone NAAQS, *id*. at 10 [JA___].

IV. EPA'S DENIAL OF THE RULEMAKING PETITION

On April 30, 2013, EPA Acting Administrator Bob Perciasepe "fully and finally respon[ed] to [the] [P]etition" by taking "final agency action" to deny the Petition. AR 0005 at 1 [JA___] (EPA Denial Letter). Specifically, the Acting Administrator stated that "EPA is denying the June 2010 petition to add coal mines to the Clean Air Act section 111 list of categories and declining to initiate the requested rulemaking at this time. This is the EPA's final agency action on this petition." *Id*. at 5 [JA___].

EPA gave the following basis for its denial of the Petition:

> [T]he agency must prioritize its regulatory actions. This is especially the case in light of limited resources and ongoing budget uncertainties. For these reasons, the EPA at this time cannot commit to conducting the process to determine whether coal mines should be added to the list of categories under Clean Air Act 111(b)(1)(A) and thus is denying your petition.

Id. at 1 [JA___]. Based on these resource concerns, EPA expressly declined to make any finding pursuant to Section 111(b)(1)(A):

> This denial is not based on a determination of whether the emissions from coal mines cause or significantly contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. In the future, the EPA may initiate the process for such a determination, but the agency has decided that it will not do so now.

Id. EPA went on to explain actions it is taking to reduce greenhouse gas emissions from the electricity and transportation sectors in response to Guardians' stated concern in the Petition about the need to reduce methane emissions from coal mines given that methane is the second most emitted and a highly potent greenhouse gas. *Id*. at 4 [JA___]. Although EPA discussed the rationale for its "step-by-step approach" for regulating greenhouse gas emissions, *id*., the agency did not even acknowledge the air quality concerns associated with coal mining raised in the Petition and Guardians' supplemental letter. *See* AR 0001 at 10-19 [JA___] (discussing air quality concerns with coal mining); AR 0007 at 2-11 [JA___] (same).

SUMMARY OF ARGUMENT

Coal mines throughout the country are a significant source of harmful air pollution, spewing pollutants such as particulate matter, nitrogen oxides, methane, and volatile organic compounds into the atmosphere. EPA regulates scores of stationary sources under the New Source Performance Standards program, but not coal mines. In light of EPA's omission of coal mines from the list of sources subject to new source performance standards, Guardians petitioned EPA, pursuant to the APA and 42 U.S.C. § 7411(b)(1)(A,B) of the Clean Air Act, to list coal mines as a category of stationary sources that emit air pollution which may reasonably be anticipated to endanger public health or welfare, establish Federal

standards of performance for new and modified coal mines within the newly designated source category, and concurrently establish Federal standards of performance to address emissions from existing coal mines. Arguing that it lacked the time and budget to conduct the process to determine whether coal mines should be added to list of categories under Section 111(b)(1)(A), EPA denied the Petition. EPA did not even attempt to present a rational scientific and technical basis for its denial. Although EPA briefly discussed its current strategy for regulating greenhouse gases, including methane, from power plants, EPA presented no meaningful basis to support its implication that this strategy has rendered regulating these emissions from coal mines through standards of performance pursuant to Section 111 unnecessary. EPA also arbitrarily ignored all of the information in the Petition relating to non-greenhouse gas air pollution from coal mines.

The APA does not allow this arbitrary approach. It requires the type of honest answer to the statute's question regarding whether air pollution from coal mines endangers public health and welfare, *i.e.*, a decision based on "consideration of the relevant factors" and reasoning that "conform[s] to the authorizing statute." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Massachusetts*, 549 U.S. at 533. As the Supreme Court ruled on similar facts presented in *Massachusetts v. EPA,* when Congress hinges a standard-setting

duty on an EPA judgment, that "judgment is not a roving license to ignore the statutory text," but rather "a direction to exercise discretion within defined statutory limits." *Massachusetts,* 549 U.S. at 532-33. Thus, EPA's denial of the Petition was arbitrary and capricious under the APA due to the agency's disregard of the relevant statutory basis for its judgment.

ARGUMENT

I. STANDARD OF REVIEW

The judicial review provisions of the Clean Air Act set forth the same standard of review for challenges to rules promulgated by EPA as is found in the APA. *See* 42 U.S.C. § 7607(d)(9)(A). Here, this Court reviews EPA's decision under the Clean Air Act's standard of review because the Petition requested rulemakings pursuant to 42 U.S.C. § 7411, which is an enumerated sections under 42 U.S.C. § 7607(d)(1)(b). The standard of review at 42 U.S.C. § 7607(d)(9) applies to any EPA rulemaking decision that falls into a category in 42 U.S.C. § 7607(d)(1). The Court may reverse EPA's denial of the rulemaking petition if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(1). Agency action is arbitrary and capricious if the agency has not "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting

Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168 (1962)). An agency's "reasons for action or inaction must conform to the authorizing statute." *Massachusetts,* 549 U.S. at 533. Therefore, this Court should review EPA's denial of the Petition to ensure that EPA's reasoning is based on the Clean Air Act and that is not "divorced from the statutory text." *Id.*

II. EPA'S BASIS FOR DENIAL OF THE PETITION IS ARBITRARY BECAUSE IT DOES NOT CONFORM TO THE APPLICABLE REQUIREMENTS OF THE CLEAN AIR ACT

The plain language of Section 111(b)(1)(A) provides the Administrator with authority and the duty to list new categories of stationary sources if the source category "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." This determination is bounded in the plain language of the statute by scientific and technical criteria. *See Nat'l Asphalt Paving Assoc. v. Train*, 539 F.2d 775, 784 (D.C. Cir. 1976) (upholding EPA's endangerment finding for asphalt plants under Section 111 where the agency considered data pertaining to emission limits from existing asphalt plants, projected growth rate in new plants, and current regulatory schemes for plant emissions).

Once the Administrator makes an endangerment finding for a category of stationary sources and lists the source, EPA has one year to establish standards of performance for new or modified sources pursuant to Section 111(b)(1)(B).

Nothing in the statutory language allows EPA to deny Guardians' Petition based on extraneous concerns, *i.e.,* bureaucratic preferences. Because EPA failed to base its reasons for inaction in the Clean Air Act, and instead relied on legally impermissible concerns about EPA's preferences for resource allocation and the events that would follow an endangerment finding, its denial is arbitrary, capricious, and otherwise not in accordance with law. *See Massachusetts v. EPA,* 549 U.S. at 533.

A. Because EPA's Denial of the Petition was not Grounded in the Clean Air Act, the Denial was Arbitrary and Capricious

The Administrator's evasion of her statutory responsibility in this case is analogous to the rulemaking petition denial struck down by the U.S. Supreme Court in *Massachusetts*. There, as here, the Clean Air Act required EPA to make a technical determination as to whether an environmental problem needed to be addressed, and to then address that problem if the answer was "yes." There, as here, EPA declined to make the required technical determination because it feared the cumbersome and politically problematic consequences that might attend addressing the problem in the event of a "yes" determination. The Supreme Court struck down EPA's decision, as this Court should here, because its refusal to take action was not grounded in the Clean Air Act.

Massachusetts concerned EPA's denial of a rulemaking petition under a section of the Clean Air Act that is strikingly parallel to Section 111(b)(1)(A), the

basis of Guardians' Petition for Rulemaking here. The statutory provision at issue in that case was Section 202:

> The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare . . .

Massachusetts, 549 U.S. at 506 (citing 42 U.S.C. § 7251(a)(1)). Under this provision, as under Section 111(b)(1)(A), EPA is required to make a finding as to whether any pollutant is impeding achievement of the statute's overarching goal (here, "air pollution prevention," *see* 42 U.S.C. § 7401(a)(3)). An "endangerment finding" under Section 202 triggers EPA's duty to promulgate federal regulations to mitigate the problem, in the same manner as an "endangerment finding" under Section 111(b)(1)(A) triggers a duty to establish performance standards.

Petitioners in *Massachusetts* petitioned EPA pursuant to Section 202 of the Clean Air Act to make an endangerment finding concerning carbon dioxide and other greenhouse gases, and to promulgate regulations governing vehicle emissions of greenhouse gases that flow from such a finding. *Massachusetts*, 549 U.S. at 510. EPA denied the petition, finding that even if it had authority to regulate greenhouse gases, "it would be unwise to do so at this time." *Id.* The reasons EPA provided to support this conclusion were similar to those it provided here because they were based on agency preferences, rather than grounded in science or

technical data. First, notwithstanding a National Research Council report on climate change causation, EPA stated that a link between greenhouse gases and climate change "cannot be unequivocally established"; and second, that regulating motor vehicle emissions pursuant to Section 202 would amount to a "piecemeal approach" to climate change, which would conflict with the President's "comprehensive approach" to the problem through support for technological innovation, the creation of nonregulatory voluntary programs, and further research—but not, as the Court noted, "actual regulation." *Id.* at 513.

The Supreme Court held that, notwithstanding EPA's inherently broad discretion in regulatory decision-making, a rulemaking petition requesting action under Section 202 created an affirmative duty to articulate reasons for action or inaction that conform to the statutory text. *Id*. at 533. The Court held that EPA could not choose an unauthorized third way out, *i.e.*, by explaining why the agency did not think the regulation triggered by an endangerment finding would be "wise" from a policy and resources standpoint. *Id.* at 533-36.

The Court concluded, "[p]ut another way, the use of the word 'judgment' *is not a roving license to ignore the statutory text.* It is but a direction to exercise discretion within defined statutory limits." *Id.* at 533 (emphasis added). Accordingly, it held that while "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations, . . . *once EPA has*

responded to a petition for rulemaking its reasons for action or inaction must conform to the authorizing statute." *Id.* at 533 (emphasis added). Thus, under section 202 (structured similarly to Section 111(b)(1)(A)), after receiving such a petition:

> EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. *To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.*

Id. (internal citations omitted, emphasis added).

While the Court acknowledged that it had "neither the expertise nor the authority to evaluate [EPA's] policy judgments" as to why regulation would be "unwise," it nonetheless held that these policy judgments "do not amount to a reasoned justification for declining to form a scientific judgment." *Id.* at 533-34. It further held, "[i]f the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether green house gases contribute to global warming, EPA must say so." *Id.* at 534.

Just as the Administrator declined to use scientific judgment to make an "endangerment finding" (*i.e.*, a threat to public health or welfare) in *Massachusetts*, here, in exercising her discretion to take final action on the Petition, she expressly declined to weigh the scientific evidence and other technical factors needed to make an "endangerment finding" pursuant to Section

111(b)(1)(A):

> This denial is not based on a determination as to whether the emissions from coal mines cause or significantly contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. In the future, the EPA may initiate the process for such a determination, but the agency has decided that it will not do so at this time.

AR 0005 at 1 [JA___]. As in *Massachusetts*, the agency here justified its failure to make the required scientific and technical determination on policy grounds, with EPA citing its desire to work on other rulemakings that it deems to be a higher priority, and budgetary constraints. *Id*. at 3-4 [JA___]. While an agency will be afforded particular deference for decisions involving "evaluation of complex scientific data within its technical expertise," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, EPA's denial was not grounded in any such scientific evaluation.

Similarly, in *NRDC v. FDA*, 872 F. Supp. 2d 318 (S.D.N.Y. 2012), the court struck down an agency's petition denial, citing the Court's mandate in *Massachusetts* to ground judicial review of a rulemaking petition denial in the substance of the underlying statute. NRDC had petitioned FDA to initiate proceedings to withdraw approval of certain antibiotics in livestock based on scientific evidence that such use endangers public health. FDA denied the petition based on the "time and expense" associated with withdrawal proceedings, and the fact that it was "pursuing a different strategy to promote the judicious use of antibiotics," largely consisting of issuing guidance documents. *Id.* at 325-26.

Based on *Massachusetts,* the court overturned the denial as inconsistent with the governing statute:

> *Denying the Petitions on the grounds that it would be too time consuming and resource-intensive to evaluate each individual drug's safety . . . is arbitrary and capricious*. The Agency did not discuss or appear to consider the controlling statute's governing criteria and overall purpose—whether the drugs at issue pose a threat to human health and, if so, the obligation to withdraw approval for such health-threatening drugs. *See Massachusetts v. EPA*, 549 U.S. at 535, 127 S.Ct. at 1463 (holding that an agency "must ground its reasons for action or inaction in the statute") . . . *The fact that withdrawing approval may be costly or time-consuming is not a sufficient justification, under the FDCA, for the Agency to abdicate its duty to ensure that the use of animal drugs is safe and effective*.

Id. at 338-39 (internal citations omitted, emphasis added); *see also Am. Horse Prot. Ass'n v. Lyng,* 812 F.2d 1, 5, 7 (D.C. Cir. 1987) (denial of a rulemaking petition overturned under APA where denial demonstrates "plain errors of law," suggesting that the agency has been "blind to the nature of [its] mandate from Congress"). This Court should adopt similar reasoning in holding EPA to the decision-making criteria established by Congress. While the APA standard of review is deferential, courts "do not hear cases merely to rubber stamp agency actions," since "[t]o play that role would be 'tantamount to abdicating the judiciary's responsibility under the Administrative Procedure Act.'" *NRDC*, 872 F. Supp. 2d at 336 (quoting *NRDC v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000)).

Under the Clean Air Act's statutory criteria governing endangerment findings, EPA's refusal to determine in response to the Petition that air pollution

from coal mines may reasonably be anticipated to endanger public health or welfare was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Even when an agency is declining to regulate, it may not depart from the unambiguous language of the statute in making its declaration. *Massachusetts*, 549 U.S. at 533. Section 111(b)(1)(A), the provision under which EPA made its decision, is clear: EPA is to decide whether to list coal mines as a stationary source on the basis of the agency's judgment as to whether air pollution from this source category causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare. The administrative and budgetary considerations EPA invoked in this case are not factors that Congress intended EPA to consider.

B. EPA's Reasoning that Control of Methane Emissions from Other Sources Renders an NSPS for Coal Mines Unnecessary is Arbitrary and Capricious

EPA's only non-administrative consideration for denying the Petition was a brief discussion of its approach to controlling greenhouse gas emissions, presumably in response to Guardians' concerns with the level of methane emissions from coal mines. EPA stated that it was taking a "step-by-step approach" to reducing greenhouse gas emissions by "starting with [the] largest sources and sectors, such as transportation and electricity systems," because these sectors contribute the highest percentage of total U.S. greenhouse gas emissions.

AR 0005 at 4 [JA___]. EPA also stated that it is reviewing performance standards for municipal solid waste landfills, which could result in reductions of greenhouse gas emissions from those sources. *Id*.[8] Finally, EPA asserts that its recent promulgation of performance standards for the oil and gas sector, while not directly regulating greenhouse gas emissions, will have the effect of reducing these emissions. *Id*.

Implicit in this discussion is EPA's arbitrary reasoning that it is justified in not listing coal mines as a source category and considering a performance standard to reduce methane emissions because the agency is already addressing methane through its regulation of other source categories. This reasoning is arbitrary, however, because it is inconsistent with Section 111(b)(1)(A) which focuses the endangerment inquiry on the *source* of the air pollution, rather than whether a specific *pollutant* endangers human health or welfare.

Section 111 was added to the Clean Air Act in 1970 to establish nationwide uniform, technology-based emission standards for new or modified stationary sources "to prevent new air pollution problems" by ensuring that "new stationary sources are designed, built, equipped, operated, and maintained so as to reduce emissions to a minimum." *U. S. v. City of Painesville*, 431 F. Supp. 496, 500 n.6

[8] Incidentally, EPA already limits methane from municipal solid waste landfills. Citing health and safety concerns, EPA adopted a limit on methane emissions from such landfills in 1996. *See* 61 Fed. Reg. 9905-9944 (March 12, 1996).

(N.D. Ohio 1977) (quoting legislative history of 1970 amendments to the Clean Air Act). Congress recognized that although EPA and the states could clean up existing air pollution through EPA's promulgation of NAAQS for specific pollutants that states could achieve through State Implementation Plans, construction of new sources posed a threat to achieving and maintaining those standards. *Nat'l Asphalt Paving Assoc. v. Train*, 539 F.2d at 783. To balance the need for preventing new air pollution with allowing industrial growth, the strategy that Congress deemed "most effective" and "least expensive" was to allow EPA "maximum feasible control of new sources at the time of their construction." *City of Painesville*, 431 F. Supp. 496, 500 n.6. Accordingly, EPA's Section 111(b)(1)(A) determination that air pollution from a category of sources "may reasonably be anticipated to endanger public health or welfare" is *source-based* rather than based on how EPA is regulating any particular pollutant under a different section of the Clean Air Act.

Thus, EPA's excuse in its Denial Letter that it is regulating methane through other means is irrelevant to the question of whether air pollution from *coal mines*, which includes but is not limited to methane, endangers public health and welfare. In a recent rulemaking, EPA itself has recognized that the endangerment finding under Section 111(b)(1)(A) is source-based rather than pollutant-based:

> The plain language of section 111(b)(1)(A) provides that such findings are to be made *for source categories, not for specific pollutants emitted by the*

> *source category*. Therefore, once the Administrator determines that the source category causes or contributes significantly to air pollution which may endanger public health or welfare, the Administrator must add the source category to the section 111(b)(1)(A) list and subsequently establish standards of performance for the sources in that source category. Determinations regarding the specific pollutants to be regulated are made, not in the initial endangerment finding, but at the time the performance standards are promulgated.
>
> .....
>
> [Section 111(b)(1)(A)] requires only a *general determination* that emissions from the category cause or contribute to air pollution that may endanger public health or welfare. *The endangerment finding is used to identify categories of sources for regulation*, not to dictate the substantive content of the required standards of performance.

74 Fed. Reg. 51,950, 51,957 (Oct. 8, 2009) (emphasis added). In this rulemaking, EPA was amending the performance standards for coal preparation and processing plants with respect to particulate matter emission limits and opacity standards, but EPA also added emissions limits for sulfur dioxide, NO_x, and carbon monoxide from thermal dryers. *Id*. at 51,950. EPA made the statements above in response to a comment challenging EPA's authority to impose the new emissions limits when EPA had not made an endangerment finding for each of the pollutants. *Id*. at 51,956. EPA's response made clear that the endangerment finding that triggered the need for performance standards was for the stationary source—coal preparation and processing plants—and *not* for the specific pollutants from the source for which EPA set performance standards. Thus, EPA cannot avoid an endangerment finding for coal mines here by claiming it is already taking steps to reduce methane emissions from other sources because, as EPA has recognized, the endangerment

finding must be source-specific. EPA's excuse for denying Guardians' Petition as it relates specifically to methane emission from coal mines, therefore, is arbitrary because EPA cannot rest its decisions "on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43.

C. EPA Arbitrarily Ignored All of the Information in the Petition Relating to Non-Greenhouse Gas Air Pollutants Including the Agency's Own Prior Concerns with Levels of Air Pollution from Coal Mines

In focusing only on methane, EPA also arbitrarily ignored the information in the Petition concerning non-greenhouse gas air pollutants. Although EPA ignored all of the information pertaining to particulate matter, NO_x, NO_2, and VOCs, EPA has previously recognized that coal mines are a significant source of these harmful pollutants. *See* Section II in Statement of Facts (extended discussion of EPA's stated concerns regarding unsafe levels of these air pollutants from coal mines).

When commenting on Federal coal leasing proposals in the Powder River Basin, EPA raised specific concerns with the high levels of particulate matter, NO_x, and NO_2 pollution from existing coal mines, as well as the projected levels of these pollutants resulting from development of new coal leases. AR 0008 Ex. 8 at 3-6 [JA___]; Ex. 9 at 2 [JA___]; Ex. 10 at 127-130 [JA___]. EPA has also recognized that coal mines are a major source of methane emissions that contribute to both climate change and ground-level ozone formation, and has already found that methane endangers public health and welfare as part of the agency's

endangerment finding for greenhouse gases. 74 Fed. Reg. 66,496 (Dec. 15, 2009). Finally, EPA's own national emissions inventory shows that coal mines emit high levels of VOCs, a precursor to ground-level ozone. AR 0001 at 13 [JA___]

Although Guardians presented all of this information in the Petition and the Supplement, apart from briefly addressing control of methane in the context of broader greenhouse gas regulation, EPA failed to acknowledge these other air pollutants in its Denial Letter or anywhere else in the record. EPA's selective discussion of methane emissions from coal mines coupled with the agency's refusal to acknowledge other air pollutants raised in the Petition illustrate the arbitrary nature of EPA's denial.

CONCLUSION

For the foregoing reasons, this Court should remand EPA's response to the Petition with an order that it produce a response consistent with the APA, and the underlying requirements of the Clean Air Act, within a reasonable time. Specifically, the Court should order that EPA within a reasonable time make a determination concerning whether coal mines cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare that conforms to Section 111(b)(1)(A) of the Clean Air Act.

Respectfully submitted on this 25th day of October, 2013.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it is proportionally spaced and contains 9,604 words.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of CORRECTED PETITIONER'S OPENING [PROOF] BRIEF was served on all counsel of record for the consolidated cases by the Court's ECF system on October 25, 2013.

/s/ Samantha Ruscavage-Barz

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

CODIFICATION

Act July 14, 1955, ch. 360, 69 Stat. 322, as amended, known as the Clean Air Act, which was formerly classified to chapter 15B (§ 1857 et seq.) of this title, was completely revised by Pub. L. 95–95, Aug. 7, 1977, 91 Stat. 685, and was reclassified to this chapter.

SUBCHAPTER I—PROGRAMS AND ACTIVITIES

PART A—AIR QUALITY AND EMISSION LIMITATIONS

AMENDMENTS

1977—Pub. L. 95–95, title I, § 117(a), Aug. 7, 1977, 91 Stat. 712, designated sections 7401 to 7428 of this title as part A.

§ 7401. Congressional findings and declaration of purpose

(a) Findings

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which

generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

(July 14, 1955, ch. 360, title I, §101, formerly §1, as added Pub. L. 88–206, §1, Dec. 17, 1963, 77 Stat. 392; renumbered §101 and amended Pub. L. 89–272, title I, §101(2), (3), Oct. 20, 1965, 79 Stat. 992; Pub. L. 90–148, §2, Nov. 21, 1967, 81 Stat. 485; Pub. L. 101–549, title I, §108(k), Nov. 15, 1990, 104 Stat. 2468.)

CODIFICATION

Section was formerly classified to section 1857 of this title.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in a prior section 1857 of this title, act of July 14, 1955, ch. 360, §1, 69 Stat. 322, prior to the general amendment of this chapter by Pub. L. 88–206.

AMENDMENTS

1990—Subsec. (a)(3). Pub. L. 101–549, §108(k)(1), amended par. (3) generally. Prior to amendment, par. (3) read as follows: ''that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and''.

Subsec. (b)(4). Pub. L. 101–549, §108(k)(2), inserted ''prevention and'' after ''pollution''.

Subsec. (c). Pub. L. 101–549, §108(k)(3), added subsec. (c).

1967—Subsec. (b)(1). Pub. L. 90–148 inserted ''and enhance the quality of'' after ''to protect''.

1965—Subsec. (b). Pub. L. 89–272 substituted ''this title'' for ''this Act'', which for purposes of codification has been changed to ''this subchapter''.

EFFECTIVE DATE OF 1990 AMENDMENT

Section 711(b) of Pub. L. 101–549 provided that:

''(1) Except as otherwise expressly provided, the amendments made by this Act [see Tables for classification] shall be effective on the date of enactment of this Act [Nov. 15, 1990].

''(2) The Administrator's authority to assess civil penalties under section 205(c) of the Clean Air Act [42 U.S.C. 7524(c)], as amended by this Act, shall apply to violations that occur or continue on or after the date of enactment of this Act. Civil penalties for violations that occur prior to such date and do not continue after such date shall be assessed in accordance with the provisions of the Clean Air Act [42 U.S.C. 7401 et seq.] in effect immediately prior to the date of enactment of this Act.

''(3) The civil penalties prescribed under sections 205(a) and 211(d)(1) of the Clean Air Act [42 U.S.C. 7524(a), 7545(d)(1)], as amended by this Act, shall apply to violations that occur on or after the date of enactment of this Act. Violations that occur prior to such date shall be subject to the civil penalty provisions prescribed in sections 205(a) and 211(d) of the Clean Air Act in effect immediately prior to the enactment of this Act. The injunctive authority prescribed under section 211(d)(2) of the Clean Air Act, as amended by this Act, shall apply to violations that occur or continue on or after the date of enactment of this Act.

''(4) For purposes of paragraphs (2) and (3), where the date of a violation cannot be determined it will be assumed to be the date on which the violation is discovered.''

EFFECTIVE DATE OF 1977 AMENDMENT; PENDING ACTIONS; CONTINUATION OF RULES, CONTRACTS, AUTHORIZATIONS, ETC.; IMPLEMENTATION PLANS

Section 406 of Pub. L. 95–95, as amended by Pub. L. 95–190, §14(b)(6), Nov. 16, 1977, 91 Stat. 1405, provided that:

''(a) No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Clean Air Act [this chapter], as in effect immediately prior to the date of enactment of this Act [Aug. 7, 1977] shall abate by reason of the taking effect of the amendments made by this Act [see Short Title of 1977 Amendment note below]. The court may, on its own motion or that of any party made at any time within twelve months after such taking effect, allow the same to be maintained by or against the Administrator or such officer or employee.

''(b) All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to the Clean Air Act [this chapter], as in effect immediately prior to the date of enactment of this Act [Aug. 7, 1977], and pertaining to any functions, powers, requirements, and duties under the Clean Air Act, as in effect immediately prior to the date of enactment of this Act, and not suspended by the Administrator or the courts, shall continue in full force and effect after the date of enactment of this Act until modified or rescinded in accordance with the Clean Air Act as amended by this Act [see Short Title of 1977 Amendment note below].

''(c) Nothing in this Act [see Short Title of 1977 Amendment note below] nor any action taken pursuant to this Act shall in any way affect any requirement of an approved implementation plan in effect under section 110 of the Clean Air Act [section 7410 of this title]

or any other provision of the Act in effect under the Clean Air Act before the date of enactment of this section [Aug. 7, 1977] until modified or rescinded in accordance with the Clean Air Act [this chapter] as amended by this Act [see Short Title of 1977 Amendment note below].

''(d)(1) Except as otherwise expressly provided, the amendments made by this Act [see Short Title of 1977 Amendment note below] shall be effective on date of enactment [Aug. 7, 1977].

''(2) Except as otherwise expressly provided, each State required to revise its applicable implementation plan by reason of any amendment made by this Act [see Short Title of 1977 Amendment note below] shall adopt and submit to the Administrator of the Environmental Protection Administration such plan revision before the later of the date—

''(A) one year after the date of enactment of this Act [Aug. 7, 1977], or

''(B) nine months after the date of promulgation by the Administrator of the Environmental Protection Administration of any regulations under an amendment made by this Act which are necessary for the approval of such plan revision.''

SHORT TITLE OF 1999 AMENDMENT

Pub. L. 106–40, §1, Aug. 5, 1999, 113 Stat. 207, provided that: ''This Act [amending section 7412 of this title and enacting provisions set out as notes under section 7412 of this title] may be cited as the 'Chemical Safety Information, Site Security and Fuels Regulatory Relief Act'.''

SHORT TITLE OF 1998 AMENDMENT

Pub. L. 105–286, §1, Oct. 27, 1998, 112 Stat. 2773, provided that: ''This Act [amending section 7511b of this title and enacting provisions set out as a note under section 7511b of this title] may be cited as the 'Border Smog Reduction Act of 1998'.''

SHORT TITLE OF 1990 AMENDMENT

Pub. L. 101–549, Nov. 15, 1990, 104 Stat. 2399, is popularly known as the ''Clean Air Act Amendments of 1990''. See Tables for classification.

SHORT TITLE OF 1981 AMENDMENT

Pub. L. 97–23, §1, July 17, 1981, 95 Stat. 139, provided: ''That this Act [amending sections 7410 and 7413 of this title] may be cited as the 'Steel Industry Compliance Extension Act of 1981'.''

SHORT TITLE OF 1977 AMENDMENT

Pub. L. 95–95, §1, Aug. 7, 1977, 91 Stat. 685, provided that: ''This Act [enacting sections 4362, 7419 to 7428, 7450 to 7459, 7470 to 7479, 7491, 7501 to 7508, 7548, 7549, 7551, 7617 to 7625, and 7626 of this title, amending sections 7403, 7405, 7407 to 7415, 7417, 7418, 7521 to 7525, 7541, 7543, 7544, 7545, 7550, 7571, 7601 to 7605, 7607, 7612, 7613, and 7616 of this title, repealing section 1857c–10 of this title, and enacting provisions set out as notes under this section, sections 7403, 7422, 7470, 7479, 7502, 7521, 7548, and 7621 of this title, and section 792 of Title 15, Commerce and Trade] may be cited as the 'Clean Air Act Amendments of 1977'.''

SHORT TITLE OF 1970 AMENDMENT

Pub. L. 91–604, §1, Dec. 31, 1970, 84 Stat. 1676, provided: ''That this Act [amending this chapter generally] may be cited as the 'Clean Air Amendments of 1970'.''

SHORT TITLE OF 1967 AMENDMENT

Section 1 of Pub. L. 90–148 provided: ''That this Act [amending this chapter generally] may be cited as the 'Air Quality Act of 1967'.''

SHORT TITLE OF 1966 AMENDMENT

Pub. L. 89–675, §1, Oct. 15, 1966, 80 Stat. 954, provided: ''That this Act [amending sections 7405 and 7616 of this title and repealing section 1857f–8 of this title] may be cited as the 'Clean Air Act Amendments of 1966'.''

SHORT TITLE

Section 317, formerly section 14, of act July 14, 1955, as added by section 1 of Pub. L. 88–206, renumbered section 307 by section 101(4) of Pub. L. 89–272, renumbered section 310 by section 2 of Pub. L. 90–148, and renumbered section 317 by Pub. L. 91–604, §12(a), Dec. 31, 1970, 84 Stat. 1705, provided that: ''This Act [enacting this chapter] may be cited as the 'Clean Air Act'.''

Section 201 of title II of act July 14, 1955, as added by Pub. L. 89–272, title I, §101(8), Oct. 20, 1965, 79 Stat. 992, and amended by Pub. L. 90–148, §2, Nov. 21, 1967, 81 Stat. 499, provided that: ''This title [enacting subchapter II of this chapter] may be cited as the 'National Emission Standards Act'.'' Prior to its amendment by Pub. L. 90–148, title II of act June 14, 1955, was known as the ''Motor Vehicle Air Pollution Control Act''.

Section 401 of title IV of act July 14, 1955, as added Dec. 31, 1970, Pub. L. 91–604, §14, 84 Stat. 1709, provided that: ''This title [enacting subchapter IV of this chapter] may be cited as the 'Noise Pollution and Abatement Act of 1970'.''

SAVINGS PROVISION

Section 711(a) of Pub. L. 101–549 provided that: ''Except as otherwise expressly provided in this Act [see Tables for classification], no suit, action, or other proceeding lawfully commenced by the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Clean Air Act [42 U.S.C. 7401 et seq.], as in effect immediately prior to the date of enactment of this Act [Nov. 15, 1990], shall abate by reason of the taking effect of the amendments made by this Act.''

TRANSFER OF FUNCTIONS

Reorg. Plan No. 3 of 1970, §2(a)(3), eff. Dec. 2, 1970, 35 F.R. 15623, 84 Stat. 2086, transferred to Administrator of Environmental Protection Agency functions vested by law in Secretary of Health, Education, and Welfare or in Department of Health, Education, and Welfare which are administered through Environmental Health Service, including functions exercised by National Air Pollution Control Administration, and Environmental Control Administration's Bureau of Solid Waste Management, Bureau of Water Hygiene, and Bureau of Radiological Health, except insofar as functions carried out by Bureau of Radiological Health pertain to regulation of radiation from consumer products, including electronic product radiation, radiation as used in healing arts, occupational exposure to radiation, and research, technical assistance, and training related to radiation from consumer products, radiation as used in healing arts, and occupational exposure to radiation.

IMPACT ON SMALL COMMUNITIES

Section 810 of Pub. L. 101–549 provided that: ''Before implementing a provision of this Act [see Tables for classification], the Administrator of the Environmental Protection Agency shall consult with the Small Communities Coordinator of the Environmental Protection Agency to determine the impact of such provision on small communities, including the estimated cost of compliance with such provision.''

RADON ASSESSMENT AND MITIGATION

Pub. L. 99–499, title I, §118(k), Oct. 17, 1986, 100 Stat. 1659, as amended by Pub. L. 105–362, title V, §501(i), Nov. 10, 1998, 112 Stat. 3284, provided that:

''(1) NATIONAL ASSESSMENT OF RADON GAS.—No later than one year after the enactment of this Act [Oct. 17, 1986], the Administrator shall submit to the Congress a report which shall, to the extent possible—

''(A) identify the locations in the United States where radon is found in structures where people normally live or work, including educational institutions;

''(B) assess the levels of radon gas that are present in such structures;

''(C) determine the level of radon gas and radon daughters which poses a threat to human health and assess for each location identified under subparagraph (A) the extent of the threat to human health;

''(D) determine methods of reducing or eliminating the threat to human health of radon gas and radon daughters; and

''(E) include guidance and public information materials based on the findings or research of mitigating radon.

''(2) RADON MITIGATION DEMONSTRATION PROGRAM.—

''(A) DEMONSTRATION PROGRAM.—The Administrator shall conduct a demonstration program to test methods and technologies of reducing or eliminating radon gas and radon daughters where it poses a threat to human health. The Administrator shall take into consideration any demonstration program underway in the Reading Prong of Pennsylvania, New Jersey, and New York and at other sites prior to enactment. The demonstration program under this section shall be conducted in the Reading Prong, and at such other sites as the Administrator considers appropriate.

''(B) LIABILITY.—Liability, if any, for persons undertaking activities pursuant to the radon mitigation demonstration program authorized under this subsection shall be determined under principles of existing law.

''(3) CONSTRUCTION OF SECTION.—Nothing in this subsection shall be construed to authorize the Administrator to carry out any regulatory program or any activity other than research, development, and related reporting, information dissemination, and coordination activities specified in this subsection. Nothing in paragraph (1) or (2) shall be construed to limit the authority of the Administrator or of any other agency or instrumentality of the United States under any other authority of law.''

SPILL CONTROL TECHNOLOGY

Pub. L. 99–499, title I, §118(n), Oct. 17, 1986, 100 Stat. 1660, provided that:

''(1) ESTABLISHMENT OF PROGRAM.—Within 180 days of enactment of this subsection [Oct. 17, 1986], the Secretary of the United States Department of Energy is directed to carry out a program of testing and evaluation of technologies which may be utilized in responding to liquefied gaseous and other hazardous substance spills at the Liquefied Gaseous Fuels Spill Test Facility that threaten public health or the environment.

''(2) TECHNOLOGY TRANSFER.—In carrying out the program established under this subsection, the Secretary shall conduct a technology transfer program that, at a minimum—

''(A) documents and archives spill control technology;

''(B) investigates and analyzes significant hazardous spill incidents;

''(C) develops and provides generic emergency action plans;

''(D) documents and archives spill test results;

''(E) develops emergency action plans to respond to spills;

''(F) conducts training of spill response personnel; and

''(G) establishes safety standards for personnel engaged in spill response activities.

''(3) CONTRACTS AND GRANTS.—The Secretary is directed to enter into contracts and grants with a nonprofit organization in Albany County, Wyoming, that is capable of providing the necessary technical support and which is involved in environmental activities related to such hazardous substance related emergencies.

''(4) USE OF SITE.—The Secretary shall arrange for the use of the Liquefied Gaseous Fuels Spill Test Facility to carry out the provisions of this subsection.''

RADON GAS AND INDOOR AIR QUALITY RESEARCH

Pub. L. 99–499, title IV, Oct. 17, 1986, 100 Stat. 1758, provided that:

''SEC. 401. SHORT TITLE.

''This title may be cited as the 'Radon Gas and Indoor Air Quality Research Act of 1986'.

''SEC. 402. FINDINGS.

''The Congress finds that:

''(1) High levels of radon gas pose a serious health threat in structures in certain areas of the country.

''(2) Various scientific studies have suggested that exposure to radon, including exposure to naturally occurring radon and indoor air pollutants, poses a public health risk.

''(3) Existing Federal radon and indoor air pollutant research programs are fragmented and underfunded.

''(4) An adequate information base concerning exposure to radon and indoor air pollutants should be developed by the appropriate Federal agencies.

''SEC. 403. RADON GAS AND INDOOR AIR QUALITY RESEARCH PROGRAM.

''(a) DESIGN OF PROGRAM.—The Administrator of the Environmental Protection Agency shall establish a research program with respect to radon gas and indoor air quality. Such program shall be designed to—

''(1) gather data and information on all aspects of indoor air quality in order to contribute to the understanding of health problems associated with the existence of air pollutants in the indoor environment;

''(2) coordinate Federal, State, local, and private research and development efforts relating to the improvement of indoor air quality; and

''(3) assess appropriate Federal Government actions to mitigate the environmental and health risks associated with indoor air quality problems.

''(b) PROGRAM REQUIREMENTS.—The research program required under this section shall include—

''(1) research and development concerning the identification, characterization, and monitoring of the sources and levels of indoor air pollution, including radon, which includes research and development relating to—

''(A) the measurement of various pollutant concentrations and their strengths and sources,

''(B) high-risk building types, and

''(C) instruments for indoor air quality data collection;

''(2) research relating to the effects of indoor air pollution and radon on human health;

''(3) research and development relating to control technologies or other mitigation measures to prevent or abate indoor air pollution (including the development, evaluation, and testing of individual and generic control devices and systems);

''(4) demonstration of methods for reducing or eliminating indoor air pollution and radon, including sealing, venting, and other methods that the Administrator determines may be effective;

''(5) research, to be carried out in conjunction with the Secretary of Housing and Urban Development, for the purpose of developing—

''(A) methods for assessing the potential for radon contamination of new construction, including (but not limited to) consideration of the moisture content of soil, porosity of soil, and radon content of soil; and

''(B) design measures to avoid indoor air pollution; and

''(6) the dissemination of information to assure the public availability of the findings of the activities under this section.

''(c) ADVISORY COMMITTEES.—The Administrator shall establish a committee comprised of individuals representing Federal agencies concerned with various aspects of indoor air quality and an advisory group comprised of individuals representing the States, the scientific community, industry, and public interest organizations to assist him in carrying out the research program for radon gas and indoor air quality.

''(d) IMPLEMENTATION PLAN.—Not later than 90 days after the enactment of this Act [Oct. 17, 1986], the Ad-

ministrator shall submit to the Congress a plan for implementation of the research program under this section. Such plan shall also be submitted to the EPA Science Advisory Board, which shall, within a reasonable period of time, submit its comments on such plan to Congress.

''(e) REPORT.—Not later than 2 years after the enactment of this Act [Oct. 17, 1986], the Administrator shall submit to Congress a report respecting his activities under this section and making such recommendations as appropriate.

''SEC. 404. CONSTRUCTION OF TITLE.

''Nothing in this title shall be construed to authorize the Administrator to carry out any regulatory program or any activity other than research, development, and related reporting, information dissemination, and coordination activities specified in this title. Nothing in this title shall be construed to limit the authority of the Administrator or of any other agency or instrumentality of the United States under any other authority of law.

''SEC. 405. AUTHORIZATIONS.

''There are authorized to be appropriated to carry out the activities under this title and under section 118(k) of the Superfund Amendments and Reauthorization Act of 1986 (relating to radon gas assessment and demonstration program) [section 118(k) of Pub. L. 99–499, set out as a note above] not to exceed $5,000,000 for each of the fiscal years 1987, 1988, and 1989. Of such sums appropriated in fiscal years 1987 and 1988, two-fifths shall be reserved for the implementation of section 118(k)(2).''

STUDY OF ODORS AND ODOROUS EMISSIONS

Pub. L. 95–95, title IV, § 403(b), Aug. 7, 1977, 91 Stat. 792, directed Administrator of Environmental Protection Agency to conduct a study and report to Congress not later than Jan. 1, 1979, on effects on public health and welfare of odors and odorous emissions, source of such emissions, technology or other measures available for control of such emissions and costs of such technology or measures, and costs and benefits of alternative measures or strategies to abate such emissions.

LIST OF CHEMICAL CONTAMINANTS FROM ENVIRONMENTAL POLLUTION FOUND IN HUMAN TISSUE

Pub. L. 95–95, title IV, § 403(c), Aug. 7, 1977, 91 Stat. 792, directed Administrator of EPA, not later than twelve months after Aug. 7, 1977, to publish throughout the United States a list of all known chemical contaminants resulting from environmental pollution which have been found in human tissue including blood, urine, breast milk, and all other human tissue, such list to be prepared for the United States and to indicate approximate number of cases, range of levels found, and mean levels found, directed Administrator, not later than eighteen months after Aug. 7, 1977, to publish in same manner an explanation of what is known about the manner in which chemicals entered the environment and thereafter human tissue, and directed Administrator, in consultation with National Institutes of Health, the National Center for Health Statistics, and the National Center for Health Services Research and Development, to, if feasible, conduct an epidemiological study to demonstrate the relationship between levels of chemicals in the environment and in human tissue, such study to be made in appropriate regions or areas of the United States in order to determine any different results in such regions or areas, and the results of such study to be reported, as soon as practicable, to appropriate committee of Congress.

STUDY ON REGIONAL AIR QUALITY

Pub. L. 95–95, title IV, § 403(d), Aug. 7, 1977, 91 Stat. 793, directed Administrator of EPA to conduct a study of air quality in various areas throughout the country including the gulf coast region, such study to include analysis of liquid and solid aerosols and other fine particulate matter and contribution of such substances to visibility and public health problems in such areas, with Administrator to use environmental health experts from the National Institutes of Health and other outside agencies and organizations.

RAILROAD EMISSION STUDY

Pub. L. 95–95, title IV, § 404, Aug. 7, 1977, 91 Stat. 793, as amended by H. Res. 549, Mar. 25, 1980, directed Administrator of EPA to conduct a study and investigation of emissions of air pollutants from railroad locomotives, locomotive engines, and secondary power sources on railroad rolling stock, in order to determine extent to which such emissions affect air quality in air quality control regions throughout the United States, technological feasibility and current state of technology for controlling such emissions, and status and effect of current and proposed State and local regulations affecting such emissions, and within one hundred and eighty days after commencing such study and investigation, Administrator to submit a report of such study and investigation, together with recommendations for appropriate legislation, to Senate Committee on Environment and Public Works and House Committee on Energy and Commerce.

STUDY AND REPORT CONCERNING ECONOMIC APPROACHES TO CONTROLLING AIR POLLUTION

Pub. L. 95–95, title IV, § 405, Aug. 7, 1977, 91 Stat. 794, directed Administrator, in conjunction with Council of Economic Advisors, to undertake a study and assessment of economic measures for control of air pollution which could strengthen effectiveness of existing methods of controlling air pollution, provide incentives to abate air pollution greater than that required by Clean Air Act, and serve as primary incentive for controlling air pollution problems not addressed by Clean Air Act, and directed that not later than 2 years after Aug. 7, 1977, Administrator and Council conclude study and submit a report to President and Congress.

NATIONAL INDUSTRIAL POLLUTION CONTROL COUNCIL

For provisions relating to establishment of National Industrial Pollution Control Council, see Ex. Ord. No. 11523, Apr. 9, 1970, 35 F.R. 5993, set out as a note under section 4321 of this title.

FEDERAL COMPLIANCE WITH POLLUTION CONTROL STANDARDS

For provisions relating to responsibility of head of each Executive agency for compliance with applicable pollution control standards, see Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

EXECUTIVE ORDER NO. 10779

Ex. Ord. No. 10779, Aug. 21, 1958, 23 F.R. 6487, which related to cooperation of Federal agencies with State and local authorities, was superseded by Ex. Ord. No. 11282, May 26, 1966, 31 F.R. 7663, formerly set out under section 7418 of this title.

EXECUTIVE ORDER NO. 11507

Ex. Ord. No. 11507, Feb. 4, 1970, 35 F.R. 2573, which provided for prevention, control, and abatement of air pollution at Federal facilities, was superseded by Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, formerly set out as a note under section 4331 of this title.

§ 7402. Cooperative activities

(a) Interstate cooperation; uniform State laws; State compacts

The Administrator shall encourage cooperative activities by the States and local governments for the prevention and control of air pollution; encourage the enactment of improved and, so far as practicable in the light of varying

(designated in subsection (a)) which consists of the $PM_{2.5}$ monitors necessary to implement the national ambient air quality standards is established by December 31, 1999.

''(c)(1) The Governors shall be required to submit designations referred to in section 107(d)(1) of the Clean Air Act [42 U.S.C. 7407(d)(1)] for each area following promulgation of the July 1997 $PM_{2.5}$ national ambient air quality standard within 1 year after receipt of 3 years of air quality monitoring data performed in accordance with any applicable Federal reference methods for the relevant areas. Only data from the monitoring network designated in subsection (a) and other Federal reference method $PM_{2.5}$ monitors shall be considered for such designations. Nothing in the previous sentence shall be construed as affecting the Governor's authority to designate an area initially as nonattainment, and the Administrator's authority to promulgate the designation of an area as nonattainment, under section 107(d)(1) of the Clean Air Act, based on its contribution to ambient air quality in a nearby nonattainment area.

''(2) For any area designated as nonattainment for the July 1997 $PM_{2.5}$ national ambient air quality standard in accordance with the schedule set forth in this section, notwithstanding the time limit prescribed in paragraph (2) of section 169B(e) of the Clean Air Act [42 U.S.C. 7492(e)(2)], the Administrator shall require State implementation plan revisions referred to in such paragraph (2) to be submitted at the same time as State implementation plan revisions referred to in section 172 of the Clean Air Act [42 U.S.C. 7502] implementing the revised national ambient air quality standard for fine particulate matter are required to be submitted. For any area designated as attainment or unclassifiable for such standard, the Administrator shall require the State implementation plan revisions referred to in such paragraph (2) to be submitted 1 year after the area has been so designated. The preceding provisions of this paragraph shall not preclude the implementation of the agreements and recommendations set forth in the Grand Canyon Visibility Transport Commission Report dated June 1996.

''(d) The Administrator shall promulgate the designations referred to in section 107(d)(1) of the Clean Air Act [42 U.S.C. 7407(d)(1)] for each area following promulgation of the July 1997 $PM_{2.5}$ national ambient air quality standard by the earlier of 1 year after the initial designations required under subsection (c)(1) are required to be submitted or December 31, 2005.

''(e) FIELD STUDY.—Not later than 2 years after the date of enactment of the SAFETEA–LU [Aug. 10, 2005], the Administrator shall—

''(1) conduct a field study of the ability of the $PM_{2.5}$ Federal Reference Method to differentiate those particles that are larger than 2.5 micrometers in diameter;

''(2) develop a Federal reference method to measure directly particles that are larger than 2.5 micrometers in diameter without reliance on subtracting from coarse particle measurements those particles that are equal to or smaller than 2.5 micrometers in diameter;

''(3) develop a method of measuring the composition of coarse particles; and

''(4) submit a report on the study and responsibilities of the Administrator under paragraphs (1) through (3) to—

''(A) the Committee on Energy and Commerce of the House of Representatives; and

''(B) the Committee on Environment and Public Works of the Senate.

''SEC. 6103. OZONE DESIGNATION REQUIREMENTS.

''(a) The Governors shall be required to submit the designations referred to in section 107(d)(1) of the Clean Air Act [42 U.S.C. 7407(d)(1)] within 2 years following the promulgation of the July 1997 ozone national ambient air quality standards.

''(b) The Administrator shall promulgate final designations no later than 1 year after the designations required under subsection (a) are required to be submitted.

''SEC. 6104. ADDITIONAL PROVISIONS.

''Nothing in sections 6101 through 6103 shall be construed by the Administrator of Environmental Protection Agency or any court, State, or person to affect any pending litigation or to be a ratification of the ozone or $PM_{2.5}$ standards.''

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95–95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95–95, see section 406(a) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95–95 [this chapter], see section 406(b) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in

combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(1) Simultaneously with the issuance of criteria under subsection (a) of this section, the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1) of this section, which shall be comprised of technically qualified individuals representative of State and local governments, industry, and the academic community. Each such committee shall submit, as appropriate, to the Administrator information related to that required by paragraph (1).

(c) Review, modification, and reissuance of criteria or information

The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section. Not later than six months after August 7, 1977, the Administrator shall revise and reissue criteria relating to concentrations of NO_2 over such period (not more than three hours) as he deems appropriate. Such criteria shall include a discussion of nitric and nitrous acids, nitrites, nitrates, nitrosamines, and other carcinogenic and potentially carcinogenic derivatives of oxides of nitrogen.

(d) Publication in Federal Register; availability of copies for general public

The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

(e) Transportation planning and guidelines

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 November 15, 1990,[1] 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. Such guidelines shall include information on—

(1) methods to identify and evaluate alternative planning and control activities;

(2) methods of reviewing plans on a regular basis as conditions change or new information is presented;

(3) identification of funds and other resources necessary to implement the plan, including interagency agreements on providing such funds and resources;

(4) methods to assure participation by the public in all phases of the planning process; and

(5) such other methods as the Administrator determines necessary to carry out a continuous planning process.

(f) Information regarding processes, procedures, and methods to reduce or control pollutants in transportation; reduction of mobile source related pollutants; reduction of impact on public health

(1) The Administrator shall publish and make available to appropriate Federal, State, and local environmental and transportation agencies not later than one year after November 15, 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 bicy-

[1] See Codification note below.

cle 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 subchapter II of this chapter, 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.[2]

(B) information on additional methods or strategies that will contribute to the reduction of mobile source related pollutants during periods in which any primary ambient air quality standard will be exceeded and during episodes for which an air pollution alert, warning, or emergency has been declared;

(C) information on other measures which may be employed to reduce the impact on public health or protect the health of sensitive or susceptible individuals or groups; and

(D) information on the extent to which any process, procedure, or method to reduce or control such air pollutant may cause an increase in the emissions or formation of any other pollutant.

(2) In publishing such information the Administrator shall also include an assessment of—

(A) the relative effectiveness of such processes, procedures, and methods;

(B) the potential effect of such processes, procedures, and methods on transportation systems and the provision of transportation services; and

(C) the environmental, energy, and economic impact of such processes, procedures, and methods.

(g) Assessment of risks to ecosystems

The Administrator may assess the risks to ecosystems from exposure to criteria air pollutants (as identified by the Administrator in the Administrator's sole discretion).

(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.

(July 14, 1955, ch. 360, title I, § 108, as added Pub. L. 91–604, § 4(a), Dec. 31, 1970, 84 Stat. 1678; amended Pub. L. 95–95, title I, §§ 104, 105, title IV, § 401(a), Aug. 7, 1977, 91 Stat. 689, 790; Pub. L. 101–549, title I, §§ 108(a)–(c), (*o*), 111, Nov. 15, 1990, 104 Stat. 2465, 2466, 2469, 2470; Pub. L. 105–362, title XV, § 1501(b), Nov. 10, 1998, 112 Stat. 3294.)

CODIFICATION

November 15, 1990, referred to in subsec. (e), was in the original ''enactment of the Clean Air Act Amendments of 1989'', and was translated as meaning the date of the enactment of Pub. L. 101–549, popularly known as the Clean Air Act Amendments of 1990, to reflect the probable intent of Congress.

Section was formerly classified to section 1857c–3 of this title.

PRIOR PROVISIONS

A prior section 108 of act July 14, 1955, was renumbered section 115 by Pub. L. 91–604 and is classified to section 7415 of this title.

AMENDMENTS

1998—Subsec. (f)(3), (4). Pub. L. 105–362 struck out par. (3), which required reports by the Secretary of Transportation and the Administrator to be submitted to Congress by Jan. 1, 1993, and every 3 years thereafter, reviewing and analyzing existing State and local air quality related transportation programs, evaluating achievement of goals, and recommending changes to existing programs, and par. (4), which required that in each report after the first report the Secretary of Transportation include a description of the actions taken to implement the changes recommended in the preceding report.

1990—Subsec. (e). Pub. L. 101–549, § 108(a), inserted first sentence and struck out former first sentence which read as follows: ''The Administrator shall, after consultation with the Secretary of Transportation and the Secretary of Housing and Urban Development and State and local officials and within 180 days after August 7, 1977, and from time to time thereafter, publish guidelines on the basic program elements for the planning process assisted under section 7505 of this title.''

Subsec. (f)(1). Pub. L. 101–549, § 108(b), in introductory provisions, substituted present provisions for provisions relating to Federal agencies, States, and air pollution control agencies within either 6 months or one year after Aug. 7, 1977.

Subsec. (f)(1)(A). Pub. L. 101–549, § 108(b), substituted present provisions for provisions relating to information prepared in cooperation with Secretary of Transportation, regarding processes, procedures, and methods to reduce certain pollutants.

Subsec. (f)(3), (4). Pub. L. 101–549, § 111, added pars. (3) and (4).

Subsec. (g). Pub. L. 101–549, § 108(*o*), added subsec. (g).

Subsec. (h). Pub. L. 101–549, § 108(c), added subsec. (h).

1977—Subsec. (a)(1)(A). Pub. L. 95–95, § 401(a), substituted ''emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare'' for ''which in his judgment has an adverse effect on public health or welfare''.

Subsec. (b)(1). Pub. L. 95–95, § 104(a), substituted ''cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology'' for ''technology and costs of emission control''.

Subsec. (c). Pub. L. 95–95, § 104(b), inserted provision directing the Administrator, not later than six months

[2] So in original. The period probably should be a semicolon.

after Aug. 7, 1977, to revise and reissue criteria relating to concentrations of NO_2 over such period (not more than three hours) as he deems appropriate, with the criteria to include a discussion of nitric and nitrous acids, nitrites, nitrates, nitrosamines, and other carcinogenic and potentially carcinogenic derivatives of oxides of nitrogen.

Subsecs. (e), (f). Pub. L. 95–95, § 105, added subsecs. (e) and (f).

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95–95 [this chapter], see section 406(b) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) National primary ambient air quality standard for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

(July 14, 1955, ch. 360, title I, § 109, as added Pub. L. 91–604, § 4(a), Dec. 31, 1970, 84 Stat. 1679;

amended Pub. L. 95–95, title I, § 106, Aug. 7, 1977, 91 Stat. 691.)

CODIFICATION

Section was formerly classified to section 1857c–4 of this title.

PRIOR PROVISIONS

A prior section 109 of act July 14, 1955, was renumbered section 116 by Pub. L. 91–604 and is classified to section 7416 of this title.

AMENDMENTS

1977—Subsec. (c). Pub. L. 95–95, § 106(b), added subsec. (c).

Subsec. (d). Pub. L. 95–95, § 106(a), added subsec. (d).

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95–95 [this chapter], see section 406(b) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

TERMINATION OF ADVISORY COMMITTEES

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

ROLE OF SECONDARY STANDARDS

Pub. L. 101–549, title VIII, § 817, Nov. 15, 1990, 104 Stat. 2697, provided that:

''(a) REPORT.—The Administrator shall request the National Academy of Sciences to prepare a report to the Congress on the role of national secondary ambient air quality standards in protecting welfare and the environment. The report shall:

''(1) include information on the effects on welfare and the environment which are caused by ambient concentrations of pollutants listed pursuant to section 108 [42 U.S.C. 7408] and other pollutants which may be listed;

''(2) estimate welfare and environmental costs incurred as a result of such effects;

''(3) examine the role of secondary standards and the State implementation planning process in preventing such effects;

''(4) determine ambient concentrations of each such pollutant which would be adequate to protect welfare and the environment from such effects;

''(5) estimate the costs and other impacts of meeting secondary standards; and

''(6) consider other means consistent with the goals and objectives of the Clean Air Act [42 U.S.C. 7401 et seq.] which may be more effective than secondary standards in preventing or mitigating such effects.

''(b) SUBMISSION TO CONGRESS; COMMENTS; AUTHORIZATION.—(1) The report shall be transmitted to the Congress not later than 3 years after the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990].

''(2) At least 90 days before issuing a report the Administrator shall provide an opportunity for public comment on the proposed report. The Administrator shall include in the final report a summary of the comments received on the proposed report.

''(3) There are authorized to be appropriated such sums as are necessary to carry out this section.''

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as nec-

essary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub. L. 101–549, title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after pub-

lic notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d)[1] of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e)[1] of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub. L. 101–549, title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409.

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term ''indirect source'' means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term ''indirect source review program'' means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term ''transportation control measure'' does not include any measure which is an ''indirect source review program''.

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d)[1] of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)(A) Repealed. Pub. L. 101–549, title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator

[1] See References in Text note below.

from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub. L. 101–549, title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409.

(D) For purposes of this paragraph—

(i) The term ''parking surcharge regulation'' means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term ''management of parking supply'' shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term ''preferential bus/carpool lane'' shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub. L. 101–549, title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d), (e) Repealed. Pub. L. 101–549, title I, § 101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that—

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall re-

main in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c–10[2] of this title, as in effect before August 7, 1977, or section 7413(d)[2] of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c–10[2] of this title as in effect before August 7, 1977, or under section 7413(d)[2] of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

[2] See References in Text note below.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d)[2] of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section; no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used at such source will enable it to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall deter-

mine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

(*l*) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter 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 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, 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 November 15, 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 chapter.

(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 November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 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 November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 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 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (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 November 15, 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 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (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 7601(d) of this title, 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 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, 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[3] effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

(July 14, 1955, ch. 360, title I, § 110, as added Pub. L. 91–604, § 4(a), Dec. 31, 1970, 84 Stat. 1680; amended Pub. L. 93–319, § 4, June 22, 1974, 88 Stat. 256; Pub. L. 95–95, title I, §§ 107, 108, Aug. 7, 1977, 91 Stat. 691, 693; Pub. L. 95–190, § 14(a)(1)–(6), Nov. 16, 1977, 91 Stat. 1399; Pub. L. 97–23, § 3, July 17, 1981, 95 Stat. 142; Pub. L. 101–549, title I, §§ 101(b)–(d), 102(h), 107(c), 108(d), title IV, § 412, Nov. 15, 1990, 104 Stat. 2404–2408, 2422, 2464, 2466, 2634.)

REFERENCES IN TEXT

The Energy Supply and Environmental Coordination Act of 1974, referred to in subsec. (a)(3)(B), is Pub. L. 93–319, June 22, 1974, 88 Stat. 246, as amended, which is classified principally to chapter 16C (§ 791 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 791 of Title 15 and Tables.

Section 7413 of this title, referred to in subsecs. (a)(3)(C), (6), (f)(5), (g)(3), and (i), was amended generally by Pub. L. 101–549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, subsecs. (d) and (e) of section 7413 no longer relates to final compliance orders and steel industry compliance extension, respectively.

Section 1857c–10 of this title, as in effect before August 7, 1977, referred to in subsecs. (f)(5) and (g)(3), was in the original ''section 119, as in effect before the date of the enactment of this paragraph'', meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93–319, § 3, 88 Stat. 248, (which was classified to section 1857c–10 of this title) as in effect prior to the enactment of subsecs. (f)(5) and (g)(3) of this section by Pub. L. 95–95, § 107, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95–95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93–319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93–319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to section 7413(d)(5) of this title. Section 7413 of this title was subsequently amended generally by Pub. L. 101–549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, see note above. Section 117(b) of Pub. L. 95–95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

CODIFICATION

Section was formerly classified to section 1857c–5 of this title.

PRIOR PROVISIONS

A prior section 110 of act July 14, 1955, was renumbered section 117 by Pub. L. 91–604 and is classified to section 7417 of this title.

AMENDMENTS

1990—Subsec. (a)(1). Pub. L. 101–549, § 101(d)(8), substituted ''3 years (or such shorter period as the Administrator may prescribe)'' for ''nine months'' in two places.

[3] So in original. Probably should be followed by a comma.

Subsec. (a)(2). Pub. L. 101–549, §101(b), amended par. (2) generally, substituting present provisions for provisions setting the time within which the Administrator was to approve or disapprove a plan or portion thereof and listing the conditions under which the plan or portion thereof was to be approved after reasonable notice and hearing.

Subsec. (a)(3)(A). Pub. L. 101–549, §101(d)(1), struck out subpar. (A) which directed Administrator to approve any revision of an implementation plan if it met certain requirements and had been adopted by the State after reasonable notice and public hearings.

Subsec. (a)(3)(D). Pub. L. 101–549, §101(d)(1), struck out subpar. (D) which directed that certain implementation plans be revised to include comprehensive measures and requirements.

Subsec. (a)(4). Pub. L. 101–549, §101(d)(2), struck out par. (4) which set forth requirements for review procedure.

Subsec. (c)(1). Pub. L. 101–549, §102(h), amended par. (1) generally, substituting present provisions for provisions relating to preparation and publication of regulations setting forth an implementation plan, after opportunity for a hearing, upon failure of a State to make required submission or revision.

Subsec. (c)(2)(A). Pub. L. 101–549, §101(d)(3)(A), struck out subpar. (A) which required a study and report on necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations to achieve and maintain national primary ambient air quality standards.

Subsec. (c)(2)(C). Pub. L. 101–549, §101(d)(3)(B), struck out subpar. (C) which authorized suspension of certain regulations and requirements relating to management of parking supply.

Subsec. (c)(4). Pub. L. 101–549, §101(d)(3)(C), struck out par. (4) which permitted Governors to temporarily suspend measures in implementation plans relating to retrofits, gas rationing, and reduction of on-street parking.

Subsec. (c)(5)(B). Pub. L. 101–549, §101(d)(3)(D), struck out ''(including the written evidence required by part D),'' after ''include comprehensive measures''.

Subsec. (d). Pub. L. 101–549, §101(d)(4), struck out subsec. (d) which defined an applicable implementation plan for purposes of this chapter.

Subsec. (e). Pub. L. 101–549, §101(d)(5), struck out subsec. (e) which permitted an extension of time for attainment of a national primary ambient air quality standard.

Subsec. (f)(1). Pub. L. 101–549, §412, inserted ''or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets)'' in subpar. (A) and in last sentence.

Subsec. (g)(1). Pub. L. 101–549, §101(d)(6), substituted ''12 months of submission of the proposed plan revision'' for ''the required four month period'' in closing provisions.

Subsec. (h)(1). Pub. L. 101–549, §101(d)(7), substituted ''5 years after November 15, 1990, and every three years thereafter'' for ''one year after August 7, 1977, and annually thereafter'' and struck out at end ''Each such document shall be revised as frequently as practicable but not less often than annually.''

Subsecs. (k) to (n). Pub. L. 101–549, §101(c), added subsecs. (k) to (n).

Subsec. (*o*). Pub. L. 101–549, §107(c), added subsec. (*o*).

Subsec. (p). Pub. L. 101–549, §108(d), added subsec. (p).

1981—Subsec. (a)(3)(C). Pub. L. 97–23 inserted reference to extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations).

1977—Subsec. (a)(2)(A). Pub. L. 95–95, §108(a)(1), substituted ''(A) except as may be provided in subparagraph (I)(i) in the case of a plan'' for ''(A)(i) in the case of a plan''.

Subsec. (a)(2)(B). Pub. L. 95–95, §108(a)(2), substituted ''transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D)'' for ''land use and transportation controls''.

Subsec. (a)(2)(D). Pub. L. 95–95, §108(a)(3), substituted ''it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure'' for ''it includes a procedure''.

Subsec. (a)(2)(E). Pub. L. 95–95, §108(a)(4), substituted ''it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 7426 of this title, relating to interstate pollution abatement'' for ''it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region''.

Subsec. (a)(2)(F). Pub. L. 95–95, §108(a)(5), added cl. (vi).

Subsec. (a)(2)(H). Pub. L. 95–190, §14(a)(1), substituted ''1977;'' for ''1977''.

Pub. L. 95–95, §108(a)(6), inserted ''except as provided in paragraph (3)(C),'' after ''or (ii)'' and ''or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977'' after ''to achieve the national ambient air quality primary or secondary standard which it implements''.

Subsec. (a)(2)(I). Pub. L. 95–95, §108(b), added subpar. (I).

Subsec. (a)(2)(J). Pub. L. 95–190, §14(a)(2), substituted ''; and'' for '', and''.

Pub. L. 95–95, §108(b), added subpar. (J).

Subsec. (a)(2)(K). Pub. L. 95–95, §108(b) added subpar. (K).

Subsec. (a)(3)(C). Pub. L. 95–95, §108(c), added subpar. (C).

Subsec. (a)(3)(D). Pub. L. 95–190, §14(a)(4), added subpar. (D).

Subsec. (a)(5). Pub. L. 95–95, §108(e), added par. (5).

Subsec. (a)(5)(D). Pub. L. 95–190, §14(a)(3), struck out ''preconstruction or premodification'' before ''review''.

Subsec. (a)(6). Pub. L. 95–95, §108(e), added par. (6).

Subsec. (c)(1). Pub. L. 95–95, §108(d)(1), (2), substituted ''plan which meets the requirements of this section'' for ''plan for any national ambient air quality primary or secondary standard within the time prescribed'' in subpar. (A) and, in provisions following subpar. (C), directed that any portion of a plan relating to any measure described in first sentence of 7421 of this title (relating to consultation) or the consultation process required under such section 7421 of this title not be required to be promulgated before the date eight months after such date required for submission.

Subsec. (c)(3) to (5). Pub. L. 95–95, §108(d)(3), added pars. (3) to (5).

Subsec. (d). Pub. L. 95–95, §108(f), substituted ''and which implements the requirements of this section'' for ''and which implements a national primary or secondary ambient air quality standard in a State''.

Subsec. (f). Pub. L. 95–95, §107(a), substituted provisions relating to the handling of national or regional energy emergencies for provisions relating to the postponement of compliance by stationary sources or classes of moving sources with any requirement of applicable implementation plans.

Subsec. (g). Pub. L. 95–95, §108(g), added subsec. (g) relating to publication of comprehensive document.

Pub. L. 95–95, §107(b), added subsec. (g) relating to Governor's authority to issue temporary emergency suspensions.

Subsec. (h). Pub. L. 95–190, §14(a)(5), redesignated subsec. (g), added by Pub. L. 95–95, §108(g), as (h). Former subsec. (h) redesignated (i).

Subsec. (i). Pub. L. 95–190, §14(a)(5), redesignated subsec. (h), added by Pub. L. 95–95, §108(g), as (i). Former subsec. (i) redesignated (j) and amended.

Subsec. (j). Pub. L. 95–190 §14(a)(5), (6), redesignated subsec. (i), added by Pub. L. 95–95, §108(g), as (j) and in subsec. (j) as so redesignated, substituted ''will enable such source'' for ''at such source will enable it''.

1974—Subsec. (a)(3). Pub. L. 93–319, §4(a), designated existing provisions as subpar. (A) and added subpar. (B).

Subsec. (c). Pub. L. 93–319, §4(b), designated existing provisions as par. (1) and existing pars. (1), (2), and (3) as subpars. (A), (B), and (C), respectively, of such redesignated par. (1), and added par. (2).

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95–95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95–95, see section 406(a) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95–95 [this chapter], see section 406(b) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

MODIFICATION OR RESCISSION OF IMPLEMENTATION PLANS APPROVED AND IN EFFECT PRIOR TO AUG. 7, 1977

Nothing in the Clean Air Act Amendments of 1977 [Pub. L. 95–95] to affect any requirement of an approved implementation plan under this section or any other provision in effect under this chapter before Aug. 7, 1977, until modified or rescinded in accordance with this chapter as amended by the Clean Air Act Amendments of 1977, see section 406(c) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

SAVINGS PROVISION

Section 16 of Pub. L. 91–604 provided that:

''(a)(1) Any implementation plan adopted by any State and submitted to the Secretary of Health, Education, and Welfare, or to the Administrator pursuant to the Clean Air Act [this chapter] prior to enactment of this Act [Dec. 31, 1970] may be approved under section 110 of the Clean Air Act [this section] (as amended by this Act) [Pub. L. 91–604] and shall remain in effect, unless the Administrator determines that such implementation plan, or any portion thereof, is not consistent with applicable requirements of the Clean Air Act [this chapter] (as amended by this Act) and will not provide for the attainment of national primary ambient air quality standards in the time required by such Act. If the Administrator so determines, he shall, within 90 days after promulgation of any national ambient air quality standards pursuant to section 109(a) of the Clean Air Act [section 7409(a) of this title], notify the State and specify in what respects changes are needed to meet the additional requirements of such Act, including requirements to implement national secondary ambient air quality standards. If such changes are not adopted by the State after public hearings and within six months after such notification, the Administrator shall promulgate such changes pursuant to section 110(c) of such Act [subsec. (c) of this section].

''(2) The amendments made by section 4(b) [amending sections 7403 and 7415 of this title] shall not be construed as repealing or modifying the powers of the Administrator with respect to any conference convened under section 108(d) of the Clean Air Act [section 7415 of this title] before the date of enactment of this Act [Dec. 31, 1970].

''(b) Regulations or standards issued under this title II of the Clean Air Act [subchapter II of this chapter] prior to the enactment of this Act [Dec. 31, 1970] shall continue in effect until revised by the Administrator consistent with the purposes of such Act [this chapter].''

FEDERAL ENERGY ADMINISTRATOR

''Federal Energy Administrator'', for purposes of this chapter, to mean Administrator of Federal Energy Administration established by Pub. L. 93–275, May 7, 1974, 88 Stat. 97, which is classified to section 761 et seq. of Title 15, Commerce and Trade, but with the term to mean any officer of the United States designated as such by the President until Federal Energy Administrator takes office and after Federal Energy Administration ceases to exist, see section 798 of Title 15, Commerce and Trade.

Federal Energy Administration terminated and functions vested by law in Administrator thereof transferred to Secretary of Energy (unless otherwise specifically provided) by sections 7151(a) and 7293 of this title.

§ 7411. Standards of performance for new stationary sources

(a) Definitions

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.

(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 subchapter II of this chapter 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

Pub. L. 95–95, §107(b), added subsec. (g) relating to Governor's authority to issue temporary emergency suspensions.

Subsec. (h). Pub. L. 95–190, §14(a)(5), redesignated subsec. (g), added by Pub. L. 95–95, §108(g), as (h). Former subsec. (h) redesignated (i).

Subsec. (i). Pub. L. 95–190, §14(a)(5), redesignated subsec. (h), added by Pub. L. 95–95, §108(g), as (i). Former subsec. (i) redesignated (j) and amended.

Subsec. (j). Pub. L. 95–190 §14(a)(5), (6), redesignated subsec. (i), added by Pub. L. 95–95, §108(g), as (j) and in subsec. (j) as so redesignated, substituted ''will enable such source'' for ''at such source will enable it''.

1974—Subsec. (a)(3). Pub. L. 93–319, §4(a), designated existing provisions as subpar. (A) and added subpar. (B).

Subsec. (c). Pub. L. 93–319, §4(b), designated existing provisions as par. (1) and existing pars. (1), (2), and (3) as subpars. (A), (B), and (C), respectively, of such redesignated par. (1), and added par. (2).

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95–95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95–95, see section 406(a) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95–95 [this chapter], see section 406(b) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

MODIFICATION OR RESCISSION OF IMPLEMENTATION PLANS APPROVED AND IN EFFECT PRIOR TO AUG. 7, 1977

Nothing in the Clean Air Act Amendments of 1977 [Pub. L. 95–95] to affect any requirement of an approved implementation plan under this section or any other provision in effect under this chapter before Aug. 7, 1977, until modified or rescinded in accordance with this chapter as amended by the Clean Air Act Amendments of 1977, see section 406(c) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

SAVINGS PROVISION

Section 16 of Pub. L. 91–604 provided that:

''(a)(1) Any implementation plan adopted by any State and submitted to the Secretary of Health, Education, and Welfare, or to the Administrator pursuant to the Clean Air Act [this chapter] prior to enactment of this Act [Dec. 31, 1970] may be approved under section 110 of the Clean Air Act [this section] (as amended by this Act) [Pub. L. 91–604] and shall remain in effect, unless the Administrator determines that such implementation plan, or any portion thereof, is not consistent with applicable requirements of the Clean Air Act [this chapter] (as amended by this Act) and will not provide for the attainment of national primary ambient air quality standards in the time required by such Act. If the Administrator so determines, he shall, within 90 days after promulgation of any national ambient air quality standards pursuant to section 109(a) of the Clean Air Act [section 7409(a) of this title], notify the State and specify in what respects changes are needed to meet the additional requirements of such Act, including requirements to implement national secondary ambient air quality standards. If such changes are not adopted by the State after public hearings and within six months after such notification, the Administrator shall promulgate such changes pursuant to section 110(c) of such Act [subsec. (c) of this section].

''(2) The amendments made by section 4(b) [amending sections 7403 and 7415 of this title] shall not be construed as repealing or modifying the powers of the Administrator with respect to any conference convened under section 108(d) of the Clean Air Act [section 7415 of this title] before the date of enactment of this Act [Dec. 31, 1970].

''(b) Regulations or standards issued under this title II of the Clean Air Act [subchapter II of this chapter] prior to the enactment of this Act [Dec. 31, 1970] shall continue in effect until revised by the Administrator consistent with the purposes of such Act [this chapter].''

FEDERAL ENERGY ADMINISTRATOR

''Federal Energy Administrator'', for purposes of this chapter, to mean Administrator of Federal Energy Administration established by Pub. L. 93–275, May 7, 1974, 88 Stat. 97, which is classified to section 761 et seq. of Title 15, Commerce and Trade, but with the term to mean any officer of the United States designated as such by the President until Federal Energy Administrator takes office and after Federal Energy Administration ceases to exist, see section 798 of Title 15, Commerce and Trade.

Federal Energy Administration terminated and functions vested by law in Administrator thereof transferred to Secretary of Energy (unless otherwise specifically provided) by sections 7151(a) and 7293 of this title.

§ 7411. Standards of performance for new stationary sources

(a) Definitions

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.

(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 subchapter II of this chapter 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 [15 U.S.C. 792(a)] or any amendment thereto, or any subsequent enactment which supersedes such Act [15 U.S.C. 791 et seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii)[1] of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(1)(A) The Administrator shall, within 90 days after December 31, 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 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 chapter 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) of this section, 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)[1] of this section shall be promulgated not later than one year after August 7, 1977. 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) State implementation and enforcement of standards of performance

(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 chapter 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) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title 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 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title 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 sub-

[1] See References in Text note below.

mitted 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 7410(c) of this title 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 7413 and 7414 of this title 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) Prohibited acts

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) New source standards of performance

(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) of this section before November 15, 1990, and for which regulations had not been proposed by the Administrator by November 15, 1990, the Administrator shall—

(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after November 15, 1990;

(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after November 15, 1990; and

(C) propose regulations for the remaining categories of sources within 6 years after November 15, 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;

(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) Revision of regulations

(1) Upon application by the Governor of a State showing that the Administrator has failed to specify in regulations under subsection (f)(1) of this section 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) of this section 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) of this section, the Administrator shall revise the list under subsection (b)(1)(A) of this section 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) of this section or by this subsection, the Administrator shall provide notice and opportunity for public hearing.

(h) Design, equipment, work practice, or operational standard; alternative emission limitation

(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 chapter (other than the provisions of subsection (a) of this section and this subsection).

(i) Country elevators

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) Innovative technological systems of continuous emission reduction

(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 7413 of this title.

(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 consider-

ation 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 7413 of this title.

(July 14, 1955, ch. 360, title I, § 111, as added Pub. L. 91–604, § 4(a), Dec. 31, 1970, 84 Stat. 1683; amended Pub. L. 92–157, title III, § 302(f), Nov. 18, 1971, 85 Stat. 464; Pub. L. 95–95, title I, § 109(a)–(d)(1), (e), (f), title IV, § 401(b), Aug. 7, 1977, 91 Stat. 697–703, 791; Pub. L. 95–190, § 14(a)(7)–(9), Nov. 16, 1977, 91 Stat. 1399; Pub. L. 95–623, § 13(a), Nov. 9, 1978, 92 Stat. 3457; Pub. L. 101–549, title I, § 108(e)–(g), title III, § 302(a), (b), title IV, § 403(a), Nov. 15, 1990, 104 Stat. 2467, 2574, 2631.)

References in Text

Such Act, referred to in subsec. (a)(8), means Pub. L. 93–319, June 22, 1974, 88 Stat. 246, as amended, known as the Energy Supply and Environmental Coordination Act of 1974, which is classified principally to chapter 16C (§ 791 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 791 of Title 15 and Tables.

Section 7413 of this title, referred to in subsec. (a)(8), was amended generally by Pub. L. 101–549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, subsec. (d) of section 7413 no longer relates to final compliance orders.

Subsection (a)(1) of this section, referred to in subsec. (b)(6), was amended generally by Pub. L. 101–549, title VII, § 403(a), Nov. 15, 1990, 104 Stat. 2631, and, as so amended, no longer contains subpars.

Codification

Section was formerly classified to section 1857c–6 of this title.

Prior Provisions

A prior section 111 of act July 14, 1955, was renumbered section 118 by Pub. L. 91–604 and is classified to section 7418 of this title.

Amendments

1990—Subsec. (a)(1). Pub. L. 101–549, § 403(a), amended par. (1) generally, substituting provisions defining ''standard of performance'' with respect to any air pollutant for provisions defining such term with respect to subsec. (b) fossil fuel fired and other stationary sources and subsec. (d) particular sources.

Subsec. (a)(3). Pub. L. 101–549, § 108(f), inserted at end ''Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.''

Subsec. (b)(1)(B). Pub. L. 101–549, § 108(e)(1), substituted ''Within one year'' for ''Within 120 days'', ''within one year'' for ''within 90 days'', and ''every 8 years'' for ''every four years'', inserted before last sentence ''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.'', and inserted at end ''When implementation and enforcement of any requirement of this chapter 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.''

Subsec. (d)(1)(A)(i). Pub. L. 101–549, § 302(a), which directed the substitution of ''7412(b)'' for ''7412(b)(1)(A)'', could not be executed, because of the prior amendment by Pub. L. 101–549, § 108(g), see below.

Pub. L. 101–549, § 108(g), substituted ''or emitted from a source category which is regulated under section 7412 of this title'' for ''or 7412(b)(1)(A)''.

Subsec. (f)(1). Pub. L. 101–549, § 108(e)(2), amended par. (1) generally, substituting present provisions for provisions requiring the Administrator to promulgate regulations listing the categories of major stationary sources not on the required list by Aug. 7, 1977, and regulations establishing standards of performance for such categories.

Subsec. (g)(5) to (8). Pub. L. 101–549, § 302(b), redesignated par. (7) as (5) and struck out ''or section 7412 of this title'' after ''this section'', redesignated par. (8) as (6), and struck out former pars. (5) and (6) which read as follows:

''(5) Upon application by the Governor of a State showing that the Administrator has failed to list any air pollutant which causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness as a hazardous air pollutant under section 7412 of this title the Administrator shall revise the list of hazardous air pollutants under such section to include such pollutant.

''(6) Upon application by the Governor of a State showing that any category of stationary sources of a hazardous air pollutant listed under section 7412 of this title is not subject to emission standards under such section, the Administrator shall propose and promulgate such emission standards applicable to such category of sources.''

1978—Subsecs. (d)(1)(A)(ii), (g)(4)(B). Pub. L. 95–623, §13(a)(2), substituted ''under this section'' for ''under subsection (b) of this section''.

Subsec. (h)(5). Pub. L. 95–623, §13(a)(1), added par. (5).

Subsec. (j). Pub. L. 95–623, §13(a)(3), substituted in pars. (1)(A) and (2)(A) ''standards under this section'' and ''under this section'' for ''standards under subsection (b) of this section'' and ''under subsection (b) of this section'', respectively.

1977—Subsec. (a)(1). Pub. L. 95–95, §109(c)(1)(A), added subpars. (A), (B), and (C), substituted ''For the purpose of subparagraphs (A)(i) and (ii) and (B), a standard of performance shall reflect'' for ''a standard for emissions of air pollutants which reflects'', ''and the percentage reduction achievable'' for ''achievable'', and ''technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environment impact and energy requirements)'' for ''system of emission reduction which (taking into account the cost of achieving such reduction)'' in existing provisions, and inserted provision that, for the purpose of subparagraph (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.

Subsec. (a)(7). Pub. L. 95–95, §109(c)(1)(B), added par. (7) defining ''technological system of continuous emission reduction''.

Pub. L. 95–95, §109(f), added par. (7) directing that under certain circumstances a conversion to coal not be deemed a modification for purposes of pars. (2) and (4).

Subsec. (a)(7), (8). Pub. L. 95–190, §14(a)(7), redesignated second par. (7) as (8).

Subsec. (b)(1)(A). Pub. L. 95–95, §401(b), substituted ''such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger'' for ''such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of''.

Subsec. (b)(1)(B). Pub. L. 95–95, §109(c)(2), substituted ''shall, at least every four years, review and, if appropriate,'' for ''may, from time to time,''.

Subsec. (b)(5), (6). Pub. L. 95–95, §109(c)(3), added pars. (5) and (6).

Subsec. (c)(1). Pub. L. 95–95, §109(d)(1), struck out ''(except with respect to new sources owned or operated by the United States)'' after ''implement and enforce such standards''.

Subsec. (d)(1). Pub. L. 95–95, §109(b)(1), substituted ''standards of performance'' for ''emission standards'' and inserted provisions directing that regulations of the Administrator permit the State, in applying a standard of performance to any particular source under a submitted plan, to take into consideration, among other factors, the remaining useful life of the existing source to which the standard applies.

Subsec. (d)(2). Pub. L. 95–95, §109(b)(2), provided that, in promulgating a standard of performance under a plan, the Administrator take into consideration, among other factors, the remaining useful lives of the sources in the category of sources to which the standard applies.

Subsecs. (f) to (i). Pub. L. 95–95, §109(a), added subsecs. (f) to (i).

Subsecs. (j), (k). Pub. L. 95–190, §14(a)(8), (9), redesignated subsec. (k) as (j) and, as so redesignated, substituted ''(B)'' for ''(8)'' as designation for second subpar. in par. (2). Former subsec. (j), added by Pub. L. 95–95, §109(e), which related to compliance with applicable standards of performance, was struck out.

Pub. L. 95–95, §109(e), added subsec. (k).

1971—Subsec. (b)(1)(B). Pub. L. 92–157 substituted in first sentence ''publish proposed'' for ''propose''.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

REGULATIONS

Section 403(b), (c) of Pub. L. 101–549 provided that:

''(b) REVISED REGULATIONS.—Not later than three years after the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990], the Administrator shall promulgate revised regulations for standards of performance for new fossil fuel fired electric utility units commencing construction after the date on which such regulations are proposed that, at a minimum, require any source subject to such revised standards to emit sulfur dioxide at a rate not greater than would have resulted from compliance by such source with the applicable standards of performance under this section [amending sections 7411 and 7479 of this title] prior to such revision.

''(c) APPLICABILITY.—The provisions of subsections (a) [amending this section] and (b) apply only so long as the provisions of section 403(e) of the Clean Air Act [42 U.S.C. 7651b(e)] remain in effect.''

TRANSFER OF FUNCTIONS

Enforcement functions of Administrator or other official in Environmental Protection Agency related to compliance with new source performance standards under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, eff. July 1, 1979, §§102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95–95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95–95, see section 406(a) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95–95 [this chapter], see section 406(b) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7412. Hazardous air pollutants

(a) Definitions

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

EFFECTIVE DATE

Subpart effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

GUIDANCE DOCUMENT

Section 127(c) of Pub. L. 95–95 required Administrator, not later than 1 year after Aug. 7, 1977, to publish a guidance document to assist States in carrying out their functions under part C of title I of the Clean Air Act (this part) with respect to pollutants for which national ambient air quality standards are promulgated.

STUDY AND REPORT ON PROGRESS MADE IN PROGRAM RELATING TO SIGNIFICANT DETERIORATION OF AIR QUALITY

Section 127(d) of Pub. L. 95–95 directed Administrator, not later than 2 years after Aug. 7, 1977, to complete a study and report to Congress on progress made in carrying out part C of title I of the Clean Air Act (this part) and the problems associated in carrying out such section.

§ 7471. Plan requirements

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

(July 14, 1955, ch. 360, title I, § 161, as added Pub. L. 95–95, title I, § 127(a), Aug. 7, 1977, 91 Stat. 731; amended Pub. L. 101–549, title I, § 110(1), Nov. 15, 1990, 104 Stat. 2470.)

AMENDMENTS

1990—Pub. L. 101–549 substituted ''designated pursuant to section 7407 of this title as attainment or unclassifiable'' for ''identified pursuant to section 7407(d)(1)(D) or (E) of this title''.

§ 7472. Initial classifications

(a) Areas designated as class I

Upon the enactment of this part, all—

(1) international parks,

(2) national wilderness areas which exceed 5,000 acres in size,

(3) national memorial parks which exceed 5,000 acres in size, and

(4) national parks which exceed six thousand acres in size,

and which are in existence on August 7, 1977, shall be class I areas and may not be redesignated. All areas which were redesignated as class I under regulations promulgated before August 7, 1977, shall be class I areas which may be redesignated as provided in this part. The extent of the areas designated as Class I under this section shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990.

(b) Areas designated as class II

All areas in such State designated pursuant to section 7407(d) of this title as attainment or unclassifiable which are not established as class I under subsection (a) of this section shall be class II areas unless redesignated under section 7474 of this title.

(July 14, 1955, ch. 360, title I, § 162, as added Pub. L. 95–95, title I, § 127(a), Aug. 7, 1977, 91 Stat. 731; amended Pub. L. 95–190, § 14(a)(40), Nov. 16, 1977, 91 Stat. 1401; Pub. L. 101–549, title I, §§ 108(m), 110(2), Nov. 15, 1990, 104 Stat. 2469, 2470.)

AMENDMENTS

1990—Subsec. (a). Pub. L. 101–549, § 108(m), inserted at end ''The extent of the areas designated as Class I under this section shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990.''

Subsec. (b). Pub. L. 101–549, § 110(2), substituted ''designated pursuant to section 7407(d) of this title as attainment or unclassifiable'' for ''identified pursuant to section 7407(d)(1)(D) or (E) of this title''.

1977—Subsec. (a)(4). Pub. L. 95–190 inserted a comma after ''size''.

§ 7473. Increments and ceilings

(a) Sulfur oxide and particulate matter; requirement that maximum allowable increases and maximum allowable concentrations not be exceeded

In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under section 7475(d)(2)(C)(iv) of this title) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

(b) Maximum allowable increases in concentrations over baseline concentrations

(1) For any class I area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	5
Twenty-four-hour maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
Twenty-four-hour maximum	5
Three-hour maximum	25

(2) For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20

(other than an area referred to in paragraph (1) or (2)'', to reflect the probable intent of Congress.

1977—Subsec. (b)(2). Pub. L. 95–190, §14(a)(42), inserted ''or is inconsistent with the requirements of section 7472(a) of this title or of subsection (a) of this section'' after ''this section''.

Subsec. (e). Pub. L. 95–190, §14(a)(43), inserted ''an'' after ''If any State affected by the redesignation of''.

§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

(iv) In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such facility will not cause or contribute to concentrations of such pollutant which exceed the following maximum allowable increases over the baseline concentration for such pollutants:

	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	325

(D)(i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

(ii) In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

(iii) In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such facility will not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which exceed the following maximum allowable increases for such areas over the baseline concentration for such pollutant and to assure that such emissions will not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less on more than 18 days during any annual period:

MAXIMUM ALLOWABLE INCREASE
(In micrograms per cubic meter)

Period of exposure	Low terrain areas	High terrain areas
24-hr maximum	36	62
3-hr maximum	130	221

(iv) For purposes of clause (iii), the term ''high terrain area'' means with respect to any facility, any area having an elevation of 900 feet or more above the base of the stack of such facility, and the term ''low terrain area'' means any area other than a high terrain area.

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

(2) Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

(3) The Administrator shall within six months after August 7, 1977, promulgate regulations respecting the analysis required under this subsection which regulations—

(A) shall not require the use of any automatic or uniform buffer zone or zones,

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

(D) shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

(July 14, 1955, ch. 360, title I, §165, as added Pub. L. 95–95, title I, §127(a), Aug. 7, 1977, 91 Stat. 735; amended Pub. L. 95–190, §14(a)(44)–(51), Nov. 16, 1977, 91 Stat. 1402.)

AMENDMENTS

1977—Subsec. (a)(1). Pub. L. 95–190, §14(a)(44), substituted ''part;'' for ''part:''.

Subsec. (a)(3). Pub. L. 95–190, §14(a)(45), inserted provision making applicable requirement of section 7410(j) of this title.

Subsec. (b). Pub. L. 95–190, §14(a)(46), inserted ''cause or'' before ''contribute'' and struck out ''actual'' before ''allowable emissions''.

Subsec. (d)(2)(C). Pub. L. 95–190, §14(a)(47)–(49), in cl. (ii) substituted ''contribute'' for ''contrbute'', in cl. (iii) substituted ''quality-related'' for ''quality related'' and ''concentrations which'' for ''concentrations, which'', and in cl. (iv) substituted ''such facility'' for ''such sources'' and ''will not cause or contribute to concentrations of such pollutant which exceed'' for ''together with all other sources, will not exceed''.

Subsec. (d)(2)(D). Pub. L. 95–190, §14(a)(50), (51), in cl. (iii) substituted provisions relating to determinations of amounts of emissions of sulfur oxides from facilities, for provisions relating to determinations of amounts of emissions of sulfur oxides from sources operating under permits issued pursuant to this subpar., together with all other sources, and added cl. (iv).

§ 7476. Other pollutants

(a) Hydrocarbons, carbon monoxide, petrochemical oxidants, and nitrogen oxides

In the case of the pollutants hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later than two years after August 7, 1977, promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions of such pollutants. In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.

(b) Effective date of regulations

Regulations referred to in subsection (a) of this section shall become effective one year after the date of promulgation. Within 21 months after such date of promulgation such plan revision shall be submitted to the Administrator who shall approve or disapprove the plan within 25 months after such date or[1] promulgation in the same manner as required under section 7410 of this title.

(c) Contents of regulations

Such regulations shall provide specific numerical measures against which permit applications may be evaluated, a framework for stimulating improved control technology, protection of air quality values, and fulfill the goals and purposes set forth in section 7401 and section 7470 of this title.

(d) Specific measures to fulfill goals and purposes

The regulations of the Administrator under subsection (a) of this section shall provide specific measures at least as effective as the increments established in section 7473 of this title to fulfill such goals and purposes, and may contain air quality increments, emission density requirements, or other measures.

(e) Area classification plan not required

With respect to any air pollutant for which a national ambient air quality standard is established other than sulfur oxides or particulate matter, an area classification plan shall not be required under this section if the implementation plan adopted by the State and submitted for the Administrator's approval or promulgated by the Administrator under section 7410(c) of this title contains other provisions which when considered as a whole, the Administrator finds will carry out the purposes in section 7470 of this title at least as effectively as an area classification plan for such pollutant. Such other provisions referred to in the preceding sentence need not require the establishment of maximum allowable increases with respect to such pollutant for any area to which this section applies.

(f) PM–10 increments

The Administrator is authorized to substitute, for the maximum allowable increases in particulate matter specified in section 7473(b) of this title and section 7475(d)(2)(C)(iv) of this title, maximum allowable increases in particulate matter with an aerodynamic diameter smaller than or equal to 10 micrometers. Such substituted maximum allowable increases shall be of equal stringency in effect as those specified in the provisions for which they are substituted. Until the Administrator promulgates regulations under the authority of this subsection, the current maximum allowable increases in con-

[1] So in original. Probably should be ''of''.

pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of ''best available control technology'' result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term ''baseline concentration'' means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

(July 14, 1955, ch. 360, title I, §169, as added Pub. L. 95–95, title I, §127(a), Aug. 7, 1977, 91 Stat. 740; amended Pub. L. 95–190, §14(a)(54), Nov. 16, 1977, 91 Stat. 1402; Pub. L. 101–549, title III, §305(b), title IV, §403(d), Nov. 15, 1990, 104 Stat. 2583, 2631.)

AMENDMENTS

1990—Par. (1). Pub. L. 101–549, §305(b), struck out ''two hundred and'' after ''municipal incinerators capable of charging more than''.

Par. (3). Pub. L. 101–549, §403(d), directed the insertion of '', clean fuels,'' after ''including fuel cleaning,'', which was executed by making the insertion after ''including fuel cleaning'' to reflect the probable intent of Congress, and inserted at end ''Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.''

1977—Par. (2)(C). Pub. L. 95–190 added subpar. (C).

STUDY OF MAJOR EMITTING FACILITIES WITH POTENTIAL OF EMITTING 250 TONS PER YEAR

Section 127(b) of Pub. L. 95–95 directed Administrator, within 1 year after Aug. 7, 1977, to report to Congress on consequences of that portion of definition of ''major emitting facility'' under this subpart which applies to facilities with potential to emit 250 tons per year or more.

SUBPART II—VISIBILITY PROTECTION

CODIFICATION

As originally enacted, subpart II of part C of subchapter I of this chapter was added following section 7478 of this title. Pub. L. 95–190, §14(a)(53), Nov. 16, 1977, 91 Stat. 1402, struck out subpart II and inserted such subpart following section 7479 of this title.

§ 7491. Visibility protection for Federal class I areas

(a) Impairment of visibility; list of areas; study and report

(1) Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution.

(2) Not later than six months after August 7, 1977, the Secretary of the Interior in consultation with other Federal land managers shall review all mandatory class I Federal areas and identify those where visibility is an important value of the area. From time to time the Secretary of the Interior may revise such identifications. Not later than one year after August 7, 1977, the Administrator shall, after consultation with the Secretary of the Interior, promulgate a list of mandatory class I Federal areas in which he determines visibility is an important value.

(3) Not later than eighteen months after August 7, 1977, the Administrator shall complete a study and report to Congress on available methods for implementing the national goal set forth in paragraph (1). Such report shall include recommendations for—

(A) methods for identifying, characterizing, determining, quantifying, and measuring visibility impairment in Federal areas referred to in paragraph (1), and

(B) modeling techniques (or other methods) for determining the extent to which manmade air pollution may reasonably be anticipated to cause or contribute to such impairment, and

(C) methods for preventing and remedying such manmade air pollution and resulting visibility impairment.

Such report shall also identify the classes or categories of sources and the types of air pollutants which, alone or in conjunction with other sources or pollutants, may reasonably be anticipated to cause or contribute significantly to impairment of visibility.

(4) Not later than twenty-four months after August 7, 1977, and after notice and public hearing, the Administrator shall promulgate regulations to assure (A) reasonable progress toward meeting the national goal specified in paragraph (1), and (B) compliance with the requirements of this section.

(b) Regulations

Regulations under subsection (a)(4) of this section shall—

(1) provide guidelines to the States, taking into account the recommendations under sub-

section (a)(3) of this section on appropriate techniques and methods for implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a)(3)), and

(2) require each applicable implementation plan for a State in which any area listed by the Administrator under subsection (a)(2) of this section is located (or for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area) to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal specified in subsection (a) of this section, including—

(A) except as otherwise provided pursuant to subsection (c) of this section, a requirement that each major stationary source which is in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date, and which, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment, and

(B) a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal specified in subsection (a) of this section.

In the case of a fossil-fuel fired generating powerplant having a total generating capacity in excess of 750 megawatts, the emission limitations required under this paragraph shall be determined pursuant to guidelines, promulgated by the Administrator under paragraph (1).

(c) Exemptions

(1) The Administrator may, by rule, after notice and opportunity for public hearing, exempt any major stationary source from the requirement of subsection (b)(2)(A) of this section, upon his determination that such source does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to a significant impairment of visibility in any mandatory class I Federal area.

(2) Paragraph (1) of this subsection shall not be applicable to any fossil-fuel fired powerplant with total design capacity of 750 megawatts or more, unless the owner or operator of any such plant demonstrates to the satisfaction of the Administrator that such powerplant is located at such distance from all areas listed by the Administrator under subsection (a)(2) of this section that such powerplant does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such area.

(3) An exemption under this subsection shall be effective only upon concurrence by the appropriate Federal land manager or managers with the Administrator's determination under this subsection.

(d) Consultations with appropriate Federal land managers

Before holding the public hearing on the proposed revision of an applicable implementation plan to meet the requirements of this section, the State (or the Administrator, in the case of a plan promulgated under section 7410(c) of this title) shall consult in person with the appropriate Federal land manager or managers and shall include a summary of the conclusions and recommendations of the Federal land managers in the notice to the public.

(e) Buffer zones

In promulgating regulations under this section, the Administrator shall not require the use of any automatic or uniform buffer zone or zones.

(f) Nondiscretionary duty

For purposes of section 7604(a)(2) of this title, the meeting of the national goal specified in subsection (a)(1) of this section by any specific date or dates shall not be considered a ''nondiscretionary duty'' of the Administrator.

(g) Definitions

For the purpose of this section—

(1) in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements;

(2) in determining best available retrofit technology the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology;

(3) the term ''manmade air pollution'' means air pollution which results directly or indirectly from human activities;

(4) the term ''as expeditiously as practicable'' means as expeditiously as practicable but in no event later than five years after the date of approval of a plan revision under this section (or the date of promulgation of such a plan revision in the case of action by the Administrator under section 7410(c) of this title for purposes of this section);

(5) the term ''mandatory class I Federal areas'' means Federal areas which may not be designated as other than class I under this part;

(6) the terms ''visibility impairment'' and ''impairment of visibility'' shall include reduction in visual range and atmospheric discoloration; and

(7) the term ''major stationary source'' means the following types of stationary sources with the potential to emit 250 tons or more of any pollutant: fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than 250 million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities.

(July 14, 1955, ch. 360, title I, §169A, as added Pub. L. 95–95, title I, §128, Aug. 7, 1977, 91 Stat. 742.)

EFFECTIVE DATE

Subpart effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7492. Visibility

(a) Studies

(1) The Administrator, in conjunction with the National Park Service and other appropriate Federal agencies, shall conduct research to identify and evaluate sources and source regions of both visibility impairment and regions that provide predominantly clean air in class I areas. A total of $8,000,000 per year for 5 years is authorized to be appropriated for the Environmental Protection Agency and the other Federal agencies to conduct this research. The research shall include—

(A) expansion of current visibility related monitoring in class I areas;

(B) assessment of current sources of visibility impairing pollution and clean air corridors;

(C) adaptation of regional air quality models for the assessment of visibility;

(D) studies of atmospheric chemistry and physics of visibility.

(2) Based on the findings available from the research required in subsection (a)(1) of this section as well as other available scientific and technical data, studies, and other available information pertaining to visibility source-receptor relationships, the Administrator shall conduct an assessment and evaluation that identifies, to the extent possible, sources and source regions of visibility impairment including natural sources as well as source regions of clear air for class I areas. The Administrator shall produce interim findings from this study within 3 years after November 15, 1990.

(b) Impacts of other provisions

Within 24 months after November 15, 1990, the Administrator shall conduct an assessment of the progress and improvements in visibility in class I areas that are likely to result from the implementation of the provisions of the Clean Air Act Amendments of 1990 other than the provisions of this section. Every 5 years thereafter the Administrator shall conduct an assessment of actual progress and improvement in visibility in class I areas. The Administrator shall prepare a written report on each assessment and transmit copies of these reports to the appropriate committees of Congress.

(c) Establishment of visibility transport regions and commissions

(1) Authority to establish visibility transport regions

Whenever, upon the Administrator's motion or by petition from the Governors of at least two affected States, the Administrator has reason to believe that the current or projected interstate transport of air pollutants from one or more States contributes significantly to visibility impairment in class I areas located in the affected States, the Administrator may establish a transport region for such pollutants that includes such States. The Administrator, upon the Administrator's own motion or upon petition from the Governor of any affected State, or upon the recommendations of a transport commission established under subsection (b) of this section[1] may—

(A) add any State or portion of a State to a visibility transport region when the Administrator determines that the interstate transport of air pollutants from such State significantly contributes to visibility impairment in a class I area located within the transport region, or

(B) remove any State or portion of a State from the region whenever the Administrator has reason to believe that the control of emissions in that State or portion of the State pursuant to this section will not significantly contribute to the protection or enhancement of visibility in any class I area in the region.

(2) Visibility transport commissions

Whenever the Administrator establishes a transport region under subsection (c)(1) of this section, the Administrator shall establish a transport commission comprised of (as a minimum) each of the following members:

(A) the Governor of each State in the Visibility Transport Region, or the Governor's designee;

(B) The[2] Administrator or the Administrator's designee; and

(C) A[2] representative of each Federal agency charged with the direct management of each class I area or areas within the Visibility Transport Region.

(3) Ex officio members

All representatives of the Federal Government shall be ex officio members.

[1] So in original. Words ''subsection (b) of this section'' probably should be ''paragraph (2)''.

[2] So in original. Probably should not be capitalized.

company at least 51 percent of the stock of the company is owned by, one or more individuals who are members of the following groups:

''(I) Black Americans.

''(II) Hispanic Americans.

''(III) Native Americans.

''(IV) Asian Americans.

''(V) Women.

''(VI) Disabled Americans.

''(ii) The presumption established by clause (i) may be rebutted with respect to a particular business concern if it is reasonably established that the individual or individuals referred to in that clause with respect to that business concern are not experiencing impediments to establishing or developing such concern as a result of the individual's identification as a member of a group specified in that clause.

''(C) The following institutions are presumed to be disadvantaged business concerns for purposes of subsection (a):

''(i) Historically black colleges and universities, and colleges and universities having a student body in which 40 percent of the students are Hispanic.

''(ii) Minority institutions (as that term is defined by the Secretary of Education pursuant to the General Education Provision Act (20 U.S.C. 1221 et seq.)).

''(iii) Private and voluntary organizations controlled by individuals who are socially and economically disadvantaged.

''(D) A joint venture may be considered to be a disadvantaged business concern under subsection (a), notwithstanding the size of such joint venture, if—

''(i) a party to the joint venture is a disadvantaged business concern; and

''(ii) that party owns at least 51 percent of the joint venture.

A person who is not an economically disadvantaged individual or a disadvantaged business concern, as a party to a joint venture, may not be a party to more than 2 awarded contracts in a fiscal year solely by reason of this subparagraph.

''(E) Nothing in this paragraph shall prohibit any member of a racial or ethnic group that is not listed in subparagraph (B)(i) from establishing that they have been impeded in establishing or developing a business concern as a result of racial or ethnic discrimination.

''SEC. 1002. USE OF QUOTAS PROHIBITED.—Nothing in this title shall permit or require the use of quotas or a requirement that has the effect of a quota in determining eligibility under section 1001.''

§ 7602. Definitions

When used in this chapter—

(a) The term ''Administrator'' means the Administrator of the Environmental Protection Agency.

(b) The term ''air pollution control agency'' means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this chapter.

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency.

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(5) An agency of an Indian tribe.

(c) The term ''interstate air pollution control agency'' means—

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term ''State'' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

(e) The term ''person'' includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

(f) The term ''municipality'' means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

(g) The term ''air pollutant'' means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term ''air pollutant'' is used.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

(i) The term ''Federal land manager'' means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(j) Except as otherwise expressly provided, the terms ''major stationary source'' and ''major emitting facility'' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

(k) The terms ''emission limitation'' and ''emission standard'' mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design,

equipment, work practice or operational standard promulgated under this chapter..[1]

(*l*) The term ''standard of performance'' means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) The term ''means of emission limitation'' means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

(n) The term ''primary standard attainment date'' means the date specified in the applicable implementation plan for the attainment of a national primary ambient air quality standard for any air pollutant.

(*o*) The term ''delayed compliance order'' means an order issued by the State or by the Administrator to an existing stationary source, postponing the date required under an applicable implementation plan for compliance by such source with any requirement of such plan.

(p) The term ''schedule and timetable of compliance'' means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.

(q) For purposes of this chapter, the term ''applicable implementation plan'' means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410 of this title, or promulgated under section 7410(c) of this title, or promulgated or approved pursuant to regulations promulgated under section 7601(d) of this title and which implements the relevant requirements of this chapter.

(r) INDIAN TRIBE.—The term ''Indian tribe'' means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(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 7408 of this title.

(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.

(z) STATIONARY SOURCE.—The term ''stationary source'' means generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 7550 of this title.

(July 14, 1955, ch. 360, title III, §302, formerly §9, as added Pub. L. 88–206, §1, Dec. 17, 1963, 77 Stat. 400, renumbered Pub. L. 89–272, title I, §101(4), Oct. 20, 1965, 79 Stat. 992; amended Pub. L. 90–148, §2, Nov. 21, 1967, 81 Stat. 504; Pub. L. 91–604, §15(a)(1), (c)(1), Dec. 31, 1970, 84 Stat. 1710, 1713; Pub. L. 95–95, title II, §218(c), title III, §301, Aug. 7, 1977, 91 Stat. 761, 769; Pub. L. 95–190, §14(a)(76), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101–549, title I, §§101(d)(4), 107(a), (b), 108(j), 109(b), title III, §302(e), title VII, §709, Nov. 15, 1990, 104 Stat. 2409, 2464, 2468, 2470, 2574, 2684.)

CODIFICATION

Section was formerly classified to section 1857h of this title.

PRIOR PROVISIONS

Provisions similar to those in subsecs. (b) and (d) of this section were contained in a section 1857e of this title, act July 14, 1955, ch. 360, §6, 69 Stat. 323, prior to the general amendment of this chapter by Pub. L. 88–206.

AMENDMENTS

1990—Subsec. (b)(1) to (3). Pub. L. 101–549, §107(a)(1), (2), struck out ''or'' at end of par. (3) and substituted periods for semicolons at end of pars. (1) to (3).

Subsec. (b)(5). Pub. L. 101–549, §107(a)(3), added par. (5).

Subsec. (g). Pub. L. 101–549, §108(j)(2), inserted at end ''Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used.''

Subsec. (h). Pub. L. 101–549, §109(b), inserted before period at end '', whether caused by transformation, conversion, or combination with other air pollutants''.

Subsec. (k). Pub. L. 101–549, §303(e), inserted before period at end '', and any design, equipment, work practice or operational standard promulgated under this chapter.''

Subsec. (q). Pub. L. 101–549, §101(d)(4), added subsec. (q).

Subsec. (r). Pub. L. 101–549, §107(b), added subsec. (r).

Subsecs. (s) to (y). Pub. L. 101–549, §108(j)(1), added subsecs. (s) to (y).

Subsec. (z). Pub. L. 101–549, §709, added subsec. (z).

1977—Subsec. (d). Pub. L. 95–95, §218(c), inserted ''and includes the Commonwealth of the Northern Mariana Islands'' after ''American Samoa''.

Subsec. (e). Pub. L. 95–190 substituted ''individual, corporation'' for ''individual corporation''.

Pub. L. 95–95, §301(b), expanded definition of ''person'' to include agencies, departments, and instrumentalities of the United States and officers, agents, and employees thereof.

[1] So in original.

Subsec. (g). Pub. L. 95–95, § 301(c), expanded definition of ''air pollutant'' so as, expressly, to include physical, chemical, biological, and radioactive substances or matter emitted into or otherwise entering the ambient air.

Subsecs. (i) to (p). Pub. L. 95–95, § 301(a), added subsecs. (i) to (p).

1970—Subsec. (a). Pub. L. 91–604, § 15(c)(1), substituted definition of ''Administrator'' as meaning Administrator of the Environmental Protection Agency for definition of ''Secretary'' as meaning Secretary of Health, Education, and Welfare.

Subsecs. (g), (h). Pub. L. 91–604, § 15(a)(1), added subsec. (g) defining ''air pollutant'', redesignated former subsec. (g) as (h) and substituted references to effects on soil, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate for references to injury to agricultural crops and livestock, and inserted references to effects on economic values and on personal comfort and well being.

1967—Pub. L. 90–148 reenacted section without change.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

§ 7603. Emergency powers

Notwithstanding any other provision of this chapter, the Administrator, upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to public health or welfare, or the environment, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment. Prior to taking any action under this section, the Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based. Any order issued by the Administrator under this section shall be effective upon issuance and shall remain in effect for a period of not more than 60 days, unless the Administrator brings an action pursuant to the first sentence of this section before the expiration of that period. Whenever the Administrator brings such an action within the 60-day period, such order shall remain in effect for an additional 14 days or for such longer period as may be authorized by the court in which such action is brought.

(July 14, 1955, ch. 360, title III, § 303, as added Pub. L. 91–604, § 12(a), Dec. 31, 1970, 84 Stat. 1705; amended Pub. L. 95–95, title III, § 302(a), Aug. 7, 1977, 91 Stat. 770; Pub. L. 101–549, title VII, § 704, Nov. 15, 1990, 104 Stat. 2681.)

CODIFICATION

Section was formerly classified to section 1857h–1 of this title.

PRIOR PROVISIONS

A prior section 303 of act July 14, 1955, was renumbered section 310 by Pub. L. 91–604 and is classified to section 7610 of this title.

AMENDMENTS

1990—Pub. L. 101–549, § 704(2)–(5), struck out subsec. (a) designation before ''Notwithstanding any other'', struck out subsec. (b) which related to violation of or failure or refusal to comply with subsec. (a) orders, and substituted new provisions for provisions following first sentence which read as follows: ''If it is not practicable to assure prompt protection of the health of persons solely by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect the health of persons who are, or may be, affected by such pollution source (or sources). Prior to taking any action under this section, the Administrator shall consult with the State and local authorities in order to confirm the correctness of the information on which the action proposed to be taken is based and to ascertain the action which such authorities are, or will be, taking. Such order shall be effective for a period of not more than twenty-four hours unless the Administrator brings an action under the first sentence of this subsection before the expiration of such period. Whenever the Administrator brings such an action within such period, such order shall be effective for a period of forty-eight hours or such longer period as may be authorized by the court pending litigation or thereafter.''

Pub. L. 101–549, § 704(1), which directed that ''public health or welfare, or the environment'' be substituted for ''the health of persons and that appropriate State or local authorities have not acted to abate such sources'', was executed by making the substitution for ''the health of persons, and that appropriate State or local authorities have not acted to abate such sources'' to reflect the probable intent of Congress.

1977—Pub. L. 95–95 designated existing provisions as subsec. (a), inserted provisions that, if it is not practicable to assure prompt protection of the health of persons solely by commencement of a civil action, the Administrator may issue such orders as may be necessary to protect the health of persons who are, or may be, affected by such pollution source (or sources), that, prior to taking any action under this section, the Administrator consult with the State and local authorities in order to confirm the correctness of the information on which the action proposed to be taken is based and to ascertain the action which such authorities are, or will be, taking, that the order be effective for a period of not more than twenty-four hours unless the Administrator brings an action under the first sentence of this subsection before the expiration of such period, and that, whenever the Administrator brings such an action within such period, such order be effective for a period of forty-eight hours or such longer period as may be authorized by the court pending litigation or thereafter, and added subsec. (b).

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95–95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95–95, see section 406(a) of Pub. L.

SEC. 2. *Designation of Facilities*. (a) The Administrator of the Environmental Protection Agency (hereinafter referred to as ''the Administrator'') shall be responsible for the attainment of the purposes and objectives of this Order.

(b) In carrying out his responsibilities under this Order, the Administrator shall, in conformity with all applicable requirements of law, designate facilities which have given rise to a conviction for an offense under section 113(c)(1) of the Air Act [42 U.S.C. 7413(c)(1)] or section 309(c) of the Water Act [33 U.S.C. 1319(c)]. The Administrator shall, from time to time, publish and circulate to all Federal agencies lists of those facilities, together with the names and addresses of the persons who have been convicted of such offenses. Whenever the Administrator determines that the condition which gave rise to a conviction has been corrected, he shall promptly remove the facility and the name and address of the person concerned from the list.

SEC. 3. *Contracts, Grants, or Loans*. (a) Except as provided in section 8 of this Order, no Federal agency shall enter into any contract for the procurement of goods, materials, or services which is to be performed in whole or in part in a facility then designated by the Administrator pursuant to section 2.

(b) Except as provided in section 8 of this Order, no Federal agency authorized to extend Federal assistance by way of grant, loan, or contract shall extend such assistance in any case in which it is to be used to support any activity or program involving the use of a facility then designated by the Administrator pursuant to section 2.

SEC. 4. *Procurement, Grant, and Loan Regulations*. The Federal Procurement Regulations, the Armed Services Procurement Regulations, and to the extent necessary, any supplemental or comparable regulations issued by any agency of the Executive Branch shall, following consultation with the Administrator, be amended to require, as a condition of entering into, renewing, or extending any contract for the procurement of goods, materials, or services or extending any assistance by way of grant, loan, or contract, inclusion of a provision requiring compliance with the Air Act, the Water Act, and standards issued pursuant thereto in the facilities in which the contract is to be performed, or which are involved in the activity or program to receive assistance.

SEC. 5. *Rules and Regulations*. The Administrator shall issue such rules, regulations, standards, and guidelines as he may deem necessary or appropriate to carry out the purposes of this Order.

SEC. 6. *Cooperation and Assistance*. The head of each Federal agency shall take such steps as may be necessary to insure that all officers and employees of this agency whose duties entail compliance or comparable functions with respect to contracts, grants, and loans are familiar with the provisions of this Order. In addition to any other appropriate action, such officers and employees shall report promptly any condition in a facility which may involve noncompliance with the Air Act or the Water Act or any rules, regulations, standards, or guidelines issued pursuant to this Order to the head of the agency, who shall transmit such reports to the Administrator.

SEC. 7. *Enforcement*. The Administrator may recommend to the Department of Justice or other appropriate agency that legal proceedings be brought or other appropriate action be taken whenever he becomes aware of a breach of any provision required, under the amendments issued pursuant to section 4 of this Order, to be included in a contract or other agreement.

SEC. 8. *Exemptions—Reports to Congress*. (a) Upon a determination that the paramount interest of the United States so requires—

(1) The head of a Federal agency may exempt any contract, grant, or loan, and, following consultation with the Administrator, any class of contracts, grants or loans from the provisions of this Order. In any such case, the head of the Federal agency granting such exemption shall (A) promptly notify the Administrator of such exemption and the justification therefor; (B) review the necessity for each such exemption annually; and (C) report to the Administrator annually all such exemptions in effect. Exemptions granted pursuant to this section shall be for a period not to exceed one year. Additional exemptions may be granted for periods not to exceed one year upon the making of a new determination by the head of the Federal agency concerned.

(2) The Administrator may, by rule or regulation, exempt any or all Federal agencies from any or all of the provisions of this Order with respect to any class or classes of contracts, grants, or loans, which (A) involve less than specified dollar amounts, or (B) have a minimal potential impact upon the environment, or (C) involve persons who are not prime contractors or direct recipients of Federal assistance by way of contracts, grants, or loans.

(b) Federal agencies shall reconsider any exemption granted under subsection (a) whenever requested to do so by the Administrator.

(c) The Administrator shall annually notify the President and the Congress of all exemptions granted, or in effect, under this Order during the preceding year.

SEC. 9. *Related Actions*. The imposition of any sanction or penalty under or pursuant to this Order shall not relieve any person of any legal duty to comply with any provisions of the Air Act or the Water Act.

SEC. 10. *Applicability*. This Order shall not apply to contracts, grants, or loans involving the use of facilities located outside the United States.

SEC. 11. *Uniformity*. Rules, regulations, standards, and guidelines issued pursuant to this order and section 508 of the Water Act [33 U.S.C. 1368] shall, to the maximum extent feasible, be uniform with regulations issued pursuant to this order, Executive Order No. 11602 of June 29, 1971 [formerly set out above], and section 306 of the Air Act [this section].

SEC. 12. *Order Superseded*. Executive Order No. 11602 of June 29, 1971, is hereby superseded.

RICHARD NIXON.

§ 7607. Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4)[1] or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the[2] chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),,[3] the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be dis-

[1] See References in Text note below.
[2] So in original. Probably should be ''this''.
[3] So in original.

closed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph,[4] the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,,[3] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5)[1] of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c–10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to[5] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

[4] So in original. Probably should be ''subsection,''.

[5] So in original. The word ''to'' probably should not appear.

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV–A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV–A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a ''rule''). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the ''comment period''). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management

and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of

title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section[6] 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

(July 14, 1955, ch. 360, title III, §307, as added Pub. L. 91–604, §12(a), Dec. 31, 1970, 84 Stat. 1707; amended Pub. L. 92–157, title III, §302(a), Nov. 18, 1971, 85 Stat. 464; Pub. L. 93–319, §6(c), June 22, 1974, 88 Stat. 259; Pub. L. 95–95, title III, §§303(d), 305(a), (c), (f)–(h), Aug. 7, 1977, 91 Stat. 772, 776, 777; Pub. L. 95–190, §14(a)(79), (80), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101–549, title I, §§108(p), 110(5), title III, §302(g), (h), title VII, §§702(c), 703, 706, 707(h), 710(b), Nov. 15, 1990, 104 Stat. 2469, 2470, 2574, 2681–2684.)

REFERENCES IN TEXT

Section 7521(b)(4) of this title, referred to in subsec. (a), was repealed by Pub. L. 101–549, title II, §230(2), Nov. 15, 1990, 104 Stat. 2529.

Section 7521(b)(5) of this title, referred to in subsec. (b)(1), was repealed by Pub. L. 101–549, title II, §230(3), Nov. 15, 1990, 104 Stat. 2529.

Section 1857c–10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977), referred to in subsec. (b)(1), was in the original ''section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977)'', meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93–319, §3, 88 Stat. 248, (which was classified to section 1857c–10 of this title) as in effect prior to the enactment of Pub. L. 95–95, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95–95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93–319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93–319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to subsec. (d)(5) of section 7413 of this title. Section 7413(d) of this title was subsequently amended generally by Pub. L. 101–549, title VII, §701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, no longer relates to final compliance orders. Section 117(b) of Pub. L. 95–95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

Part C of subchapter I of this chapter, referred to in subsec. (d)(1)(J), was in the original ''subtitle C of title I'', and was translated as reading ''part C of title I'' to reflect the probable intent of Congress, because title I does not contain subtitles.

CODIFICATION

In subsec. (h), ''subchapter II of chapter 5 of title 5'' was substituted for ''the Administrative Procedures Act'' on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Section was formerly classified to section 1857h–5 of this title.

PRIOR PROVISIONS

A prior section 307 of act July 14, 1955, was renumbered section 314 by Pub. L. 91–604 and is classified to section 7614 of this title.

Another prior section 307 of act July 14, 1955, ch. 360, title III, formerly §14, as added Dec. 17, 1963, Pub. L. 88–206, §1, 77 Stat. 401, was renumbered section 307 by Pub. L. 89–272, renumbered section 310 by Pub. L. 90–148, and renumbered section 317 by Pub. L. 91–604, and is set out as a Short Title note under section 7401 of this title.

[6] So in original. Probably should be ''sections''.

AMENDMENTS

1990—Subsec. (a). Pub. L. 101–549, §703, struck out par. (1) designation at beginning, inserted provisions authorizing issuance of subpoenas and administration of oaths for purposes of investigations, monitoring, reporting requirements, entries, compliance inspections, or administrative enforcement proceedings under this chapter, and struck out ''or section 7521(b)(5)'' after ''section 7410(f)''.

Subsec. (b)(1). Pub. L. 101–549, §706(2), which directed amendment of second sentence by striking ''under section 7413(d) of this title'' immediately before ''under section 7419 of this title'', was executed by striking ''under section 7413(d) of this title,'' before ''under section 7419 of this title'', to reflect the probable intent of Congress.

Pub. L. 101–549, §706(1), inserted at end: ''The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.''

Pub. L. 101–549, §702(c), inserted ''or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title,'' before ''or any other final action of the Administrator''.

Pub. L. 101–549, §302(g), substituted ''section 7412'' for ''section 7412(c)''.

Subsec. (b)(2). Pub. L. 101–549, §707(h), inserted sentence at end authorizing challenge to deferrals of performance of nondiscretionary statutory actions.

Subsec. (d)(1)(C). Pub. L. 101–549, §110(5)(A), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: ''the promulgation or revision of any standard of performance under section 7411 of this title or emission standard under section 7412 of this title,''.

Subsec. (d)(1)(D), (E). Pub. L. 101–549, §302(h), added subpar. (D) and redesignated former subpar. (D) as (E). Former subpar. (E) redesignated (F).

Subsec. (d)(1)(F). Pub. L. 101–549, §302(h), redesignated subpar. (E) as (F). Former subpar. (F) redesignated (G).

Pub. L. 101–549, §110(5)(B), amended subpar. (F) generally. Prior to amendment, subpar. (F) read as follows: ''promulgation or revision of regulations pertaining to orders for coal conversion under section 7413(d)(5) of this title (but not including orders granting or denying any such orders),''.

Subsec. (d)(1)(G), (H). Pub. L. 101–549, §302(h), redesignated subpars. (F) and (G) as (G) and (H), respectively. Former subpar. (H) redesignated (I).

Subsec. (d)(1)(I). Pub. L. 101–549, §710(b), which directed that subpar. (H) be amended by substituting ''subchapter VI of this chapter'' for ''part B of subchapter I of this chapter'', was executed by making the substitution in subpar. (I), to reflect the probable intent of Congress and the intervening redesignation of subpar. (H) as (I) by Pub. L. 101–549, §302(h), see below.

Pub. L. 101–549, §302(h), redesignated subpar. (H) as (I). Former subpar. (I) redesignated (J).

Subsec. (d)(1)(J) to (M). Pub. L. 101–549, §302(h), redesignated subpars. (I) to (L) as (J) to (M), respectively. Former subpar. (M) redesignated (N).

Subsec. (d)(1)(N). Pub. L. 101–549, §302(h), redesignated subpar. (M) as (N). Former subpar. (N) redesignated (O).

Pub. L. 101–549, §110(5)(C), added subpar. (N) and redesignated former subpar. (N) as (U).

Subsec. (d)(1)(O) to (T). Pub. L. 101–549, §302(h), redesignated subpars. (N) to (S) as (O) to (T), respectively. Former subpar. (T) redesignated (U).

Pub. L. 101–549, §110(5)(C), added subpars. (O) to (T).

Subsec. (d)(1)(U). Pub. L. 101–549, §302(h), redesignated subpar. (T) as (U). Former subpar. (U) redesignated (V).

Pub. L. 101–549, §110(5)(C), redesignated former subpar. (N) as (U).

Subsec. (d)(1)(V). Pub. L. 101–549, §302(h), redesignated subpar. (U) as (V).

Subsec. (h). Pub. L. 101–549, § 108(p), added subsec. (h).

1977—Subsec. (b)(1). Pub. L. 95–190 in text relating to filing of petitions for review in the United States Court of Appeals for the District of Columbia inserted provision respecting requirements under sections 7411 and 7412 of this title, and substituted provisions authorizing review of any rule issued under section 7413, 7419, or 7420 of this title, for provisions authorizing review of any rule or order issued under section 7420 of this title, relating to noncompliance penalties, and in text relating to filing of petitions for review in the United States Court of Appeals for the appropriate circuit inserted provision respecting review under section 7411(j), 7412(c), 7413(d), or 7419 of this title, provision authorizing review under section 1857c–10(c)(2)(A), (B), or (C) to the period prior to Aug. 7, 1977, and provisions authorizing review of denials or disapprovals by the Administrator under subchapter I of this chapter.

Pub. L. 95–95, § 305(c), (h), inserted rules or orders issued under section 7420 of this title (relating to noncompliance penalties) and any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter to the enumeration of actions of the Administrator for which a petition for review may be filed only in the United States Court of Appeals for the District of Columbia, added the approval or promulgation by the Administrator of orders under section 7420 of this title, or any other final action of the Administrator under this chapter which is locally or regionally applicable to the enumeration of actions by the Administrator for which a petition for review may be filed only in the United States Court of Appeals for the appropriate circuit, inserted provision that petitions otherwise capable of being filed in the Court of Appeals for the appropriate circuit may be filed only in the Court of Appeals for the District of Columbia if the action is based on a determination of nationwide scope, and increased from 30 days to 60 days the period during which the petition must be filed.

Subsec. (d). Pub. L. 95–95, § 305(a), added subsec. (d).

Subsec. (e). Pub. L. 95–95, § 303(d), added subsec. (e).

Subsec. (f). Pub. L. 95–95, § 305(f), added subsec. (f).

Subsec. (g). Pub. L. 95–95, § 305(g), added subsec. (g).

1974—Subsec. (b)(1). Pub. L. 93–319 inserted reference to the Administrator's action under section 1857c–10(c)(2)(A), (B), or (C) of this title or under regulations thereunder and substituted reference to the filing of a petition within 30 days from the date of promulgation, approval, or action for reference to the filing of a petition within 30 days from the date of promulgation or approval.

1971—Subsec. (a)(1). Pub. L. 92–157 substituted reference to section ''7545(c)(3)'' for ''7545(c)(4)'' of this title.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

TERMINATION OF ADVISORY COMMITTEES

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95–95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95–95, see section 406(a) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95–95 [this chapter], see section 406(b) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7608. Mandatory licensing

Whenever the Attorney General determines, upon application of the Administrator—

(1) that—

(A) in the implementation of the requirements of section 7411, 7412, or 7521 of this title, a right under any United States letters patent, which is being used or intended for public or commercial use and not otherwise reasonably available, is necessary to enable any person required to comply with such limitation to so comply, and

(B) there are no reasonable alternative methods to accomplish such purpose, and

(2) that the unavailability of such right may result in a substantial lessening of competition or tendency to create a monopoly in any line of commerce in any section of the country,

the Attorney General may so certify to a district court of the United States, which may issue an order requiring the person who owns such patent to license it on such reasonable terms and conditions as the court, after hearing, may determine. Such certification may be made to the district court for the district in which the person owning the patent resides, does business, or is found.

(July 14, 1955, ch. 360, title III, § 308, as added Pub. L. 91–604, § 12(a), Dec. 31, 1970, 84 Stat. 1708.)

CODIFICATION

Section was formerly classified to section 1857h–6 of this title.

PRIOR PROVISIONS

A prior section 308 of act July 14, 1955, was renumbered section 315 by Pub. L. 91–604 and is classified to section 7615 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect

pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of ''best available control technology'' result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term ''baseline concentration'' means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

(July 14, 1955, ch. 360, title I, §169, as added Pub. L. 95–95, title I, §127(a), Aug. 7, 1977, 91 Stat. 740; amended Pub. L. 95–190, §14(a)(54), Nov. 16, 1977, 91 Stat. 1402; Pub. L. 101–549, title III, §305(b), title IV, §403(d), Nov. 15, 1990, 104 Stat. 2583, 2631.)

AMENDMENTS

1990—Par. (1). Pub. L. 101–549, §305(b), struck out ''two hundred and'' after ''municipal incinerators capable of charging more than''.

Par. (3). Pub. L. 101–549, §403(d), directed the insertion of '', clean fuels,'' after ''including fuel cleaning,'', which was executed by making the insertion after ''including fuel cleaning'' to reflect the probable intent of Congress, and inserted at end ''Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.''

1977—Par. (2)(C). Pub. L. 95–190 added subpar. (C).

STUDY OF MAJOR EMITTING FACILITIES WITH POTENTIAL OF EMITTING 250 TONS PER YEAR

Section 127(b) of Pub. L. 95–95 directed Administrator, within 1 year after Aug. 7, 1977, to report to Congress on consequences of that portion of definition of ''major emitting facility'' under this subpart which applies to facilities with potential to emit 250 tons per year or more.

SUBPART II—VISIBILITY PROTECTION

CODIFICATION

As originally enacted, subpart II of part C of subchapter I of this chapter was added following section 7478 of this title. Pub. L. 95–190, §14(a)(53), Nov. 16, 1977, 91 Stat. 1402, struck out subpart II and inserted such subpart following section 7479 of this title.

§ 7491. Visibility protection for Federal class I areas

(a) Impairment of visibility; list of areas; study and report

(1) Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution.

(2) Not later than six months after August 7, 1977, the Secretary of the Interior in consultation with other Federal land managers shall review all mandatory class I Federal areas and identify those where visibility is an important value of the area. From time to time the Secretary of the Interior may revise such identifications. Not later than one year after August 7, 1977, the Administrator shall, after consultation with the Secretary of the Interior, promulgate a list of mandatory class I Federal areas in which he determines visibility is an important value.

(3) Not later than eighteen months after August 7, 1977, the Administrator shall complete a study and report to Congress on available methods for implementing the national goal set forth in paragraph (1). Such report shall include recommendations for—

(A) methods for identifying, characterizing, determining, quantifying, and measuring visibility impairment in Federal areas referred to in paragraph (1), and

(B) modeling techniques (or other methods) for determining the extent to which manmade air pollution may reasonably be anticipated to cause or contribute to such impairment, and

(C) methods for preventing and remedying such manmade air pollution and resulting visibility impairment.

Such report shall also identify the classes or categories of sources and the types of air pollutants which, alone or in conjunction with other sources or pollutants, may reasonably be anticipated to cause or contribute significantly to impairment of visibility.

(4) Not later than twenty-four months after August 7, 1977, and after notice and public hearing, the Administrator shall promulgate regulations to assure (A) reasonable progress toward meeting the national goal specified in paragraph (1), and (B) compliance with the requirements of this section.

(b) Regulations

Regulations under subsection (a)(4) of this section shall—

(1) provide guidelines to the States, taking into account the recommendations under sub-

section (a)(3) of this section on appropriate techniques and methods for implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a)(3)), and

(2) require each applicable implementation plan for a State in which any area listed by the Administrator under subsection (a)(2) of this section is located (or for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area) to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal specified in subsection (a) of this section, including—

(A) except as otherwise provided pursuant to subsection (c) of this section, a requirement that each major stationary source which is in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date, and which, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment, and

(B) a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal specified in subsection (a) of this section.

In the case of a fossil-fuel fired generating powerplant having a total generating capacity in excess of 750 megawatts, the emission limitations required under this paragraph shall be determined pursuant to guidelines, promulgated by the Administrator under paragraph (1).

(c) Exemptions

(1) The Administrator may, by rule, after notice and opportunity for public hearing, exempt any major stationary source from the requirement of subsection (b)(2)(A) of this section, upon his determination that such source does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to a significant impairment of visibility in any mandatory class I Federal area.

(2) Paragraph (1) of this subsection shall not be applicable to any fossil-fuel fired powerplant with total design capacity of 750 megawatts or more, unless the owner or operator of any such plant demonstrates to the satisfaction of the Administrator that such powerplant is located at such distance from all areas listed by the Administrator under subsection (a)(2) of this section that such powerplant does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such area.

(3) An exemption under this subsection shall be effective only upon concurrence by the appropriate Federal land manager or managers with the Administrator's determination under this subsection.

(d) Consultations with appropriate Federal land managers

Before holding the public hearing on the proposed revision of an applicable implementation plan to meet the requirements of this section, the State (or the Administrator, in the case of a plan promulgated under section 7410(c) of this title) shall consult in person with the appropriate Federal land manager or managers and shall include a summary of the conclusions and recommendations of the Federal land managers in the notice to the public.

(e) Buffer zones

In promulgating regulations under this section, the Administrator shall not require the use of any automatic or uniform buffer zone or zones.

(f) Nondiscretionary duty

For purposes of section 7604(a)(2) of this title, the meeting of the national goal specified in subsection (a)(1) of this section by any specific date or dates shall not be considered a ''nondiscretionary duty'' of the Administrator.

(g) Definitions

For the purpose of this section—

(1) in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements;

(2) in determining best available retrofit technology the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology;

(3) the term ''manmade air pollution'' means air pollution which results directly or indirectly from human activities;

(4) the term ''as expeditiously as practicable'' means as expeditiously as practicable but in no event later than five years after the date of approval of a plan revision under this section (or the date of promulgation of such a plan revision in the case of action by the Administrator under section 7410(c) of this title for purposes of this section);

(5) the term ''mandatory class I Federal areas'' means Federal areas which may not be designated as other than class I under this part;

(6) the terms ''visibility impairment'' and ''impairment of visibility'' shall include reduction in visual range and atmospheric discoloration; and

(7) the term ''major stationary source'' means the following types of stationary sources with the potential to emit 250 tons or more of any pollutant: fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than 250 million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities.

(July 14, 1955, ch. 360, title I, §169A, as added Pub. L. 95–95, title I, §128, Aug. 7, 1977, 91 Stat. 742.)

EFFECTIVE DATE

Subpart effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7492. Visibility

(a) Studies

(1) The Administrator, in conjunction with the National Park Service and other appropriate Federal agencies, shall conduct research to identify and evaluate sources and source regions of both visibility impairment and regions that provide predominantly clean air in class I areas. A total of $8,000,000 per year for 5 years is authorized to be appropriated for the Environmental Protection Agency and the other Federal agencies to conduct this research. The research shall include—

(A) expansion of current visibility related monitoring in class I areas;

(B) assessment of current sources of visibility impairing pollution and clean air corridors;

(C) adaptation of regional air quality models for the assessment of visibility;

(D) studies of atmospheric chemistry and physics of visibility.

(2) Based on the findings available from the research required in subsection (a)(1) of this section as well as other available scientific and technical data, studies, and other available information pertaining to visibility source-receptor relationships, the Administrator shall conduct an assessment and evaluation that identifies, to the extent possible, sources and source regions of visibility impairment including natural sources as well as source regions of clear air for class I areas. The Administrator shall produce interim findings from this study within 3 years after November 15, 1990.

(b) Impacts of other provisions

Within 24 months after November 15, 1990, the Administrator shall conduct an assessment of the progress and improvements in visibility in class I areas that are likely to result from the implementation of the provisions of the Clean Air Act Amendments of 1990 other than the provisions of this section. Every 5 years thereafter the Administrator shall conduct an assessment of actual progress and improvement in visibility in class I areas. The Administrator shall prepare a written report on each assessment and transmit copies of these reports to the appropriate committees of Congress.

(c) Establishment of visibility transport regions and commissions

(1) Authority to establish visibility transport regions

Whenever, upon the Administrator's motion or by petition from the Governors of at least two affected States, the Administrator has reason to believe that the current or projected interstate transport of air pollutants from one or more States contributes significantly to visibility impairment in class I areas located in the affected States, the Administrator may establish a transport region for such pollutants that includes such States. The Administrator, upon the Administrator's own motion or upon petition from the Governor of any affected State, or upon the recommendations of a transport commission established under subsection (b) of this section[1] may—

(A) add any State or portion of a State to a visibility transport region when the Administrator determines that the interstate transport of air pollutants from such State significantly contributes to visibility impairment in a class I area located within the transport region, or

(B) remove any State or portion of a State from the region whenever the Administrator has reason to believe that the control of emissions in that State or portion of the State pursuant to this section will not significantly contribute to the protection or enhancement of visibility in any class I area in the region.

(2) Visibility transport commissions

Whenever the Administrator establishes a transport region under subsection (c)(1) of this section, the Administrator shall establish a transport commission comprised of (as a minimum) each of the following members:

(A) the Governor of each State in the Visibility Transport Region, or the Governor's designee;

(B) The[2] Administrator or the Administrator's designee; and

(C) A[2] representative of each Federal agency charged with the direct management of each class I area or areas within the Visibility Transport Region.

(3) Ex officio members

All representatives of the Federal Government shall be ex officio members.

[1] So in original. Words ''subsection (b) of this section'' probably should be ''paragraph (2)''.

[2] So in original. Probably should not be capitalized.

semiannual, or other regular periodic report listed in House Document No. 103–7 (in which the report required by subsec. (j) of this section is listed on page 151), see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance.

TERMINATION OF ADMINISTRATIVE CONFERENCE OF UNITED STATES

For termination of Administrative Conference of United States, see provision of title IV of Pub. L. 104–52, set out as a note preceding section 591 of this title.

DECLARATION OF POLICY AND STATEMENT OF PURPOSE

Pub. L. 94–409, § 2, Sept. 13, 1976, 90 Stat. 1241, provided that: ''It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act [see Short Title note set out above] to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.''

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1003.	June 11, 1946, ch. 324, § 4, 60 Stat. 238.

In subsection (a)(1), the words ''or naval'' are omitted as included in ''military''.

In subsection (b), the word ''when'' is substituted for ''in any situation in which''.

In subsection (c), the words ''for oral presentation'' are substituted for ''to present the same orally in any manner''. The words ''sections 556 and 557 of this title apply instead of this subsection'' are substituted for ''the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection''.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CODIFICATION

Section 553 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2245 of Title 7, Agriculture.

EXECUTIVE ORDER NO. 12044

Ex. Ord. No. 12044, Mar. 23, 1978, 43 F.R. 12661, as amended by Ex. Ord. No. 12221, June 27, 1980, 45 F.R. 44249, which related to the improvement of Federal regulations, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a[1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

[1] So in original.

(c) To demonstrate attainment, the second-highest 3-hour average must be based upon hourly data that are at least 75 percent complete in each calendar quarter. A 3-hour block average shall be considered valid only if all three hourly averages for the 3-hour period are available. If only one or two hourly averages are available, but the 3-hour average would exceed the level of the standard when zeros are substituted for the missing values, subject to the rounding rule of paragraph (a) of this section, then this shall be considered a valid 3-hour average. In all cases, the 3-hour block average shall be computed as the sum of the hourly averages divided by 3.

[61 FR 25580, May 22, 1996]

§ 50.6 National primary and secondary ambient air quality standards for PM_{10}.

(a) The level of the national primary and secondary 24-hour ambient air quality standards for particulate matter is 150 micrograms per cubic meter ($\mu g/m^3$), 24-hour average concentration. The standards are attained when the expected number of days per calendar year with a 24-hour average concentration above 150 $\mu g/m^3$, as determined in accordance with appendix K to this part, is equal to or less than one.

(b) [Reserved]

(c) For the purpose of determining attainment of the primary and secondary standards, particulate matter shall be measured in the ambient air as PM_{10} (particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers) by:

(1) A reference method based on appendix J and designated in accordance with part 53 of this chapter, or

(2) An equivalent method designated in accordance with part 53 of this chapter.

[52 FR 24663, July 1, 1987, as amended at 62 FR 38711, July 18, 1997; 65 FR 80779, Dec. 22, 2000; 71 FR 61224, Oct. 17, 2006]

§ 50.7 National primary and secondary ambient air quality standards for $PM_{2.5}$.

(a) The national primary and secondary ambient air quality standards for particulate matter are 15.0 micrograms per cubic meter ($\mu g/m^3$) annual arithmetic mean concentration, and 65 $\mu g/m^3$ 24-hour average concentration measured in the ambient air as $PM_{2.5}$ (particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) by either:

(1) A reference method based on appendix L of this part and designated in accordance with part 53 of this chapter; or

(2) An equivalent method designated in accordance with part 53 of this chapter.

(b) The annual primary and secondary $PM_{2.5}$ standards are met when the annual arithmetic mean concentration, as determined in accordance with appendix N of this part, is less than or equal to 15.0 micrograms per cubic meter.

(c) The 24-hour primary and secondary $PM_{2.5}$ standards are met when the 98^{th} percentile 24-hour concentration, as determined in accordance with appendix N of this part, is less than or equal to 65 micrograms per cubic meter.

[62 FR 38711, July 18, 1997, as amended at 69 FR 45595, July 30, 2004]

§ 50.8 National primary ambient air quality standards for carbon monoxide.

(a) The national primary ambient air quality standards for carbon monoxide are:

(1) 9 parts per million (10 milligrams per cubic meter) for an 8-hour average concentration not to be exceeded more than once per year and

(2) 35 parts per million (40 milligrams per cubic meter) for a 1-hour average concentration not to be exceeded more than once per year.

(b) The levels of carbon monoxide in the ambient air shall be measured by:

(1) A reference method based on appendix C and designated in accordance with part 53 of this chapter, or

(2) An equivalent method designated in accordance with part 53 of this chapter.

(c) An 8-hour average shall be considered valid if at least 75 percent of the hourly average for the 8-hour period are available. In the event that only six (or seven) hourly averages are available, the 8-hour average shall be computed on the basis of the hours

in accordance with appendix S of this part for the annual standard.

(f) The 1-hour primary standard is met when the three-year average of the annual 98th percentile of the daily maximum 1-hour average concentration is less than or equal to 100 ppb, as determined in accordance with appendix S of this part for the 1-hour standard.

(g) The secondary standard is attained when the annual arithmetic mean concentration in a calendar year is less than or equal to 0.053 ppm, rounded to three decimal places (fractional parts equal to or greater than 0.0005 ppm must be rounded up). To demonstrate attainment, an annual mean must be based upon hourly data that are at least 75 percent complete or upon data derived from manual methods that are at least 75 percent complete for the scheduled sampling days in each calendar quarter.

[75 FR 6531, Feb. 9, 2010]

§ 50.12 National primary and secondary ambient air quality standards for lead.

(a) National primary and secondary ambient air quality standards for lead and its compounds, measured as elemental lead by a reference method based on appendix G to this part, or by an equivalent method, are: 1.5 micrograms per cubic meter, maximum arithmetic mean averaged over a calendar quarter.

(b) The standards set forth in this section will remain applicable to all areas notwithstanding the promulgation of lead national ambient air quality standards (NAAQS) in § 50.16. The lead NAAQS set forth in this section will no longer apply to an area one year after the effective date of the designation of that area, pursuant to section 107 of the Clean Air Act, for the lead NAAQS set forth in § 50.16; except that for areas designated nonattainment for the lead NAAQS set forth in this section as of the effective date of § 50.16, the lead NAAQS set forth in this section will apply until that area submits, pursuant to section 191 of the Clean Air Act, and EPA approves, an implementation plan providing for attainment and/or maintenance of the lead NAAQS set forth in § 50.16.

(Secs. 109, 301(a) Clean Air Act as amended (42 U.S.C. 7409, 7601(a)))

[43 FR 46258, Oct. 5, 1978, as amended at 73 FR 67051, Nov. 12, 2008]

§ 50.13 National primary and secondary ambient air quality standards for $PM_{2.5}$.

(a) The national primary and secondary ambient air quality standards for particulate matter are 15.0 micrograms per cubic meter ($\mu g/m^3$) annual arithmetic mean concentration, and 35 $\mu g/m^3$ 24-hour average concentration measured in the ambient air as $PM_{2.5}$ (particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) by either:

(1) A reference method based on appendix L of this part and designated in accordance with part 53 of this chapter; or

(2) An equivalent method designated in accordance with part 53 of this chapter.

(b) The annual primary and secondary $PM_{2.5}$ standards are met when the annual arithmetic mean concentration, as determined in accordance with appendix N of this part, is less than or equal to 15.0 $\mu g/m^3$.

(c) The 24-hour primary and secondary $PM_{2.5}$ standards are met when the 98th percentile 24-hour concentration, as determined in accordance with appendix N of this part, is less than or equal to 35 $\mu g/m^3$.

[71 FR 61224, Oct. 17, 2006]

§ 50.14 Treatment of air quality monitoring data influenced by exceptional events.

(a) *Requirements.* (1) A State may request EPA to exclude data showing exceedances or violations of the national ambient air quality standard that are directly due to an exceptional event from use in determinations by demonstrating to EPA's satisfaction that such event caused a specific air pollution concentration at a particular air quality monitoring location.

(2) Demonstration to justify data exclusion may include any reliable and accurate data, but must demonstrate a clear causal relationship between the

the reporting frequency(ies) specified for such facility under this part, the owner or operator may change the dates by which periodic reports under this part shall be submitted (without changing the frequency of reporting) to be consistent with the State's schedule by mutual agreement between the owner or operator and the State. The allowance in the previous sentence applies in each State beginning 1 year after the affected facility is required to be in compliance with the applicable subpart in this part. Procedures governing the implementation of this provision are specified in paragraph (f) of this section.

(e) If an owner or operator supervises one or more stationary sources affected by standards set under this part and standards set under part 61, part 63, or both such parts of this chapter, he/she may arrange by mutual agreement between the owner or operator and the Administrator (or the State with an approved permit program) a common schedule on which periodic reports required by each applicable standard shall be submitted throughout the year. The allowance in the previous sentence applies in each State beginning 1 year after the stationary source is required to be in compliance with the applicable subpart in this part, or 1 year after the stationary source is required to be in compliance with the applicable 40 CFR part 61 or part 63 of this chapter standard, whichever is latest. Procedures governing the implementation of this provision are specified in paragraph (f) of this section.

(f)(1)(i) Until an adjustment of a time period or postmark deadline has been approved by the Administrator under paragraphs (f)(2) and (f)(3) of this section, the owner or operator of an affected facility remains strictly subject to the requirements of this part.

(ii) An owner or operator shall request the adjustment provided for in paragraphs (f)(2) and (f)(3) of this section each time he or she wishes to change an applicable time period or postmark deadline specified in this part.

(2) Notwithstanding time periods or postmark deadlines specified in this part for the submittal of information to the Administrator by an owner or operator, or the review of such information by the Administrator, such time periods or deadlines may be changed by mutual agreement between the owner or operator and the Administrator. An owner or operator who wishes to request a change in a time period or postmark deadline for a particular requirement shall request the adjustment in writing as soon as practicable before the subject activity is required to take place. The owner or operator shall include in the request whatever information he or she considers useful to convince the Administrator that an adjustment is warranted.

(3) If, in the Administrator's judgment, an owner or operator's request for an adjustment to a particular time period or postmark deadline is warranted, the Administrator will approve the adjustment. The Administrator will notify the owner or operator in writing of approval or disapproval of the request for an adjustment within 15 calendar days of receiving sufficient information to evaluate the request.

(4) If the Administrator is unable to meet a specified deadline, he or she will notify the owner or operator of any significant delay and inform the owner or operator of the amended schedule.

[59 FR 12428, Mar. 16, 1994]

Subpart B—Adoption and Submittal of State Plans for Designated Facilities

SOURCE: 40 FR 53346, Nov. 17, 1975, unless otherwise noted.

§ 60.20 Applicability.

The provisions of this subpart apply to States upon publication of a final guideline document under §60.22(a).

§ 60.21 Definitions.

Terms used but not defined in this subpart shall have the meaning given them in the Act and in subpart A:

(a) *Designated pollutant* means any air pollutant, emissions of which are subject to a standard of performance for new stationary sources but for which air quality criteria have not been issued, and which is not included on a

list published under section 108(a) or section 112(b)(1)(A) of the Act.

(b) *Designated facility* means any existing facility (see §60.2(aa)) which emits a designated pollutant and which would be subject to a standard of performance for that pollutant if the existing facility were an affected facility (see §60.2(e)).

(c) *Plan* means a plan under section 111(d) of the Act which establishes emission standards for designated pollutants from designated facilities and provides for the implementation and enforcement of such emission standards.

(d) *Applicable plan* means the plan, or most recent revision thereof, which has been approved under §60.27(b) or promulgated under §60.27(d).

(e) *Emission guideline* means a guideline set forth in subpart C of this part, or in a final guideline document published under §60.22(a), which reflects the degree of emission reduction achievable through the application of the best system of emission reduction which (taking into account the cost of such reduction) the Administrator has determined has been adequately demonstrated for designated facilities.

(f) *Emission standard* means a legally enforceable regulation setting forth an allowable rate of emissions into the atmosphere, or prescribing equipment specifications for control of air pollution emissions.

(g) *Compliance schedule* means a legally enforceable schedule specifying a date or dates by which a source or category of sources must comply with specific emission standards contained in a plan or with any increments of progress to achieve such compliance.

(h) *Increments of progress* means steps to achieve compliance which must be taken by an owner or operator of a designated facility, including:

(1) Submittal of a final control plan for the designated facility to the appropriate air pollution control agency;

(2) Awarding of contracts for emission control systems or for process modifications, or issuance of orders for the purchase of component parts to accomplish emission control or process modification;

(3) Initiation of on-site construction or installation of emission control equipment or process change;

(4) Completion of on-site construction or installation of emission control equipment or process change; and

(5) Final compliance.

(i) *Region* means an air quality control region designated under section 107 of the Act and described in part 81 of this chapter.

(j) *Local agency* means any local governmental agency.

§60.22 Publication of guideline documents, emission guidelines, and final compliance times.

(a) Concurrently upon or after proposal of standards of performance for the control of a designated pollutant from affected facilities, the Administrator will publish a draft guideline document containing information pertinent to control of the designated pollutant form designated facilities. Notice of the availability of the draft guideline document will be published in the FEDERAL REGISTER and public comments on its contents will be invited. After consideration of public comments and upon or after promulgation of standards of performance for control of a designated pollutant from affected facilities, a final guideline document will be published and notice of its availability will be published in the FEDERAL REGISTER.

(b) Guideline documents published under this section will provide information for the development of State plans, such as:

(1) Information concerning known or suspected endangerment of public health or welfare caused, or contributed to, by the designated pollutant.

(2) A description of systems of emission reduction which, in the judgment of the Administrator, have been adequately demonstrated.

(3) Information on the degree of emission reduction which is achievable with each system, together with information on the costs and environmental effects of applying each system to designated facilities.

(4) Incremental periods of time normally expected to be necessary for the design, installation, and startup of identified control systems.

(5) An emission guideline that reflects the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated for designated facilities, and the time within which compliance with emission standards of equivalent stringency can be achieved. The Administrator will specify different emission guidelines or compliance times or both for different sizes, types, and classes of designated facilities when costs of control, physical limitations, geographical location, or similar factors make subcategorization appropriate. (6) Such other available information as the Administrator determines may contribute to the formulation of State plans.

(c) Except as provided in paragraph (d)(1) of this section, the emission guidelines and compliance times referred to in paragraph (b)(5) of this section will be proposed for comment upon publication of the draft guideline document, and after consideration of comments will be promulgated in subpart C of this part with such modifications as may be appropriate.

(d)(1) If the Administrator determines that a designated pollutant may cause or contribute to endangerment of public welfare, but that adverse effects on public health have not been demonstrated, he will include the determination in the draft guideline document and in the FEDERAL REGISTER notice of its availability. Except as provided in paragraph (d)(2) of this section, paragraph (c) of this section shall be inapplicable in such cases.

(2) If the Administrator determines at any time on the basis of new information that a prior determination under paragraph (d)(1) of this section is incorrect or no longer correct, he will publish notice of the determination in the FEDERAL REGISTER, revise the guideline document as necessary under paragraph (a) of this section, and propose and promulgate emission guidelines and compliance times under paragraph (c) of this section.

[40 FR 53346, Nov. 17, 1975, as amended at 54 FR 52189, Dec. 20, 1989]

§ 60.23 Adoption and submittal of State plans; public hearings.

(a)(1) Within nine months after notice of the availability of a final guideline document is published under §60.22(a), each State shall adopt and submit to the Administrator, in accordance with §60.4, a plan for the control of the designated pollutant to which the guideline document applies.

(2) Within nine months after notice of the availability of a final revised guideline document is published as provided in §60.22(d)(2), each State shall adopt and submit to the Administrator any plan revision necessary to meet the requirements of this subpart.

(b) If no designated facility is located within a State, the State shall submit a letter of certification to that effect to the Administrator within the time specified in paragraph (a) of this section. Such certification shall exempt the State from the requirements of this subpart for that designated pollutant.

(c)(1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, the State shall, prior to the adoption of any plan or revision thereof, conduct one or more public hearings within the State on such plan or plan revision.

(2) No hearing shall be required for any change to an increment of progress in an approved compliance schedule unless the change is likely to cause the facility to be unable to comply with the final compliance date in the schedule.

(3) No hearing shall be required on an emission standard in effect prior to the effective date of this subpart if it was adopted after a public hearing and is at least as stringent as the corresponding emission guideline specified in the applicable guideline document published under §60.22(a).

(d) Any hearing required by paragraph (c) of this section shall be held only after reasonable notice. Notice shall be given at least 30 days prior to the date of such hearing and shall include:

(1) Notification to the public by prominently advertising the date, time, and place of such hearing in each region affected;

(2) Availability, at the time of public announcement, of each proposed plan

or operator must not cause to be discharged into the atmosphere from the affected facility any gases which contain a combined concentration of NO_X and CO in excess of 280 ng/J (0.65 lb/MMBtu) heat input.

(ii) For each thermal dryer reconstructed or modified after May 27, 2009, the owner or operator must not cause to be discharged into the atmosphere from the affected facility any gases which contain combined concentration of NO_X and CO in excess of 430 ng/J (1.0 lb/MMBtu) heat input.

(iii) Thermal dryers that receive all of their thermal input from a source other than coal or residual oil, that receive all of their thermal input from a source subject to a NO_X limit and/or CO limit under another subpart of this part, or that use waste heat or residual from the combustion of coal or residual oil as their only thermal input, are not subject to the combined NO_X and CO limits of this section.

(c) Thermal dryers receiving all of their thermal input from an affected facility covered under another 40 CFR Part 60 subpart must meet the applicable requirements in that subpart but are not subject to the requirements in this subpart.

§ 60.253 Standards for pneumatic coal-cleaning equipment.

(a) On and after the date on which the performance test is conducted or required to be completed under § 60.8, whichever date comes first, an owner or operator of pneumatic coal-cleaning equipment constructed, reconstructed, or modified on or before April 28, 2008, must meet the requirements of paragraphs (a)(1) and (a)(2) of this section.

(1) The owner or operator must not cause to be discharged into the atmosphere from the pneumatic coal-cleaning equipment any gases that contain PM in excess of 0.040 g/dscm (0.017 gr/dscf); and

(2) The owner or operator must not cause to be discharged into the atmosphere from the pneumatic coal-cleaning equipment any gases that exhibit 10 percent opacity or greater.

(b) On and after the date on which the performance test is conducted or required to be completed under § 60.8, whichever date comes first, an owner or operator of pneumatic coal-cleaning equipment constructed, reconstructed, or modified after April 28, 2008, must meet the requirements in paragraphs (b)(1) and (b)(2) of this section.

(1) The owner of operator must not cause to be discharged into the atmosphere from the pneumatic coal-cleaning equipment any gases that contain PM in excess or 0.023 g/dscm (0.010 gr/dscf); and

(2) The owner or operator must not cause to be discharged into the atmosphere from the pneumatic coal-cleaning equipment any gases that exhibit greater than 5 percent opacity.

§ 60.254 Standards for coal processing and conveying equipment, coal storage systems, transfer and loading systems, and open storage piles.

(a) On and after the date on which the performance test is conducted or required to be completed under § 60.8, whichever date comes first, an owner or operator shall not cause to be discharged into the atmosphere from any coal processing and conveying equipment, coal storage system, or coal transfer and loading system processing coal constructed, reconstructed, or modified on or before April 28, 2008, gases which exhibit 20 percent opacity or greater.

(b) On and after the date on which the performance test is conducted or required to be completed under § 60.8, whichever date comes first, an owner or operator of any coal processing and conveying equipment, coal storage system, or coal transfer and loading system processing coal constructed, reconstructed, or modified after April 28, 2008, must meet the requirements in paragraphs (b)(1) through (3) of this section, as applicable to the affected facility.

(1) Except as provided in paragraph (b)(3) of this section, the owner or operator must not cause to be discharged into the atmosphere from the affected facility any gases which exhibit 10 percent opacity or greater.

(2) The owner or operator must not cause to be discharged into the atmosphere from any mechanical vent on an affected facility gases which contain particulate matter in excess of 0.023 g/dscm (0.010 gr/dscf).

(3) Equipment used in the loading, unloading, and conveying operations of open storage piles are not subject to the opacity limitations of paragraph (b)(1) of this section.

(c) The owner or operator of an open storage pile, which includes the equipment used in the loading, unloading, and conveying operations of the affected facility, constructed, reconstructed, or modified after May 27, 2009, must prepare and operate in accordance with a submitted fugitive coal dust emissions control plan that is appropriate for the site conditions as specified in paragraphs (c)(1) through (6) of this section.

(1) The fugitive coal dust emissions control plan must identify and describe the control measures the owner or operator will use to minimize fugitive coal dust emissions from each open storage pile.

(2) For open coal storage piles, the fugitive coal dust emissions control plan must require that one or more of the following control measures be used to minimize to the greatest extent practicable fugitive coal dust: Locating the source inside a partial enclosure, installing and operating a water spray or fogging system, applying appropriate chemical dust suppression agents on the source (when the provisions of paragraph (c)(6) of this section are met), use of a wind barrier, compaction, or use of a vegetative cover. The owner or operator must select, for inclusion in the fugitive coal dust emissions control plan, the control measure or measures listed in this paragraph that are most appropriate for site conditions. The plan must also explain how the measure or measures selected are applicable and appropriate for site conditions. In addition, the plan must be revised as needed to reflect any changing conditions at the source.

(3) Any owner or operator of an affected facility that is required to have a fugitive coal dust emissions control plan may petition the Administrator to approve, for inclusion in the plan for the affected facility, alternative control measures other than those specified in paragraph (c)(2) of this section as specified in paragraphs (c)(3)(i) through (iv) of this section.

(i) The petition must include a description of the alternative control measures, a copy of the fugitive coal dust emissions control plan for the affected facility that includes the alternative control measures, and information sufficient for EPA to evaluate the demonstrations required by paragraph (c)(3)(ii) of this section.

(ii) The owner or operator must either demonstrate that the fugitive coal dust emissions control plan that includes the alternate control measures will provide equivalent overall environmental protection or demonstrate that it is either economically or technically infeasible for the affected facility to use the control measures specifically identified in paragraph (c)(2).

(iii) While the petition is pending, the owner or operator must comply with the fugitive coal dust emissions control plan including the alternative control measures submitted with the petition. Operation in accordance with the plan submitted with the petition shall be deemed to constitute compliance with the requirement to operate in accordance with a fugitive coal dust emissions control plan that contains one of the control measures specifically identified in paragraph (c)(2) of this section while the petition is pending.

(iv) If the petition is approved by the Administrator, the alternative control measures will be approved for inclusion in the fugitive coal dust emissions control plan for the affected facility. In lieu of amending this subpart, a letter will be sent to the facility describing the specific control measures approved. The facility shall make any such letters and the applicable fugitive coal dust emissions control plan available to the public. If the Administrator determines it is appropriate, the conditions and requirements of the letter can be reviewed and changed at any point.

(4) The owner or operator must submit the fugitive coal dust emissions control plan to the Administrator or delegated authority as specified in paragraphs (c)(4)(i) and (c)(4)(ii) of this section.

(i) The plan must be submitted to the Administrator or delegated authority

prior to startup of the new, reconstructed, or modified affected facility, or 30 days after the effective date of this rule, whichever is later.

(ii) The plan must be revised as needed to reflect any changing conditions at the source. Such revisions must be dated and submitted to the Administrator or delegated authority before a source can operate pursuant to these revisions. The Administrator or delegated authority may also object to such revisions as specified in paragraph (c)(5) of this section.

(5) The Administrator or delegated authority may object to the fugitive coal dust emissions control plan as specified in paragraphs (c)(5)(i) and (c)(5)(ii) of this section.

(i) The Administrator or delegated authority may object to any fugitive coal dust emissions control plan that it has determined does not meet the requirements of paragraphs (c)(1) and (c)(2) of this section.

(ii) If an objection is raised, the owner or operator, within 30 days from receipt of the objection, must submit a revised fugitive coal dust emissions control plan to the Administrator or delegated authority. The owner or operator must operate in accordance with the revised fugitive coal dust emissions control plan. The Administrator or delegated authority retain the right, under paragraph (c)(5) of this section, to object to the revised control plan if it determines the plan does not meet the requirements of paragraphs (c)(1) and (c)(2) of this section.

(6) Where appropriate chemical dust suppression agents are selected by the owner or operator as a control measure to minimize fugitive coal dust emissions, (1) only chemical dust suppressants with Occupational Safety and Health Administration (OSHA)-compliant material safety data sheets (MSDS) are to be allowed; (2) the MSDS must be included in the fugitive coal dust emissions control plan; and (3) the owner or operator must consider and document in the fugitive coal dust emissions control plan the site-specific impacts associated with the use of such chemical dust suppressants.

§ 60.255 Performance tests and other compliance requirements.

(a) An owner or operator of each affected facility that commenced construction, reconstruction, or modification on or before April 28, 2008, must conduct all performance tests required by § 60.8 to demonstrate compliance with the applicable emission standards using the methods identified in § 60.257.

(b) An owner or operator of each affected facility that commenced construction, reconstruction, or modification after April 28, 2008, must conduct performance tests according to the requirements of § 60.8 and the methods identified in § 60.257 to demonstrate compliance with the applicable emissions standards in this subpart as specified in paragraphs (b)(1) and (2) of this section.

(1) For each affected facility subject to a PM, SO_2, or combined NO_X and CO emissions standard, an initial performance test must be performed. Thereafter, a new performance test must be conducted according the requirements in paragraphs (b)(1)(i) through (iii) of this section, as applicable.

(i) If the results of the most recent performance test demonstrate that emissions from the affected facility are greater than 50 percent of the applicable emissions standard, a new performance test must be conducted within 12 calendar months of the date that the previous performance test was required to be completed.

(ii) If the results of the most recent performance test demonstrate that emissions from the affected facility are 50 percent or less of the applicable emissions standard, a new performance test must be conducted within 24 calendar months of the date that the previous performance test was required to be completed.

(iii) An owner or operator of an affected facility that has not operated for the 60 calendar days prior to the due date of a performance test is not required to perform the subsequent performance test until 30 calendar days after the next operating day.

(2) For each affected facility subject to an opacity standard, an initial performance test must be performed. Thereafter, a new performance test

EXHIBIT 1

Declaration of Jeremy Nichols

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

WILDEARTH GUARDIANS,	)	
	)	
Petitioner,	)	Case No. 13-1212
	)	
v.	)	
	)	
U. S. ENVIRONMENTAL PROTECTION AGENCY and GINA MCCARTHY, Administrator, U.S. Environmental Protection Agency,	)	
	)	
Respondents,	)	
	)	
WYOMING MINING ASSOC., *et al*.,	)	
	)	
Respondent-Intervenors.	)	

DECLARATION OF JEREMY NICHOLS

I, Jeremy Nichols, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge. If called as a witness in these proceedings, I could and would testify competently to these facts.

2. I currently reside in Golden, Colorado.

3. I am a member of WildEarth Guardians and have been since July 2008. WildEarth Guardians is a non-profit environmental organization dedicated to protecting and restoring the wildlife, wild places and wild rivers throughout the

American West (primarily the interior western states of Arizona, Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, Washington, and Wyoming). A statement of WildEarth Guardians' mission and its general goals is online at http://www.wildearthguardians.org/site/PageServer?pagename=about (last visited Oct. 20, 2013). WildEarth Guardians is headquartered in Santa Fe, New Mexico, but maintains offices in Denver, Colorado, Tucson, Arizona, and Missoula, Montana. The organization has 7,827 members. I support the mission of the organization personally and professionally.

4. I am also the Director of WildEarth Guardians' Climate and Energy Program. WildEarth Guardians' Climate and Energy Program aims to protect the wildlife, wild places, and wild rivers of the American West from the impacts of fossil fuel development and consumption with an aim to curtail greenhouse gas and other harmful emissions. As Director of the Climate and Energy Program, I advocate for the development and promotion of cleaner energy solutions in order to safeguard our climate, our clean air, and our communities. As part of my work as Climate and Energy Program Director, I focus extensively on combating air pollution in the American West. To this end, I aided in preparing and submitting WildEarth Guardians' petition to the U.S. Environmental Protection Agency ("EPA") requesting that coal mines be listed as a source category under Section 111 of the Clean Air Act.

5. I enjoy visiting and recreating in the outdoors throughout the American West, particularly in the region's more remote and wild landscapes in the interior states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. My recreational activities include hiking, bicycling, camping, fishing, rockhounding, river floating, skiing, viewing scenic landscapes, observing plant life, and wildlife viewing. I enjoy these activities greatly; they keep me physically and mentally healthy. I enjoy the clean air outdoors, the undeveloped nature, and the feeling of "getting away" from the world for a little bit. Recreating outdoors is also important for my family. It gives my 11-year-old son and I a great opportunity to bond. I recreate outdoors at least four times a month and intend to continue doing so for the rest of my life. I often undertake these activities on public lands, including lands federally owned and managed by the U.S. Forest Service and Bureau of Land Management. Just last weekend, I recreated with my family on the Comanche National Grassland in southeastern Colorado, a large chunk of public lands managed by the U.S. Forest Service. We camped, hiked, viewed wildlife, searched for fossils, and enjoyed being in a remote corner of Colorado.

6. In my recreational visits outdoors in the West, I have frequently come across coal mining operations, including surface coal mining operations in northeastern and southeastern Wyoming (a region called the Powder River Basin),

in southern Wyoming, in northwestern and western Colorado, in northwestern New Mexico, and in northeastern Utah. There are many coal mines in the interior western states, including some of the largest surface coal mines in the world, so it is not hard to observe these mines while recreating outdoors in some amazing landscapes.

7. These mines, whether underground or surface mines, have very obvious and distressing impacts on the landscape. Whether it is an underground mine with large silos, coal piles, and other coal processing facilities at the surface, or a surface mine with extensive excavating operations, these facilities are easily noticed and detract from my recreational enjoyment of the West. Although I normally try to avoid recreating in areas where coal mining is occurring, it is often nearly impossible to do so.

8. In my travels throughout the West over the years, I have observed the following coal mines:

Coal Mine	State	County	Surface or Underground
Bowie	Colorado	Delta	Underground
West Elk	Colorado	Gunnison	Underground
Elk Creek	Colorado	Gunnison	Underground
Trapper	Colorado	Moffat	Surface
Colowyo	Colorado	Moffat/Rio Blanco	Surface
Deserado	Colorado	Moffat/Rio Blanco	Underground
New Horizon	Colorado	Montrose	Surface
Foidel Creek	Colorado	Routt	Underground
Sage Creek	Colorado	Routt	Underground

Spring Creek	Montana	Big Horn	Surface
Decker	Montana	Big Horn	Surface
Rosebud	Montana	Rosebud	Surface
San Juan	New Mexico	San Juan	Underground
Navajo	New Mexico	San Juan	Surface
Lila Canyon	Utah	Carbon	Underground
Skyline	Utah	Carbon	Underground
Horizon	Utah	Carbon	Underground
Rawhide	Wyoming	Campbell	Surface
Buckskin	Wyoming	Campbell	Surface
Dry Fork	Wyoming	Campbell	Surface
Eagle Butte	Wyoming	Campbell	Surface
Wyodak	Wyoming	Campbell	Surface
Caballo	Wyoming	Campbell	Surface
Belle Ayr	Wyoming	Campbell	Surface
Cordero Rojo	Wyoming	Campbell	Surface
Coal Creek	Wyoming	Campbell	Surface
Black Thunder	Wyoming	Campbell	Surface
School Creek	Wyoming	Campbell	Surface
North Antelope-Rochelle	Wyoming	Campbell	Surface
Antelope	Wyoming	Campbell/Converse	Surface
Kemmerer	Wyoming	Lincoln	Surface
Black Butte	Wyoming	Sweetwater	Surface
Bridger	Wyoming	Sweetwater	Surface

I know I observed these coal mines because they all have visible signs advertising the mines' names and the owners (and usually mining permit information) posted along public roadways next to the mines. I have also researched these mines and sought to understand their location, their production rates, and their impacts to the environment. One can read about these mines by searching the U.S. Energy Information Administration's ("EIA's") website and through other resources (such as state agency and other federal agency websites). For example, the EIA produces

an Annual Coal Report every year, which has information on coal mine production, including a list of major U.S. coal mines. See EIA, "Major U.S. Coal Mines," website available at http://www.eia.gov/coal/annual/pdf/table9.pdf (last visited Oct. 18, 2013). I have sought to understand these mines both professionally, but also from a personal standpoint. It interests me to know more about how these large industrial operations are affecting the public lands where I enjoy recreating.

9. Observing these coal mines has detracted from my recreational enjoyment of the outdoors in these states. Their sights and sounds detract from the naturalness of the outdoors, detract from my ability to hike undisturbed, detract from my ability to view wildlife, and detract from my ability to fully enjoy being outside. In northwestern Colorado, for example, the Deserado coal mine is located only 10 miles south of Dinosaur National Monument. I recreate in Dinosaur National Monument at least once a year, usually hiking on trails near the visitors center at the south end of the Monument located east of the town of Dinosaur, Colorado off of U.S. Highway 40. When hiking in this area, it is impossible not to see the Deserado coal mine, including its silos and other coal processing facilities. This detracts from my enjoyment of the outdoors in Dinosaur National Monument, which is otherwise a very undisturbed, natural, and protected landscape.

10. The air pollution impacts of these coal mines is especially disturbing. While recreating, I have observed air pollution from coal mines on a number of occasions, including emissions of particulate matter (especially from surface coal mines), blasting emissions (including emissions of nitrogen dioxide, or the "orange cloud"), and methane venting emissions. Seeing air pollution from coal mines while recreating makes me concerned over my health and well-being. I know, for example, that methane is an explosive gas. Hiking in an area where methane venting is occurring makes me concerned for my safety. Furthermore, visible air pollution is simply offensive to observe, especially while recreating on public lands where I seek out and enjoy clear skies, clean air, and un-industrialized landscapes. It diminishes my enjoyment of recreating outdoors because it makes me worry about my health, detracts from the natural scenery of areas, and detracts from my overall enjoyment of the otherwise natural and undisturbed nature of the lands where I recreate.

11. There are two key areas where I regularly recreate and where I and observe and am harmed by air pollution from coal mines. These include a place in western Colorado called the North Fork of the Gunnison River Valley (often just referred to as the "North Fork Valley") and the Powder River Basin of northeastern Wyoming and southeastern Montana.

12. I visit the North Fork Valley frequently to visit friends in the largest town in the area, Paonia, and to recreate in the West Elk Mountain range on the south side of the Valley. The West Elks are a magnificent mountain range. They are rugged and remote. They are under the management of the U.S. Forest Service, so they are publicly accessible for camping, hiking, and other outdoor activities. I enjoy visiting this mountain range and its flanks, especially accessing it from the North Fork Valley. I enjoy visiting the area because it does not receive much use, so there are significant opportunities for solitude. The area is remote and rugged, something I value when recreating outdoors. I visit the West Elks at least once a year and have done so sine 2008, primarily for hiking, camping, wildlife viewing, and to enjoy the scenery. I most recently visited the West Elks and the North Fork Valley from June 22-23, 2013. I intend to return in June of 2014 and in years thereafter. Below is a picture of the West Elks that I took from the North Fork Valley in June of 2013. The picture is a view of Mount Gunnison taken from the northern flanks of the West Elks looking south.

Mount Gunnison in West Elk Mountains, Gunnison County, Colorado. View south from North Fork Valley. Picture taken June 22, 2013.

13. The North Fork Valley contains three large underground coal mines, including the West Elk Mine (located on the northern flanks of the West Elk Mountains, or the south side of the North Fork Valley), the Elk Creek Mine (located on the north side of the North Fork Valley across from the West Elk Mine), and the Bowie Mine (located directly northeast of Paonia, Colorado also on the north side of the North Fork Valley). Below is a Google Earth map I prepared showing the general locations of these mines in the North Fork Valley. I was able

to prepare this by using the Google Earth application and by placing "placemarkers" where I know the mines in the North Fork Valley are located.

14. The mines in the North Fork Valley all vent methane gas through venting wells drilled above the mines (often called "methane drainage wells"). The West Elk Mine in particular has drilled dozens of methane venting wells above its mine. This land is all owned and managed by the U.S. Forest Service, so it is publicly accessible. These wells are basically natural gas wells, yet all they do is vent gas into the air. The development of these wells has essentially turned the landscape above the West Elk Mine into a natural gas field. I understand that these wells are

needed to remove dangerous methane gas. However, the development and operation of these wells leaves a significant impact on the natural landscape where I recreate. Worse, I have been hiking and have come across methane venting wells that are actively venting. Observing these operations makes me fear for my safety, especially given that methane can be an explosive gas. Below are some pictures I have taken of methane venting wells above the West Elk Mine.

Methane venting well above West Elk Mine (view of Mount Gunnison in background). Picture taken June 30, 2010.

Methane venting operation above West Elk Mine.
Picture taken June 30, 2010.

15. I have actually smelled and felt the gas being vented from these drainage wells. Compressor engines are used to blow the methane gas from the mine into the atmosphere, creating quite a disturbance. I try to avoid these methane drainage well sites, but they are difficult to avoid while recreating.

16. The venting of methane raises other concerns for me. Methane is a potent greenhouse gas with more than 20 times the heat-trapping capability than carbon dioxide. Studies have also linked methane to ground-level ozone pollution,

the key ingredient of smog and a dangerous pollutant that the EPA has sought to limit nationwide through the establishment of national ambient air quality standards under the Clean Air Act. See 40 C.F.R. § 50.15. A recent study published in the Proceedings of the National Academy of Sciences of the United States of America found that "Methane (CH_4) contributes to the growing global background concentration of tropospheric ozone (O_3), an air pollutant associated with premature mortality. Methane and ozone are also important greenhouse gases. Reducing methane emissions therefore decreases surface ozone everywhere while slowing climate warming....Here we show that global decreases in surface ozone concentrations, due to methane mitigation, result in substantial and widespread decreases in premature human mortality." West, et al., "Global health benefits of mitigating ozone pollution with methane emission controls," Proceedings of the National Academy of Sciences of the United States of America (March 14, 2006), available online at http://www.pnas.org/content/103/11/3988.full.pdf+html (last visited Oct. 20, 2013).

17. I understand that ozone can be extremely harmful to human health. According to the EPA, "Breathing ozone can trigger a variety of health problems including chest pain, coughing, throat irritation, and congestion. It can worsen bronchitis, emphysema, and asthma. Ground level ozone can also reduce lung

function and inflame the linings of the lungs. Repeated exposure may permanently scar lung tissue." EPA, "Ground-level Ozone Health Effects," website available at http://www.epa.gov/glo/health.html (last visited Oct. 20, 2013). Observing and coming into contact with methane venting operations while recreating makes me concerned for my health, diminishing my enjoyment of the outdoors.

18. I visit the Powder River Basin of northeastern Wyoming and southeastern Montana frequently because I enjoy recreating on public lands in the region, especially the Thunder Basin National Grassland, which is managed by the U.S. Forest Service. The Thunder Basin National Grassland provides unmatched high plains recreation opportunities. It is located north of Douglas, Wyoming. It contains vast tracts of undisturbed prairie, remote drainages, wildlife, and incredible geology (including interesting fossils). I enjoy visiting the Thunder Basin National Grassland because I can escape the urban areas of Colorado, enjoy the wildness of the Great Plains, and enjoy the outdoors of Wyoming. I visit the Thunder Basin National Grassland around once a year and have done so since 2003. I most recently visited the Grassland on June 20, 2013. I intend to return to recreate on the Thunder Basin National Grassland in the Spring of 2014 and in years thereafter.

19. There are several large surface coal mines in the Powder River Basin that encroach upon the Thunder Basin National Grassland. In some cases, these mines

actually strip mine on the Thunder Basin National Grassland. These mines include the Antelope Mine, North Antelope-Rochelle Mine, School Creek Mine, and Black Thunder Mine. The Black Thunder and North Antelope-Rochelle Mines are the two largest mines in the United States. The Black Thunder Mine is the largest coal mining complex in the world.

20. Although these surface mines leave an indelible impact on the landscape that can be seen from miles away, their air pollution impacts are probably the most noticeable and impacting upon the landscape. There is a constant blackish to brownish haze hovering over these large surface coal mines. I notice this every time I recreate on the Thunder Basin National Grassland, especially in an area called the "Red Hills," which is located to the south and east of the Antelope and North Antelope-Rochelle Mines.

21. I have observed that this haze is linked to the constant and intensive disturbance to the land. Huge drag lines strip overburden off of coal seams, kicking up particulate matter. Blasting of coal seams leaves huge black clouds that linger for many minutes. The moving and piling of overburden seems to provide a constant source of exposed materials that are easily kicked up into the air. Below is a picture I took of a large black cloud at the Belle Ayr Mine, which I took when visiting the Powder River Basin on March 19, 2011.

Black cloud hanging over surface mine in Powder River Basin (large drag line in background). Picture taken March 19, 2011.

22. I understand there are numerous adverse health effects associated with particulate matter pollution. In fact, EPA has established national ambient air quality standards for particulate matter less than 10 microns (or micrometers) in diameter, including standards for particulate matter less than 2.5 microns in diameter. See 40 C.F.R. §§ 50.6 and 50.13. According to the EPA, "particles less than 10 micrometers in diameter pose the greatest problems, because they can get deep into your lungs, and some may even get into your bloodstream." EPA,

"Particulate Matter, Health," website available at http://www.epa.gov/pm/health.html (last visited Oct. 20, 2013). The EPA explains there are a number of adverse health effects linked to particulate matter, including "premature death in people with heart or lung disease," "nonfatal heart attacks," "irregular heartbeat," "aggravated asthma," "decreased lung function," and "increased respiratory systems." Id. The EPA also notes that particulate matter can cause visibility impairment and other environmental damages. Id.

23. Observing this haze particulate pollution is not only aesthetically distressing, it raises concerns over the impacts to my health and well-being and diminishes my enjoyment of recreating in the area. Although I prefer to avoid recreating in areas with air pollution, on the Thunder Basin National Grassland where I prefer to recreate, it is nearly impossible to escape the sights of air pollution from the neighboring coal mines.

24. While recreating on and near the Thunder Basin National Grassland, I have also often seen orange clouds, or emissions of nitrogen dioxide, resulting from blasting activities at these mines. I know these orange clouds are produced from blasting and consist of nitrogen dioxide because of environmental reports from the U.S. Bureau of Land Management (for instance, recent environmental impact statements prepared under the National Environmental Policy Act), which have identified these clouds as a byproduct of blasting and have explained that they

consist of nitrogen dioxide. These orange clouds are very distressing to observe, especially given that there are warning signs throughout the Powder River Basin warning the passing public to avoid being exposed to the emissions. These orange clouds are so common that these signs are posted throughout the Powder River Basin. Below is a picture I took of an orange cloud from the Black Thunder Mine. I took the picture while recreating on the Thunder Basin National Grassland. Also below is a picture of an "orange cloud" warning sign posted off a state highway near the Black Thunder Mine.

Orange cloud at Black Thunder coal mine. Picture taken from Thunder Basin National Grassland on April 11, 2010.

Sign warning of orange cloud posted off highway near Black Thunder Mine. Picture taken April 11, 2010.

25. I understand that nitrogen dioxide emissions can be very dangerous to human health. In fact, nitrogen dioxide is so dangerous that the EPA has established national ambient air quality standards for the pollutant. See 40 C.F.R. § 50.11. According to the EPA, the effects of nitrogen dioxide exposure can include airway inflammation, increased respiratory symptoms, and increased visits to the emergency room. See EPA, "Nitrogen dioxide, health," website available at

http://www.epa.gov/oaqps001/nitrogenoxides/health.html (last visited Oct. 20, 2013). Nitrogen dioxide is especially harmful to those with existing respiratory conditions, children, and the elderly. Id.

26. Observing orange clouds while recreating on the Thunder Basin National Grassland near the coal mines of the Powder River Basin is not only aesthetically offensive, but makes me significantly concerned for my health. When I observed an orange cloud while recreating on the Thunder Basin National Grassland, I was concerned that it might drift over where I was hiking. Worrying about the potential health threat of an orange cloud while recreating on the Thunder Basin National Grassland greatly diminishes my enjoyment of the area.

27. In June of 2010, WildEarth Guardians and other organizations petitioned the EPA to list coal mines as a source category under Section 111 of the Clean Air Act, and to accordingly adopt New Source Performance Standards. As justification, the petition brought to the EPA's attention many of the air quality impacts identified above, as well as other relevant information on other air quality concerns, in order to demonstrate that air pollutants, such as methane, particulate matter, and nitrogen dioxide, released from coal mines endanger public health and welfare. As a follow up to the petition, in December of 2010 I also submitted, on behalf of WildEarth Guardians, supplemental information regarding air pollution

from coal mines in the Powder River Basin, including information on nitrogen dioxide and particulate matter emissions.

28. The EPA, unfortunately, denied the petition earlier this year. In doing so, the Agency did not even directly (or seemingly indirectly) address much of the information submitted by WildEarth Guardians in the June 2010 petition and the December 2010 supplement. The Agency also did not even address, directly or otherwise, whether coal mines emitted air pollution that endanger public health and welfare.

29. The EPA's failure to even address relevant information submitted by WildEarth Guardians harms the organization because it denies information necessary to confirm or refute whether coal mines, as a source category, release air pollution that can be harmful to public health and welfare. Although all information gathered and submitted by WildEarth Guardians as part of its petition effort indicates that coal mines can, in fact, release harmful air pollution, the EPA's petition denial casts doubt and confusion over this conclusion.

30. Furthermore, if the petition had been granted, the EPA would have promulgated New Source Performance Standards in order to limit air emissions from new and modified coal mines. This would have had many significant benefits to my interests and those of WildEarth Guardians because it would redress the harms I identified above.

31. For example, if EPA had granted the petition, the Agency very likely would have adopted limits on methane venting from new and modified underground coal mines. As the 2010 petition explained, EPA has already identified capture and use or flaring as potential control options. Such controls would have been extremely relevant for coal mines in the North Fork Valley, in particular the West Elk Mine, which was given approval to expand by the U.S. Bureau of Land Management and U.S. Forest Service in late 2012. See U.S. Bureau of Land Management, "BLM Signs Record of Decision for West Elk Coal Lease Modifications (12-27-12)," website available at http://www.blm.gov/co/st/en/BLM_Information/newsroom/2012/blm_signs_record_of.html (last visited Oct. 20, 2013). In other words, the West Elk Mine is in the process of being modified, indicating that it would likely trigger the imposition of New Source Performance Standards. Unfortunately, with no New Source Performance Standards, the West Elk Mine will continue to vent methane into the air uncontrolled. This will continue to harm my recreational use and enjoyment of the area where the West Elk Mine is located.

32. In the Powder River Basin, New Source Performance Standards would have tremendous benefits. Currently, both the Black Thunder and North Antelope-Rochelle Mines are in the process of expanding their surface mining operations. In 2012, both mines obtained new federal coal leases from the U.S. Bureau of Land

Management. The Black Thunder Mine obtained the "South Hilight" coal lease in May of 2012, a 222,676,000 ton coal lease. See U.S. Bureau of Land Management, "South Hilight LBA," website available at http://www.blm.gov/wy/st/en/programs/energy/Coal_Resources/PRB_Coal/lba/hilight-south.html (last visited Oct. 20, 2013). The North Antelope-Rochelle Mine obtained the "South Porcupine" and "North Porcupine" coal leases on August 1, 2012 and October 1, 2012, respectively. The "South Porcupine" lease consisted of 401,830,508 tons of coal and the "North Porcupine" lease consisted of 721,154,828 tons of coal. See U.S. Bureau of Land Management, "South Porcupine LBA," website available at http://www.blm.gov/wy/st/en/programs/energy/Coal_Resources/PRB_Coal/lba/porcupine-south.html (last visited Oct. 20, 2013) and "North Porcupine LBA," website available at http://www.blm.gov/wy/st/en/programs/energy/Coal_Resources/PRB_Coal/lba/porcupine.html (last visited Oct. 20, 20313). They are now both in the process of securing additional state and federal approval to begin mining those leases. Additionally, the Black Thunder Mine is also seeking the "North Hilight" coal lease. The Bureau of Land Management issued a decision approving the sale of the lease in 2012 to the Black Thunder Mine, yet has not actually sold the lease to date. See U.S. Bureau of Land Management, "North Hilight LBA," website

available at http://www.blm.gov/wy/st/en/programs/energy/Coal_Resources/PRB_Coal/lba/hilight_field.html (last visited Oct. 20, 2013).

33. If the EPA would have granted the petition, the Agency very likely would have adopted limits on particulate matter and nitrogen dioxide emissions from new and modified coal mines, including the Black Thunder and North Antelope-Rochelle Mines. Such limits would have enhanced my recreational enjoyment of the Thunder Basin National Grassland and other areas of the Powder River Basin. The harms I have experienced from current levels of particulate matter and nitrogen dioxide pollution from the surface coal mines in the region would be diminished, making future visits more enjoyable and less worrisome.

34. New Source Performance Standards would not only redress many of the harms I have experienced and will continue to experience from air pollution at coal mines, but redress the harms experienced by WildEarth Guardians. The organization has an interest in promoting clean energy development, not polluting energy develop. New Source Performance Standards would aid Guardians' in its ability to achieve its mission, protecting the American West from air pollution and promoting cleaner energy.

35. The adoption of New Source Performance Standards for coal mines would have benefits for myself and WildEarth Guardians throughout the American

West. I am aware that a number of existing mines are looking to expand, including other mines in Colorado, Montana, New Mexico, Utah, and Wyoming. I am also aware of numerous other plans to expand mines in the North Fork Valley of Colorado and the Powder River Basin of Montana and Wyoming. Several new mines are also being proposed, including one in western Colorado near the city of Grand Junction called the "Book Cliffs" Mine. See U.S. Bureau of Land Management, "Proposed Book Cliffs Coal Lease by Application Project Description," website available at http://www.blm.gov/co/st/en/BLM_Programs/land_use_planning/rmp/red_cliff_mine.html (last visited Oct. 20, 2013). There is also a new mine being proposed in the North Fork Valley called the "Oak Mesa" Mine. Currently, the proponent of the mine is in the process of conducting exploration activities, which were recently approved by the Bureau of Land Management. See U.S. Bureau of Land Management, "BLM approves coal exploration license (09-11-12)," website available at http://www.blm.gov/co/st/en/BLM_Information/newsroom/2012/september/blm_approves_coal.html (last visited Oct. 20, 2013). New Source Performance Standards would ensure that harmful emissions from these new and modified coal mines are curtailed, providing greater assurances of healthy, enjoyable, and scenic

air. This would greatly enhance my recreational enjoyment of lands throughout the American West.

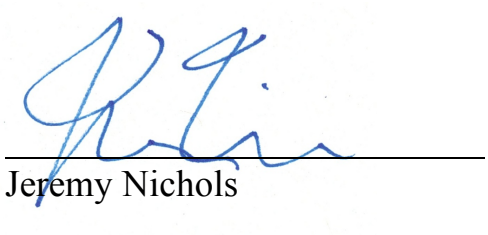
36. At the least, if coal mines were listed as a source category under Section 111 of the Clean Air Act, it would have required that the EPA undertake a rulemaking that would provide me and WildEarth Guardians an opportunity to submit information alerting the Agency methane, particulate, and nitrogen dioxide emissions (as well as other harmful emissions) from coal mines throughout the American West, including in the North Fork Valley and the Powder River Basin. This would have allowed me and WildEarth Guardians to submit information that could influence the Agency's rulemaking. The EPA's denial of WildEarth Guardians' petition prevents me and Guardians from influencing the Agency's rulemaking process to ensure that air pollution from coal mines is better controlled.

37. A ruling in this appeal overturning EPA's denial and remanding the matter to ensure the Agency considers relevant information regarding coal mine pollution and endangerment to public health and welfare would very likely lead to a decision by EPA to list coal mines as a source category. Because WildEarth Guardians presented extensive evidence indicating that coal mines release pollutants that endanger public health and welfare, including pollutants for which national ambient air quality standards have been set and for which the EPA has already made endangerment findings (such as methane), it seems extremely

unlikely that the EPA would be able to determine that air pollution from coal mines does not endanger public health and welfare. A ruling in Guardians' favor would spur the EPA to establish New Source Performance Standards, which would ultimately redress the harms I identified in the paragraphs above.

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing is true and correct.

Executed this 21st day of October, 2013 in Golden, Colorado



Jeremy Nichols

EXHIBIT 2

Declaration of Michael Eisenfeld

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

WILDEARTH GUARDIANS, Petitioner, v. U. S. ENVIRONMENTAL PROTECTION AGENCY and GINA MCCARTHY, Administrator, U.S. Environmental Protection Agency, Respondents, WYOMING MINING ASSOC., *et al*., Respondent-Intervenors.	)	Case No. 13-1212

DECLARATION OF MICHAEL EISENFELD

I, Mike Eisenfeld, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge. If called as a witness in these proceedings, I could and would testify competently to these facts.

2. I am a dues paying member of WildEarth Guardians. WildEarth Guardians is a non-profit environmental organization dedicated to protecting and restoring the wildlife, wild places and wild rivers throughout the American West. A statement of WildEarth Guardians' mission and its general goals is online at

http://www.wildearthguardians.org/site/PageServer?pagename=about (last visited Oct. 18, 2013). The organization has 7,827 members. I support the mission of the organization personally and professionally.

3. I am a 17-year resident of Farmington, New Mexico, located in San Juan County. I live here with my wife and two children, both of which are in school in Farmington. We intend to continue living in Farmington for the foreseeable future. We are engaged in the community and both work with nonprofit organizations.

4. I live in Farmington in part because I love to recreate outdoors. Farmington is located in the Four Corners region where there are innumerable outdoor recreation opportunities, including mountain biking, hiking, camping, river floating, and wildlife viewing. I enjoy being outside in clean air, away from traffic and development, and in a more natural setting. I also enjoy recreating outdoors with my family because I feel like I can bond better with my kids. My home in Farmington is directly adjacent to public lands managed by the Bureau of Land Management. There are many opportunities to recreate on public lands in the region, particularly lands managed by the U.S. Bureau of Land Management. I enjoy partaking in these activities on a regular basis (i.e., at least once a week), both for my physical and mental well-being. I mountain bike and hike on these lands regularly. I intend to continue recreating outdoors for the rest of my life.

5. In living in Farmington and in recreating outdoors on nearby lands, I frequently observe coal mining operations. There are four primary coal mines in the region very near Farmington, including the following: the San Juan Coal Mine, an underground coal mine located approximately 15 miles west of Farmington in San Juan County, New Mexico; the Navajo Coal Mine, a surface coal mine (i.e., strip mine) located approximately 20 miles southwest of Farmington also in San Juan County; the Lee Ranch Coal Mine, a surface coal mine located approximately 80 miles south of Farmington in McKinley County, New Mexico; and the El Segundo Coal Mine, a surface coal mine located approximately 80 miles southeast of Farmington also in McKinley County.

6. The San Juan and Navajo coal mines are very visible to the west of Farmington. I have actually observed both of these mines up close, having visited their operations directly on several occasions. I observe these mining operations on a regular basis when I recreate on lands west of town and often when running around town, they are impossible not to ignore. The San Juan coal mine is very noticeable. Even though it is underground, there are large coal silos and piles of coal near the mine portal. The Navajo coal mine is very noticeable. There is large machinery operating at the mine that is visible from quite a distance. There are also large stockpiles of overburden that are stripped away to expose the coal. I have seen both mines from the air when I fly into and out of the Farmington

airport, which I do at least once a year to go visit friends and family in Denver, Colorado.

7. When observing the mines, I frequently see particulate clouds and a general haze hovering over the mining operations. I observe particulates, including dust and haze, from the mines at least 60% of the time that I recreate on lands west of Farmington and at least 30% of the time that I am simply driving around town running errands or performing other tasks. From what I have observed, the particulates seems to be created when winds kick up exposed materials at the mining operations, especially overburden piles and materials disturbed by heavy machinery, when blasting happens at the Navajo coal mine, and seemingly when coal ash is disposed of in the pits of the Navajo mine.

8. Seeing this particulate pollution is offensive. It diminishes my enjoyment of outdoor recreation and also diminishes my enjoyment of residing in Farmington for the outdoor recreation opportunities. It diminishes the clean air that I value when recreating outdoors. I am aware that particulate pollution can be harmful to human health, particularly respiratory health if I breath in too much particulate pollution in a short period of time. Observing this particulate pollution makes me worried for my health and well-being, and makes me worried for the health of my children. I usually avoid recreating on high wind days on lands west

of Farmington because I know there will likely be particulates in the air kicked up from the coal mining operations.

9. I always see the Lee Ranch and El Segundo coal mines when I recreate in and around Chaco Culture National Historical Park, which is located approximately 50 miles south of Farmington. I visit Chaco Culture at least twice a year, usually with my family, to enjoy the landscape, learn about its cultural heritage, and enjoy the undeveloped outdoors of the area. Chaco Culture contains ruins of the ancestral Puebloans, including their great houses, kivas, and other developments. It was established both to protect the ruins and to preserve a culturally significant landscape, one that harkens back to a time before European settlement of the region. In hiking in the Park, especially on the South Mesa, one can see the coal mining operations of the Lee Ranch and El Segundo coal mines. I often see particulate emissions kicked up by the drag lines, shovels, and truck traffic at the mines, as well as by blasting. There is usually a haze sitting over the mining operations that is impossible not to notice. I notice this pollution more than 50% of the time that I recreate in Chaco Canyon.

10. Seeing the particulate pollution over the Lee Ranch and El Segundo coal mines is offensive to observe, especially when visiting a National Historical Park that has been protected to preserve the integrity of its undeveloped landscape. It is especially frustrating to see this when hiking on the South Mesa. To get to the

South Mesa, one must hike from Chaco Wash, the lowlands in Chaco, more than a mile to get to the top of the South Mesa. I cannot see the mining operations until I am at the top of the Mesa. There are many amazing cultural sites on the top of the Mesa, including Tsin Kletsen, a large Ancestral Puebloan ruin. After hiking more than a mile to see this ruin and enjoy the landscape, seeing particulate pollution over the Lee Ranch and El Segundo coal mines to the south significantly diminishes my enjoyment of the area.

11. I am aware of WildEarth Guardians' 2010 petition to the U.S. Environmental Protection Agency requesting that the Agency identify coal mines as a source of air pollution that is harmful to health and welfare, and take steps to limit this pollution according to the Clean Air Act. I am aware that, among other things, the petition identified the particulate pollution impacts of coal mines as evidence of their adverse impacts to public health and welfare. I am aware that the U.S. Environmental Protection Agency denied this petition.

12. If the EPA would have granted WildEarth Guardians' petition, it would have identified coal mines as a source of air pollution that could reasonably be anticipated to endanger public health and welfare, triggering an obligation to develop emission standards for new and modified coal mine operations. To this end, if the U.S. Environmental Protection Agency would have granted WildEarth

Guardians' petition, it would have led to greater limits on particulate emissions from coal mining, including mining operations in the Four Corners region.

13. This is especially the case in light of at least two mine expansion plans in the works in the Four Corners region. These expansions indicate that the development of new and/or modified mines are imminent.

14. The first is an expansion of the Navajo coal mine. The owner is currently seeking to develop a new mine area called the "Pinabete area." The U.S. Office of Surface Mining Reclamation and Enforcement is in the process of analyzing the impacts of this expansion and plans to issue a decision to allow mining by 2016. See http://www.wrcc.osmre.gov/Current_Initiatives/fcnavprj/FCPPEIS.shtm (last visited Oct. 18, 2013).

15. The second is an expansion of the El Segundo coal mine. The owner recently obtained a new lease from the U.S. Bureau of Land Management to allow the development of 640 acres of federal coal as part of an expansion of the mine. The U.S. Bureau of Land Management issued a decision approving the coal lease in May of 2013 and according to the Agency's Environmental Assessment (on page 2-2), mining is expected to start in 2014. See http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/farmington/farmington_planning/ffo_eas/ffo_mineral_eas_open.Par.57293.File.pdf/El_Segundo_Mine_Lease_by_Application_Final_EA.pdf (last visited Oct. 18, 2013).

16. Were coal mines listed under the Clean Air Act, these new and/or modified coal mining operations likely would have triggered greater emission controls that would have curtailed particulate pollution. Curtailed particulate pollution from these coal mines would enhance my enjoyment of recreating on public lands near the mines, as well as enhance my enjoyment of living in Farmington, and preserve my family's health.

17. At the least, if coal mines were listed under the Clean Air Act, it would have required that the U.S. Environmental Protection Agency undertake a rulemaking that would provide me an opportunity to submit information alerting the U.S. Environmental Protection Agency to acknowledge particulate emissions from the four coal mines near Farmington. This would have allowed me to submit information that could influence the Agency's rulemaking. The Environmental Protection Agency's denial of WildEarth Guardians' petition prevents me from influencing the Agency's rulemaking process to ensure that particulate pollution from coal mines is better controlled.

Pursuant to 28 U.S.C. § 1746 I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 22nd day of October, 2013 in Farmington, New Mexico.

Michael Eisenfeld