ORAL ARGUMENT NOT YET SCHEDULED

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

No. 11-1108 (and consolidated cases)

UNITED STATES SUGAR CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

Petition for Review of Final Administrative Actions of the
United States Environmental Protection Agency

PROOF BRIEF FOR ENVIRONMENTAL RESPONDENT-INTERVENORS

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DATED: December 17, 2014

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UNITED STATES SUGAR CORPORATION, *et al.*, *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents*.	Case No. 11-1108 (and consolidated cases)

ENVIRONMENTAL RESPONDENT-INTERVENORS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Louisiana Environmental Action Network, Sierra Club, Clean Air Council, Partnership for Policy Integrity, and Environmental Integrity Project (collectively, "Environmental Respondent-Intervenors") hereby certify as follows:

(A) Parties and Amici

(i) Parties, Intervenors, and Amici Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to This Case

Petitioners:

11-1108 United States Sugar Corporation

11-1124 American Forest & Paper Association, National Association of Manufacturers, American Coke and Coal Chemicals Institute, American Iron and Steel Institute, American Municipal Power, Inc., American Wood Council, Biomass Power Association, Chamber of Commerce of the United States of America, Corn Refiners Association, National Oilseed Processors Association, Rubber Manufacturers Association, Treated Wood Council

11-1134 American Petroleum Institute

11-1142 American Chemistry Council

11-1145 Coalition for Responsible Waste Incineration

11-1159 Council of Industrial Boiler Owners

11-1165 Utility Air Regulatory Group

11-1172 Southeastern Lumber Manufacturers Association, Inc.

11-1174 JELD-WEN, Inc.

11-1181 Sierra Club

13-1086 JELD-WEN, Inc.

13-1087 Eastman Chemical Company

13-1091 American Chemistry Council

13-1092 United States Sugar Corporation

13-1096 American Petroleum Institute

13-1097 Utility Air Regulatory Group

13-1098 Louisiana Environmental Action Network, Sierra Club, Clean Air Council, Partnership for Policy Integrity, Environmental Integrity Project

13-1099 Council of Industrial Boiler Owners, American Municipal Power, Inc.

13-1100 American Forest & Paper Association, American Wood Council, Biomass Power Association, Chamber of Commerce of the United States of America, Corn Refiners Association, National Oilseed Processors Association, Rubber Manufacturers Association, Southeastern Lumber Manufacturers Association, National Association of Manufacturers

13-1103 Coalition for Responsible Waste Incineration

Respondents:

The respondent in all cases is the United States Environmental Protection Agency. Also named as a respondent in case nos. 11-1134, 11-1181, and 13-1098 is Gina McCarthy, in her official capacity as Administrator of the U.S. Environmental Protection Agency.

Intervenors:

American Chemistry Council, JELD-WEN, Inc., American Forest & Paper Association, American Home Furnishings Alliance, Inc., American Iron and Steel Institute, American Municipal Power, Inc., American Petroleum Institute, Auto Industry Forum, Biomass Power Association, Chamber of Commerce of the United States of America, Coalition for Responsible Waste Incineration, Corn Refiners Association, Council of Industrial Boiler Owners, Energy Recovery Council, Florida Sugar Industry, HOVENSA, L.L.C., National Oilseed Processors Association, Rubber Manufacturers Association, Sierra Club, Southeastern Lumber Manufacturers Association, Inc., Tesoro Hawaii Corporation, American Coke and Coal Chemicals Institute, Utility Air Regulatory Group, Waste Management, Inc.,

American Wood Council, Clean Air Council, Eastman Chemical Company, National Association of Manufacturers, Partnership for Policy Integrity, and WM Renewable Energy, LLC have intervened on behalf of the respondent in these consolidated cases.

(iii) *Amici* in This Case

There are currently no *amici*.

(iv) Circuit Rule 26.1 Disclosures for Environmental Petitioners

See disclosure form filed below.

(B) Rulings Under Review

Petitioners seek review of final actions taken by EPA at 76 Fed. Reg. 15,608 (Mar. 21, 2011) and titled "National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters," and at 78 Fed. Reg. 7138 (Jan. 31, 2013), and titled "National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters."

(C) Related Cases

Apart from the consolidated cases, Environmental Respondent-Intervenors are unaware of currently pending related cases. The Court has ordered these cases be heard by the same panel as will hear the following currently pending challenges in this Court to rules related to the rules challenged herein:

American Forest & Paper Association v. EPA, No. 11-1125 (and consolidated cases)

American Chemistry Council v. EPA, No. 11-1141 (and consolidated cases)

Solvay USA Inc. v. EPA, No. 11-1189 (and consolidated cases)

DATED: December 17, 2014

Respectfully submitted,

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ENVIRONMENTAL RESPONDENT-INTERVENORS' RULE 26.1 DISCLOSURE STATEMENT

Louisiana Environmental Action Network

Non-Governmental Corporate Party to this Action: Louisiana Environmental Action Network ("LEAN").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: LEAN is a corporation organized and existing under the laws of the State of Louisiana. LEAN is a nonprofit organization which works with citizens' groups throughout the state of Louisiana to develop, implement, protect, and enforce legislative and regulatory environmental safeguards.

Sierra Club

Non-Governmental Corporate Party to this Action: Sierra Club.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

Clean Air Council

Non-Governmental Corporate Party to this Action: Clean Air Council ("CAC").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: CAC is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. CAC is a not-for-profit organization focused on protection of public health and the environment.

Partnership for Policy Integrity

Non-Governmental Corporate Party to this Action: Partnership for Policy Integrity ("PFPI").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: PFPI, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, is a nonprofit organization that uses science, policy analysis, and strategic communications to promote sound energy policy.

Environmental Integrity Project

Non-Governmental Corporate Party to this Action: Environmental Integrity Project ("EIP").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: EIP, a corporation organized and existing under the laws of the District of Columbia, is a national nonprofit organization that advocates for more effective enforcement of environmental laws.

DATED: December 17, 2014

Respectfully submitted,

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

CEMS	Continuous Emissions Monitors
EPA	Respondents U.S. Environmental Protection Agency and Gina McCarthy, Administrator
MMBtu/Hr	Million British Thermal Units per Hour
NACWA	National Association of Clean Water Agencies

STATUTES AND REGULATIONS

All applicable statutes are contained in the Opening Brief for Environmental Petitioners.

SUMMARY OF ARGUMENT

Industry Petitioners do not and cannot provide any statutory basis for their claim that EPA violated the Clean Air Act by basing the floors for each pollutant it regulated on the sources that performed best with respect to that pollutant. Read in context, as it must be, § 7412(d)(3) not only permits EPA to set floors on a pollutant-by-pollutant basis but requires it to do so.

Had EPA set work practice standards in lieu of emission standards for carbon monoxide, as advocated by Industry Petitioners, it would have contravened Clean Air Act § 7412(h). This provision prohibits EPA from setting work practice standards unless it is infeasible to set emission standards for control of a hazardous air pollutant. Carbon monoxide is not a hazardous air pollutant but merely EPA's chosen surrogate for the organic hazardous air pollutants that boilers emit. EPA must set emission standards for these pollutants – so long as it is feasible to do so – regardless of whether it is feasible to set emission standards for boilers' carbon monoxide emissions. The record does not show, and Industry Petitioners do not

claim, that it is infeasible to set emission standards for boilers' emissions of organic hazardous air pollutants.

Industry Petitioners' vague argument that the Clean Air Act required EPA to provide an unspecified "allowance" for malfunction emissions is at odds with the statutory text and this Court's precedent. Contrary to their claims, nothing in the statute even suggests that EPA must set emission standards at levels so high they cannot be exceeded even when a plant's pollution control equipment is non-functional. Indeed, any such requirement would violate § 7412(d)(2)-(3) and completely defeat these provisions' purpose by forcing EPA to promulgate meaningless emission standards that allow uncontrolled emissions of hazardous air pollutants.

To the extent Industry Petitioners seek some less extreme "allowance" for malfunctions, their arguments boil down to dissatisfaction with the way EPA accounted for emissions variability. EPA amply accounted for variability in setting its emission standards and the operating requirements with which sources actually comply on an ongoing basis. Industry Petitioners do not identify any way in which EPA either violated the statute or acted arbitrarily on this score.

Nor did EPA act arbitrarily in declining to demonstrate that its standards would be "achievable" even during malfunctions or to set separate work practice standards for malfunctions. EPA set all the standards at issue under the minimum

stringency provisions of § 7412(d)(3) and, as this Court has held repeatedly, such standards must reflect the emission level actually "achieved" by the relevant best-performing units not the level EPA determines is "achievable." EPA had no obligation to set separate work practice standards for malfunctions, and correctly explained that they are not a distinct operating mode for which separate standards are appropriate.

ARGUMENT

I. CONGRESS INTENDED EPA TO SET § 7412(d) STANDARDS ON A POLLUTANT-BY-POLLUTANT BASIS.

Industry Petitioners argue that Clean Air Act § 7412(d)(3) unambiguously requires EPA to base floors on the performance of a single boiler or group of boilers that is – in some unexplained sense – achieving the lowest emission levels with respect to all hazardous air pollutants at once. Industry Br. at 29-30, 32.[1] They rely primarily on § 7412(d)(3)'s requirement that new source floors reflect the "the" best controlled "source" and the fact that § 7412(d)(3) does not expressly direct EPA to base floors on the performance of the boilers that are best with respect to specific pollutants. *Id.*

[1] We refer herein to Industry Petitioners' opening brief as "Industry Br."; EPA's brief as "EPA Br."; and Environmental Petitioners' opening brief as "Env. Pet. Br."

Industry Petitioners assume what they seek to prove. Section 7412(d)(3)'s requirement to base new source floors on a single best source says nothing about whether Congress was referring to the source that performs best with respect to a specific pollutant or the one that performs best with respect to all pollutants at once. Nor does the absence of an express mandate to select the best source "*for each pollutant*," 42 U.S.C. § 7412(d)(3), prove anything; language directing EPA to select the source or sources that are best for "*all pollutants at once*" is equally absent from § 7412(d)(3). Thus, if the text of § 7412(d)(3) were the only indicator of Congress's intent, the Clean Air Act would be ambiguous on this point and EPA's reasonable interpretation would be entitled to *Chevron* deference. *See* EPA Br. at 21-22, 27.

"[T]extual analysis," however, "is a language game played on a field known as 'context.'" *Bell Atl. Tel. Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). The context of § 7412(d)(3) and the structure of § 7412(d) as a whole make clear that Congress intended EPA to set floors as it did – *i.e.*, on a pollutant-by-pollutant basis.

It is already well established that EPA has a "clear statutory obligation to set emission standards for each listed HAP" that a source category releases. *Sierra Club v. EPA*, 479 F.3d 875, 883 (D.C. Cir. 2007) (quoting *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000)); *Mossville Envtl. Action Now v. EPA*,

370 F.3d 1232, 1236, 1242 (D.C. Cir. 2004) (same). Further, each standard under § 7412(d)(2) must require "the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section … that the Administrator … determines is achievable." 42 U.S.C. § 7412(d)(2). Thus, to satisfy § 7412(d)(2), EPA must determine the maximum achievable degree of reduction for each hazardous air pollutant that a source category emits. *Id.* Industry Petitioners do not argue otherwise.

Sections 7412(d)(2) and 7412(d)(3) are interdependent: "[s]ection 7412(d)(3) … limits the scope of the word 'achievable' in section 7412(d)(2)." *Sierra Club*, 479 F.3d at 878 (*quoting Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 861 (D.C. Cir. 2001)). Given this close and functional connection, § 7412(d)(2)'s requirement that EPA make separate determinations about what is "achievable" with respect to each hazardous air pollutant (or surrogate) strongly indicates that § 7412(d)(3) requires EPA to make separate determinations about what is actually "achieved" with respect to each pollutant. Just as EPA must base final standards under § 7412(d)(2) on the maximum "achievable" degree of reduction in mercury emissions, for example, the agency must base floors under § 7412(d)(3) on the sources that "achieve" the lowest mercury emission levels. *Sierra Club*, 479 F.3d at 880-81. *See generally HolRail, LLC v. Surface Transp. Bd.*, 515 F.3d 1313, 1317 (D.C. Cir. 2008) ("'In determining whether a statutory

provision speaks directly to the question before us, we consider it in context.'" (quoting *Holly Sugar Corp. v. Johanns*, 437 F.3d 1210, 1213 (D.C. Cir. 2006))).

This straightforward reading of § 7412(d)(2) and (d)(3) is confirmed by § 7412(d)(4), which authorizes EPA to consider a "health threshold" in setting the standard for any pollutant for which a health threshold has been established. 42 U.S.C. § 7412(d)(4). Because health thresholds are established for particular pollutants, *id.*, it makes sense to consider them only when setting standards for particular pollutants. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (*quoting Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989))

Industry Petitioners' all-pollutants-at-once interpretation of § 7412(d)(3) is not only inconsistent with the pollutant-by-pollutant approach spelled out in § 7412(d)(2) and (d)(4), but turns § 7412(d)(3)'s plain direction on floor-setting into mush. They do not even suggest how EPA should determine which sources are "best" for all pollutants at once, given that a source that is best for one pollutant might be worst for another. *See* EPA Br. at 24 (*citing* 76 Fed. Reg. 15,608, 15,622/1-2 & n.3 (Mar. 21, 2011), JA____).

Further, Industry Petitioners' interpretation would require EPA to devise an approach to determining which sources are best without any guidance from the statutory text. As the agency explains, it would necessarily require the agency to exercise broad discretion in weighing sources' relative performance with respect to the different hazardous air pollutants and the relative risk posed by different pollutants that are all listed as "hazardous" in § 7412(b). EPA Br. at 24-25. This Court has found that risk-based analysis has no role in standard-setting under § 7412(d). *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222, 1245 (D.C. Cir. 2014); *Sierra Club v. EPA*, 353 F.3d 976, 979-80 (D.C. Cir. 2004). Moreover, the notion that Congress would have written § 7412(d)(3) so vaguely and would have relied so heavily on discretionary value judgments by EPA is hopelessly inconsistent with the text and structure of § 7412, a highly detailed and prescriptive statutory provision crafted to "eliminat[e] much of EPA's discretion" over the regulation of hazardous air pollutants. *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008).

Finally, as EPA pointed out in the rulemaking, the practical result of Industry Petitioners' interpretation would be floors reflecting "mediocre or no control rather than performance which is the average of what the best performers have achieved." 76 Fed. Reg. at 15,622/1, JA____. That result is directly at odds with § 7412(d)(3)'s established requirement that floors reflect "the emission level

actually *achieved* by the best performers (those with the lowest emission levels)." *Sierra Club*, 479 F.3d at 880. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 133.

II. EPA PROPERLY DECLINED TO SET A WORK PRACTICE STANDARD FOR CARBON MONOXIDE EMISSIONS FROM COAL-FIRED BOILERS.

Industry Petitioners argue that EPA acted arbitrarily in declining to set work practice standards instead of emission standards for coal-fired boilers' carbon monoxide emissions. Industry Br. at 45-48. EPA correctly responds that the Clean Air Act does not allow the agency to take such action unless setting emission standards is "not feasible," 42 U.S.C. § 7412(h)(1)-(2), and asserts that it reasonably concluded this statutory test was not met. EPA Br. at 29-31.

Even if it were not feasible to set emission standards for carbon monoxide, however, it does not follow that EPA would be required or even authorized to set work practice standards in this instance. Carbon monoxide is not a hazardous air pollutant, but merely EPA's chosen surrogate for organic hazardous air pollutants other than dioxins. 76 Fed. Reg. at 15,612/1, JA____. Section 7412(h) provides that EPA may set work practice standards only "if it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard **for control of a hazardous air pollutant or pollutants**." 42 U.S.C. § 7412(h)(1) (emphasis added). It does not authorize EPA to set work practice standards just because it is

not feasible to set emission standards for EPA's **preferred surrogate** for a hazardous air pollutant or pollutants. Only if it were "not feasible" to set emission standards for organic hazardous air pollutants at all – either directly or through a valid surrogate – would § 7412(h) allow the agency to set work practice standards for these pollutants. *Id. See Sierra Club*, 479 F.3d at 884. Industry Petitioners do not argue, and the record does not show, that that is the situtation here.[2]

III. EPA PROPERLY DECLINED TO SET EMISSION STANDARDS AT LEVELS REFLECTING MALFUNCTION EMISSIONS.

A. The Clean Air Act Does Not Require EPA To Set Emission Standards At Levels Reflecting Malfunction Emissions.

Industry Petitioners advance the remarkable argument that the Clean Air Act requires EPA to set emission standards for hazardous air at levels so high that they can be met even when sources' emission control equipment is not functioning. Industry Br. at 35, 42. Their interpretation lacks any support in the text of the statute, and is directly at odds with the statutory requirement to reduce emissions of these pollutants at least to the level achieved by the best performing sources.

[2] Although the feasibility of setting carbon monoxide standards is irrelevant to whether § 7412(h) allows EPA to set work practice standards for organic hazardous air pollutants, it is relevant to whether carbon monoxide is a valid surrogate for those pollutants. As explained in Environmental Petitioners' brief, EPA's conclusion that it cannot set carbon monoxide standards at the levels mandated by 42 U.S.C. § 7412(d)(3) confirms that carbon monoxide is not a valid surrogate for the underlying organic hazardous air pollutants it purports to represent. *See* Env. Pet. Br. at 25-26.

Indeed, it would result in standards that allow pollution sources not to control their emissions of hazardous air pollutants at all, completely defeating the statute's purpose.

Industry Petitioners do not identify any part of the Clean Air Act that requires EPA to set standards at malfunction levels. Instead, they inaccurately claim that: (1) standards are not "achievable" unless they are set at levels so high they cannot be exceeded even during a control equipment malfunction; and (2), the Clean Air Act allows EPA "to limit emissions only 'where achievable.'" Industry Br. at 35, 42.

Standards are not unachievable just because a plant needs functioning control equipment to meet them. In any event, Industry Petitioners misrepresent the statute. Although § 7412(d)(2) allows EPA to "include[e] a prohibition" on emissions of hazardous air pollutants in its § 7412 regulations "where achievable," 42 U.S.C. § 7412(d)(2), § 7412(d)(3) unambiguously requires that the agency set standards at least as stringent as the emission level actually "achieved" by the best performing sources. 42 U.S.C. § 7412(d)(3). As this Court has held repeatedly, "Section 7412(d)(3) … limits the scope of the word 'achievable' in section 7412(d)(2)." *Sierra Club*, 479 F.3d at 878 (*quoting Cement Kiln Recycling Coalition*, 255 F.3d at 861). *See also Sierra Club*, 479 F.3d at 880 ("section

7412(d)(3) requires floors based on the emission level actually *achieved* by the best performers (those with the lowest emission levels)").

Industry Petitioners next argue that EPA's standards do not reflect the emission levels that the best sources have "achieved in practice" unless EPA sets them at the levels those sources achieve during malfunctions. Industry Br. at 36-37. Nothing in § 7412(d)(3), however, provides or even suggests that floors must reflect the emissions achieved by the best sources "during malfunction events." *See* EPA Br. at 39-40.

Unsupported by the statutory text, Industry Petitioners rely on a statement in prior cases that "it is reasonable to expect that the incinerator on which the MACT floors are based should be able to 'achieve' the MACT floor 'in practice,' which it could not do unless 'achieved in practice' meant 'achieved under the worst foreseeable circumstances.'" Industry Br. at 36 (*quoting Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1132 (D.C. Cir. 2013) ("*NACWA*")). By applying that statement to malfunctions, however, Industry Petitioners seek to put words in the Court's mouth. Neither *NACWA* nor the cases it cites were discussing malfunction emissions. The type of variability they address is the normal variability in the performance of operating controls. In *Cement Kiln Recycling Coalition*, for example, the Court explained that "[w]hile we have recognized that a given control can experience operational variability … the relevant question here

is not whether control technologies experience variability at all but whether the variability experienced by the best-performing sources can be estimated by relying on emissions data from the worst-performing sources using the MACT control." 255 F.3d at 865.[3]

Moreover, because malfunctions include the "failure" of air pollution control equipment, 76 Fed. Reg. at 15,613/2, JA____, setting standards that reflect uncontrolled emissions is the only way that emission standards could reflect the worst emission levels that sources "achieve" during malfunctions. *See* Industry Br. at 35-36. Requiring EPA to set air toxics standards at uncontrolled emission levels would nullify § 7412(d) and recreate the very problem Congress enacted § 7412 to solve. *See New Jersey*, 517 F.3d at 583 (rejecting statutory interpretation that would nullify Clean Air Act provision).

Finally, even if *NACWA* or the cases it cites had stated it would be "reasonable" for EPA to set emission standards at malfunction levels – which they

[3] Nor is there any record support for the notion that malfunctions are "foreseeable" in the sense that normal operating variations are foreseeable. EPA's regulations have long defined malfunctions as "sudden, infrequent, and not reasonably preventable" equipment failures. 40 C.F.R. § 63.2. Industry Petitioners do not provide any record evidence of "foreseeable" malfunctions – *i.e.*, specific equipment failures that are "foreseeable" but "not reasonably preventable" through proper operations and maintenance practices.

did not – such a statement would not support Industry Petitioners' claim that § 7412(d)(3) requires such a result.[4]

B. The Caselaw Discussing Clean Air Act § 7411 Lends No Support To Industry Petitioners' Interpretation of § 7412.

Industry Petitioners next seek to rely on cases interpreting the achievability requirement in § 7411 of the Clean Air Act. Industry Br. at 38-39. Those cases – *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *Essex Chemical Corporation v. Ruckelshaus*, 486 F.2d 427 (D.C. Cir. 1973), and *National Lime Assocation v. EPA*, 627 F.2d 416 (D.C. Cir. 1980) – are not precedent regarding the different statutory requirement in § 7412. *See Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1042 (D.C. Cir. 1999) ("Our decision in *Portland Cement*, however, actually construed only 'section 111 of the Clean Air Act.'"), *rev'd on other grounds sub nom. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); EPA Br. at 45. In particular, § 7411 merely requires standards reflecting "the degree of emission limitation achievable through the best system of

[4] The statement on which Industry Petitioners rely is not only inapposite for the reasons given above, but *dicta*. It is not part of the holding in *NACWA*, 734 F.3d at 1132. Nor is it any part of the holding in *Sierra Club v. EPA*, 167 F.3d 658 (D.C. Cir. 1999), the case cited in *NACWA*. In *Sierra Club*, the Court was merely discussing a "potential rationale" for EPA's rule that appeared in the agency's briefs but not in the record. 167 F.3d at 665. As the Court explained, "we do not know what interpretation the agency chose, and thus cannot evaluate its choice." *Id.*

emission reduction," 42 U.S.C. § 7411(a)(1), whereas § 7412 contains mandatory floor language that "limits the scope of the word 'achievable.'" *Sierra Club*, 479 F.3d at 878; *Cement Kiln Recycling Coalition*, 255 F.3d at 861.

Further, the § 7411 cases on which Industry Petitioners rely do not even discuss setting the standards for ongoing operations at levels so high they will accommodate even the uncontrolled emissions that occur during equipment malfunctions. Rather, they discuss "set[ting] up a procedure by which emissions due to malfunction will not be the basis of an enforcement action." *Portland Cement Ass'n*, 486 F.2d at 399; *see Essex Chemical*, 486 F.2d at 433 (same).[5] That approach might have been permissible before Congress amended § 7602(k) to require continuous compliance in the Clean Air Act Amendments of 1977, but would be flatly unlawful under the current Clean Air Act. Because § 7602(k) and § 7412 require "continuous section 112-compliant standards," this Court has already held that EPA lacks discretion to exempt sources from normal emission standards during malfunction events. *Sierra Club v. EPA*, 551 F.3d 1019, 1027-28 (D.C. Cir. 2008). Industry Petitioners disavow any claim to such an allowance, as they must. Industry Br. at 41-42.

[5] In *National Lime Association*, the Court merely noted its previous holdings in *Portland Cement Association* and *Essex Chemical*. 627 F.2d at 429-30. *See also id.* at 434 n.54 (declining to decide whether malfunction exemption would violate § 7602(k)).

C. EPA Did Not Under-Account For Variability.

Although Industry Petitioners seek an "allowance" for malfunctions, they are understandably vague about the particular allowance they think the statute requires. Industry Br. at 38-39. To the extent Industry Petitioners are asking for standards weak enough to accommodate **all** malfunctions, they are asking the Court to rewrite the Clean Air Act and require EPA to set meaningless air toxics standards at uncontrolled emission levels. To the extent they are merely arguing for weaker standards that would accommodate **some** malfunctions, their argument boils down to a claim that EPA should have made a greater allowance for the variability of boilers' emissions.

Section 7412(d)(3) does not say how EPA must account for variability other than to provide that existing source standards must reflect the "average" emission level achieved by the best sources. 42 U.S.C. § 7412(d)(3). Industry Petitioners do not even argue that EPA fails to satisfy this requirement. *Cf.* Env. Pet. Br. at 27-40. At best, therefore, their argument goes to whether EPA reasonably accounted for variability in setting floors, not to whether EPA's rule violates the statute.

Industry Petitioners do not provide any record basis for the Court to conclude that EPA under-accounted for variability, let alone in a way that was unreasonable or arbitrary. In particular, they neither acknowledge the ways in which EPA did account for variability nor take issue with the agency's approach.

Notably, EPA set standards at the 99 percent upper prediction limit. *See* Env. Pet. Br. at 12-13, 32-40. This approach resulted in standards that greatly exceed – in some cases by orders of magnitude – the average emission levels achieved by the best performing sources. *See id.* at 8-9, 16; Sahu Declaration at ¶¶ 9, 17-18. Nowhere do Industry Petitioners explain why they believe this approach arbitrarily under-counts variability.

Further, the Rule requires boiler operators to test their emissions once per year at most. 40 C.F.R. § 63.7515(a), JA____. Industry Petitioners do not even claim it is likely that boilers will experience a malfunction during one of these pre-scheduled and tightly controlled emission tests.

During the rest of the year, the Rule requires compliance with "operating limits" that are allegedly related to the actual emission limits. 76 Fed. Reg. at 15,615, JA____. Compliance with these limits is averaged over time. *Id.* For example, to meet the particulate matter limit on an ongoing basis, coal-fired boilers with heat input capacities of less than 250 MMBtu/hr merely have to keep their opacity levels below ten percent on a "daily average," or ensure that the bag leak detection system for their fabric filter is not in "alarm" mode for "more than 5 percent of the operating time during any 6-month period." *Id.* at 15,615/2-3, JA____. Large units using continuous emissions monitors ("CEMS") need only keep their "monthly average" particulate matter emissions below the particulate

matter standard. *Id.* Other operating limits are averaged in "12-hour block average[s]." *Id.* at 15,615/2. Thus, to the extent they would be captured by the promulgated operating parameters at all, malfunction events are averaged against normal operations – making it even less likely that any particular malfunction will result in a violation.

Even in the unlikely event that a truly unpreventable malfunction causes a plant to exceed its operating limits despite the averaging provisions, there is no basis to assume that any penalties would result. EPA has explained that it will exercise enforcement discretion "based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions." *Id.* at 15,642/1, JA____; *see also id.* at 15,613/2-3, JA____. Citizen suits are available only where violations are ongoing or repeated, 42 U.S.C. § 7604(a)(1), and even assuming a violation is established in an enforcement suit, the Clean Air Act gives federal district courts discretion to consider plants' "good faith efforts to comply," among other things, in deciding what penalty should be assessed, if any. 42 U.S.C. § 7413(e)(1). *See Natural Res. Def. Council v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014). Given the number of serious, repeated, and preventable violations that go unenforced, it is highly unlikely that any citizen group would waste limited resources in bringing a lawsuit

to enforce against an isolated and unpreventable violation, let alone obtain penalties in such a case.

D. EPA Reasonably Declined To Provide The Malfunction "Allowance" Sought By Industry Petitioners.

1. EPA Reasonably Declined To Set Meaningless Emission Standards To Accommodate Malfunctions.

Industry Petitoners argue EPA acted arbitrarily by not adequately proving that its standards are continuously "achievable," even during control equipment malfunctions. Industry Br. at 42 (*citing Nat'l Lime Ass'n*, 627 F.2d at 430). Because EPA set the standards under § 7412(d)(3) rather than under § 7412(d)(2), they had to reflect what the best sources actually "achieved," not what EPA determined to be "achievable." *See Sierra Club*, 479 F.3d at 880-81 (*quoting Cement Kiln Recycling Coalition*, 255 F.3d at 861). EPA had no obligation to prove that the standards it set under § 7412(d)(3) are "achievable," and Industry Petitioners' reliance on caselaw discussing the obligation to demonstrate achievability of regulations under § 7411 is misplaced.

Pretending that EPA's only rationale for declining to set the weak standards they seek is that doing so is "too difficult," Industry Petitioners argue that difficulty does not excuse the agency from statutory compliance. Industry Br. at 42-43. Nothing in the statute required EPA to set such weak standards, *see supra* at 9-13, and EPA's explanation for declining to do so was not an excuse. Rather, EPA

explained in detail that the law does not require it to set standards at levels reflecting malfunction emissions and that doing so would undermine the statutory purpose of requiring standards reflecting the "best performing" sources. 76 Fed. Reg. at 15,613/1-2, JA____. *See also id.* at 15,641/2-42/2, JA____-__. Industry Petitioners provide no basis to conclude that rationale is arbitrary.

2. EPA Reasonably Declined To Set Separate Work Practice Standards For Malfunctions.

Industry Petitioners also argue that EPA failed to explain its decision not to set separate work practice standards for malfunctions. Industry Br. at 43-44. They claim EPA provided only one insufficient reason for that decision, that setting such standards would be too difficult. *Id.* at 44.

Directly refuting Industry Petitioners' claim, the record shows that EPA declined to set separate standards of any kind for malfunctions – emission standards or work practice standards – because it concluded that malfunctions are not "a distinct operating mode." 76 Fed. Reg. at 15,613/2, 15,641/2-42/2, JA____, ____-__. Industry Petitioners do not even take issue with that rationale, let alone show it to be arbitrary.

EPA further explained that "it would be difficult to set a standard that takes into account the myriad different types of malfunctions that can occur across all sources in the category" and that "malfunctions can vary in frequency, degree, and

duration, further complicating standard setting." *Id.* at, 15,613/2-3, JA____. Because EPA had no statutory obligation to set work practice standards at all, it was reasonable for EPA to consider the difficulty of setting such standards when it determined not to do so.

CONCLUSION

For the reasons given above, the Court should deny Industry's petitions.

DATED: December 17, 2014

Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Proof Brief for Environmental Respondent-Intervenors contains 4,467 words, as counted by counsel's word processing system, and thus complies with the applicable word limit established by the Court.

DATED: December 17, 2014

/s/James S. Pew
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2014, I have served the foregoing **Proof Brief for Environmental Respondent-Intervenors** on all registered counsel through the Court's electronic filing system (ECF). I further certify that I have mailed the foregoing document by First Class mail to the following non-ECF participant:

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