No. 13-

IN THE

Supreme Court of the United States

GENON POWER MIDWEST, L.P.,

Petitioner,

v.

KRISTIE BELL AND JOAN LUPPE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 20, 2014

QUESTION PRESENTED

Whether the Clean Air Act, which provides a comprehensive system for the regulation of air pollution in the United States and leaves "no room for a parallel track," *American Electric Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2538 (2011), preempts state common law nuisance claims that would impose emissions restrictions different from those adopted pursuant to the Act and expose companies operating in compliance with all applicable emissions standards under the Act to liability for their emissions.

PARTIES TO THE PROCEEDINGS

The petitioner herein, which was the defendant-appellee below, is GenOn Power Midwest, L.P. (GenOn). GenOn operates Cheswick Generating Station, which is not a legal entity but was incorrectly identified as the defendant below. GenOn has since been acquired by NRG Energy, Inc., and is now known as NRG Power Midwest, L.P.

The respondents herein, which were the plaintiffs-appellants below, are Kristie Bell and Joan Luppe.

RULE 29.6 STATEMENT

GenOn Power Midwest, L.P. is a partially or wholly owned subsidiary of the following companies: NRG Power Midwest GP, LLC; NRG Power Generation Assets, LLC; NRG Power Generation, LLC; NRG Americas, Inc.; NRG Energy Holdings, Inc.; and NRG Energy, Inc. T. Rowe Price Associates, Inc. and Capital Research Global Investors are publicly held companies that own 10% or more of the stock of NRG Energy, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, GenOn Power Midwest, L.P., hereby petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit is reported at 734 F.3d 188, and reproduced at Petition Appendix (Pet. App.) 1a-20a. The unpublished order of the Third Circuit denying rehearing en banc is reproduced at Pet. App. 41a-42a. The opinion of the district court is reported at 903 F. Supp. 2d 314, and reproduced at Pet. App. 21a-40a.

JURISDICTION

The Third Circuit entered its judgment on August 20, 2013, and denied a timely petition for rehearing en banc by order dated September 23, 2013. Pet. App. 1a, 42a. By orders on December 3, 2013, and January 4, 2014, Justice Alito granted an extension to and including February 20, 2014, of the time for filing a petition for a writ of certiorari. This Court has jurisdiction over this timely filed petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the U.S. Constitution provides, in pertinent part, that "the Laws of the United States … shall be the supreme Law of the Land; … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

Relevant provisions of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, are reproduced at Pet. App. 43a-212a.

INTRODUCTION

This case presents the critically important and recurring question that this Court left open in *American Electric Power Co.* v. *Connecticut*, 131 S. Ct. 2527 (2011) (*AEP*): whether the Clean Air Act preempts nuisance claims under state common law that impose different emissions restrictions than those adopted pursuant to the Act. In *AEP*, this Court held that the Act displaces nuisance suits under federal common law because the Act establishes a uniform and comprehensive national system of regulation, with "no room for a parallel track." *Id.* at 2538. The availability of nuisance claims under state law was not at issue in *AEP*, and was expressly reserved by the Court. *Id.* at 2540.

Notwithstanding this reservation, the reasoning of *AEP* applies with equal if not greater force to common law claims under state law, and requires that those claims likewise be deemed precluded by the Clean Air Act. The statute defines a single expert agency, the Environmental Protection Agency (EPA), as the "primary regulator" of air pollutants throughout the country, and it sets forth in great detail the process by which EPA determines which pollutants should be regulated, how they should be regulated, and the specific role of state authorities in administering and enforcing the regulations. *Id.* at 2539. Nothing could be more detrimental to the uniformity and predictability of this system than developing a shadow regime of fifty separate state common law regulatory systems across the Nation, which impose inconsistent and ever-changing emissions requirements on the regulated community. Certainly the

concerns this Court identified in *AEP* with the creation of a federal common law of nuisance governing air pollution would pale in comparison to the problems created by such a fragmented system. There is simply no way to reconcile the structure and operation of the Clean Air Act—and the existing regulatory system crafted by EPA to implement the Act's mandates—with state nuisance claims that would allow a state court or jury to impose different standards than those adopted by EPA, approved after public notice and hearing and with the involvement of state regulators.

A number of courts have recognized this point, realizing that a contrary result would lead to "the balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *North Carolina ex rel. Cooper* v. *Tenn. Valley Auth.*, 615 F.3d 291, 296 (4th Cir. 2010) (*TVA*); see also, *e.g.*, *Comer* v. *Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013); Pet. App. 35a-39a. Nevertheless, other courts—including the Third Circuit below—have continued to follow a pre-*AEP* line of precedent starting with a 1989 Sixth Circuit decision, and hold that state law air pollution claims *cannot* be preempted because they fall within the "savings clause" of the Clean Air Act. Pet. App. 14a-19a (citing *Her Majesty the Queen in Right of the Province of Ontario* v. *City of Detroit*, 874 F.2d 332 (6th Cir. 1989)); see also, *e.g.*, *Gutierrez* v. *Mobil Oil Corp.*, 798 F. Supp. 1280 (W.D. Tex. 1992). But that provision by its terms preserves only those state claims seeking to enforce emissions standards adopted by EPA or by state statute or regulation, not the much broader universe of claims under state common law. 42 U.S.C. § 7416. These decisions assert that

their holding is required by *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), in which this Court concluded that certain common law water pollution suits are not preempted by the Clean Water Act, *e.g.*, Pet. App. 15a-16a; however, they fail to recognize that the Court in *Ouellette* relied on unique language in the savings provision of that Act, 479 U.S. at 485 (citing 33 U.S.C. § 1370(2))—language that is notably (and, as the legislative history shows, deliberately) excluded from the Clean Air Act. In all events, it is for this Court alone to decide whether the reasoning of *AEP*, which would seemingly compel preemption of state nuisance claims, is somehow inconsistent with the holding of *Ouellette* or otherwise inapplicable.

Review by this Court is indeed urgently needed, given the exceptional importance of this issue to the regulated community. If the decision below is allowed to stand, it will encourage litigants across the country to use the nearly limitless range of liability theories available under state common law to try to impose their own preferred emissions restrictions on enterprises and businesses. Litigants in prior cases have in fact already attempted to do so. *E.g.*, *Comer*, 839 F. Supp. 2d at 852-53 (nuisance, negligence, trespass). Companies operating in full compliance with the requirements of the Act, as well as any related state regulations permitted under the Act, would nonetheless face a material and continuing risk that they may be held monetarily liable for their emissions or enjoined from operating (or even forced to close) because they did not adopt additional, unstated and undefined emission-reduction methods beyond those required by EPA and relevant state regulatory agencies. This is precisely the situation that the Clean Air Act was designed to avoid, and upsets the delicate balance between the benefits and burdens

that regulations under the Act are intended to achieve.

Only this Court can restore the uniformity and predictability the Clean Air Act was designed to provide. Certiorari should be granted.

STATEMENT OF THE CASE

The claims in this case seek to impose upon Cheswick Generating Station, a power plant owned and operated by the petitioner, standards for emissions of several air pollutants subject to regulation under the Clean Air Act—including "particulate matter," a category that encompasses a broad range of airborne agents including acids, organic chemicals, metals, and soil or dust particles—that are different than the standards adopted by EPA pursuant to the Act. Pet. App. 36a-40a. An examination of the Act's structure and operation shows why, as the district court held, these claims are preempted.

1. The Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, first passed by Congress in 1963, and amended several times thereafter,[1] is "a lengthy, detailed, technical, complex, and comprehensive response" to air pollution in the United States. *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 848 (1984). It vests in EPA responsibility to consider regulating any "air pollutant," defined broadly to encompass "any physical, chemical, [or] biological … substance … [which] enters the ambient air," 42 U.S.C. § 7602(g), and it authorizes EPA to adopt emissions standards and limitations for particular pollutants and sources—both mobile and stationary—

[1] Pub. L. No. 88-206, 77 Stat. 392 (1963); Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L. No. 95-95, 91 Stat. 685 (1977); Pub. L. No. 101-549, 104 Stat. 2399 (1990).

when the agency makes particular findings as specified under the statute, *id.* §§ 7409, 7411, 7502, 7521. The Act is, in short, "sweeping" and "capacious." *Massachusetts* v. *EPA*, 549 U.S. 497, 528-32 (2007); see *TVA*, 615 F.3d at 298 ("To say this regulatory and permitting regime is comprehensive would be an understatement.").

Congress intended for the states to play a significant, but carefully defined, role in implementing and enforcing these federal standards in collaboration with federal regulators. See 42 U.S.C. § 7401(a)(3) ("[A]ir pollution prevention [and] control at its source is the primary responsibility of States and local governments ...."); *id.* §§ 7413, 7477. This relationship between the federal government and the States, frequently called "cooperative federalism," allows state agencies to tailor environmental policies to local conditions without sacrificing national oversight and uniformity. See, *e.g.*, Jonathan H. Adler, *The Green Aspects of Printz*: *The Revival of Federalism and its Implications for Environmental Law*, 6 Geo. Mason L. Rev. 573 (1998).

a. Several programs under Title I of the Act authorize EPA to establish standards for emissions of "air pollutants," including particulate matter, from stationary sources. Among the most important is the system for promulgation and enforcement of the "[n]ational primary and secondary ambient air quality standards" (NAAQS). 42 U.S.C. § 7409. These standards, developed by EPA with public input, set the maximum permissible concentrations of a pollutant that may safely be present in the local ambient air with an adequate margin for safety. *Id.* §§ 7408-7409. The pollutants subject to a NAAQS are those that, in EPA's judgment, pose special risks to the public health and welfare—currently including ozone,

sulfur dioxide, particulate matter, nitrogen oxides, carbon monoxide, and lead. See 40 C.F.R. §§ 50.1-50.12. The Act requires the NAAQS to be reviewed and revised, as appropriate, every five years to ensure continued protection of the public health and welfare. 42 U.S.C. § 7409(d)(1).

While the NAAQS are established by EPA, decisions regarding how to meet those standards are assigned initially to the regulatory bodies of individual States. *Id.* § 7410(a)(1). Each State is required to undertake notice and comment rulemaking to develop a "state implementation plan" (SIP) that "provides for implementation, maintenance, and enforcement of [NAAQS] … within such State," *id.*, through "emission limitations and other control measures, means or techniques … as may be necessary or appropriate to meet the applicable requirements of [the Act]." *Id.* § 7410(a)(2)(A). All SIPs must be submitted to EPA for approval before they become final. *Id.* § 7410(a)(1), (k). Once approved, SIP requirements become federal law and are fully enforceable in federal court. *Id.*

The NAAQS and SIPs are, however, only one piece of the comprehensive statutory regime for regulating emissions from stationary sources. Under the "new source performance standard" (NSPS) program, for any category of stationary source that in the agency's view "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," EPA can issue "standard[s] of performance" requiring those sources (both new and existing) to attain "the degree of emission limitation achievable through the application of the best system of emission reduction." *Id.* § 7411(a), (b), (d). For those air pollutants defined as "hazardous," the "national emission standards for hazardous air

pollutants" (NESHAP) program separately directs EPA to impose stringent technology-based limits that "require the maximum degree of reduction in emission of the hazardous air pollutant[]" that is achievable. *Id.* § 7412(d)(2). The NESHAP rules cover metal compounds (including mercury), dioxins, and acid gases, among other pollutants commonly emitted by power plants. See 77 Fed. Reg. 9304 (Feb. 16, 2012); 77 Fed. Reg. 23399 (Apr. 19, 2012).

b. These programs are complemented and reinforced by the permitting provisions of Title V of the Act. Those provisions require States to administer a comprehensive permit program for sources emitting air pollutants, as necessary to satisfy applicable requirements for each source under the Act, including the NAAQS, NSPS, and NESHAP standards. 42 U.S.C. § 7661c. Permits must indicate how much of which regulated air pollutants a source is allowed to emit, and the standards to which it is subject. *Id.* "[E]ach permit is intended to be a source-specific bible for Clean Air Act compliance containing in a single, comprehensive set of documents, all [Clean Air Act] requirements relevant to the particular polluting source." *TVA*, 615 F.3d at 300.

All sources subject to the Title V permitting program must prepare a compliance plan and certify—at the time of the application and at least annually thereafter—compliance with all applicable requirements. 42 U.S.C. § 7661b. Permit applications must be approved by the relevant state permitting authority before a source may commence or continue operations. *Id.*; see also *id.* § 7661b(d) (providing that, for renewal applications, operating without a permit will not be deemed a violation if a timely application has been submitted but not yet acted upon).

c. The Act also provides several methods by which other interested persons may seek to impose new or different emissions standards than those developed by EPA or a state permitting authority, or challenge a source's compliance with existing standards. Any person may, for example, petition EPA to consider rulemaking with respect to any category of air pollution sources he or she contends poses a risk to the public. See *Massachusetts*, 549 U.S. at 516-17. The denial of such a petition is subject to judicial review in the courts of appeals, with the option of further review in this Court. *Id.* (citing 42 U.S.C. § 7607(b)).

With respect to particular sources subject to permitting requirements, any person may petition EPA to object to a permit application. 42 U.S.C. § 7661d(b)(2). Denial of such a petition is subject to review in federal court. *Id.* § 7607(b). Once a permit is approved, a "citizen suit" provision of the Act allows individuals to bring suit against any source "alleged … to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." *Id.* § 7604(a)(1). This provision offers yet another means by which individuals may seek to enforce the emissions standards imposed by EPA in conjunction with the state permitting authority.

d. Only *after* an emissions standard or restriction has been promulgated by EPA or a state permitting authority (under authority assigned by EPA), does the Act contemplate that a court may become involved in addressing or enforcing those requirements. The statute expressly "designate[s] an expert agency, … EPA, as … primary regulator" of air pollutant emissions. *AEP*, 131 S. Ct. at 2539; see also *TVA*,

615 F.3d at 304 ("Congress … opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, especially in comparison with … judicially managed nuisance decrees"). This approach is eminently reasonable, given that "judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *AEP*, 131 S. Ct. at 2539-40; see *id.* at 2540 ("Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located.").

This design is consistent with the "savings clause" of the Act. That provision states that "nothing in this [Act] shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution ...." 42 U.S.C. § 7416. This clause allows a "State or political subdivision thereof" to adopt affirmative emissions standards and requirements through statutory enactment or regulatory procedures, subject to standard legislative and administrative review, which may thereafter be enforced in state or federal courts. *Id.* It does not, however, provide any authority for judges and juries applying state common law to create and then impose, retroactively, new emissions standards that have not otherwise been approved by any state regulatory body. See *id.* Such a result, as this Court and others have said, "cannot be reconciled with the decisionmaking scheme Congress enacted." *AEP*, 131 S. Ct. at 2540; see also, *e.g.*, *TVA*, 615 F.3d at 300.

2. It is against this statutory and regulatory backdrop that the claims in this case must be assessed. These claims do not allege that the facility at issue, the Cheswick Generating Station, violated any emissions standard or limitation under the Clean Air Act, or any aspect of the facility's operating permit.[2] See Pet. App. 32a. Nor do they allege that emissions from the facility violated some other "requirement" adopted by the "State or political subdivision thereof." See *id.* Rather, they ask a court—indeed, in this case, a *federal* district court—to create and impose new emissions standards on the facility. *Id.*

a. The complaint, brought by two plaintiffs who own property near the Cheswick Generating Station and seek to represent a putative class of "at least 1,500" similarly situated people, alleges that emissions from the plant are polluting the air and causing property damage. Pet. App. 1a. In particular, it asserts that, due to negligent operation—including the failure to use the "proper air pollution control equipment"—the facility emits unreasonable levels of multiple pollutants, including particulate matter, metal compounds, dioxin, and acid gases. *Id.* at 8a. It seeks as relief compensatory and punitive damages, as well as injunctive relief. *Id.*

The district court dismissed the complaint. Pet. App. 40a. "The standards and regulations with which the [Cheswick Generating Station] must comply under the Clean Air Act are extensive," the court ex-

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[2] Cheswick Generating Station is a power plant in Allegheny County, Pennsylvania. Pet. App. 21a. It has been in operation since 1970, and can generate up to 570 megawatts of electricity. *See id.* There is no dispute that it has been, and continues to be, operating in full compliance with all requirements of the permit issued by the state permitting authority, and submitted to EPA, under Title V of the Act.

plained, including "many operational requirements" to use proper air pollution control technology, and limits on allowable emissions from the plant. *Id.* at 30a-31a. The court explained that *AEP* and other cases held "very similar" nuisance claims to be preempted, because "they threaten to scuttle the comprehensive regulatory and permitting regime that has developed over several decades" by "asking the court to make determinations regarding the reasonableness of the defendants' emissions." *Id.* at 35a-36a. Because "Plaintiffs' Complaint ... necessarily speak[s] to and attack[s] emission standards," it "impermissibly encroach[es] on and interfere[s] with" the Clean Air Act's "comprehensive statutory and regulatory scheme that establishes the standards with which the Cheswick Generating Station must abide." *Id.* at 35a-37a.

The Third Circuit reversed. Pet. App. 20a. It acknowledged that "[f]ederal, state, and local authorities extensively regulate and comprehensively oversee the operations of the Cheswick Plant pursuant to their authority under the Clean Air Act," *id.* at 5a,and it agreed that the complaint did not allege a violation of any emissions standards adopted pursuant to the Act or seek relief authorized by the Act, *id.* at 10a. Nevertheless, the panel held that these claims could proceed because, in its view, the savings clause of the Act permits individuals to bring common law claims of this type—even if otherwise inconsistent with and in conflict with the substantive and remedial provisions of the Act. *Id.* at 10a-16a. It relied in this regard on this Court's decision in *Ouellette*, holding that certain common law water pollution nuisance claims were preserved under the savings clause of the Clean Water Act; although the panel recognized that the savings clause of that Act dif-

fers from that of the Clean Air Act, it found that those differences were not "meaningful" and could not support a different result. *Id.* The panel addressed *AEP* only in a footnote, *id.* at 16a n.7, and then did not attempt to reconcile its holding with that decision but instead stated only that "the Court [in *AEP*] … explicitly left open the question of whether the Clean Air Act preempted state law." *Id.* at 17a n.7.

REASONS FOR GRANTING THE PETITION

This case squarely presents the recurring question, left unaddressed in *AEP*, of whether courts may create and enforce as a matter of state common law restrictions on emissions of air pollutants that differ from those adopted pursuant to the Clean Air Act. This issue is of exceptional importance to the federal and state permitting authorities tasked with implementing the Act, whose expert determinations regarding the benefits and burdens of regulation may (under the Third Circuit's approach) be ignored in favor of the decisions of lay judges and juries based on "vague and indeterminate ... maxims of equity," and is of even greater concern to regulated sources across the country. *Infra* pp. 14-15. Those sources, in every industry and sector of the economy, are now faced with the prospect of fashioning emissions controls to satisfy the different and often unpredictable dictates of the common law of the fifty States, with billions of dollars at stake in future investments and potential liability. *Infra* pp. 15-18.

This balkanization of air emissions standards is precisely what Congress intended to avoid in designing the Clean Air Act, and was one of the principal grounds for this Court's holding in *AEP* that the Act displaces these claims when presented as a matter of federal common law. *Infra* pp. 22-25. To address

these concerns, and resolve the demonstrable conflicts between the decision of the Third Circuit and opinions of this Court and others, including *AEP* itself, the Court should grant certiorari and hold that, just as the Act displaces air pollution claims under federal common law, so too does it preempt those claims when presented under state law.

I. THE QUESTION PRESENTED IMPLICATES ISSUES OF EXCEPTIONAL IMPORTANCE CONCERNING NATIONWIDE APPLICATION OF THE CLEAN AIR ACT.

The Clean Air Act was, as this Court has recognized, designed to provide a "comprehensive" approach to the regulation of air pollution in the United States. *Gen. Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). It tasks a single expert agency, EPA, with the responsibility to assess the problems associated with emissions of air pollutants from stationary sources across the country. *AEP*, 131 S. Ct. at 2538-39. When appropriate, based on the agency's assessment of the benefits and burdens of regulation, including considerations regarding "our Nation's energy needs and the possibility of economic disruption," the Act directs EPA to develop and promulgate a uniform set of standards governing those emissions. *Id.*; see 42 U.S.C. §§ 7409-7412. To implement those standards, the Act establishes a permitting system to be administered by state authorities under EPA supervision. *AEP*, 131 S. Ct. at 2538-39; 42 U.S.C. §§ 7661a-7661d. The underlying purpose of these provisions—indeed, a preeminent goal of the Act itself—is to ensure some level of uniformity, certainty, and predictability in the application of air emissions standards throughout the Nation. *AEP*, 131 S. Ct. at 2538-39; see also *Gen. Motors*, 496 U.S. at 532.

That goal will be critically, perhaps fatally, undermined if nuisance claims of the sort alleged in this case are allowed to proceed. These claims do not seek to apply emissions standards developed by EPA, or adopted by a state legislature or regulatory body pursuant to the Act, but instead ask a court to create and enforce different emissions standards, as a matter of judicial common lawmaking, based on its own assessment of what is "reasonable[]" under the circumstances. Pet. App. 36a-37a. Courts addressing these claims would not be bound to follow or even consider the determinations of EPA or state authorities concerning the benefits or burdens of regulation. See *id.* In any individual case a judge (or jury) would be free to decide upon a permissible level of emissions, and then to impose sanctions—either in the form of monetary damages or an injunction—if the facility's emissions exceeded that level.

Nothing could be more damaging to the interests in uniformity and predictability the Clean Air Act was structured to advance. No longer could regulated entities, having successfully navigated (often at great expense) all of the requirements imposed by the Act (including any state requirements imposed as prescribed by the Act) and obtained an operating permit approved by state and federal regulators following a public hearing, be certain that they will be allowed to operate in accordance with that permit. Quite the contrary, as occurred in this case, a company operating in full compliance with its permit and all other requirements under the Act, as well as any related state regulations adopted pursuant to the Act, would nonetheless face a significant and ongoing risk that it may be sued in court and held liable for its emissions. See Pet. App. 37a. This would render it at least difficult, and likely impossible, for companies to manage

their operations or plan investments, since "[a] company, no matter how well-meaning, would be simply unable to determine its obligations ex ante ... for any judge in any nuisance suit could modify them dramatically." *TVA*, 615 F.3d at 306.

These problems are greatly exacerbated by the vagaries of nuisance law across the Nation. The standards imposed by nuisance are vague and amorphous; indeed, "one searches in vain ... for anything resembling a principle in the common law of nuisance." *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting). In nearly all jurisdictions the governing standard is one of "reasonableness," to be assessed by "weighing ... the gravity of the harm against the utility of the conduct." Restatement (Second) of Torts, § 821B cmt. e (1979); see also, *e.g.*, W. Page Keeton et al., *Prosser & Keeton on Torts* 626 (5th ed. 1984). The breadth of this standard means that, even within a single jurisdiction, a company cannot be certain of how any particular factfinder will rule. Keeton et al., *supra*, at 616 ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people ...."). If two companies in the same jurisdiction are subject to the same permitting requirements and have the same level of air emissions, one may nevertheless be found liable and exposed to crushing damages, while the other's conduct may be declared to be in perfect conformity with the law.

Because of this unpredictability, businesses large and small would face intractable challenges in assessing future capacity—not knowing when, whether, and to what degree a court might impose onerous caps or damages on them for allegedly "unreasonable" emissions. *TVA*, 615 F.3d at 306. Allowing potential-

ly hundreds of district courts and state courts across the country to attempt to define "reasonable" emission levels through an endless barrage of common law suits would impose enormous costs on regulated companies. *Id.*

These costs will adversely impact not only these companies' revenues, but the public as a whole. Companies engaged in the manufacture or production of socially beneficial goods or services will be required either to increase the prices they charge or to restrict or reduce their operations. See Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 Geo. L.J. 2167, 2174 (2000). Indeed, the generation of electrical power—the activity targeted in this case—is undoubtedly crucial to the Nation's economy and society in general. See Andy Grove, *Our Electric Future*, The American (July/Aug. 2008) ("[E]nergy is the lifeblood of all economies." "We live in a world where just about everything—from a hairdryer to the Internet—runs on electricity."). Yet, an adverse judgment in a common law tort suit, of the type presented here, could require a facility to limit the energy it generates or to close down entirely. The result will be a dramatic increase in energy prices, borne ultimately by consumers, upsetting the Act's delicate balance between the costs and benefits of regulation and causing potentially massive damage to the economy.

These lawsuits, seeking to regulate air pollutant emissions under state common law, will occur with much greater frequency in light of *AEP*'s holding that such claims are unavailable as a matter of federal common law. "With public nuisance claims based on federal common law now foreclosed [by *AEP*], the question for plaintiffs like those in *AEP* is whether state common law might step in to fill the void."

Scott Gallisdorfer, Note, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After AEP v. Connecticut*, 99 Va. L. Rev. 131, 132 (2013). In particular, class action lawsuits of the type under review here will become increasingly common, as class action attorneys seeking to represent large putative classes bring serial claims against (among others) power generating plants, manufacturing facilities, and large agricultural operations that emit any pollutant that might be characterized as in some sense harmful to the public health or welfare. *Id.* These would include not only particulate matter and scores of other agents traditionally viewed as "pollutants," but also ubiquitous emissions such as carbon dioxide and other greenhouse gases—which were, of course, at issue in *AEP*. See, *e.g.*, *Comer*, 839 F. Supp. 2d at 852 (dismissing putative class action challenging the defendants' greenhouse gas emissions under state common law of nuisance); see also Theodore J. Boutrous, Jr. & Dominic Lanza, *Global Warming Tort Litigation: The Real 'Public Nuisance,'* 35 Ecology L. Currents 80, 81 (2008) (discussing the "proliferation of global warming lawsuits brought under an array of novel legal theories"). Viewed in this light, there is essentially no limit to the facilities potentially subject to these claims.

In addition to these economic risks, these suits may indeed exacerbate the very problem they are supposed to address: air pollution. "Differing standards [across jurisdictions] could create perverse incentives for ... companies to increase utilization of plants in regions subject to less stringent judicial decrees." *TVA*, 615 F.3d at 302. Companies forced by judicial order to undertake immediate emissions control measures may not adopt those measures that would ultimately produce the greatest net reduction in

overall air pollution, as would be the case under EPA regulations, but instead may be driven by their need to respond quickly to "the most pressing legal demands." *Id.* In some circumstances, complying with the directives of an injunction will cause other emissions—potentially more harmful overall to the environment—to increase. *Id.* This result is avoided through the review and analysis provisions of the Clean Air Act, but is possible and probable under a regime governed by state common law standards. And the ever-present threat of unrestrained common law suits, with the possibility of huge damage awards, will prevent or deter many companies from investing in the construction of new facilities—facilities that will almost invariably be cleaner and more efficient than the older ones they replace.

The decision below, in short, threatens "to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air," resulting in a "balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *Id.* at 296. To avoid this outcome, so potentially damaging to the economy and the environment and plainly inconsistent with the purpose of the Clean Air Act, review should be granted.

II. THE QUESTION PRESENTED HAS DIVIDED AND WILL CONTINUE TO DIVIDE COURTS NATIONWIDE.

The preemptive effect of the Clean Air Act is an issue that has divided courts nationwide. That divide continues to widen following this Court's decision in *AEP*.

Several courts had held before *AEP*, albeit with significant reservations, that state common law

claims seeking to impose emissions restrictions different than those adopted pursuant to the Clean Air Act were not preempted. Most prominent among these was *Her Majesty the Queen in Right of the Province of Ontario* v. *City of Detroit*, 874 F.2d 332 (6th Cir. 1989), in which a divided Sixth Circuit panel held—relying principally on this Court's decision in *Ouellette*, interpreting the Clean Water Act—that the savings clause preserves such claims insofar as they are based on the law of the source state. *Id.* at 343. Judge Boggs dissented, explaining that *Ouellette* was clearly distinguishable and that "the Clean Air Act's [savings clause] should not be construed in a manner that essentially eviscerates the permitting system created by the Act." *Id.* at 345. Similarly, in *Gutierrez* v. *Mobil Oil Corp.*, 798 F. Supp. 1280 (W.D. Tex. 1992), the district court relied on *Ouellette* in holding that the Clean Air Act does not preempt such state common law nuisance claims. *Id.* at 1282, 1285. While the court was "concerned with the manageability and efficiency of this dual system that Congress has created," it concluded that it "must adhere to ... the precedent established by the Supreme Court" and that "any change in the interpretation of [the] wording [of the Clean Air Act] must come from a higher court." *Id.* at 1285.

More recent decisions have, by contrast, recognized that these holdings are inconsistent with the language and structure of the Clean Air Act, particularly following this Court's decision in *AEP*. One federal court, addressing class action claims under state common law that sought to impose liability on sources of greenhouse gas emissions on grounds that those emissions contributed to global climate change and therefore constituted a "nuisance," held the claims preempted by the Clean Air Act. *Comer*, 839

F. Supp. 2d at 865. Citing *AEP*, it explained that "the plaintiffs were calling upon the federal courts to determine what amount of carbon-dioxide emissions is unreasonable as well as what level of reduction is practical, feasible, and economically viable"—determinations that "had been entrusted by Congress to the EPA." *Id.* At least one state court has reached the same conclusion, holding that state common law claims challenging particulate emissions from a local grain processing plant were preempted by the Clean Air Act because they "[e]ssentially … ask[a] jury to make a judgment about the reasonableness of [the d]efendant's air emissions," contrary to this Court's opinion in *AEP*. *Freeman v. Grain Processing Corp.*, No. 021232, 2013 WL 6508484, at *6 (D. Iowa Apr. 1, 2013).

Most notable for these purposes is the decision of the Fourth Circuit in *North Carolina ex rel. Cooper* v. *Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010). Addressing a claim brought under the law of the affected state, that opinion held that crafting air pollutant emissions limits based on "vague public nuisance standards," *id.* at 296—"the same principles we use to regulate prostitution, obstacles in highways, and bullfights," *id.* at 302 (citing Keeton et al., *supra*, at 643-45)—is fundamentally inconsistent with the regulatory system of the Clean Air Act. See *id.* ("The contrast between the defined standards of the Clean Air Act and an ill-defined omnibus tort of last resort could not be more stark."). In the Act, the court explained, "Congress … opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, especially in comparison with … judicially managed nuisance decrees." *Id.* at 304; see also *id.* at 305 ("[W]e doubt seriously that Congress thought that a judge holding a twelve-

day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider."). Particularly because the Act grants to States an "extensive" role in the regulatory system, including through the SIP and permitting process, "conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law to contradict joint federal-state rules so meticulously drafted," *TVA* held. *Id.* at 303.

Although the decision of the Third Circuit below deals with claims under the law of the source state rather than an affected state, it nonetheless conflicts directly with the Fourth Circuit's reasoning in *TVA*, that state common law claims cannot be allowed to upend the Clean Air Act's carefully balanced regulatory system. It therefore deepens the split among federal and state courts addressing the viability of state common law claims seeking to impose air pollutant emissions standards different than those adopted pursuant to the Clean Air Act. To address the widespread disagreement, certiorari should be granted.

III. THE THIRD CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S PRECEDENT.

It is hardly surprising that courts have cited *AEP* in refusing to follow prior judicial decisions, including *Her Majesty the Queen*, and held instead that air pollution nuisance claims under state common law are preempted. The reasoning of the *AEP* opinion, although addressing claims under federal common law, applies equally to state nuisance claims, requiring that those claims also are precluded as inconsistent with the Clean Air Act. *Infra* pp. 23-25. The savings clause of the Act, on which the Third Circuit relied,

does not by its terms and could not in any event be read, consistent with structure of the Act, to preserve nuisance claims such as these. *Infra* pp. 25-29.

1. The specific issue presented in *AEP* was whether "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of … emissions from fossil-fuel fired power plants … [of] air pollution subject to regulation under the Act." 131 S. Ct. at 2537. This Court held unequivocally that any such common law claims are indeed displaced. *Id.* The Act creates a precise and carefully balanced relationship between federal regulatory bodies, state regulatory bodies, and courts. *Id.* It "entrusts ... complex balancing to EPA in the first instance, in combination with state regulators," and with "extensive cooperation between federal and state [regulatory] authorities." *Id.* at 2539. Courts, by contrast, have only a secondary role, to review the expert agencies' decisions and ensure compliance with statutory requirements. *Id.* at 2539-40.

This "prescribed order of decisionmaking," the Court explained, is "altogether fitting" given that "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Id.* They cannot, for example, "commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators." *Id.* at 2540. Instead, they "are confined by a record comprising the evidence the parties present," and thus limited to a narrow assessment that takes into account only the potential impact on the parties before the court. *Id.* In short, "[t]he expert agency is surely better equipped to do the job than individual

district judges issuing ad hoc, case-by-case injunctions." *Id.* at 2539.

There is no difference whatsoever between the claims in this case and those in *AEP* as regards their inconsistency with the regulatory system of the Clean Air Act. These claims, like those in *AEP*, are brought by private plaintiffs against a fossil-fuel power plant owner and seek to hold the defendant liable, under the common law of nuisance, for alleged violations of emissions restrictions that differ from the standards established by federal and state regulators pursuant to the Act. Pet. App. 37a. These claims, like the *AEP* claims, would have judges and juries making decisions concerning appropriate emissions regulation that the Act entrusts in the first instance to EPA. *Id.*

The only distinction is that these claims are fashioned as arising under state common law, whereas the claims in *AEP* (at least those addressed by the Court) were characterized as based on federal common law. But, whatever distinctions normally exist between displacement and preemption analysis, they cannot change the fact that the claims in this case present precisely the same conflicts and inconsistencies with the Act as did the claims in *AEP*, and that the reasoning in *AEP* compels that these claims are precluded. See 131 S. Ct. at 2537-38.

Indeed, *AEP*'s reasoning would seemingly apply with even greater force to claims under the law of individual States. State common law normally limits even further the class of interests that a judge or jury could consider, restricting them to the policy concerns of that particular jurisdiction—even though air pollutants by their very nature almost invariably implicate interstate and national interests. See, *e.g.*, *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 103-05 & n.6 (1972) ("there is an overriding federal interest in the

need for a uniform rule of decision" in air and water pollution cases); *Natural Res. Def. Council, Inc.* v. *EPA*, 478 F.2d 875, 880 (1st Cir. 1973) ("Air pollutants, by their nature, do not respect political boundaries ...."). In all events, the language and reasoning of *AEP*, and specifically its holding that the Clean Air Act contemplates a uniform national system of regulation with "no room for a parallel track," 131 S. Ct. at 2538, precludes common law claims like these, whether presented under federal or state law, that would impose different emission standards than those adopted pursuant to the Act.

2. The only reason given by the panel below for concluding otherwise was that, in its view, the savings clause of the Clean Air Act preserves these claims notwithstanding their inconsistency with other provisions of the Act. Pet. App. 13a-16a. It noted that this Court in *Ouellette* had cited the savings clause of the Clean Water Act—which the panel described as "[in]distinguishable" from that of the Clean Air Act—in holding the Clean Water Act does not preempt water pollution claims based on the common law of the source State. *Id.* at 13a. The Third's Circuit's conclusion reflects a misreading of the savings clause of the Clean Air Act, and a misinterpretation of *Ouellette* and this Court's preemption jurisprudence.

The savings clause of the Clean Air Act does not, by its own terms, preserve claims such as those in this case brought by individuals under the common law of nuisance. It provides that "nothing in this [Act] shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. The

plain language of this provision preserves only those state law claims seeking to enforce an emissions standard established through statute or regulation, not claims under state common law.[3] See Pet. App. 37a-38a. This reading is supported by other provisions in the Act, which define the language in precisely this way, 42 U.S.C. § 7604(f), and by the relevant legislative history, S. Rep. No. 91-1196, at 14-15 (1970).

This conclusion is confirmed, not undermined, by *Ouellette*. That opinion, in holding that state common law water pollution claims were preserved by a savings clause in the Clean Water Act, 33 U.S.C. § 1370, relied on language that was unique to that clause—language that was, notably, excluded from the savings clause of the Clean Air Act. 479 U.S. at 485. In particular, the *Ouellette* Court quoted the additional language from the Clean Water Act stating that "nothing in this [Act] shall … be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (in-

[3] The Clean Air Act has an additional savings clause, located in the section of the Act creating a cause of action for citizen suits, which provides that "[n]othing *in this section* shall restrict any right which any person ... may have under any statute or common law to seek *enforcement* of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e) (emphasis added). However, by its terms, this savings clause provides only that the creation of a new cause of action in "this section"—that is, the citizen suit provision—does not preempt other causes of action that may exist. It says nothing about the preemptive effect of *other* sections of the Clean Air Act. *See, e.g., Ouellette*, 479 U.S. at 493 (concluding that the citizen-suit savings clause of the Clean Water Act "merely says that '[n]othing in this section' *i.e.*, the citizen-suit provisions, shall affect an injured party's right to seek relief under state law; it does not purport to preclude pre-emption of state law by other provisions of the Act.") (emphasis omitted).

cluding boundary waters) of such States." *Id.* (quoting 33 U.S.C. § 1370). This is the language on which the Court's holding in *Ouellette* was based, not the less expansive provision—limited to "standard[s]" and "requirement[s]" adopted by a "State or political subdivision thereof," 42 U.S.C. § 7416—that appears in the savings clause of the Clean Air Act. See 479 U.S. at 485. That clause, as *Ouellette* affirms by implication, cannot operate to preserve claims such as those in this case.[4]

The panel's decision is also, more generally, contrary to this Court's conflict preemption jurisprudence. The Third Circuit focused only on the language of the savings clauses and did not, as this Court's precedents require, consider whether the state common law nuisance suit "actually conflicts," *Geier* v. *Am. Honda Motor Co., Inc.*, 529 U.S. 861, 871 (2000), with the Act as a whole, by "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Boggs* v. *Boggs*, 520 U.S. 833, 844 (1997). It is well-settled law that a savings clause "does *not* bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869. Indeed, courts may not "give broad effect to savings clauses where doing so would upset the careful regu-

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[4] The panel suggested that the broader language of the Clean Water Act was excluded from the Clean Air Act because "there are no such jurisdictional boundaries or rights which apply to the air." Pet. App. 14a (emphasis omitted). That is incorrect as a legal matter: it has long been recognized that States have jurisdictional authority to regulate, and indeed property rights in, the airspace above their borders. *See, e.g.*, *Massachusetts*, 549 U.S. at 518-19. In all events, that Congress included broader language in the savings clause of the Clean Water Act can support only the conclusion that it intended to preserve a greater range of claims in that context.

latory scheme established by federal law." *Id.* at 870. "In other words, the act cannot be held to destroy itself." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1748 (2011).

Indeed, this Court's holding in *Ouellette*, upon which the Third Circuit relied, did not turn exclusively on the language of the Clean Water Act's savings clauses. To the contrary, *Ouellette* recognized that "the plain language of the [savings clause] provisions on which respondents rely by no means compels the result they seek." 479 U.S. at 493. Concluding that "the Act itself does not speak directly to the issue," the Court instead was "guided by the goals and policies of the Act in determining whether it in fact preempts an action." *Id.* The Third Circuit should have similarly examined the "goals and policies" of the Clean Air Act, rather than uncritically applying this Court's holding on the Clean Water Act in *Ouellette*, to an entirely separate statute. Pet. App. 16a ("[W]e conclude that the Supreme Court's decision in *Ouellette* controls this case"). As this Court recently admonished, courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (quoting *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 393 (2008)).

The "goals and policies" of the Clean Water Act and the Clean Air Act differ in crucial respects. A principal focus of the Clean Air Act is the establishment and enforcement of uniform standards for air quality. 42 U.S.C. §§ 7408, 7411. These standards are developed by EPA based on its consideration of the risks associated with particular emissions from categories of stationary sources, balanced against the need for economic development, the costs of regulation, and

the availability and reliability of control technologies. *Id.* This system—depending as it does on the issuance of prospective standards based on EPA's considered judgment concerning the benefits and burdens of regulation—is fundamentally inconsistent with common law adjudication that would allow for the imposition of liability based on standards developed by a judge or jury and retroactively applied against a facility. The regulatory structure of the Clean Water Act, by contrast, depends more on individualized assessments of specific point sources, and the waters into which the pollutant will be discharged, to judge whether the discharge at issue will adversely impact water quality and, if so, at what levels if any the discharge may be allowed. See 33 U.S.C. § 1342. In this context, there may be less cause to believe that a common law adjudication of liability in a single district will directly interfere with or undermine federal regulatory methods and goals. Congress could then have chosen to preempt common law air pollution claims in the Clean Air Act, while deciding that water pollution claims could be preserved (through the distinct language that appears in the savings clause of that Act).

* * *

When the correct inquiry is considered—whether the state common law nuisance claims at issue here conflict with the complex and carefully calibrated structure of the Clean Air Act—the answer is clearly that the claims must be preempted. *Supra* pp. 25-29. That conclusion is required by the reasoning of *AEP*, and supported by a long line of this Court's preemption jurisprudence as well as the decisions of other courts. *Supra* pp. 19-25, 27-28. Review by this Court is necessary to address the conflict between the panel's decision and these opinions, and to avoid the se-

verely adverse consequences—to industry and the economy as a whole—that will result if common law claims such as these are allowed to proceed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT

No. 12-4216

KRISTIE BELL; JOAN LUPPE,
Appellants,
v.
CHESWICK GENERATING STATION,
GENON POWER MIDWEST, L.P.

Argued June 25, 2013
Opinion Filed Aug. 20, 2013

Before FUENTES, FISHER, and CHAGARES, *Circuit Judges.*

OPINION OF THE COURT

FUENTES, *Circuit Judge*:

Kristie Bell and Joan Luppe are the named plaintiffs in a class action complaint (the "Complaint") filed against Cheswick Generating Station, GenOn Power Midwest, L.P. ("GenOn")[1] The putative class (the "Class") is made up of at least 1,500 individuals

[1] The Complaint was filed in April 2012 in the Court of Common Pleas of Allegheny County, Pennsylvania. GenOn is a limited partnership organized under the laws of Delaware with its organizational headquarters and principal place of business in Houston, Texas. According to GenOn, "Cheswick Generating Station, GenOn Power Midwest, L.P." is not a legal entity. However, GenOn admits that it operates the Cheswick Generating Station. *See Bell v. Cheswick Generating Station*, 903 F.Supp.2d 314, 314 n. 1 (W.D.Pa.2012). The error in the caption does not affect our ruling in any way.

who own or inhabit residential property within one mile of GenOn's Cheswick Generating Station, a 570-megawatt coal-fired electrical generation facility in Spring dale, Pennsylvania (the "Plant").

Complaining of ash and contaminants settling on their property, the Class brought suit against GenOn under several state law tort theories. GenOn argued that because the Plant was subject to comprehensive regulation under the Clean Air Act, it owed no extra duty to the members of the Class under state tort law. The District Court agreed with GenOn and dismissed the case. On appeal, we are faced with a matter of first impression: whether the Clean Air Act preempts state law tort claims brought by private property owners against a source of pollution located within the state. Based on the plain language of the Clean Air Act and controlling Supreme Court precedent, we conclude that such source state common law actions are not preempted. Accordingly, we reverse the decision of the District Court and remand the case for further proceedings.

I. REGULATORY FRAMEWORK

A. Environmental Regulation Under the Clean Air Act

The Clean Air Act, 42 U.S.C. § 7401 *et seq*., enacted in 1970, is a comprehensive federal law that regulates air emissions under the auspices of the United States Environmental Protection Agency ("EPA"). Congress enacted the law in response to evidence of the increasing amount of air pollution created by the industrialization and urbanization of the United States and its threat to public health and welfare. 42 U.S.C. § 7401(a)(2). The Clean Air Act states that air pollution prevention and control is the primary responsibility of individual states and local governments but that federal financial assistance and leadership is essential

to accomplish these goals. *Id*. § 7401(a)(3)-(4). Thus, it employs a "cooperative federalism" structure under which the federal government develops baseline standards that the states individually implement and enforce. *GenOn Rema, LLC v. EPA*, 722 F.3d 513, ___, No. 12-1022, 2013 WL 3481486, at *1 (3d Cir. July 12, 2013). In so doing, states are expressly allowed to employ standards more stringent than those specified by the federal requirements. 42 U.S.C. § 7416.

The Clean Air Act makes the EPA responsible for developing acceptable national ambient air quality standards ("NAAQS"), which are meant to set a uniform level of air quality across the country in order to protect the populace and the environment. *Id*. § 7409(b)(1). Before such levels are adopted or modified by the EPA, "a reasonable time for interested persons to submit written comments" must be provided. *Id*. § 7409(a)(1)(B). The EPA itself does not typically regulate individual sources of emissions. Instead, decisions regarding how to meet NAAQS are left to individual states. *Id*. § 7410(a)(1). Pursuant to this goal, each state is required to create and submit to the EPA a State Implementation Plan ("SIP") which provides for implementation, maintenance, and enforcement of NAAQS within the state. *Id*. All SIPs must be submitted to the EPA for approval before they become final, and once a SIP is approved, "its requirements become federal law and are fully enforceable in federal court." *Her Majesty the Queen in Right of the Province of Ontario v. Detroit*, 874 F.2d 332, 335 (6th Cir.1989) (citing 42 U.S.C. § 7604(a)).

States are tasked with enforcing the limitations they adopt in their SIPs. They must regulate all stationary sources located within the areas covered by the SIPs, 42 U.S.C. § 7410(a)(2)(C), and implement a

mandatory permit program that limits the amounts and types of emissions that each stationary source is allowed to discharge, *id*. §§ 7661a(d)(1), 7661c(a). "[E]ach permit is intended to be a source-specific bible for Clean Air Act compliance containing in a single, comprehensive set of documents, all [Clean Air Act] requirements relevant to the particular polluting source." *North Carolina, ex rel. Cooper v. Tenn. Valley Auth*., 615 F.3d 291, 300 (4th Cir.2010) (internal quotation marks omitted). Furthermore, pursuant to the federal Prevention of Significant Deterioration of Air Quality program in areas attaining NAAQS, "a covered source must, among other things, install the 'best available control technology [ ] for each pollutant subject to regulation. . . .'" *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 133 (D.C.Cir.2012) (quoting 42 U.S.C. § 7475(a)(4)).

B. Modes of Redress Under the CAA

The Clean Air Act contains a "citizen suit" provision, *see* 42 U.S.C. § 7604, which permits the filing of civil suits in district courts "against any person . . . who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." *Id*. § 7604(a)(1). The statute further grants a cause of action against the EPA if it fails to perform any non-discretionary responsibility, *id*. § 7604(a)(2), and also allows suit against any entity that constructs a source of emissions without securing the requisite permits. *Id*. § 7604(a)(3). Furthermore, the EPA "retains the power to inspect and monitor regulated sources, to impose administrative penalties for noncompliance, and to commence civil actions against polluters in federal court." *Am. Elec. Power Co., Inc. v. Connecticut*,

— U.S. —, 131 S.Ct. 2527, 2538, 180 L.Ed.2d 435 (2011).

The citizen suit provision contains a "savings clause" which provides, in pertinent part:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

42 U.S.C. § 7604(e). This is the Clean Air Act's "citizen suit savings clause."

The Clean Air Act also contains a separate savings clause entitled "Retention of State authority," codified at 42 U.S.C. § 7416. This provision focuses on states' rights, and reads as follows:

> Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution. . . .

Id. § 7416. This is the Clean Air Act's "states' rights savings clause."

C. Regulation at the Cheswick Plant

Federal, state, and local authorities extensively regulate and comprehensively oversee the operations of the Cheswick Plant pursuant to their authority under the Clean Air Act. The EPA, the Pennsylvania Department of Environmental Protection, and the Allegheny County Health Department comprise the administrative bodies that are primarily responsible for defining environmental emission standards and

policing compliance with the Clean Air Act at the Plant. As discussed above, at the EPA's direction and with its approval, states issue operating permits for all stationary sources under Subchapter V of the Clean Air Act. *See* 42 U.S.C. §§ 7661a-f Subchapter V program authority has in this instance been delegated to Allegheny County. GenOn's Subchapter V permit for Cheswick (the "Permit") imposes limits on the emission of various particulate matter, gasses, chemical, and compounds from coal combustion. *See* App. 91-161.

The Permit collects all the operational requirements that are contained in Subchapter V of the Clean Air Act, and approved by the EPA. It specifically provides that GenOn may not "operate . . . any source in such manner that emissions of malodorous matter from such source are perceptible beyond the property line," App. 106 (§ IV.3); must "take all reasonable actions to prevent fugitive air contaminants from becoming airborne," App. 112 (§ IV.19); may not "conduct . . . any materials handling operation in such manner that emissions from such operation are visible at or beyond the property line," App. 106 (§ IV.4); must ensure that "[a]ll air pollution control equipment" is "properly installed, maintained, and operated," App. 106 (§ IV.5); and may not "operate any source . . . in such manner that emissions from such source . . . [m]ay reasonably be anticipated to endanger the public health, safety, or welfare." App. 96 (§ III.1).

However, it also provides that "nothing in this permit relieves the permittee from the obligation to comply with all applicable Federal, State and Local Laws and regulations," App. 96 (Declaration of Policy), and contains a savings clause which provides that:

> Nothing in this permit shall be construed as impairing any right or remedy now existing or

> hereafter created in equity, common law or statutory law with respect to air pollution, nor shall any court be deprived of such jurisdiction for the reason that such air pollution constitutes a violation of this permit.

App. 102 (§ III.31).

II. GENERAL FACTUAL AND PROCEDURAL OVERVIEW

A. The Complaint[2]

The Complaint alleges that GenOn's operation, maintenance, control, and use of the Plant releases malodorous substances and particulates[3] into the surrounding neighborhood, causing fly ash and unburned coal combustion byproducts to settle onto the Class members' property as a "black dust/film . . . or white powder" which requires constant cleaning. App. 9. These odors and particulates are harmful and noxious and have caused substantial damage to Class members' property and the loss of their ability to use and enjoy their properties, making them "prisoners in their [own] homes." App. 12. The operation of the Plant has been the subject of numerous and constant complaints by the residents of the surrounding neighborhood and by organizations and interested persons within the area. However, these complaints have not compelled GenOn to cease the improper operation of

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[2] The following factual allegations are taken from the Complaint, and we accept them as true for the purposes of this appeal.

[3] These particulates include arsenic compounds, barium compounds, chromium compounds, copper compounds, dioxin and dioxin-like compounds, hydrochloric acid, hydrogen fluoride, lead compounds, manganese compounds, mercury compounds, nickel compounds, polycyclic aromatic compounds, sulfuric acid, vanadium compounds, and zinc compounds. App. 10-11.

the Plant or to discontinue the ongoing invasion and trespass of the Class members' properties. The Complaint alleges that GenOn knows of the "improper construction, and operation of the [Plant], which allows discharge" of these particulates, yet "continues to operate the [Plant] without proper or best available technology, or any proper air pollution control equipment." App. 12-13.

Based on these allegations, the Class seeks to recover compensatory and punitive damages under three state common law tort theories: (1) nuisance; (2) negligence and recklessness; and (3) trespass.[4] Although the Complaint also seeks injunctive relief on the nuisance and trespass counts, the Class admits that such relief would be limited to an order requiring GenOn to remove the particulate that continuously falls upon the Class members' properties. Oral Arg. at 13:50; *Bell*, 903 F.Supp.2d at 318.

B. The District Court Decision

In July 2012, GenOn removed the case to the Western District of Pennsylvania invoking the District Court's diversity jurisdiction, and promptly moved to dismiss the action on the grounds that the state law tort claims were preempted by the Clean Air Act. It argued that allowing such claims to go forward "would undermine the [Clean Air Act]'s comprehensive scheme, and make it impossible for regulators to strike their desired balance in implementing emissions standards." App. 84. In October 2012 the District Court granted GenOn's motion, finding that the Clean Air Act preempted all of the Class's state law claims.

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[4] The Class also asserted a strict liability claim, but has conceded that it must fail because power generation is not an ultra-hazardous activity. *See Bell*, 903 F.Supp.2d at 317.

The District Court began by summarizing the extensive regulatory framework governing the Plant. It then reviewed the Complaint and determined that "the allegations of Plaintiffs, as pleaded, assert various permit violations and seek a judicial examination of matters governed by the regulating administrative bodies." *Bell*, 903 F.Supp.2d at 320. Thus, it moved on to examine "whether the Clean Air Act preempts the state common law claims or whether the savings clause in the citizen suit provision allow those claims to survive." *Id*. at 321. After discussing the relevant case law, the District Court concluded that, "[b]ased on the extensive and comprehensive regulations promulgated by the administrative bodies which govern air emissions from electrical generation facilities, the Court finds and rules that to permit the common law claims would be inconsistent with the dictates of the Clean Air Act." *Id.* at 322. The Court found that the "savings clause of the Clean Air Act does not alter this analysis." *Id*. The Class now appeals this decision.

III. DISCUSSION[5]

A. Preemption Analysis

The Supremacy Clause of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance

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[5] The District Court had diversity jurisdiction pursuant to 28 U.S.C. § 1332. We have appellate jurisdiction under 28 U.S.C. § 1291. In reviewing a motion to dismiss, we must accept as true all well-pleaded facts and allegations, and must draw all reasonable inferences therefrom in favor of the plaintiff. *Monroe v. Beard*, 536 F.3d 198, 205 (3d Cir.2008). A district court's order granting a motion to dismiss is given plenary review. *Grier v. Klem*, 591 F.3d 672, 676 (3d Cir.2010).

> thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. The Supreme Court has interpreted the Supremacy Clause as preempting any state law that "interferes with or is contrary to federal law." *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962). "Federal law can preempt state law in three ways: (1) express preemption, (2) field preemption, and (3) conflict preemption." *Farina v. Nokia*, 625 F.3d 97, 115 (3d Cir.2010). "Conflict preemption nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law erects an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotation marks omitted). GenOn argues that state tort law conflicts with the objectives of the Clean Air Act, because it "would undermine the [Act]'s comprehensive scheme and rival the work of regulators as they strike their desired balance in implementing emissions standards." Appellee Br. at 26.

1. Legal Precedent

While the extent to which the Clean Air Act preempts state law tort claims against an in-state source of pollution is a matter of first impression in this Circuit, the Supreme Court has addressed this issue in the context of a similarly comprehensive environmental statute: the Clean Water Act, 33 U.S.C. § 1251, *et seq*. In *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987), the Court was asked to determine whether the Clean Water Act preempted a Vermont common law nuisance suit filed in Vermont state court, where the

source of the alleged injury was located in New York. Plaintiffs, a group of property owners who resided on the Vermont ("affected state") shore of Lake Champlain, alleged that the defendant paper company, which operated a pulp and paper mill on the New York ("source state") side of the lake, was discharging "effluents" into the lake, polluting the water and thereby diminishing the value of their property. *Id.* at 484, 107 S.Ct. 805. Defendants argued that the Clean Water Act preempted the court from applying Vermont state law against a source of pollution located in New York. In response, Plaintiffs argued that the Clean Water Act's savings clauses indicated "that Congress intended to preserve the right to bring suit under the law of any affected State." *Id.* at 493, 107 S.Ct. 805.

Like the Clean Air Act, the Clean Water Act contains two savings clauses, one located in the citizen suit provision, and another which focuses on states' rights. Section § 505(e) of the Clean Water Act, which is located in the Act's citizen suit provision, states:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . .

33 U.S.C. § 1365(e). Section 510 of the Clean Water Act focuses on states' rights, and provides:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; . . . or (2) be

> construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Id. § 1370.

The *Ouellette* Court found that the Clean Water Act's savings clauses clearly preserved *some* state law tort actions, but that the text of the clauses did not provide a definitive answer to the question of whether suits based on the law of the *affected* state were preempted. 479 U.S. at 492, 497, 107 S.Ct. 805. However, it found definitively that "nothing in the [Clean Water Act] bars aggrieved individuals from bringing a nuisance claim pursuant to the laws of the *source* State." *Id*. at 497, 107 S.Ct. 805 (emphasis in original). The Court reasoned that, "[b]y its terms the Clean Water Act allows States . . . to impose higher standards on their own point sources," and "this authority may include the right to impose higher common-law as well as higher statutory restrictions." *Id*. (internal citation omitted). The Court acknowledged that a source state's "nuisance law may impose separate standards and thus create some tension with the permit system," but explained that this "would not frustrate the goals of the Clean Water Act," because "a source only is required to look to a single additional authority, whose rules should be relatively predictable." *Id*. at 498-99, 107 S. Ct. 805.[6]

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[6] Ultimately, the *Ouellette* Court concluded that "the [Clean Water Act] precludes a court from applying the law of an affected State against an out-of-state source," *id*. at 494, 107 S.Ct. 805, reasoning that if "affected States were allowed to impose separate discharge standards on a single [out-of-state] point source, the inevitable result would be a serious interference with the

Thus, a suit by Vermont citizens would not be preempted if brought under the law of New York, the source state.

GenOn argues that *Ouellette* is distinguishable from this case because the savings clauses of the Clean Water Act are broader than the corresponding provisions in the Clean Air Act. However, a textual comparison of the two savings clauses at issue demonstrates there is no meaningful difference between them.

As the Supreme Court has acknowledged, and GenOn concedes, the citizen suit savings clause of the Clean Water Act is "virtually identical" to its counterpart in the Clean Air Act. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 328, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981); Appellee Br. at 30. Thus, GenOn's argument hinges on its expansive reading of the Clean Water Act's states' rights savings clause, which again provides:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; . . . or (2) *be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.*

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achievement of the full purposes and objectives of Congress," *id.* at 493, 107 S.Ct. 805 (internal quotation marks omitted).

33 U.S.C. § 1370 (emphasis added). By way of comparison, the states' rights savings clause of the Clean Air Act provides:

> Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution. . . .

42 U.S.C. § 7416. As a side-by-side comparison of the text indicates, the only meaningful difference between the two states' rights savings clauses is the portion of the Clean Water Act italicized above which refers to the boundary waters of the states. The reason why such language is not included the in Clean Air Act is clear: *there are no such jurisdictional boundaries or rights which apply to the air*. If anything, the absence of any language regarding state boundaries in the states' rights savings clause of the Clean Air Act indicates that Congress intended to preserve more rights for the states, rather than less. In no way can this omission be read to preempt all state law tort claims.

The only other circuit courts to have examined this issue in depth have also found no meaningful distinction between the Clean Water Act and the Clean Air Act. In *Her Majesty the Queen in Right of the Province of Ontario v. Detroit*, 874 F.2d 332 (6th Cir.1989), the Sixth Circuit held that the Clean Air Act did not preempt plaintiffs from suing the City of Detroit under the Michigan Environmental Protection Act ("MEPA"), finding that "the [Clean Air Act] displaces state law only to the extent that state law is not as strict as emission limitations established in the federal statute." *Id*. at 342 (emphasis removed from original). The

court reasoned that "the plain language of the [Clean Air Act's] savings clause . . . clearly indicates that Congress did not wish to abolish state control," *id*. at 342-43, and, relying on *Ouellette*, concluded:

> If the plaintiffs succeed in state court, it will simply be an instance where a state is enacting and enforcing more stringent pollution controls as authorized by the [Clean Air Act]. With MEPA, the State of Michigan has created a mechanism under which more stringent limitations may be imposed than required by federal law. It is, by its terms, supplemental to other legal and administrative procedures and requirements, and in this case principles of comity and federalism require us to hold these MEPA actions are not preempted by federal law.

Id. at 344.

In *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir.2010), the state of North Carolina brought a state law public nuisance suit against the Tennessee Valley Authority ("TVA"), a federal agency which owned and operated eleven coal-fired power plants located in Tennessee, Alabama, and Kentucky. After a bench trial, the District Court for the Western District of North Carolina issued an injunction against four of the TVA plants, imposing emission standards on the plants that were stricter than what was required by the Clean Air Act. On appeal, the Fourth Circuit reversed, finding that the district court had incorrectly applied the law of the affected state in violation of *Ouellette*, and that the TVA plants' emissions were not a public nuisance under the laws of the source states. In explaining its decision to apply *Ouellette*, the court noted that the savings clauses of the Clean Air Act and the Clean

Water Act are "similar." *Id*. at 304. It also noted that the Clean Water Act is "similarly comprehensive" to the Clean Air Act, and that "[w]hile *Ouellette* involved a nuisance suit against a source regulated under the Clean Water Act, all parties agree its holding is equally applicable to the Clean Air Act." *Id*. at 306.

Ultimately, as commentators have recognized, "there is little basis for distinguishing the Clean Air Act from the Clean Water Act—the two statutes feature nearly identical savings clauses and employ similar 'cooperative federalism' structures." Scott Gallisdorfer, Note, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After AEP v. Connecticut*, 99 Va. L.Rev. 131, 150 (2013). Both Acts establish a regulatory scheme through which source states, and not affected states, play the primary role in developing the regulations by which a particular source will be bound. Both Acts contain citizen suit provisions which allow individuals to bring suit to enforce their terms under certain circumstances, and both Acts contain two savings clauses: one located within the citizen suit provision which focuses on the rights of individuals to sue, and a second independent savings clause which focuses on states' rights.

Given that we find no meaningful difference between the Clean Water Act and the Clean Air Act for the purposes of our preemption analysis, we conclude that the Supreme Court's decision in *Ouellette* controls this case, and thus, the Clean Air Act does not preempt state common law claims based on the law of the state where the source of the pollution is located.[7]

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[7] The Supreme Court's recent decision in *American Electric Power Co. v. Connecticut*, — U.S. —, 131 S.Ct. 2527, 180 L.Ed.2d 435 (2011), does nothing to alter our analysis. There, the Court

Accordingly, the suit here, brought by Pennsylvania residents under Pennsylvania law against a source of pollution located in Pennsylvania, is not preempted.

2. Public Policy Considerations

GenOn argues that our holding may undermine the comprehensive regulatory structure established by the Clean Air Act by allowing the jury and the court to set emissions standards. Furthermore, amicus Utility Air Regulatory Group ("UARG") argues that allowing such cases to move forward would open the proverbial floodgates to nuisance claims against sources in full compliance with federal and state environmental standards, creating a patchwork of inconsistent standards across the country that would compromise Congress's carefully constructed cooperative federalism framework. Such inconsistency, it argues, would make it extremely difficult for sources to plan and operate, as they would never be sure of precisely what standards apply to their operations.

However, "[t]he Supreme Court addressed this precise problem" in *Ouellette, Cooper*, 615 F.3d at 301, and rejected the very same concerns that GenOn and UARG now raise. Indeed, while the *Ouellette* Court acknowledged that allowing "a number of different

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held that the Clean Air Act displaced any federal common law right to seek abatement of carbon-dioxide emissions from power plants. *Id*. at 2537. However, the Court acknowledged that "[l]egislative displacement of federal common law does not require the same sort of evidence of clear and manifest [congressional] purpose demanded for preemption of state law," and explicitly left open the question of whether the Clean Air Act preempted state law. *Id*. at 2537, 2540; *see* Gallisdorfer, 99 Va. L.Rev. at 139 ("the displacement finding in [*American Electric*] hardly compels—or even presages—a corresponding finding of preemption").

states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states," 479 U.S. at 496-97, 107 S.Ct. 805 (quoting *Illinois v. City of Milwaukee*, 731 F.2d 403, 414 (7th Cir.1984)), it found that "[a]n action brought . . . under [source state] nuisance law would not frustrate the goals of the [Clean Water Act] as would a suit governed by [affected state] law," *id*. at 498, 107 S.Ct. 805. Its reasoning was straightforward:

> First, application of the source State's law does not disturb the balance among federal, source-state, and affected-state interests. Because the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system. Second, the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations. Although [source state] nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable. Moreover, States can be expected to take into account their own nuisance laws in setting permit requirements.

Id. at 498-99, 107 S.Ct. 805.

Thus, the Court recognized that the requirements placed on sources of pollution through the "cooperative federalism" structure of the Clean Water Act served as a regulatory floor, not a ceiling, and expressly held that states are free to impose higher standards on their own sources of pollution, and that state tort law

is a permissible way of doing so. *Id*. at 497-98, 107 S.Ct. 805. Indeed, courts in other circuits have affirmed decisions granting plaintiffs relief against sources of air pollution under state law nuisance theory. *See e.g., Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir.2004) (upholding award of injunctive relief and compensatory and punitive damages for violation of Kentucky nuisance law where "fugitive dust" from defendant's steel plant settled on plaintiffs' property).

B. Political Question Doctrine

GenOn argues in the alternative that the Class's claims should be barred by the political question doctrine based on the existence of the Clean Air Act. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc*., 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986). No court has ever held that such a constitutional commitment of authority regarding the redress of individual property rights for pollution exists in the legislative branch. Indeed, if such a commitment did exist, the Supreme Court would not have decided *Ouellette* in the first place. Accordingly, we reject this argument.

III. CONCLUSION

"In all pre-emption cases . . . we start with the assumption that the . . . powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc., v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). We see nothing in the

Clean Air Act to indicate that Congress intended to preempt source state common law tort claims. If Congress intended to eliminate such private causes of action, "its failure even to hint at" this result would be "spectacularly odd." *Id*. at 491. The Supreme Court's decision in *Ouellette* confirms this reading of the statute. Accordingly, we hold that the Class's claims are not preempted. We will reverse the decision of the District Court and remand this case for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT,
W.D. PENNSYLVANIA

No. 2:12-cv-929

KRISTIE BELL AND JOAN LUPPE,
Plaintiffs,

v.

CHESWICK GENERATING STATION,
GENON POWER MIDWEST, L.P.,
Defendant.

Oct. 12, 2012

MEMORANDUM OPINION
AND ORDER OF COURT

TERRENCE F. McVERRY, *District Judge*.

Presently pending before the Court is the MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (Doc. No. 6) with Brief in Support (Doc. No. 7) filed by Defendant Cheswick Generating Station, GenOn Power Midwest, L.P. ("GenOn" or "Defendant").[1] Plaintiffs Kristie Bell and Joan Luppe, Putative Class

[1] In its Notice of Removal, Defendant states that "Cheswick Generating Station, GenOn Power Midwest, L.P." is not a legal entity. Defendant nonetheless makes clear that that "Cheswick Generating Station" is "operated by Defendant GenOn, a limited partnership authorized to do business in Pennsylvania." (Doc. No. 1 at 3, n. 1). For present purposes, the Court will disregard the

Action Representatives, ("Plaintiffs") have filed a Brief in Opposition (Doc. No. 12), Defendant has filed a Reply Brief (Doc. No. 13), and Plaintiffs have filed a Sur-Reply Brief (Doc. No. 14). Accordingly, the Motion is ripe for disposition.

Background

Plaintiffs commenced this lawsuit on April 19, 2012 by the filing of a "Class Action Complaint in Civil Action" in the Court of Common Pleas of Allegheny County in which they assert that emissions from Defendant's 570-megawatt coal-fired electrical generating facility, the Cheswick Generating Station, did and continues to cause damage to the property of Plaintiffs and a putative class that they purport to represent.[2] Plaintiffs aver that this putative class is comprised of at least one thousand and five hundred (1,500) individuals who reside or own residential property within a one-mile radius of the power plant in the Borough of Springdale, Allegheny County, Pennsylvania.

Defendant GenOn is a limited partnership organized under the laws of Delaware with its organizational headquarters and principle place of business located in Houston, Texas. After GenOn was properly served, it timely removed the case to this Court based

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alleged (and easily amendable) misnomer in the caption and will proceed to address the merits of Defendant's Motion.

[2] The Court notes that the exact time period of the alleged tortious conduct is unclear. According to Plaintiffs, the alleged physical invasion onto Plaintiff's person and property occurred "on occasions too numerous to list." *See* Pl's Compl. at ¶ 29 ("On occasions too numerous to list, Plaintiffs' person and property, including Plaintiffs' neighborhood, residences, and yards, were physically invaded by fallout, particulate, odor, and air contaminants.").

on diversity of citizenship. Defendant has now moved the Court to dismiss the Complaint in its entirety under FED. R. CIV. P. 12(b)(6).

The Complaint alleges that Defendant's operation, maintenance, control and use of its facility has caused this putative class "similar property damage, the invasion by and inhalation of similar odors, and the deposit of similar particulate coal dust, including fly ash and particulates formed by gases and chemicals emitted by [Cheswick Generating Station]."[3] Moreover, Plaintiffs claim that the atmospheric emissions fall upon their properties and leave a film of either black dust (*i.e.*, unburned coal particulate/unburned coal combustion byproduct) or white powder (*i.e.*, fly ash). According to the Plaintiffs, those discharges require them to constantly clean their properties, preclude them from full use and enjoyment of their land, and "make [them] prisoners in their own homes."

Plaintiffs also aver that the operation of the facility by GenOn has been the subject of numerous and constant complaints of the residents of the surrounding neighborhood, by organizations and interested persons within the area, and by "government action." As Plaintiffs' Complaint states, that dissention has not compelled GenOn to cease the improper operation of its facility or to discontinue the ongoing invasion and trespass of their properties by damaging air contaminants, odors, chemical and particulates.

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[3] Plaintiffs aver that the emissions include "coal combustion byproducts, fly ash, barium compounds, copper compounds, dioxin and dioxin-like compounds, hydrochloric acid (acid aerosols), hydrogen fluoride, lead compounds, manganese compounds, mercury compounds, sulfuric acid (acid aerosols), vanadium compounds, and zinc compounds."

The Complaint also asserts that Defendant knew of or allowed the improper construction and operation of the facility and that GenOn continues to operate the power plant without proper or best available technology or any proper air pollution control equipment, thereby allowing the generating station's emissions to invade and damage the properties within a one-mile radius. Likewise, the Complaint avers that GenOn "has installed limited technology to reduce or eliminate emissions from the Cheswick Power Plant," and that "Defendant's Permit to Operate does not allow [its] operations including emissions to damage private property."

Based on said allegations, Plaintiffs seek to recover compensatory and punitive damages under four (4) common law tort theories: (I) nuisance; (II) negligence and recklessness; (III) trespass; and (IV) strict liability. At Counts One and Three, Plaintiffs also request that this Court order injunctive relief.

Standard of Review

A motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) challenges the legal sufficiently of the complaint filed by plaintiff. The United States Supreme Court has held that "[a] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)) (alterations in original).

The Court must accept as true all well-pleaded facts and allegations, and must draw all reasonable inferences therefrom in favor of the plaintiff. However,

as the Supreme Court made clear in *Twombly*, the "factual allegations must be enough to raise a right to relief above the speculative level." *Id*. The United States Supreme Court has subsequently broadened the scope of this requirement, stating that only a complaint that states a plausible claim for relief survives a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

Thus, after *Iqbal*, a district court must conduct a two-part analysis when presented with a motion to dismiss for failure to state a claim. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir.2009). First, the Court must separate the factual and legal elements of the claim. *Id*. Although the Court "must accept all of the complaint's well-pleaded facts as true, [it] may disregard any legal conclusions." *Id*. at 210-11. Second, the Court "must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.' In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." *Id*. at 211 (citing *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937). The determination for "plausibility" will be "'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id*. at 211 (quoting *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937).

As a result, "pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss." *Id*. at 211. That is, "all civil complaints must now set out 'sufficient factual matter' to show that the claim is facially plausible. This then 'allows the court to draw the reasonable inference that

the defendant is liable for the misconduct alleged.'" *Id*. at 210 (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937).

However, nothing in *Twombly* or *Iqbal* changed the other pleading standards for a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) and the requirements of FED. R. CIV. P. 8 must still be met. *See Phillips v. Co. of Allegheny*, 515 F.3d 224, 231 (3d Cir.2008) (internal citations omitted). Rule 8 requires a showing, rather than a blanket assertion, of entitlement to relief, and "contemplates the statement of circumstances, occurrences, and events in support of the claim presented and does not authorize a pleader's bare averment that he wants relief and is entitled to it." *Twombly*, 550 U.S. at 555 n. 3, 127 S.Ct. 1955 (internal citations and quotations omitted). Additionally, the United States Supreme Court did not abolish the FED. R. CIV. P. 12(b)(6) requirement that "the facts must be taken as true and a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on those merits." *Phillips*, 515 F.3d at 231 (citing *Twombly*, 550 U.S. at 553, 127 S.Ct. 1955).

Discussion

Defendant advances multiple arguments in support of its Motion to Dismiss including (1) that Plaintiffs have not satisfied the pleading requirements under *Twombly* and *Iqbal*; (2) that the Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq*., preempts Plaintiffs' common law claims; (3) that the Political Question Doctrine, see *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), bars the Plaintiffs' action as non-justiciable; and (4) that Plaintiff's strict liability count must fail because power generation is not an ultra-hazardous activity. Throughout its Motion, Defendant frames the Complaint as a request to have this Court

regulate emission standards by asserting that the requested relief would undermine the scheme of the Clean Air Act.

In response, Plaintiffs dispute that characterization and challenge each argument advanced by Defendant with the exception that they "do not dispute Defendant's position as to [the] strict liability claim." In sum, Plaintiffs assert (1) that the Clean Air Act cannot preempt their common law claims because the savings clause in the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(e), preserves their right to bring suit for property damage; (2) that the Complaint "do[es] not speak to nor attack emission standards, and [it] has no relationship to emission standards"; (3) that the Political Question Doctrine is inapposite here because "[p]rotection can be 'judicially molded' in this case just as it is molded in any other action to protect property rights"; (4) that they only seek redress for property injuries allegedly traceable to Defendant's facility; and (5) that this case is "solely an action for damage to property, not an attempt to challenge the regulations of emissions in any way." Defendant's Reply directly challenges two of those assertions.

First, Defendant argues that contrary to Plaintiffs' efforts to suggest otherwise, the Complaint explicitly asks and necessarily requires the Court to regulate Cheswick's emissions. Defendant highlights that throughout the Complaint, Plaintiffs refer to alleged permit violations on multiple occasions, including the "improper construction, operation, and maintenance" of Cheswick Generating Station, the "install[ation] of limited technology to reduce or eliminate emissions from the [facility]", and the continued operation of the power plant without the "best available technology or

any proper air pollution control equipment." Defendant posits that all of those activities are regulated by agency permits and attacks Plaintiffs requests for injunctive relief as an attempt to encroach on already-fixed emission limits and to undermine the discretion of permitting authorities. Thus, as Defendant concludes, Plaintiffs' "assertion that their suit is not an effort to regulate emissions is pure fiction," and Plaintiff's reading of their Complaint is a "fruitless attempt to avoid the consequences of their pleading."

Second, GenOn disputes that the savings clause in the Clean Air Act's citizen suit provision, 42 U.S.C. § 7604(e), preserves their common law claims. In support, Defendant notes that no part of the statute expressly preserves the state law nuisance and trespass suits and attempts to distinguish two cases relied upon by Plaintiffs. *See* Doc. No. 12 at 2 (citing *Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332 (6th Cir.1989); *Gutierrez v. Mobil Oil Corp.*, 798 F.Supp. 1280 (W.D.Tex.1992)). Defendant characterizes those cases as outdated authority on this matter where the court either reviewed a statute that prohibited court deference to state environmental agencies or encroached on agency standards with trepidation about the propriety of the "dual system" thus created. According to the Defendants, those agencies must now be afforded deference and that "duality" with regard to federal and state common law claims has been ended. *See* Doc. No. 13 at 4-5 (citing *Am. Elec. Power Co., Inc. v. Connecticut*, — U.S. —, 131 S.Ct. 2527, 180 L.Ed.2d 435 (2011); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir.2012); *N. Carolina, ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291 (4th Cir.2010) *cert. dismissed*, — U.S. —, 132 S.Ct. 46, 180

L.Ed.2d 914 (2011); *United States v. EME Homer City Generation L.P.*, 823 F.Supp.2d 274 (W.D.Pa.2011)).

Much like Defendant, Plaintiffs' surreply endeavors to distinguish the authority on which it relies. More specifically, Plaintiffs explain that *American Electric Power Co.* and *Kivalina* primarily address the displacement of federal common law for public nuisance actions and the preemptive effect of the Clean Air Act on such claims. Thus, as Plaintiffs argue, those decisions have no relationship to their Complaint.

The surreply also addresses the assertions made by Defendant that the Complaint impermissibly seeks and requires this Court to regulate emissions. Plaintiffs claim that through no averments in the Complaint do they either request a change in emissions standards, comment unfavorably upon Defendant's emissions standards, or seek a change of technology in GenOn's operation. Plaintiffs further admit that "Defendant's operation and Defendant's air pollution controls, or the lack thereof, are the business of Defendant and the Environmental Protection Agency, not the Plaintiffs" and that Defendant operates pursuant to a Title V Operating Permit issued by the EPA, which may only be changed by that Agency. Plaintiffs do note, however, that they refuse to recognize that the Operating Permit "absolves [GenOn] of responsibility for damages caused to private property by [its] allowed emissions." As Plaintiffs conclude, "[t]he Defendant is allowed to emit whatever millions of pounds of emissions the [EPA] has decided for Defendant but Defendant is not allowed by those emissions granted [to] it by the [EPA] to damage private property."

Finally, Plaintiffs' surreply reinforces their belief that the language of the Clean Air Act's savings clause

necessarily permits the present suit and attempts to clarify that they do not seek to enjoin the operations of the Cheswick Generating Station. The only injunctive relief that Plaintiffs could seek, according to their filing, is a "request of this court to consider an Order to Defendant to clean the property of Plaintiffs from the particulate which continuously falls upon Plaintiffs' properties from Defendant's smokestacks." Plaintiffs offer to remove any reference to injunctive relief from their Complaint to satisfy Defendant.

After careful consideration of the motion, the filings in support and opposition thereto, and the relevant case law, the Court finds and rules that Plaintiffs' Complaint does not sufficiently state a plausible claim for relief in order to survive. Thus, for the reasons that follow, Defendant's Motion will be granted in its entirety.

A. The Complaint

Much like all coal-fired electrical generating facilities, federal, state, and local authorities extensively regulate and comprehensively oversee the operations of the Cheswick Generating Station. The United States Environmental Protection Agency ("EPA"), the Penn Department of Environmental Protection ("DEP"), and the Allegheny County Health Department ("ACHD") comprise the administrative bodies that are primarily responsible for defining environmental emission standards and policing compliance with the Clean Air Act at the power plant.

The standards and regulations with which the facility must comply under the Clean Air Act are extensive. For example, the Clean Air Act directed the EPA to promulgate National Ambient Air Quality Standards ("NAAQS") for sulfur dioxide, particulate

matter, ozone, nitrogen dioxide, carbon monoxide and lead and it directed the states to prepare State Implementation Plans ("SIPs") for federal approval in order to achieve the NAAQS; states issue operating permits for major operating sources under Title V of the Clean Air Act; and the Prevention of Significant Deterioration ("PSD") program requires, *inter alia*, that a proposed facility is subject to the best available control technology. *See generally EME Homer City Generation L.P.*, 823 F.Supp.2d at 278-283 (providing an overview of various air quality standards promulgated pursuant to the Clean Air Act for federal, state, and local implementation). "Together, these laws and regulations form a system that seeks to keep air pollutants at or below safe levels." *N. Carolina, ex rel. Cooper*, 615 F.3d at 296.

Pursuant to many of those regulations, the air emissions at the facility operated by the Defendant are governed by an ACHD permit. As GenOn highlights, its permit imposes many operational requirements which provide, in relevant part, as follows:

> GenOn may not "operate . . . any source in such manner that emissions of malodorous matter from such source are perceptible beyond the property line." *Id*. § IV. 3. GenOn must "take all reasonable actions to prevent fugitive air contaminants from becoming airborne." *Id*. § IV. 19. GenOn may not "conduct . . . any materials handling operation in such manner that emissions from such operation are visible at or beyond the property line." *Id*. § IV. 4; *see also id*. §§ V.D.1.a, -E.1.a, -F.1.a (restricting visible fugitive emissions from coal handling and storage operations, ash handling, processing, and storage operations, and vehicular

> traffic). GenOn must ensure that "[a]ll air pollution control equipment" is "properly installed, maintained, and operated. . . ." *Id*. § IV. 5. GenOn may not "operate any source . . . in such manner that emissions from such source . . . [m]ay reasonably be anticipated to endanger the public health, safety, or welfare." *Id*. § III. 1(c).

Doc. No. 7 at 6 (citing Doc. No. 7-1 (ACHD Title V Operating Permit and Federally Enforceable State Operating Permit)) (alterations in original). The ACHD permit also imposes limits on the emission of various particulate matter, gasses, chemical, and compounds from coal combustion.

Here, Plaintiffs' Brief in Opposition and Surreply Brief persistently submit the claims that their Complaint does not speak to or attack emission standards, has no relationship to emission standards, and "has no relationship to Federal Law at all." The Court cannot agree and notes that it is black letter law that when ruling on a motion to dismiss, the Court is constrained to look only at the allegations of the Complaint. *See, e.g*., *Lay v. Hixon*, CIVA 09-0075-WS-M, 2009 WL 825814 (S.D.Ala. Mar. 26, 2009) (noting "it is black-letter law that a court's review on a motion to dismiss is limited to the four corners of the complaint") (citation and quotation marks omitted); *see also Snyder v. Baxter Healthcare, Inc.*, 393 Fed.Appx. 905, 907 n. 4 (3d Cir.2010) ("[A] motion to dismiss attacks claims contained by the four corners of the complaint.").

A review of the Complaint reveals that the allegations of Plaintiffs, as pleaded, assert various permit violations and seek a judicial examination of matters governed by the regulating administrative bodies. The

Court highlights the following averments from the Complaint as prime examples:

> ¶ 21. Defendant's operation, maintenance, control and use of the coal fired electrical facility has caused to the Plaintiff Class Representative and all others similarly situated who live or own real residential property within the one (1) mile diameter described similar property damages, the invasion by and inhalation of similar odors, the deposit of similar particulate coal dust, including fly ash, and particulates formed by gases and chemical emitted by Defendant, and thereby caused similar damages to the personal and real property of the Class representative and all others similarly situated within the one (1) mile radius of the Defendant's facility.
>
> ¶ 22. The operation by Defendant of its coal fired electrical generation facility has been the subject of numerous and constant complaints . . . which has failed to compel Defendant to cease the improper operation of its facility. . . .
>
> ¶ 26. Defendant has installed limited technology to reduce or eliminate emissions from the Cheswick Power Plant.
>
> ¶ 37. It is Plaintiffs' information and belief that Defendant knew of the improper construction, and operation of the facility . . . or allowed the improper construction, or maintenance and operation of the facility, of the Cheswick coal fired power plant, which allows discharge of chemicals, odor, air pollutants, and particulates into Plaintiffs' neighborhood, and exercises exclusive control and[/]or ownership over the facility.

> ¶ 38. Defendant knowingly continues to operate the Cheswick coal fired electrical generation plant without proper or best available technology, or any proper air pollution control equipment, and thereby knowingly allows Plaintiffs' properties within one (1) mile of the facility to be invaded and damaged by chemicals, air pollutants, odors, and particulates emitted by the facility thereby causing damage to the Plaintiffs' properties.
>
> ¶ 39. As a direct and proximate result of Defendant's negligence in constructing and[/]or engineering and designing and[/]or operation and[/]or maintenance of the facility, Plaintiffs' person and[/]or property have been invaded by particulates and contaminants.

Contrary to Plaintiffs' assertions, the Court finds that those averments are not merely "informational only;" rather, those paragraphs form the basis for their suit as pled.

While Plaintiffs' Complaint does continue beyond those paragraphs in which they allege the four common law violations, the averments at each count are little more than formulaic recitations of the elements to each cause of action. That is, after the Court disregards all of the legal conclusions at each paragraph in Counts I-IV, little remains that would support a showing of a plausible claim for relief. Indeed, among those averments that do remain are additional allegations that concern the regulation of emissions and requests for injunctive relief. *See, e.g.*, Pl.'s Comp. at ¶ 46 ("Defendant by and through current technological process and current engineering standards could and should preclude the discharge of any particulates and extra hazardous substances onto Plaintiffs' properties.").

Thus, the Court reads the Plaintiffs' Complaint, including its common law claims, as necessarily speaking to and attacking emission standards. The only issue that remains is whether the Clean Air Act preempts the state common law claims or whether the savings clause in the citizen suit provision allow those claims to survive.

B. Preemption

Recently, some courts have precluded common law claims that have encroached on or directly interfered with the provisions of the Clean Air Act. *See, e.g., Am. Elec. Power Co., Inc*., 131 S.Ct. at 2538-39; *N. Carolina, ex rel. Cooper*, 615 F.3d at 304-05. *In American Electric Power Co. v. Connecticut*, the United States Supreme Court held that the Clean Air Act preempted federal common law nuisance claims as a means to curb emissions from power plants. 131 S.Ct. at 2540. In that case, the Court explained that:

> It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order

Id. at 2539-40. While the Supreme Court did not specifically rule on the availability of a state law nuisance claim, it noted that the issue would turn "on the preemptive effect of the federal Act." *Id*. at 2540.

In *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, the United States Court of Appeals for the Fourth Circuit rejected a very similar state law public

nuisance claim against power plants. 615 F.3d at 303. The Court held that the public nuisance claims were preempted because they threaten to scuttle the comprehensive regulatory and permitting regime that has developed over several decades. The Court explained its preemption analysis, in pertinent part as follows:

> A field of state law, here public nuisance law, would be preempted if a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Here, of course, the role envisioned for the states has been made clear. Where Congress has chosen to grant states an extensive role in the Clean Air Act's regulatory regime through the SIP and permitting process, field and conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law to contradict joint federal-state rules so meticulously drafted.

Id. at 303 (citations, quotation marks and alterations in original omitted). District Courts have also preempted other common law claims based on the Clean Air Act's preemptive impact.

In *Comer v. Murphy Oil USA, Inc*., the court dismissed a common law property damage suit in which the plaintiffs asserted public and private nuisance, trespass, and negligence claims against numerous oil, coal, electric, and chemical companies. 839 F.Supp.2d 849, 865 (S.D.Miss.2012). The court explained that as in *American Electric Power Co*., the plaintiffs were similarly asking the court to make determinations regarding the reasonableness of the defendants' emissions—a determination that the Supreme Court decided had been entrusted to the EPA

by Congress. *Id*. After the court noted that the judgment sought by the plaintiffs (*i.e*., a judgment that the defendants' emissions were unreasonable) could not be reconciled with the decision-making scheme enacted by Congress, it held that the entire lawsuit was displaced by the Clean Air Act. *Id*.

Here, the Clean Air Act represents a comprehensive statutory and regulatory scheme that establishes the standards with which the Cheswick Generating Station must abide. Plaintiffs' claims impermissibly encroach on and interfere with that regulatory scheme. The allegations throughout Plaintiff's Complaint, as previously highlighted, implore this Court to weigh in on matters regulated by agency permits, governed by the ACHD, and imposed through the preconstruction-permit process. However, the specific controls, equipment, and processes to which the Cheswick Generating Station is subject to are implemented and enforced by the EPA, DEP, and ACHD. Plaintiff's Complaint, as pled, would necessarily require this Court to engraft or alter those standards, and judicial interference in this regulatory realm is neither warranted nor permitted. To conclude otherwise would require an impermissible determination regarding the reasonableness of an otherwise government regulated activity.

C. Savings Clause

Finally, the savings clause of the Clean Air Act does not alter this analysis. The savings clause provides, in pertinent part, that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief

against the Administrator or a State agency)." 42 U.S.C.A. § 7604(e).

In *North Carolina, ex rel. Cooper*, the court noted, but found unpersuasive, this provision. 615 F.3d at 303-04. There, the court highlighted *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987) where the savings clause of the Clean Water Act, which is similar to that in the Clean Air Act, was at issue. *Id*. (citation omitted). The court explained that the Supreme Court "indicated that the clause was ambiguous as to which state actions were preserved" and ultimately did not permit the states to rely on the clause to impose separate discharge standards on a single point source because it would "undermine [the] carefully drawn statute through a general savings clause." *Id*. at 304 (citations omitted); *c.f. AT & T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740, 1748, 179 L.Ed.2d 742 (2011) ("As we have said, a federal statute's saving clause cannot in reason be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act.") (citations, alterations, and quotation marks omitted). The *Ouellette* Court concluded that the inevitable result of allowing the states to rely on the savings clause for that purpose "would be a serious interference with the achievement of the full purposes and objectives of Congress." *North Carolina, ex rel. Cooper*, 615 F.3d at 304 (citation omitted).

Based on the extensive and comprehensive regulations promulgated by the administrative bodies which govern air emissions from electrical generation facilities, the Court finds and rules that to permit the common law claims would be inconsistent with the dictates of the Clean Air Act. To enforce any of the

emissions standards of or limitations on the Cheswick Generating Station, the Clean Air Act provides Plaintiffs multiple avenues for redress. First, the Act allows for so-called "citizen suits," *see* 42 U.S.C. § 7604, which permits the filing of civil suits in district courts against persons who violate various promulgations of the Act or orders issued by the EPA or states. *See Abuhouran v. KaiserKane, Inc*., 10-6609 NLH/KMW, 2011 WL 6372208 *4 (D.N.J. Dec. 19, 2011) (citing *Delaware Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 264 (3d Cir.1991)). However, "as multiple federal courts have recognized, the Clean Air Act does not authorize a private cause of action for compensatory damages for alleged violations of the Act." *Id*. (citations omitted). Second, the EPA also "retains the power to inspect and monitor regulated sources, to impose administrative penalties for noncompliance, and to commence civil actions against polluters in federal court," but "may delegate implementation and enforcement authority to the States." *Am. Elec. Power Co., Inc*., 131 S.Ct. at 2538. Thus, the recovery sought—monetary damages and injunctive relief—is simply inconsistent with those provisions; the Clean Air Act already provides a means to seek limits on emissions, and the Court will not create a parallel track.

Accordingly, Defendant's MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (Doc. No. 6) will be GRANTED in its entirety.

An appropriate order follows.

ORDER OF COURT

AND NOW, this 12th day of October, 2012, in accordance with the foregoing Memorandum Opinion, it is hereby ORDERED, ADJUDGED, and DECREED

that the Defendant's MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, filed at Doc. No. 6, is GRANTED. The Clerk shall docket this case closed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-4216

KRISTIE BELL; JOAN LUPPE,

Appellants

v.

CHESWICK GENERATING STATION,
GENON POWER MIDWEST, L.P.

(W.D. Pa. No. 2-12-cv-00929)

SUR PETITION FOR REHEARING

Present: McKEE, *Chief Judge*, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE and SHWARTZ, *Circuit Judges*

The petition for rehearing filed by Cheswick Generating Station, Genon Power Midwest, L.P., appellee in the above-entitled case, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

Dated: September 23, 2013

APPENDIX D

FEDERAL STATUTES

42 U.S.C. § 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 anthro-pogenic 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 main-

tenance of such national ambient air quality standards.

42 U.S.C. § 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 necessary 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 public 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) 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) 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) 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 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 remain 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 of this title, as in effect before August 7, 1977, or section 7413(d) 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 of this title as in effect before August 7, 1977, or under section 7413(d) 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.

(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) 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 determine 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 sub-paragraph (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, classify-cation, 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 effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

42 U.S.C. § 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) 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) 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 submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 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 consideration the design, installation, and capital cost of the technological system or systems being used, or

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

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

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

and that such failure cannot be corrected.

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

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

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

whichever is earlier.

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

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

(B) An extension granted under this paragraph shall set forth emission limits and a compliance schedule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize emissions. Such schedule shall be treated as a standard of performance for purposes of subsection (e) of this section and section 7413 of this title.

42 U.S.C. § 7412. Hazardous air pollutants

(a) Definitions

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

(1) Major source

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

(2) Area source

The term "area source" means any stationary source of hazardous air pollutants that is not a major source. For purposes of this section, the term "area source" shall not include motor vehicles or nonroad vehicles subject to regulation under subchapter II of this chapter.

(3) Stationary source

The term "stationary source" shall have the same meaning as such term has under section 7411(a) of this title.

(4) New source

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

(5) Modification

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

(6) Hazardous air pollutant

The term "hazardous air pollutant" means any air pollutant listed pursuant to subsection (b) of this section.

(7) Adverse environmental effect

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

(8) Electric utility steam generating unit

The term "electric utility steam generating unit" means any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and

more than 25 megawatts electrical output to any utility power distribution system for sale shall be considered an electric utility steam generating unit.

(9) Owner or operator

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

(10) Existing source

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

(11) Carcinogenic effect

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

(b) List of pollutants

(1) Initial list

The Congress establishes for purposes of this section a list of hazardous air pollutants as follows:

CAS number	Chemical name
75070	Acetaldehyde
60355	Acetamide
75058	Acetonitrile
98862	Acetophenone

53963	2-Acetylaminofluorene
107028	Acrolein
79061	Acrylamide
79107	Acrylic acid
107131	Acrylonitrile
107051	Allyl chloride
92671	4-Aminobiphenyl
62533	Aniline
90040	o-Anisidine
1332214	Asbestos
71432	Benzene (including benzene from gasoline)
92875	Benzidine
98077	Benzotrichloride
100447	Benzyl chloride
92524	Biphenyl
117817	Bis(2-ethylhexyl)phthalate (DEHP)
542881	Bis(chloromethyl)ether
75252	Bromoform
106990	1,3-Butadiene
156627	Calcium cyanamide
105602	Caprolactam

133062	Captan
63252	Carbaryl
75150	Carbon disulfide
56235	Carbon tetrachloride
463581	Carbonyl sulfide
120809	Catechol
133904	Chloramben
57749	Chlordane
7782505	Chlorine
79118	Chloroacetic acid
532274	2-Chloroacetophenone
108907	Chlorobenzene
510156	Chlorobenzilate
67663	Chloroform
107302	Chloromethyl methyl ether
126998	Chloroprene
1319773	Cresols/Cresylic acid (isomers and mixture)
95487	o-Cresol
108394	m-Cresol
106445	p-Cresol
98828	Cumene

94757	2,4-D, salts and esters
3547044	DDE
334883	Diazomethane
132649	Dibenzofurans
96128	1,2-Dibromo-3-chloropropane
84742	Dibutylphthalate
106467	1,4-Dichlorobenzene(p)
91941	3,3-Dichlorobenzidene
111444	Dichloroethyl ether (Bis(2-chloroethyl)ether)
542756	1,3-Dichloropropene
62737	Dichlorvos
111422	Diethanolamine
121697	N,N-Diethyl aniline (N,N-Dimethylaniline)
64675	Diethyl sulfate
119904	3,3-Dimethoxybenzidine
60117	Dimethyl aminoazobenzene
119937	3,3′-Dimethyl benzidine
79447	Dimethyl carbamoyl chloride
68122	Dimethyl formamide
57147	1,1-Dimethyl hydrazine
131113	Dimethyl phthalate

77781	Dimethyl sulfate
534521	4,6-Dinitro-o-cresol, and salts
51285	2,4-Dinitrophenol
121142	2,4-Dinitrotoluene
123911	1,4-Dioxane (1,4-Diethyleneoxide)
122667	1,2-Diphenylhydrazine
106898	Epichlorohydrin (1-Chloro-2,3-epoxypropane)
106887	1,2-Epoxybutane
140885	Ethyl acrylate
100414	Ethyl benzene
51796	Ethyl carbamate (Urethane)
75003	Ethyl chloride (Chloroethane)
106934	Ethylene dibromide (Dibromoethane)
107062	Ethylene dichloride (1,2-Dichloroethane)
107211	Ethylene glycol
151564	Ethylene imine (Aziridine)
75218	Ethylene oxide
96457	Ethylene thiourea
75343	Ethylidene dichloride (1,1-Dichloroethane)
50000	Formaldehyde
76448	Heptachlor

118741	Hexachlorobenzene
87683	Hexachlorobutadiene
77474	Hexachlorocyclopentadiene
67721	Hexachloroethane
822060	Hexamethylene-1,6-diisocyanate
680319	Hexamethylphosphoramide
110543	Hexane
302012	Hydrazine
7647010	Hydrochloric acid
7664393	Hydrogen fluoride (Hydrofluoric acid)
123319	Hydroquinone
78591	Isophorone
58899	Lindane (all isomers)
108316	Maleic anhydride
67561	Methanol
72435	Methoxychlor
74839	Methyl bromide (Bromomethane)
74873	Methyl chloride (Chloromethane)
71556	Methyl chloroform (1,1,1-Trichloroethane)
78933	Methyl ethyl ketone (2-Butanone)
60344	Methyl hydrazine

74884	Methyl iodide (Iodomethane)
108101	Methyl isobutyl ketone (Hexone)
624839	Methyl isocyanate
80626	Methyl methacrylate
1634044	Methyl tert butyl ether
101144	4,4-Methylene bis(2-chloroaniline)
75092	Methylene chloride (Dichloromethane)
101688	Methylene diphenyl diisocyanate (MDI)
101779	4,4′-Methylenedianiline
91203	Naphthalene
98953	Nitrobenzene
92933	4-Nitrobiphenyl
100027	4-Nitrophenol
79469	2-Nitropropane
684935	N-Nitroso-N-methylurea
62759	N-Nitrosodimethylamine
59892	N-Nitrosomorpholine
56382	Parathion
82688	Pentachloronitrobenzene (Quintobenzene)
87865	Pentachlorophenol
108952	Phenol

106503	p-Phenylenediamine
75445	Phosgene
7803512	Phosphine
7723140	Phosphorus
85449	Phthalic anhydride
1336363	Polychlorinated biphenyls (Aroclors)
1120714	1,3-Propane sultone
57578	beta-Propiolactone
123386	Propionaldehyde
114261	Propoxur (Baygon)
78875	Propylene dichloride (1,2-Dichloropropane)
75569	Propylene oxide
75558	1,2-Propylenimine (2-Methyl aziridine)
91225	Quinoline
106514	Quinone
100425	Styrene
96093	Styrene oxide
1746016	2,3,7,8-Tetrachlorodibenzo-p-dioxin
79345	1,1,2,2-Tetrachloroethane
127184	Tetrachloroethylene (Perchloroethylene)
7550450	Titanium tetrachloride

108883	Toluene
95807	2,4-Toluene diamine
584849	2,4-Toluene diisocyanate
95534	o-Toluidine
8001352	Toxaphene (chlorinated camphene)
120821	1,2,4-Trichlorobenzene
79005	1,1,2-Trichloroethane
79016	Trichloroethylene
95954	2,4,5-Trichlorophenol
88062	2,4,6-Trichlorophenol
121448	Triethylamine
1582098	Trifluralin
540841	2,2,4-Trimethylpentane
108054	Vinyl acetate
593602	Vinyl bromide
75014	Vinyl chloride
75354	Vinylidene chloride (1,1-Dichloroethylene)
1330207	Xylenes (isomers and mixture)
95476	o-Xylenes
108383	m-Xylenes
106423	p-Xylenes

0	Antimony Compounds
0	Arsenic Compounds (inorganic including arsine)
0	Beryllium Compounds
0	Cadmium Compounds
0	Chromium Compounds
0	Cobalt Compounds
0	Coke Oven Emissions
0	Cyanide Compounds1
0	Glycol ethers2
0	Lead Compounds
0	Manganese Compounds
0	Mercury Compounds
0	Fine mineral fibers3
0	Nickel Compounds
0	Polycylic Organic Matter4
0	Radionuclides (including radon)5
0	Selenium Compounds

NOTE: For all listings above which contain the word "compounds" and for glycol ethers, the following applies: Unless otherwise specified, these listings are defined as including any unique chemical substance that contains the named chemical (i.e., antimony, arsenic, etc.) as part of that chemical's infrastructure.

1 X′CN where X = H′ or any other group where a formal dissociation may occur. For example KCN or Ca(CN) 2

2 Includes mono- and di- ethers of ethylene glycol, diethylene glycol, and triethylene glycol R-(OCH2CH2) n-OR′ where

n = 1, 2, or 3

R = alkyl or aryl groups

R′ = R, H, or groups which, when removed, yield glycol ethers with the structure: R-(OCH2CH) n-OH. Polymers are excluded from the glycol category.

3 Includes mineral fiber emissions from facilities manufacturing or processing glass, rock, or slag fibers (or other mineral derived fibers) of average diameter 1 micrometer or less.

4 Includes organic compounds with more than one benzene ring, and which have a boiling point greater than or equal to 100°C.

5 A type of atom which spontaneously undergoes radioactive decay.

(2) Revision of the list

The Administrator shall periodically review the list established by this subsection and publish the results thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic,

which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) of this section as a result of emissions to the air. No air pollutant which is listed under section 7408(a) of this title may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is listed under section 7408(a) of this title or to any pollutant which is in a class of pollutants listed under such section. No substance, practice, process or activity regulated under subchapter VI of this chapter shall be subject to regulation under this section solely due to its adverse effects on the environment.

(3) Petitions to modify the list

(A) Beginning at any time after 6 months after November 15, 1990, any person may petition the Administrator to modify the list of hazardous air pollutants under this subsection by adding or deleting a substance or, in case of listed pollutants without CAS numbers (other than coke oven emissions, mineral fibers, or polycyclic organic matter) removing certain unique substances. Within 18 months after receipt of a petition, the Administrator shall either grant or deny the petition by publishing a written explanation of the reasons for the Administrator's decision. Any such petition shall include a showing by the petitioner that there is adequate data on the health or environmental defects1 of the pollutant or other evidence adequate

to support the petition. The Administrator may not deny a petition solely on the basis of inadequate resources or time for review.

(B) The Administrator shall add a substance to the list upon a showing by the petitioner or on the Administrator's own determination that the substance is an air pollutant and that emissions, ambient concentrations, bioaccumulation or deposition of the substance are known to cause or may reasonably be anticipated to cause adverse effects to human health or adverse environmental effects.

(C) The Administrator shall delete a substance from the list upon a showing by the petitioner or on the Administrator's own determination that there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects.

(D) The Administrator shall delete one or more unique chemical substances that contain a listed hazardous air pollutant not having a CAS number (other than coke oven emissions, mineral fibers, or polycyclic organic matter) upon a showing by the petitioner or on the Administrator's own determination that such unique chemical substances that contain the named chemical of such listed hazardous air pollutant meet the deletion requirements of subparagraph (C). The Administrator must grant or deny a deletion petition prior to promulgating any emission standards pursuant to subsection (d) of this section applicable to any source category or subcategory of a listed hazardous air pollutant without a CAS number listed under

subsection (b) of this section for which a deletion petition has been filed within 12 months of November 15, 1990.

(4) Further information

If the Administrator determines that information on the health or environmental effects of a substance is not sufficient to make a determination required by this subsection, the Administrator may use any authority available to the Administrator to acquire such information.

(5) Test methods

The Administrator may establish, by rule, test measures and other analytic procedures for monitoring and measuring emissions, ambient concentrations, deposition, and bioaccumulation of hazardous air pollutants.

(6) Prevention of significant deterioration

The provisions of part C of this subchapter (prevention of significant deterioration) shall not apply to pollutants listed under this section.

(7) Lead

The Administrator may not list elemental lead as a hazardous air pollutant under this subsection.

(c) List of source categories

(1) In general

Not later than 12 months after November 15, 1990, the Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories and subcategories of major sources and area sources (listed under

paragraph (3)) of the air pollutants listed pursuant to subsection (b) of this section. To the extent practicable, the categories and subcategories listed under this subsection shall be consistent with the list of source categories established pursuant to section 7411 of this title and part C of this subchapter. Nothing in the preceding sentence limits the Administrator's authority to establish subcategories under this section, as appropriate.

(2) Requirement for emissions standards

For the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section, according to the schedule in this subsection and subsection (e) of this section.

(3) Area sources

The Administrator shall list under this subsection each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under this section. The Administrator shall, not later than 5 years after November 15, 1990, and pursuant to subsection (k)(3)(B) of this section, list, based on actual or estimated aggregate emissions of a listed pollutant or pollutants, sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section. Such regulations shall be promulgated not later than 10 years after November 15, 1990.

(4) Previously regulated categories

The Administrator may, in the Administrator's discretion, list any category or subcategory of sources previously regulated under this section as in effect before November 15, 1990.

(5) Additional categories

In addition to those categories and subcategories of sources listed for regulation pursuant to paragraphs (1) and (3), the Administrator may at any time list additional categories and subcategories of sources of hazardous air pollutants according to the same criteria for listing applicable under such paragraphs. In the case of source categories and subcategories listed after publication of the initial list required under paragraph (1) or (3), emission standards under subsection (d) of this section for the category or subcategory shall be promulgated within 10 years after November 15, 1990, or within 2 years after the date on which such category or subcategory is listed, whichever is later.

(6) Specific pollutants

With respect to alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the Administrator shall, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) of this section. Such standards shall be promulgated not later than 10 years after November 15, 1990. This paragraph shall not be construed to require the Administrator to

promulgate standards for such pollutants emitted by electric utility steam generating units.

(7) Research facilities

The Administrator shall establish a separate category covering research or laboratory facilities, as necessary to assure the equitable treatment of such facilities. For purposes of this section, "research or laboratory facility" means any stationary source whose primary purpose is to conduct research and development into new processes and products, where such source is operated under the close supervision of technically trained personnel and is not engaged in the manufacture of products for commercial sale in commerce, except in a de minimis manner.

(8) Boat manufacturing

When establishing emissions standards for styrene, the Administrator shall list boat manufacturing as a separate subcategory unless the Administrator finds that such listing would be inconsistent with the goals and requirements of this chapter.

(9) Deletions from the list

(A) Where the sole reason for the inclusion of a source category on the list required under this subsection is the emission of a unique chemical substance, the Administrator shall delete the source category from the list if it is appropriate because of action taken under either subparagraphs (C) or (D) of subsection (b)(3) of this section.

(B) The Administrator may delete any source category from the list under this subsection, on petition of any person or on the Administrator's own motion, whenever the Administrator makes the

following determination or determinations, as applicable:

(i) In the case of hazardous air pollutants emitted by sources in the category that may result in cancer in humans, a determination that no source in the category (or group of sources in the case of area sources) emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source (or group of sources in the case of area sources).

(ii) In the case of hazardous air pollutants that may result in adverse health effects in humans other than cancer or adverse environmental effects, a determination that emissions from no source in the category or subcategory concerned (or group of sources in the case of area sources) exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source (or from a group of sources in the case of area sources).

The Administrator shall grant or deny a petition under this paragraph within 1 year after the petition is filed.

(d) Emission standards

(1) In general

The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in

accordance with the schedules provided in subsections (c) and (e) of this section. The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for any standard applicable to any source under subsection (i) of this section as the result of the authority provided by this sentence.

(2) Standards and methods

Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures, processes, methods, systems or techniques including, but not limited to, measures which—

(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications,

(B) enclose systems or processes to eliminate emissions,

(C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point,

(D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h) of this section, or

(E) are a combination of the above.

None of the measures described in subparagraphs (A) through (D) shall, consistent with the provisions of section 7414(c) of this title, in any way compromise any United States patent or United States trademark right, or any confidential business information, or any trade secret or any other intellectual property right.

(3) New and existing sources

The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or subcategory but shall not be less stringent, and may be more stringent than—

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined

by section 7501 of this title) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources, or

(B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

(4) Health threshold

With respect to pollutants for which a health threshold has been established, the Administrator may consider such threshold level, with an ample margin of safety, when establishing emission standards under this subsection.

(5) Alternative standard for area sources

With respect only to categories and subcategories of area sources listed pursuant to subsection (c) of this section, the Administrator may, in lieu of the authorities provided in paragraph (2) and subsection (f) of this section, elect to promulgate standards or requirements applicable to sources in such categories or subcategories which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

(6) Review and revision

The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.

(7) Other requirements preserved

No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title, part C or D of this subchapter, or other authority of this chapter or a standard issued under State authority.

(8) Coke ovens

(A) Not later than December 31, 1992, the Administrator shall promulgate regulations establishing emission standards under paragraphs (2) and (3) of this subsection for coke oven batteries. In establishing such standards, the Administrator shall evaluate—

(i) the use of sodium silicate (or equivalent) luting compounds to prevent door leaks, and other operating practices and technologies for their effectiveness in reducing coke oven emissions, and their suitability for use on new and existing coke oven batteries, taking into account costs and reasonable commercial door warranties; and

(ii) as a basis for emission standards under this subsection for new coke oven batteries that begin construction after the date of proposal of such standards, the Jewell design Thompson non-recovery coke oven batteries and other non-recovery coke oven technologies, and other appropriate emission control and coke production technologies, as to their effectiveness in reducing coke oven emissions and their capability for production of steel quality coke.

Such regulations shall require at a minimum that coke oven batteries will not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing oven doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries shall be December 31, 1995.

(B) The Administrator shall promulgate work practice regulations under this subsection for coke oven batteries requiring, as appropriate--

(i) the use of sodium silicate (or equivalent) luting compounds, if the Administrator determines that use of sodium silicate is an effective means of emissions control and is achievable, taking into account costs and reasonable commercial warranties for doors and related equipment; and

(ii) door and jam cleaning practices.

Notwithstanding subsection (i) of this section, the compliance date for such work practice regulations for coke oven batteries shall be not later than the date 3 years after November 15, 1990.

(C) For coke oven batteries electing to qualify for an extension of the compliance date for standards promulgated under subsection (f) of this section in accordance with subsection (i)(8) of this section, the emission standards under this subsection for coke oven batteries shall require that coke oven batteries not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after

the closing of self-sealing doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries seeking an extension shall be not later than the date 3 years after November 15, 1990.

(9) Sources licensed by the Nuclear Regulatory Commission

No standard for radionuclide emissions from any category or subcategory of facilities licensed by the Nuclear Regulatory Commission (or an Agreement State) is required to be promulgated under this section if the Administrator determines, by rule, and after consultation with the Nuclear Regulatory Commission, that the regulatory program established by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act [42 U.S.C. § 2011 et seq.] for such category or subcategory provides an ample margin of safety to protect the public health. Nothing in this subsection shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce any standard or limitation respecting emissions of radionuclides which is more stringent than the standard or limitation in effect under section 7411 of this title or this section.

(10) Effective date

Emission standards or other regulations promulgated under this subsection shall be effective upon promulgation.

(e) Schedule for standards and review

(1) In general

The Administrator shall promulgate regulations establishing emission standards for categories and subcategories of sources initially listed for regulation

pursuant to subsection (c)(1) of this section as expeditiously as practicable, assuring that--

(A) emission standards for not less than 40 categories and subcategories (not counting coke oven batteries) shall be promulgated not later than 2 years after November 15, 1990;

(B) emission standards for coke oven batteries shall be promulgated not later than December 31, 1992;

(C) emission standards for 25 per centum of the listed categories and subcategories shall be promulgated not later than 4 years after November 15, 1990;

(D) emission standards for an additional 25 per centum of the listed categories and subcategories shall be promulgated not later than 7 years after November 15, 1990; and

(E) emission standards for all categories and subcategories shall be promulgated not later than 10 years after November 15, 1990.

(2) Priorities

In determining priorities for promulgating standards under subsection (d) of this section, the Administrator shall consider—

(A) the known or anticipated adverse effects of such pollutants on public health and the environment;

(B) the quantity and location of emissions or reasonably anticipated emissions of hazardous air pollutants that each category or subcategory will emit; and

(C) the efficiency of grouping categories or subcategories according to the pollutants emitted, or the processes or technologies used.

(3) Published schedule

Not later than 24 months after November 15, 1990, and after opportunity for comment, the Administrator shall publish a schedule establishing a date for the promulgation of emission standards for each category and subcategory of sources listed pursuant to subsection (c)(1) and (3) of this section which shall be consistent with the requirements of paragraphs (1) and (2). The determination of priorities for the promulgation of standards pursuant to this paragraph is not a rulemaking and shall not be subject to judicial review, except that, failure to promulgate any standard pursuant to the schedule established by this paragraph shall be subject to review under section 7604 of this title.

(4) Judicial review

Notwithstanding section 7607 of this title, no action of the Administrator adding a pollutant to the list under subsection (b) of this section or listing a source category or subcategory under subsection (c) of this section shall be a final agency action subject to judicial review, except that any such action may be reviewed under such section 7607 of this title when the Administrator issues emission standards for such pollutant or category.

(5) Publicly owned treatment works

The Administrator shall promulgate standards pursuant to subsection (d) of this section applicable to publicly owned treatment works (as defined in title II of the Federal Water Pollution Control Act [33 U.S.C. § 1281 et seq.]) not later than 5 years after November 15, 1990.

(f) Standard to protect health and environment

(1) Report

Not later than 6 years after November 15, 1990, the Administrator shall investigate and report, after consultation with the Surgeon General and after opportunity for public comment, to Congress on--

(A) methods of calculating the risk to public health remaining, or likely to remain, from sources subject to regulation under this section after the application of standards under subsection (d) of this section;

(B) the public health significance of such estimated remaining risk and the technologically and commercially available methods and costs of reducing such risks;

(C) the actual health effects with respect to persons living in the vicinity of sources, any available epidemiological or other health studies, risks presented by background concentrations of hazardous air pollutants, any uncertainties in risk assessment methodology or other health assessment technique, and any negative health or environmental consequences to the community of efforts to reduce such risks; and

(D) recommendations as to legislation regarding such remaining risk.

(2) Emission standards

(A) If Congress does not act on any recommendation submitted under paragraph (1), the Administrator shall, within 8 years after promulgation of standards for each category or subcategory of sources pursuant to subsection (d) of this section, promulgate standards for such category or subcategory if promulgation of such standards is required in order to provide an ample margin of safety to protect public

health in accordance with this section (as in effect before November 15, 1990) or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. If standards promulgated pursuant to subsection (d) of this section and applicable to a category or subcategory of sources emitting a pollutant (or pollutants) classified as a known, probable or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million, the Administrator shall promulgate standards under this subsection for such source category.

(B) Nothing in subparagraph (A) or in any other provision of this section shall be construed as affecting, or applying to the Administrator's interpretation of this section, as in effect before November 15, 1990, and set forth in the Federal Register of September 14, 1989 (54 Federal Register 38044).

(C) The Administrator shall determine whether or not to promulgate such standards and, if the Administrator decides to promulgate such standards, shall promulgate the standards 8 years after promulgation of the standards under subsection (d) of this section for each source category or subcategory concerned. In the case of categories or subcategories

for which standards under subsection (d) of this section are required to be promulgated within 2 years after November 15, 1990, the Administrator shall have 9 years after promulgation of the standards under subsection (d) of this section to make the determination under the preceding sentence and, if required, to promulgate the standards under this paragraph.

(3) Effective date

Any emission standard established pursuant to this subsection shall become effective upon promulgation.

(4) Prohibition

No air pollutant to which a standard under this subsection applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(A) such standard shall not apply until 90 days after its effective date, and

(B) the Administrator may grant a waiver permitting such source a period of up to 2 years after the effective date of a standard to comply with the standard if the Administrator finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(5) Area sources

The Administrator shall not be required to conduct any review under this subsection or promulgate emission limitations under this subsection for any category or subcategory of area sources that is listed pursuant to subsection (c)(3) of this section and for

which an emission standard is promulgated pursuant to subsection (d)(5) of this section.

(6) Unique chemical substances

In establishing standards for the control of unique chemical substances of listed pollutants without CAS numbers under this subsection, the Administrator shall establish such standards with respect to the health and environmental effects of the substances actually emitted by sources and direct transformation byproducts of such emissions in the categories and subcategories.

(g) Modifications

(1) Offsets

(A) A physical change in, or change in the method of operation of, a major source which results in a greater than de minimis increase in actual emissions of a hazardous air pollutant shall not be considered a modification, if such increase in the quantity of actual emissions of any hazardous air pollutant from such source will be offset by an equal or greater decrease in the quantity of emissions of another hazardous air pollutant (or pollutants) from such source which is deemed more hazardous, pursuant to guidance issued by the Administrator under subparagraph (B). The owner or operator of such source shall submit a showing to the Administrator (or the State) that such increase has been offset under the preceding sentence.

(B) The Administrator shall, after notice and opportunity for comment and not later than 18 months after November 15, 1990, publish guidance with respect to implementation of this subsection. Such guidance shall include an identification, to the

extent practicable, of the relative hazard to human health resulting from emissions to the ambient air of each of the pollutants listed under subsection (b) of this section sufficient to facilitate the offset showing authorized by subparagraph (A). Such guidance shall not authorize offsets between pollutants where the increased pollutant (or more than one pollutant in a stream of pollutants) causes adverse effects to human health for which no safety threshold for exposure can be determined unless there are corresponding decreases in such types of pollutant(s).

(2) Construction, reconstruction and modifications

(A) After the effective date of a permit program under subchapter V of this chapter in any State, no person may modify a major source of hazardous air pollutants in such State, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for existing sources will be met. Such determination shall be made on a case-by-case basis where no applicable emissions limitations have been established by the Administrator.

(B) After the effective date of a permit program under subchapter V of this chapter in any State, no person may construct or reconstruct any major source of hazardous air pollutants, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for new sources will be met. Such determination shall be made on a case-by-case basis where no applicable emission limitations have been established by the Administrator.

(3) Procedures for modifications

The Administrator (or the State) shall establish reasonable procedures for assuring that the requirements applying to modifications under this section are reflected in the permit.

(h) Work practice standards and other requirements

(1) In general

For purposes of this section, 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, the Administrator may, in lieu thereof, promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in the Administrator's judgment is consistent with the provisions of subsection (d) or (f) of this section. In the event the Administrator promulgates a design or equipment standard under this subsection, the Administrator 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) Definition

For the purpose of this subsection, the phrase "not feasible to prescribe or enforce an emission standard" means any situation in which the Administrator determines that—

(A) a hazardous air 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 and economic limitations.

(3) Alternative standard

If after notice and opportunity for comment, the owner or operator of any source 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 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) Numerical standard required

Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it is feasible to promulgate and enforce a standard in such terms.

(i) Schedule for compliance

(1) Preconstruction and operating requirements

After the effective date of any emission standard, limitation, or regulation under subsection (d), (f) or (h) of this section, no person may construct any new major source or reconstruct any existing major source subject to such emission standard, regulation or limitation unless the Administrator (or a State with a permit program approved under subchapter V of this chapter) determines that such source, if properly constructed, reconstructed and operated, will comply with the standard, regulation or limitation.

(2) Special rule

Notwithstanding the requirements of paragraph (1), a new source which commences construction or reconstruction after a standard, limitation or regulation applicable to such source is proposed and before such standard, limitation or regulation is promulgated shall not be required to comply with such promulgated standard until the date 3 years after the date of promulgation if--

(A) the promulgated standard, limitation or regulation is more stringent than the standard, limitation or regulation proposed; and

(B) the source complies with the standard, limitation, or regulation as proposed during the 3-year period immediately after promulgation.

(3) Compliance schedule for existing sources

(A) After the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard, limitation or regulation except, in the case of an existing source, the Administrator shall establish a compliance date or dates for each category or subcategory of existing sources, which shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard, except as provided in subparagraph (B) and paragraphs (4) through (8).

(B) The Administrator (or a State with a program approved under subchapter V of this chapter) may issue a permit that grants an extension permitting an existing source up to 1 additional year to comply with standards under subsection (d) of this section if such additional period is necessary for the installation of controls. An additional extension of up

to 3 years may be added for mining waste operations, if the 4-year compliance time is insufficient to dry and cover mining waste in order to reduce emissions of any pollutant listed under subsection (b) of this section.

(4) Presidential exemption

The President may exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than 2 years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so. An exemption under this paragraph may be extended for 1 or more additional periods, each period not to exceed 2 years. The President shall report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

(5) Early reduction

(A) The Administrator (or a State acting pursuant to a permit program approved under subchapter V of this chapter) shall issue a permit allowing an existing source, for which the owner or operator demonstrates that the source has achieved a reduction of 90 per centum or more in emissions of hazardous air pollutants (95 per centum in the case of hazardous air pollutants which are particulates) from the source, to meet an alternative emission limitation reflecting such reduction in lieu of an emission limitation promulgated under subsection (d) of this section for a period of 6 years from the compliance date for the otherwise applicable standard, provided that such reduction is achieved before the otherwise applicable standard under subsection (d) of this section is first proposed. Nothing in this paragraph

shall preclude a State from requiring reductions in excess of those specified in this subparagraph as a condition of granting the extension authorized by the previous sentence.

(B) An existing source which achieves the reduction referred to in subparagraph (A) after the proposal of an applicable standard but before January 1, 1994, may qualify under subparagraph (A), if the source makes an enforceable commitment to achieve such reduction before the proposal of the standard. Such commitment shall be enforceable to the same extent as a regulation under this section.

(C) The reduction shall be determined with respect to verifiable and actual emissions in a base year not earlier than calendar year 1987, provided that, there is no evidence that emissions in the base year are artificially or substantially greater than emissions in other years prior to implementation of emissions reduction measures. The Administrator may allow a source to use a baseline year of 1985 or 1986 provided that the source can demonstrate to the satisfaction of the Administrator that emissions data for the source reflects verifiable data based on information for such source, received by the Administrator prior to November 15, 1990, pursuant to an information request issued under section 7414 of this title.

(D) For each source granted an alternative emission limitation under this paragraph there shall be established by a permit issued pursuant to subchapter V of this chapter an enforceable emission limitation for hazardous air pollutants reflecting the reduction which qualifies the source for an alternative emission limitation under this paragraph. An alternative emission limitation under this paragraph shall not be available with respect to

standards or requirements promulgated pursuant to subsection (f) of this section and the Administrator shall, for the purpose of determining whether a standard under subsection (f) of this section is necessary, review emissions from sources granted an alternative emission limitation under this paragraph at the same time that other sources in the category or subcategory are reviewed.

(E) With respect to pollutants for which high risks of adverse public health effects may be associated with exposure to small quantities including, but not limited to, chlorinated dioxins and furans, the Administrator shall by regulation limit the use of offsetting reductions in emissions of other hazardous air pollutants from the source as counting toward the 90 per centum reduction in such high-risk pollutants qualifying for an alternative emissions limitation under this paragraph.

(6) Other reductions

Notwithstanding the requirements of this section, no existing source that has installed—

(A) best available control technology (as defined in section 7479(3) of this title), or

(B) technology required to meet a lowest achievable emission rate (as defined in section 7501 of this title),

prior to the promulgation of a standard under this section applicable to such source and the same pollutant (or stream of pollutants) controlled pursuant to an action described in subparagraph (A) or (B) shall be required to comply with such standard under this section until the date 5 years after the date on which such installation or reduction has been achieved, as determined by the Administrator. The

Administrator may issue such rules and guidance as are necessary to implement this paragraph.

(7) Extension for new sources

A source for which construction or reconstruction is commenced after the date an emission standard applicable to such source is proposed pursuant to subsection (d) of this section but before the date an emission standard applicable to such source is proposed pursuant to subsection (f) of this section shall not be required to comply with the emission standard under subsection (f) of this section until the date 10 years after the date construction or reconstruction is commenced.

(8) Coke ovens

(A) Any coke oven battery that complies with the emission limitations established under subsection (d)(8)(C) of this section, subparagraph (B), and subparagraph (C), and complies with the provisions of subparagraph (E), shall not be required to achieve emission limitations promulgated under subsection (f) of this section until January 1, 2020.

(B)(i) Not later than December 31, 1992, the Administrator shall promulgate emission limitations for coke oven emissions from coke oven batteries. Notwithstanding paragraph (3) of this subsection, the compliance date for such emission limitations for existing coke oven batteries shall be January 1, 1998. Such emission limitations shall reflect the lowest achievable emission rate as defined in section 7501 of this title for a coke oven battery that is rebuilt or a replacement at a coke oven plant for an existing battery. Such emission limitations shall be no less stringent than—

(I) 3 per centum leaking doors (5 per centum leaking doors for six meter batteries);

(II) 1 per centum leaking lids;

(III) 4 per centum leaking offtakes; and

(IV) 16 seconds visible emissions per charge,

with an exclusion for emissions during the period after the closing of self-sealing oven doors (or the total mass emissions equivalent). The rulemaking in which such emission limitations are promulgated shall also establish an appropriate measurement methodology for determining compliance with such emission limitations, and shall establish such emission limitations in terms of an equivalent level of mass emissions reduction from a coke oven battery, unless the Administrator finds that such a mass emissions standard would not be practicable or enforceable. Such measurement methodology, to the extent it measures leaking doors, shall take into consideration alternative test methods that reflect the best technology and practices actually applied in the affected industries, and shall assure that the final test methods are consistent with the performance of such best technology and practices.

(ii) If the Administrator fails to promulgate such emission limitations under this subparagraph prior to the effective date of such emission limitations, the emission limitations applicable to coke oven batteries under this subparagraph shall be—

(I) 3 per centum leaking doors (5 per centum leaking doors for six meter batteries);

(II) 1 per centum leaking lids;

(III) 4 per centum leaking offtakes; and

(IV) 16 seconds visible emissions per charge,

or the total mass emissions equivalent (if the total mass emissions equivalent is determined to be practicable and enforceable), with no exclusion for emissions during the period after the closing of self-sealing oven doors.

(C) Not later than January 1, 2007, the Administrator shall review the emission limitations promulgated under subparagraph (B) and revise, as necessary, such emission limitations to reflect the lowest achievable emission rate as defined in section 7501 of this title at the time for a coke oven battery that is rebuilt or a replacement at a coke oven plant for an existing battery. Such emission limitations shall be no less stringent than the emission limitation promulgated under subparagraph (B). Notwithstanding paragraph (2) of this subsection, the compliance date for such emission limitations for existing coke oven batteries shall be January 1, 2010.

(D) At any time prior to January 1, 1998, the owner or operator of any coke oven battery may elect to comply with emission limitations promulgated under subsection (f) of this section by the date such emission limitations would otherwise apply to such coke oven battery, in lieu of the emission limitations and the compliance dates provided under subparagraphs (B) and (C) of this paragraph. Any such owner or operator shall be legally bound to comply with such emission limitations promulgated under subsection (f) of this section with respect to such coke oven battery as of January 1, 2003. If no such emission limitations have been promulgated for such coke oven battery, the Administrator shall promulgate such emission limitations in accordance

with subsection (f) of this section for such coke oven battery.

(E) Coke oven batteries qualifying for an extension under subparagraph (A) shall make available not later than January 1, 2000, to the surrounding communities the results of any risk assessment performed by the Administrator to determine the appropriate level of any emission standard established by the Administrator pursuant to subsection (f) of this section.

(F) Notwithstanding the provisions of this section, reconstruction of any source of coke oven emissions qualifying for an extension under this paragraph shall not subject such source to emission limitations under subsection (f) of this section more stringent than those established under subparagraphs (B) and (C) until January 1, 2020. For the purposes of this subparagraph, the term "reconstruction" includes the replacement of existing coke oven battery capacity with new coke oven batteries of comparable or lower capacity and lower potential emissions.

(j) Equivalent emission limitation by permit

(1) Effective date

The requirements of this subsection shall apply in each State beginning on the effective date of a permit program established pursuant to subchapter V of this chapter in such State, but not prior to the date 42 months after November 15, 1990.

(2) Failure to promulgate a standard

In the event that the Administrator fails to promulgate a standard for a category or subcategory of major sources by the date established pursuant to subsection (e)(1) and (3) of this section, and beginning

18 months after such date (but not prior to the effective date of a permit program under subchapter V of this chapter), the owner or operator of any major source in such category or subcategory shall submit a permit application under paragraph (3) and such owner or operator shall also comply with paragraphs (5) and (6).

(3) Applications

By the date established by paragraph (2), the owner or operator of a major source subject to this subsection shall file an application for a permit. If the owner or operator of a source has submitted a timely and complete application for a permit required by this subsection, any failure to have a permit shall not be a violation of paragraph (2), unless the delay in final action is due to the failure of the applicant to timely submit information required or requested to process the application. The Administrator shall not later than 18 months after November 15, 1990, and after notice and opportunity for comment, establish requirements for applications under this subsection including a standard application form and criteria for determining in a timely manner the completeness of applications.

(4) Review and approval

Permit applications submitted under this subsection shall be reviewed and approved or disapproved according to the provisions of section 7661d of this title. In the event that the Administrator (or the State) disapproves a permit application submitted under this subsection or determines that the application is incomplete, the applicant shall have up to 6 months to revise the application to meet the objections of the Administrator (or the State).

(5) Emission limitation

The permit shall be issued pursuant to subchapter V of this chapter and shall contain emission limitations for the hazardous air pollutants subject to regulation under this section and emitted by the source that the Administrator (or the State) determines, on a case-by-case basis, to be equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner under subsection (d) of this section. In the alternative, if the applicable criteria are met, the permit may contain an emissions limitation established according to the provisions of subsection (i)(5) of this section. For purposes of the preceding sentence, the reduction required by subsection (i)(5)(A) of this section shall be achieved by the date on which the relevant standard should have been promulgated under subsection (d) of this section. No such pollutant may be emitted in amounts exceeding an emission limitation contained in a permit immediately for new sources and, as expeditiously as practicable, but not later than the date 3 years after the permit is issued for existing sources or such other compliance date as would apply under subsection (i) of this section.

(6) Applicability of subsequent standards

If the Administrator promulgates an emission standard that is applicable to the major source prior to the date on which a permit application is approved, the emission limitation in the permit shall reflect the promulgated standard rather than the emission limitation determined pursuant to paragraph (5), provided that the source shall have the compliance period provided under subsection (i) of this section. If the Administrator promulgates a standard under subsection (d) of this section that

would be applicable to the source in lieu of the emission limitation established by permit under this subsection after the date on which the permit has been issued, the Administrator (or the State) shall revise such permit upon the next renewal to reflect the standard promulgated by the Administrator providing such source a reasonable time to comply, but no longer than 8 years after such standard is promulgated or 8 years after the date on which the source is first required to comply with the emissions limitation established by paragraph (5), whichever is earlier.

(k) Area source program

(1) Findings and purpose

The Congress finds that emissions of hazardous air pollutants from area sources may individually, or in the aggregate, present significant risks to public health in urban areas. Considering the large number of persons exposed and the risks of carcinogenic and other adverse health effects from hazardous air pollutants, ambient concentrations characteristic of large urban areas should be reduced to levels substantially below those currently experienced. It is the purpose of this subsection to achieve a substantial reduction in emissions of hazardous air pollutants from area sources and an equivalent reduction in the public health risks associated with such sources including a reduction of not less than 75 per centum in the incidence of cancer attributable to emissions from such sources.

(2) Research program

The Administrator shall, after consultation with State and local air pollution control officials, conduct a program of research with respect to sources of

hazardous air pollutants in urban areas and shall include within such program—

(A) ambient monitoring for a broad range of hazardous air pollutants (including, but not limited to, volatile organic compounds, metals, pesticides and products of incomplete combustion) in a representative number of urban locations;

(B) analysis to characterize the sources of such pollution with a focus on area sources and the contribution that such sources make to public health risks from hazardous air pollutants; and

(C) consideration of atmospheric transformation and other factors which can elevate public health risks from such pollutants.

Health effects considered under this program shall include, but not be limited to, carcinogenicity, mutagenicity, teratogenicity, neurotoxicity, reproductive dysfunction and other acute and chronic effects including the role of such pollutants as precursors of ozone or acid aerosol formation. The Administrator shall report the preliminary results of such research not later than 3 years after November 15, 1990.

(3) National strategy

(A) Considering information collected pursuant to the monitoring program authorized by paragraph (2), the Administrator shall, not later than 5 years after November 15, 1990, and after notice and opportunity for public comment, prepare and transmit to the Congress a comprehensive strategy to control emissions of hazardous air pollutants from area sources in urban areas.

(B) The strategy shall—

(i) identify not less than 30 hazardous air pollutants which, as the result of emissions from area sources, present the greatest threat to public health in the largest number of urban areas and that are or will be listed pursuant to subsection (b) of this section, and

(ii) identify the source categories or subcategories emitting such pollutants that are or will be listed pursuant to subsection (c) of this section. When identifying categories and subcategories of sources under this subparagraph, the Administrator shall assure that sources accounting for 90 per centum or more of the aggregate emissions of each of the 30 identified hazardous air pollutants are subject to standards pursuant to subsection (d) of this section.

(C) The strategy shall include a schedule of specific actions to substantially reduce the public health risks posed by the release of hazardous air pollutants from area sources that will be implemented by the Administrator under the authority of this or other laws (including, but not limited to, the Toxic Substances Control Act [15 U.S.C. § 2601 et seq.], the Federal Insecticide, Fungicide and Rodenticide Act [7 U.S.C. § 136 et seq.] and the Resource Conservation and Recovery Act [42 U.S.C. § 6901 et seq.]) or by the States. The strategy shall achieve a reduction in the incidence of cancer attributable to exposure to hazardous air pollutants emitted by stationary sources of not less than 75 per centum, considering control of emissions of hazardous air pollutants from all stationary sources and resulting from measures implemented by the Administrator or by the States under this or other laws.

(D) The strategy may also identify research needs in monitoring, analytical methodology, modeling or pollution control techniques and recommendations

for changes in law that would further the goals and objectives of this subsection.

(E) Nothing in this subsection shall be interpreted to preclude or delay implementation of actions with respect to area sources of hazardous air pollutants under consideration pursuant to this or any other law and that may be promulgated before the strategy is prepared.

(F) The Administrator shall implement the strategy as expeditiously as practicable assuring that all sources are in compliance with all requirements not later than 9 years after November 15, 1990.

(G) As part of such strategy the Administrator shall provide for ambient monitoring and emissions modeling in urban areas as appropriate to demonstrate that the goals and objectives of the strategy are being met.

(4) Areawide activities

In addition to the national urban air toxics strategy authorized by paragraph (3), the Administrator shall also encourage and support areawide strategies developed by State or local air pollution control agencies that are intended to reduce risks from emissions by area sources within a particular urban area. From the funds available for grants under this section, the Administrator shall set aside not less than 10 per centum to support areawide strategies addressing hazardous air pollutants emitted by area sources and shall award such funds on a demonstration basis to those States with innovative and effective strategies. At the request of State or local air pollution control officials, the Administrator shall prepare guidelines for control technologies or

management practices which may be applicable to various categories or subcategories of area sources.

(5) Report

The Administrator shall report to the Congress at intervals not later than 8 and 12 years after November 15, 1990, on actions taken under this subsection and other parts of this chapter to reduce the risk to public health posed by the release of hazardous air pollutants from area sources. The reports shall also identify specific metropolitan areas that continue to experience high risks to public health as the result of emissions from area sources.

(l) State programs

(1) In general

Each State may develop and submit to the Administrator for approval a program for the implementation and enforcement (including a review of enforcement delegations previously granted) of emission standards and other requirements for air pollutants subject to this section or requirements for the prevention and mitigation of accidental releases pursuant to subsection (r) of this section. A program submitted by a State under this subsection may provide for partial or complete delegation of the Administrator's authorities and responsibilities to implement and enforce emissions standards and prevention requirements but shall not include authority to set standards less stringent than those promulgated by the Administrator under this chapter.

(2) Guidance

Not later than 12 months after November 15, 1990, the Administrator shall publish guidance that would

be useful to the States in developing programs for submittal under this subsection. The guidance shall also provide for the registration of all facilities producing, processing, handling or storing any substance listed pursuant to subsection (r) of this section in amounts greater than the threshold quantity. The Administrator shall include as an element in such guidance an optional program begun in 1986 for the review of high-risk point sources of air pollutants including, but not limited to, hazardous air pollutants listed pursuant to subsection (b) of this section.

(3) Technical assistance

The Administrator shall establish and maintain an air toxics clearinghouse and center to provide technical information and assistance to State and local agencies and, on a cost recovery basis, to others on control technology, health and ecological risk assessment, risk analysis, ambient monitoring and modeling, and emissions measurement and monitoring. The Administrator shall use the authority of section 7403 of this title to examine methods for preventing, measuring, and controlling emissions and evaluating associated health and ecological risks. Where appropriate, such activity shall be conducted with not-for-profit organizations. The Administrator may conduct research on methods for preventing, measuring and controlling emissions and evaluating associated health and environment risks. All information collected under this paragraph shall be available to the public.

(4) Grants

Upon application of a State, the Administrator may make grants, subject to such terms and conditions as

the Administrator deems appropriate, to such State for the purpose of assisting the State in developing and implementing a program for submittal and approval under this subsection. Programs assisted under this paragraph may include program elements addressing air pollutants or extremely hazardous substances other than those specifically subject to this section. Grants under this paragraph may include support for high-risk point source review as provided in paragraph (2) and support for the development and implementation of areawide area source programs pursuant to subsection (k) of this section.

(5) Approval or disapproval

Not later than 180 days after receiving a program submitted by a State, and after notice and opportunity for public comment, the Administrator shall either approve or disapprove such program. The Administrator shall disapprove any program submitted by a State, if the Administrator determines that—

(A) the authorities contained in the program are not adequate to assure compliance by all sources within the State with each applicable standard, regulation or requirement established by the Administrator under this section;

(B) adequate authority does not exist, or adequate resources are not available, to implement the program;

(C) the schedule for implementing the program and assuring compliance by affected sources is not sufficiently expeditious; or

(D) the program is otherwise not in compliance with the guidance issued by the Administrator under paragraph (2) or is not likely to satisfy, in whole or in part, the objectives of this chapter.

If the Administrator disapproves a State program, the Administrator shall notify the State of any revisions or modifications necessary to obtain approval. The State may revise and resubmit the proposed program for review and approval pursuant to the provisions of this subsection.

(6) Withdrawal

Whenever the Administrator determines, after public hearing, that a State is not administering and enforcing a program approved pursuant to this subsection in accordance with the guidance published pursuant to paragraph (2) or the requirements of paragraph (5), the Administrator shall so notify the State and, if action which will assure prompt compliance is not taken within 90 days, the Administrator shall withdraw approval of the program. The Administrator shall not withdraw approval of any program unless the State shall have been notified and the reasons for withdrawal shall have been stated in writing and made public.

(7) Authority to enforce

Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard or requirement under this section.

(8) Local program

The Administrator may, after notice and opportunity for public comment, approve a program developed and submitted by a local air pollution control agency (after consultation with the State) pursuant to this

subsection and any such agency implementing an approved program may take any action authorized to be taken by a State under this section.

(9) Permit authority

Nothing in this subsection shall affect the authorities and obligations of the Administrator or the State under subchapter V of this chapter.

(m) Atmospheric deposition to Great Lakes and coastal waters

(1) Deposition assessment

The Administrator, in cooperation with the Under Secretary of Commerce for Oceans and Atmosphere, shall conduct a program to identify and assess the extent of atmospheric deposition of hazardous air pollutants (and in the discretion of the Administrator, other air pollutants) to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters. As part of such program, the Administrator shall—

(A) monitor the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters, including monitoring of the Great Lakes through the monitoring network established pursuant to paragraph (2) of this subsection and designing and deploying an atmospheric monitoring network for coastal waters pursuant to paragraph (4);

(B) investigate the sources and deposition rates of atmospheric deposition of air pollutants (and their atmospheric transformation precursors);

(C) conduct research to develop and improve monitoring methods and to determine the relative contribution of atmospheric pollutants to total pollution loadings to the Great Lakes, the

Chesapeake Bay, Lake Champlain, and coastal waters;

(D) evaluate any adverse effects to public health or the environment caused by such deposition (including effects resulting from indirect exposure pathways) and assess the contribution of such deposition to violations of water quality standards established pursuant to the Federal Water Pollution Control Act [33 U.S.C. § 1251 et seq.] and drinking water standards established pursuant to the Safe Drinking Water Act [42 U.S.C. § 300f et seq.]; and

(E) sample for such pollutants in biota, fish, and wildlife of the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters and characterize the sources of such pollutants.

(2) Great Lakes monitoring network

The Administrator shall oversee, in accordance with Annex 15 of the Great Lakes Water Quality Agreement, the establishment and operation of a Great Lakes atmospheric deposition network to monitor atmospheric deposition of hazardous air pollutants (and in the Administrator's discretion, other air pollutants) to the Great Lakes.

(A) As part of the network provided for in this paragraph, and not later than December 31, 1991, the Administrator shall establish in each of the 5 Great Lakes at least 1 facility capable of monitoring the atmospheric deposition of hazardous air pollutants in both dry and wet conditions.

(B) The Administrator shall use the data provided by the network to identify and track the movement of hazardous air pollutants through the Great Lakes, to determine the portion of water pollution loadings

attributable to atmospheric deposition of such pollutants, and to support development of remedial action plans and other management plans as required by the Great Lakes Water Quality Agreement.

(C) The Administrator shall assure that the data collected by the Great Lakes atmospheric deposition monitoring network is in a format compatible with databases sponsored by the International Joint Commission, Canada, and the several States of the Great Lakes region.

(3) Monitoring for the Chesapeake Bay and Lake Champlain

The Administrator shall establish at the Chesapeake Bay and Lake Champlain atmospheric deposition stations to monitor deposition of hazardous air pollutants (and in the Administrator's discretion, other air pollutants) within the Chesapeake Bay and Lake Champlain watersheds. The Administrator shall determine the role of air deposition in the pollutant loadings of the Chesapeake Bay and Lake Champlain, investigate the sources of air pollutants deposited in the watersheds, evaluate the health and environmental effects of such pollutant loadings, and shall sample such pollutants in biota, fish and wildlife within the watersheds, as necessary to characterize such effects.

(4) Monitoring for coastal waters

The Administrator shall design and deploy atmospheric deposition monitoring networks for coastal waters and their watersheds and shall make any information collected through such networks available to the public. As part of this effort, the Administrator shall conduct research to develop and

improve deposition monitoring methods, and to determine the relative contribution of atmospheric pollutants to pollutant loadings. For purposes of this subsection, "coastal waters" shall mean estuaries selected pursuant to section 320(a)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C. § 1330(a)(2)(A)] or listed pursuant to section 320(a)(2)(B) of such Act [33 U.S.C. § 1330(a)(2)(B)] or estuarine research reserves designated pursuant to section 1461 of Title 16.

(5) Report

Within 3 years of November 15, 1990, and biennially thereafter, the Administrator, in cooperation with the Under Secretary of Commerce for Oceans and Atmosphere, shall submit to the Congress a report on the results of any monitoring, studies, and investigations conducted pursuant to this subsection. Such report shall include, at a minimum, an assessment of--

(A) the contribution of atmospheric deposition to pollution loadings in the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters;

(B) the environmental and public health effects of any pollution which is attributable to atmospheric deposition to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters;

(C) the source or sources of any pollution to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters which is attributable to atmospheric deposition;

(D) whether pollution loadings in the Great Lakes, the Chesapeake Bay, Lake Champlain or coastal

waters cause or contribute to exceedances2 of drinking water standards pursuant to the Safe Drinking Water Act [42 U.S.C. § 300f et seq.] or water quality standards pursuant to the Federal Water Pollution Control Act [33 U.S.C. § 1251 et seq.] or, with respect to the Great Lakes, exceedances2 of the specific objectives of the Great Lakes Water Quality Agreement; and

(E) a description of any revisions of the requirements, standards, and limitations pursuant to this chapter and other applicable Federal laws as are necessary to assure protection of human health and the environment.

(6) Additional regulation

As part of the report to Congress, the Administrator shall determine whether the other provisions of this section are adequate to prevent serious adverse effects to public health and serious or widespread environmental effects, including such effects resulting from indirect exposure pathways, associated with atmospheric deposition to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters of hazardous air pollutants (and their atmospheric transformation products). The Administrator shall take into consideration the tendency of such pollutants to bioaccumulate. Within 5 years after November 15, 1990, the Administrator shall, based on such report and determination, promulgate, in accordance with this section, such further emission standards or control measures as may be necessary and appropriate to prevent such effects, including effects due to bioaccumulation and indirect exposure pathways. Any requirements promulgated pursuant to this paragraph with respect to coastal waters shall

only apply to the coastal waters of the States which are subject to section 7627(a) of this title.

(n) Other provisions

(1) Electric utility steam generating units

(A) The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator's report to Congress alternative control strategies for emissions which may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.

(B) The Administrator shall conduct, and transmit to the Congress not later than 4 years after November 15, 1990, a study of mercury emissions from electric utility steam generating units, municipal waste combustion units, and other sources, including area sources. Such study shall consider the rate and mass of such emissions, the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies.

(C) The National Institute of Environmental Health Sciences shall conduct, and transmit to the Congress not later than 3 years after November 15, 1990, a study to determine the threshold level of mercury

exposure below which adverse human health effects are not expected to occur. Such study shall include a threshold for mercury concentrations in the tissue of fish which may be consumed (including consumption by sensitive populations) without adverse effects to public health.

(2) Coke oven production technology study

(A) The Secretary of the Department of Energy and the Administrator shall jointly undertake a 6-year study to assess coke oven production emission control technologies and to assist in the development and commercialization of technically practicable and economically viable control technologies which have the potential to significantly reduce emissions of hazardous air pollutants from coke oven production facilities. In identifying control technologies, the Secretary and the Administrator shall consider the range of existing coke oven operations and battery design and the availability of sources of materials for such coke ovens as well as alternatives to existing coke oven production design.

(B) The Secretary and the Administrator are authorized to enter into agreements with persons who propose to develop, install and operate coke production emission control technologies which have the potential for significant emissions reductions of hazardous air pollutants provided that Federal funds shall not exceed 50 per centum of the cost of any project assisted pursuant to this paragraph.

(C) On completion of the study, the Secretary shall submit to Congress a report on the results of the study and shall make recommendations to the Administrator identifying practicable and economically viable control technologies for coke oven

production facilities to reduce residual risks remaining after implementation of the standard under subsection (d) of this section.

(D) There are authorized to be appropriated $5,000,000 for each of the fiscal years 1992 through 1997 to carry out the program authorized by this paragraph.

(3) Publicly owned treatment works

The Administrator may conduct, in cooperation with the owners and operators of publicly owned treatment works, studies to characterize emissions of hazardous air pollutants emitted by such facilities, to identify industrial, commercial and residential discharges that contribute to such emissions and to demonstrate control measures for such emissions. When promulgating any standard under this section applicable to publicly owned treatment works, the Administrator may provide for control measures that include pretreatment of discharges causing emissions of hazardous air pollutants and process or product substitutions or limitations that may be effective in reducing such emissions. The Administrator may prescribe uniform sampling, modeling and risk assessment methods for use in implementing this subsection.

(4) Oil and gas wells; pipeline facilities

(A) Notwithstanding the provisions of subsection (a) of this section, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or

stations are major sources, and in the case of any oil or gas exploration or production well (with its associated equipment), such emissions shall not be aggregated for any purpose under this section.

(B) The Administrator shall not list oil and gas production wells (with its associated equipment) as an area source category under subsection (c) of this section, except that the Administrator may establish an area source category for oil and gas production wells located in any metropolitan statistical area or consolidated metropolitan statistical area with a population in excess of 1 million, if the Administrator determines that emissions of hazardous air pollutants from such wells present more than a negligible risk of adverse effects to public health.

(5) Hydrogen sulfide

The Administrator is directed to assess the hazards to public health and the environment resulting from the emission of hydrogen sulfide associated with the extraction of oil and natural gas resources. To the extent practicable, the assessment shall build upon and not duplicate work conducted for an assessment pursuant to section 8002(m) of the Solid Waste Disposal Act [42 U.S.C. § 6982(m)] and shall reflect consultation with the States. The assessment shall include a review of existing State and industry control standards, techniques and enforcement. The Administrator shall report to the Congress within 24 months after November 15, 1990, with the findings of such assessment, together with any recommendations, and shall, as appropriate, develop and implement a control strategy for emissions of hydrogen sulfide to protect human health and the environment, based on the findings of such

assessment, using authorities under this chapter including sections3 7411 of this title and this section.

(6) Hydrofluoric acid

Not later than 2 years after November 15, 1990, the Administrator shall, for those regions of the country which do not have comprehensive health and safety regulations with respect to hydrofluoric acid, complete a study of the potential hazards of hydrofluoric acid and the uses of hydrofluoric acid in industrial and commercial applications to public health and the environment considering a range of events including worst-case accidental releases and shall make recommendations to the Congress for the reduction of such hazards, if appropriate.

(7) RCRA facilities

In the case of any category or subcategory of sources the air emissions of which are regulated under subtitle C of the Solid Waste Disposal Act [42 U.S.C. § 6921 et seq.], the Administrator shall take into account any regulations of such emissions which are promulgated under such subtitle and shall, to the maximum extent practicable and consistent with the provisions of this section, ensure that the requirements of such subtitle and this section are consistent.

(o) National Academy of Sciences study

(1) Request of the Academy

Within 3 months of November 15, 1990, the Administrator shall enter into appropriate arrangements with the National Academy of Sciences to conduct a review of—

(A) risk assessment methodology used by the Environmental Protection Agency to determine the

carcinogenic risk associated with exposure to hazardous air pollutants from source categories and subcategories subject to the requirements of this section; and

(B) improvements in such methodology.

(2) Elements to be studied

In conducting such review, the National Academy of Sciences should consider, but not be limited to, the following--

(A) the techniques used for estimating and describing the carcinogenic potency to humans of hazardous air pollutants; and

(B) the techniques used for estimating exposure to hazardous air pollutants (for hypothetical and actual maximally exposed individuals as well as other exposed individuals).

(3) Other health effects of concern

To the extent practicable, the Academy shall evaluate and report on the methodology for assessing the risk of adverse human health effects other than cancer for which safe thresholds of exposure may not exist, including, but not limited to, inheritable genetic mutations, birth defects, and reproductive dysfunctions.

(4) Report

A report on the results of such review shall be submitted to the Senate Committee on Environment and Public Works, the House Committee on Energy and Commerce, the Risk Assessment and Management Commission established by section 303 of the Clean Air Act Amendments of 1990 and the

Administrator not later than 30 months after November 15, 1990.

(5) Assistance

The Administrator shall assist the Academy in gathering any information the Academy deems necessary to carry out this subsection. The Administrator may use any authority under this chapter to obtain information from any person, and to require any person to conduct tests, keep and produce records, and make reports respecting research or other activities conducted by such person as necessary to carry out this subsection.

(6) Authorization

Of the funds authorized to be appropriated to the Administrator by this chapter, such amounts as are required shall be available to carry out this subsection.

(7) Guidelines for carcinogenic risk assessment

The Administrator shall consider, but need not adopt, the recommendations contained in the report of the National Academy of Sciences prepared pursuant to this subsection and the views of the Science Advisory Board, with respect to such report. Prior to the promulgation of any standard under subsection (f) of this section, and after notice and opportunity for comment, the Administrator shall publish revised Guidelines for Carcinogenic Risk Assessment or a detailed explanation of the reasons that any recommendations contained in the report of the National Academy of Sciences will not be implemented. The publication of such revised Guidelines shall be a final Agency action for purposes of section 7607 of this title.

(p) Mickey Leland National Urban Air Toxics Research Center

(1) Establishment

The Administrator shall oversee the establishment of a National Urban Air Toxics Research Center, to be located at a university, a hospital, or other facility capable of undertaking and maintaining similar research capabilities in the areas of epidemiology, oncology, toxicology, pulmonary medicine, pathology, and biostatistics. The center shall be known as the Mickey Leland National Urban Air Toxics Research Center. The geographic site of the National Urban Air Toxics Research Center should be further directed to Harris County, Texas, in order to take full advantage of the well-developed scientific community presence on-site at the Texas Medical Center as well as the extensive data previously compiled for the comprehensive monitoring system currently in place.

(2) Board of Directors

The National Urban Air Toxics Research Center shall be governed by a Board of Directors to be comprised of 9 members, the appointment of which shall be allocated pro rata among the Speaker of the House, the Majority Leader of the Senate and the President. The members of the Board of Directors shall be selected based on their respective academic and professional backgrounds and expertise in matters relating to public health, environmental pollution and industrial hygiene. The duties of the Board of Directors shall be to determine policy and research guidelines, submit views from center sponsors and the public and issue periodic reports of center findings and activities.

(3) Scientific Advisory Panel

The Board of Directors shall be advised by a Scientific Advisory Panel, the 13 members of which shall be appointed by the Board, and to include eminent members of the scientific and medical communities. The Panel membership may include scientists with relevant experience from the National Institute of Environmental Health Sciences, the Center for Disease Control, the Environmental Protection Agency, the National Cancer Institute, and others, and the Panel shall conduct peer review and evaluate research results. The Panel shall assist the Board in developing the research agenda, reviewing proposals and applications, and advise on the awarding of research grants.

(4) Funding

The center shall be established and funded with both Federal and private source funds.

(q) Savings provision

(1) Standards previously promulgated

Any standard under this section in effect before the date of enactment of the Clean Air Act Amendments of 1990 [November 15, 1990] shall remain in force and effect after such date unless modified as provided in this section before the date of enactment of such Amendments or under such Amendments. Except as provided in paragraph (4), any standard under this section which has been promulgated, but has not taken effect, before such date shall not be affected by such Amendments unless modified as provided in this section before such date or under such Amendments. Each such standard shall be reviewed and, if appropriate, revised, to comply with the requirements of subsection (d) of this section within 10 years after the date of enactment of the Clean Air

Act Amendments of 1990. If a timely petition for review of any such standard under section 7607 of this title is pending on such date of enactment, the standard shall be upheld if it complies with this section as in effect before that date. If any such standard is remanded to the Administrator, the Administrator may in the Administrator's discretion apply either the requirements of this section, or those of this section as in effect before the date of enactment of the Clean Air Act Amendments of 1990.

(2) Special rule

Notwithstanding paragraph (1), no standard shall be established under this section, as amended by the Clean Air Act Amendments of 1990, for radionuclide emissions from (A) elemental phosphorous plants, (B) grate calcination elemental phosphorous plants, (C) phosphogypsum stacks, or (D) any subcategory of the foregoing. This section, as in effect prior to the date of enactment of the Clean Air Act Amendments of 1990 [November 15, 1990], shall remain in effect for radionuclide emissions from such plants and stacks.

(3) Other categories

Notwithstanding paragraph (1), this section, as in effect prior to the date of enactment of the Clean Air Act Amendments of 1990 [November 15, 1990], shall remain in effect for radionuclide emissions from non-Department of Energy Federal facilities that are not licensed by the Nuclear Regulatory Commission, coal-fired utility and industrial boilers, underground uranium mines, surface uranium mines, and disposal of uranium mill tailings piles, unless the Administrator, in the Administrator's discretion, applies the requirements of this section as modified

by the Clean Air Act Amendments of 1990 to such sources of radionuclides.

(4) Medical facilities

Notwithstanding paragraph (1), no standard promulgated under this section prior to November 15, 1990, with respect to medical research or treatment facilities shall take effect for two years following November 15, 1990, unless the Administrator makes a determination pursuant to a rulemaking under subsection (d)(9) of this section. If the Administrator determines that the regulatory program established by the Nuclear Regulatory Commission for such facilities does not provide an ample margin of safety to protect public health, the requirements of this section shall fully apply to such facilities. If the Administrator determines that such regulatory program does provide an ample margin of safety to protect the public health, the Administrator is not required to promulgate a standard under this section for such facilities, as provided in subsection (d)(9) of this section.

(r) Prevention of accidental releases

(1) Purpose and general duty

It shall be the objective of the regulations and programs authorized under this subsection to prevent the accidental release and to minimize the consequences of any such release of any substance listed pursuant to paragraph (3) or any other extremely hazardous substance. The owners and operators of stationary sources producing, processing, handling or storing such substances have a general duty in the same manner and to the same extent as section 654 of Title 29 to identify hazards which may result from such releases using appropriate hazard

assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur. For purposes of this paragraph, the provisions of section 7604 of this title shall not be available to any person or otherwise be construed to be applicable to this paragraph. Nothing in this section shall be interpreted, construed, implied or applied to create any liability or basis for suit for compensation for bodily injury or any other injury or property damages to any person which may result from accidental releases of such substances.

(2) Definitions

(A) The term "accidental release" means an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source.

(B) The term "regulated substance" means a substance listed under paragraph (3).

(C) The term "stationary source" means any buildings, structures, equipment, installations or substance emitting stationary activities (i) which belong to the same industrial group, (ii) which are located on one or more contiguous properties, (iii) which are under the control of the same person (or persons under common control), and (iv) from which an accidental release may occur.

(D) The term "retail facility" means a stationary source at which more than one-half of the income is obtained from direct sales to end users or at which more than one-half of the fuel sold, by volume, is sold through a cylinder exchange program.

(3) List of substances

The Administrator shall promulgate not later than 24 months after November 15, 1990, an initial list of 100 substances which, in the case of an accidental release, are known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health or the environment. For purposes of promulgating such list, the Administrator shall use, but is not limited to, the list of extremely hazardous substances published under the Emergency Planning and Community Right-to-Know Act of 1986 [42 U.S.C. § 11001 et seq.], with such modifications as the Administrator deems appropriate. The initial list shall include chlorine, anhydrous ammonia, methyl chloride, ethylene oxide, vinyl chloride, methyl isocyanate, hydrogen cyanide, ammonia, hydrogen sulfide, toluene diisocyanate, phosgene, bromine, anhydrous hydrogen chloride, hydrogen fluoride, anhydrous sulfur dioxide, and sulfur trioxide. The initial list shall include at least 100 substances which pose the greatest risk of causing death, injury, or serious adverse effects to human health or the environment from accidental releases. Regulations establishing the list shall include an explanation of the basis for establishing the list. The list may be revised from time to time by the Administrator on the Administrator's own motion or by petition and shall be reviewed at least every 5 years. No air pollutant for which a national primary ambient air quality standard has been established shall be included on any such list. No substance, practice, process, or activity regulated under subchapter VI of this chapter shall be subject to regulations under this subsection. The Administrator shall establish procedures for the addition and deletion of substances from the list established under

this paragraph consistent with those applicable to the list in subsection (b) of this section.

(4) Factors to be considered

In listing substances under paragraph (3), the Administrator--

(A) shall consider—

(i) the severity of any acute adverse health effects associated with accidental releases of the substance;

(ii) the likelihood of accidental releases of the substance; and

(iii) the potential magnitude of human exposure to accidental releases of the substance; and

(B) shall not list a flammable substance when used as a fuel or held for sale as a fuel at a retail facility under this subsection solely because of the explosive or flammable properties of the substance, unless a fire or explosion caused by the substance will result in acute adverse health effects from human exposure to the substance, including the unburned fuel or its combustion byproducts, other than those caused by the heat of the fire or impact of the explosion.

(5) Threshold quantity

At the time any substance is listed pursuant to paragraph (3), the Administrator shall establish by rule, a threshold quantity for the substance, taking into account the toxicity, reactivity, volatility, dispersibility, combustibility, or flammability of the substance and the amount of the substance which, as a result of an accidental release, is known to cause or may reasonably be anticipated to cause death, injury or serious adverse effects to human health for which the substance was listed. The Administrator is

authorized to establish a greater threshold quantity for, or to exempt entirely, any substance that is a nutrient used in agriculture when held by a farmer.

(6) Chemical Safety Board

(A) There is hereby established an independent safety board to be known as the Chemical Safety and Hazard Investigation Board.

(B) The Board shall consist of 5 members, including a Chairperson, who shall be appointed by the President, by and with the advice and consent of the Senate. Members of the Board shall be appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in the fields of accident reconstruction, safety engineering, human factors, toxicology, or air pollution regulation. The terms of office of members of the Board shall be 5 years. Any member of the Board, including the Chairperson, may be removed for inefficiency, neglect of duty, or malfeasance in office. The Chairperson shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board.

(C) The Board shall—

(i) investigate (or cause to be investigated), determine and report to the public in writing the facts, conditions, and circumstances and the cause or probable cause of any accidental release resulting in a fatality, serious injury or substantial property damages;

(ii) issue periodic reports to the Congress, Federal, State and local agencies, including the Environmental Protection Agency and the Occupational Safety and Health Administration, concerned with

the safety of chemical production, processing, handling and storage, and other interested persons recommending measures to reduce the likelihood or the consequences of accidental releases and proposing corrective steps to make chemical production, processing, handling and storage as safe and free from risk of injury as is possible and may include in such reports proposed rules or orders which should be issued by the Administrator under the authority of this section or the Secretary of Labor under the Occupational Safety and Health Act [29 U.S.C. § 651 et seq.] to prevent or minimize the consequences of any release of substances that may cause death, injury or other serious adverse effects on human health or substantial property damage as the result of an accidental release; and

(iii) establish by regulation requirements binding on persons for reporting accidental releases into the ambient air subject to the Board's investigatory jurisdiction. Reporting releases to the National Response Center, in lieu of the Board directly, shall satisfy such regulations. The National Response Center shall promptly notify the Board of any releases which are within the Board's jurisdiction.

(D) The Board may utilize the expertise and experience of other agencies.

(E) The Board shall coordinate its activities with investigations and studies conducted by other agencies of the United States having a responsibility to protect public health and safety. The Board shall enter into a memorandum of understanding with the National Transportation Safety Board to assure coordination of functions and to limit duplication of activities which shall designate the National Transportation Safety Board as the lead

agency for the investigation of releases which are transportation related. The Board shall not be authorized to investigate marine oil spills, which the National Transportation Safety Board is authorized to investigate. The Board shall enter into a memorandum of understanding with the Occupational Safety and Health Administration so as to limit duplication of activities. In no event shall the Board forego an investigation where an accidental release causes a fatality or serious injury among the general public, or had the potential to cause substantial property damage or a number of deaths or injuries among the general public.

(F) The Board is authorized to conduct research and studies with respect to the potential for accidental releases, whether or not an accidental release has occurred, where there is evidence which indicates the presence of a potential hazard or hazards. To the extent practicable, the Board shall conduct such studies in cooperation with other Federal agencies having emergency response authorities, State and local governmental agencies and associations and organizations from the industrial, commercial, and nonprofit sectors.

(G) No part of the conclusions, findings, or recommendations of the Board relating to any accidental release or the investigation thereof shall be admitted as evidence or used in any action or suit for damages arising out of any matter mentioned in such report.

(H) Not later than 18 months after November 15, 1990, the Board shall publish a report accompanied by recommendations to the Administrator on the use of hazard assessments in preventing the occurrence and minimizing the consequences of accidental

releases of extremely hazardous substances. The recommendations shall include a list of extremely hazardous substances which are not regulated substances (including threshold quantities for such substances) and categories of stationary sources for which hazard assessments would be an appropriate measure to aid in the prevention of accidental releases and to minimize the consequences of those releases that do occur. The recommendations shall also include a description of the information and analysis which would be appropriate to include in any hazard assessment. The Board shall also make recommendations with respect to the role of risk management plans as required by paragraph (8)(B)4 in preventing accidental releases. The Board may from time to time review and revise its recommendations under this subparagraph.

(I) Whenever the Board submits a recommendation with respect to accidental releases to the Administrator, the Administrator shall respond to such recommendation formally and in writing not later than 180 days after receipt thereof. The response to the Board's recommendation by the Administrator shall indicate whether the Administrator will—

(i) initiate a rulemaking or issue such orders as are necessary to implement the recommendation in full or in part, pursuant to any timetable contained in the recommendation;

(ii) decline to initiate a rulemaking or issue orders as recommended.

Any determination by the Administrator not to implement a recommendation of the Board or to implement a recommendation only in part, including

any variation from the schedule contained in the recommendation, shall be accompanied by a statement from the Administrator setting forth the reasons for such determination.

(J) The Board may make recommendations with respect to accidental releases to the Secretary of Labor. Whenever the Board submits such recommendation, the Secretary shall respond to such recommendation formally and in writing not later than 180 days after receipt thereof. The response to the Board's recommendation by the Administrator shall indicate whether the Secretary will—

(i) initiate a rulemaking or issue such orders as are necessary to implement the recommendation in full or in part, pursuant to any timetable contained in the recommendation;

(ii) decline to initiate a rulemaking or issue orders as recommended.

Any determination by the Secretary not to implement a recommendation or to implement a recommendation only in part, including any variation from the schedule contained in the recommendation, shall be accompanied by a statement from the Secretary setting forth the reasons for such determination.

(K) Within 2 years after November 15, 1990, the Board shall issue a report to the Administrator of the Environmental Protection Agency and to the Administrator of the Occupational Safety and Health Administration recommending the adoption of regulations for the preparation of risk management plans and general requirements for the prevention of accidental releases of regulated substances into the ambient air (including recommendations for listing

substances under paragraph (3)) and for the mitigation of the potential adverse effect on human health or the environment as a result of accidental releases which should be applicable to any stationary source handling any regulated substance in more than threshold amounts. The Board may include proposed rules or orders which should be issued by the Administrator under authority of this subsection or by the Secretary of Labor under the Occupational Safety and Health Act [29 U.S.C. § 651 et seq.]. Any such recommendations shall be specific and shall identify the regulated substance or class of regulated substances (or other substances) to which the recommendations apply. The Administrator shall consider such recommendations before promulgating regulations required by paragraph (7)(B).

(L) The Board, or upon authority of the Board, any member thereof, any administrative law judge employed by or assigned to the Board, or any officer or employee duly designated by the Board, may for the purpose of carrying out duties authorized by subparagraph (C)—

(i) hold such hearings, sit and act at such times and places, administer such oaths, and require by subpoena or otherwise attendance and testimony of such witnesses and the production of evidence and may require by order that any person engaged in the production, processing, handling, or storage of extremely hazardous substances submit written reports and responses to requests and questions within such time and in such form as the Board may require; and

(ii) upon presenting appropriate credentials and a written notice of inspection authority, enter any property where an accidental release causing a

fatality, serious injury or substantial property damage has occurred and do all things therein necessary for a proper investigation pursuant to subparagraph (C) and inspect at reasonable times records, files, papers, processes, controls, and facilities and take such samples as are relevant to such investigation.

Whenever the Administrator or the Board conducts an inspection of a facility pursuant to this subsection, employees and their representatives shall have the same rights to participate in such inspections as provided in the Occupational Safety and Health Act [29 U.S.C. § 651 et seq.].

(M) In addition to that described in subparagraph (L), the Board may use any information gathering authority of the Administrator under this chapter, including the subpoena power provided in section 7607(a)(1) of this title.

(N) The Board is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions and duties. The Board is authorized without regard to section 6101 of Title 41 to enter into contracts, leases, cooperative agreements or other transactions as may be necessary in the conduct of the duties and functions of the Board with any other agency, institution, or person.

(O) After the effective date of any reporting requirement promulgated pursuant to subparagraph (C)(iii) it shall be unlawful for any person to fail to report any release of any extremely hazardous substance as required by such subparagraph. The Administrator is authorized to enforce any regulation or requirements established by the Board pursuant to

subparagraph (C)(iii) using the authorities of sections 7413 and 7414 of this title. Any request for information from the owner or operator of a stationary source made by the Board or by the Administrator under this section shall be treated, for purposes of sections 7413, 7414, 7416, 7420, 7603, 7604 and 7607 of this title and any other enforcement provisions of this chapter, as a request made by the Administrator under section 7414 of this title and may be enforced by the Chairperson of the Board or by the Administrator as provided in such section.

(P) The Administrator shall provide to the Board such support and facilities as may be necessary for operation of the Board.

(Q) Consistent with subsection (G)5 and section 7414(c) of this title any records, reports or information obtained by the Board shall be available to the Administrator, the Secretary of Labor, the Congress and the public, except that upon a showing satisfactory to the Board by any person that records, reports, or information, or particular part thereof (other than release or emissions data) to which the Board has access, if made public, is likely to cause substantial harm to the person's competitive position, the Board shall consider such record, report, or information or particular portion thereof confidential in accordance with section 1905 of Title 18, except that such record, report, or information may be disclosed to other officers, employees, and authorized representatives of the United States concerned with carrying out this chapter or when relevant under any proceeding under this chapter. This subparagraph does not constitute authority to withhold records, reports, or information from the Congress.

(R) Whenever the Board submits or transmits any budget estimate, budget request, supplemental budget request, or other budget information, legislative recommendation, prepared testimony for congressional hearings, recommendation or study to the President, the Secretary of Labor, the Administrator, or the Director of the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No report of the Board shall be subject to review by the Administrator or any Federal agency or to judicial review in any court. No officer or agency of the United States shall have authority to require the Board to submit its budget requests or estimates, legislative recommendations, prepared testimony, comments, recommendations or reports to any officer or agency of the United States for approval or review prior to the submission of such recommendations, testimony, comments or reports to the Congress. In the performance of their functions as established by this chapter, the members, officers and employees of the Board shall not be responsible to or subject to supervision or direction, in carrying out any duties under this subsection, of any officer or employee or agent of the Environmental Protection Agency, the Department of Labor or any other agency of the United States except that the President may remove any member, officer or employee of the Board for inefficiency, neglect of duty or malfeasance in office. Nothing in this section shall affect the application of Title 5 to officers or employees of the Board.

(S) The Board shall submit an annual report to the President and to the Congress which shall include, but not be limited to, information on accidental releases which have been investigated by or reported to the Board during the previous year,

recommendations for legislative or administrative action which the Board has made, the actions which have been taken by the Administrator or the Secretary of Labor or the heads of other agencies to implement such recommendations, an identification of priorities for study and investigation in the succeeding year, progress in the development of risk-reduction technologies and the response to and implementation of significant research findings on chemical safety in the public and private sector.

(7) Accident prevention

(A) In order to prevent accidental releases of regulated substances, the Administrator is authorized to promulgate release prevention, detection, and correction requirements which may include monitoring, record-keeping, reporting, training, vapor recovery, secondary containment, and other design, equipment, work practice, and operational requirements. Regulations promulgated under this paragraph may make distinctions between various types, classes, and kinds of facilities, devices and systems taking into consideration factors including, but not limited to, the size, location, process, process controls, quantity of substances handled, potency of substances, and response capabilities present at any stationary source. Regulations promulgated pursuant to this subparagraph shall have an effective date, as determined by the Administrator, assuring compliance as expeditiously as practicable.

(B)(i) Within 3 years after November 15, 1990, the Administrator shall promulgate reasonable regulations and appropriate guidance to provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated

substances and for response to such releases by the owners or operators of the sources of such releases. The Administrator shall utilize the expertise of the Secretaries of Transportation and Labor in promulgating such regulations. As appropriate, such regulations shall cover the use, operation, repair, replacement, and maintenance of equipment to monitor, detect, inspect, and control such releases, including training of persons in the use and maintenance of such equipment and in the conduct of periodic inspections. The regulations shall include procedures and measures for emergency response after an accidental release of a regulated substance in order to protect human health and the environment. The regulations shall cover storage, as well as operations. The regulations shall, as appropriate, recognize differences in size, operations, processes, class and categories of sources and the voluntary actions of such sources to prevent such releases and respond to such releases. The regulations shall be applicable to a stationary source 3 years after the date of promulgation, or 3 years after the date on which a regulated substance present at the source in more than threshold amounts is first listed under paragraph (3), whichever is later.

(ii) The regulations under this subparagraph shall require the owner or operator of stationary sources at which a regulated substance is present in more than a threshold quantity to prepare and implement a risk management plan to detect and prevent or minimize accidental releases of such substances from the stationary source, and to provide a prompt emergency response to any such releases in order to protect human health and the environment. Such plan shall provide for compliance with the

requirements of this subsection and shall also include each of the following:

(I) a hazard assessment to assess the potential effects of an accidental release of any regulated substance. This assessment shall include an estimate of potential release quantities and a determination of downwind effects, including potential exposures to affected populations. Such assessment shall include a previous release history of the past 5 years, including the size, concentration, and duration of releases, and shall include an evaluation of worst case accidental releases;

(II) a program for preventing accidental releases of regulated substances, including safety precautions and maintenance, monitoring and employee training measures to be used at the source; and

(III) a response program providing for specific actions to be taken in response to an accidental release of a regulated substance so as to protect human health and the environment, including procedures for informing the public and local agencies responsible for responding to accidental releases, emergency health care, and employee training measures.

At the time regulations are promulgated under this subparagraph, the Administrator shall promulgate guidelines to assist stationary sources in the preparation of risk management plans. The guidelines shall, to the extent practicable, include model risk management plans.

(iii) The owner or operator of each stationary source covered by clause (ii) shall register a risk management plan prepared under this subparagraph with the Administrator before the effective date of regulations under clause (i) in such form and manner

as the Administrator shall, by rule, require. Plans prepared pursuant to this subparagraph shall also be submitted to the Chemical Safety and Hazard Investigation Board, to the State in which the stationary source is located, and to any local agency or entity having responsibility for planning for or responding to accidental releases which may occur at such source, and shall be available to the public under section 7414(c) of this title. The Administrator shall establish, by rule, an auditing system to regularly review and, if necessary, require revision in risk management plans to assure that the plans comply with this subparagraph. Each such plan shall be updated periodically as required by the Administrator, by rule.

(C) Any regulations promulgated pursuant to this subsection shall to the maximum extent practicable, consistent with this subsection, be consistent with the recommendations and standards established by the American Society of Mechanical Engineers (ASME), the American National Standards Institute (ANSI) or the American Society of Testing Materials (ASTM). The Administrator shall take into consideration the concerns of small business in promulgating regulations under this subsection.

(D) In carrying out the authority of this paragraph, the Administrator shall consult with the Secretary of Labor and the Secretary of Transportation and shall coordinate any requirements under this paragraph with any requirements established for comparable purposes by the Occupational Safety and Health Administration or the Department of Transportation. Nothing in this subsection shall be interpreted, construed or applied to impose requirements affecting, or to grant the Administrator, the Chemical

Safety and Hazard Investigation Board, or any other agency any authority to regulate (including requirements for hazard assessment), the accidental release of radionuclides arising from the construction and operation of facilities licensed by the Nuclear Regulatory Commission.

(E) After the effective date of any regulation or requirement imposed under this subsection, it shall be unlawful for any person to operate any stationary source subject to such regulation or requirement in violation of such regulation or requirement. Each regulation or requirement under this subsection shall for purposes of sections 7413, 7414, 7416, 7420, 7604, and 7607 of this title and other enforcement provisions of this chapter, be treated as a standard in effect under subsection (d) of this section.

(F) Notwithstanding the provisions of subchapter V of this chapter or this section, no stationary source shall be required to apply for, or operate pursuant to, a permit issued under such subchapter solely because such source is subject to regulations or requirements under this subsection.

(G) In exercising any authority under this subsection, the Administrator shall not, for purposes of section 653(b)(1) of Title 29, be deemed to be exercising statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

(H) Public access to off-site consequence analysis information

(i) Definitions

In this subparagraph:

(I) Covered person

The term "covered person" means—

(aa) an officer or employee of the United States;

(bb) an officer or employee of an agent or contractor of the Federal Government;

(cc) an officer or employee of a State or local government;

(dd) an officer or employee of an agent or contractor of a State or local government;

(ee) an individual affiliated with an entity that has been given, by a State or local government, responsibility for preventing, planning for, or responding to accidental releases;

(ff) an officer or employee or an agent or contractor of an entity described in item (ee); and

(gg) a qualified researcher under clause (vii).

(II) Official use

The term "official use" means an action of a Federal, State, or local government agency or an entity referred to in subclause (I)(ee) intended to carry out a function relevant to preventing, planning for, or responding to accidental releases.

(III) Off-site consequence analysis information

The term "off-site consequence analysis information" means those portions of a risk management plan, excluding the executive summary of the plan, consisting of an evaluation of 1 or more worst-case release scenarios or alternative release scenarios, and any electronic data base created by the Administrator from those portions.

(IV) Risk management plan

The term "risk management plan" means a risk management plan submitted to the Administrator by an owner or operator of a stationary source under subparagraph (B)(iii).

(ii) Regulations

Not later than 1 year after August 5, 1999, the President shall--

(I) assess—

(aa) the increased risk of terrorist and other criminal activity associated with the posting of off-site consequence analysis information on the Internet; and

(bb) the incentives created by public disclosure of off-site consequence analysis information for reduction in the risk of accidental releases; and

(II) based on the assessment under subclause (I), promulgate regulations governing the distribution of off-site consequence analysis information in a manner that, in the opinion of the President, minimizes the likelihood of accidental releases and the risk described in subclause (I)(aa) and the likelihood of harm to public health and welfare, and--

(aa) allows access by any member of the public to paper copies of off-site consequence analysis information for a limited number of stationary sources located anywhere in the United States, without any geographical restriction;

(bb) allows other public access to off-site consequence analysis information as appropriate;

(cc) allows access for official use by a covered person described in any of items (cc) through (ff) of clause (i)(I) (referred to in this subclause as a "State or local

covered person") to off-site consequence analysis information relating to stationary sources located in the person's State;

(dd) allows a State or local covered person to provide, for official use, off-site consequence analysis information relating to stationary sources located in the person's State to a State or local covered person in a contiguous State; and

(ee) allows a State or local covered person to obtain for official use, by request to the Administrator, off-site consequence analysis information that is not available to the person under item (cc).

(iii) Availability under freedom of information act

(I) First year

Off-site consequence analysis information, and any ranking of stationary sources derived from the information, shall not be made available under section 552 of Title 5, during the 1-year period beginning on August 5, 1999.

(II) After first year

If the regulations under clause (ii) are promulgated on or before the end of the period described in subclause (I), off-site consequence analysis information covered by the regulations, and any ranking of stationary sources derived from the information, shall not be made available under section 552 of Title 5, after the end of that period.

(III) Applicability

Subclauses (I) and (II) apply to off-site consequence analysis information submitted to the Administrator before, on, or after August 5, 1999.

(iv) Availability of information during transition period

The Administrator shall make off-site consequence analysis information available to covered persons for official use in a manner that meets the requirements of items (cc)through (ee) of clause (ii)(II), and to the public in a form that does not make available any information concerning the identity or location of stationary sources, during the period--

(I) beginning on August 5, 1999; and

(II) ending on the earlier of the date of promulgation of the regulations under clause (ii) or the date that is 1 year after August 5, 1999.

(v) Prohibition on unauthorized disclosure of information by covered persons

(I) In general

Beginning on August 5, 1999, a covered person shall not disclose to the public off-site consequence analysis information in any form, or any statewide or national ranking of identified stationary sources derived from such information, except as authorized by this subparagraph (including the regulations promulgated under clause (ii)). After the end of the 1-year period beginning on August 5, 1999, if regulations have not been promulgated under clause (ii), the preceding sentence shall not apply.

(II) Criminal penalties

Notwithstanding section 7413 of this title, a covered person that willfully violates a restriction or prohibition established by this subparagraph (including the regulations promulgated under clause (ii)) shall, upon conviction, be fined for an infraction under section 3571 of Title 18 (but shall not be

subject to imprisonment) for each unauthorized disclosure of off-site consequence analysis information, except that subsection (d) of such section 3571 shall not apply to a case in which the offense results in pecuniary loss unless the defendant knew that such loss would occur. The disclosure of off-site consequence analysis information for each specific stationary source shall be considered a separate offense. The total of all penalties that may be imposed on a single person or organization under this item shall not exceed $1,000,000 for violations committed during any 1 calendar year.

(III) Applicability

If the owner or operator of a stationary source makes off-site consequence analysis information relating to that stationary source available to the public without restriction--

(aa) subclauses (I) and (II) shall not apply with respect to the information; and

(bb) the owner or operator shall notify the Administrator of the public availability of the information.

(IV) List

The Administrator shall maintain and make publicly available a list of all stationary sources that have provided notification under subclause (III)(bb).

(vi) Notice

The Administrator shall provide notice of the definition of official use as provided in clause (i)(III) and examples of actions that would and would not meet that definition, and notice of the restrictions on further dissemination and the penalties established by this chapter to each covered person who receives

off-site consequence analysis information under clause (iv) and each covered person who receives off-site consequence analysis information for an official use under the regulations promulgated under clause (ii).

(vii) Qualified researchers

(I) In general

Not later than 180 days after August 5, 1999, the Administrator, in consultation with the Attorney General, shall develop and implement a system for providing off-site consequence analysis information, including facility identification, to any qualified researcher, including a qualified researcher from industry or any public interest group.

(II) Limitation on dissemination

The system shall not allow the researcher to disseminate, or make available on the Internet, the off-site consequence analysis information, or any portion of the off-site consequence analysis information, received under this clause.

(viii) Read-only information technology system

In consultation with the Attorney General and the heads of other appropriate Federal agencies, the Administrator shall establish an information technology system that provides for the availability to the public of off-site consequence analysis information by means of a central data base under the control of the Federal Government that contains information that users may read, but that provides no means by which an electronic or mechanical copy of the information may be made.

(ix) Voluntary industry accident prevention standards

The Environmental Protection Agency, the Department of Justice, and other appropriate agencies may provide technical assistance to owners and operators of stationary sources and participate in the development of voluntary industry standards that will help achieve the objectives set forth in paragraph (1).

(x) Effect on State or local law

(I) In general

Subject to subclause (II), this subparagraph (including the regulations promulgated under this subparagraph) shall supersede any provision of State or local law that is inconsistent with this subparagraph (including the regulations).

(II) Availability of information under State law

Nothing in this subparagraph precludes a State from making available data on the off-site consequences of chemical releases collected in accordance with State law.

(xi) Report

(I) In general

Not later than 3 years after August 5, 1999, the Attorney General, in consultation with appropriate State, local, and Federal Government agencies, affected industry, and the public, shall submit to Congress a report that describes the extent to which regulations promulgated under this paragraph have resulted in actions, including the design and maintenance of safe facilities, that are effective in detecting, preventing, and minimizing the consequences of releases of regulated substances that may be caused by criminal activity. As part of this report, the Attorney General, using available data to

the extent possible, and a sampling of covered stationary sources selected at the discretion of the Attorney General, and in consultation with appropriate State, local, and Federal governmental agencies, affected industry, and the public, shall review the vulnerability of covered stationary sources to criminal and terrorist activity, current industry practices regarding site security, and security of transportation of regulated substances. The Attorney General shall submit this report, containing the results of the review, together with recommendations, if any, for reducing vulnerability of covered stationary sources to criminal and terrorist activity, to the Committee on Commerce of the United States House of Representatives and the Committee on Environment and Public Works of the United States Senate and other relevant committees of Congress.

(II) Interim report

Not later than 12 months after August 5, 1999, the Attorney General shall submit to the Committee on Commerce of the United States House of Representatives and the Committee on Environment and Public Works of the United States Senate, and other relevant committees of Congress, an interim report that includes, at a minimum—

(aa) the preliminary findings under subclause (I);

(bb) the methods used to develop the findings; and

(cc) an explanation of the activities expected to occur that could cause the findings of the report under subclause (I) to be different than the preliminary findings.

(III) Availability of information

Information that is developed by the Attorney General or requested by the Attorney General and received from a covered stationary source for the purpose of conducting the review under subclauses(I) and (II) shall be exempt from disclosure under section 552 of Title 5 if such information would pose a threat to national security.

(xii) Scope

This subparagraph—

(I) applies only to covered persons; and

(II) does not restrict the dissemination of off-site consequence analysis information by any covered person in any manner or form except in the form of a risk management plan or an electronic data base created by the Administrator from off-site consequence analysis information.

(xiii) Authorization of appropriations

There are authorized to be appropriated to the Administrator and the Attorney General such sums as are necessary to carry out this subparagraph (including the regulations promulgated under clause (ii)), to remain available until expended.

(8) Research on hazard assessments

The Administrator may collect and publish information on accident scenarios and consequences covering a range of possible events for substances listed under paragraph (3). The Administrator shall establish a program of long-term research to develop and disseminate information on methods and techniques for hazard assessment which may be useful in improving and validating the procedures employed in the preparation of hazard assessments under this subsection.

(9) Order authority

(A) In addition to any other action taken, when the Administrator determines that there may be an imminent and substantial endangerment to the human health or welfare or the environment because of an actual or threatened accidental release of a regulated substance, the Administrator may secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The Administrator may also, after notice to the State in which the stationary source is located, take other action under this paragraph including, but not limited to, issuing such orders as may be necessary to protect human health. The Administrator shall take action under section 7603 of this title rather than this paragraph whenever the authority of such section is adequate to protect human health and the environment.

(B) Orders issued pursuant to this paragraph may be enforced in an action brought in the appropriate United States district court as if the order were issued under section 7603 of this title.

(C) Within 180 days after November 15, 1990, the Administrator shall publish guidance for using the order authorities established by this paragraph. Such guidance shall provide for the coordinated use of the authorities of this paragraph with other emergency powers authorized by section 9606 of this title, sections 311(c), 308, 309 and 504(a) of the Federal Water Pollution Control Act [33 U.S.C. §§ 1321(c), 1318, 1319, 1364(a)], sections 3007, 3008, 3013, and 7003 of the Solid Waste Disposal Act [42 U.S.C.

§§ 6927, 6928, 6934, 6973], sections 1445 and 1431 of the Safe Drinking Water Act [42 U.S.C. §§ 300j-4, 300i], sections 5 and 7 of the Toxic Substances Control Act [15 U.S.C. §§ 2604, 2606], and sections 7413, 7414, and 7603 of this title.

(10) Presidential review

The President shall conduct a review of release prevention, mitigation and response authorities of the various Federal agencies and shall clarify and coordinate agency responsibilities to assure the most effective and efficient implementation of such authorities and to identify any deficiencies in authority or resources which may exist. The President may utilize the resources and solicit the recommendations of the Chemical Safety and Hazard Investigation Board in conducting such review. At the conclusion of such review, but not later than 24 months after November 15, 1990, the President shall transmit a message to the Congress on the release prevention, mitigation and response activities of the Federal Government making such recommendations for change in law as the President may deem appropriate. Nothing in this paragraph shall be interpreted, construed or applied to authorize the President to modify or reassign release prevention, mitigation or response authorities otherwise established by law.

(11) State authority

Nothing in this subsection shall preclude, deny or limit any right of a State or political subdivision thereof to adopt or enforce any regulation, requirement, limitation or standard (including any procedural requirement) that is more stringent than a regulation, requirement, limitation or standard in

effect under this subsection or that applies to a substance not subject to this subsection.

(s) Periodic report

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

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

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

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

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

42 U.S.C. § 7416. Retention of State authority

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1)

any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. § 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]

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[1] So in original.

(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.

42 U.S.C. § 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant

deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(i)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; service of complaint; consent judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the

Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

(f) "Emission standard or limitation under this chapter" defined

For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or[1]

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment),[2] section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection

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[1] So in original. The word "or" probably should not appear.

[2] So in original.

and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise);[3] or

(4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations.[4]

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

(g) Penalty fund

(1) Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended, for use by the Administrator to finance air compliance and enforcement activities. The Administrator shall annually report to the Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof.

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[3] So in original. The semicolon probably should be comma.

[4] So in original. The period probably should be a comma.

(2) Notwithstanding paragraph (1) the court in any action under this subsection to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed $100,000.

42 U.S.C. § 7661a. Permit programs

(a) Violations

After the effective date of any permit program approved or promulgated under this subchapter, it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source (as provided in subchapter IV-A of this chapter), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts[1] C or D of subchapter I of this chapter, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter. (Nothing in this

[1] So in original. Probably should be "part".

subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.) The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this chapter, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.

(b) Regulations

The Administrator shall promulgate within 12 months after November 15, 1990, regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency. These elements shall include each of the following:

(1) Requirements for permit applications, including a standard application form and criteria for determining in a timely fashion the completeness of applications.

(2) Monitoring and reporting requirements.

(3)(A) A requirement under State or local law or interstate compact that the owner or operator of all sources subject to the requirement to obtain a permit under this subchapter pay an annual fee, or the equivalent over some other period, sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements of this subchapter, including section 7661f of this title, including the reasonable costs of—

(i) reviewing and acting upon any application for such a permit,

(ii) if the owner or operator receives a permit for such source, whether before or after November 15, 1990, implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

(iii) emissions and ambient monitoring,

(iv) preparing generally applicable regulations, or guidance,

(v) modeling, analyses, and demonstrations, and

(vi) preparing inventories and tracking emissions.

(B) The total amount of fees collected by the permitting authority shall conform to the following requirements:

(i) The Administrator shall not approve a program as meeting the requirements of this paragraph unless the State demonstrates that, except as otherwise provided in subparagraphs (ii) through (v) of this subparagraph, the program will result in the collection, in the aggregate, from all sources subject to subparagraph (A), of an amount not less than $25 per ton of each regulated pollutant, or such other amount as the Administrator may determine adequately reflects the reasonable costs of the permit program.

(ii) As used in this subparagraph, the term "regulated pollutant" shall mean (I) a volatile organic compound; (II) each pollutant regulated under section 7411 or 7412 of this title; and (III) each pollutant for which a national primary ambient air quality standard has been promulgated (except that carbon monoxide shall be excluded from this reference).

(iii) In determining the amount under clause (i), the permitting authority is not required to include any amount of regulated pollutant emitted by any source in excess of 4,000 tons per year of that regulated pollutant.

(iv) The requirements of clause (i) shall not apply if the permitting authority demonstrates that collecting an amount less than the amount specified under clause (i) will meet the requirements of subparagraph (A).

(v) The fee calculated under clause (i) shall be increased (consistent with the need to cover the reasonable costs authorized by subparagraph (A)) in each year beginning after 1990, by the percentage, if any, by which the Consumer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Consumer Price Index for the calendar year 1989. For purposes of this clause—

(I) the Consumer Price Index for any calendar year is the average of the Consumer Price Index for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year, and

(II) the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1989 shall be used.

(C)(i) If the Administrator determines, under subsection (d) of this section, that the fee provisions of the operating permit program do not meet the requirements of this paragraph, or if the Administrator makes a determination, under subsection (i) of this section, that the permitting authority is not adequately administering or enforcing an approved fee program, the Administrator may, in addition to

taking any other action authorized under this subchapter, collect reasonable fees from the sources identified under subparagraph (A). Such fees shall be designed solely to cover the Administrator's costs of administering the provisions of the permit program promulgated by the Administrator.

(ii) Any source that fails to pay fees lawfully imposed by the Administrator under this subparagraph shall pay a penalty of 50 percent of the fee amount, plus interest on the fee amount computed in accordance with section 6621(a)(2) of Title 26 (relating to computation of interest on underpayment of Federal taxes).

(iii) Any fees, penalties, and interest collected under this subparagraph shall be deposited in a special fund in the United States Treasury for licensing and other services, which thereafter shall be available for appropriation, to remain available until expended, subject to appropriation, to carry out the Agency's activities for which the fees were collected. Any fee required to be collected by a State, local, or interstate agency under this subsection shall be utilized solely to cover all reasonable (direct and indirect) costs required to support the permit program as set forth in subparagraph (A).

(4) Requirements for adequate personnel and funding to administer the program.

(5) A requirement that the permitting authority have adequate authority to:

(A) issue permits and assure compliance by all sources required to have a permit under this subchapter with each applicable standard, regulation or requirement under this chapter;

(B) issue permits for a fixed term, not to exceed 5 years;

(C) assure that upon issuance or renewal permits incorporate emission limitations and other requirements in an applicable implementation plan;

(D) terminate, modify, or revoke and reissue permits for cause;

(E) enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and provide appropriate criminal penalties; and

(F) assure that no permit will be issued if the Administrator objects to its issuance in a timely manner under this subchapter.

(6) Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

(7) To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such permit-ting authority to act on a permit application or permit renewal application (in accordance with the time periods specified in section 7661b of this title or, as

appropriate, subchapter IV-A of this chapter) shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay.

(8) Authority, and reasonable procedures consistent with the need for expeditious action by the permitting authority on permit applications and related matters, to make available to the public any permit application, compliance plan, permit, and monitoring or compliance report under section 7661b(e) of this title, subject to the provisions of section 7414(c) of this title.

(9) A requirement that the permitting authority, in the case of permits with a term of 3 or more years for major sources, shall require revisions to the permit to incorporate applicable standards and regulations promulgated under this chapter after the issuance of such permit. Such revisions shall occur as expeditiously as practicable and consistent with the procedures established under paragraph (6) but not later than 18 months after the promulgation of such standards and regulations. No such revision shall be required if the effective date of the standards or regulations is a date after the expiration of the permit term. Such permit revision shall be treated as a permit renewal if it complies with the requirements of this subchapter regarding renewals.

(10) Provisions to allow changes within a permitted facility (or one operating pursuant to section 7661b(d) of this title) without requiring a permit revision, if the changes are not modifications under any provision of subchapter I of this chapter and the

changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions:[2] *Provided,* That the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies.

(c) Single permit

A single permit may be issued for a facility with multiple sources.

(d) Submission and approval

(1) Not later than 3 years after November 15, 1990, the Governor of each State shall develop and submit to the Administrator a permit program under State or local law or under an interstate compact meeting the requirements of this subchapter. In addition, the Governor shall submit a legal opinion from the attorney general (or the attorney for those State air pollution control agencies that have independent legal counsel), or from the chief legal officer of an interstate agency, that the laws of the State, locality, or the interstate compact provide adequate authority to carry out the program. Not later than 1 year after receiving a program, and after notice and opportunity for public comment, the Administrator shall approve or disapprove such program, in whole or in part. The Administrator may approve a program to the extent that the program meets the requirements of this chapter, including the regulations issued under

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[2] So in original. A closing parenthesis probably should precede the colon.

subsection (b) of this section. If the program is disapproved, in whole or in part, the Administrator shall notify the Governor of any revisions or modifications necessary to obtain approval. The Governor shall revise and resubmit the program for review under this section within 180 days after receiving notification.

(2)(A) If the Governor does not submit a program as required under paragraph (1) or if the Administrator disapproves a program submitted by the Governor under paragraph (1), in whole or in part, the Administrator may, prior to the expiration of the 18-month period referred to in subparagraph (B), in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.

(B) If the Governor does not submit a program as required under paragraph (1), or if the Administrator disapproves any such program submitted by the Governor under paragraph (1), in whole or in part, 18 months after the date required for such submittal or the date of such disapproval, as the case may be, the Administrator shall apply sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

(C) The sanctions under section 7509(b)(2) of this title shall not apply pursuant to this paragraph in any area unless the failure to submit or the disapproval referred to in subparagraph (A) or (B) relates to an air pollutant for which such area has been designated a nonattainment area (as defined in part D of subchapter I of this chapter).

(3) If a program meeting the requirements of this subchapter has not been approved in whole for any State, the Administrator shall, 2 years after the date required for submission of such a program under paragraph (1), promulgate, administer, and enforce a program under this subchapter for that State.

(e) Suspension

The Administrator shall suspend the issuance of permits promptly upon publication of notice of approval of a permit program under this section, but may, in such notice, retain jurisdiction over permits that have been federally issued, but for which the administrative or judicial review process is not complete. The Administrator shall continue to administer and enforce federally issued permits under this subchapter until they are replaced by a permit issued by a permitting program. Nothing in this subsection should be construed to limit the Administrator's ability to enforce permits issued by a State.

(f) Prohibition

No partial permit program shall be approved unless, at a minimum, it applies, and ensures compliance with, this subchapter and each of the following:

(1) All requirements established under subchapter IV-A of this chapter applicable to “affected sources”.

(2) All requirements established under section 7412 of this title applicable to “major sources”, “area sources,” and “new sources”.

(3) All requirements of subchapter I of this chapter (other than section 7412 of this title) applicable to sources required to have a permit under this subchapter.

Approval of a partial program shall not relieve the State of its obligation to submit a complete program, nor from the application of any sanctions under this chapter for failure to submit an approvable permit program.

(g) Interim approval

If a program (including a partial permit program) submitted under this subchapter substantially meets the requirements of this subchapter, but is not fully approvable, the Administrator may by rule grant the program interim approval. In the notice of final rulemaking, the Administrator shall specify the changes that must be made before the program can receive full approval. An interim approval under this subsection shall expire on a date set by the Administrator not later than 2 years after such approval, and may not be renewed. For the period of any such interim approval, the provisions of subsection (d)(2) of this section, and the obligation of the Administrator to promulgate a program under this subchapter for the State pursuant to subsection (d)(3) of this section, shall be suspended. Such provisions and such obligation of the Administrator shall apply after the expiration of such interim approval.

(h) Effective date

The effective date of a permit program, or partial or interim program, approved under this subchapter, shall be the effective date of approval by the Administrator. The effective date of a permit program, or partial permit program, promulgated by the Administrator shall be the date of promulgation.

(i) Administration and enforcement

(1) Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, the Administrator shall provide notice to the State and may, prior to the expiration of the 18-month period referred to in paragraph (2), in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.

(2) Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, 18 months after the date of the notice under paragraph (1), the Administrator shall apply the sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

(3) The sanctions under section 7509(b)(2) of this title shall not apply pursuant to this subsection in any area unless the failure to adequately enforce and administer the program relates to an air pollutant for which such area has been designated a nonattainment area.

(4) Whenever the Administrator has made a finding under paragraph (1) with respect to any State, unless the State has corrected such deficiency within 18 months after the date of such finding, the Administrator shall, 2 years after the date of such finding, promulgate, administer, and enforce a program under this subchapter for that State. Nothing in this paragraph shall be construed to affect

the validity of a program which has been approved under this subchapter or the authority of any permitting authority acting under such program until such time as such program is promulgated by the Administrator under this paragraph.

42 U.S.C. § 7661b. Permit applications

(a) Applicable date

Any source specified in section 7661a(a) of this title shall become subject to a permit program, and required to have a permit, on the later of the following dates—

(1) the effective date of a permit program or partial or interim permit program applicable to the source; or

(2) the date such source becomes subject to section 7661a(a) of this title.

(b) Compliance plan

(1) The regulations required by section 7661a(b) of this title shall include a requirement that the applicant submit with the permit application a compliance plan describing how the source will comply with all applicable requirements under this chapter. The compliance plan shall include a schedule of compliance, and a schedule under which the permittee will submit progress reports to the permitting authority no less frequently than every 6 months.

(2) The regulations shall further require the permittee to periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and

to promptly report any deviations from permit requirements to the permitting authority.

(c) Deadline

Any person required to have a permit shall, not later than 12 months after the date on which the source becomes subject to a permit program approved or promulgated under this subchapter, or such earlier date as the permitting authority may establish, submit to the permitting authority a compliance plan and an application for a permit signed by a responsible official, who shall certify the accuracy of the information submitted. The permitting authority shall approve or disapprove a completed application (consistent with the procedures established under this subchapter for consideration of such applications), and shall issue or deny the permit, within 18 months after the date of receipt thereof, except that the permitting authority shall establish a phased schedule for acting on permit applications submitted within the first full year after the effective date of a permit program (or a partial or interim program). Any such schedule shall assure that at least one-third of such permits will be acted on by such authority annually over a period of not to exceed 3 years after such effective date. Such authority shall establish reasonable procedures to prioritize such approval or disapproval actions in the case of applications for construction or modification under the applicable requirements of this chapter.

(d) Timely and complete applications

Except for sources required to have a permit before construction or modification under the applicable requirements of this chapter, if an applicant has submitted a timely and complete application for a

permit required by this subchapter (including renewals), but final action has not been taken on such application, the source's failure to have a permit shall not be a violation of this chapter, unless the delay in final action was due to the failure of the applicant timely to submit information required or requested to process the application. No source required to have a permit under this subchapter shall be in violation of section 7661a(a) of this title before the date on which the source is required to submit an application under subsection (c) of this section.

(e) Copies; availability

A copy of each permit application, compliance plan (including the schedule of compliance), emissions or compliance monitoring report, certification, and each permit issued under this subchapter, shall be available to the public. If an applicant or permittee is required to submit information entitled to protection from disclosure under section 7414(c) of this title, the applicant or permittee may submit such information separately. The requirements of section 7414(c) of this title shall apply to such information. The contents of a permit shall not be entitled to protection under section 7414(c) of this title.

42 U.S.C. § 7661c. Permit requirements and conditions

(a) Conditions

Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the

results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.

(b) Monitoring and analysis

The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this chapter, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance. Nothing in this subsection shall be construed to affect any continuous emissions monitoring requirement of subchapter IV-A of this chapter, or where required elsewhere in this chapter.

(c) Inspection, entry, monitoring, certification, and reporting

Each permit issued under this subchapter shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to any applicable regulation under subsection (b) of this section. Any report required to be submitted by a permit issued to a corporation under this subchapter shall be signed by a responsible corporate official, who shall certify its accuracy.

(d) General permits

The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general

permit shall comply with all requirements applicable to permits under this subchapter. No source covered by a general permit shall thereby be relieved from the obligation to file an application under section 7661b of this title.

(e) Temporary sources

The permitting authority may issue a single permit authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of this chapter at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under part C of subchapter I of this chapter. Any such permit shall in addition require the owner or operator to notify the permitting authority in advance of each change in location. The permitting authority may require a separate permit fee for operations at each location.

(f) Permit shield

Compliance with a permit issued in accordance with this subchapter shall be deemed compliance with section 7661a of this title. Except as otherwise provided by the Administrator by rule, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this chapter that relate to the permittee if—

(1) the permit includes the applicable requirements of such provisions, or

(2) the permitting authority in acting on the permit application makes a determination relating to the

permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.

Nothing in the preceding sentence shall alter or affect the provisions of section 7603 of this title, including the authority of the Administrator under that section.

42 U.S.C. § 7661d. Notification to Administrator and contiguous States

(a) Transmission and notice

(1) Each permitting authority—

(A) shall transmit to the Administrator a copy of each permit application (and any application for a permit modification or renewal) or such portion thereof, including any compliance plan, as the Administrator may require to effectively review the application and otherwise to carry out the Administrator's responsibilities under this chapter, and

(B) shall provide to the Administrator a copy of each permit proposed to be issued and issued as a final permit.

(2) The permitting authority shall notify all States—

(A) whose air quality may be affected and that are contiguous to the State in which the emission originates, or

(B) that are within 50 miles of the source,

of each permit application or proposed permit forwarded to the Administrator under this section, and shall provide an opportunity for such States to

submit written recommendations respecting the issuance of the permit and its terms and conditions. If any part of those recommendations are not accepted by the permitting authority, such authority shall notify the State submitting the recommendations and the Administrator in writing of its failure to accept those recommendations and the reasons therefor.

(b) Objection by EPA

(1) If any permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of this chapter, including the requirements of an applicable implementation plan, the Administrator shall, in accordance with this subsection, object to its issuance. The permitting authority shall respond in writing if the Administrator (A) within 45 days after receiving a copy of the proposed permit under subsection (a)(1) of this section, or (B) within 45 days after receiving notification under subsection (a)(2) of this section, objects in writing to its issuance as not in compliance with such requirements. With the objection, the Administrator shall provide a statement of the reasons for the objection. A copy of the objection and statement shall be provided to the applicant.

(2) If the Administrator does not object in writing to the issuance of a permit pursuant to paragraph (1), any person may petition the Administrator within 60 days after the expiration of the 45-day review period specified in paragraph (1) to take such action. A copy of such petition shall be provided to the permitting authority and the applicant by the petitioner. The petition shall be based only on objections to the permit that were raised with reasonable specificity

during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). The petition shall identify all such objections. If the permit has been issued by the permitting agency, such petition shall not postpone the effectiveness of the permit. The Administrator shall grant or deny such petition within 60 days after the petition is filed. The Administrator shall issue an objection within such period if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan. Any denial of such petition shall be subject to judicial review under section 7607 of this title. The Administrator shall include in regulations under this subchapter provisions to implement this paragraph. The Administrator may not delegate the requirements of this paragraph.

(3) Upon receipt of an objection by the Administrator under this subsection, the permitting authority may not issue the permit unless it is revised and issued in accordance with subsection (c) of this section. If the permitting authority has issued a permit prior to receipt of an objection by the Administrator under paragraph (2) of this subsection, the Administrator shall modify, terminate, or revoke such permit and the permitting authority may thereafter only issue a revised permit in accordance with subsection (c) of this section.

(c) Issuance or denial

If the permitting authority fails, within 90 days after the date of an objection under subsection (b) of this section, to submit a permit revised to meet the objection, the Administrator shall issue or deny the permit in accordance with the requirements of this subchapter. No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.

(d) Waiver of notification requirements

(1) The Administrator may waive the requirements of subsections (a) and (b) of this section at the time of approval of a permit program under this subchapter for any category (including any class, type, or size within such category) of sources covered by the program other than major sources.

(2) The Administrator may, by regulation, establish categories of sources (including any class, type, or size within such category) to which the requirements of subsections (a) and (b) of this section shall not apply. The preceding sentence shall not apply to major sources.

(3) The Administrator may exclude from any waiver under this subsection notification under subsection (a)(2) of this section. Any waiver granted under this subsection may be revoked or modified by the Administrator by rule.

(e) Refusal of permitting authority to terminate, modify, or revoke and reissue

If the Administrator finds that cause exists to terminate, modify, or revoke and reissue a permit under this subchapter, the Administrator shall notify the permitting authority and the source of the Administrator's finding. The permitting authority

shall, within 90 days after receipt of such notification, forward to the Administrator under this section a proposed determination of termination, modification, or revocation and reissuance, as appropriate. The Administrator may extend such 90 day period for an additional 90 days if the Administrator finds that a new or revised permit application is necessary, or that the permitting authority must require the permittee to submit additional information. The Administrator may review such proposed determination under the provisions of subsections (a) and (b) of this section. If the permitting authority fails to submit the required proposed determination, or if the Administrator objects and the permitting authority fails to resolve the objection within 90 days, the Administrator may, after notice and in accordance with fair and reasonable procedures, terminate, modify, or revoke and reissue the permit.