

ORAL ARGUMENT NOT YET SCHEDULED

No. 12-1459
(Consolidated with Nos. 12-1460 & 13-1147)

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

NATIONAL ASSOCIATION FOR SURFACE FINISHING, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for Review of a Final Rule Issued by the
Environmental Protection Agency

**BRIEF FOR AMICUS CURIAE UNITED STATES
REPRESENTATIVE HENRY A. WAXMAN IN SUPPORT OF
ENVIRONMENTAL PETITIONERS IN NO. 12-1460**

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June 2014

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**CERTIFICATE AS TO PARTIES, RULINGS, RELATED CASES,
AND FILING OF SEPARATE BRIEF**

As required by Circuit Rules 28(a)(1) and 29(d), counsel for amicus curiae United States Representative Henry A. Waxman hereby certifies as follows:

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing in this court are listed in the Brief for Environmental Petitioners California Communities Against Toxics, Clean Air Council, and Sierra Club and the Brief for Petitioner National Association for Surface Finishing. Those Briefs do not list the following, who have filed or are expected to file notices of intent to appear as amici curiae:

United States Representative Henry A. Waxman, amicus curiae in support of the Environmental Petitioners in No 12-1460.

The American Lung Association, Air Alliance Houston, Environmental Integrity Project, Environment Texas, and Pleasantville Area Super Neighborhood Council #57, amici curiae in support of the Environmental Petitioners in No 12-1460.

California Air Resources Board and South Coast Air Quality Management District, amici curiae in support of the Environmental Petitioners in No 12-1460.

The Chromium RTR Coalition, an ad hoc association consisting of the American Chemistry Council, American Coatings Association, American Forest & Paper Association, American Wood Council, American Fuel & Petrochemical Manufacturers, American Iron & Steel Institute, Brick Industry Association, Council of Industrial Boiler Owners, National Association of Manufacturers, National Mining Association, National Oilseed Processors Association, Rubber Manufacturers Association, and Utility Air Regulatory Group, amici curiae in support of Petitioner National Association of Surface Finishers in Nos. 12-1459 and 13-1147, and in opposition to the Environmental Petitioners in No. 12-1460.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Environmental Petitioners California Communities Against Toxics, Clean Air Council, and Sierra Club and the Brief for Petitioner National Association for Surface Finishing.

C. Related Cases

These cases have not previously been before this Court, and amicus curiae is not aware of any related cases.

D. Separate Brief

Representative Waxman is a sitting Member of the United States House of Representatives. As such, he is an “officer” and a “governmental entity” within the meaning of FRAP 29(a) and Circuit Rules 29(b) and (d), and the rules permit him both to file a brief as amicus curiae without the consent of the parties and to file a separate brief from non-governmental amici. Should the Court nonetheless consider Representative Waxman to fall outside the scope of its Rule’s definition of “governmental entity,” Representative Waxman has received the consent of all parties to file this brief, and undersigned counsel certifies that a separate brief is necessary because the objective of this brief is to provide the perspective of one of the principal authors of the legislation at issue on the purposes that led to its enactment and how its language reflects those purposes—an objective that would not be served by joining in a brief with the other amici supporting the Environmental Petitioners, as those amici do not share Representative

Waxman's experience as a leader in the process of enacting the statute, and they address the issues from a markedly different vantage point that could not practicably be combined with his.

Whether on the ground that he is a government entity or on the ground that a separate brief is necessary under Circuit Rule 29(b), acceptance of a separate brief from Representative Waxman would be consistent with respect for members of a coordinate branch of government and with this Court's general practice of accepting amicus briefs from congressional sponsors of legislation without requiring that they be combined with briefs from non-congressional amici.

Respectfully submitted,

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GLOSSARY

Amendments	Clean Air Act Amendments of 1990
EPA	United States Environmental Protection Agency
EPCRA	Emergency Planning and Community Right-to-Know Act of 1986
MACT	Maximum Achievable Control Technology

STATUTES AND REGULATIONS

Applicable statutes and regulations are contained in the addenda to the Brief for the Environmental Petitioners.

INTEREST OF AMICUS CURIAE¹

Representative Henry A. Waxman is a member of the United States House of Representatives representing California's 33rd Congressional District, comprising portions of Los Angeles and adjoining communities. Representative Waxman has served in the House since 1974. He has long been a leader on environmental protection and public health, as reflected in the many pieces of legislation he has successfully championed and in his leadership positions.

Since 2011, Representative Waxman has been the Ranking Minority Member of the House Committee on Energy and Commerce, which has jurisdiction over federal environmental legislation, including the Clean Air Act. From 2009 to 2011, he was Chairman of Energy and Commerce, following two years chairing the House Committee on

¹ Representative Waxman, a “governmental entity” under Circuit Rule 29(b), files this brief as authorized by FRAP 29(a) and Circuit Rules 29(b) and (d). All parties have also consented to the submission of this brief. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than amicus curiae or his counsel made a monetary contribution to its preparation or submission.

Government Reform and Oversight, and ten years as Ranking Minority Member of that committee. Earlier, Representative Waxman chaired the Energy and Commerce Committee's Subcommittee on Health and the Environment from 1979 through 1994 and was Ranking Minority Member of that subcommittee for another two years.

Representative Waxman has consistently sought to strengthen enforcement of environmental laws by the Environmental Protection Agency (EPA). He has advocated legislation that expands the agency's authority to protect the public and, where appropriate, cabins its discretion by mandating action. And through vigorous oversight, he has fought EPA efforts to back away from its statutory obligations.

Most relevant here, Representative Waxman was a primary author of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990). That bipartisan legislation, a signature achievement of the 101st Congress and the Administration of President George Bush, comprehensively revised the Clean Air Act to address, among other things, urban smog, hazardous air pollution, acid rain, and ozone depletion.

The Amendments' hazardous air pollution provisions, at issue here, reflected Congress's concern that EPA had not taken meaningful steps to limit toxic air pollutants under the Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970). To ensure that EPA would take prompt and effective action, Congress enacted requirements that significantly limit EPA's discretion. The Amendments specify the pollutants that EPA must address, the time by which it must address them, and the technology-based requirements—"Maximum Achievable Control Technology" ("MACT")—that EPA must impose on hazardous polluters. The Amendments further require periodic review of MACT standards and issuance of updated standards satisfying the Amendments' requirements when necessitated by developments in control technologies.

Representative Waxman submits this brief because EPA, in promulgating the chromium standard at issue here, and this Court, in *Association of Battery Recyclers v. EPA*, 716 F.3d 667 (D.C. Cir. 2013), have misread the Amendments' plain text and excused EPA from compliance with baseline statutory requirements when it periodically issues updated standards. This misreading frustrates Congress's clearly expressed intent that hazardous air pollutant standards meet the

Amendments' technology-based requirements. Unless this Court corrects its precedent, through en banc hearing if necessary, public protection against toxic air pollutants will be significantly impaired, and EPA will be left without meaningful criteria governing revised standards under the statute—exactly the opposite of what Congress intended when it specified clear and precise requirements that hazardous air pollutant standards must meet. Representative Waxman believes that his understanding of the Amendments' terms, background and purposes will assist the Court in bringing EPA's implementation of the law into conformity with its unambiguous language and manifest purpose.

SUMMARY OF ARGUMENT

The Clean Air Act Amendments' hazardous air pollutant provisions precisely tell EPA *what* to regulate, *when* to regulate, and *how* to regulate. Those provisions, found at 42 U.S.C. § 7412, unambiguously foreclose EPA's view that when revising a hazardous pollutant emission standard, it need not comply with the substantive requirements section 7412(d) imposes on such standards.

The Clean Air Act Amendments were the product of exhaustive congressional deliberations aimed at strengthening and expanding the

Clean Air Act. Throughout the Amendments, Congress achieved these objectives by imposing specific mandates on EPA.

Section 7412 exemplifies this approach. It was amended after 20 years of regulatory failure during which EPA abdicated its responsibility under the Clean Air Act of 1970 to identify and regulate hazardous air pollutants. EPA's failure had stark consequences: American industry released billions of pounds of toxics annually with little or no effort to control emissions.

The Amendments attacked this problem by overhauling section 7412 to ensure that EPA could not escape its responsibilities. Section 7412 specifically identifies chemicals EPA must regulate, gives EPA precise deadlines, and directs EPA to promulgate emission standards requiring maximum achievable reduction of hazardous pollutants—a technology-based criterion Congress adopted to achieve substantial emissions reductions that the 1970 Act's health-based approach had not fostered.

Section 7412's plain language makes the requirement of maximum achievable reduction applicable to emission standards promulgated under subsection (d) of section 7412. When EPA periodically revises

those standards under paragraph (6) of subsection (d), it acts under subsection (d) and therefore must meet that requirement.

EPA’s contrary construction contradicts the statute’s unambiguous language and the purposes it reflects. In upholding that misconstruction, this Court’s 2013 decision in *Association of Battery Recyclers v. EPA*, 716 F.3d 667, made no attempt to reconcile EPA’s position with the statutory language. *Battery Recyclers* conflicts with this Court’s consistent recognition—most recently in *White Stallion Energy Center, LLC v. EPA*, __ F.3d __, 2014 WL 1420294 (D.C. Cir. April 15, 2014)—that EPA must give effect to section 7412’s plain language and the congressional purposes it embodies. This Court should reconsider *Battery Recyclers*, through en banc hearing if necessary, and hold that standards revised under section 7412(d)(6) must meet the requirements applicable to subsection (d) standards. Only in this way can the Court give effect to the statutory language and vindicate congressional intent to require maximum achievable reductions in hazardous pollutants.

ARGUMENT

I. Section 7412 Was Carefully Crafted to Ensure Stringent Emission Standards by Providing Specific Directions to EPA.

A. The Clean Air Act Amendments Strengthened the Act by Fostering Technology-Based Standards and Constraining EPA's Discretion.

The Clean Air Act of 1970 is a milestone in the history of environmental legislation, establishing the framework for cooperative federal-state protection of air quality under EPA's leadership and leading to nationwide improvements in air quality. The major overhaul of the Clean Air Act effected by the Clean Air Act Amendments of 1990 is no less significant. The Amendments—occupying 313 pages of the Statutes at Large, compared to the 1970 Act's 38—reflected a massive, ten-year effort to improve what had worked, correct significant failures, tackle previously unaddressed problems such as acid rain and ozone depletion, and facilitate more effective enforcement across the board. “The product of all this effort is a sweeping collection of programs that dwarfs previous environmental laws.”²

² Henry Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 Envtl. L. 1721, 1723–24 (1991).

This painstaking legislative process involved close congressional scrutiny of a wide range of issues. During the course of a decade, the focus of the effort shifted, as attempts early in the Reagan Administration to weaken the Act met resistance and were replaced by a broad-based effort to strengthen and expand the law.³ With the impetus of a looming deadline for sanctions under the Act’s “nonattainment” provisions against over 200 communities nationwide that failed to meet ambient air quality standards,⁴ and with a more supportive attitude from President George Bush and his administration,⁵ the Amendments finally achieved passage in September 1990.

The legislation that emerged from “one of the longest, most scrutinized, and hardest fought legislative battles in recent history”⁶ reflects Congress’s detailed attention to innumerable issues. Congress’s carefully chosen words embodied policy choices and compromises that,

³ The process leading to the Amendments is described in Henry Waxman & Joshua Green, *The Waxman Report: How Congress Really Works* 75–102 (2009), and Waxman, *Overview*, *supra*, at 1723–42.

⁴ See Waxman, *The Waxman Report*, *supra*, at 86–87, 93–94.

⁵ See *id.* at 94–95.

⁶ Henry Waxman, *Clean Air: An Act That Works* (1995), <http://waxman.house.gov/sites/waxman.house.gov/files/1.pdf>.

together, led to the Amendments' passage. In a host of provisions, Congress resolved critical issues through explicit requirements that EPA take specific actions, in particular ways, by designated dates:

To an extent unprecedented in prior environmental statutes, the pollution control programs of the 1990 Amendments include very detailed mandatory directives to EPA, rather than more general mandates or broad grants of authority that would allow for wide latitude in EPA's implementation of the C[lean] A[ir] A[ct]'s programs. In addition, statutory deadlines are routinely provided to assure that required actions are taken in a timely fashion.⁷

The Amendments also reflect a broad congressional preference for stringent standards that "force the development of new technologies to provide for health protection and to achieve environmental objectives."⁸

B. In Amending Section 7412, Congress Addressed a History of Regulatory Failure.

The Amendments' hazardous air pollutant provisions exemplify Congress's approach of imposing specific mandates that EPA take timely action to issue aggressive standards based on pollution control technologies. These requirements reflected Congress's chagrin at EPA's 20 years of failure to control hazardous emissions under the 1970 Act.

⁷ Waxman, *Overview, supra*, at 1742.

⁸ *Id.* at 1749.

The 1970 Act required EPA not only to issue national ambient air quality standards for the most prominent air pollutants—an obligation the agency successfully fulfilled when it issued such standards for six “criteria pollutants”⁹—but also to regulate hazardous air pollutants, contaminants released in lower volumes but posing risks of cancer and toxicity. The Act required EPA *immediately* to list such pollutants, to update the list regularly, and, within one year of listing any hazardous pollutant, to promulgate emission standards providing “an ample margin of safety to protect the public health.”¹⁰ EPA’s exercise of these responsibilities was a dismal failure: By 1990, EPA had listed only eight hazardous pollutants and issued emission standards for only seven.¹¹

Congress was keenly aware of the extent and consequences of EPA’s failure, and early in the process leading to the Amendments it began to focus on the need to remedy the agency’s inaction with precise and mandatory directions to act. Indeed, a major turning point in the

⁹ See EPA, *National Ambient Air Quality Standards (NAAQS)*, <http://www.epa.gov/air/criteria.html>.

¹⁰ Former Clean Air Act § 112(b)(1), as added by Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1685 (1970).

¹¹ See H.R. Rep. No. 101-490, at 151, 322 (1990); Waxman, *Overview, supra*, at 1774.

fight against the Reagan Administration’s initial attempts to weaken the Act was a 1982 vote in the House Energy and Commerce Committee to give EPA a strict deadline to consider whether to issue standards for 37 suspected carcinogens.¹²

In the years that followed, the extent of the toxic pollutant problem became increasingly evident. The release of methyl isocyanate from a Union Carbide plant at Bhopal, India, in December 1984, which killed over 3,000 people and injured tens of thousands more, brought the issue forcefully to Congress’s attention—along with the realization that EPA had not even classified methyl isocyanate as hazardous.¹³ Representative Waxman convened hearings that revealed that a similar plant in West Virginia emitted 11,000 tons of chemicals each year, including many that were carcinogens.¹⁴

These revelations highlighted the absence of reliable information about the extent of toxic emissions. To address that gap, Representative Waxman’s subcommittee asked chemical manufacturers to disclose the

¹² See Waxman, *The Waxman Report*, *supra*, at 83–85.

¹³ See *id.* at 89.

¹⁴ See *Toxic Air Pollutants, Hearing Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, House of Representatives, 98th Cong. 43–44, 250–52 (Dec. 1984).

amounts of toxic substances they released into the air. Incomplete responses from about 50 of the 86 companies surveyed showed annual releases of over 60 million pounds of toxic pollutants.¹⁵

At Representative Waxman's urging, Congress responded with the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), Pub. L. No. 99-499, Title III, 100 Stat. 1613, 1728–58 (1986), *codified at 42 U.S.C. §§ 11001–50*. Section 313 of EPCRA requires that releases of toxic chemicals above threshold amounts be reported to EPA, which uses the reports to develop a national Toxics Release Inventory. *See 42 U.S.C. § 11023.*

The information disclosed under EPCRA showed that EPA's failure to regulate toxic pollutants did not reflect the absence of pollutants posing significant cancer and toxicity risks. Far from it. Despite industry claims that Representative Waxman's survey exaggerated toxic releases, EPA's first Toxics Release Inventory, preliminary results of which were released by Representative Waxman's subcommittee,¹⁶ revealed that

¹⁵ *See H.R. Rep. No. 101-490, at 151.*

¹⁶ *See Subcomm. on Health and Env't, Comm. on Energy and Commerce, U.S. House of Reps., The National Toxic Release Inventory: Preliminary Air Toxic Data* (March 22, 1989).

industry had reported 2.7 billion pounds of toxic emissions for 1987.¹⁷ EPA acknowledged that the reported quantities understated the actual prevalence of toxic pollution.¹⁸ EPA's estimates of the health effects of emissions—also revealed by Representative Waxman's subcommittee—were equally alarming: Residents near sites releasing toxic pollutants were exposed to substantial cancer risks—in some reported instances as high as a 1 in 100 lifetime risk—and EPA estimated that toxic emissions caused thousands of excess cancer cases annually.¹⁹

EPA, however, had dragged its feet in listing toxic pollutants and triggering the statutory deadline for issuing emission standards. The “ample margin of safety” standard in the 1970 Act posed scientific challenges to EPA in quantifying health impacts of toxic pollutants.²⁰ In

¹⁷ See H.R. Rep. No. 101-490, at 151–52; Waxman, *The Waxman Report*, *supra*, at 93; EPA, *The Toxics-Release Inventory: A National Perspective* 3 (1989).

¹⁸ See H.R. Rep. No. 101-490, at 152.

¹⁹ See *id.* at 153, 316–18; see also Waxman, *Overview*, *supra*, at 1773; Subcomm. on Health and Env't, Comm. on Energy and Commerce, U.S. House of Reps., *The EPA Preliminary List of High Risk Industrial Facilities* (May 1989).

²⁰ See Comptroller General of the United States, *Delays in EPA's Regulation of Hazardous Air Pollutants* 14–23 (1983), <http://www.gao.gov/assets/150/140586.pdf>.

addition, EPA believed it could not comply with the one-year deadline for issuing regulations after it listed substances, so it avoided the problem by not listing them.²¹ And because many hazardous pollutants pose risks at extremely low exposures and lack threshold safe levels, there was concern that the “ample margin of safety” standard could require standards so stringent that industry would be unable to comply.²²

Thus, instead of issuing the emission standards the statute required, EPA chose not to regulate recognized hazards.²³ Of the top 50 toxic industrial pollutants, by volume, only one was among the seven hazardous pollutants EPA had regulated under the 1970 Act.²⁴ Companies often faced no legal requirements, and had no economic or other incentives, to reduce emissions of these dangerous substances. Not surprisingly, over 70 percent of companies reporting toxic emissions reported no use of controls for them.²⁵

²¹ See *id.* at 43.

²² See *id.* at 43–44 (1983).

²³ See H.R. Rep. No. 101-490, at 151; Waxman, *The Waxman Report, supra*, at 89; Waxman, *Overview, supra*, at 1774.

²⁴ See H.R. Rep. No. 101-490, at 322; Waxman, *Overview, supra*, at 1774.

²⁵ See *id.*

C. Section 7412’s Specific Mandates Tell EPA What, When and How to Regulate.

In the 1990 Amendments, Congress responded to EPA’s two decades of regulatory failure by comprehensively amending 42 U.S.C. § 7412 to provide precise directions to EPA ensuring meaningful emission standards for hazardous air pollutants. Congress began by relieving EPA of primary responsibility for identifying hazardous pollutants: Congress itself specified 189 hazardous pollutants that EPA must regulate. 42 U.S.C. § 7412(b)(1). Although EPA may add to or make deletions from the list, section 7412 carefully defines procedures and substantive criteria EPA must follow in doing so. *See id.* § 7412(b)(2)–(3).

Congress further provided firm deadlines for EPA action. Subsection (c) of section 7412 requires EPA to list categories of “major sources” (those emitting 10 tons of one hazardous pollutant or 25 tons of multiple pollutants) and “area sources” (emitters that are not “major sources”) within 12 months of the Amendments’ enactment, and to update the list at least every 8 years. Once EPA lists sources, it must promulgate emission standards governing them within time limits stated in subsections (c) and (e). *See id.* § 7412(c)(2). Those deadlines range from 2 to 10 years after November 15, 1990, except for categories EPA

subsequently lists, for which standards must be promulgated within two years of listing. *See id.* §§ 7412(c)(3), (5) & (6); (e)(1).

Congress also specifically defined the standards that EPA must prescribe. The statute makes promulgation of emission standards under subsection (d) of section 7412 for listed sources of hazardous pollutants mandatory. Section 7412(c)(2), entitled “Requirement for emissions standards,” commands that, “[f]or the categories and subcategories [of sources] the Administrator [of EPA] lists, the Administrator shall establish emissions standards under subsection (d) of this section[.]” *Id.* § 7412(c)(2). Subsection (d) in turn repeats that EPA “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.” *Id.* § 7412(d)(1).²⁶

²⁶ This command has an exception for “electric utility steam generating units,” which EPA need only regulate if it finds regulation “appropriate and necessary.” 42 U.S.C. § 7412(n)(1)(A). Although the statute grants EPA discretion whether to make that finding, if it does so it is *required* to regulate those sources “under this section,” *id.*, through standards satisfying subsections (d) and (f). *See White Stallion*, __ F.3d at __, 2014 WL 1420294, at *14–15.

Paragraph (2) of subsection (d) goes on to specify the technology-based criteria that emission standards for hazardous air pollutants must meet. It provides that “[e]missions 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 ... that the Administrator ... determines is achievable[.]” *Id.* § 7412(d)(2).

This mandate that EPA use “Maximum Achievable Control Technology” (“MACT”) to control emissions reflected Congress’s deliberate choice to use technology-based emission standards, rather than the health-based standards of the 1970 Act, as the first-line tool to combat hazardous pollution. Although Congress’s goal was to protect public health, the assignment that EPA issue standards that ensured safety had proved to be beyond its capacity or willingness to pursue effectively. The maximum-achievable-reduction requirement substituted a criterion ensuring both substantial emissions reductions and feasibility.²⁷ Although MACT standards might leave the public exposed to

²⁷ See, e.g., 136 Cong. Rec. S16978–79 (Statement of Sen. Baucus) (Oct. 27, 1990).

some risk, they were substantial improvements over no standards at all. Moreover, because the maximum reduction achievable would increase over time as technology advanced, MACT standards would provide ever-increasing health protections within bounds of feasibility.

For these reasons, Congress made the maximum-achievable-reduction mandate “[t]he cornerstone of the new hazardous air pollution control regime.”²⁸ As the Conference Report on the Amendments stated unequivocally, “For each category of sources, EPA *will promulgate* a standard which requires the installation of maximum achievable control technology (MACT) by the sources in the category”; the legislation thus “requires EPA to require the maximum degree of reduction of hazardous air pollutants that the Administrator determines is achievable.” H.R. Conf. Rep. No. 101-92, at 338 (1990) (emphasis added).

Congress not only set forth the general standard of maximum achievable reduction, but also specifically “prescribed the minimum stringency of the MACT standards” because it was “[c]oncerned that EPA might not be able to withstand industry pressure in establishing

²⁸ Waxman, *Overview, supra*, at 1775.

MACT standards.”²⁹ Congress defined minimum criteria MACT standards must meet in objectively quantifiable terms, enabling EPA to establish emission standards through relatively straightforward determinations of the reductions achieved by existing sources. Congress thus limited the need for EPA to make subjective judgments and made it easier to hold EPA accountable for its compliance with the statute.

Specifically, paragraph (3) of subsection (d) defines the “maximum degree of reduction in emissions … achievable” for both new and existing sources and requires EPA standards to meet specific stringency floors based on emissions from well-controlled, 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 … in the category or subcategory for categories and subcategories with 30 or more sources, or

²⁹ *Id.* at 1777.

(B) the average emission limitation achieved by the best performing 5 sources ... in the category or subcategory for categories or subcategories with fewer than 30 sources.

42 U.S.C. § 7412(d)(3). Because paragraph (3) defines “the scope of the word ‘achievable’ in section 7412(d)(2),” standards subject to paragraph (2)’s maximum-achievable-reduction criterion must meet paragraph (3)’s floor requirements. *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 861 (D.C. Cir. 2001).

In short, the statute provides that the required emission standards for new and existing sources must require maximum achievable reductions in emissions, and it sets floors EPA must satisfy in setting such MACT standards: At a bare minimum, EPA must require *new sources* to achieve the same emissions reductions as the best performing similar sources, and *existing sources* to reduce emissions as much as the top 12 percent or 5 similar sources, depending on the number of sources in the category. EPA may go beyond these floors if it “determines, considering cost and the other factors listed in Section [7412](d)(2), [that] a more restrictive standard is ‘achievable[.]’” *NRDC v. EPA*, ___F.3d ___, 2014 WL 1499825, at *4 (D.C. Cir. April 15, 2014). The floors themselves, however, are “minimum stringency level[s]” that section

7412(d) standards must meet regardless of cost or other factors EPA may consider in setting “beyond-the-floor” standards. *Id.*; see also *Sierra Club v. EPA*, 479 F.3d 875, 877 (D.C. Cir. 2007); *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 629 (D.C. Cir. 2000).

Subsection (d) provides only one exception to the requirement that emission standards promulgated under it meet these floors: For area sources—sources that emit smaller amounts of toxic pollutants—EPA may “promulgate standards … which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.” 42 U.S.C. § 7412(d)(5). This authority to require less than maximum achievable reductions applies “[w]ith respect *only* to categories and subcategories of area sources[.]” *Id.* (emphasis added).

Lest the point be lost, Congress added a fail-safe provision that would kick in if EPA did not carry out its duty to issue a MACT standard by an applicable statutory deadline. In that event, Congress required any major source in the relevant category to obtain an emissions permit and specified that the permit must include emission limits equivalent to those in a subsection (d) emission standard—i.e., it must require

maximum achievable reductions and meet the paragraph (3) floors. *See id.* § 7412(j)(2), (5).

Cognizant that technology-based standards might still permit emissions posing significant health risks, Congress further required EPA to address those risks once the MACT standards were in place. Subsection (f) of section 7412 requires that, not later than 8 years after establishing a MACT standard under subsection (d), EPA must promulgate a more stringent standard if necessary to provide an “ample margin of safety to protect public health” or “prevent … an adverse environmental effect.” *Id.* § 7412(f)(2)(A).³⁰ With respect to carcinogenic pollutants, subsection (f) requires a health-based standard if a MACT standard under subsection (d) “do[es] not reduce lifetime excess cancer

³⁰ Subsection (f) defines an “adequate margin of safety” to be the same as the standard under the 1970 Act’s hazardous air pollutant provisions, which had by 1990 been interpreted to require EPA to establish an “acceptable” level of exposure and limit emissions to provide at least that degree of protection, regardless of cost; EPA could limit emissions even further to provide an additional margin of safety, but could consider costs and feasibility in providing such additional protection. *See* EPA, Final Rule, *National Emission Standards for Hazardous Air Pollutants; Benzene Emissions From Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants*, 54 FR 38044, 38049 (1989) (summarizing this Court’s decision in *NRDC v. EPA*, 824 F.2d 1146, 1165–66 (D.C. Cir. 1987)).

risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million.” *Id.* Like subsection (d)’s requirement of MACT standards, subsection (f)’s requirements are subject to one exception: for area sources only, EPA need not promulgate such standards if it regulates them using the alternative “generally available control technology” approach. *See id.* § 7412(d)(5) (permitting such standards “in lieu of” standards under “subsection (f) of this section”).

Finally, Congress recognized that standards based on maximum achievable reductions should evolve as technology advances and achievable reductions grow ever greater. Under the 1970 Act, however, EPA had not updated the few standards it had issued to account for such changes.³¹ Accordingly, paragraph (6) of subsection (d) provides that, every 8 years after promulgating a MACT standard (or a health-based standard under subsection (f)), EPA must review the standard and, if necessary, issue a revised standard: “The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated

³¹ See Comptroller General, *supra*, at 44.

under this section no less often than every 8 years.” *Id.* § 7412(d)(6). In this way, “the continual tightening of existing source standards will be assured[.]”³² Paragraph (6) reflects a congressional determination that as technology advances and the reductions achieved by better-performing sources improve, it is both fair and reasonable to require the standards that similar sources must meet to be tightened accordingly.

The requirement that EPA consider issuance of health-based standards under subsection (f) does not vitiate the need for continued observance of the floor maximum-achievable-reduction requirement. EPA’s determination of “acceptable” risk will not necessarily reduce risks to the level Congress deemed desirable, *see NRDC v. EPA*, 529 F.3d 1077, 1081–83 (D.C. Cir. 2008), and there is no level of exposure that can be reliably demonstrated to be safe for many hazardous materials. Thus, Congress commanded that subsection (f) standards may not be *less* stringent than subsection (d) standards, *see* 42 U.S.C. § 7412(f)(2)(A), and it required that MACT standards be continually reevaluated and tightened if necessary every 8 years, *see id.* § 7412(d)(6), even if EPA determines that no distinct subsection (f) standard is required.

³² Waxman, *Overview, supra*, at 1776, n.256.

II. EPA’s Failure to Apply Maximum-Achievable-Reduction Floors When Promulgating Revised Standards Violates Section 7412.

A. Section 7412’s Language, Structure, Context, and Purpose Require Revised Standards Promulgated Under 7412(d)(6) to Satisfy Paragraphs (2) and (3) of Subsection (d).

The precise language of the interlocking provisions through which Congress sought to strengthen EPA’s authority to regulate hazardous air pollutants while limiting its discretion to avoid effective regulation resolves the issue in this case. The statute requires EPA to issue hazardous pollutant emission standards to meet the maximum-achievable-reduction criterion of section 7412’s subsection (d). Once EPA has issued such a MACT standard, paragraph (6) of subsection (d) requires the agency to consider every 8 years whether revising it is necessary in light of stated criteria, and, if so, to issue a revised standard.

Under the statute’s plain language, a revised emission standard issued under paragraph (6) of subsection (d) is a standard “promulgated under” subsection (d). Such a standard is therefore subject to the requirement in paragraph (2) of subsection (d) that “[e]missions standards promulgated under this subsection”—except those for area sources under section 7412(d)(5)—“shall require the maximum

[achievable] degree of reduction in emissions of the hazardous air pollutants[.]” 42 U.S.C. § 7412(d)(2). Compliance with that mandate, in turn, requires compliance with the floors established by section 7412(d)(3), which define the lower bounds of the maximum achievable reductions demanded by paragraph (2).

EPA’s view that revised standards promulgated under paragraph (6) of subsection (d) are not subject to the requirements paragraphs (2) and (3) impose on standards promulgated under subsection (d) contradicts the carefully wrought language of the statute. Throughout section 7412, Congress used the term “subsection” in conformity with its general usage to refer to the lower-case-lettered subdivisions of the section.³³ Specifically, Congress referred to “subsection (d)” no less than

³³ See *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 61–62 (2004); Office of the Legislative Counsel, U.S. House of Representatives, *House Legislative Counsel’s Manual on Drafting Style* 24 (1995), http://legcounsel.house.gov/HOLC/Drafting_Legislation/draftstyle.pdf; Office of the Legislative Counsel, U.S. Senate, *Legislative Drafting Manual* 10 (1997), [http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual\(1997\).pdf](http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf). Section 7412 also consistently follows the corollary that “[i]f the reference is to more than 1 unit, the reference is to the senior unit. Thus, refer to section 5(a)(1) and not paragraph 5(a)(1).” *House Legislative Counsel’s Manual*, *supra*, at 52. See, e.g., 42 U.S.C. § 7412(c)(3) (referring to “subsection (k)(3)(B) of this section”).

30 times. When section 7412(d)(2) refers to standards promulgated “under this subsection,” there is no doubt that it means subsection (d).³⁴ There is likewise no doubt that paragraph (6) of subsection (d), under which revised standards are promulgated, is part of subsection (d). The statute’s unambiguous language thus provides that revised standards promulgated under section 7412(d)(6) are subject to the maximum-achievable-reduction requirement, with its mandatory floors, prescribed by paragraphs (2) and (3) of subsection (d).

That the maximum-achievable-reduction requirement and the floors it incorporates apply to standards promulgated under paragraph (6) of subsection (d) is underscored by Congress’s creation of only one exception to the rule that those requirements apply to emission standards promulgated under subsection (d): EPA may issue standards “[w]ith respect *only* to ... area sources” using a “generally available control technologies” standard. *Id.* § 7412(d)(5) (emphasis added).

³⁴ Following its usual practice, *see Koons Buick*, 543 U.S. at 61–62, when Congress referred only to paragraph (2) of subsection (d), it used the term “paragraph (2).” *See* 42 U.S.C. § 7412(d)(5). In the same sentence, it used the term “subsection” to refer to lower-case-lettered subdivisions of section 7412. See *id.* (referring to “subsection (c) of this section” and “subsection (f) of this section”).

Congress explicitly provided that the authorization to issue such standards is “in lieu of the authorities provided in paragraph (2)”—i.e., the maximum-achievable-reduction requirement—which otherwise apply to area-source standards promulgated under subsection (d). *Id.* Congress’s creation of a single, carefully limited, express exception to the otherwise unqualified requirement that standards promulgated under subsection (d) satisfy the requirements of paragraph (2) and, in turn, paragraph (3), strongly confirms that Congress intended no other exceptions. As this Court has recognized, Congress’s creation of “specific exceptions” to section 7412 requirements “indicates that Congress has spoken on the question” and that “‘additional exceptions are not to be implied[.]’” *NRDC v. EPA*, 489 F.3d 1364, 1374 (D.C. Cir. 2007) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001)).

Reading the statute to exempt revised standards issued under section 7412(d)(6) from the requirements otherwise applicable to subsection (d) standards would have the anomalous result of effectively leaving revised standards subject to *no* statutory criteria. Subsections (d) and (f) are the only parts of section 7412 that specify substantive requirements for hazardous pollutant emission standards, and (except

with respect to area standards) paragraphs (2) and (3) are the parts of subsection (d) that define criteria applicable to emission standards under subsection (d). Holding those paragraphs inapplicable to revised standards under paragraph (6) of subsection (d) would mean that, once EPA determines a revision is “necessary,” it has no further statutory yardstick against which to judge the substance of a revised standard.

Conceivably, a statute that required EPA to revise a standard as it thought “necessary” and provided no further criteria for revision might provide a sufficiently “intelligible principle” to satisfy the nondelegation doctrine. *See Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472–76 (2001). But reading the Amendments to confer such unfettered discretion would be contrary not only to the specific language of the applicable statutory provisions, but also to the entire structure of section 7412 and the congressional purpose it reflects.

As explained above, Congress designed the text and structure of section 7412 to prevent EPA from evading its responsibilities to promulgate stringent standards governing hazardous air pollutants. Congress did so by creating a precisely defined mandate to regulate air emissions of hazardous substances to the maximum degree achievable.

Reading section 7412 to relieve EPA from that statutory mandate once it has issued the initial round of standards and moved on to the task of periodically reevaluating and revising them to take into account advances in technology would be wholly at odds with section 7412's evident purpose. Granting EPA a free hand to regulate however it sees fit is exactly what Congress sought to avoid in crafting section 7412.

Moreover, if standards revised under paragraph (6) are not themselves "promulgated" under subsection (d) and subject to its requirements, they would presumably also not be subject to the requirement that they themselves be reviewed under subsection (d)(6) every 8 years. Thus, by revising the standards once, EPA would not only relieve itself of the requirement that its standards comport with the maximum-achievable-reduction criterion, but also of its obligation to review and update them every 8 years.³⁵ That result would be wholly contrary to the evident congressional intent that subsection (d) standards be regularly updated to reflect technological advances. EPA

³⁵ Similarly, holding that a revised standard is not "promulgated" under subsection (d) would also seemingly relieve EPA of the subsection (f) requirement that it promulgate a health-based standard if a subsection (d) standard does not reduce lifetime excess cancer risks to less than one in one million. *See* 42 U.S.C. § 7412(f)(2)(A).

does not itself appear to take this extreme position. But if EPA *is* required to engage in periodic review and revision of standards that have been revised under paragraph (6), that can only be because they are still standards “promulgated” under subsection (d) and subject to its requirements.

As this Court explained earlier this year, section 7412 was enacted “[t]o remedy the slow pace of EPA’s regulation of [hazardous air pollutants] … by eliminating much of EPA’s discretion in the process,” *White Stallion*, __ F.3d at __, 2014 WL 1420294, at *1. The statute must be interpreted consistently with that purpose. *See id.* at *9. Recognizing this central concern animating the statute’s language and structure, this Court has rejected agency constructions that would undermine the statute by importing discretion into provisions that unambiguously require emission standards to meet explicitly defined criteria. *See, e.g., New Jersey v. EPA*, 517 F.3d 574, 578–83 (D.C. Cir. 2008); *NRDC v. EPA*, 489 F.3d at 1368–74; *Sierra Club*, 479 F.3d at 876–84; *Cement Kiln Recycling Coal.*, 255 F.3d at 857–58, 861–62.

Thus, the Court has recognized, “EPA cannot do an end-run around the statutory scheme enacted by Congress” by declining to

require maximum achievable reductions in emission standards subject to that mandate. *NRDC*, 489 F.3d at 1371. Nor may EPA “rely on its gap-filling authority to supplement the Clean Air Act’s provisions when Congress has not left the agency a gap to fill.” *NRDC*, __ F.3d at __, 2014 WL 1499825, at *8. Here, EPA’s position that an emission standard revised under section 7412(d)(6) need not meet requirements of 7412(d)(2) and (3)—requirements expressly applicable to standards issued under subsection (d)—attempts exactly the end-run Congress took pains to prevent.

B. *Battery Recyclers* Cannot Be Squared With the Statute.

Against the statute’s language and structure and the congressional purposes they embody, this Court’s decision in *Association of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, which last year held standards revised under section 7412(d)(6) to be exempt from subsection (d)’s MACT floor requirements, offered no basis for that holding other than that the panel believed it was required by the Court’s 2008 decision in *NRDC v. EPA*, 529 F.3d 1077. *Battery Recyclers* made no attempt to square its holding with the actual language and structure of the statute.

The Court in the 2008 *NRDC* case, in turn, was not faced with the question whether a revised emission standard issued under section 7412(d)(6) must meet the requirements sections 7412(d)(2) and (3) impose on “[e]missions standards promulgated under this subsection.” In *NRDC*, EPA had *not* issued a revised standard. The agency had concluded that a new standard was not “necessary” under section 7412(d)(6) because there had been no significant “developments in practices, processes, and control technologies.” *See* 529 F.3d at 1084. Under paragraph (6), that determination excused EPA from issuing a revised standard and thus obviated any need to consider whether a revised standard, if issued, must satisfy the requirements of subsection (d). *NRDC* therefore did not have to, and did not, address the statutory language requiring standards issued under subsection (d) to meet the requirements of sections 7412(d)(2) and (3).

The *Battery Recyclers* panel nonetheless felt bound by a statement in *NRDC* that, expansively construed, might suggest that even if EPA issued a new standard, it would not be “obliged to completely recalculate the maximum achievable control technology.” *NRDC*, 529 F.3d at 1084. Even assuming that statement was intended to address not the issue

before the *NRDC* Court (i.e., what EPA must do to determine whether a revised standard is necessary) but the separate issue, not presented there, of what EPA would have been required to do *had it issued a revised standard*, this Court should now reject the proposition that the maximum-achievable-reduction requirement is inapplicable to revised standards under section 7412(d)(6). Nothing in *NRDC* explains how that proposition could be squared with the statutory language, structure, and purpose. *NRDC*'s discussion of the language of section 7412(d)(6) establishes only that a finding that a new standard is not "necessary" in light of "developments in practices, processes and control technologies" excuses EPA from issuing a new standard. The opinion offers no analysis of what the statutory language requires if, as in this case, EPA decides a revised standard *is* necessary. *See* 529 F.3d at 1084.

As this Court very recently recognized, whether it is "necessary" for EPA to issue a standard under section 7412 is a different question from what substantive requirements such a standard must meet if EPA decides issuing it is necessary. Discretion to decide the former question is not discretion to determine the latter. Thus, in *White Stallion Energy Center*, the Court held that, although EPA has discretion to determine

whether regulation of electric utility steam generating units is “necessary,” *see* 42 U.S.C. § 7412(n)(1)(A), once EPA makes such a finding, it regulates their emissions “under this section.” *Id.* Thus, emission standards must satisfy the maximum-achievable-reduction floors required by sections 7412(d)(2) and (3). *See* __ F.3d at __, 2014 WL 1420294, at *1–2, *14–15. As the Court explained, under section 7412, “the statutory framework for regulating [hazardous air pollutant] sources appears in [section 7412(c)], which covers listing, and [section 7412(d)], which covers standard-setting.” *Id.* at *15. “[T]he plain statutory language suggests” that when EPA determines that an emission standard is necessary, the standard is subject to the maximum-achievable-reduction requirement of section 7412(d). *Id.* at *14.

The same is true here. Whatever the scope of EPA’s discretion under section 7412(d)(6) to determine whether a revised standard is “necessary,” once EPA makes that determination and issues a new standard, that standard is promulgated under subsection (d) and subject to requirements expressly applicable to such standards. EPA’s contrary view cannot be squared with the statute, nor can this Court’s acceptance of that view in *Battery Recyclers*. The statute’s unambiguous words—and

the important policies that led Congress to adopt the limits on EPA's discretion those words impose—require this Court to reject EPA's distortion of the law, through en banc consideration if necessary.

CONCLUSION

This Court should hold that EPA's revised chromium plating emission standard is contrary to law and remand it with directions that EPA conform it to the requirements of section 7412(d).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Amicus Curiae United States Representative Henry A. Waxman in Support of Environmental Petitioners in No. 12-1460 complies with the type-volume limitation of FRAP 32(a)(7)(B) and 29(d). The brief is composed in a 14-point proportional typeface, Century Schoolbook BT. As calculated by my word processing software (Microsoft Word 2010), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 6,824 words.

s/Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that, on June 9, 2014, this Brief for Amicus Curiae United States Representative Henry A. Waxman in Support of Environmental Petitioners in No. 12-1460 was served through the court's ECF system on counsel for all parties.

/s/Scott L. Nelson
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