ORAL ARGUMENT NOT YET SCHEDULED

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

No. 04-1323 (and consolidated cases)

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,

Petitioners,

v.

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

Respondents.

On Petitions for Review of Final Action of the
United States Environmental Protection Agency

BRIEF OF THE STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS AND THE ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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DATED: August 21, 2006

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* the State and Territorial Air Pollution Program Administrators ("STAPPA") and the Association of Local Air Pollution Control Officials ("ALAPCO") certify as follows:

A. Parties and Amici.

All parties, intervenors, and amici appearing before this Court are listed in the Environmental Petitioners' Opening Brief.

B. Ruling Under Review.

The rulings under review are the "National Emission Standards for Hazardous Air Pollutants: Plywood and Composite Wood Products; Effluent Limitations Guidelines and Standards for the Timber Products Point Source Category; List of Hazardous Air Pollutants, Lesser Quantity Designations, Source Category List" (final rule), 69 Fed. Reg. 45944 *et seq.* (July 30,2004) [JA__] (challenged in Docket Nos. 04-1323, 04-1325, 04-1328 and 04-1329); and "National Emission Standards for Hazardous Air Pollutants; Plywood and Composite Wood Products; List of Hazardous Air Pollutants, Lesser Quantity Designations, Source Category List" (final rule, amendments; notice of final action on reconsideration), 71 Fed. Reg. 8342 *et seq.* (Feb. 16, 2006) [JA__] (challenged in Docket No. 06-1140, consolidated with Docket Nos. 04-1323, 04-1325, 04-1328 and 04-1329).

C. Related Cases.

Amici curiae STAPPA and ALAPCO are not aware of any unconsolidated cases related to this matter.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *amici curiae* STAPPA and ALAPCO state as follows:

STAPPA and ALAPCO are national non-profit associations of air pollution control agencies in 54 states and territories and more than 165 major metropolitan areas across the United States. Neither STAPPA nor ALAPCO has any outstanding shares or debt securities in the hands of the public, and neither has any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

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* Authorities upon which *amici* chiefly rely are marked with asterisks.

STATUTES AND REGULATIONS

Applicable statutes and regulations are contained in the addendum to the Environmental Petitioners' Opening Brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Together with the Environmental Protection Agency ("EPA"), STAPPA and ALAPCO's members are responsible for protecting the public from the detrimental effects of hazardous air pollutants ("HAPs"). STAPPA and ALAPCO's members also have primary responsibility for granting permits to facilities emitting HAPs under federal law.[1]

SUMMARY OF ARGUMENT

STAPPA and ALAPCO submit this brief in support of the Petitioners' argument that EPA's creation of a "low-risk" "subcategory" of plywood and composite wood products ("PCWP") manufacturers violates the plain text, the clear structure and the core legislative purpose of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) ("CAAA"). Determined "to overcome the inertia that plagued the health-based standard setting process authorized by [prior] law[,]"[2] the focal point of Congress's 1990 amendments was its clear command that emissions standards must henceforth be promulgated "based *not* on an

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[1] One U.S. Senator specifically recognized and acknowledged the important role STAPPA and ALAPCO members play in the regulation and control of air pollution:

> . . . . I want to make clear to the Members who are listening to this debate the seriousness that is attached to this amendment by those who are on the front line, those who are the local air pollution control officers throughout this Nation. They are represented in two formal organizations. One is the State and Territorial Air Pollution Program Administrators, STAPPA, and the other is the Association of Local Air Pollution Control Officials (ALAPCO).

Clean Air Act Amendments of 1989, 136 Cong. Rec. S2826, S2852, 1990 CAA Leg. Hist. 5955, 6028 (Lexis) (statement of Senator Wilson) (March 21, 1990).

[2] Clean Air Conference Report, 1990 CAA Leg. Hist. 731, 1029 (Lexis) (Nov. 1993) .

assessment of the risks posed by HAPs," but rather on "the emissions limitation achieved by the best-performing sources in a particular category . . . ." *Sierra Club v. EPA*, 353 F.3d 976, 980 (D.C. Cir. 2004). EPA's creation of a low-risk subcategory for PCWP manufacturers subverts this core legislative purpose. Rather than deferring all but marginal consideration of risk until a second phase of rulemaking, as Congress clearly intended, EPA has drawn risk analysis back into the center of the standard-setting process. It does this first, by using perceived health risks as the sole criteria for defining a "subcategory" of PCWP manufacturers; then proclaiming that the manufacturers who fall within that risk-based "subcategory" will be entirely exempt from meeting emissions limitations that are demonstrably feasible as a matter of technology; and finally establishing a procedure pursuant to which more than half of the industry stands to apply for case-by-case exemptions from the MACT standards, all of which must be reviewed by EPA and state and local pollution control officials such as those represented by *amici*.

After briefly demonstrating that the rule's risk-based subcategory and case-by-case exemption process are inconsistent with the CAAA's clear text, purpose and legislative history (Section I), STAPPA and ALAPCO focus on two points on which their members have a unique perspective. In Section II, STAPPA and ALAPCO explain that EPA's rule will prolong, rather than eliminate, the risk-based gridlock when one considers that state and local air pollution control officials will be required to expend considerable time reviewing scores of exemption applications on a case-by-case basis. Moreover, if EPA's construction of the statute is approved for purposes of the plywood industry, there is every reason to expect EPA to seek to define "low-risk" subcategories for dozens more industries, compounding the delays associated with case-by-case risk analysis.

STAPPA and ALAPCO also occupy a unique position in objecting to the short shrift EPA has given to Congress' intent to establish national uniformity in emission levels (Section III). Qualifying for EPA's "low-risk" subcategory will inevitably involve the conduct of site-specific tests to establish pollution levels in the vicinity of the sources applying for "low-risk" exemptions. Manufacturers located in certain regions will be authorized to emit higher levels of pollutants than their competitors in other regions, to the environmental detriment of the regions where the exemptions will concentrate, and to the economic detriment of the regions where existing levels preclude an exemption.

ARGUMENT

I. THE PCWP RULE'S RISK-BASED EXEMPTIONS MUST BE REJECTED BECAUSE THEY ARE INCONSISTENT WITH CONGRESSIONAL INTENT IN ADOPTING THE CAAA.

The rule under review violates the twin mandates of the 1990 Amendments to the Clean Air Act. This Court has already recognized that Congress's primary intent was to make clear that emissions standards must henceforth "be based *not* on an assessment of the risks posed by HAPs," but rather "must reflect the emissions limitation achieved by the best-performing sources in a particular category . . . ." *Sierra Club*, 353 F.3d at 980. Second, even when it becomes appropriate to consider risk – during a second phase of regulation that EPA has not yet reached for PCWP manufacturing – EPA may do so only for the purpose of imposing "*more stringent* standards than [can be] achieved through MACT." *Id.* at 980 (emphasis added). *See also* The White House, Office of the Press Secretary, *Fact Sheet: The Clean Air Act Amendments of 1990*, at 5 (Nov. 15, 1990) ("Sources will be required to install [MACT] and, if necessary, to *later* reduce emissions even further if there remains a significant residual risk. . . .") (emphasis added).

EPA's purported MACT standard for PCWP manufacturers plainly violates these core principles. Instead of "requir[ing] all sources in a category to at least clean up their emissions to

the level that their best performing peers have shown can be achieved" (*Sierra Club*, 353 F.3d at 980), EPA has established a MACT standard that, during phase one, purports to relieve a large segment of sources from compliance with the technology-based standard by defining a "subcategory" based solely on risk. Such a blatant evasion of congressional intent cannot be sustained. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 & n.9 (1984) (courts "must reject administrative constructions which are contrary to clear congressional intent"); *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) ("[Courts] must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."); *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000) ("If, in light of its text, legislative history, structure, and purpose, a statute is found to be plain in its meaning, then Congress has expressed its intention as to the question, and [*Chevron*] deference is not appropriate.") (internal quotation marks omitted).

There can be no doubt, of course, that CAAA's central purpose was to abolish the inclusion of risk in this phase of standard development, which EPA has now introduced in the PCWP Rule. Before 1990, Congress had required EPA to establish emissions standards that provided an "ample margin of safety to protect the public health." 42 U.S.C. § 7412(b)(1)(B) (1990). As explained in the debates leading to the CAAA, that approach was a failure. 136 Cong. Rec. S205, 208 (Jan. 24, 1990) (Legislative History of the Clean Air Act Amendments of 1990, vol. IV, at 4846) (statement of Senator Chafee) [hereinafter "Chafee Statement"] ("EPA is authorized under the current Clean Air Act to regulate . . . pollutants. But the program has not worked well."); Clean Air Conference Report, 1990 CAA Leg. Hist. 731, 1029 (Lexis) (Nov. 1993) ("This new approach towards regulation of both routine releases of hazardous air

pollutants [industrial and area source categories] relies on technology-based standards rather than risk-based standards. This approach is needed to overcome the inertia that plagued the health-based standard setting process authorized by current law."). *See also Sierra Club*, 353 F.3d at 979 (risk-based analysis previously mandated by the "proved to be disappointing."). The risk-based program had "proven itself to be largely ineffective" not only because risk-based standards had been set for only a handful of HAPs, but also because "[u]nder a risk management approach, sources that emit carcinogens and other toxic air pollutants can escape any control requirement."[3]

As this Court recognized, "[t]he ineffectiveness of the risk-based approach created a 'broad consensus that the program to regulate [HAPs] under section 112 of the Clean Air Act should be restructured to provide EPA with authority to regulate . . . with *technology-based* standards.'" *Sierra Club*, 353 F.3d at 979 (quoting Clean Air Act Amendments of 1989, S. Rep. No. 101-228, at 133 (1989), *reprinted in* V Legislative History, at 8473). *See also* Clean Air Act Amendments of 1989, 136 Cong. Rec. S3748, 1990 CAA Leg. Hist. 6946, 7197 (Lexis) (statement of Senator Domenici) ("[T]he basic concept of technology requirements is a necessary first step to assure the public that measures are being taken to address this serious public health threat."). Accordingly, Congress abandoned the risk-based standard and instead "require[d] EPA to set the most stringent standards achievable, 42 U.S.C. § 7412(d)(2), that is, standards 'based on the maximum reduction in emissions which can be achieved by application of [the] best available control technology.'" *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 857 (D.C. Cir. 2001) (quoting S. Rep. No. 101-228, *reprinted in* V Legislative History, at 8473) (citation omitted); *accord National Lime Ass'n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000).

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[3] Toxic Substances Release Act of 1985: Hearing on H.R. 2576 Before the Subcomm. on Health and the Environment of the H. Energy and Commerce Comm., 99th Cong. 7-8 (June 11, 1985) (Statement of Kenneth Hagg, President, STAPPA) ("Hagg Testimony").

Overwhelming legislative history supports the notion that EPA's focus in the first phase of setting MACT standards must be on technological feasibility, not risk:

> The bill reported by the committee has a two phase regulatory program that is designed to get the program moving. There is broad consensus on the first phase. It requires EPA to issue emissions standards for a large number of industrial categories which will require about 20,000 individual facilities which are major sources of about 200 air toxics to install best available control technology.
>
> . . . .
>
> The second phase of the program is called residual risk.

Chafee Statement. *See also* Legislative History of the Clean Air Act Amendments of 1990, vol. IV, at 4846 (statement of Senator Durenberger) ("The new air toxics program . . . will have two phases. In the first phase EPA is to require major sources of these air toxics to install best available pollution control technology. . . . In a second phase, the bill imposes more stringent standards, if they are necessary to protect public health."); Hearing on S. 816 and 1490 Before the S. Environment and Public Works Subcomm. on Environmental Protection, 101st Cong. 7 (Sept. 21, 1989) (Statement of Bruce Maillet, on behalf of STAPPA/ALAPCO) ("Once control technologies have been applied to new and existing sources of toxic air pollutants, both [proposed] bills call for the evaluation of residual risks."); *Sierra Club*, 353 F.3d at 980 (citing legislative history to demonstrate that "Congress established a two-phase approach for setting HAP emission standards"); *National Lime*, 233 F.3d at 629, *citing* 42 U.S.C. § 7412(d)(2) ("*Once the Agency sets statutory floors*, it *then* determines, considering cost and the other factors listed in section 7412(d)(2), whether stricter standards are 'achievable.'") (emphasis added).

The Court should dismiss EPA's contention that CAA § 112(c)(9) authorizes it to create a source category or subcategory based on risk. The *amici* do not challenge the broad principle that Congress gave EPA reasonable discretion to define categories and subcategories of major and area sources of HAPs. Moreover, the *amici* understand that, once those categories are

defined, CAA § 112(c)(9)(B) gives EPA a narrow avenue to consider risk and determine that the sources with a properly defined category or subcategory may be exempted from meeting the MACT standard.

Yet, the PCWP Rule's low-risk subcategory is not saved by this analysis for two reasons. First, it fails to address the Petitioners' compelling argument that the plain language of CAA § 112(c)(9)(B)(i) applies solely to categories, not *sub*categories. More fundamentally, reading § 112(c)(9)(B) as allowing EPA to create and exempt an entire subcategory *based solely on risk* would convert what Congress intended to be a relief valve (to permit incidental consideration of risk under limited circumstances) into a gaping loophole that injects broad-based, industry-wide, case-by-case risk analysis into the phase-one rulemaking and implementation process.

The intent of § 112(c)(9)(B) is to say that *once a category has been defined based on the usual criteria*, EPA *then* may evaluate whether the risk presented by the sources in that category warrant an exemption from the MACT standard. Under EPA's construction, risk is brought back into the equation at the outset, by using risk as the sole criteria for defining the category in the first place. The problems posed by this cynical construction of the statute are only compounded by the fact that "[i]t would . . . give the Agency authority to exempt individual sources from MACT, an authority that Congress in 1990 explicitly refused to grant to the Agency." Bradford C. Mank, *A Scrivener's Error Or Greater Protection Of The Public: Does The EPA Have The Authority To Delist 'Low-Risk' Sources Of Carcinogens From Section 112's Maximum Achievable Control Technology Requirements?*, 24 Va. Envtl. L.J. 75, 80 (2005) [hereinafter "Mank, *Scrivener's Error*"]. In fact, "[i]n the [Plywood] Rule alone, the EPA is seeking to exempt over one-half of the sources in the PCWP industry - 147 sources." *Id.* at 123. Such

broad, individualized exemptions clearly were not envisioned by Congress when it adopted the MACT standard set forth in CAA § 112.

In short, the Court should reject EPA's contention that it was empowered by Congress to create and delist source categories and subcategories based solely on risk. Such a treacherous position simply cannot be squared with the relevant statutory language, case law, and legislative history. The PCWP Rule's exemptions thus must be rejected because they erode the categorical technology-based standards mandated by the CAAA and resurrect a risk-based approach that Congress squarely disavowed.

II. EPA'S RULE WILL PROLONG THE RISK-BASED GRIDLOCK THAT CONGRESS INTENDED TO ELIMINATE BY ADOPTING THE CAAA.

In considering the PCWP Rule, EPA acted arbitrarily and capriciously (5 U.S.C. § 706(a)(A)) by ignoring the inevitable gridlock the proposed PCWP Rule will cause in state and local air pollution control procedures, which Congress sought to eliminate in adopting the CAAA. Given their purposes and focus, STAPPA and ALAPCO are vitally interested in avoiding such a result and, more generally, in the proper interpretation and implementation of the 1990 Amendments to the Clean Air Act. With a membership comprised of those who have been and will continue to be on the front lines of protecting our nation's air quality – and, indeed, of implementing and enforcing the regime mandated by Congress and the regulations promulgated by EPA – STAPPA and ALAPCO have a unique perspective. *See* n.1. STAPPA and ALAPCO members, being air quality regulators, are keenly aware that the risk-based approach will require them to undertake time-consuming procedures, and that, perversely, the extensive efforts that they must make will not diminish public exposure to toxic emissions – as would occur with installation by sources of MACT technology requirements.

Several commenters warned EPA about the slowdown problem inherent in the PCWP Rule:

> The commenters noted that many State and local agencies will find it necessary to review the risk-based exemptions, and the process could place a very intensive resource demand on State and local air agencies that must verify extensive emissions and stack information and review the risk assessments to ensure that they have been done properly. The review of these risk assessments would require expertise in risk assessment methodology that State and local agencies may not possess.

71 Fed. Reg. at 8364 [JA__]. EPA responded that by taking responsibility for reviewing and approving/disapproving eligibility demonstrations submitted by PCWP facilities, EPA would alleviate much of the delay anticipated by state and local authorities. *Id.* [JA__] But EPA's role hardly cures the problem, which is that state and local permitting entities have a responsibility – sometimes imposed by state law – to review and verify submissions independently. EPA shrugged off this issue, concluding that "[EPA has] maintained the approach that relies upon EPA review and approval of LRD [low-risk demonstrations], and we depend upon States' inherent authority to require more of themselves and of sources, under CAA section 116, for those States that choose to do so." 71 Fed. Reg. at 8364 [JA__]. But this statement disregards the fact that approximately half of the states are prohibited under state laws or policies from promulgating regulations more stringent than those promulgated by EPA. Moreover, relying upon states to gap-fill inadequate national programs creates inequities in how a single industry is treated across the country and, more importantly, the level of health protection afforded all citizens.

Furthermore, EPA contradicts its statement that EPA will do most of the work under the Rule, explaining in the proposed Rule its *limited* role in determining a facility's eligibility for the low-risk parameters:

> The process that occurs between the source and EPA is limited to EPA's review and approval or disapproval of the source's LRD submitted in support of its applicability determination request, and EPA's forwarding of approved low-risk parameters to the State permitting authority.

71 Fed. Reg. at 8363 [JA__]. Such contradictory positions lead to a simple conclusion: EPA has neither an understanding of nor an appreciation for the significant impediments to implementation that the Rule will cause, despite EPA's claim to a "general desire to reduce costs of CAA compliance" (71 Fed. Reg. at 8367 [JA__]).[4]

State and local permitting authorities are obligated to review and verify the accuracy of information contained in the Title V permits that they issue. Citizens hold state and local air agencies accountable for explaining how source compliance with permit terms and conditions will insure they are not exposed to harmful levels of toxic emissions. In fact, EPA's regulations require all air agencies to provide "a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it." 40 C.F.R. 70.7(a)(5). Permitting authorities must, therefore, critically review and validate or invalidate EPA's low-risk demonstrations before embodying the results into permits. Only in this way can they draft accurate statements of basis and defend the permits if they are challenged by citizens or environmental groups.

EPA has not seriously considered or responded to the inevitable delays posed by the PCWP Rule, which will indeed be substantial. One member state of STAPPA estimates that at least four steps must be taken to review and verify each demonstration:

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[4] *See also* 71 Fed. Reg. 8342, 8366 (EPA relying on "$66 million reduction in compliance costs that is estimated in the supporting information for the final rule").

- First, many permitting authorities, such as the particular state member, are required under state regulations to approve test protocols before the scheduled test. Because the PCWP MACT requires low-risk demonstrations to include all HAP-emitting sources at the facility, the state expects that review and approval of the test protocols will be particularly time-consuming. Such protocols comprise all planning details, including the test methods to be used, the pollutants to be measured, the number of test runs, the operating rate, and any deviations from testing requirements. Since many of the process units required to be tested for the low-risk demonstrations are units that have never before been tested, the state expects to visit some of the sites prior to the tests and also plans to be present to observe many of the tests.
- Second, the state will review the test reports, which sources generally submit in order that the state or local agency can review the raw data from the test. This will involve, at a minimum, checking and verifying the emissions calculations, process data, and quality-assurance procedures used by the source. The state estimates that the review of protocols and test reports will take approximately 80 hours for each facility. If the tests were observed by staff, and occurred over multiple days, as happens fairly frequently, this estimate would increase significantly.
- Third, the low-risk demonstration report must be reviewed and verified. Because EPA has stated that it does not expect most facilities to be able to demonstrate low-risk by using the look-up tables provided in Appendix B of the rule, the majority of facilities will likely submit site-specific risk assessments with modeling analyses. The state estimates that it will take approximately 60 hours to review the demonstrations, which will be presented as reports that include all data, computer modeling, and risk analyses

and calculations. In order to adequately review these demonstrations as well as those now allowed under the industrial boiler MACT, additional full-time technical staff with expertise in risk assessment has been hired by the state.[5]

- Fourth, incorporating low-risk permit conditions into the state-issued Title V permits raises a number of problems for many state and local entities. Some facilities may need to make process modifications or add control equipment to qualify for the low-risk subcategory, and construction permits may be necessary in such cases. Moreover, permit engineers will need to work closely with EPA, the facility, and state air toxics regulators to amend and reissue the Title V permit properly in the event that the facility makes process changes, such as production increases. In addition, incorporating these permit conditions into the Title V permits constitutes a major permit modification, which, under most state laws, requires public notice, necessitating further expenditures in funds and manpower by state and local authorities. Due to the controversial nature of the low-risk permits, many are likely to be challenged, requiring public hearings. If the permit is appealed, work hours and costs increase significantly.

Not only will the additional resource expenditures be significant, but no benefits to public health are realized. Were MACT technology requirements imposed on this industry sector as envisioned by Congress, one vitally important purpose of the Clean Air Act Amendments – to clean up toxic emissions for the benefit of public health – would result. EPA asks the permitting authorities to swallow a hard pill: significantly increase their workloads for the convenience of an industrial sector, when *no health benefits accrue for the citizens to whom they are accountable*.

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[5] Other states, however, have noted that such technical expertise is simply not available to them, and are uncertain about how to proceed in evaluating risk demonstrations.

Finally, if the Court approves EPA's construction of the statute for the plywood industry, EPA likely will seek to define "low-risk" subcategories for dozens more industries, compounding the delays associated with case-by-case risk analysis during a regulatory phase intended to be focused almost exclusively on technological feasibility. Mank, *Scrivener's Error* at 80 ("The EPA's claim that it has the authority to exempt subcategories of so-called 'low-risk' carcinogenic sources is significant because it could be used to exempt thousands of sources governed by MACT standards in dozens of industries.") This raises a frightening specter of steadily increasing delays in state and local reviews of exponentially more exemption applications, while those same authorities must still find and expend the resources necessary to devise control strategies under state implementation plans, monitor ambient air quality, compile emissions inventories, and enforce environmental laws, regulations and permits.

In sum, EPA's arbitrary and capricious disregard for the delays the PCWP Rule poses to both states and localities, together with its disregard for the plain meaning of the Clean Air Act and its evident intent to disregard the Act in an ever-expanding group of industries, renders the Rule untenable.

III. EPA'S RULE CONTRADICTS CONGRESS' INTENT TO ESTABLISH NATIONAL UNIFORMITY IN EMISSIONS LEVELS.

The adoption of a categorical technology-based standard serves another important congressional purpose: to ensure a uniform national standard for HAP emissions levels. National uniformity is essential to the success of the CAAA. As STAPPA's President explained in testimony to Congress:

> Many state and local agencies are precluded by law or policy from adopting rules more stringent than federal regulations. Without a minimum federal requirement, these state and local agencies may be prevented from regulating facilities to the extent that they find necessary to protect the public health. National consistency also discourages the type of interstate competition that potentially could undermine public protection from hazardous air pollutants.

Hagg Testimony at 5-6. Congress, in recognizing the significance of national uniformity, emphasized the need for a "national control strategy" for reducing toxic emissions. S. Rep. No. 101-228, at 3, *reprinted in* V Legislative History, at 8343. By establishing national technology-based standards for all sources within the same category, the CAAA eliminated the possibility of a destructive "race to the bottom" in which industry sources could move into areas of the country that have less stringent local air quality standards. Even EPA acknowledges that "one of the primary goals of developing a uniform national air toxics program under CAA section 112 of the 1990 CAA amendments is to establish a 'level playing field,' where appropriate." 71 Fed. Reg. at 8346 [JA__].

As STAPPA and ALAPCO have explained, the MACT standard is essential to maintaining a uniform national standard because it requires all source categories and subcategories to meet minimum performance-based solutions to reduce HAP emissions.[6] Risk-based exemptions, by contrast, undermine this important congressional objective by allowing sources of HAPs to exempt themselves on a case-by-case basis from national emissions standards. Despite admitting agreement "that one of the primary goals of developing a uniform national air toxics program under CAA section 112 of the 1990 CAA amendments is to establish a 'level playing field,' where appropriate" (71 Fed. Reg. at 8346 [JA__]), EPA's response to this concern was that "[t]he PCWP NESHAP and its criteria for demonstrating eligibility for the delisted low-risk subcategory apply uniformly to all PCWP facilities across the nation." *Id.* [JA__]. But this ignores reality. By replacing uniform national technology-based emissions

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[6] *See* Letter from Lloyd L. Eagan, STAPPA, and Robert H. Colby, ALAPCO, to EPA, Docket ID No. OAR-2002-0058, at 2 (Aug. 11, 2005) [JA__] ("[t]he establishment of a baseline level of control is essential to prevent industry from gaining a competitive advantage relating to installation – or failure to install – pollution controls").

standards with risk-based standards based on site-specific tests, the exemptions will inevitably exacerbate state and regional variation in pollution controls because the proposed risk-based standards necessitate consideration of state and regional differences in exposure to HAPs.

As Congress recognized, equity across regions assures that those living in high-risk areas will not be exposed to an inordinate amount of pollution. 1990 CAA Leg. Hist. 4943, 4950 (Lexis) (Nov. 1993) (statement of Senator Durenberger) ("The overall number of cancer cases is only one dimension of the problem. Another dimension of the problem is that the risk is not spread evenly. Those living near large chemical plants or in concentrated urban corridors face much higher risks than most Americans. So, it is also an equity issue."); *id.* at 4951 ("Toxic air pollution from industrial sources is . . . not random. The risks are unevenly distributed. Those living near large chemical and manufacturing plants or in highly developed urban areas face much larger risks than the general population as a whole. It is not just a question of incidence--small risks widely distributed. It is also a question of equity."). Instead of establishing a "MACT floor" that binds all facilities in a given industry and stands to improve air quality everywhere, EPA's approach will prevent achievement of the level playing field that MACT standards are supposed to ensure, to the detriment of industry and the environment in certain locales, states, and regions. If allowed to go into effect, EPA's proposed rule would adversely affect portions of the population residing in low-pollution areas, because plants would be able to show lower risk from their HAPs than in high-pollution areas. Such a result will lead to plants moving to "clean" regions, both draining urban areas of their industries and creating high levels of air pollution in areas that previously enjoyed low levels.

CONCLUSION

For the foregoing reasons, the petitions for review should be granted.

August 21, 2006

Respectfully submitted,

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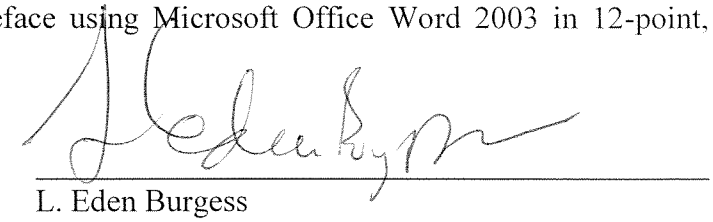
CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a)(3)(C), I hereby certify that this brief complies with the volume limitation specified in this Court's Order of June 28, 2006. According to the word-count function of Microsoft Office Word 2003, this brief contains 4,775 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2).

I also hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) as modified by D.C. Circuit Rule 32(a)(1). It has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 12-point, Times New Roman.



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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2006, the foregoing **Brief Of The State And Territorial Air Pollution Program Administrators And The Association Of Local Air Pollution Control Officials As *Amici Curiae* In Support Of Petitioners** was served by first-class U.S. mail, postage prepaid, upon the following:

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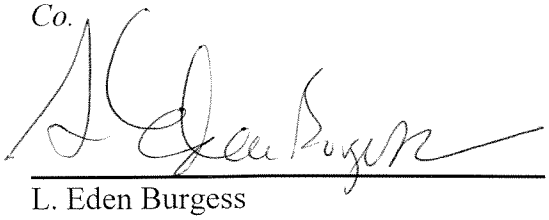

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