**ORAL ARGUMENT APRIL 12, 2013**

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

**No. 12-1129 (and consolidated cases)**

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**ASSOCIATION OF BATTERY RECYCLERS, et al.,**

**Petitioners,**

**v.**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,**

**Respondent.**

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**ON CONSOLIDATED PETITIONS FOR REVIEW OF FINAL ACTION BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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# FINAL BRIEF FOR RESPONDENT

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**DATED: March 1, 2013 (Final Brief)**

## RESPONDENT'S CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

Pursuant to D.C. Circuit R. 28(a)(1), Respondent United States Environmental Protection Agency submits this certificate as to parties, rulings and related cases.

(A) Parties and amici: All parties and intervenors are listed in the opening briefs of the environmental and industry petitioners (Doc. Nos. 1403020, 1403046). There are no amici.

(B) Ruling under review: This is a set of consolidated petitions for review of the final EPA rule entitled "National Emissions Standards For Hazardous Air Pollutants From Secondary Lead Smelting," 77 Fed. Reg. 556 (Jan. 5, 2012).

(C) Related cases:

1. Case Nos. 12-1130, 12-1134, and 12-1135 are all petitions for review of the final rule cited above. Those petitions were consolidated with No. 12-1129 by the Court. By order dated September 17, 2012 (Doc. No. 1394809) the Court severed certain issues raised by those petitions, assigned the severed issues Case No. 12-1373, and held the severed matter in abeyance.

2. Doe Run Resources Corp. et al. v. EPA, No. 12-1345, is a petition for review of the final EPA rule entitled "National Emission Standards for Hazardous Air Pollutant Emissions for Primary Lead Processing." 76 Fed. Reg. 70,834 (Nov. 15, 2011). Doe Run Resources Corporation is the petitioner in No. 12-1134, which

is consolidated with No. 12-1129 in the instant case. Doe Run Resources Corp. v. EPA, No. 12-1345, is fully briefed, but has not yet been set for oral argument. The following issues in this case were also briefed in Doe Run Resources Corp v. EPA, No. 12-1345: EPA Issue Presented No. 2.b. (EPA Argument III.B-C), and EPA Issue Presented No. 4 (EPA Argument IV).

To the best of the undersigned counsel's knowledge, there are no other related cases in this or any other Court.

DATED: March 1, 2013

*/s/ Angeline Purdy*
Counsel for Respondent

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# GLOSSARY

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|---|---|
| Act | Clean Air Act |
| EPA | United States Environmental Protection Agency |
| Env. Br. | Initial Brief of Environmental Petitioners California Communities Against Toxics, et al. |
| CEMS | Continuous Emissions Monitoring System |
| HAP | Hazardous Air Pollutant |
| HEPA | High efficiency particulate air |
| Ind. Br. | [Industry] Petitioners' Opening Brief |
| JA | Joint Appendix |
| MACT | Maximum Available Control Technology |
| mg/dscm | Milligrams per dry standard meter |
| NAAQS | National Ambient Air Quality Standard |
| NESHAP | National Emissions Standard for Hazardous Air Pollutants |
| PSD | Prevention of Significant Deterioration |
| RSR Br. | Initial Brief of RSR Corporation as Petitioner-Intervenor |
| RTC | EPA's Response to Comments |
| Rule | National Emissions Standards For Hazardous Air Pollutants From Secondary Lead Smelting: Final Rule, 77 Fed. Reg. 556 (Jan. 5, 2012) |

## JURISDICTION

Petitioners Association of Battery Recyclers, Inc., et al. ("Industry Petitioners"); Petitioners California Communities Against Toxics, et al. ("Environmental Petitioners"); and Intervenor RSR Corporation ("RSR") challenge EPA's revision of certain emission standards applicable to the secondary lead smelting category pursuant to Section 112 of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7412. See National Emissions Standards For Hazardous Air Pollutants From Secondary Lead Smelting: Final Rule, 77 Fed. Reg. 556 (Jan. 5, 2012) ("Rule"). As explained in greater detail below, this Court lacks jurisdiction over Industry Petitioners' claim that the Rule impermissibly regulates lead emissions (infra at 37-39); Industry Petitioners' claim that EPA cannot regulate lead compounds under the Prevention of Significant Deterioration ("PSD") program (infra at 45-46); and Industry Petitioners' claim that EPA improperly adopted certain monitoring requirements (infra at 57-61). The Court has jurisdiction over the remaining claims pursuant to 42 U.S.C. § 7607(b)(1).

## STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in the addenda to Petitioners' briefs.

## ISSUES PRESENTED

1. Section 112(d)(2) of the Act requires EPA to set technology-based emission standards that require the "maximum degree of reduction in emissions of [hazardous air pollutants]" that EPA determines is "achievable" considering certain factors. 42 U.S.C. § 7412(d)(2). Section 112(d)(3) sets minimum stringency requirements for these standards (the "MACT floor"). Id. § 7412(d)(3). Section 112(d)(6) requires EPA to "review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section." Id. § 7412(d)(6). EPA interprets the statute as not requiring EPA to start afresh and re-establish the MACT floor in a Section 112(d)(6) review, an interpretation this Court accepted in Natural Resources Defense Council v. EPA, 529 F.3d 1077 (D.C. Cir. 2008) ("NRDC").

   a. Does binding Circuit precedent dispose of Environmental Petitioners' claim that EPA is required to re-calculate the MACT floor in a Section 112(d)(6) review?

   b. Was it reasonable for EPA to consider the Section 112(d)(2) "achievability" factors (among other factors) in determining whether it was "necessary" to amend the secondary lead emission standard under Section 112(d)(6)?

c. Did EPA reasonably decline to adopt even more stringent emission limitations than those contained in the Rule based on control technologies that would produce only minimal additional emission reductions at significant cost, with adverse energy and environmental impacts?

2. The Rule regulates lead compound emissions, measured as total lead.

a. Given that EPA has regulated and measured lead compound emissions the same way since 1995, when EPA promulgated the secondary lead emission standard, is Industry Petitioners' claim that the Rule improperly regulates elemental lead time-barred?

b. Does the Rule regulate lead as a hazardous air pollutant merely by using total lead to measure lead compound emissions?

3. Given that EPA took no final action with regard to the Prevention of Significant Deterioration program in this rulemaking, does the Court lack jurisdiction over Industry Petitioners' claim that EPA can no longer regulate lead compounds under that program?

4. The Rule also revises emission standards pursuant to Section 112(f)(2) of the Act, 42 U.S.C. § 7412(f)(2), to protect public health with an ample margin of safety and to protect against adverse environmental effects. Section 112(f) standards become applicable within 90 days of their effective date, but EPA may grant sources up to two years to comply. Id. § 7412(f)(4). EPA is separately

authorized to grant existing sources up to three years to comply with emission standards promulgated under Section 112 generally. Id. § 7412(i)(3). Did EPA reasonably interpret the statute such that the specific provisions of Section 112(f)(4) control over the general provisions of Section 112(i)(3)?

5. Does the record adequately support EPA's estimate of the amount of fugitive emissions from secondary lead facilities and the consequent requirement that process areas at such facilities be enclosed?

6. The Rule includes a provision stating that new and reconstructed sources must employ continuous emissions monitoring systems, but only after EPA has promulgated specifications for such systems. EPA has not yet promulgated such specifications. Is Industry Petitioners' challenge to this monitoring provision unripe?

## STATEMENT OF THE CASE

Section 112(d) of the Act requires EPA to establish, and periodically review, emission standards for hazardous air pollutants. 42 U.S.C. § 7412(d). The standards at issue here limit emissions of lead compounds and other metal hazardous air pollutants emitted by secondary lead smelting facilities. EPA reviewed the technology-based standards that it set in 1995 and concluded that both developments in control technology and the public health risks associated with exposure to lead compounds emitted by secondary lead facilities warranted

revision of those standards. See 77 Fed. Reg. at 556, 558-59. EPA therefore revised the emission standards at issue by, *inter alia*, lowering the limit for lead compound emissions and requiring that secondary lead facilities enclose fugitive emission sources. See id. at 558-59. Industry and Environmental Petitioners thereafter filed petitions challenging multiple aspects of the Rule.[1]

## STATEMENT OF FACTS

### I. STATUTORY BACKGROUND.

#### A. National Emission Standards For Hazardous Air Pollutants.

The Act is intended to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C. § 7401(b)(1). One method Congress chose to achieve this goal was to require EPA to establish standards that reduce emissions of "hazardous air pollutants," or "HAPs."[2] Id. § 7412(d). In the 1990 amendments to the Act, Congress listed 189 hazardous air pollutants, including "lead compounds." Id. § 7412(b)(1). Congress authorized

[1] Pursuant to this Court's order of September 17, 2012 (Doc. No. 1394809), certain issues raised in the petitions were severed and held in abeyance under Case No. 12-1373.

[2] Hazardous air pollutants are "pollutants which present, or may present, . . . a threat of adverse human health effects . . . or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise[.]" 42 U.S.C. § 7412(b)(2).

EPA to add hazardous air pollutants to the list, but specified that "[n]o air pollutant which is listed under [Section 108(a), 42 U.S.C. § 7408(a), which governs pollutants for which EPA establishes national ambient air quality standards] may be added to the list[.]" Id. § 7412(b)(2). Congress also barred EPA from listing "elemental lead" as a hazardous air pollutant. 42 U.S.C. § 7412(b)(7).

Congress further established a multi-step process for regulating hazardous air pollutants from major sources, which are the sources at issue here. EPA was first required to list categories of major sources of hazardous air pollutants, and then to establish national emission standards (known as "NESHAPs," and generally referred to herein as "emission standards") for such categories under Section 112(d) of the Act. Id. § 7412(c)(1), (d). Section 112(d)(3) specifies the minimum degree of emission control such sources must achieve. Existing source standards for sources in categories or subcategories with 30 or more sources may not be "less stringent . . . than . . . the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information)." Id. § 7412(d)(3)(A). Existing source standards for sources in categories or subcategories with fewer than 30 sources may not be less stringent than "the average emission limitation achieved by the best performing 5 sources." Id. § 7412(d)(3)(B). This minimum level of emission control required is

commonly called the "MACT floor." See Mossville Envtl. Action Now v. EPA, 370 F.3d 1232, 1235 (D.C. Cir. 2004).

Section 112(d)(2) then directs EPA to go beyond the minimum stringency requirements of Section 112(d)(3) and set more stringent standards where "achievable." It grants EPA broad authority to require the application of controls in light of the factors listed in Section 112(d)(2), including "the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements." Standards set under this subsection are commonly called "beyond-the-floor" standards. Mossville, 370 F.3d at 1235.

Within eight years after promulgating emission standards, EPA is required to review those standards under two subsections of Section 112. Section 112(d)(6), 42 U.S.C. § 7412(d)(6), requires EPA to review promulgated emission standards and revise them "as necessary," "taking into account developments in practices, processes, and control technologies[.]" Section 112(f)(2), id. § 7412(f)(2), requires EPA to "consider whether residual risks remain that warrant more stringent standards than achieved through MACT." Sierra Club v. EPA, 353 F.3d 976, 980 (D.C. Cir. 2004). Standards issued under Section 112(f)(2) must protect public health with an ample margin of safety, and must protect against adverse environmental effects. 42 U.S.C. § 7412(f)(2).

### B. National Ambient Air Quality Standards ("NAAQS").

The NAAQS are a central element of the Act's air pollution control program. Section 108 of the Act directs EPA to list air pollutants that, in EPA's judgment, "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" and for which EPA plans to issue air quality criteria. 42 U.S.C. § 7408(a)(1)(A). Section 109 then directs EPA to promulgate "primary" and "secondary" NAAQS for pollutants for which air quality criteria are issued. Id. § 7409(a)(1)(A). In brief, a primary standard is set at a level "requisite to protect the public health," allowing "an adequate margin of safety," and a secondary standard is set at a level "requisite to protect the public welfare." Id. § 7409(b)(1), (2).

Each State must submit a state implementation plan ("SIP") for review and approval by EPA, setting forth the State's plan for attaining and maintaining compliance with the NAAQS. Id. § 7410(a)(1). Although each SIP must include "enforceable emission limitations and other control measures . . . as may be necessary or appropriate to meet the applicable requirements" of the Act, id. § 7410(a)(2)(A), States retain discretion to determine which restrictions will be imposed on which sources within their borders. See Virginia v. EPA, 108 F.3d 1397, 1407-09 (D.C. Cir. 1997).

## II. REVIEW AND REVISION OF THE SECONDARY LEAD EMISSION STANDARDS.

Secondary lead smelters recycle lead-bearing scrap material (mostly lead-acid batteries) into lead or lead alloys. 76 Fed. Reg. 29,032, 29,036 (May 19, 2011) ("Proposed Rule"). Lead compounds (among other hazardous air pollutants) are emitted from secondary lead smelters as process emissions, process fugitive emissions, and fugitive dust emissions. See id.

EPA promulgated the emission standards for this source category in 1995. 60 Fed. Reg. 32,587 (June 23, 1995).[3] Among other things, the 1995 rule limits lead compound emissions from secondary lead smelters to 2.0 milligrams per dry standard cubic meter (mg/dscm). Id. at 32,596. Compliance is determined according to EPA Reference Method 12, which measures inorganic lead emissions from stationary sources. Id. at 32,598; 40 C.F.R. pt. 60 Appendix A-5. The 1995 rule also requires secondary lead smelters to comply with certain work practices to control fugitive dust emissions. 60 Fed. Reg. at 32,597-98.

EPA promulgated the Rule following its review of the 1995 emission standard pursuant to Sections 112(d)(6) and (f)(2) of the Act, 42 U.S.C.

[3] In 1997, EPA promulgated a direct final rule adopting minor technical amendments to the 1995 rule. 62 Fed. Reg. 32,209 (June 13, 1997). The Proposed Rule inadvertently cited the 1997 revision rather than the 1995 rule. 76 Fed. Reg. at 29,036-37.

§§ 7412(d)(6), (f)(2). 77 Fed. Reg. at 558. EPA's technology review under Section 112(d)(6) revealed that control technology used by much of the secondary lead smelting industry is capable of achieving lead emission levels much lower than the 1995 2.0 mg/dscm standard at reasonable cost and cost-effectiveness. 77 Fed. Reg. at 564; see also id. at 558-59; Response to Comments ("RTC") at 27-28 (JA 171-72).

In its risk assessment under Section 112(f)(2), EPA used the level of the primary lead NAAQS as a measure of acceptable risk from airborne lead emissions. 77 Fed. Reg. at 562. Based in part on its determination that emissions from 9 out of 15 secondary lead smelters could expose persons living near smelters to lead concentrations in excess of the level of the primary lead NAAQS, EPA concluded that emissions allowed under the 1995 standard created unacceptable public health risks. 77 Fed. Reg. at 563.

The Rule adopts identical standards under Sections 112(d)(6) and (f)(2). 77 Fed. Reg. at 564. The Rule reduces allowable lead compound stack emissions by 90% from the amount allowed under the 1995 rule, from 2.0 mg/dscm to 0.2 mg/dscm.[4] 77 Fed. Reg. at 559. As with the original 1995 standard, compliance

[4] The preamble (as opposed to the regulatory text itself) refers to lead emissions; however, as EPA explained, references to lead emissions in the preamble mean (footnote con't)

with lead compound emission limits is to be determined by using testing methods that measure total lead levels. See 77 Fed. Reg. at 565. Existing sources can meet the standard on a facility-wide flow-weighted basis, averaging lead emissions from all process vents. 40 C.F.R. § 63.543(a). New sources cannot average emissions, but must demonstrate that lead emissions from each process vent do not exceed the 0.2 mg/dscm standard. 40 C.F.R. § 63.543(b). The Rule further requires that certain fugitive emission sources be enclosed, and that secondary lead smelting facilities adopt additional work practices to minimize fugitive dust emissions.

## STANDARD OF REVIEW

The standard of review is set forth in Section 307(d)(9) of the Act, 42 U.S.C. § 7607(d)(9), under which the Court asks whether the challenged action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. This standard of review "is a narrow one," and the Court is not "to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). The pertinent question is simply "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43-44 (1983) (citation

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lead compounds as listed by Congress in Section 112(b)(1). 77 Fed. Reg. at 559 n.3; see also id. at 557.

omitted); see also Lead Indus. Ass'n, Inc. v. EPA, 647 F.2d 1130, 1145 (D.C. Cir. 1980) (arbitrary and capricious standard "is highly deferential, and presumes agency action to be valid.").

Particular deference is given to an agency with regard to technical matters within its area of expertise, and the Court may not "second-guess the Agency's expert decisionmaker." Lead Indus., 647 F.2d at 1146. A court examines EPA's decision "not as the chemist, biologist or statistician that [it is] qualified neither by training nor experience to be, but as a reviewing court exercising [its] narrowly defined duty of holding agencies to certain minimal standards of rationality." Id. (citing Ethyl Corp. v. EPA, 541 F.2d 1, 36-37 (D.C. Cir. 1976)). EPA is, moreover, entitled to weigh conflicting evidence and act even in the face of some uncertainty. See Ethyl Corp., 541 F.2d at 27-28.

Judicial deference also extends to an agency's interpretation of a statute it administers. Chevron, U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-45 (1984). Under Chevron, if Congress has "directly spoken to the precise question at issue," that intent must be given effect. 467 U.S. at 842-43. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843.

## SUMMARY OF ARGUMENT

Section 112(d)(2) of the Act requires EPA to promulgate emission standards that require the "maximum degree of reduction in emissions of [hazardous air pollutants]" that EPA determines is "achievable," in light of various factors, while Section 112(d)(3) sets minimum stringency requirements for such standards (the "MACT floor"). 42 U.S.C. § 7412(d)(2)-(3). Section 112(d)(6) requires EPA to review and revise these standards "as necessary," taking into account "developments in practices, processes and control technologies." Id. § 7412(d)(6). EPA's longstanding interpretation is that Section 112(d)(6) does not require EPA to re-establish the MACT floor – a view that this Court upheld in NRDC, 529 F.3d at 1084. In determining whether it is "necessary" to revise promulgated standards, however, EPA reasonably looks in part to the Section 112(d)(2) achievability factors for guidance. Environmental Petitioners' and RSR's attack on EPA's longstanding interpretation of Section 112(d)(6) is foreclosed by this Court's decision in NRDC and otherwise without merit. Nor have any of the Petitioners demonstrated that EPA erred in its determination that it was unnecessary to base standards on the performance of highly expensive technologies with adverse energy and environmental consequences.

Industry Petitioners argue that although the Rule on its face regulates lead *compounds*, EPA's measurement of total lead to determine the amount of lead

compounds emitted amounts to impermissible regulation of elemental lead emissions. This claim is untimely because EPA established the identical requirements in the 1995 rule. Even if the Court does reach this claim, Industry Petitioners have failed to demonstrate that EPA erred in using total lead as a measurement metric. Industry Petitioners' related claim that because the Rule regulates lead compounds, EPA can no longer regulate lead compounds under the independent PSD program, is not tethered to any final action in this rulemaking, and thus is not within the Court's jurisdiction.

Section 112(f)(2) of the Act further requires EPA to promulgate additional emission standards to protect public health and the environment from unacceptable risks to public health. Such standards become effective within 90 days of promulgation, but Section 112(f)(4) authorizes EPA to grant existing sources up to two years to comply – which it did in this case. Not satisfied with the maximum compliance extension authorized under Section 112(f), Industry Petitioners argue that EPA should have considered giving them even *more* time to comply by invoking the general provisions of Section 112(i)(3). EPA's conclusion that the specific compliance date provisions of Section 112(f)(4) control with regard to standards adopted under Section 112(f) over the more general provisions of Section 112(i)(3) is reasonable.

Industry Petitioners also challenge limited aspects of EPA's estimation of fugitive emissions from secondary lead facilities, which estimates support the requirement to enclose process areas. Not only are EPA's estimates supported by the administrative record, but Industry Petitioners' preferred means of analysis merely *strengthens* the conclusions that EPA reached.

Finally, Industry Petitioners and RSR challenge the requirement that new or reconstructed sources employ continuous emissions monitoring systems. Because this requirement will not become effective until EPA has adopted performance specifications for such systems – at which time any party with standing will have the opportunity to seek judicial review – this claim is not ripe.

## ARGUMENT

### I. EPA IS NOT REQUIRED TO RE-ESTABLISH THE MACT FLOOR IN A SECTION 112(d)(6) REVIEW.

As discussed supra at 6-7, EPA promulgates MACT emission standards for listed major source categories under Sections 112(d)(2) and (3), 42 U.S.C. § 7412(d)(2), (3). EPA must periodically review these standards under Section 112(d)(6), which reads in full as follows:

> [EPA] 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.

42 U.S.C. § 7412(d)(6). This section confers broad discretion on EPA to revise emission standards "as necessary," provided that EPA considers at least those factors enumerated in Section 112(d)(6).

EPA has long since determined that Section 112(d)(6)'s directive to "review, and revise as necessary" does not require EPA to completely redo the promulgated MACT, and in particular that EPA is not required to re-calculate the MACT floor under Section 112(d)(6) – a view that has been accepted by this Court. See RTC at 33-34 (JA 177-78); NRDC, 529 F.3d at 1084. That does not mean, however, that EPA ignores everything other than the factors enumerated in Section 112(d)(6). In determining whether it is "necessary" to revise an existing standard, EPA reasonably looks in part to the Section 112(d)(2) criteria for guidance in determining whether revisions are warranted. RTC at 30 (JA 174). First, EPA determines whether there have in fact been any developments in practices, processes, and control technologies. If such developments have occurred, EPA then considers, among other things, the costs and feasibility of imposing hazardous air pollutant emission controls. See id.

Environmental and Industry Petitioners both attack aspects of EPA's interpretation of Section 112(d)(6). Environmental Petitioners' contention that the Section 112(d)(2) and (3) MACT criteria govern a Section 112(d)(6) review is contrary to Circuit precedent and lacks merit. Environmental and Industry

Petitioners' arguments concerning EPA's consideration of factors relevant to determining whether it was "necessary" to revise the secondary lead emission standard are equally flawed, and (as discussed in Point II below) the record supports EPA's application of those factors in this case. EPA's reasonable interpretation and application of Section 112(d)(6) should therefore be upheld.

### A. This Court's Precedent Establishes That EPA Is Not Required to Apply The Section 112(d)(2)-(3) MACT Criteria to a Section 112(d)(6) Review.

Although presented in a myriad of ways, the heart of Environmental Petitioners' statutory argument (which is echoed by Intervenor RSR) is that instead of merely reviewing and revising the secondary lead standard pursuant to Section 112(d)(6), EPA was required to completely *re-establish* the standard pursuant to Sections 112(d)(2) and (3), and in particular to re-calculate the MACT floor. See Initial Brief of Environmental Petitioners California Communities Against Toxics, et al. ("Env. Br.") at 11-16, 17-22; Initial Brief of RSR Corporation as Petitioner-Intervenor ("RSR Br.") at 10-14. This Court has already rejected Environmental Petitioners' argument, holding that the statute cannot reasonably be construed to impose such an obligation. NRDC, 529 F.3d at 1084.

In NRDC, Petitioner NRDC and other environmental groups challenged EPA's Section 112(d)(6) review of emission standards applicable to facilities that use or produce synthetic organic chemicals. NRDC, 529 F.3d at 1079. Among

other things, the NRDC petitioners argued what Environmental Petitioners and RSR argue here – i.e., "that EPA was obliged to completely recalculate the maximum achievable control technology – in other words, to start from scratch." Id. at 1084; compare Env. Br. at 12-16, RSR Br. at 10-12. The Court squarely rejected this argument, holding that "[w]e do not think the words 'review, and revise as necessary' can be construed reasonably as imposing any such obligation." NRDC, 529 F.3d at 1084.

Environmental Petitioners' efforts to distinguish NRDC are unpersuasive. They point to the Court's discussion of the fact that there had been no developments in control technology since the standard at issue in NRDC was originally promulgated, and that therefore EPA did not actually revise the standard. Env. Br. at 18-19 (citing NRDC, 529 F.3d at 1084). The Court's language in NRDC makes it clear, however, that the absence of technological developments was not the basis for its resolution of the statutory interpretation question regarding whether Section 112(d)(6) requires a "re-do" of MACT floors. Having already concluded that Section 112(d)(6)'s directive to "review, and revise" standards cannot reasonably be interpreted to require EPA to start completely afresh, the Court elaborated that "*even if*" the statute imposed such an obligation (which the Court had determined it did not), the petitioners had failed to identify any technological innovations that EPA had overlooked. NRDC, 529 F.3d at 1084

(emphasis added).[5] The Court's holding that Section 112(d)(6) cannot reasonably be interpreted to require EPA to re-establish standards pursuant to Sections 112(d)(2) and (3) thus stands independent of any further discussion in NRDC. See RTC at 34 (JA 178). Environmental Petitioners have offered the Court no reason to re-visit that holding, and no justification for disregarding binding Circuit precedent. See Maxwell v. Snow, 409 F.3d 354, 358 (D.C. Cir. 2005) (Court is bound to follow Circuit precedent until overruled by *en banc* court or Supreme Court); Brewster v. Comm'r of Internal Revenue, 607 F.2d 1369, 1373 (D.C. Cir. 1979) (principle of stare decisis "assumes increased importance when the antecedent case involves construction of a statute").

### B. Section 112(d)(6) Is Ambiguous, And EPA's Interpretation Is Reasonable.

Because this issue was already resolved in NRDC, the Court need not reach Environmental Petitioners' and RSR's argument that EPA was required to apply Section 112(d)(2) and (3) criteria in a Section 112(d)(6) review. See Env. Br. at

[5] RSR insists that "[t]he most obvious interpretation" of NRDC "is that EPA need not revise MACT requirements under Section 112(d)(6) unless there have been changes in 'practices, processes, or control technologies.'" RSR Br. at 13. The Court's plain statement that "review, and revise as necessary" cannot reasonably be construed as imposing an obligation to re-calculate MACT does not require any interpretation, let alone the strained one offered by RSR.

11-16, 17-25; RSR Br. at 10-14. Even if the Court does so, however, their arguments fail.

**1. The Act does not unambiguously require EPA to apply Sections 112(d)(2) and (3) in a Section 112(d)(6) review.**

Environmental Petitioners claim that the statute "unambiguously" requires standards revised under Section 112(d)(6) to fully comport with the MACT standard setting provisions of Sections 112(d)(2) and (3), Env. Br. at 11, but they have identified no statutory language that actually says this. See generally id. at 11-15; see also RSR Br. at 10-11. Had this been Congress' intent, Congress could have said so explicitly, as it has done in other provisions. See, e.g., 42 U.S.C. § 7409(d) (requiring EPA to periodically review air quality criteria and NAAQS and to "make such revisions . . . and promulgate such new standards as may be appropriate in accordance with" the statutory sections under which those standards were first established (i.e., 42 U.S.C. § 7409(b)).

Presumably in an effort to escape this Court's holding in NRDC concerning Section 112(d)(*6*), Environmental Petitioners turn first to Section 112(d)(*2*), arguing that it "broadly and unambiguously" applies to all "[Section] 112(d) standards," including standards revised pursuant to Section 112(d)(6). Env. Br. at 11, 12; see generally id. at 11-15. Environmental Petitioners have, however, identified no language in Section 112(d)(2) that unambiguously *requires* EPA to

apply this section every time it reviews existing valid MACT standards under Section 112(d)(6). Petitioners' argument that Congress created a single "narrowly tailored exemption" to the Section 112(d)(2) and (d)(3) MACT standard requirement, Env. Br. at 12-13, is misplaced. Section 112(d)(5) provides EPA discretion to set generally available control technology standards – as opposed to MACT standards – for certain sources. 42 U.S.C. § 7412(d)(5). Both MACT standards and generally available control technology standards are reviewed pursuant to Section 112(d)(6). Section 112(d)(5) says nothing about the standard that applies when EPA *reviews* standards under Section 112(d)(6).[6]

Environmental Petitioners fare no better when they turn to the language of Section 112(d)(6) itself. Env. Br. at 13-15. Their conclusory assertions that the terms "review" and "revise" "plainly" incorporate the MACT criteria established in Sections 112(d)(2) and (3), and that the term "developments" somehow "connect[s]" Section 112(d)(6) to Sections 112(d)(2) and (3), Env. Br. at 13-14, reflect their preferred reading of the statute, not any clear congressional directive.

[6] The cases cited by the Environmental Petitioners are not on point, as they discuss only the MACT standard-setting requirements of Sections 112(d)(2) and (3), not the Section 112(d)(6) review requirement. See Cement Kiln Recycling Coal. v. EPA, 255 F.3d 855, 861 (D.C. Cir. 2001) (Env. Br. at 11) (discussion Sections 112(d)(2) and (3)); Sierra Club v. EPA, 479 F.3d 875, 877 (D.C. Cir. 2007) (Env. Br. at 13) (discussing sections 112(d)(2) and (3)); National Lime Ass'n v. EPA, 233 F.3d 625, 634 (D.C. Cir. 2000) (Env. Br. at 13) (discussing Section 112(d)(2)).

Their claim that Section 112(d)(6)'s directive to revise standards "as necessary" means that EPA "*must* bring emissions standards into compliance with Section 112(d)(2)-(3)," Env. Br. at 14-15 (emphasis added) is similarly flawed. See Cellular Telecomms. & Internet Ass'n v. FCC, 330 F.3d 502, 504 (D.C. Cir. 2003) (statutory term "necessary" does not have plain meaning). Where, as here, EPA has established a MACT standard consistent with the requirements of the Act, there is nothing in Section 112(d)(6) that compels EPA to re-do the MACT standard (including the MACT floor calculation) when it reviews that standard.[7]

As the statute does not *command* the result Environmental Petitioners seek, the only question then is whether EPA's interpretation of the statute as *not* requiring consideration of the Section 112(d)(2) and (3) factors during the Agency's periodic Section 112(d)(6) review is reasonable. If it is, it must be upheld.

**2. EPA reasonably interprets Section 112(d)(6) as not requiring the application of Sections 112(d)(2) and (3).**

Environmental Petitioners' argument that EPA's interpretation of Section 112(d)(6) is unreasonable is largely indistinguishable from their argument that the

[7] Of course, EPA may re-do a standard that does *not* comply with Sections 112(d)(2) and (3), and would necessarily recalculate the MACT floor in doing so. Portland Cement Ass'n v. EPA, 665 F.3d 177, 189 (D.C. Cir. 2011). EPA did so in this rulemaking, and no party challenged those MACT standards. See 77 Fed. Reg. 559-60.

statute is unambiguous, as both depend heavily on the flawed premise that Congress intended the MACT standard-setting provisions of Sections 112(d)(2) and (3) to govern a Section 112(d)(6) review. See Env. Br. at 11, 17, 20, 21. It is also aimed at a false target, because EPA does not interpret Section 112(d)(6) to allow EPA to "set whatever standards it chooses." Env. Br. at 21; see also id. at 22, 25; RSR Br. at 11 (arguing that EPA claims "unfettered discretion"). EPA of course considers the factors enumerated in Section 112(d)(6) itself, which focus on whether there have been developments in practices, processes, and control technologies since the issuance of the initial emission standard. EPA has the discretion to revise the standard "as necessary" after considering these factors.

Here, EPA reasonably looked to the requirements of the beyond-the-floor provisions of Section 112(d)(2) for further guidance in determining whether it is "necessary" to revise an existing standard under Section 112(d)(6). Section 112(d)(2) calls for EPA to determine whether tighter beyond-the-floor standards are "achievable" based on a consideration of the "cost of achieving such emission reduction, and any non-air-quality health and environmental impacts and energy requirements." 42 U.S.C. § 7412(d)(2). These factors are helpful in assessing whether it is "necessary" to revise technology-based MACT standards under Section 112(d)(6). See RTC at 30 (JA 174).

EPA's interpretation of Section 112(d)(6) avoids the adverse consequences that could result if EPA re-calculated the MACT floor in each Section 112(d)(6) review. Unlike beyond-the-floor standards established under Section 112(d)(2), the Section 112(d)(3) MACT floor is set without regard to cost or other (d)(2) factors. See 70 Fed. Reg. at 29,992, 20,008 (Apr. 15, 2005); RTC at 33-34 (JA 177-78). Tightening a valid MACT standard through a Section 112(d)(6) review every eight years could thus repeatedly force further controls on sources regardless of cost, or adverse energy and environmental implications. For example, were EPA to re-calculate a valid MACT floor every eight years, sources could be put in the untenable position of having to remove expensive control equipment installed to meet the initial MACT and to install only marginally better equipment at significant expense, and potentially requiring additional energy use, to meet the revised MACT standard. It is wholly reasonable for EPA to interpret Section 112(d)(6)'s ambiguous directive that EPA revise emission standards "as necessary" to avoid these consequences.

Intervenor RSR takes a different tack, focusing on the standards applicable to new sources. Although its point is somewhat opaque, RSR appears to be saying that (1) under Sections 112(d)(2) and (3), when MACT standards are first promulgated, new sources must meet standards that are at least as stringent as the performance of the best-controlled similar source; (2) if EPA is not required to re-

establish the MACT floor in a Section 112(d)(6) review, new sources constructed after that review will not necessarily have to meet the same standard as what are *then* the best-controlled sources; and (3) this means that new sources constructed after a Section 112(d)(6) review may be able to "do less . . . than if the same controls had existed at the time of initial promulgation." RSR Br. at 11-12.[8]

Section 112(d)(6), however, applies equally to new *and existing* sources – and as discussed above, RSR's preferred statutory interpretation (under which EPA would be required to re-do the MACT standard, including the MACT floor, every 8 years) could have significant consequences for existing sources. Nor are new sources by any means left uncontrolled under EPA's reasonable interpretation of the Act. Such sources must at least meet the promulgated new source standard for the source category (which is typically more stringent than an existing source standard), and a still more stringent standard if EPA revises the new source standard as part of a Section 112(d)(6) review. In this case, the new source standard adopted under Section 112(d)(6) (as well as Section 112(f)(2)) imposes more stringent requirements on process vent emissions than does the standard for

[8] To the extent that RSR is arguing that Section 112(d)(6) should be interpreted differently with regard to new and existing sources, it is far from clear that RSR raised that point in its comments on the Proposed Rule. See RSR Comments at 5-6 (JA 507-08). EPA is unaware of any other comments raising this issue, which has arguably been waived. See 42 U.S.C. § 7607(d)(7)(B).

existing sources. See supra at 11 (new sources, unlike existing sources, cannot average emissions).

Environmental Petitioners and RSR have, in sum, failed to demonstrate either that Section 112(d)(6) unambiguously requires EPA to repeat the entire Section 112(d)(2)-(3) MACT standard-setting process in every Section 112(d)(6) review, or that EPA's interpretation of this ambiguous provision is unreasonable.

## II. EPA REASONABLY DETERMINED THAT EMISSION REDUCTIONS BEYOND THOSE REQUIRED BY THE REVISED STANDARD WERE NOT WARRANTED.

Section 112(d)(6) requires EPA to take "developments in practices, processes, and control technologies" into account, but leaves EPA otherwise free to determine whether it is "necessary" to revise an emission standard. 42 U.S.C. § 7412(d)(6). In exercising its discretion, along with the Section 112(d)(6) statutory factors EPA considered the same factors it is required to consider in promulgating beyond-the-floor standards under Section 112(d)(2) – the cost of achieving emission reductions, non-air quality health and environmental impacts, and energy requirements. 42 U.S.C. § 7412(d)(2); RTC at 30 (JA 174). After considering all of these factors in this case, EPA reduced the emission limit for lead compounds by 90%, from 2.0mg/dscm to 0.2 mg/dscm. 77 Fed. Reg. at 558, 564.

Both sets of Petitioners argue that EPA was required to consider factors other than it did in determining whether it was "necessary" to revise the secondary lead emission standard. Env. Br. at 16-17, 22-25; [Industry] Petitioners' Opening Brief ("Ind. Br."). at 27-29. Environmental Petitioners further argue that EPA's conclusion that additional emission reductions would be too costly is not supported by the administrative record. Env. Br. at 26-30. None of these arguments has merit.

### A. EPA Reasonably Considered The Cost Of Achieving Additional Emission Reductions.

Courts have repeatedly held that the term "necessary" is ambiguous. NRDC v. Thomas, 838 F.2d 1224, 1238 (D.C. Cir. 1988) (finding term "necessary" "completely ambiguous"); Cellular Telecomms., 330 F.3d 502 at 509-10 (meaning of "necessary" is ambiguous and varies with context). In determining whether a revision is necessary, EPA looks in part to Section 112(d)(2) (which defines what standards are "achievable") for guidance. 42 U.S.C. § 7412(d)(2). More specifically, Section 112(d)(2) directs EPA to consider cost, technical feasibility, non-air quality impacts of a technology, and energy implications. It is certainly rational for EPA to consider these factors not only when it first sets a standard, but when it later determines under Section 112(d)(6) whether to revise that standard . See RTC at 30 (JA 174).

Environmental Petitioners argue that EPA cannot consider costs because Section 112(d)(6) does not explicitly authorize EPA to do so. This argument is based on Whitman v. Am.Trucking Ass'ns, 531 U.S. 457 (2001), in which the Supreme Court assessed whether EPA could consider implementation costs in setting NAAQS under Section 109(b) of the Act. Accepting the Environmental Petitioners' approach, however, leads to an evident anomaly. Section 112(f)(2) requires EPA to promulgate emission standards as required "to provide an ample margin of safety to protect public health" from risks remaining after the application of MACT standards adopted under Section 112(d)(2) and (d)(3). 42 U.S.C. § 7412(f)(1)-(2). This Court held *en banc* that similar language in the prior version of the Act allowed EPA to consider cost, after first determining a safe level of exposure to the pollutant at issue. Natural Res. Def. Council v. EPA, 824 F.2d 1146, 1155, 1157 (D.C. Cir. 1987); see generally id. at 1154-63; see also 42 U.S.C. § 7412(f)(2)(B) (preserving EPA's interpretation of section 112 as in effect before November 15, 1990); NRDC, 529 F.3d at 1083.[9] If Environmental Petitioners are correct, EPA must consider cost in setting risk-based standards under Section 112(f)(2), but may not do so in reviewing and, if necessary, revising technology-

[9] This Court has held that EPA may not consider cost *in setting a MACT floor* (see NRDC, 529 F.3d at 1083); however, for the reasons discussed in the previous section, EPA properly declined to re-establish MACT floors in its Section 112(d)(6) review here.

based standards under Section 112(d)(6). Environmental Petitioners offer no reason to believe that such an interpretation of the statute would even be reasonable, let alone mandatory.

Environmental Petitioners also argue that EPA is cherry-picking by interpreting Section 112(d)(6) to "allow[] it to comply with some requirements in § 112(d)(2)-(3) while ignoring others." Env. Br. at 23. Environmental Petitioners misstate EPA's interpretation. Nowhere did EPA say that it is required to "comply" with *any* aspect of Section 112(d)(2) or (3) when it considers revising a standard pursuant to Section 112(d)(6). In fact, EPA's position is exactly the opposite: it is *not* required to comply with Section 112(d)(2) or (d)(3) when it revises a standard pursuant to Section 112(d)(6). That does not mean, however, that EPA may not look to Section 112(d)(2)'s factors as one source of guidance to inform its decision whether to revise a standard pursuant to Section 112(d)(6). Nor did EPA pick and choose among the (d)(2) factors – it considered all of them in evaluating whether to revise the standards at issue. See RTC at 30 (JA 174); see also id. at 46 (JA 187) ((d)(2) factors of energy requirements and adverse environmental implications of energy use are aspects of EPA's consideration in Section 112(d)(6) review).

### B. The Record Supports EPA's Determination That It Was Not Necessary To Revise The Standards Based On Polishing Technologies.

EPA found in its Section 112(d)(6) review that control technologies are available to reduce lead process vent (i.e. stack) emissions at secondary lead smelters significantly below levels allowed under the 1995 standard. Existing "baghouse," or fabric filter, technology can be improved with more advanced filters. There are also two auxiliary technologies that can be added following a baghouse to remove additional lead: a wet electrostatic precipitator ("WESP," or a "precipitator"), and a high efficiency particulate air ("HEPA") filter. See Summary Of The Technology Review For The Secondary Lead Smelting Source Category at 4-8 (JA 240-44). Having thoroughly reviewed all available technologies, EPA significantly lowered the emission standard to account for improved baghouse performance, but declined to require further emission reductions predicated on the use of precipitators or HEPA filters. This conclusion was reasonable and fully supported by the administrative record.

#### 1. EPA reasonably declined to base the process vent standard on the performance of polishing precipitators.

EPA tightened the process vent standard for lead compound emissions by an order of magnitude (from 2.0 mg/dscm to 0.2 mg/dscm) based on the performance of improved baghouse technology. See 77 Fed. Reg. at 559; 40 C.F.R. § 63.543.

EPA further concluded, however, that although adding precipitators to baghouses would remove additional lead and other metal HAPs, the significantly increased costs, poor cost-effectiveness, and collateral adverse energy impacts of precipitators were such that basing a standard on performance of a polishing precipitator was unnecessary. See RTC at 28 (JA 172). EPA therefore declined to require further emission reductions based on the use of polishing precipitators in addition to baghouses.

Intervenor RSR operates a plant that uses a polishing precipitator. See RSR Br. at 6. EPA carefully considered the emissions reductions attributable to this technology, its cost and cost-effectiveness, and the adverse implications for energy use if polishing precipitators were deployed across the industry. To estimate industry-wide costs, EPA scaled RSR's costs to reflect differing size and air-flow rates of other secondary lead facilities.[10] RTC at 31 (JA 175). EPA determined that the estimated cost of installing precipitators at all remaining secondary lead facilities would be $365 million, resulting in an annualized capital cost of $34

[10] Environmental Petitioners and RSR assert that EPA never docketed this analysis, and that therefore it should be disregarded. Env. Br. at 28-29; RSR Br. at 17. In fact, it is attached to the draft cost analysis supporting the proposed rule, as well as the updated analysis used in the final rule. See Draft Cost Impacts For The Secondary Lead Smelting Source Category, EPA-HQ-OAR-2011-0344-0040 (proposed rule) (JA 141); Secondary Lead Cost Estimate Spreadsheets, EPA-HQ-OAR-2011-0344-0168 (final rule) (JA 403).

million and operating costs of $12 million. Cost Impacts of the Revised NESHAP for the Secondary Lead Smelting Source Category ("Final Cost Memo") at 6 (JA 261). Since precipitators would remove only 19.2 tons of lead and other metal HAP per year – nationwide – this technology would cost approximately $2.4 million dollars per year for each ton removed. RTC at 28, 31 (JA 172, 175).[11] EPA also noted the adverse energy implications of using polishing precipitators, which are an energy-intense technology. RTC at 28 (JA 172). Further, using precipitators could lead to increased air pollution (including increased emissions of nitrogen oxide, a criteria pollutant) and increased wastewater generation. Id.; Secondary Lead Cost Estimate Spreadsheets at 9 (JA 403). Accordingly, EPA declined to set emission standards based on the use of polishing precipitators pursuant to Section 112(d)(6). EPA also noted that requiring this additional technology would result in only minor incremental reductions in risk. RTC at 36 (JA 180).

Environmental Petitioners argue that EPA has not explained why the cost associated with using baghouses is appropriate, but the cost associated with using polishing filters is not. Env. Br. at 27. The record demonstrates, however, that polishing filters are significantly more expensive, and have collateral adverse

[11] That is, the annualized cost of $46 million (capital costs plus operating costs), divided by 19.2 tons of metal pollutants removed per year.

energy and environmental impacts. RTC at 28 (JA 172). Moreover, their cost-effectiveness is considerably higher than EPA considered acceptable: $2.4 million per ton of metal HAP removed, as compared to $0.33 million per ton of lead removed for baghouses, and $1.3 million per ton to enclose process areas. RTC at 27-28 (JA 171-72); Final Cost Memo at 3 Table 1-1 (JA 258). Given the deference due EPA's evaluation of technical issues within its expertise, see supra at 12, Environmental Petitioners have failed to demonstrate that EPA's conclusions were unreasonable.

RSR argues that it would have been preferable for EPA to have compared the dollar-per-ton cost of operating a precipitator to the value of a ton of refined lead. RSR Br. at 18. EPA has significant discretion to determine cost in setting technology-based standards, and considering the cost per ton of emissions removed is a reasonable means of doing so. Husqvarna AB v. EPA, 254 F.3d 195, 200 (D.C. Cir. 2001). The fact that there might also be other reasonable ways of assessing costs – which is all that RSR has established – does not make the methodology that EPA used in this case arbitrary or capricious. Id.

RSR further argues that EPA erred by declining to amend at least the *new* source standard based on the use of polishing precipitators. RSR Br. at 14-15. This argument is merely a variant of RSR's argument that (at least as to new source standards) EPA must re-do the MACT floor in a Section 112(d)(6) review,

which is addressed above. See supra at 24-26. RSR has, moreover, wholly failed to address the adverse energy and non-air environmental impacts that contributed to EPA's decision not to require further emission reductions based on the use of polishing precipitators.

**2. EPA reasonably concluded that HEPA filters are not an effective means of reducing emissions.**

Environmental Petitioners question EPA's decision not to adopt stricter standards based on the performance of HEPA filters, maintaining that such filters can reduce emissions of lead and other metal hazardous air pollutants by an additional 20% and that they are more cost-effective than the enclosure requirement that EPA adopted to control fugitive emissions. Env. Br. at 27-28. As EPA explained, however, the 20% reduction in emissions to which Environmental Petitioners refer is not solely attributable to the use of HEPA filters, but rather reflects multiple variables, including the performance of baghouses, the age of the primary control device, and the type of process stream vented to the emission point. RTC at 27-28 (JA 171-72). Indeed, some sources equipped with baghouses alone control emissions to a lower level than sources equipped with both baghouses and HEPA filters. RTC at 37 (JA 181). Moreover, HEPA filters do not work well under certain conditions, such as with stacks with high particle loading and high exhaust gas temperatures. Id. EPA reasonably declined to adopt a more

stringent standard predicated on the use of technology with uncertain benefits, real costs, and questionable utility at many secondary lead facilities.

### C. EPA Was Not Required To Consider Additional Factors In Determining Whether Revisions Were Necessary.

Industry Petitioners argue that EPA "must consider technical or public-health based objectives" in determining whether it is "necessary" to promulgate a revised standard under Section 112(d)(6). Ind. Br. at 27. By statute, however, the only things EPA *must* consider are the factors set forth in Section 112(d)(6) – i.e., developments in practices, processes, and control technologies. Although EPA is not *limited* by these factors (as discussed supra at 23), Industry Petitioners' claim that EPA is *required* to consider specific additional factors finds no support in the language of the statute.

Nor does the language of Section 112(d)(6) support Industry Petitioners' related claim that in order to determine whether a revision is "necessary" EPA must consider the risk-based controls adopted under Section 112(f)(2) and other potential controls. Ind. Br. at 28. EPA properly rejected the argument that Section 112(d)(6) determinations are to be based exclusively on considerations of risk reduction, given the absence of any specific mention of risk in this provision and the provision's evident technology-based focus. RTC at 23 (JA 167). EPA further noted that standards more stringent than the 0.2 mg/dscm that EPA established

under Section 112(d)(6) would only achieve minor incremental risk reduction. RTC at 36-37 (JA 180-81). Contrary to Industry Petitioners' assertions, EPA thus addressed the issue of risk in its Section 112(d)(6) review. EPA explained, moreover, that Industry Petitioners' argument that EPA was required to consider public health risks is of no practical consequence in this case. RTC at 23-24 (JA 167-68). EPA fully considered public health risks in its review under Section 112(f)(2), and concluded that the lower emission standards adopted in the Rule were warranted to prevent unacceptable health risks with an ample margin of safety.[12] See id.; see also 77 Fed. Reg. at 562-64.

## III. THE RULE DOES NOT REGULATE ELEMENTAL LEAD EMISSIONS.

It is undisputed that the Act bars EPA from adding criteria pollutants generally – and elemental lead specifically – to the list of hazardous air pollutants regulated under Section 112. See 42 U.S.C. § 7412(b)(2), (7); Ind. Br. at 1-2, 11-12, 14 -15. Lead *compounds*, on the other hand, are on the list of hazardous air pollutants established by Congress. 42 U.S.C. § 7412(b)(1). Congress' determination to explicitly designate "lead compounds" as a hazardous air

[12] Industry Petitioners argue that Sections 112(d)(6) and (f)(2) cannot be redundant. Ind. Br. at 28. They are not – although Section 112(d)(6) and Section 112(f)(2) standards may ultimately be the same, each is established for its own independent reasons. 77 Fed. Reg. at 570; RTC at 7 (JA 155).

pollutant requires EPA to treat lead compounds as hazardous air pollutants for the purposes of the NESHAP program. See National Lime Ass'n v. EPA, 233 F.3d 625, 634 (D.C. Cir. 2000) ("National Lime") (EPA has "the clear statutory obligation to set emission standards for each listed [hazardous air pollutant]").

Industry Petitioners argue that despite the plain text of the Rule (which applies to lead compounds, not to elemental lead), the Rule impermissibly regulates elemental lead as a hazardous air pollutant. Ind. Br. at 14-15, 16. Industry Petitioners further contend that because the lead compound emission limits established in the Rule may, as a practical matter, mean that air quality standards are attained sooner rather than later in some areas, EPA has somehow superseded State authority to adopt appropriate control measures in their SIPs. Ind. Br. at 15-16. The first of these claims is time-barred, and both are meritless.

### A. Industry Petitioners' Claim That The Rule Regulates Elemental Lead Emissions Is Time-Barred.

EPA promulgated the secondary lead emission standards in 1995, and made technical amendments to those standards in 1997. The standards limit lead compound emissions. See 60 Fed. Reg. 32,587, 32,589 (June 23, 1995); 62 Fed. Reg. 32,209, 32,210-11 (June 13, 1997). The 1995 rule required sources to measure compliance with the lead compound emissions limits according to EPA Reference Method 12, which measures the mass of total lead in a source's

emissions. See 60 Fed. Reg. at 32,589; 62 Fed. Reg. at 32,211. As with its predecessors, the Rule limits lead compound emissions; and as with its predecessors, the Rule specifies testing methods that measure the mass of total lead, as opposed to the mass of lead compounds, in emissions. See 77 Fed. Reg. at 565 (performance testing requirements allow use of EPA Method 12 or Method 29).[13]

Industry Petitioners could have raised their claim that the secondary lead emission standard impermissibly regulates elemental lead rather than lead compounds at least as early as 1995. The time limit for any such challenge has long since run, and this claim is no longer within the Court's jurisdiction. See 42 U.S.C. § 7607(b)(1) (petition for review must be filed within 60 days of date notice is published in Federal Register); Medical Waste Inst. & Energy Recovery Council v. EPA, 645 F.3d 420, 427 (D.C. Cir. 2011) (Clean Air Act's filing period "is jurisdictional in nature;" if petitioners failed to meet deadline, Court is "powerless

[13] Method 12 and Method 29 measure the total lead in an emissions sample. In simplified terms, the tests measure all of the lead atoms in a given sample, including both the lead atoms from lead compounds (e.g., the lead present in lead sulfate) and the lead atoms that were emitted as elemental lead (i.e., not as part of a compound). See 40 C.F.R. Pt. 60, App. A-5 § 1.1 (specifying that the Method 12 "analyte" is "Inorganic Lead Compounds as lead (Pb)").

to address their claim") (citation and internal quotations omitted); RTC at 4 (JA 152).[14]

Industry Petitioners claim that their argument is timely because they are challenging the Rule on the grounds that it "sets elemental lead emissions standards to assure lead NAAQS attainment, thereby treating elemental lead as a HAP." Ind. Br. at 17. The (false) premise of this argument, however, is that the rule in fact "sets elemental lead emissions standards" – i.e., that because the Rule requires sources to use testing methods that *measure* total lead emissions, it actually *regulates* elemental lead emissions. Ind. Br. at 16. Total lead emissions have been used to measure lead compound emissions since the inception of the secondary lead standard, and there is no reason that Industry Petitioners could not have raised this argument within the 60-day limit imposed by the Act.

**B. The Rule Does Not Regulate Elemental Lead Emissions.**

Industry Petitioners contend that EPA is treating elemental lead as a hazardous air pollutant because the *testing methods* specified in the Rule measure the mass of total lead, as opposed to the mass of lead compounds, in emissions.[15]

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[14] EPA's Response to Comments states that this challenge could have been raised in 1997; however, as noted supra at 9 n.3, EPA inadvertently cited the 1997 amendment rather than the 1995 rule.

[15] This argument is purely legal. Nowhere do Industry Petitioners suggest that the testing methods required by the Final Rule are not accurate, that measuring total

(footnote con't)

Ind. Br. at 16. Even if this contention were timely, it is unavailing. The Rule does not "in effect treat[]" elemental lead as a hazardous air pollutant within the meaning of National Lime, on which Industry Petitioners rely. Ind. Br. at 17. National Lime involved a challenge to EPA's emission standard for cement kilns, which used emissions of particulate matter – a NAAQS criteria pollutant – as a surrogate for emissions of certain metals that are hazardous air pollutants. Although the Court interpreted Section 112(b)(2) to "extend[] of necessity not only to rules that literally list a criteria pollutant as a [hazardous air pollutant (HAP)] but also to any rule that in effect treats a criteria pollutant as a HAP," it upheld EPA's use of particulate matter in the cement kiln rule. 233 F.3d at 638. In doing so, the Court made clear that EPA does not effectively regulate a criteria pollutant as a hazardous air pollutant simply by using it as a surrogate or requiring that the criteria pollutant be measured in emissions from a source. Id. at 638-39.

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lead is not a reasonable means of measuring lead compound emissions, or that there is anything in the record that might suggest EPA could reasonably have measured lead compound emissions in some other fashion. Industry Petitioners' passing suggestion that in crafting emission limits EPA should have considered the "nature" of specific lead compounds, Ind. Br. at 16, is not supported by any citation to the record, and is not otherwise developed. This Court has made it clear that it will not consider issues raised in such a cursory fashion. See, e.g., Anna Jaques Hosp. v. Sebelius, 583 F.3d 1, 7 (D.C. Cir. 2009) ("We will not consider asserted but unanalyzed arguments") (internal quotation omitted).

Using total lead as a surrogate for lead compounds is precisely what EPA did in the Rule (and in the 1995 and 1997 standards) by specifying a test that measures the total lead in emissions. This approach is supported by the legislative history of the 1990 Amendments to the Act, which shows that Congress intended to allow EPA discretion to establish emission standards for metal compounds based on the amount of the metal itself. See S. Rep. No. 101-228, at 164 (1989), reprinted in 5 Legislative History of the CAA Amendments of 1990 at 8338, 8504 (Comm. Print 1993) (explaining that EPA could establish standards based "on the weight or emissions rate of [the] constituent toxic metal . . . , rather than on th[e weight or emissions rate] of their compounds.").

Industry Petitioners' assertion that "the . . . quantity of the lead compounds emitted are irrelevant to determining compliance with the [Rule]," Ind. Br. at 16, thus completely misses the point. It is not that EPA is concerned with elemental lead emissions *instead of* lead compound emissions; rather, EPA has used total lead emissions (which includes elemental lead, if present) to *measure* lead compound emissions. The Rule thus does not regulate elemental lead as a hazardous air pollutant, and poses no conflict with Section 112(b)(2) or (b)(7).

### C. The Rule Was Not Designed To Attain The NAAQS, and Does Not Interfere With State Authority To Do So.

In conducting its residual risk assessment under Section 112(f)(2), EPA compared modeled off-site atmospheric lead concentrations at secondary lead facilities to the primary lead NAAQS. 76 Fed. Reg. at 29,040; see generally id. at 29,040-42. The NAAQS represents a "public health policy judgment" incorporating "the Agency's most recent health evaluation of air effects of lead exposure." Id. at 29,042. EPA thus considers ambient air lead concentrations above the level of the NAAQS to pose a potential increased risk to public health. Id.; see also Residual Risk Assessment For The Secondary Lead Smelting Category ("Risk Assessment") at 12-13 (JA 284-85) (discussing use of lead NAAQS).

Industry Petitioners do not argue that this approach was substantively unreasonable, or even suggest that EPA should have assessed potential risks to public health posed by lead compound emissions by using some different criteria. They assert, instead, that the fact that EPA used the primary lead NAAQS as a reference point means that EPA must have designed the Rule to attain the lead NAAQS. Ind. Br. at 14, 16-17. This claim finds no support in the record. The preamble language Industry Petitioners cite, Ind. Br. at 16, recognizes one positive *effect* of the Rule; it does not, however, state that NAAQS attainment was a *goal* of

the Rule. See 77 Fed. Reg. at 565; RTC at 6 (JA 154) (discussion of relationship of Rule to NAAQS merely shows timing of rule can fit with implementation process). Nor have Industry Petitioners cited any record evidence to support their assertion that EPA "use[d] state NAAQS attainment measures." Ind. Br. at 16. [16]

Contrary to Industry Petitioners' argument, the Rule does not "frustrate[] the [Act's] cooperative federalism scheme" by "superseding" state authority to determine how to attain the NAAQS. Ind. Br. at 15. This argument is based on a misleading paraphrase of the preamble to the Proposed Rule. EPA did not "explain[]" that "regulation under the [Rule] would supersede state authority," Ind. Br. at 15; again, it simply recognized that the Rule might have the effect of assisting States in reaching NAAQS attainment:

> *EPA anticipates that, at least in areas where nonattainment is attributable to single sources that are subject to this rule, if the proposed controls* are sufficient to attain the NAAQS by the attainment deadline, *then* adoption of additional controls in the SIP for the area would not be necessary.

76 Fed. Reg. 29, 063-64 (emphasis added). Industry Petitioners' paraphrase omits the italicized language, which makes it clear that EPA is merely describing one

[16] Industry Petitioners state in the factual background section that certain work practices and standards in the Final Rule were "lifted verbatim" from a state rule designed for NAAQS attainment. Ind. Br. at 6. The cited portion of the Response to Comments says only that EPA is familiar with a particular state rule, and "[took] many aspects of [it] into consideration" when developing the Final Rule – an appropriate step in light of Section 112(d)(6)'s directive to consider "developments in practices, processes, and control technologies." RTC at 32 (JA 176).

potential effect of the proposed rule. See id.; see also RTC at 6-8 (JA 154-56). As EPA explicitly stated, the Rule "rests on the exclusive authority of [S]ections 112(d) and(f)," not on any provision applicable to NAAQS implementation, and does not "chang[e], modif[y], or otherwise bea[r] upon legal obligations to attain the lead NAAQS." RTC at 7 (JA 155); RTC at 99 (JA 194).

Industry Petitioners also miss the mark with their claim that the Rule accelerates the lead NAAQS attainment deadline. Ind. Br. at 16. The Rule does not require that the lead NAAQS be attained at all, let alone that it be attained any earlier than otherwise required. The lead compound emission reductions required by the Rule may mean that lead levels in ambient air are reduced sooner rather than later, and thus incidentally *promote* expeditious attainment of the NAAQS; that does not mean, however, that the Rule somehow *requires* more rapid attainment than would otherwise be the case, or that it should be set aside because more rapid attainment is one possible consequence of the Rule. See RTC at 7 (JA 155) ("[t]he measures that facilities are required to implement to achieve [the rule's] requirements should also have positive effects on areas attaining and maintaining the lead NAAQS, but the standards are required and justified under Section 112(f) and (d)(6) whether or not that were the case").

The Rule represents EPA's exercise of its obligation under Section 112 to regulate lead compound emissions from secondary lead facilities. It does not,

however, infringe on any state authority, or eliminate any state responsibility. It does not require any state to modify its SIP or take any particular action to attain the lead NAAQS, nor does it do anything to restrict a state's ability – and, indeed, its responsibility – to control lead emissions as necessary to ensure that the lead NAAQS is attained by the statutory deadline. See RTC at 6-8 and n.3 (JA 154-56). The reduction in emissions of lead compounds, and its resulting assistance in NAAQS attainment, is simply an incidental benefit of the proper functioning of the regulatory programs Congress created in the Act.

### D. The Court Lacks Jurisdiction Over Industry Petitioners' Claim That EPA Cannot Regulate Lead Compounds Under The Prevention of Significant Deterioration Program.

Industry Petitioners contend that if the Rule regulates lead compounds (as it does), EPA can no longer regulate lead compounds under the Prevention of Significant Deterioration program, and therefore the Court should "vacate this aspect of the Rule." Ind. Br. at 29-30. There is no PSD "aspect" of the Rule the Court can vacate, or even review, because EPA took no final action with regard to the PSD program in this rulemaking. See 42 U.S.C. § 7607(b) (limiting Court's jurisdiction to review of final agency actions). Absent a reviewable final agency action, Industry Petitioners are not entitled to a wholly advisory ruling regarding

the propriety of regulating lead compounds under the separate PSD program. See RTC at 12-13 (JA 160-61); 42 U.S.C. §§ 7470-7492 (establishing PSD program).[17]

## IV. EPA PROPERLY ESTABLISHED A TWO-YEAR COMPLIANCE DEADLINE.

EPA adopted the Rule under Section 112(f)(2) as well as under Section 112(d)(6). Emissions standards established pursuant to subsection 112(f)(2) must protect public health with an ample margin of safety and prevent adverse environmental effects, and become effective upon promulgation, although for existing sources the standard does not apply until 90 days after the effective date. 42 U.S.C. § 7412(f)(3), (4)(A). Section 112(f)(4), however, authorizes EPA to grant existing sources up to two years after the effective date to comply where the additional time is needed for installation of controls. 42 U.S.C. § 7412(f)(4).[18]

[17] To the extent that a response to Industry Petitioners' argument is required, EPA has explained why that argument is incorrect. In short, EPA has reasonably interpreted Section 112(b)(6) of the Act to permit the regulation under PSD of a hazardous air pollutant listed in Section 112 to the extent that it is a constituent or precursor of a more general pollutant that is subject to PSD regulation, such as elemental lead. RTC at 12-13 (JA 160-61).

[18] 40 C.F.R. § 63.6(i)(4)(C)(ii) establishes the process by which EPA determines that sources need additional time to implement Section 112(f)(2) standards. Industry Petitioners' statement that EPA "abandoned its reliance" on this provision, Ind. Br. at 9, is incorrect. See RTC at 96-97 (JA 191-92); see also Summary of Compliance Time for the Revised NESHAP for the Secondary Lead Smelting Source Category ("Compliance Timeline") at 2 (JA 233).

Pursuant to Section 112(f)(4), EPA granted all existing secondary lead facilities a two-year compliance waiver. 77 Fed. Reg. at 561.

Industry Petitioners argue that EPA should instead have "consider[ed]" granting sources a *three*-year compliance extension pursuant to Section 112(i)(3) of the Act, 42 U.S.C. § 7412(i)(3). Ind. Br. at 24; see generally id. at 24-27. EPA did "consider" this possibility when it was raised in comments. RTC at 96-98 (JA 191-93). EPA concluded, however, that because the provisions in Section 112(f)(4) governing compliance periods and waivers expressly apply to the risk-based emission standards adopted under Section 112(f)(2), and are more specific than the general provision in Section 112(i)(3)(A), the maximum allowable compliance period for existing sources was two years beyond the effective date of the relevant emission standards in the Rule. See RTC at 97 (JA 192). Industry Petitioners have failed to demonstrate that the relevant statutory text unambiguously requires their approach, or that EPA's interpretation of the statute is unreasonable.

Industry Petitioners offer nothing to support their assertion that the Act "unambiguously" authorizes EPA to grant sources a three-year extension for standards adopted under Section 112(f). See Ind. Br. at 24-25. Section 112(i)(3) provides that EPA shall establish a compliance date for standards adopted "under this section [i.e., Section 112]" that is no more than three years after the effective

date of those standards. 42 U.S.C. § 7412(i)(3)(A). Section 112(f)(4), however, is more specific: it provides that no air pollutant to which a standard "under this subsection [i.e., Section 112(f)]" applies may be emitted in violation of that standard, unless EPA has granted an effective date waiver of up to two years. 42 U.S.C. § 7412(f)(4)(B). The very fact that both provisions exist creates an ambiguity – did Congress intend that the three-year waiver language of Section 112(i)(3) apply even to standards adopted under Section 112(f), or did it intend the more specific two-year waiver language of Section 112(f)(4) to govern Section 112(f) standards and Section 112(i)(3) to govern the rest of Section 112?

EPA's interpretation of this ambiguity is entirely reasonable. The language of Section 112(i)(3)(A) refers broadly to "any emissions standard, limitation or regulation under [Section 112]," 42 U.S.C. § 7412(i)(3)(A), whereas Section 112(f)(4) applies specifically and more narrowly to standards "under this subsection," id. § 7412(f)(4), meaning risk-based standards under subsection (f) of Section 112. EPA's interpretation – that the more specific Section 112(f)(4) governs over the general language of Section 112(i)(3) – is consistent with well-established principles of statutory construction. See RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2071 (2012) ("'[I]t is a commonplace of statutory construction that the specific governs the general.'") (citations omitted); accord Norwest Bank Minn. Nat'l Ass'n v. FDIC, 312 F.3d 447, 451

(D.C. Cir. 2002). The "general/specific canon" fully applies to statutes where "a general authorization and a more limited, specific authorization exist side-by-side," RadLAX, 132 S. Ct. at 2071, as is the case with Section 112(i)(3)(A) and Section 112(f)(4).

Industry Petitioners' interpretation would permit Section 112(i)(3)(A) to swallow the specific compliance period provisions in Section 112(f)(4), as it would allow EPA to grant sources up to three years to comply with risk-based emission standards promulgated pursuant to Section 112(f). Petitioners' construction would thus render superfluous both the shorter compliance period in Section 112(f)(4) and the associated limits on when a waiver should be granted. That result not only violates basic canons of construction, but would undermine Congress' concern about expediting compliance for sources found to pose unacceptable health risks. By adhering to the general/specific canon, EPA's interpretation gives effect both to Section 112(f)(4) and to Section 112(i)(3)(A), and is consistent with Congress' manifest concern about expediting compliance for those sources where EPA has identified an ongoing unreasonable risk to public health (as it has here, where secondary lead sources are exposing hundreds of people to lead concentrations as high as 20 times the level of the lead NAAQS). 77 Fed. Reg. at 563; Risk Assessment at 34 (JA 290).

Because EPA's interpretation represents an "appropriate harmonization" of these two provisions that remains within the bounds of EPA's authority, "it is the duty of the reviewing court to sustain the agency's result." Citizens to Save Spencer Cnty v. EPA, 600 F.2d 844, 871-72 (D.C. Cir. 1979). Industry Petitioners argue that the Court should not defer to EPA's interpretation of the statute because EPA supposedly believed that interpretation was "compelled by Congress." Ind. Br. at 26. There is, however, nothing in the record that suggests that EPA felt that it was "compelled" to reach the conclusions it did.[19] Certainly EPA was attempting to effectuate Congress' intent – but that is simply what an agency does when it interprets an ambiguous statute.

Industry Petitioners' remaining arguments are unpersuasive. Industry Petitioners' suggestion that Section 112(i)(3) somehow "answer[s] the question" of whether a standard "applies" within the meaning of Section 112(f)(4), Ind. Br. at 25-26, is simply nonsensical. There was no such "question" here – lead compounds (as well as other hazardous air pollutants addressed in the Rule) are

[19] The cases cited by Industry Petitioners are not on point. In PDK Laboratories Inc. v. DEA, 362 F.3d 786 (D.C. Cir. 2004), the agency believed the statute at issue was unambiguous, and thus had not interpreted it at all. Id. at 795. Once the Court concluded the statute was ambiguous, it remanded the matter so the agency could do so. Id. at 798. In Prill v. National Labor Relations Board 755 F.2d 941 (D.C. Cir. 1985), the agency similarly believed the statute at issue established a clear mandate, and the Court similarly remanded for reconsideration when it concluded otherwise. Id. at 948.

unquestionably air pollutants to which standards "under this subsection" (i.e., Section 112(f)) apply. Industry Petitioners also argue that Section 112(i)(3) must be interpreted broadly because it refers to "any" emission standard, limitation, or regulation promulgated "under this section" (i.e., Section 112). Ind. Br. at 26. Industry Petitioners never explain, however, why it would be reasonable to interpret Section 112(i)(3) *so* broadly that it writes Section 112(f)(4) out of existence, or how such an interpretation would effectuate Congress' intent.[20]

## V. EPA'S RISK ESTIMATE DEMONSTRATES THAT IT IS APPROPRIATE TO REQUIRE SECONDARY LEAD FACILITIES TO ENCLOSE THEIR PROCESS AREAS.

As part of its risk review under Section 112(f)(2), EPA compiled an emissions profile for each secondary lead facility that included estimates of annual process, process fugitive, and fugitive dust emissions. 76 Fed. Reg. at 29,038. EPA estimated that fugitive emissions from 9 out of 15 secondary lead facilities exceeded the level of the lead NAAQS by 8, 10, or even 20 times, primarily due to high levels of fugitive dust emissions. Risk Assessment at 33 and Table 3.2.3 (JA 289, 290); 77 Fed. Reg. at 562; Development of the RTR Emissions Dataset For The Secondary Lead Smelting Source Category (December 16, 2011) ("Final

[20] Industry Petitioners' argument also lacks a factual basis. EPA determined that existing sources need no more than two years to comply with the Section 112(f)(2) standards, and thus would not have granted a longer compliance period. Compliance Timeline at 4-5 (JA 235-36).

Dataset") at 15-16 (JA 215-16). This is unsurprising, since a number of secondary lead facilities do not enclose their process areas. See Final Dataset at 15-16 (JA 215-16).

EPA determined that these emissions pose an unreasonable risk, and established a standard requiring process fugitive emissions to be virtually completely captured by totally enclosing process areas at secondary lead facilities. Captured emissions from these areas are ducted to a plant's air pollution control system, and emissions from that system must meet the 0.2mg/dscm standard for lead emissions from process vents. 40 C.F.R. § 63.543(a).

Industry Petitioners argue that EPA's methodology for estimating fugitive emissions was flawed. Ind. Br. at 18-22. As a threshold matter, Industry Petitioners suggested in comments that any error in EPA's methodology resulted in an *underestimation* of emissions from completely unenclosed facilities, which EPA categorized as "Level 1" facilities. See Association of Battery Recyclers' Comments at 10 (JA 549); RTC at 93 (JA 188). Industry Petitioners similarly contend in their brief that EPA's methodology estimates that emissions from "Level 1" facilities and the baseline Exide Frisco facility are "nearly equivalent," whereas in their view emissions from Level 1 facilities should be *higher* than EPA estimated. Ind. Br. at 19. EPA's finding of unreasonable risks to public health and the environment was principally based on emissions from these "Level 1"

facilities. Final Dataset at 15 (JA 215). Even if Industry Petitioners were correct (which, as we demonstrate below, they are not), they would thus have done no more than show that the record even more fully supports the enclosure standard.

Industry Petitioners' challenges to EPA's methodology are in any event unfounded. Since fugitive emissions by definition cannot be measured directly, EPA necessarily estimated their magnitude. EPA used estimated emissions from the Exide Frisco facility (which EPA concluded had provided the best supported and most complete fugitive emissions estimate) as a baseline, then scaled all remaining secondary lead facilities to that baseline to derive site-specific fugitive emission estimates. 76 Fed. Reg. at 29,038; Final Dataset at 12-16 (JA 212-16). EPA estimated the fugitive emissions from each facility by (1) estimating each facility's level of fugitive emissions control relative to Exide Frisco, and then (2) multiplying Exide Frisco's fugitive emissions rate by a factor reflecting this difference in emissions control, as well as by factors reflecting size and housekeeping practices. Final Dataset at 14, 15-16 (JA 214, 215-16).[21]

[21] Industry Petitioners do not challenge EPA's use of Exide Frisco as a baseline, or EPA's consideration of differing sizes and housekeeping practices. Rather, they argue that EPA improperly relied on undisclosed confidential business information and suggest that such information played some part in establishing the challenged enclosure factors. Ind. Br. at 21-22. Petitioners are incorrect, however, as EPA did not use such information to establish the enclosure factors. Indeed, the single passing statement in EPA's Response to Comments on which Petitioners rely does (footnote con't)

EPA began its assessment of enclosure levels by dividing facilities into three categories relative to the baseline facility: Level 1 (facilities with no major processes enclosed), Level 2 (facilities with more processes enclosed than the baseline facility), and Level 3 (facilities with all processes enclosed). Id. at 13 (JA 213). Because the Exide Frisco facility has only some processes enclosed, EPA classified it as Level 2. Id. After making this initial grouping, EPA refined its comparison of enclosure levels. Id. at 13-14 (JA 213-14). As the baseline facility, Exide Frisco has an enclosure factor of 1.0. Id. at 15 (JA 215), Table 5-2. Facilities determined to be *less* enclosed than Exide Frisco would have more fugitive emissions – thus, those facilities had an enclosure factor of 1.07, higher than Exide Frisco's. Id. at 13, 15-16 (JA 213, 215-16). Facilities *more* enclosed than Exide Frisco would have fewer fugitive emissions. EPA further divided these more-enclosed facilities into those that had enclosed more processes than Exide Frisco but that did not have complete enclosures (enclosure factor of .75), and

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not say that EPA used confidential business information to establish enclosure factors. RTC at 93 (JA 188). EPA used confidential business information solely in its estimation of facility size, and those estimates are not in dispute. EPA kept certain facility size information confidential in order to prevent competitors from learning each others' annual production rates.

those that had complete enclosures (enclosure factor of .25).[22] Id. at 13-16 (JA 214-16).

EPA's determination that lead emissions from secondary lead plants posed unreasonable risks to public health was primarily based on the two facilities emitting lead at the highest concentrations (20 and 10 times the level of the lead NAAQS respectively), both of which are classified as Level 1. Id. at 15 (JA 215). Petitioners do not challenge this classification, arguing only that the Exide Frisco baseline facility was actually less well-enclosed than EPA thought and therefore should also have been classified as Level 1. This semantic dispute over whether Exide Frisco should have been *called* a Level 1 facility or a Level 2 facility misses the point – what is at issue is not what Exide Frisco was called, but rather the relative difference in emissions between the Exide Frisco baseline and all other facilities. Exide Frisco encloses its raw material storage area; thus, its emission rate is slightly better than that of the completely unenclosed Level 1 facilities. Id. at 13 (JA 213); Summary of the Technology Review for the Secondary Lead Smelting Source Category at 13 n. 3 (JA 249).[23] EPA therefore assigned the Level 1 (completely unenclosed) facilities an emissions factor of 1.07 vs. Exide Frisco's

[22] Total enclosures are not impermeable, but do substantially control fugitive emissions. Final Dataset at 13 (JA 213).

[23] Petitioners' claim that EPA did not explain why it used a factor of 1.07, Ind. Br. at 19 n.7, is simply mistaken. See Final Dataset at 13 (JA 213).

baseline factor of 1.0, while more-enclosed (and therefore lesser-emitting) facilities were assigned lower emissions factors.

Industry Petitioners offer nothing to support their claim that it was "dysfunctional," Ind. Br. at 20, for EPA to fine-tune its analysis to ensure that the enclosure factor reflected actual conditions at various facilities. The cases they cite, Ind. Br. at 20, are distinguishable, in that both involved EPA modeling that was determined to be at odds with real-world evidence.[24] Industry Petitioners point to no such inconsistencies here – they do not, for example, identify any record evidence that suggests that specific facilities were either more or less enclosed than EPA's enclosure factors suggest, or that EPA's estimate of fugitive emissions is inconsistent with actual emissions data. EPA compared modeled and actual ambient lead concentrations for those facilities that have ambient monitors located nearby, and this comparison indicated that EPA's fugitive emissions estimates were reasonable. RTC at 93-94 (JA 188-89).[25] Nor do Industry Petitioners challenge the percentages EPA used in its enclosure factors.

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[24] See Appalachian Power Co. v. EPA, 249 F.3d 1032, 1053 (D.C. Cir. 2001) (EPA growth projections were inconsistent with observed growth rates); Chemical Mfrs. Ass'n. v. EPA, 28 F.3d 1259, 1265-66 (D.C. Cir. 1994) (record evidence did not establish rational relationship between model and known physical properties of pollutant emissions being modeled).

[25] Indeed, EPA's estimate of lead emissions from the highest-emitting source (Doe Run's Level 1 Buick Mill facility) matched that facility's monitored emissions

(footnote con't)

Industry Petitioners' argument is entirely insufficient to overcome the deference due EPA's technical analysis, which is fully supported by the administrative record. As discussed supra at 52-53, moreover, if Industry Petitioners are correct, then EPA *underestimated* emissions from the facilities which drove the finding of unreasonable risk – thus, there is no reason to believe EPA would have reached a different conclusion (or adopted a different standard) had it proceeded as Industry Petitioners suggest it should have. Industry Petitioners' claim that EPA improperly estimated fugitive emissions must therefore be rejected.

## VI. CHALLENGES TO THE LEAD CEMS MONITORING PROVISION ARE NOT RIPE.

To ensure that lead compound emissions remain within required limits, the Rule requires sources to measure the concentration of lead in gas emitted from process vents. See 77 Fed. Reg. at 582 (40 C.F.R. § 63.543); supra at 10-11. The Rule further sets forth how new and reconstructed sources must do so:

> *Except as provided in paragraphs (l)(2) or (3) of this section*, all new or reconstructed sources subject to the requirements under § 63.543 must install, calibrate, maintain, and operate a [Continuous Emissions Monitoring System ("CEMS")] for measuring lead emissions. . . .

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almost exactly. Summary of Ambient Lead Monitoring Around Secondary Lead Smelting Facilities at 4 (Doe Run Buick Mill maximum 3-month monitored rolling average lead emissions 2.46 µg/m$^3$) (JA 229); Risk Assessment at 34 (JA 290) (estimated lead emissions from Doe Run Buick Mill are 2.36 µg/m$^3$).

. . .

(2) *Prior to 180 days after the EPA promulgates performance specifications for CEMS used to measure lead concentrations, you must use the procedure described in § 63.543(g)(1)* to determine compliance.

40 C.F.R. § 63.548(l) (emphasis added). EPA has not yet promulgated performance specifications for continuous emissions monitoring systems, and has explicitly stated that until it has done so (following notice-and-comment rulemaking) it is inappropriate to require the use of such systems. RTC at 103 (JA 198); see also id. at 105 (JA 200).

Industry Petitioners and RSR challenge the CEMS requirement for new and reconstructed sources.[26] Ind. Br. at 22-24; RSR Br. at 19. As set forth in the cited regulatory text, no source is required to use such systems unless and until EPA has promulgated appropriate performance specifications – and it is undisputed that EPA has not yet done so. Any challenge to the CEMS monitoring requirement thus is not ripe, and must be dismissed.

In determining whether a claim is ripe, courts consider:

[26] Neither Industry Petitioners nor RSR claims any intent to build or reconstruct a secondary lead facility; thus, it is far from clear that they have standing to press this claim. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (Article III standing requires, inter alia, actual or imminent injury).

> (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.

Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998). All three factors favor a finding that Industry Petitioners' and RSR's claims are not ripe, and are therefore beyond the Court's jurisdiction.

Given that the regulatory text ensures that no new or reconstructed source will be required to employ continuous emissions monitoring until EPA promulgates specifications, Industry Petitioners and RSR will suffer no hardship if judicial review is delayed. See Ohio Forestry, 523 U.S. at 733 (challenged provisions did not create legal harm where they "[did] not command anyone to do anything or refrain from doing anything."). Industry Petitioners and RSR do not explain why they believe that a continuous monitoring requirement will somehow be triggered before EPA has promulgated performance specifications. These parties will, moreover, "have ample opportunity later to bring [their] legal challenge at a time when harm is more imminent and more certain." Ohio Forestry, 523 U.S. at 734. If and when EPA promulgates performance standards and this claim ripens, any party with standing will have the opportunity to seek judicial review, including a challenge to the underlying CEMS requirement itself as well as to the promulgated performance standards. See Louisiana Envtl. Action

Network v. Browner, 87 F.3d 1379, 1385 (D.C. Cir. 1996) (Clean Air Act's time limitation does not begin to run until claim ripens).

The other ripeness factors similarly favor a finding that this argument is not ripe. Judicial review of the as-yet-inapplicable continuous emissions monitoring requirement would interfere with further administrative action by EPA to promulgate appropriate performance specifications for such systems. The Court would, moreover, benefit from waiting to review the monitoring requirement until EPA has established specific performance specifications, has made any appropriate adjustments to the standard, and has presented the Court with a fully developed administrative record.

Relying on American Iron & Steel Inst. v. EPA, 115 F.3d 979 (D.C. Cir. 1997), Industry Petitioners argue that EPA cannot "save a deficient rule by promising to correct mistakes in a future rulemaking proceeding." Ind. Br. at 23. In American Iron & Steel, EPA conceded that it had erred in using a particular factor in its calculations and promised to re-calculate the relevant standard in a future rulemaking. American Iron & Steel, 115 F.3d at 1008. In this case, Industry Petitioners can only point to EPA's statement that when it develops performance specifications (thereby triggering the continuous monitoring requirement) it will consider adjusting emissions standards in light of the fact that emissions would be measured more frequently by continuous monitoring systems

than by stack tests. Ind. Br. at 23. This is in no way an acknowledgment that there is anything wrong with the Rule as it stands, nor does the mere fact that EPA contemplates further rulemaking in the future render Industry Petitioners' claim ripe now. Industry Petitioners' challenge to the CEMS monitoring requirement should therefore be dismissed.

## CONCLUSION

For all of the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,
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DATED: March 1, 2013 (Final Brief)

**RESPONDENT'S CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION AND TYPEFACE REQUIREMENTS**

Respondent United States Environmental Protection Agency hereby represents that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,847 words, as counted by Microsoft Word, excluding the signature block and the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that it complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

DATED: March 1, 2013

*/s/ Angeline Purdy*
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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Final Brief for Respondents have been served through the Court's CM/ECF system on all registered counsel this 1st day of March, 2013.

DATED: March 1, 2013

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