No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law alleging that defendants—in this case, five electric utilities—have created a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon dioxide emissions at judicially-determined levels. The questions presented are:

1. Whether States and private parties have standing to seek judicially-fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

2. Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.

3. Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

PARTIES TO THE PROCEEDINGS

Defendant-appellees below were American Electric Power Company, Inc.; American Electric Power Service Corporation; Cinergy Corporation (merged into Duke Energy Corporation); Southern Company; Xcel Energy Inc.; and the Tennessee Valley Authority.

Plaintiff-appellants below were State of Connecticut; State of New York; People of the State of California; State of Iowa; State of New Jersey; State of Rhode Island; State of Vermont; State of Wisconsin; City of New York; Open Space Institute, Inc.; Open Space Conservancy, Inc.; and Audubon Society of New Hampshire.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES—continued

REGULATIONS

RULES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES — Page

OPINIONS BELOW

The Second Circuit's opinion is reported at 582 F.3d 309, and reproduced at Petition Appendix ("Pet. App.") 1a-170a. The Second Circuit's orders denying rehearing or rehearing en banc are reproduced at Pet. App. 188a-191a. The opinion of the United States District Court for the Southern District of New York is published at 406 F. Supp. 2d 265, and reproduced at Pet. App. 171a-187a.

JURISDICTION

The court of appeals entered judgment on September 21, 2009, Pet. App. 1a, and denied timely petitions for rehearing or rehearing en banc on March 5 and 10, 2010, *id.* at 188a-191a. On June 28, 2010, Justice Ginsburg granted an extension of the time for filing a petition for writ of certiorari to and including August 2, 2010. The petition was filed on August 2, 2010, and granted on December 6, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution provides, in pertinent part, that "[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ... [and] to Controversies ... between a State and Citizens of another State [or] between Citizens of different States." U.S. Const. art. III, § 2, cl. 1.

Relevant provisions of the Clean Air Act, 42 U.S.C. §§ 7401, 7409, 7411, 7413, 7475, 7477, 7502, 7521,

7601, 7602, 7604, 7607, 7661-7661d, are reproduced at Pet. App. 192a-214a and at Add-13 to Add-72 of the addendum to this brief. Relevant provisions of the 1970 version of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151, 1160, are reproduced at Add-1 to Add-13 of the addendum.

INTRODUCTION

The Second Circuit in this case held that there exists a federal common law nuisance cause of action for contributing to climate change. Such a claim could be pursued by anyone who claims to be affected by climate change against any source of greenhouse gas emissions. It would empower courts to determine the "reasonable" level of global greenhouse gas emissions, allocate them among economic sectors, and order individual actors to conform their emissions to the court's judgments. These lawsuits would thus allow federal judges, acting without statutory authority or guidance, to adjudicate competing claims about appropriate global, national, and industry-wide emission levels by making policy decisions and tradeoffs that the Constitution commits to the political branches and over which Congress by statute has delegated significant authority to the Environmental Protection Agency (EPA).

Greenhouse gas regulation and climate change are issues of exceptional complexity and extraordinary importance to the Nation, implicating fundamental economic and security concerns and affecting every sector and industry—and every individual—in the country. These issues are wholly inappropriate for resolution by "an unelected, unrepresentative judiciary," *Allen* v. *Wright*, 468 U.S. 737, 750 (1984), under the "vague and indeterminate nuisance concepts" of the common law, *City of Milwaukee* v.

Illinois, 451 U.S. 304, 317 (1981) (*Milwaukee II*). The judgment of the Second Circuit should be reversed.

STATEMENT OF THE CASE

This is one of several climate change tort lawsuits that have been brought in federal courts across the country. These common law actions seek to restrict the greenhouse gas emissions of certain enterprises or to impose monetary liability on those entities as remedies for claimed effects of global warming. In each case, a district court dismissed the claims as presenting non-justiciable political questions and sometimes for lack of standing, based on the inherent unsuitability of a common law approach to issues of such socioeconomic complexity and sensitivity as greenhouse gas regulation and climate change.[1]

1. The claims in this case are based on specific current and future effects alleged to be the result of centuries of accumulation in the atmosphere of greenhouse gases which "trap[ ] solar energy and retard[ ] the escape of reflected heat." *Massachusetts* v. *EPA*, 549 U.S. 497, 505 (2007); see also, *e.g.*, Nat'l Research Council, *Climate Change Science* 1-10 (2001). The phrase "greenhouse gases" refers to a broad group of substances present in the atmosphere, including both man-made chemicals like chloro-fluorocarbons and many naturally occurring

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[1] Pet. App. 187a; *California* v. *Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009); *Comer* v. *Murphy Oil USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (unpublished ruling), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011); *Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

substances. Nat'l Research Council, *supra*, at 1-10. The most pervasive greenhouse gas emitted by anthropogenic activities is carbon dioxide. *Id.* at 9-10.

Greenhouse gases are emitted by a wider variety of sources than any other "air pollutant." *Id.*; see 73 Fed. Reg. 44354, 44402-03 (July 30, 2008). These sources include nearly every utility, factory, and motor vehicle in the United States, and virtually every home, office building, and farm. Nat'l Research Council, *supra*, at 1-10. For this reason, regulating greenhouse gas emissions presents a particularly complex, difficult, and consequential regulatory challenge. *Id.* This is especially true for the regulation of emissions from the combustion of fossil fuels. Because more than 80% of electricity in the United States is generated from fossil fuels, see U.S. Energy Info. Admin., *Annual Energy Review 2009*, at 9 tbl. 1.3 (Aug. 2010), any such regulation carries potentially massive and cascading consequences for the economic productivity and security of the Nation.

Predicting the long- and short-term effects of greenhouse gas regulation on global climate change is, moreover, extremely complex. Nat'l Research Council, *supra*, at 9-10. Greenhouse gases are unique in that they are both well-mixed and long-lived in the atmosphere, so that concentrations of greenhouse gases at a given time are determined by the emissions of all greenhouse gas sources worldwide over centuries, rather than by emissions from local, contemporaneous sources. See 75 Fed. Reg. 31514, 31529 (June 3, 2010). This means that, unlike regulation of most other pollutants, regulation of greenhouse gas emissions in one area or Nation or from one source or set of sources has no effect on greenhouse gas levels that is specific to that area or

Nation, and may even have no effect on global greenhouse gas levels because other sources (including those in other countries) may increase their own emissions. *Id.*; see also, *e.g.*, *North Carolina ex rel. Cooper* v. *TVA*, 615 F.3d 291, 302 (4th Cir. 2010).

2. The enormous complexities of these issues, both scientific and socioeconomic, are reflected in legislative and executive efforts regarding climate change in the United States. Those measures implement and rely on interagency collaboration and research to develop a gradual but comprehensive system of domestic greenhouse gas emissions standards, through statutes and regulations, while also seeking to negotiate a worldwide approach.

a. As early as 1978, Congress established a "national climate program," with the purpose of improving understanding of global climate change through research and international cooperation. National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601. Through the 1980s and 1990s, Congress enacted a series of statutes mandating further study of the impact of greenhouse gases and trends in climate change, Energy Policy Act of 1992, Pub. L. No. 102-486, tit. XVI, § 1601, 106 Stat. 2776, 2999; Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096; Energy Security Act of 1980, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75, and directing executive officials to coordinate international negotiations concerning global climate change, Global Climate Protection Act of 1987, Pub. L. No. 100-204, tit. XI, 101 Stat. 1407. In the Energy Independence and Security Act of 2007, Congress established nationwide greenhouse gas reduction targets to be satisfied through modified biofuel production methods, as implemented by EPA. Pub.

L. No. 110-140, 121 Stat. 1492. In 2008, Congress formally directed EPA to "develop and publish a ... rule ... to require mandatory reporting of [greenhouse gas] emissions above appropriate thresholds in all sectors of the economy of the United States." Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, tit. II, 121 Stat. 1844, 2128.

Recently, EPA has been pursuing greenhouse gas regulation under the Clean Air Act. First passed by Congress in 1963, and amended several times thereafter,[2] the Act is "a lengthy, detailed, technical, complex, and comprehensive response" to air pollution in the United States. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 848 (1984). The Act governs the regulation of "air pollutants," defined broadly to encompass "any physical, chemical, [or] biological ... substance ... [which] enters the ambient air." 42 U.S.C. § 7602(g). In *Massachusetts*, this Court held that greenhouse gases, including carbon dioxide, qualify as "air pollutants" under the Act. 549 U.S. at 528-29, 532.

Three parts of the Act—Titles I, II, and V—are particularly relevant for these purposes. Title I addresses the regulation of emissions of air pollutants from stationary sources. For any category of stationary sources that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," EPA issues a "standard of performance" requiring "the degree of emission limitation achievable through the application of the best system of emission reduction." 42 U.S.C. § 7411(a), (b). EPA may then,

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

in appropriate circumstances, require States to submit plans to control designated pollutants at existing facilities in light of those standards. *Id.* § 7411(d).

Title II of the Act addresses the regulation of mobile sources of air pollutants. It requires EPA to determine whether emissions of a pollutant from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7521(a)(1). If EPA makes an affirmative "endangerment" determination, it prescribes standards controlling these emissions. *Id.*

Title V sets forth permit requirements for operating major sources of air pollutants. It requires States to administer a comprehensive permit program for sources emitting air pollutants, as necessary to satisfy applicable requirements for each source under the Act. *Id.* § 7661c; see also *id.* § 7661a. Permits must indicate how much of which regulated air pollutants a source is allowed to emit, and the standards to which it is subject. *Id.* A source must prepare a compliance plan and certify compliance with applicable requirements, *id.* § 7661b; and state authorities must notify contiguous and other nearby States of permit applications that may affect them, *id.* § 7661d(a)(2). Affected States and others may petition EPA to object to a permit application, a step that may lead to EPA rejection of the permit. *Id.* § 7661d(b)(2). Denial of such a petition is subject to review in federal court. *Id.* § 7607(b).

In recent years, and continuing to this day, Congress has considered additional greenhouse gas legislation. The House of Representatives passed greenhouse gas "cap-and-trade" legislation in 2009, see H.R. 2454, 111th Cong. (2009), but the Senate did

not vote upon the measure. Most recently, several bills have been offered that would modify EPA's authority to regulate greenhouse gases. *E.g.*, S. 3072, 111th Cong. (2010). None of these proposals has been adopted.

b. Over the last two years, and in response to this Court's decision in *Massachusetts*, EPA has issued a series of findings and rules regarding greenhouse gas emissions.

EPA formally found in 2009 that greenhouse gas emissions from new motor vehicles contribute to air pollution that "endangers" public health and welfare and should be regulated under the Clean Air Act. 74 Fed. Reg. 66496 (Dec. 15, 2009). It issued a final rule establishing greenhouse gas emissions standards for certain model-year light-duty motor vehicles. 75 Fed. Reg. 25324 (May 7, 2010). Since then, EPA also has proposed greenhouse gas emissions standards for certain heavy-duty vehicles, 75 Fed. Reg. 74152 (proposed Nov. 30, 2010), and announced its intent to issue further, more stringent standards for other model-year light-duty vehicles, 75 Fed. Reg. 62739 (Oct. 13, 2010).

Shortly after finalizing the motor vehicle standards, EPA issued rules addressing greenhouse gas emissions by new or modified major stationary sources. 75 Fed. Reg. 31514. Those rules would potentially impose new Clean Air Act obligations on millions of sources throughout the United States, including facilities operated by these defendants; however, in recognition of the massive economic impact of such action, EPA included "tailoring" provisions intended to "phase-in" the regulatory scheme over five years. *Id.* These provisions define the "greenhouse gases" that are regulated in terms of the quantities emitted or increased by a source, and

in their initial phases apply to certain sources already subject to permitting requirements and, later, those emitting threshold quantities of greenhouse gases (generally, at least 75,000 or 100,000 tons per year of "carbon dioxide equivalent," reflecting adjustments accounting for the "global warming potential" of the particular greenhouse gas). *Id.* Regulated sources are required to obtain construction and operating permits from EPA or the appropriate state authority and otherwise to comply with relevant emissions restrictions. *Id.* EPA expects to propose, by July 2011, additional performance standards and guidelines for greenhouse gas emissions from new, modified, and existing electric utility facilities, including those operated by defendants, and to take final action by May 2012 on the proposed standards and guidelines. 75 Fed. Reg. 82392 (Dec. 30, 2010) (announcing proposed settlement agreement, addressing greenhouse gas emissions standards for certain electric generating facilities); see also 75 Fed. Reg. 82390 (Dec. 30, 2010) (announcing proposed settlement agreement addressing refineries).

c. In addition to these domestic measures, the United States has pursued international negotiations to address a worldwide approach to greenhouse gas emissions and climate change. The United States is a signatory to the United Nations Framework Convention on Climate Change (UNFCCC), *adopted* May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38, which established a multinational coalition to develop a coordinated approach to these issues. In 1997, member nations negotiated the Kyoto Protocol, *adopted* Dec. 11, 1997, 37 I.L.M. 22, which called for mandatory reductions in greenhouse gas emissions by developed nations. The protocol was

not, however, formally joined by the United States. See S. Res. 98, 105th Cong. (1997).

More recently, as a result of meetings in Copenhagen in 2009, the United States pledged to cut nationwide greenhouse gas emissions by 17 percent from 2005 levels by the year 2020. Letter from Todd Stern, U.S. Special Envoy for Climate Change, to UNFCCC (Jan. 28, 2010). Additional negotiations were held in December 2010 in Cancún, Mexico, and more talks are scheduled for the coming year in Durban, South Africa. John M. Broder, *Climate Talks End With Modest Deal on Emissions*, N.Y. Times, Dec. 12, 2010.

3. The complaints in this case were not filed pursuant to the Clean Air Act, or any other statute or regulation. J.A. 103-05, 145-47. Rather, they seek to impose emissions reductions on these defendants—which own and operate facilities that are among those subject to EPA's greenhouse gas regulations—based on claims that would be created and adjudicated under federal common law. *Id.*

Eight States, three nonprofit land trusts, and a municipality brought these complaints, seeking to hold these defendants "jointly and severally liable for ... global warming." *Id.* at 56-59, 117-19. The complaints allege that defendants operate facilities that emit carbon dioxide, which contributes to elevated atmospheric levels of greenhouse gases, which in turn contribute to climate change, which in turn contributes to a wide range of alleged future risks, including "increases in respiratory problems," "more droughts and floods," "wildfires," and "widespread loss of species and biodiversity." *Id.* at 57-58, 99-100. The pleadings describe climate change as a "public nuisance," purportedly actionable under federal common law, and demand an order "enjoining

each of the defendants to ... cap[ ] its emissions of carbon dioxide and ... reduc[e] those emissions by a specified percentage each year for at least a decade." *Id.* at 59, 110, 153.

The district court dismissed the claims as presenting non-justiciable political questions. Pet. App. 187a. It reasoned that a court could not resolve the claims without first determining an acceptable global level of greenhouse gas emissions and then determining which particular sectors and industries, and which individual entities within those sectors and industries, should be held responsible for reducing their emissions and by what amounts to achieve that acceptable global level. *Id.* at 183a-185a. These decisions, the district court found, necessarily involve a number of "policy determination[s]" of the type properly reserved for Congress, including "the implications of [emissions reductions] on the United States' ongoing negotiations with other nations concerning global climate change [and] on the United States' energy sufficiency and thus its national security." *Id.* In light of this conclusion, the district court found it unnecessary to address whether plaintiffs had standing or whether federal common law provided a valid basis for their claims. *Id.* at 180a n.6, 187a.

The Second Circuit reversed. *Id.* at 3a. It held that a cause of action for the alleged "nuisance" of climate change could be implied under federal common law, in light of the interstate nature of greenhouse gas emissions and climate change, and that the Clean Air Act did not displace that cause of action because EPA had not (at the time of the Second Circuit's decision) yet exercised authority under the Act to regulate greenhouse gas emissions. *Id.* at 88a. The panel further held that courts could rely on the

"reasonableness" standard of the Restatement (Second) of Torts to adjudicate the claims and that, because the case involved only "six domestic coal-fired electricity plants,"[3] judges would not have to address the broader "policy" issues identified by the district court. *Id.* at 26a, 34a, 119a. Finally, addressing standing, the panel found the allegation that these defendants "contribute" to climate change was adequate to satisfy constitutional requirements. *Id.* at 67a-73a.

The Second Circuit denied timely petitions for rehearing or rehearing en banc. *Id.* at 188a-191a.

SUMMARY OF ARGUMENT

The judgment below, which allows plaintiffs to pursue a federal common law nuisance action against defendants based on their alleged contribution to climate change, transgresses constitutionally and prudentially imposed limits on federal judicial power long recognized and enforced by this Court.

First, plaintiffs lack standing to bring these claims. To establish standing under Article III, a plaintiff must plead facts showing that the alleged harm is both "fairly traceable" to the challenged conduct and "redressable" by the remedy sought. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Neither the specific harms alleged nor climate change generally, however, is traceable to these defendants. According to plaintiffs' own allegations, climate change instead results from greenhouse gas emissions from billions of independent actors over centuries—emissions that have mixed in undiffer-

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[3] In fact, the complaints identify dozens of facilities owned or operated by these defendants in more than 20 States. J.A. 105-10, 148-53.

entiated fashion in the atmosphere to gradually increase average global temperatures. See J.A. 79-84, 134-36. Nor would plaintiffs' alleged injuries be redressed by the imposition of emissions caps on these five defendants. Plaintiffs ask that the court impose emissions limits that would achieve defendants' "*share* of the ... reductions necessary to significantly slow the rate and magnitude of warming." *Id.* at 102 (emphasis added). As their formulation of the requested relief makes plain, they do not and cannot show that their "remedy" alone would have any effect on climate change, let alone on their risk of injury.

Relying on this Court's decision in *Massachusetts*, the Second Circuit held that the allegation that these defendants "contribute[d]" to climate change through their emissions is sufficient to establish both that defendants' emissions caused the harms asserted and that reducing defendants' share of emissions will redress plaintiffs' injuries. Pet. App. 67a-73a. But, in *Massachusetts*, this Court considered whether the petitioner had standing to pursue a *statutory* cause of action enacted by Congress, not a common law nuisance claim. 549 U.S. at 516. That distinction is "of critical importance" to the standing inquiry. *Id.* This Court found that Congress's decision to create a specific legal right allowed a relaxed causation and redressability analysis for standing to enforce that right. Plaintiffs here do not invoke any statutory right. They seek a tort remedy against private defendants for particular harms, and thus this Court's decision in *Massachusetts* provides no support for the Second Circuit's holding. Plaintiffs must instead satisfy traditional causation and redress-ability requirements. Their allegations are plainly insufficient to do so.

Plaintiffs' claims are also barred by prudential standing restrictions. Those limitations preclude courts from adjudicating "generalized grievances more appropriately addressed in the representative branches." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004). The chain of causation alleged here would allow suits by and against virtually any enterprise on the planet, based on virtually any injury resulting from climatological or meteorological events. The judiciary is ill-suited to that kind of inquiry unless and until Congress establishes statutory requirements reflecting the policy judgments on which it must be based.

Second, even if plaintiffs had standing, their federal common law nuisance claim for injuries alleged to result from climate change should be dismissed. Federal courts have the power to create federal common law causes of action only when they are authorized to do so by federal statute or required to do so by constitutional need. There is no basis for such an "unusual exercise of lawmaking by federal courts" here. *Milwaukee II*, 451 U.S. at 314. Plaintiffs' claims are not based on any statute, and they do not implicate any constitutional interest or necessity that might warrant such an extraordinary exercise of federal common lawmaking power. *Tex. Indus., Inc.* v. *Radcliff Mats., Inc.*, 451 U.S. 630, 641 (1981).

In fact, numerous considerations militate powerfully against the creation of a federal common law cause of action here. This case is unlike prior nuisance cases, involving delineated regions and discrete numbers of sources, that have come before this Court. *Infra* pp. 35, 38-39. A federal common law claim for contribution to climate change is a cause of action almost any person could pursue in any

court against any governmental or economic actor. *Infra* pp. 18-19. It would require judges to resolve fundamental questions of social and economic policy regarding the response to climate change. And, it would result in a patchwork of conflicting regulation of greenhouse gas emissions, undermining any federal interest in coordinated emissions standards.

Furthermore, even if these claims were theoretically cognizable under federal common law, they would be displaced by the Clean Air Act. When Congress "addresse[s] the problem" previously governed by federal common law, the need for federal common law in that area "disappears." *Milwaukee II,* 451 U.S. at 314-315. Congress here has directly "addressed the problem": The Clean Air Act, like the Clean Water Act, establishes a comprehensive scheme for the regulation of pollutants within its scope. *Massachusetts*, 549 U.S. at 528-29, 532. This Court has held that greenhouse gases are an "air pollutant" under the Act, see *id.*, and States and others may request EPA to consider emissions restrictions similar to those they seek from the court in this case, *id.* at 516, 527. Cf. *Milwaukee II*, 451 U.S. at 325 (describing comprehensive nature of the Clean Water Act, which displaced federal common law water pollution claims). Moreover, plaintiffs' claims are displaced whether or not EPA exercises its full regulatory authority under the Act. Where Congress has legislated on a subject and delegated authority to an agency, federal common law claims are displaced regardless of whether, when, or how the agency then exercises its authority. See *id.* at 324.

Third, plaintiffs' claims present non-justiciable political questions. To determine the "share" of global greenhouse gas emissions reductions for which these defendants should be responsible, as plaintiffs

request, J.A. 102, a court would be required to predict potential environmental benefits that might result from imposing caps globally; to compare the social and economic value of the services these defendants provide, as well as services provided by all the other pertinent industry sectors alleged to contribute to global climate change (including manufacturing, transportation, agriculture, petroleum, chemical, and many others); and then to determine the "reasonable" overall level of emissions and "reasonable" emissions-reduction burden to place on defendants' sector and each individual defendant. See Pet. App. 32a-35a (citing "reasonableness" standard of Restatement (Second) of Torts). These decisions involve predictive judgments about every sector of the national and international economies and policy tradeoffs that turn on how the public values different potential economic, social, and environmental risks and benefits. They are precisely the kinds of judgments that are reserved for the political branches. See *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

The Second Circuit called this an "ordinary tort suit," Pet. App. 34a, but plainly it is not. It seeks to transfer to the judiciary standardless authority for some of the most important and sensitive economic, energy, and social policy issues presently before the country. The decision below should be reversed.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLIMATE CHANGE NUISANCE CLAIMS.

The doctrine of standing embraces "core" constitutional requirements, arising directly from Article III, as well as "prudential" considerations, "closely related to Art[icle] III concerns but

essentially matters of judicial self-governance." *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975); see also *Allen*, 468 U.S. at 750-52. Neither set of requirements is satisfied here.

A. These Claims Cannot Satisfy Core Constitutional Standing Requirements.

To satisfy the "irreducible constitutional minimum of standing," a plaintiff must plead facts showing an "injury in fact" that is "fairly traceable to the challenged action of the defendant" and "likely ... redressable by a favorable decision." *Lujan*, 504 U.S. at 560-61 (alterations omitted). Plaintiffs in this case cannot meet that standard. The injuries alleged are not traceable, much less "fairly traceable," to these defendants, and would not be redressed by imposing emissions caps on them.

The Second Circuit's contrary theory of standing, under which any of the billions of entities that "contribute" greenhouse gases into the atmosphere could be named as defendants in this and similar lawsuits, does not satisfy constitutional causation and redressability requirements and would effectively eliminate those requirements for climate change tort claims. The decisions on which the Second Circuit relied for that theory, most notably *Massachusetts* v. *EPA*, involved suits brought pursuant to congressionally conferred rights of action that can "give rise to a case or controversy where none existed before," 549 U.S. at 516, and do not apply to these non-statutory claims.

1. Plaintiffs' Alleged Injuries Are Not Fairly Traceable To Defendants' Emissions.

The attenuated link that plaintiffs posit between these defendants' emissions and their alleged injuries

suffers from at least two related and fundamental deficiencies. *First,* the complaint fails to allege a plausible "causal connection" between the injuries and the challenged conduct. *Lujan*, 504 U.S. at 560-61; see *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 560 (2007). *Second*, the alleged causal chain impermissibly depends upon "the independent action[s] of ... third part[ies] not before the court." *Bennett* v. *Spear*, 520 U.S. 154, 167-69 (1997).

a. The alleged chain of causation fails, first, to draw the necessary connection between the "injury to the complaining party" and "the putatively illegal action." *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771-73 (2000); *Warth*, 422 U.S. at 499. The complaints assert that these defendants have contributed to climate change *generally* through their emissions, and that climate change contributes *generally* to increased risks of injuries. See J.A. 79-86, 134-39. But the pleadings never allege the requisite direct connection between these defendants' emissions and the individual risks to which plaintiffs are allegedly exposed.

To the contrary, plaintiffs' own allegations conclusively demonstrate that no such link could reasonably be drawn. The complaints trace climate change to greenhouse gas emissions from billions of sources worldwide over the last several centuries, *id.* at 82, 135, and identify as effects of climate change nearly *every* climatological and meteorological occurrence on the planet, including (among others) "sea-level rise," "the frequency of [damaging] storm[s]," and "an increased likelihood of drought," as well as "the decline of animal and plant populations." *Id.* at 84-102, 137-45. Under this theory, a storm in New York City in 2011 could be traced back to greenhouse gas emissions from a factory in China

that same year, or just as easily to emissions from a California farm in 1961. And those same emissions might later be re-traced forward to a flood in San Francisco in 2111, or to a loss of habitat in the Florida wetlands in 2061. See *id.* at 89, 143 ("Accelerated sea level rise caused by global warming will continue for hundreds of years."). Indeed, emissions from any single facility in the United States might be deemed the "cause" of any adverse climatological or meteorological event anywhere in the world over the next year, or anytime in the next hundred years.

In other words, taking the alleged chain of causation to its logical conclusion, any entity on the planet could sue any other for a risk or injury that could be tied to any natural force, so long as it is alleged to have been affected by global climate change. Responsibility for much of what would traditionally have been called "acts of God" could now be imposed on any entity in the world.

This is not a valid theory of standing. It is not enough for a plaintiff to allege that the defendant's conduct may generally contribute to a risk to "society" or to some group of parties of which the plaintiff is a part. *Gladstone Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 111-14 (1979); see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998). Instead, a complaint must show an actual causal connection between the particular risk or injury to the plaintiff and the particular conduct of the defendant. *Allen*, 468 U.S. at 752, 755-56, 764-66; see *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615-16 (1989) (opinion of Kennedy, J.). Indeed, a central purpose of standing doctrine is to limit the number of potential plaintiffs and defendants for any given claim to those with a distinct interest in the subject matter at issue. See

Allen, 468 U.S. at 752, 755-56. The theory advanced by plaintiffs accomplishes the opposite: it allows suits by each against all, for any injury resulting from virtually any climate-related natural event.[4]

In nonetheless declining to dismiss the case for lack of standing, the court of appeals placed heavy emphasis on the fact that the case was "at the pleading stage." Pet. App. 42a-44a. With respect to causation, however, the pleadings in this case make only conclusory allegations that emissions from each of these defendants contribute to injuries from climate change. As this Court recently affirmed, such "conclusory" statements are insufficient. *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1950-51 (2009); *Twombly*, 550 U.S. at 560; see also, *e.g.*, *Warth*, 422 U.S. at 507. The pleadings must, instead, move the claims "across the line from conceivable to plausible." *Iqbal*, 129 S. Ct. at 1950-51. The allegations here fail to do so. They assert a link between greenhouse gas emissions and climate change generally, but they never allege facts that plausibly could explain how any particular defendant's emissions, as opposed to other emissions from countless other actors now and in the past, result in climate change. To go one step further, and suggest that emissions from one of these defendants are the "cause" of a particular risk attributed to

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[4] This case thus bears little resemblance to the tort "contribution" cases cited by the Second Circuit. Pet. App. 69a-70a. Those cases involved a limited, ascertainable set of contributing forces that combined at a point in time to produce a discrete effect. *See* Restatement (Second) of Torts §§ 432, 840E, 875. In such cases, the restricted group of relevant actors and direct link between contributing forces and discrete effect gave rise to a plausible inference that all might be "substantial factors" in causing the injury. *See id.*; *see also* Charles E. Carpenter, *Concurrent Causation*, 83 U. Pa. L. Rev. 941, 941-45 (1935).

climate change—for example, the risk of a heat-related death in Los Angeles in 2100, J.A. 87-88—is even more untenable.

b. The alleged chain of causation also fails because it depends "on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO*, 490 U.S. at 615 (opinion of Kennedy, J.), *quoted in Lujan*, 504 U.S. at 562. Climate change, according to the complaints, "already has begun" and is attributable to greenhouse gas emissions from billions of independent sources around the world over the course of centuries. J.A. 57, 79-84, 134-36. Plaintiffs further acknowledge that the injunctions they seek would merely "achieve [these defendants'] *share* of the ... reductions necessary to significantly slow the rate and magnitude of warming." *Id.* at 102 (emphasis added).

The link alleged between climate change and these defendants' emissions is thus wholly insufficient. Climate change has commenced and will continue, according to the complaints, with or without these defendants' emissions. See *id.* at 57, 79-84, 134-36. And it will abate or slow, again according to the complaints, only if sources other than defendants simultaneously reduce their emissions—a possibility that is entirely speculative. *Id.* at 102. These defendants therefore cannot be said to "cause" climate change in any reasonable sense of the term, much less to "cause" the increased risks of injuries that plaintiffs allege will follow from climate change.

Plaintiffs' characterization of defendants as possible "contributors" to climate change, through their greenhouse gas emissions, does not establish causation for purposes of standing. In *Allen* v.

Wright, 468 U.S. 737 (1984), for example, parents of minority schoolchildren lacked standing to challenge IRS policy concerning tax exemptions to racially segregated private schools in part because, even if those exemptions might contribute to continued segregation in public schools, that injury ultimately resulted from the independent enrollment decisions of other parents. *Id.* at 757-59. In *ASARCO Inc.* v. *Kadish*, 490 U.S. 605 (1989), a teachers association lacked standing to challenge a state law that transferred leasing revenue from school trust funds to other parties because the trust funds were also subsidized by the State, and "the State might reduce its supplement ... so that the [total] money available for schools would be unchanged." *Id.* at 614 (opinion of Kennedy, J.). And, in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), the Court dismissed for lack of standing a lawsuit in which the plaintiffs claimed to be injured by agencies' funding of projects that posed risks to endangered species when the agencies at issue "generally suppl[ied] only a fraction of the funding for [the] ... project[s]" and "nothing ... indicate[d] that the projects ... will either be suspended, or do less harm to listed species, if that fraction is eliminated." *Id.* at 571 (plurality); see also *Allen*, 468 U.S. at 759 n.24 (noting that, when the "relief requested [is] simply the cessation of ... allegedly illegal conduct," the traceability and redressability analyses are "identical").

This Court has found standing based on allegations that a defendant "contributed" to an injury that was caused by the separate decisions of third parties only when the defendant's conduct had a "determinative or coercive effect" in producing those third-party decisions and therefore the ultimate injury. *Bennett*, 520 U.S. at 169. In such circumstances, the third-

party decisions are not "independent," because they are themselves traceable to the defendant's actions. See, *e.g.*, *id.* That principle is not applicable here. The chain of events leading to climate change, according to the complaints, depends upon the emissions of greenhouse gases by innumerable independent actors both past and present, J.A. 79-84, 134-36, and those sources neither were nor are directed, or even influenced, by these defendants in any way. An injury that is alleged to be caused by the collective operations of the global economy over generations is not "caused" by, and cannot be "traced" to, the handful of individual defendants named here.

2. The Alleged Harms Will Not Be Redressed By The Relief Sought.

For similar reasons, plaintiffs also do not, and cannot, plausibly allege that the relief they seek will redress their alleged harms. As noted, the complaints assert only that the injunctions requested would "achieve [these defendants'] *share* of the ... reductions necessary to significantly slow the rate and magnitude of warming." J.A. 102 (emphasis added). Put differently, plaintiffs' theory concedes that broader reductions are "necessary" to slow or reverse climate change and to prevent future harm to the interests they have identified; and the relief they seek here represents some unknown increment of those broader reductions.

Such allegations are plainly insufficient to support standing. Although Congress and federal agencies, such as EPA, may attack environmental, social, or economic problems through a series of "incremental step[s]," *Massachusetts*, 549 U.S. at 524, a court is not a legislator or a regulator. A federal court may not enter relief against a particular tort defendant unless the relief sought from that defendant will

redress the plaintiff's injury. *Lujan*, 504 U.S. at 562; see also *ASARCO*, 490 U.S. at 615 (opinion of Kennedy, J.). The complaints in this case do not and cannot allege that the relief requested—only these defendants' "share" of global emissions reductions—would prevent or mitigate plaintiffs' claimed harms.

Equally to the point, the vast bulk of greenhouse gas emissions are from sources that are not parties to this case and would not be reached by a decree in this case; indeed, to an increasing degree, most of these sources are outside the United States and may not be reached even by follow-on cases. Thus, there is no basis to believe that reductions ordered here from particular sources would lead to *any* overall reduction, or prevent or even slow the ongoing global warming effect that plaintiffs allege. To the contrary, it is just as likely that other sources would *increase* their emissions if these defendants limit theirs, thereby negating the purported benefit achieved by these defendants' "share" of emissions reductions in this country. See, *e.g.*, *North Carolina*, 615 F.3d at 302. Even if independent sources might not increase their emissions—so that a decree in this case might result in some overall reduction in worldwide greenhouse gases—that possibility and its scope are "too uncertain to satisfy the redressability prong of federal standing requirements." *ASARCO*, 490 U.S. at 615 (opinion of Kennedy, J.).

3. The Standing Analysis In Statutory Rights Cases, Including *Massachusetts* v. *EPA*, Does Not Apply.

The Second Circuit nevertheless concluded that a plaintiff claiming injury from climate change has standing to sue any defendant that "contributes" to climate change through greenhouse gas emissions. In support of this theory, it relied largely on this

Court's decision in *Massachusetts* v. *EPA*, as well as lower court decisions in Clean Water Act cases such as *PIRG* v. *Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990). Pet. App. 69a-75a. Those cases, however, addressed *statutory* causes of action, where the litigant brought suit to redress a *statutory* violation. 549 U.S. at 516-17. Their holdings have no application in a non-statutory, common law case such as this.

In *Massachusetts* and other cases, this Court has characterized the statutory basis of a cause of action—or, conversely, the lack thereof—as "of critical importance to the standing inquiry." *Id.* at 516. This is so because "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)); see, *e.g.*, *Warth*, 422 U.S. at 500; *Sierra Club* v. *Morton*, 405 U.S. 727, 732-35 (1972). When a statute confers upon a class of persons an interest in enforcement of its provisions, and an individual within that class suffers a concrete harm "of a kind" the statute was "designed to protect [against]," that individual may under some circumstances have standing to bring suit against the party that caused the statutory violation as a means of vindicating the statutorily protected interest, even if the litigant cannot "meet[] all the normal standards for redressability and immediacy" that would apply in the absence of a statutory cause of action. *Massachusetts*, 549 U.S. at 517-18; *FEC* v. *Akins*, 524 U.S. 11, 20 (1998); *Lujan*, 504 U.S. at 572-73 & nn.7-8, 578; see *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000); *United States* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S.

669, 686-89 (1973); *Morton*, 405 U.S. at 736-38; *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153-55 (1970).[5]

This explains why in *Massachusetts* the Court concluded that the State had standing to press its claim against EPA. That claim did not seek common law injunctive relief against the alleged nuisance of climate change; it was brought pursuant to an express statutory cause of action under the Clean Air Act, granting the State the right "to challenge agency action unlawfully withheld." 549 U.S. at 516-17 (citing 42 U.S.C. § 7607(b)(1)). Through the claim, the State sought to compel EPA to exercise its statutory authority under the Act to consider, in response to a rulemaking petition, whether greenhouse gas emissions from motor vehicles endanger the public and should be regulated. *Id.* at 514-16. This Court found that the State had standing to bring the claim, even though there was only a "possibility" that EPA would ultimately exercise its discretion to regulate those emissions, because the relief requested would, at a minimum, redress the statutory violation and vindicate the statutorily protected interest in ensuring that EPA makes properly grounded judgments about "air pollutants" that may endanger the public. *Id.* at 518, 524-26.

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[5] *See also Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) ("Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."); *cf. Warth*, 422 U.S. at 501 ("[P]ersons to whom Congress has granted a right of action ...may invoke the general public interest in support of their claim."). The process by which Congress "define[s] injuries and articulate[s] chains of causation" might also be described as "elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously in-adequate in law." *Lujan*, 504 U.S. at 578.

The Court emphasized that the claims in *Massachusetts* were directed at a regulatory decision under a federal statute. *Id.* at 524-26. Congress and federal agencies need not address "massive problems in one fell regulatory swoop," the Court explained, but may instead "whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed." *Id.* For that reason, the fact that the regulations sought by the State in *Massachusetts* might not "reverse" climate change or mitigate its effects did not preclude standing. *Id.* Because Congress had authorized EPA to address the alleged risks of climate change through "incremental" regulation, *id.*, and had created a cause of action to ensure that EPA properly exercised its authority in considering whether to undertake such regulation, the State had standing to vindicate its statutorily conferred interest in seeking the incremental protection from those risks that regulation might afford. *Id.*

The claims in this case stand on an entirely different footing, because they were brought not to vindicate a statutory interest but to impose individualized injunctions under common law. A court is not a regulator and lacks the discretion of a legislature to craft "tentative" remedies designed to "whittle away" at a larger problem. *Id.* In contrast, in a case seeking individual relief under the common law, a federal court may enter judgment against a particular defendant only where the plaintiff's injury is "traceable" to that defendant and where relief against the defendant would "redress" that injury. In the absence of a statutory right and cause of action, there is no basis to "loosen the strictures of the ... standing inquiry" to allow litigants to sue based on

nothing more than a possible "contribution" to a risk of injury. *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009); *Lujan*, 504 U.S. at 562; see also *ASARCO*, 490 U.S. at 615 (opinion of Kennedy, J.).

The circuit court decisions in *Powell Duffryn* and other Clean Water Act cases on which the court of appeals erroneously relied, Pet. App. 69a-72a, are consistent with that understanding. Those cases interpret the Clean Water Act to create and confer a substantive statutorily protected interest in the enforcement of discharge permits issued under that Act. See, *e.g.*, *Powell Duffryn*, 913 F.2d at 72. They then hold that a person has standing to sue for a violation of the statute (*i.e.*, a "discharge[of] some pollutant in concentrations greater than allowed by [a] permit") if he or she can relate that violation to an actual concrete harm—for example, by showing that the pollutant was discharged "into a waterway in which the plaintiff[ ] ha[s] an interest" and is of a type that likely "causes or contributes to the kinds of injuries alleged by the plaintiffs." *Id.*; see also, *e.g.*, *Friends of the Earth, Inc.* v. *Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc); *Sierra Club* v. *Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996).

Thus, because the Clean Water Act authorized EPA to address the harms of water pollution through discharge limits, and created a private right of action to enforce these limits, the plaintiffs had standing to vindicate their statutorily conferred right to enjoy waterways unmarred by the very types of aesthetic or other injuries that the federal permits were intended to prevent. See, *e.g.*, *Powell Duffryn*, 913 F.2d at 73 (plaintiffs had standing based on aesthetically offensive oily and greasy sheen where permit limited amounts of oil and grease that could be discharged).

By contrast, applying the *Powell Duffryn* analysis in the absence of an alleged discharge in excess of statutorily-authorized federal limits, as the Second Circuit suggested, Pet. App. 71a, ignores the fundamental (indeed, the sole) basis for standing in that and similar cases: that Congress had defined the discharge as a statutory violation and granted individuals a cause of action to remedy it. Compare Pet. App. 70a-71a (concluding that standing requirement in *Powell Duffryn* that there be a discharge in excess of statutory limits is not "meaningful" in this case "because there is no statute") with *Kivalina*, 663 F. Supp. 2d at 879-80 & n.7 (describing Second Circuit's reasoning as "circular").

This Court has never applied such an analysis outside of the statutory rights context or suggested, as the Second Circuit did, Pet. App. 70a-73a, that the statutory basis for a claim is immaterial to standing. To the contrary, the Court consistently has considered this fact "of critical importance" to the standing inquiry. *Massachusetts*, 549 U.S. at 516.[6] Whether or not Congress would have the power to authorize a suit such as this, it has not done so, and because plaintiffs cannot otherwise satisfy Article III traceability and redressability requirements, their claims should be dismissed.

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[6] *See also Summers*, 129 S. Ct. at 1151 (Kennedy, J., concurring) ("This case would present different considerations if Congress had sought to provide redress for a concrete injury 'giv[ing] rise to a case or controversy where none existed before.'"); *Warth*, 422 U.S. at 513-14 (rejecting standing and noting that the case's "critical distinction" from *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), where standing was upheld in factually analogous circumstances, was that the claims in *Trafficante* arose under a federal statute).

B. Prudential Standing Principles Also Bar These Claims.

In addition to "core" constitutional requirements, the federal judiciary observes "prudential" limitations on its authority. *Valley Forge Christian Coll.* v. *Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982). Most relevant here is "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." *Elk Grove*, 542 U.S. at 12.

The claims in this case constitute precisely this type of "generalized grievance." They challenge conduct—the emission of greenhouse gases—that is common to (and necessary for) virtually every enterprise on the planet. *Supra* pp. 3-4. And they assert impacts from climate change that will allegedly be felt by virtually every person around the world. *Supra* pp. 18-19. It is hard to conceive of a grievance more "generalized" than this.

The nature of these claims, as well as the policy judgments necessary to their consideration, see *infra* pp. 47-51, further confirm that they are "more appropriately addressed in the representative branches." *Elk Grove*, 542 U.S. at 12. Indeed, judicial forbearance is "especially important" here: These claims are asserted under federal common law, unsupported by any statute and lacking "manageable standards" for their adjudication, and Congress and EPA are engaged in ongoing legislative and regulatory responses to issues of greenhouse gas emissions and climate change. U.S. Cert. Br. 13; see also *supra* pp. 5-10. For these reasons, and those further explained by the United States in its brief in

support of certiorari, the claims are barred by principles of prudential standing.[7]

II. A CLIMATE CHANGE NUISANCE CAUSE OF ACTION CANNOT BE MAINTAINED AS A MATTER OF FEDERAL COMMON LAW.

Even if plaintiffs had standing, their federal common law cause of action should be dismissed. This Court's decisions make clear that federal courts do not have authority to create a federal common law nuisance cause of action to address climate change. Moreover, even if such a claim otherwise would exist, it has been displaced by, at a minimum, Congress's enactment of the Clean Air Act. That Act establishes a "comprehensive" regulatory process, *Chevron*, 467 U.S. at 848, through which EPA can determine whether and how greenhouse gas emissions should be regulated based on proceedings in which interested persons, including plaintiffs here, may seek emissions restrictions. Cf. *Milwaukee II*, 451 U.S. at 314

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[7] The Second Circuit suggested that, if the States satisfied the requirements for *parens patriae* standing, the prudential limitation on the adjudication of generalized grievances would not apply. Pet. App. 53a-54a. But the doctrine of *parens patriae* simply allows a State to sue on behalf of its citizens despite the independent prudential prohibition on "a litigant's raising another person's legal rights." *See Elk Grove*, 542 U.S. at 12; *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 611-12 (1982) (Brennan, J., concurring); R. Fallon, D. Meltzer, & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 289-93 (5th ed. 2003); *see also Massachusetts*, 549 U.S. at 520 (noting "special solicitude" owed to State's assertion of a quasi-sovereign interest for purposes of *parens patriae*). That doctrine does not eliminate other jurisdictional barriers, prudential or otherwise. *E.g.*, *Massachusetts*, 549 U.S. at 520-26 (addressing "core" constitutional standing after finding that States satisfied *parens patriae*).

(holding that the Clean Water Act displaces federal common law water pollution claims).

A. There Is No Federal Common Law Nuisance Cause Of Action To Address Alleged Effects of Climate Change.

"There is no federal general common law." *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938).[8] That is because the Constitution vests general lawmaking power in Congress, not the judiciary. Accordingly, since *Erie*, this Court has recognized that courts have only a highly "restricted" authority to create federal common law. *Tex. Indus.*, 451 U.S. at 640.

This limited authority has been exercised most often to create federal common law rules of decision to resolve claims that litigants are otherwise authorized to bring under state law. See *infra* pp. 34-35. This case, however, involves the far rarer use of federal common law to create a cause of action. Because it is such an extraordinary exercise of power for federal courts to themselves authorize the invocation of their authority to hear cases, this Court

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[8] For much of the Nation's first 150 years, it was "clear" that "there is no"—and "can be no"—"federal common law of the United States." *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 8 (1888); *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 658-59 (1834); *see* Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. 1231, 1274-75 (1985). During this period, the "common law" applied by federal courts was not "federal," but was characterized as a "general" corpus of legal principles—a "transcendental body of law outside of any particular State"—which any court, state or federal, could draw from and develop. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 725-27 (2004). *Erie* rejected this view, holding that common law exists only as authorized by a sovereign entity. 304 U.S. at 78-79. At that point, it became necessary to address whether and when *federal* common law might be available. *Sosa*, 542 U.S. at 725-27; *see* Jay, *supra*, at 1322.

has, for over 30 years, repeatedly held that federal courts should no longer create or expand causes of action. For example, although implying causes of action from statutes was a classic exercise of federal common lawmaking power, see, *e.g.*, Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 421 (1964), the Court more recently has repudiated the practice, *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001). It likewise has refused to expand causes of action previously implied from statutes, *e.g.*, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), or "to extend *Bivens* liability to any new context or new category of defendants," *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67-68 (2001). The Court also declined to create a federal common law cause of action for violations of international legal norms—even though the Alien Tort Statute authorized such judicial lawmaking. *Sosa*, 542 U.S. at 727-28. "[A] decision to create a private right of action," the Court explained, "is one better left to legislative judgment in the great majority of cases." *Id.*

The federal "nuisance" cause of action asserted in this case does not arise under any federal statute. Nor do any of the relevant—and very limited—concerns that have justified creation of federal common law causes of action in the past support such an "unusual exercise of lawmaking by federal courts" here. *Milwaukee II*, 451 U.S. at 314. Moreover, even if there were a basis for such an exercise, the exceptional complexity and scope of the issues raised by this lawsuit demonstrate that creation of a "climate change" cause of action falls outside the courts' "limited" and "restricted" federal common lawmaking powers.

1. This Court has upheld the creation of federal common law in only three "enclaves": (i) "[controversies] concerned with the rights and obligations of the United States," (ii) "admiralty cases," and (iii) "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations." *Tex. Indus.*, 451 U.S. at 641; see also *Sosa*, 542 U.S. at 725-30; *Atherton* v. *FDIC*, 519 U.S. 213, 225-226 (1997). The "uniquely federal interests" that have justified such exercises of judicial lawmaking are "few" and "restricted." *Tex. Indus.*, 451 U.S. at 641. Although these interests have distinct "constitutional underpinnings," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423, 426-27 & n.25 (1964), all ultimately rested on some perceived notion of constitutional necessity justifying the creation of federal common law.

Most typically, courts have fashioned federal common law rules of decisions in situations where they have deemed it unacceptable under our constitutional scheme for certain substantive rights to be determined under state law. Cases involving the rights and obligations of the United States are paradigmatic examples of such federal common lawmaking. See, *e.g.*, *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943); see also *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 505-06 (1988) (recognizing "government contractor" defense as "closely related" to rights and obligations of the United States). Other examples have included recognition of an affirmative defense derived from an interstate compact governing the allocation of interstate waters, see *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104-05 (1938), and much of admiralty law, see *N.W. Airlines, Inc.* v. *Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95-96 (1981).

Much more rarely, courts have concluded that the structure of our Constitution and the status of the States in our federal system justify creation of a federal common law cause of action. For example, because the Constitution guarantees States a forum to adjudicate their disputes (having denied States the right to address them by treaty or force), the Court recognized a cause of action for the resolution of state boundary disputes. See *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 723-31 (1838); cf. *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951) ("A State cannot be its own ultimate judge in a controversy with a sister State."); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1322-23 (1996). The Court similarly recognized a cause of action to resolve "the conflicting rights of States," *Tex. Indus.*, 451 U.S. at 641, when one State sued another State to abate a discrete transboundary nuisance, see, *e.g.*, *Missouri* v. *Illinois*, 180 U.S. 208 (1901); *North Dakota* v. *Minnesota*, 263 U.S. 365 (1923). And, at a time when Congress was thought to lack the power to provide any remedy for such harms[9] (and before *Erie* had rejected the idea of a "general common law" enforceable by federal courts), the Court in one case relied on this same reasoning to resolve a discrete nuisance claim brought by the State of Georgia against a company in Tennessee, after Georgia had made "a vain application to the State of Tennessee for relief." *Georgia* v. *Tenn. Copper Co.*, 206 U.S. 230, 236 (1907).

The Second Circuit assumed that the present case qualifies as an "interstate ... dispute[ ]," warranting the creation of federal common law, simply because it

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[9] *See, e.g., United States* v. *E.C. Knight Co.*, 156 U.S. 1 (1895).

can be characterized as an "interstate pollution dispute." Pet. App. 99a-100a. But this Court has never created a federal common law cause of action merely because a plaintiff alleges wrongs with transboundary effects. Instead, recognition of the federal common law cause of action rested on a perceived constitutional necessity wholly lacking here. See *Atherton*, 519 U.S. at 224 ("To find a justification for federal common law in this argument ... is to substitute analogy or formal symmetry for the controlling legal requirement, namely, the existence of a need to create federal common law arising out of a significant conflict or threat to a federal interest."); see also *California* v. *Sierra Club*, 451 U.S. 287, 296 n.7 (1981) (prior cases adjudicating "nuisance" claims did not somehow "federalize" those claims or "establish a general federal law of nuisance").

To be sure, the opinion in *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*), declares broadly that "[w]hen we deal with air and water in their ambient or interstate aspects[ ] there is a federal common law," *id.* at 103. But this statement is plainly *dicta*. First, the case involved "conflicting rights of States," as one State (*i.e.*, Illinois) complained of pollution to its waters caused by the "instrumentalit[y]" of another State (*i.e.*, the City of Milwaukee and its sewerage authority, acting under authority of and in conformance with Wisconsin law). *Id.* at 94-97. Second, and more fundamentally, *Milwaukee I* is properly understood as basing its holding not on the type of constitutional necessity that had theretofore justified the extraordinary use of judicial lawmaking power to create a federal common law cause of action, but on then-existing "federal environmental protection statutes," *id.* at 101-04 & n.5, which the Court

interpreted to contain remedial gaps that (under the then-prevailing view of implied causes of action) allowed for and authorized development of federal common law. See *id.* (citing *Textile Workers Union* v. *Lincoln Mills of Ala.*, 353 U.S. 448 (1957), interpreting Labor Management Relations Act as granting lawmaking authority to the federal courts); see also *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 488 (1987) (explaining that *Milwaukee I* found that the terms of the Clean Water Act were "not sufficiently comprehensive"); *Milwaukee II*, 451 U.S. at 324 n.18 (same). Indeed, according to the Court in *Milwaukee I*, the federal statute then governing water pollution appeared to invite the creation of federal common law, as it "ma[de] clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters"; authorized the Attorney General to bring an equitable "abatement" action in federal court; and expressly provided that "[s]tate and interstate action[s] to abate pollution of interstate or navigable waters shall be encouraged and shall not ... be displaced by Federal enforcement action." 406 U.S. at 102-04 (quoting 33 U.S.C. §§ 1151, 1160 (1970)).[10]

Milwaukee I, therefore, cannot properly be understood as having jettisoned the notions of constitutional necessity that justified recognition of a federal common law cause of action for States to sue to abate discrete interstate nuisances. Nor, for the same reason, should it be read to have authorized courts to create federal common law to deal

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[10] The Court later held in *Milwaukee II* that the Clean Water Act displaced federal common law water pollution claims, 451 U.S. at 325, and it has since rejected the more expansive view of implied causes of action reflected in cases like *Milwaukee I*, *see Alexander*, 532 U.S. at 287.

pervasively and comprehensively with all matters relating to "air and water in their ambient or interstate aspects."[11]

2. No notion of constitutional necessity justifies recognition of the extraordinary federal common law "nuisance" cause of action that plaintiffs purport to assert in this case. This case raises no claims of conflicting States' rights. And, even if it did, no theory of constitutional necessity compels federal courts to provide a remedy, as it is now understood that Congress is fully empowered to do so under the Commerce Clause. Thus, even if Congress had wholly failed to address the issue—which is not the case, see *infra* Part II.B—courts would lack authority to recognize the right that plaintiffs assert. In addition, two overarching factors militate conclusively against "exercising [the] innovative authority over substantive law" necessary to recognize the cause of action sought here. *Sosa*, 542 U.S. at 726; see *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68-69 (1966) (noting factors).

First, the nature and complexities of these issues, and the possible ramifications of recognizing a cause of action, strongly counsel against any exercise of judicial lawmaking in this particular context. The nuisance cases this Court adjudicated in the past all

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[11] To the extent *Milwaukee I* could be so read, this Court should disavow such a reading as fundamentally at odds with the now-prevailing understanding of the federal courts' limited and restricted authority to create federal common law causes of action. *Supra* pp. 32-33. Indeed, as explained below, such an understanding of *Milwaukee I* would arrogate to federal courts responsibility for addressing issues that are wholly unfit for resolution by courts using federal common law and that, under our constitutional scheme, are properly resolved by the political branches.

involved a localized problem that affected a discrete area and was traceable to a discrete source—*i.e.*, nuisances "of simple type." See, *e.g.*, *Tenn. Copper*, 206 U.S. at 237; *Missouri*, 180 U.S. 208. The claims here—alleging that defendants' greenhouse gas emissions combine with emissions from countless other activities around the globe that have been accumulating for centuries to create a worldwide problem—bear no resemblance to those cases or any other previous tort claim.

To hold that anyone affected by climate change may maintain a claim against any source of greenhouse gas emissions under the federal common law of "nuisance" would expand the traditional conception of that cause of action beyond all recognizable bounds. Indeed, it would be unprecedented and transformative, resulting in an essentially limitless set of potential plaintiffs and defendants, see *supra* pp. 18-19, and a judiciary asked to design, enforce, and (over time) modify a set of piecemeal regulatory decrees of great intricacy and enormous consequence for the Nation's energy supply and economic security (and for the international climate change negotiations in which the United States is presently engaged, see *supra* pp. 9-10). The effects would be massive and unpredictable. *North Carolina*, 615 F.3d at 306 ("There is no way to predict the effect on ... utilities generally of supplanting operating permits with mandates derived from public nuisance law, but one suspects the costs and dislocations would be heavy indeed."). Addressing these issues is a task for "those who write the laws, [not] those who interpret them." *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 89 (1994); *Tex. Indus.*, 451 U.S. at 640.

Second, recognition of this cause of action would not serve, and could undermine, any federal interest in

coordination of air emission regulation. No standards would direct judges and juries in assessing a "reasonable" level of emissions in any individual case, other than the "vague and indeterminate" mandate of the Restatement, *Milwaukee II*, 451 U.S. at 317, to "weigh[ ] the gravity of the harm against the utility of the conduct," Restatement (Second) of Torts § 821B cmt. e. Different jurists would invariably "balanc[e] the equities" (Pet. App. 35a) differently, come to different conclusions, and impose different forms of relief against different sources of greenhouse gas emissions. The result would be a "balkanization of clean air regulations and a confused patchwork of standards." *North Carolina*, 615 F.3d at 296.

The judgment of the Second Circuit would thus not only "revert ... to the understanding of private causes of action that held sway 40 years ago," *Alexander*, 532 U.S. at 287, creating a "new substantive legal liability without legislative aid and as at the common law," *Bush* v. *Lucas*, 462 U.S. 367, 390 (1983), based on the court's notion of what rights and remedies would best serve the public interest. It would do so in a context far *more* complex, policy-laden, and consequential than any at issue in the prior cases on which the court of appeals relied for support.

B. Any Federal Common Law Climate Change Nuisance Cause Of Action Has Been Displaced.

Even if there would otherwise have been a federal common law cause of action to address the "nuisance" of climate change, any such cause of action has been displaced by Congress. Federal common law is relied upon as a "necessary expedient" in the "absence of an applicable act of Congress." *Milwaukee II*, 451 U.S. at 314-15. For that reason, when Congress "addresse[s] the problem" previously governed by

federal common law, "the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* Congress has addressed the issue of greenhouse gas emissions: this Court held in *Massachusetts* that the Clean Air Act defines those emissions as an "air pollutant," 549 U.S. at 528-29, 532, and required EPA to consider regulation of those emissions consistent with its statutory duties, *id.* Just as the Clean Water Act displaced the federal common law water pollution claims asserted in *Milwaukee II*, the Clean Air Act displaces the common law air emission claims asserted here. See *Milwaukee II*, 451 U.S. at 325 ("the invocation of federal common law ... in the face of congressional legislation ... is peculiarly inappropriate in areas as complex as water pollution control," the problems of which are "particularly unsuited to the [*ad hoc* adjudicative] approach inevitable under a regime of federal common law").

1. The Clean Air Act, like the Clean Water Act, is a "comprehensive" regulatory scheme to address environmental pollution. *Chevron*, 467 U.S. at 848; see also 42 U.S.C. § 7401. It vests in EPA responsibility to consider regulating any "air pollutant," defined broadly to encompass "any physical, chemical, [or] biological ... substance ... [which] enters the ambient air," 42 U.S.C. § 7602(g); authorizes EPA to require, when it makes certain findings, that mobile and stationary sources meet technology- and air quality-based emission standards, *id.* §§ 7409, 7411, 7502, 7521; requires major sources to secure operating permits as well as pre-construction permits that establish emissions limitations, *id.* §§ 7475(a), 7661b(a), 7661c(a); and grants EPA rights to enforce those limitations through administrative and judicial proceedings, *id.* §§ 7413, 7477. The Act is "sweeping" and "capacious."

Massachusetts, 549 U.S. at 528-29, 532; see *North Carolina*, 615 F.3d at 298 ("To say this regulatory and permitting regime is comprehensive would be an understatement.").

Throughout the debates and reports of Congress, its sponsors repeatedly characterized the Act as "comprehensive," and commented on its expansive reach. *E.g.*, 136 Cong. Rec. S592 (daily ed. Jan. 31, 1990); *id.* at H2511 (daily ed. May 21, 1990); *id.* at H12845 (daily ed. Oct. 26, 1990). Like the Clean Water Act, the legislation was "self-consciously comprehensive." *Milwaukee II*, 451 U.S. at 319. Nothing in the Act or legislative history suggests that Congress intended to leave "room for courts to attempt to improve on that program with federal common law." *Id.*; see also *North Carolina*, 615 F.3d at 304 ("Congress in the Clean Air Act opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, especially in comparison with ... judicially managed nuisance decrees"); *Nat'l Audubon Soc'y* v. *Dep't of Water*, 869 F.2d 1196, 1202 (9th Cir. 1988) (same).

The Second Circuit analogized the Clean Air Act to the pre-1972 Federal Water Pollution Control Act (FWPCA), Pet. App. 142a-44a, which *Milwaukee I* found did not displace common law water pollution claims, 406 U.S. at 98-100. But the FWPCA at that time did not provide any authority for direct enforcement of discharge limitations for individual pollutants. Instead, it provided that, if EPA believed that a particular discharge constituted a danger to the public, it could—after seeking voluntary resolution, petitioning the State to act, and holding a public hearing—ask the Attorney General to bring an equitable "abatement" action in federal court. *Id.* at 102-03 (citing 33 U.S.C. §§ 1151, 1160 (1970)); see

United States v. *Reserve Mining Co.*, 380 F. Supp. 11 (D. Minn. 1974) (addressing claims under FWPCA). In contrast, the Clean Air Act vests EPA with broad authority not only to promulgate national standards for pollutants, but also to enforce those standards directly, through administrative or judicial proceedings, and to mandate that stationary sources in identified categories secure pre-construction and operating permits. *Massachusetts*, 549 U.S. at 528-29; see 42 U.S.C. §§ 7413, 7475, 7477, 7604, 7607, 7661b, 7661c. This statute bears no resemblance to the FWPCA addressed in *Milwaukee I*. Instead, it more closely mirrors the post-1972 Clean Water Act in *Milwaukee II*, on which the permit requirements of the Clean Air Act were modeled. *Clean Air Act: A Summary of the Act and Its Major Requirements*, CRS Report RL30853, at 15 (May 2005).

Most fundamentally, greenhouse gases collectively have been held to be an "air pollutant" within the meaning of the Clean Air Act, see *Massachusetts*, 549 U.S. at 528-29, 532 (citing 42 U.S.C. § 7602(g)), and EPA has interpreted the Act to provide it with authority to consider restrictions on greenhouse gas emissions from mobile and stationary sources, including those of these defendants. See 75 Fed. Reg. 31514. Accordingly, through the Clean Air Act, Congress has established a legislative scheme that "speaks directly" to the alleged problem identified in the complaint, rendering resort to federal common law not only unnecessary but improper. See *Milwaukee II*, 451 U.S. at 314-15, 325.

2. The Clean Air Act's displacement of federal common law claims is further underscored by other aspects of the federal regulatory scheme. In particular, federal law specifically defines methods by which States and other persons may seek, through

rulemaking petitions, regulations addressing greenhouse gas emissions. See *Massachusetts*, 549 U.S. at 527; cf. *Milwaukee II*, 451 U.S. at 326-28. In other words, Congress has already provided a statutory means by which these plaintiffs could pursue essentially the same relief they now seek through common law.

Federal law allows interested persons, including plaintiffs here, to petition EPA to consider rulemaking with respect to any category of air pollution sources they contend poses a risk to the public. See *Massachusetts*, 549 U.S. at 516-17. The denial of such a petition is subject to judicial review in the courts of appeals, with the option of further review in this Court—the basis for the State's claim in *Massachusetts*. *Id.* (citing 42 U.S.C. § 7607(b)). And, once regulations are adopted, whenever a State issues an operating permit to a major stationary pollution source in its jurisdiction, that State must notify contiguous and other nearby States that might be affected, and those States may petition EPA to revise or reject the permit terms. 42 U.S.C. § 7661d(a)(2), (b)(2). Again, the denial of such a petition is subject to review in a federal court of appeals. *Id.* § 7607(b).

Congress's decision to provide these express avenues for States and others to seek emissions limitations means that federal courts may not allow plaintiffs to bypass those paths and seek similar relief in diverse district courts under federal common law standards fashioned by judges. See *Alexander*, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."). As was true in *Milwaukee II*, any common law cause of action that might have been recognized has been displaced.

3. The Second Circuit believed that the Clean Air Act did not have displacing effect—despite its comprehensive character, specific coverage of greenhouse gases as "pollutants," and applicable remedial schemes—because EPA had not exercised its authority under the Act to regulate greenhouse gas emissions by these individual defendants. Pet. App. 140a-44a. In particular, the court of appeals focused on the fact that EPA had not yet issued regulations finding that such emissions "endanger" the public or controlling emissions from stationary sources. *Id.* These two predicates are no longer true, as the United States pointed out in arguing that current regulations compel displacement. U.S. Cert. Br. 22-24. But, even leaving aside these regulatory developments, the absence of regulations would not alter the displacing effect of the Act.

It is Congress that can create or eliminate causes of action. Agencies have no lawmaking power but that which Congress invests in them. *Alexander*, 532 U.S. at 290-91. Rulemaking by an agency, for that reason, can neither independently support the development of federal common law, nor expand or diminish the displacing effect of a federal statute. See *id.* Thus, once Congress legislates on the subject and delegates authority to an agency to make regulatory decisions implementing Congress's basic policy choices, federal common law claims are displaced regardless of whether or how the agency exercises its delegated authority. As this Court explained in *Milwaukee II*, "[d]emanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question[: t]he question is whether the field has been occupied, not whether it has been occupied in a particular manner." 451 U.S.

at 324; see also *Middlesex Cnty. Sewer Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 622-23 (1978).

Likewise here, the Clean Air Act delegates regulatory authority over carbon dioxide emissions to EPA, and thus displaces federal common law claims addressing those emissions without regard to how the agency has exercised or may exercise its authority. If, for example, EPA had found (contrary to its actual finding) that greenhouse gases *do not* endanger the public health and welfare, there would be no basis for a federal court then to make a competing assessment under a federal common law of torts. To hold, as the court of appeals did, that there are still "interstices" for courts to "fill[ ]," Pet. App. 37a, is "no different from holding that the solution Congress chose is not adequate. This [a court] cannot do." *Illinois* v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982).

III. THIS CASE PRESENTS NON-JUSTICIABLE POLITICAL QUESTIONS.

By virtue of their subject matter, certain cases are not cognizable in the courts because they present "political questions." *Vieth* v. *Jubelirer*, 541 U.S. 267, 277 (2004) (plurality). A political question is present if, upon a "discriminating inquiry into the precise facts and posture of the particular [claims]," *Baker*, 369 U.S. at 217, adjudication of the claims would require the courts to make "an initial policy determination of a kind clearly for nonjudicial discretion," to decide a case in the absence of "judicially discoverable and manageable standards," or otherwise to resolve a question that has been or should be decided by the other branches. *Id.*; see *INS* v. *Chadha*, 462 U.S. 919, 941 (1983) (a political

question exists "when *any one* of the ... circumstances [outlined in *Baker*] is present") (emphasis added). While the claims in this case implicate all of these concerns, see, *e.g.*, *supra* pp. 5-9, 40-46, it is particularly clear that their adjudication would require an impermissible "initial policy determination" made in the absence of "judicially discoverable and manageable standards."

"One of the most obvious limitations imposed by [Article III] is that judicial action must be governed by *standard*, by *rule*." *Vieth*, 541 U.S. at 278 (plurality) (emphasis in original). Those rules must be "principled, rational, and based upon reasoned distinctions," and not the result of "ad hoc" policy judgments. *Id.* By contrast, claims that would "cast [judges] forth upon a sea of imponderables," *id.* at 290, or "involve large elements of prophecy," *Chi. & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), are not justiciable.

Adjudication of the claims in this case would place a judge in that intractable situation. Central to any common law "nuisance" claim is the allegation that the defendant's actions constitute "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1); see *id.* §§ 821B cmt. e, 822. To determine whether an interference is "unreasonable," a judge must "weigh[ ] ... the gravity of the harm against the utility of the conduct." *Id.* § 821B cmt. e.

No "principled" or "reasoned" standards would govern this inquiry in the context of the claims alleged in this case. To determine a "reasonable" emissions level for a single defendant, a judge would first have to determine the "reasonable" level of global emissions in light of the global risks of climate change, and the global costs and benefits of

emissions-producing activities and associated reduction measures. The posited risks of climate change and the costs and benefits of emissions reductions, however, are not quantifiable or predictable even under the report described in the complaints as "a standard scientific reference on global warming." J.A. 80; see Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2001: Synthesis Report*, at 2-5 (2001) (noting "uncertainties" in addressing these issues). And, even if a judge could somehow determine a "reasonable" aggregate emissions level for sources worldwide, in order then to determine a "reasonable" level for an individual source the judge could not simply divide the global level by the number of historical worldwide sources of greenhouse gas emissions (assuming that number could somehow be obtained), but would necessarily have to tailor emissions levels on a nation-by-nation, sector-by-sector (if not entity-by-entity) basis, weighing the gravity of harm to plaintiffs against the utility of each sector's and each defendant's conduct. Moreover, because total worldwide emissions are in flux and the relative quantities of emissions are ever-changing among nations, sectors, and individual sources, these allocations would need to be revisited by courts in perpetuity.

A judge in this circumstance would "search[ ] in vain ... for anything resembling a principle in the common law of nuisance." *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting). Thus, to resolve these claims, any decisionmaker would need to make *ad hoc* policy judgments, for which there is no "right" or "wrong" answer. For example, a judge that accepts the argument that climate change produced the risks

allegedly facing these plaintiffs could, under that theory, "trace" the phenomenon to automotive companies' decisions to offer fuel-intensive sport-utility vehicles, but find that the electric utilities and oil and coal companies had responsibly limited their emissions over time and therefore were "reasonable." Or, the judge might determine that individual car ownership is integral to the national economy and that other industries "caused" climate change and should have reduced their emissions. Or, the judge might trace climate change to the emissions of the U.S. Department of Defense or other government entities and hold that utilities, oil companies, and car companies and drivers acted reasonably. Whether our Nation should have had more public transportation and fewer cars, more electricity from nuclear power or solar power, or less electricity and slower economic growth are not decisions that any judge should make. These are issues of "high policy" that only a legislature has the capacity and authority to address. *Tex. Indus.*, 451 U.S. at 647.

This case is thus hardly an "ordinary tort suit," as the Second Circuit described it. Pet. App. 34a. Prior common law pollution claims involved a discrete number of emitters, a clear chain of causation, and a specific injury resulting from the discharged substance itself in a localized area, even when the emissions crossed state lines. See *supra* pp. 35, 38-39. In contrast, the emissions here are not inherently harmful, but instead are produced by virtually all enterprises on the planet. According to the pleadings, defendants' emissions combined in the Earth's atmosphere with undifferentiated emissions from billions of sources around the planet over centuries to trap heat, altering the global environment and, in turn, influencing by undefined

increments the impact of naturally occurring processes that already affect the planet. Indeed, because under plaintiffs' theory liability for climate change could be traced to any emitter of greenhouse gases over the past centuries, all emitters (to the extent they are still in existence) would presumably be subject to joinder as defendants. See Fed. R. Civ. P. 13(h), 20(a)(2). Far from an "ordinary" nuisance suit, a climate change tort case such as this could become the largest and most complex in the history of jurisprudence. This fact simply underscores that, to resolve these claims, a judge would be making decisions committed to the political branches.

"The requirements of Art[icle] III are not satisfied merely because a party ... has couched [its] request for ... relief ... in terms that have a familiar ring to those trained in the legal process." *Valley Forge*, 454 U.S. at 471. Whatever the label applied to these claims, only a legislature has the capacity and authority to assess and weigh the cost of one societal harm (the possible risks of climate change and its effects) against the innumerable other societal harms (including increased costs and lost productivity) that would flow from restrictions on emissions of carbon dioxide and other greenhouse gases. See Laurence H. Tribe et al., Wash. Legal Found., Critical Legal Issues Series No. 169, *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 13-15 (Jan. 2010); see also IPCC, *supra*, at 2 (describing these decisions as "value judgments [that must be] determined through socio-political processes, taking into account considerations such as development, equity, and sustainability, as well as uncertainties and risk"). *Massachusetts* explained that, although the Court could adjudicate the agency's compliance with the

Clean Air Act—"a question eminently suitable to resolution in federal court," 549 U.S. at 516—it had "neither the expertise nor the authority to evaluate the[ ] policy judgments" identified by EPA as counseling against greenhouse gas regulation. *Id.* at 533-34. These are the very judgments courts would have to make if the claims in this case were adjudicated.

The lack of judicially manageable standards, the need for initial policy decisions to be made by judges, and the actual and potential conflicts with current and future legislation and regulation addressing greenhouse gas emissions and climate change all demonstrate that this case presents "political questions" that are reserved for the representative branches.

CONCLUSION

The decision of the court of appeals should be reversed, and the case should be remanded with instructions that it be dismissed.

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STATUTORY ADDENDUM

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STATUTORY ADDENDUM

33 U.S.C. § 1151 (1970). Congressional declaration of policy in controlling water pollution; right of States to waters.

(a) The purpose of this chapter is to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution.

(b) In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water pollution, it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution, to support and aid technical research relating to the prevention and control of water pollution, and to provide Federal technical services and financial aid to State and interstate agencies and to municipalities in connection with the prevention and control of water pollution. The Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter through the Environmental Protection Agency. The Secretary of Health, Education, and Welfare shall supervise and direct the administration of all functions of the Department of Health, Education, and Welfare which relate to water pollution.

(c) Nothing in this chapter shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1160 (1970). Enforcement measures against pollution of interstate or navigable waters.

(a) Pollution of waters subject to abatement.

The pollution of interstate or navigable Waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of any persons, shall be subject to abatement as provided in this chapter.

(b) Encouragement of State and interstate action.

Consistent with the policy declaration of this chapter, State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (h) of this section, be displaced by Federal enforcement action.

(c) Water quality standards; procedure for establishment; considerations governing establishment; approval or modification by Hearing Board; violations.

(1) If the Governor of a State or a State water pollution control agency files, within one year after October 2, 1965, a letter of intent that such State, after public hearings, will before June 30, 1967, adopt (A) water quality criteria applicable to interstate waters or portions thereof within such State, and (B) a plan for the implementation and enforcement of the water quality criteria adopted, and if such criteria and plan are established in accordance with the letter of intent, and if the Administrator determines that

such State criteria and plan are consistent with paragraph (3) of this subsection, such State criteria and plan shall thereafter be the water quality standards applicable to such interstate waters or portions thereof.

(2) If a State does not (A) file a letter of intent or (B) establish water quality standards in accordance with paragraph (1) of this subsection, or if the Administrator or the Governor of any State affected by water quality standards established pursuant to this subsection desires a revision in such standards, the Administrator may, after reasonable notice and a conference of representatives of appropriate Federal departments and agencies, interstate agencies, States, municipalities and industries involved, prepare regulations setting forth standards of water quality to be applicable to interstate waters or portions thereof. If, within six months from the date the Administrator publishes such regulations, the State has not adopted water quality standards found by the Administrator publishes such regulations, the State has not adopted water quality standards found by the Administrator to be consistent with paragraph (3) of this subsection, or a petition for public hearing has not been filed under paragraph (4) of this subsection, the Administrator shall promulgate such standards.

(3) Standards of quality established pursuant to this subsection shall be such as to protect the public health or welfare, enhance the quality of water and such standards the Administrator, the Hearing Board, or the appropriate State authority shall take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses. In establishing such

standards the Administrator, the Hearing Board, or the appropriate State authority shall take into consideration their use and value for navigation.

(4) If at any time prior to 30 days after standards have been promulgated under paragraph (2) of this subsection, the Governor of any State affected by such standards petitions the Administrator for a hearing, the Administrator shall call a public hearing, to be held in or near one or more of the places where the water quality standards will take effect, before a Hearing Board of five or more persons appointed by the Administrator. Each State which would be affected by such standards shall be given an opportunity to select one member of the Hearing Board. The Department of Commerce and other affected Federal departments and agencies shall each be given an opportunity to select a member of the Hearing Board and not less than a majority of the Hearing Board shall be persons other than officers or employees of the Environmental Protection Agency.

The members of the Board who are not officers or employees of the United States, while participating in the hearing conducted by such Hearing Board or otherwise engaged on the work of such Hearing Board, shall be entitled to receive compensation at a rate fixed by the Administrator, but not exceeding $100 per diem, including travel time, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 73b-2 of Title 5 for persons in the Government service employed intermittently. Notice of such hearing shall be published in the Federal Register and given to the State water pollution control agencies, interstate agencies and municipalities involved at least 30 days prior to the date of such hearing. On the basis of the

evidence presented at such hearing the Hearing Board shall make findings as to whether the standards published or promulgated by the Administrator should be approved or modified and transmit its findings to the Administrator. If the Hearing Board approves the standards as published or promulgated by the Administrator, the standards shall take effect on receipt by the Administrator of the Hearing Board's recommendations. If the Hearing Board recommends modifications in the standards as published or promulgated by the Administrator, the Administrator shall promulgate revised regulations setting forth standards of water quality in accordance with the Hearing Board's recommendations which will become effective immediately upon promulgation.

(5) The discharge of matter into such interstate waters or portions thereof, which reduces the quality of such waters below the water quality standards established under this subsection (whether the matter causing or contributing to such reduction is discharged directly into such waters or reaches such waters after discharge into tributaries of such waters), is subject to abatement in accordance with the provisions of paragraph (1) or (2) of subsection (g) of this section, except that at least 180 days before any abatement action is initiated under either paragraph (1) or (2) of subsection (g) of this section as authorized by this subsection, the Administrator shall notify the violators and other interested parties of the violation of such standards. In any suit brought under the provisions of this subsection the court shall receive in evidence a transcript of the proceedings of the conference and hearing provided for in this subsection, together with the recommendations of the conference and Hearing Board and the recommendations and standards promulgated by the

Administrator, and such additional evidence, including that relating to the alleged violation of the standards, as it deems necessary to a complete review of the standards and to a determination of all other issues relating to the alleged violation. The court, giving due consideration to the practicability and to the physical and economic feasibility of complying with such standards, shall have jurisdiction to enter such judgment and orders enforcing such judgment as the public interest and the equities of the case may require.

(6) Nothing in this subsection shall (A) prevent the application of this section to any case to which subsection (a) of this section would otherwise be applicable, or (B) extend Federal jurisdiction over water not otherwise authorized by this chapter.

(7) In connection with any hearings under this section no witness or any other person shall be required to divulge trade secrets or secret processes.

(d) Notification of pollution; conference of State and interstate agencies; notice of conference date; summary of conference discussions.

(1) Whenever requested by the Governor of any State or a State water pollution control agency, or (with the concurrence of the Governor and of the State water pollution control agency for the State in which the municipality is situated) the governing body of any municipality, the Administrator shall, if such request refers to pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges (causing or contributing to such pollution) originates, give formal notification thereof to the water pollution control agency and interstate agency, if any, of the State or States where such discharge or

discharges originate and shall call promptly a conference of such agency or agencies and of the State water pollution control agency and Interstate agency, if any, of the State or States, if any, which may be adversely affected by such pollution.

Whenever requested by the Governor of any State, the Administrator shall, if such request refers to pollution of interstate or navigable waters which is endangering the health or welfare of persons only in the requesting State in which the discharge or discharges (causing or contributing to such pollution) originate, give formal notification thereof to the water pollution control agency and interstate agency, if any, of such State and shall promptly call a conference of such agency or agencies, unless, in the judgment of the Administrator, the effect of such pollution on the legitimate uses of the waters is not of sufficient significance to warrant exercise of Federal jurisdiction under this section. The Administrator shall also call such a conference whenever, on the basis of reports, surveys, or studies, he has reason to believe that any pollution referred to in subsection (a) of this section and endangering the health or welfare of persons in a State other than that in which the discharge or discharges originate is occurring;- or he finds that substantial economic injury results from the inability to market shellfish or shellfish products in interstate commerce because of pollution referred to in subsection (a) of this section and action of Federal, State, or local authorities.

(2) Whenever the Administrator, upon receipt of reports, surveys, or studies from any duly constituted international agency, has reason to believe that any pollution referred to in subsection (a) of this section which endangers the health or welfare of persons in a foreign country is occurring, and the Secretary of

State requests him to abate such pollution, he shall give formal notification thereof to the State water pollution control agency of the State in which such discharge or discharges originate and to the interstate water pollution control agency, If any, and shall call promptly a conference of such agency or agencies, if he believes that such rant such action. The Administrator, through the Secretary of State, shall invite the foreign country which may be adversely affected by the pollution to attend and participate in the conference, and the representative of such country shall, for the purpose of the conference and any further proceeding resulting from such conference, have all the rights of a State water pollution control agency. The paragraph shall apply only to a foreign country which the Administrator determines has given the United States essentially the same rights with respect to the prevention and control of water pollution occurring in that country as is given that country by this paragraph.

Nothing in this paragraph shall be construed to modify, amend, repeal, or otherwise affect the provisions of the 1909 Boundary Waters Treaty between Canada and the United States or the Water Utilization Treaty of 1944 between Mexico and the United States (59 Stat. 1219), relative to the control and abatement of water pollution in waters covered by those treaties.

(3) The agencies called to attend such conference may bring such persons as they desire to the conference.

In addition, it shall be the responsibility of the chairman of the conference to give every person contributing to the alleged pollution or affected by it an opportunity to make a full statement of his views to the conference. Not less than three weeks' prior

notice of the conference date shall be given to such agencies.

(4) Following this conference, the Administrator shall prepare and forward to all the water pollution control agencies attending the conference a summary of conference discussions including (A) occurrence of pollution of interstate or navigable waters subject to abatement under this chapter; (B) adequacy of measures taken toward abatement of the pollution; and (C) nature of delays, if any, being encountered in abating the pollution.

(e) Recommendation of Administrator to State agency to take remedial action.

If the Administrator believes, upon the conclusion of the conference or thereafter, that effective progress toward abatement of such pollution is not being made and that the health or welfare of any persons is being endangered, he shall recommend to the appropriate State water pollution control agency that it take necessary remedial action. The Administrator shall allow at least six months from the date he makes such recommendations for the taking of such recommended action.

(f) Failure to take remedial action: public hearing: appointment of Board; notice of hearing; findings and recommendations; action of Administrator; requests for reports from persons whose alleged activities result in discharges causing or contributing to water pollution; failure to file report; forfeiture; prosecution.

(1) If, at the conclusion of the period so allowed, such remedial action has not been taken or action which in the Judgment of the Administrator is reasonably calculated to secure abatement of such

pollution has not been taken, the Administrator shall call a public hearing, to be held in or near one or more of the places where the discharge or discharges causing or contributing to such pollution originated, before a Hearing Board of five or more persons appointed by the Administrator. Each State in which any discharge causing or contributing to such pollution originates and each State claiming to be adversely affected by such pollution shall be given an opportunity to select one member of the Hearing Board and at least one member shall be a representative of the Department of Commerce, and not less than a majority of the Hearing Board shall be persons other than officers or employees of the Environmental Protection Agency. At least three weeks' prior notice of such hearing shall be given to the State water pollution control agencies and interstate agencies, if any, called to attend the aforesaid hearing and the alleged polluter or polluters. It shall be the responsibillty of the Hearing Board to give every person contributing to the alleged pollution or affected by it, an opportunity to make a full statement of his views to the Hearing Board. On the basis of the evidence presented at such hearing, the Hearing Board shall make findings as to whether pollution referred to in subsection (a) of this section is occurring and whether effective progress toward abatement thereof is being made. If the Hearing Board finds such pollution is occurring and effective progress toward abatement thereof is not being made, it shall make recommendations to the Administrator concerning the measures, if any, which it finds to be reasonable and equitable to secure abatement of such pollution. The Administrator shall send such findings and recommendations to the person or persons discharging any matter causing or contributing to such pollution, together with a notice specifying a

reasonable time (not less than six months) to secure abatement of such pollution, and shall also send such findings and recommendations and such notice to the State water pollution control agency and to the interstate agency, if any, of the State or States where such discharge or discharges originate.

(2) In connection with any hearing called under this section the Administrator is authorized to require any person whose alleged activities result in discharges causing or contributing to water pollution to file with him, in such form as he may prescribe, a report based on existing data, furnishing such information as may reasonably be required as to the character, kind, and quantity of such discharges and the use of facilities or other means to prevent or reduce such discharges by the person filing such a report. Such report shall be made under oath or otherwise, as the Administrator may prescribe, and shall be filed with the Administrator within such reasonable period as the Administrator may prescribe, unless additional time be granted by the Administrator. No person shall be required in such report to divulge trade secrets or secret processes, and all information reported shall be considered confidential for the purposes of section 1905 of Title 18.

(3) If any person required to file any report under paragraph (2) of this subsection shall fail to do so within the time fixed by the Administrator for filing the same, and such failure' shall continue for thirty days after notice of such default, such person shall forefeit I to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the

district where such person has his principal office or in any district in which he does business. The Administrator may upon application therefor remit or mitigate any forfeiture provided for under this paragraph and he shall have authority to determine the facts upon all such applications.

(4) It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of such forfeitures.

(g) Action on behalf of United States to secure abatement of the pollution.

If action reasonably calculated to secure abatement of the pollution within the time specified in the notice following the public hearing is not taken, the Administrator—

(1) in the case of pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges (causing or contributing to such pollution) originate, may request the Attorney General to bring a suit on behalf of the United States to secure abatement of pollution, and

(2) in the case of pollution of waters which is endangering the health or welfare of persons only in the State in which the discharge or discharges (causing or contributing to such pollution) originate, may, with the written consent of the Governor of such State, request the Attorney General to bring a suit on behalf of the United States to secure abatement of the pollution.

(h) Evidence; jurisdiction of court.

The court shall receive in evidence in any such suit a transcript of the proceedings before the Board and a copy of the Board's recommendations and shall receive such further evidence as the court in its discretion deems proper. The court, giving due consideration to the practicability and to the physical and economic feasibility of securing abatement of any pollution proved, shall have jurisdiction to enter such judgment, and orders enforcing such judgment, as the public interest and the equities of the case may require.

* * * *

42 U.S.C. § 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) National primary ambient air quality standard for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this

title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

42 U.S.C. § 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this

section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

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

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

(7) The term "technological system of continuous emission reduction" means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. § 792(a)] or any amendment thereto, or any subsequent enactment which supersedes

such Act [15 U.S.C. § 791 et seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii) of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available

information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed

revised standards shall not be required to comply with such revised standards.

(c) State implementation and enforcement of standards of performance

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the

remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

(e) Prohibited acts

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

(f) New source standards of performance

(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) of this section before November 15, 1990, and for which regulations had not been proposed by the Administrator by November 15, 1990, the Administrator shall—

(A) propose regulations establishing standards of performance for at least 25 percent of such

categories of sources within 2 years after November 15, 1990;

(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after November 15, 1990; and

(C) propose regulations for the remaining categories of sources within 6 years after November 15, 1990.

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider—

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit;

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.

(g) Revision of regulations

(1) Upon application by the Governor of a State showing that the Administrator has failed to specify in regulations under subsection (f)(1) of this section

any category of major stationary sources required to be specified under such regulations, the Administrator shall revise such regulations to specify any such category.

(2) Upon application of the Governor of a State, showing that any category of stationary sources which is not included in the list under subsection (b)(1)(A) of this section contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources), the Administrator shall revise such regulations to specify such category of stationary sources.

(3) Upon application of the Governor of a State showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2) of this section, the Administrator shall revise the list under subsection (b)(1)(A) of this section to apply properly such criteria.

(4) Upon application of the Governor of a State showing that—

> (A) a new, innovative, or improved technology or process which achieves greater continuous emission reduction has been adequately demonstrated for any category of stationary sources, and
>
> (B) as a result of such technology or process, the new source standard of performance in effect under this section for such category no longer reflects the greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and

any non-air quality health and environmental impact and energy requirements) has been adequately demonstrated,

the Administrator shall revise such standard of performance for such category accordingly.

(5) Unless later deadlines for action of the Administrator are otherwise prescribed under this section, the Administrator shall, not later than three months following the date of receipt of any application by a Governor of a State, either—

(A) find that such application does not contain the requisite showing and deny such application, or

(B) grant such application and take the action required under this subsection.

(6) Before taking any action required by subsection (f) of this section or by this subsection, the Administrator shall provide notice and opportunity for public hearing.

(h) Design, equipment, work practice, or operational standard; alternative emission limitation

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. In the event the Administrator promulgates a design or

equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce a standard of performance" means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the

provisions of this chapter (other than the provisions of subsection (a) of this section and this subsection).

(i) Country elevators

Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.

(j) Innovative technological systems of continuous emission reduction

(1)(A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this paragraph, if the Administrator determines after notice and opportunity for public hearing, that—

(i) the proposed system or systems have not been adequately demonstrated,

(ii) the proposed system or systems will operate effectively and there is a substantial likelihood that such system or systems will achieve greater continuous emission reduction than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact,

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C).

In making any determination under clause (ii), the Administrator shall take into account any previous failure of such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technological systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amounts without use of such system.

(B) A waiver under this paragraph shall be granted on such terms and conditions as the Administrator determines to be necessary to assure—

(i) emissions from the source will not prevent attainment and maintenance of any national ambient air quality standards, and

(ii) proper functioning of the technological system or systems authorized.

Any such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and section 7413 of this title.

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of continuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified in clauses (ii) and (iii) of subparagraph (A).

(D) A waiver under this paragraph shall extend to the sooner of—

(i) the date determined by the Administrator, after consultation with the owner or operator of the source, taking into consideration the design, installation, and capital cost of the technological system or systems being used, or

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

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

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

and that such failure cannot be corrected.

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

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

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

whichever is earlier.

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

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

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

performance for purposes of subsection (e) of this section and section 7413 of this title.

42 U.S.C. § 7413. Federal enforcement

(a) In general

(1) Order to comply with SIP

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may, without regard to the period of violation (subject to section 2462 of Title 28)—

(A) issue an order requiring such person to comply with the requirements or prohibitions of such plan or permit,

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action in accordance with subsection (b) of this section.

(2) State failure to enforce SIP or permit program

Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under subchapter V of this chapter are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively, the Administrator

shall so notify the State. In the case of a permit program, the notice shall be made in accordance with subchapter V of this chapter. If the Administrator finds such failure extends beyond the 30th day after such notice (90 days in the case of such permit program), the Administrator shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan or permit program (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement or prohibition of such plan or permit program with respect to any person by—

(A) issuing an order requiring such person to comply with such requirement or prohibition,

(B) issuing an administrative penalty order in accordance with subsection (d) of this section, or

(C) bringing a civil action in accordance with subsection (b) of this section.

(3) EPA enforcement of other requirements

Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved under those provisions or subchapters, or for the payment of any fee owed to the United States under this chapter (other than subchapter II of this chapter), the Administrator may—

(A) issue an administrative penalty order in accordance with subsection (d) of this section,

(B) issue an order requiring such person to comply with such requirement or prohibition,

(C) bring a civil action in accordance with subsection (b) of this section or section 7605 of this title, or

(D) request the Attorney General to commence a criminal action in accordance with subsection (c) of this section.

(4) Requirements for orders

An order issued under this subsection (other than an order relating to a violation of section 7412 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation and specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers. An order issued under this subsection shall require the person to whom it was issued to comply with the requirement as expeditiously as practicable, but in no event longer than one year after the date the order was issued, and shall be nonrenewable. No order issued under this subsection shall prevent the State

or the Administrator from assessing any penalties nor otherwise affect or limit the State's or the United States authority to enforce under other provisions of this chapter, nor affect any person's obligations to comply with any section of this chapter or with a term or condition of any permit or applicable implementation plan promulgated or approved under this chapter.

(5) Failure to comply with new source requirements

Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may—

(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;[1]

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action under subsection (b) of this section.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

(b) Civil judicial enforcement

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other

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

person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both, in any of the following instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. Such an action shall be commenced (A) during any period of federally assumed enforcement, or (B) more than 30 days following the date of the Administrator's notification under subsection (a)(1) of this section that such person has violated, or is in violation of, such requirement or prohibition.

(2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter).

(3) Whenever such person attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred, or is occurring, or in which the defendant resides, or where the defendant's principal place of business is located, and such court shall have jurisdiction to

restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed the United States under this chapter (other than subchapter II of this chapter) and any noncompliance assessment and nonpayment penalty owed under section 7420 of this title, and to award any other appropriate relief. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable.

(c) Criminal penalties

(1) Any person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after having been notified under subsection (a)(1) of this section by the Administrator that such person is violating such requirement or prohibition), any order under subsection (a) of this section, requirement or prohibition of section 7411(e) of this title (relating to new source performance standards), section 7412 of this title, section 7414 of this title (relating to inspections, etc.), section 7429 of this title (relating to solid waste combustion), section 7475(a) of this title (relating to preconstruction requirements), an order under section 7477 of this title (relating to preconstruction requirements), an order under section 7603 of this title (relating to emergency orders), section 7661a(a) or 7661b(c) of this title (relating to permits), or any requirement or prohibition of subchapter IV-A of this chapter

(relating to acid deposition control), or subchapter VI of this chapter (relating to stratospheric ozone control), including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or subchapters, and including any requirement for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter) shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not to exceed 5 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(2) Any person who knowingly—

(A) makes any false material statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this chapter to be either filed or maintained (whether with respect to the requirements imposed by the Administrator or by a State);

(B) fails to notify or report as required under this chapter; or

(C) falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained or followed under this chapter[2]

shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more

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[2] So in original. Probably should be followed by a comma.

than 2 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(3) Any person who knowingly fails to pay any fee owed the United States under this subchapter, subchapter III, IV-A, V, or VI of this chapter shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(4) Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(5)(A) Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section

7412 of this title, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than $1,000,000 for each violation. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).

(B) In determining whether a defendant who is an individual knew that the violation placed another person in imminent danger of death or serious bodily injury—

(i) the defendant is responsible only for actual awareness or actual belief possessed; and

(ii) knowledge possessed by a person other than the defendant, but not by the defendant, may not be attributed to the defendant;

except that in proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information.

(C) It is an affirmative defense to a prosecution that the conduct charged was freely consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(i) an occupation, a business, or a profession; or

(ii) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subparagraph by a preponderance of the evidence.

(D) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subparagraph (A) of this paragraph and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(E) The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(F) The term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement or protracted loss or

impairment of the function of a bodily member, organ, or mental faculty.

(6) For the purpose of this subsection, the term "person" includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer.

(d) Administrative assessment of civil penalties

(1) The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person—

(A) has violated or is violating any requirement or prohibition of an applicable implementation plan (such order shall be issued (i) during any period of federally assumed enforcement, or (ii) more than thirty days following the date of the Administrator's notification under subsection (a)(1) of this section of a finding that such person has violated or is violating such requirement or prohibition); or

(B) has violated or is violating any other requirement or prohibition of this subchapter or subchapter III, IV-A, V, or VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver, permit, or plan promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter); or

(C) attempts to construct or modify a major stationary source in any area with respect to

which a finding under subsection (a)(5) of this section has been made.

The Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

(2)(A) An administrative penalty assessed under paragraph (1) shall be assessed by the Administrator by an order made after opportunity for a hearing on the record in accordance with sections 554 and 556 of Title 5. The Administrator shall issue reasonable rules for discovery and other procedures for hearings under this paragraph. Before issuing such an order, the Administrator shall give written notice to the person to be assessed an administrative penalty of the Administrator's proposal to issue such order and provide such person an opportunity to request such a hearing on the order, within 30 days of the date the notice is received by such person.

(B) The Administrator may compromise, modify, or remit, with or without conditions, any administrative penalty which may be imposed under this subsection.

(3) The Administrator may implement, after consultation with the Attorney General and the States, a field citation program through regulations establishing appropriate minor violations for which field citations assessing civil penalties not to exceed $5,000

per day of violation may be issued by officers or employees designated by the Administrator. Any person to whom a field citation is assessed may, within a reasonable time as prescribed by the Administrator through regulation, elect to pay the penalty assessment or to request a hearing on the field citation. If a request for a hearing is not made within the time specified in the regulation, the penalty assessment in the field citation shall be final. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence. Payment of a civil penalty required by a field citation shall not be a defense to further enforcement by the United States or a State to correct a violation, or to assess the statutory maximum penalty pursuant to other authorities in the chapter, if the violation continues.

(4) Any person against whom a civil penalty is assessed under paragraph (3) of this subsection or to whom an administrative penalty order is issued under paragraph (1) of this subsection may seek review of such assessment in the United States District Court for the District of Columbia or for the district in which the violation is alleged to have occurred, in which such person resides, or where such person's principal place of business is located, by filing in such court within 30 days following the date the administrative penalty order becomes final under paragraph (2), the assessment becomes final under paragraph (3), or a final decision following a hearing under paragraph (3) is rendered, and by simultaneously sending a copy of the filing by certified mail to the Administrator and the Attorney General. Within 30 days thereafter, the Administrator shall file in such court a certified copy, or certified index,

as appropriate, of the record on which the administrative penalty order or assessment was issued. Such court shall not set aside or remand such order or assessment unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion. Such order or penalty assessment shall not be subject to review by any court except as provided in this paragraph. In any such proceedings, the United States may seek to recover civil penalties ordered or assessed under this section.

(5) If any person fails to pay an assessment of a civil penalty or fails to comply with an administrative penalty order—

(A) after the order or assessment has become final, or

(B) after a court in an action brought under paragraph (4) has entered a final judgment in favor of the Administrator,

the Administrator shall request the Attorney General to bring a civil action in an appropriate district court to enforce the order or to recover the amount ordered or assessed (plus interest at rates established pursuant to section 6621(a)(2) of Title 26 from the date of the final order or decision or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such order or assessment shall not be subject to review. Any person who fails to pay on a timely basis a civil penalty ordered or assessed under this section shall be required to pay, in addition to such penalty and interest, the United States enforcement expenses, including but not limited to attorneys fees and costs incurred by the United States for collection

proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be 10 percent of the aggregate amount of such person's outstanding penalties and nonpayment penalties accrued as of the beginning of such quarter.

(e) Penalty assessment criteria

(1) In determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. The court shall not assess penalties for noncompliance with administrative subpoenas under section 7607(a) of this title, or actions under section 7414 of this title, where the violator had sufficient cause to violate or fail or refuse to comply with such subpoena or action.

(2) A penalty may be assessed for each day of violation. For purposes of determining the number of days of violation for which a penalty may be assessed under subsection (b) or (d)(1) of this section, or section 7604(a) of this title, or an assessment may be made under section 7420 of this title, where the Administrator or an air pollution control agency has notified the source of the violation, and the plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have

continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

(f) Awards

The Administrator may pay an award, not to exceed $10,000, to any person who furnishes information or services which lead to a criminal conviction or a judicial or administrative civil penalty for any violation of this subchapter or subchapter III, IV-A, V, or VI of this chapter enforced under this section. Such payment is subject to available appropriations for such purposes as provided in annual appropriation Acts. Any officer, or employee of the United States or any State or local government who furnishes information or renders service in the performance of an official duty is ineligible for payment under this subsection. The Administrator may, by regulation, prescribe additional criteria for eligibility for such an award.

(g) Settlements; public participation

At least 30 days before a consent order or settlement agreement of any kind under this chapter to which the United States is a party (other than enforcement actions under this section, section 7420 of this title, or subchapter II of this chapter, whether or not involving civil or criminal penalties, or judgments subject to Department of Justice policy on public participation) is final or filed with a court, the Administrator shall provide a reasonable opportunity

by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing. The Administrator or the Attorney General, as appropriate, shall promptly consider any such written comments and may withdraw or withhold his consent to the proposed order or agreement if the comments disclose facts or considerations which indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of this chapter. Nothing in this subsection shall apply to civil or criminal penalties under this chapter.

(h) Operator

For purposes of the provisions of this section and section 7420 of this title, the term "operator", as used in such provisions, shall include any person who is senior management personnel or a corporate officer. Except in the case of knowing and willful violations, such term shall not include any person who is a stationary engineer or technician responsible for the operation, maintenance, repair, or monitoring of equipment and facilities and who often has supervisory and training duties but who is not senior management personnel or a corporate officer. Except in the case of knowing and willful violations, for purposes of subsection (c)(4) of this section, the term "a person" shall not include an employee who is carrying out his normal activities and who is not a part of senior management personnel or a corporate officer. Except in the case of knowing and willful violations, for purposes of paragraphs (1), (2), (3), and (5) of subsection (c) of this section the term "a person" shall not include an employee who is carrying out his normal activities and who is acting under orders from the employer.

42 U.S.C. § 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility

which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

* * * *

42 U.S.C. § 7477. Enforcement

The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

42 U.S.C. § 7502. Nonattainment plan provisions in general

(a) Classifications and attainment dates

(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification

under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of Title 5 (concerning notice and comment) and shall not be subject to judicial review until the Administrator takes final action under subsection (k) or (l) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the attainment date determined by the Administrator under subparagraph (A) or (B) if—

(i) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(ii) in accordance with guidance published by the Administrator, no more than a minimal number of exceedances of the relevant national ambient air quality standard has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this subparagraph for a single nonattainment area.

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part.

(b) Schedule for plan submissions

At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 7407(d) of this title, the Administrator shall establish a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision (including the plan items)

meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title.

(c) Nonattainment plan provisions

The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

(1) In general

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.

(2) RFP

Such plan provisions shall require reasonable further progress.

(3) Inventory

Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as the Administrator may determine necessary to assure that the requirements of this part are met.

(4) Identification and quantification

Such plan provisions shall expressly identify and quantify the emissions, if any, of any such pollutant or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) of this title, from the construction and operation of

major new or modified stationary sources in each such area. The plan shall demonstrate to the satisfaction of the Administrator that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient air quality standard by the applicable attainment date.

(5) Permits for new and modified major stationary sources

Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.

(6) Other measures

Such plan provisions shall include enforceable emission limitations, and such other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified in this part.

(7) Compliance with section 7410(a)(2)

Such plan provisions shall also meet the applicable provisions of section 7410(a)(2) of this title.

(8) Equivalent techniques

Upon application by any State, the Administrator may allow the use of equivalent

modeling, emission inventory, and planning procedures, unless the Administrator determines that the proposed techniques are, in the aggregate, less effective than the methods specified by the Administrator.

(9) Contingency measures

Such plan shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

(d) Plan revisions required in response to finding of plan inadequacy

Any plan revision for a nonattainment area which is required to be submitted in response to a finding by the Administrator pursuant to section 7410(k)(5) of this title (relating to calls for plan revisions) must correct the plan deficiency (or deficiencies) specified by the Administrator and meet all other applicable plan requirements of section 7410 of this title and this part. The Administrator may reasonably adjust the dates otherwise applicable under such requirements to such revision (except for attainment dates that have not yet elapsed), to the extent necessary to achieve a consistent application of such requirements. In order to facilitate submittal by the States of adequate and approvable plans consistent with the applicable requirements of this chapter, the Administrator shall, as appropriate and from time to time, issue written guidelines, interpretations, and information to the States which shall be available to

the public, taking into consideration any such guidelines, interpretations, or information provided before November 15, 1990.

(e) Future modification of standard

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

42 U.S.C. § 7661a. Permit programs

(a) Violations

After the effective date of any permit program approved or promulgated under this subchapter, it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source (as provided in subchapter IV-A of this chapter), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts[1] C or D of subchapter I of this chapter, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a

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

permitting authority under this subchapter. (Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.) The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this chapter, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.

(b) Regulations

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

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

(2) Monitoring and reporting requirements.

* * * *

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

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

(A) issue permits and assure compliance by all sources required to have a permit under this

subchapter with each applicable standard, regulation or requirement under this chapter;

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

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

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

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

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

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

(7) To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such

permitting authority to act on a permit application or permit renewal application (in accordance with the time periods specified in section 7661b of this title or, as appropriate, subchapter IV-A of this chapter) shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay.

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

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

(10) Provisions to allow changes within a permitted facility (or one operating pursuant to section 7661b(d) of this title) without requiring a permit revision, if

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

(c) Single permit

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

(d) Submission and approval

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

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

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

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(e) Suspension

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

(f) Prohibition

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

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

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

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

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

(g) Interim approval

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

(h) Effective date

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

program, or partial permit program, promulgated by the Administrator shall be the date of promulgation.

(i) Administration and enforcement

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

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

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

(4) Whenever the Administrator has made a finding under paragraph (1) with respect to any State, unless the State has corrected such deficiency within 18 months after the date of such finding, the Administrator shall, 2 years after the date of such

finding, promulgate, administer, and enforce a program under this subchapter for that State. Nothing in this paragraph shall be construed to affect the validity of a program which has been approved under this subchapter or the authority of any permitting authority acting under such program until such time as such program is promulgated by the Administrator under this paragraph.

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

(a) Applicable date

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

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

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

(b) Compliance plan

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

(2) The regulations shall further require the permittee to periodically (but no less frequently than

annually) certify that the facility is in compliance with any applicable requirements of the permit, and to promptly report any deviations from permit requirements to the permitting authority.

(c) Deadline

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

(d) Timely and complete applications

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

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

(e) Copies; availability

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

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

(a) Conditions

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

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

(b) Monitoring and analysis

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

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

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

(d) General permits

The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to permits under this subchapter. No source covered

by a general permit shall thereby be relieved from the obligation to file an application under section 7661b of this title.

(e) Temporary sources

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

(f) Permit shield

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

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

(2) the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit

includes the determination or a concise summary thereof.

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

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

(a) Transmission and notice

(1) Each permitting authority—

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

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

(2) The permitting authority shall notify all States—

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

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

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

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

(b) Objection by EPA

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

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

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

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

(c) Issuance or denial

If the permitting authority fails, within 90 days after the date of an objection under subsection (b) of this section, to submit a permit revised to meet the

objection, the Administrator shall issue or deny the permit in accordance with the requirements of this subchapter. No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.

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