

was only one FGD vendor and only three FGD units in operation. The 1979 NSPS retained the 1971 emission standard but also required a 70-90% reduction in emissions, depending upon the sulfur content of the coal. This requirement could then only be met by using an FGD device.

A history of the development of FGD devices (cited in the CRS report) further illustrates how much the SO₂ NSPS motivated the development of this technology:

The Standards of Performance for New Sources are technology-forcing, and for the utility industry they forced the development of a technology that had never been installed on facilities the size of utility plants. That technology had to be developed, and a number of installations completed in a short period of time. The US EPA continued to force technology through the promulgation of successive regulations. The development of this equipment was not an easy process.

...

Chemical and mechanical engineers had never dealt with the challenges they faced in developing FGD systems for utility plants during this period. Chemical engineers had never designed process equipment as large as was required, nor had they dealt with the complex chemistry that occurred in the early FGD systems. Mechanical engineers were faced with similar challenges. While they had designed equipment for either acid service or slurry service, they typically had not designed for a combination of the two. Generally, equipment was larger than what they normally dealt with in chemical plants and refineries.

It is an understatement to say that the new source performance standards promulgated by the EPA were technology-forcing. Electric utilities went from having no scrubbers on their generating units to incorporating very complex chemical processes. Chemical plants and refineries had scrubbing systems that were a few feet in diameter, but not the 30- to 40-foot diameters required by the utility industry. Utilities had dealt with hot flue gases but not with saturated flue gases that contained all sorts of contaminants. Industry, and the US EPA, has always looked upon new source performance standards as technology-forcing, because they force the development of new technologies in order to satisfy emission requirements.⁸

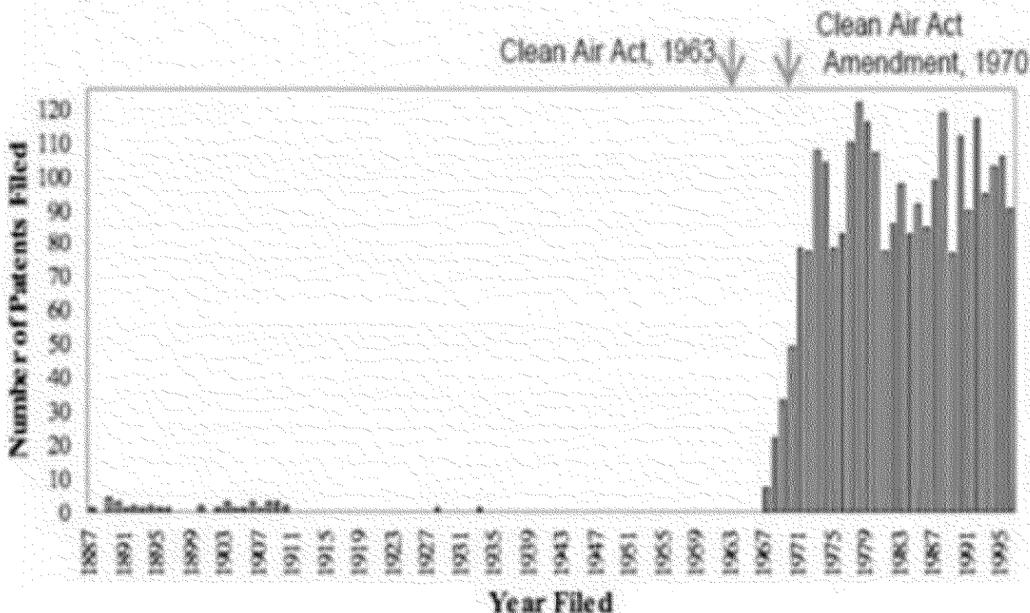
This example demonstrates that under Section 111, the Agency has based an NSPS on a technology that: (1) was sold by only a single vendor at the time the standards go into effect; (2) required the design of equipment with multiple functionalities in a single piece of equipment when existing equipment types only performed one of the functionalities; (3) existed in some form at other types of units but had to operate at units of different size and provide different capacities at the units subject to the NSPS. This is a compelling example

⁸ Donald Shattuck, Ken Campbell, Michael Czuchna, Mary Graham, and Andrea Hyatt, "A History of Flue Gas Desulfurization (FGD) – The Early Years," at 15, 3.

of both the flexibility of the Agency's authority under Section 111 and the efficacy of innovation-focused standards at incentivizing technology development.

As can be seen in the Figure 1 below, analysis of patenting activity further demonstrates the dramatic rise in control technology innovation in the U.S. that followed the 1971 SO₂ NSPS promulgation.⁹

Figure 1: U.S. Patents Relevant to SO₂ Control Technology as Identified with the Patent Subclass Method¹⁰



Thanks to these technology advances, when Germany subsequently implemented a program to control acid rain, 33% of the FGD systems installed were licensed from U.S. companies.¹¹ Researchers of this and similar regulatory initiatives have observed that stringent regulation is required to stimulate significant innovation in control technologies; neither modest regulation nor legislation supporting control technology research have this effect.¹²

Application to the GHG Context

To translate the legal authorities and historical precedents discussed above into the GHG mitigation context, we believe that the Agency's Section 111 authority would support the

⁹ Taylor, M., "The Influence of Government Actions on Innovative Activities in the Development of Environmental Technologies to Control Sulfur Dioxide Emissions from Stationary Sources," PhD Thesis, Carnegie Mellon University, (Jan. 2001), p. 211-212 (hereinafter "Taylor PhD"). See also ICF Consulting, "The Clean Air Act Amendments: Spurring Innovation and Growth While Cleaning the Air," (2005), p. 106-108, 118-120, 211-212.

¹⁰ Taylor PhD at 107.

¹¹ Taylor PhD at 56; see also p. 131.

¹² *Id.* at 220; Taylor, M., Rubin, E.S., and Hounshell, D.A., "Control of SO₂ Emissions from Power Plants: A Case of Induced Technological Innovation in the U.S.," *Technological Forecasting & Social Change* (July 2005), p. 697.

following regulatory frameworks, and respectfully urge the Agency to give these proposals serious consideration:

- Setting an NSPS under 111(b) that applies different levels of stringency to units built or modified at different times.
 - The agency has discretion to make a finding of “adequately demonstrated” that applies to a future date under *Portland Cement*. Any finding that a technology will be adequately demonstrated by a future date must be based on sufficient supporting information to justify the finding as reasonable.
 - The Agency can base its finding that a technology will be adequately demonstrated at a future date on real-world test data, extrapolations from existing test data, projections based on existing technologies, and evidence provided by experts and vendors.
 - Any such finding must be reasonable and based on defensible assumptions.
- Setting an NSPS that is technology-forcing at the time it becomes effective. This could include a standard based on a technology that:
 - Is only sold by a single vendor when the standard becomes effective.
 - Is used at other types of units, but must be altered significantly to work at a unit of the size and with the characteristics of those in the regulated sector.

Thank you for your consideration of our views. If you have any questions about the content of these comments, please contact:

Megan Ceronsky
Attorney
Environmental Defense Fund
(303) 447-7224
mceronsky@edf.org

To:

Vickie_Patton@environmentaldefense.org; ddoniger@nrdc.org; joanne.spalding@sierra club.org; Michael.Myers@ag.ny.gov[]; doniger@nrdc.org; joanne.spalding@sierraclub.org; Michael.Myers@ag.ny.gov[]; oanne.spalding@sierraclub.org; Michael.Myers@ag.ny.gov[]; Michael.Myers@ag.ny.gov[]

Cc:

DGunter@ENRD.USDOJ.GOV; CN=Avi Garbow/OU=DC/O=USEPA/C=US@EPA; CN=Elliott Zenick/OU=DC/O=USEPA/C=US@EPA; CN=Eric Ginsburg/OU=RTP/O=USEPA/C=US@EPA; CN=Joseph Goffman/OU=DC/O=USEPA/C=US@EPA; CN=Peter Tsirigotis/OU=RTP/O=USEPA/C=US@EPA[]; N=Avi Garbow/OU=DC/O=USEPA/C=US@EPA; CN=Elliott Zenick/OU=DC/O=USEPA/C=US@EPA; CN=Eric Ginsburg/OU=RTP/O=USEPA/C=US@EPA; CN=Joseph Goffman/OU=DC/O=USEPA/C=US@EPA; CN=Peter Tsirigotis/OU=RTP/O=USEPA/C=US@EPA[]; N=Elliott Zenick/OU=DC/O=USEPA/C=US@EPA; CN=Eric Ginsburg/OU=RTP/O=USEPA/C=US@EPA; CN=Joseph Goffman/OU=DC/O=USEPA/C=US@EPA; CN=Peter Tsirigotis/OU=RTP/O=USEPA/C=US@EPA[]; N=Eric Ginsburg/OU=RTP/O=USEPA/C=US@EPA; CN=Joseph Goffman/OU=DC/O=USEPA/C=US@EPA; CN=Peter Tsirigotis/OU=RTP/O=USEPA/C=US@EPA[]; N=Joseph Goffman/OU=DC/O=USEPA/C=US@EPA; CN=Peter Tsirigotis/OU=RTP/O=USEPA/C=US@EPA[]; N=Peter Tsirigotis/OU=RTP/O=USEPA/C=US@EPA[]

Bcc:

Patricia Embrey/OU=DC/O=USEPA/C=US
From: CN=Patricia Embrey/OU=DC/O=USEPA/C=US
Sent: Tue 9/21/2010 9:07:06 PM
Subject: In preparation for our September 22, 2010
Draft EGU settlement Sept 21.DOC

This is to confirm that we are holding a second, settlement confidential, meeting/call tomorrow at 3 p.m. Eastern Time.

Same call in number:

Ex. 6 - Personal Privacy

For anyone attending in person, we will use the same room as last week -- 7500 Ariel Rios North. Please let us know if any of you will be here in person so that we can arrange to sign you in.

In preparation for the meeting we have put together a confidential draft settlement agreement for your review. We hope that you will have the opportunity to read it through before call, so that we can have a productive discussion.

DRAFT September 21, 2010.

Settlement confidential do not release or cite

SETTLEMENT AGREEMENT

This Settlement Agreement is made by and between the following groups of Petitioners: (1) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”); and (2) the States of New York, **[California, Connecticut, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Wisconsin, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York]** (collectively “State Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”).

WHEREAS, EPA published a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, the Final Rule included amendments to the standards of performance for steam generating units subject to 40 C.F.R. part 60, subpart Da;

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas (“GHG”) emissions;

WHEREAS, Environmental and State Petitioners filed petitions for judicial review of the Final Rule under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, contending, *inter alia*, that the Final Rule was required to include standards of performance for GHG emissions from electric utility steam generating units (“EGUs”);

WHEREAS, the portion of Environmental and State Petitioners’ petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District

DRAFT September 21, 2010.

Settlement confidential do not release or cite

of Columbia Circuit (the “Court”) under the caption *State of New York, et al. v. EPA*, No. 06-1322;

WHEREAS, EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007);

WHEREAS, the Court remanded the Final Rule to EPA for further proceedings in light of *Massachusetts v. EPA*, without vacating the Final Rule, by its Order of September 24, 2007 (the “Remand Order”);

WHEREAS, as of the date of this Settlement Agreement, EPA had not taken any publicly noticed action to respond to the Remand Order;

WHEREAS, Environmental Petitioners submitted a letter to EPA on August 20, 2010, requesting that EPA agree to consider GHG emissions in conjunction with other utility standards to be proposed in March 2011, and threatening the possibility of further litigation in the absence of such an agreement;

WHEREAS, EGUs are, collectively, the largest source category of GHG emissions in the United States, according to a recent EPA analysis. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009);

WHEREAS, based on EPA’s initial evaluation of available GHG control strategies, it appears that there are cost-effective control strategies for reducing GHGs from EGUs;

WHEREAS, EPA believes that if it sets standards of performance for GHGs, it would be appropriate for it to concurrently issue emissions guidelines for GHGs from existing affected EGUs pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

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WHEREAS, the Parties wish to enter into this Settlement Agreement to resolve the Environmental and State Petitioners' request for consideration of GHGs in NSPS for EGUs and to avoid further litigation on this issue, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. EPA agrees that it will sign and promptly transmit to the Office of the Federal Register a proposed rule by May 31, 2011, that addresses standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the Environmental and State Petitioners a copy of the proposed rule within five business days of signature.
2. EPA agrees that if it proposes standards of performance pursuant to Paragraph 1 it will also sign and promptly transmit to the Office of the Federal Register a proposed rule by May 31, 2011, that addresses emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the Environmental and State Petitioners a copy of the proposed rule within five business days of signature.
3. After considering any public comments received concerning the proposed rule described in Paragraph 1, EPA will sign and promptly submit to the Office of the Federal Register a final rule no later than May 31, 2012, that takes final action with respect to the proposed rule described in Paragraph 1. EPA shall provide the Environmental and State Petitioners with a copy of its final action within five business days of signature.
4. If EPA finalizes standards of performance for GHGs pursuant to Paragraph 3 then based on consideration of the public comments received concerning the proposed rule described

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in Paragraph 2, EPA will sign and promptly submit to the Office of the Federal Register a final rule no later than May 31, 2012, that takes final action with respect to the proposed rule describe in Paragraph 2. EPA shall provide the Environmental and State Petitioners with a copy of its final action within five business days of signature

5. Upon EPA's fulfillment of each of the obligations stated in Paragraphs 1 through 4 above, this Settlement Agreement shall constitute a full and final release of any claims that Environmental and State Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order, or for any attorneys' fees and costs in such an action.
6. Environmental and State Petitioners shall not file any motion or petition for review seeking to compel EPA action in response to the Remand Order unless EPA has first failed to meet an obligation stated in Paragraphs 1 through 4 above. If EPA fails to meet such an obligation, Environmental and State Petitioners' sole remedy shall be to file an appropriate motion or petition with the Court seeking to compel EPA to take action responding to the Remand Order. In that event, all Parties reserve any claims or defenses they may have in such an action, and the terms of this Settlement Agreement shall not be included in the record or other filings presented to the Court nor referenced in any such filing.
7. This Settlement Agreement constitutes the sole and entire understanding of EPA and the Environmental and State Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.

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8. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have.
9. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.
10. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.
11. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.
12. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraph 3 or 4, or to promulgate superseding regulations.
13. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. This Settlement Agreement

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shall become final on the date that EPA provides written notice of such finality to the Environmental and State Petitioners.

- 14. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 13.

DATE: _____

 DAVID GUNTER
 U.S. Department of Justice
 Environment and Natural Resources Division
 Environmental Defense Section
 P.O. Box 23986
 Washington, D.C. 20026-3986
 (202) 514-3785
 David.Gunter2@usdoj.gov

 Counsel for EPA

DATE: _____

Counsel for **[environmental petitioners]**

Counsel for **[state petitioners]**

To: "Joanne Spalding" [Joanne.Spalding@sierraclub.org]
From: CN=Patricia Embrey/OU=DC/O=USEPA/C=US
Sent: Fri 9/24/2010 11:55:46 AM
Subject: Re: Combined state/environmental edits on draft

Thanks Joanne. We will review and be in touch.

From: Joanne Spalding [Joanne.Spalding@sierraclub.org]
Sent: 09/24/2010 01:12 AM MST
To: Patricia Embrey
Cc: Vickie_Patton@environmentaldefense.org; ddoniger@nrdc.org; Michael.Myers@ag.ny.gov; DGunter@ENRD.USDOJ.GOV; Avi Garbow; Elliott Zenick; Eric Ginsburg; Joseph Goffman; Peter Tsirigotis
Subject: Combined state/environmental edits on draft

CONFIDENTIAL

Thank you for offering the draft settlement agreement. It is a meaningful step toward resolving our claims. The attached version includes the combined proposed edits of the state and environmental petitioners. We have not made any changes to the schedule. We have, however, changed "addresses" to "includes" in paragraphs 1 and 2, as we discussed in our last call. We think it is very important that EPA commit to proposing performance standards for greenhouse gas emissions from EGUs. EPA has already found that GHGs endanger health and welfare, and both individually and as a category, EGUs are the largest GHG emitters. Over the past year, EPA has examined a variety of effective methods to limit GHG emissions from EGUs, along with other stationary sources. We do not see any legal or technical obstacle that would preclude a commitment to including GHG performance standards in a proposed rule.

Our very cursory review of prior settlements has yielded several instances in which EPA has agreed to include specific content in proposed rules. In a number of situations, the settlement has recited at length the exact language that would appear in the proposed rule. A few sample settlements are attached. The circumstances of this case do not warrant a different treatment.

The attached draft also contains other edits, which we can explain further in our next conversation. We are available Friday to discuss these proposed changes and work together to resolve any remaining differences.

Joanne Spalding
Managing Attorney
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
415-977-5725
415-977-5793 (Fax)
joanne.spalding@sierraclub.org

CONFIDENTIAL LEGAL COMMUNICATION/WORK PRODUCT

This e-mail may contain privileged and confidential attorney-client communications and/or confidential attorney work product. If you receive this e-mail inadvertently, please reply and notify the sender and delete all versions on your system. Thank you.

To: "Michael Myers" [Michael.Myers@ag.ny.gov]
Cc: []
Bcc: []
From: CN=Patricia Embrey/OU=DC/O=USEPA/C=US
Sent: Wed 12/22/2010 6:26:27 PM
Subject: Re: NSPS
[Boiler NSPS Settlement \(signed\).pdf](#)
[Refinery NSPS Settlement \(signed\).pdf](#)
michael.myers@ag.ny.gov
[\(embedded image\)](#)
[\(embedded image\)](#)

The cite for the Mercury section 111 rule (both the NSPS and the Emission Guidelines) is: Proposal -- 69 FR 12398 (March 16, 2004). Final -- 70 FR 28606 (May 18, 2005).

An older Emission Guideline, for Sulfuric Acid is at 60 FR 65414 (December 19, 1995).

Here are the agreements with signature pages attached.

From: "Michael Myers" <Michael.Myers@ag.ny.gov>
To: Patricia Embrey/DC/USEPA/US@EPA
Date: 12/22/2010 12:38 PM
Subject: NSPS

Patricia, can you give me a call? Joe suggested that I follow up with you on a couple of things. Thanks.--
Mike

Michael J. Myers
Chief, Affirmative Litigation Section
Environmental Protection Bureau
New York State Attorney General
The Capitol
Albany, NY 12224
(518) 402-2594
michael.myers@ag.ny.gov

SETTLEMENT AGREEMENT

This Settlement Agreement is made by and between the following groups of Petitioners:

(1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively "State Petitioners"); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively "Environmental Petitioners"), and Respondent, the U.S. Environmental Protection Agency ("EPA") (collectively "the Parties").

WHEREAS, EPA published a final action entitled "Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units," 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the "Final Rule");

WHEREAS, the Final Rule included amendments to the standards of performance for electric utility steam generating units subject to 40 C.F.R. part 60, subpart Da ("EGUs");

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas ("GHG") emissions;

WHEREAS, State and Environmental Petitioners filed petitions for judicial review of the Final Rule under the Clean Air Act ("CAA") Section 111, 42 U.S.C. § 7411, contending, *inter alia*, that the Final Rule was required to include standards of performance for GHG emissions from EGUs;

WHEREAS, the portions of State and Environmental Petitioners' petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District

of Columbia Circuit (the “Court”) under the caption *State of New York, et al. v. EPA*, No. 06-1322;

WHEREAS, following the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of that decision;

WHEREAS, the Court remanded the Final Rule to EPA for further proceedings on GHG emissions in light of *Massachusetts v. EPA*, by its Order of September 24, 2007 (the “Remand Order”);

WHEREAS, as of the date of this Settlement Agreement, EPA has not taken any publicly noticed action to respond to the Remand Order;

WHEREAS, the State Petitioners submitted letters to EPA dated June 16, 2008 and August 4, 2009 inquiring as to the status of EPA’s action on the remand and stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111, and Environmental Petitioners submitted a letter to EPA on August 20, 2010 seeking commitments to rulemaking on GHG emissions from EGUs as a means of avoiding further litigation;

WHEREAS, EGUs are, collectively, the largest source category of GHG emissions in the United States, according to a recent EPA analysis. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from EGUs;

WHEREAS, EPA believes it would be appropriate for it to concurrently propose performance standards for GHG emissions from new and modified EGUs under CAA section

111(b), 42 U.S.C. § 7411(b), and emissions guidelines for GHG emissions from existing affected EGUs pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, the Parties wish to enter into this Settlement Agreement to resolve the State and Environmental Petitioners' request for performance standards and emission guidelines for GHG emissions under CAA sections 111(b) and 111(d) and to avoid further litigation on this issue, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
2. EPA will also sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
3. After considering any public comments received concerning the proposed rule described in Paragraph 1, EPA will sign no later than May 26, 2012, and will transmit to the Office of the Federal Register within five business days, a final rule that takes final action with respect to the proposed rule described in Paragraph 1. EPA shall provide the

Environmental and State Petitioners with a copy of its final action within five business days of signature.

4. If EPA finalizes standards of performance for GHGs pursuant to Paragraph 3, then based on consideration of the public comments received concerning the proposed rule described in Paragraph 2, EPA will sign no later than May 26, 2012, and will transmit to the Office of the Federal Register within five business days, a final rule that takes final action with respect to the proposed rule describe in Paragraph 2. EPA shall provide the State and Environmental Petitioners with a copy of its final action within five business days of signature.
5. EPA agrees that it will make staff available by telephone at least every 60 days to update State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs (1) through (4). In addition, EPA will provide State and Environmental Petitioners with a status letter every 60 days, which shall include an affirmative statement of whether EPA believes it will timely complete all actions described in Paragraphs 1 through 4.
6. Upon EPA's fulfillment of each of the obligations stated in Paragraphs 1 through 4 above, this Settlement Agreement shall constitute a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs.
7. State and Environmental Petitioners shall not file any motion or petition seeking to compel EPA action in response to the Remand Order with respect to GHG emissions from EGUs unless EPA has first failed to meet an obligation stated in Paragraphs 1

through 4 above. If EPA fails to meet such an obligation, or if an EPA status letter described in Paragraph 5 does not affirm that EPA believes it will timely complete all actions described in Paragraphs 1 through 4, or if EPA fails to send a status letter as described in Paragraph 5 and does not promptly cure that failure upon receiving notice, State and Environmental Petitioners' sole remedy shall be to file an appropriate motion or petition with the Court or other civil action seeking to compel EPA to take action responding to the Remand Order. In that event, all Parties reserve any claims or defenses they may have in such an action, and the dates stated in Paragraphs 1 through 4 shall be construed to represent only the parties' attempt to compromise claims in litigation, and not to represent agreement that any particular schedule for further agency action is reasonable or otherwise required by law. State and Environmental Petitioners reserve all rights under the law to file petitions for review of final agency actions under this Settlement Agreement, pursuant to section 307(b), 42 U.S.C. § 7607(b).


8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the Environmental and State Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.
9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. State and Environmental Petitioners reserve the right to seek attorneys' fees and costs relating to this litigation, and EPA reserves any defenses it may have relating to such claims.
10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.

11. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.
12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.
13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraphs 3 or 4, or to promulgate superseding regulations.
14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the

date that EPA provides written notice of such finality to the State and Environmental Petitioners.

- 15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: 12/21/10



 DAVID GUNTER
 U.S. Department of Justice
 Environment and Natural Resources Division
 Environmental Defense Section
 P.O. Box 23986
 Washington, D.C. 20026-3986

Counsel for U.S. Environmental Protection Agency

DATE: _____

 MICHAEL J. MYERS
 MORGAN A. COSTELLO
 Assistant Attorneys General
 Environmental Protection Bureau
 Office of the Attorney General, The Capitol
 Albany, New York 12224

Counsel for State of New York

DATE: _____

 KENNETH P. ALEX
 SUSAN DURBIN
 Office of the Attorney General, State of California
 1515 Clay Street, 20th Floor, P.O. Box 70550
 Oakland, CA 94612

Counsel for State of California

date that EPA provides written notice of such finality to the State and Environmental
Petitioners.


- 15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: _____

 DAVID GUNTER
 U.S. Department of Justice
 Environment and Natural Resources Division
 Environmental Defense Section
 P.O. Box 23986
 Washington, D.C. 20026-3986

Counsel for U.S. Environmental Protection Agency

DATE: 12/16/2010



 MICHAEL J. MYERS
 MORGAN A. COSTELLO
 Assistant Attorneys General
 Environmental Protection Bureau
 Office of the Attorney General, The Capitol
 Albany, New York 12224

Counsel for State of New York

DATE: _____

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 SUSAN DURBIN
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 1515 Clay Street, 20th Floor, P.O. Box 70550
 Oakland, CA 94612

Counsel for State of California

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Petitioners.

- 15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

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 DAVID GUNTER
 U.S. Department of Justice
 Environment and Natural Resources Division
 Environmental Defense Section
 P.O. Box 23986
 Washington, D.C. 20026-3986

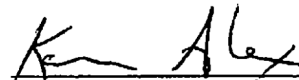
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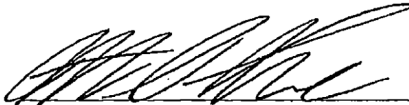
DATE: 12/8/10



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Hartford, Connecticut 06141-0120

Counsel for State of Connecticut

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Department of Justice
102 W. Water Street
Dover, DE 19904

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DATE: _____

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Assistant Attorney General
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State House Station #6
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Counsel for State of Maine

DATE: _____

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P.O. Drawer 1508
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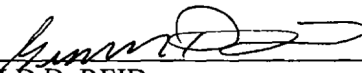
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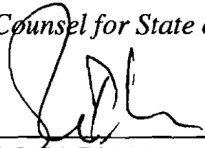
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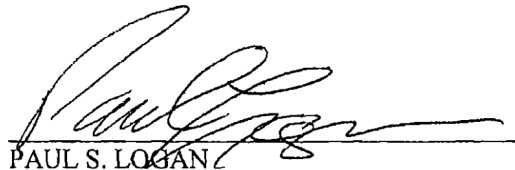
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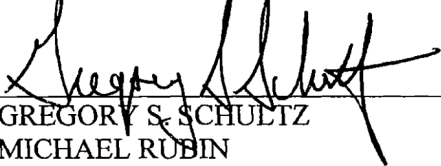
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DATE: 12/10/10


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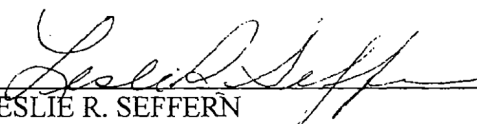
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DATE: _____

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Counsel for Commonwealth of Massachusetts

DATE: _____

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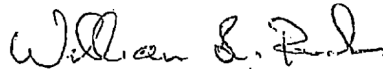
Counsel for City of New York

DATE: _____

DONNA M. MURASKY
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441 Fourth Street, N.W.
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Counsel for District of Columbia

DATE: Dec 8, 2010



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CAROL IANCU
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CHRISTOPHER G. KING
CARRIE NOTEBOOM
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New York, NY 10007

Counsel for City of New York

DATE: _____

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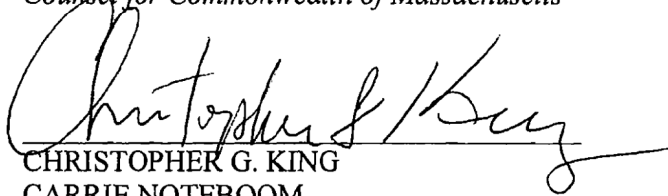
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Counsel for Commonwealth of Massachusetts

DATE: 12.10.10



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DAVID D. DONIGER
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Counsel for Natural Resources Defense Council



DATE: 12/16/2010

JOANNE SPALDING
Sierra Club
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Counsel for Sierra Club



DATE: 12/20/2010

VICKIE PATTON
Environmental Defense Fund
2334 N. Broadway
Boulder, CO 80304

Counsel for Environmental Defense Fund

SETTLEMENT AGREEMENT

This Settlement Agreement is made by and between the following groups of Petitioners:

(1) the States of New York, California, Connecticut, Delaware, Maine, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively “State Petitioners”); (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Integrity Project (EIP) (collectively “Environmental Petitioners”); and (3) Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”).

WHEREAS, the State and Environmental Petitioners filed petitions for judicial review of the final action under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, entitled, “Standards of Performance for Petroleum Refineries, Final Rule,” published at 73 Fed. Reg. 35,838 (June 24, 2008) (“Final Rule”). These petitions for review currently are pending before the U.S. Court of Appeals for the District of Columbia Circuit in consolidated cases under the lead case *American Petroleum Institute, et al. v. EPA*, No. 08-1277;

WHEREAS, the Final Rule includes amendments to the current standards of performance (40 CFR part 60, subpart J) and separate standards of performance for new process units (40 CFR part 60, subpart Ja) at petroleum refineries;

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas emissions (“GHGs”);

WHEREAS, the Environmental Petitioners also filed a petition for administrative reconsideration pursuant to CAA section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), and EPA granted reconsideration with respect to some of the issues raised in that petition for

reconsideration. *See* “Standards of Performance for Petroleum Refineries,” 73 Fed. Reg. 55,751 (Sept. 26, 2008).

WHEREAS, on December 22, 2008, EPA published a proposed rule concerning issues that were raised in the Environmental Petitioners’ administrative petition for reconsideration. *See* “Standards of Performance for Petroleum Refineries; Standards of Performance for Petroleum Refineries for Which Construction, Reconstruction, or Modification Commenced after May 14, 2007,” 73 Fed. Reg. 78,522 (Dec. 22, 2008) (“Proposed Rule”). EPA has accepted public comment on the Proposed Rule;

WHEREAS, starting on December 15, 2008, the Court has held the consolidated cases in abeyance pending further order;

WHEREAS, on December 29, 2009, EPA granted reconsideration of all remaining issues that were raised in the petitions for administrative reconsideration, including the failure to regulate GHGs. *See* Letter from Gina McCarthy, Assistant Administrator, Office of Air and Radiation, U.S. EPA to petitioners’ counsel (Dec. 29, 2009);

WHEREAS, refineries are estimated to be the second largest direct stationary source category of GHGs in the United States, according to a recent EPA analysis (based on data in Table 5-1, Regulatory Impact Analysis for the Mandatory Reporting of Greenhouse Gas Emissions, Final Report, September 2009.);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from refineries;

WHEREAS, based on current knowledge, EPA believes that it is appropriate for it to set standards of performance for GHGs from refineries;

WHEREAS, EPA believes it will be more effective to address GHGs and various other pollutants from refineries in a comprehensive manner rather than just addressing such pollutants from those affected facilities that are subject to regulation under NSPS subparts J and Ja;

WHEREAS, EPA believes that if it sets standards of performance for GHGs, it is also appropriate for it to concurrently issue emissions guidelines for GHGs from existing affected facilities at refineries pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, this comprehensive approach of simultaneously addressing all affected facilities at refineries will require more time than would be required were EPA only addressing the pending issues on reconsideration;

WHEREAS, the State and Environmental Petitioners desire that EPA complete its reconsideration of GHG standards of performance for refineries as expeditiously as possible, but agree that allowing additional time for EPA to complete a rulemaking that follows the comprehensive approach discussed above is warranted in light of the potentially greater emissions reductions possible through such an approach, when compared to a rulemaking addressing only the remaining issues on reconsideration for NSPS subparts J and Ja;

WHEREAS, the Parties wish to implement this Settlement Agreement resolving the State and Environmental Petitioners' challenges to the Final Rule and the issues raised in the Environmental Petitioners' administrative petition for reconsideration and thereby avoid protracted litigation, and to preserve judicial resources, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. Within three business days after this Settlement Agreement is executed by the Parties, but before finalization pursuant to Paragraph 14 of this Settlement Agreement, the Parties shall file a joint motion with the Court notifying it of this Settlement Agreement and requesting that the State and Environmental Petitioners' petitions for review be held in abeyance pending completion of the process under CAA section 113(g) as set forth in Paragraph 14 and the actions described in Paragraphs 2 and 3 below.

2. EPA agrees that it will sign by December 10, 2011, and transmit to the Office of the Federal Register within five business days, a proposed rule that includes, at a minimum, the following: (A) standards of performance for GHGs pursuant to 42 U.S.C. § 7411(b) for affected facilities at refineries that are subject to the following NSPS: (1) subparts J and Ja, (2) subpart Db, (3) subpart Dc, (4) subpart GGG, and (5) subpart QQQ, and emissions guidelines for GHGs pursuant to 42 U.S.C. § 7411(d) and 40 C.F.R. § 60.22 from existing affected facilities at refineries in the source categories covered by those NSPS subparts; (B) a review of the emission standards set forth in 40 C.F.R. Part 63, subpart UUU, pursuant to CAA sections 112(d)(6) and (f)(2), 42 U.S.C. §§ 7412(d)(6) and (f)(2); and (C) a proposed resolution of all other issues raised in Environmental Petitioners' August 25, 2008 petition for administrative reconsideration. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.

3. After considering any public comments received concerning the proposed rule addressed in Paragraph 2, EPA will sign by November 10, 2012, and transmit to the Office of the Federal Register within five business days, a final rule that includes final determinations with regard to each of the elements, including all proposed standards and guidelines, listed in

Paragraph 2. EPA shall provide the State and Environmental Petitioners with a copy of this final rule within five business days of signature.

4. If EPA signs a final rule by November 10, 2012, as described in Paragraph 3 above, the State and Environmental Petitioners and EPA shall, no later than five business days after the date on which that final rule takes effect, file an appropriate pleading seeking the dismissal of Petitions for Review Nos. 08-1279 and 08-1281, with prejudice, in accordance with Rule 42(b) of the Federal Rules of Appellate Procedure. The State and Environmental Petitioners reserve their right to seek attorneys' fees and costs relating to this litigation, and EPA reserves any defenses it may have relating to such claims.

5. The State and Environmental Petitioners agree that performance of the obligations described in Paragraphs 2 and 3 shall constitute full and complete settlement of all claims they have or could have asserted under any provision of law in connection with this case, excluding any claims for attorneys' fees or other litigation costs as a result of this case.

6. EPA agrees that it will make staff available by telephone on at least a monthly basis to update the State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs 2 and 3 and will recommend to the Court that EPA be ordered to file written status reports with the Court every 90 days starting from the date these cases are stayed under Paragraph 1, to inform the Court of EPA's progress in completing the actions described in Paragraphs 2 and 3. Such written status reports shall include an affirmative statement of whether EPA believes it will timely complete all actions described in Paragraphs 2 and 3. If the Court does not require written status reports every 90 days, EPA shall provide written status reports that otherwise meet the requirements of this paragraph directly to the State

and Environmental Petitioners every 90 days starting from the date these cases are stayed under Paragraph 1.

7. If EPA does not sign a proposed rule by December 10, 2011, as described above in Paragraph 2, or a final rule by November 10, 2012, as described above in Paragraph 3, or does not transmit those documents to the Federal Register within the time allotted in Paragraphs 2 and 3, or if the written status reports described in Paragraph 6 do not state that EPA will timely complete all actions described in Paragraphs 2 or 3, or if the Administrator and/or the Attorney General determines to withdraw or withhold his/her consent to this Settlement Agreement as described in Paragraph 14, then the State and Environmental Petitioners' sole remedy with respect to the Final Rule at issue in these consolidated cases shall be the right to ask the Court to lift the stay of proceedings and establish a schedule for briefing and oral argument of the pending petitions for judicial review.

8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the State and Environmental Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.

9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. In the event of further litigation, the dates stated in Paragraphs 2 and 3 shall be construed to represent only the parties' attempt to compromise claims in litigation, and not to represent agreement that any particular schedule for further agency action is reasonable or otherwise required by law.

10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.

11. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.

12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.

13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraph 3, or to promulgate superseding regulations.

14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the date that EPA provides written notice of such finality to the State and Environmental Petitioners.

15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: 12/21/10



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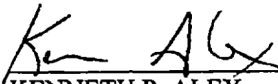
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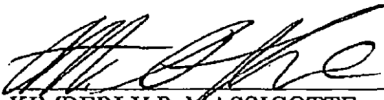
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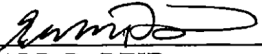
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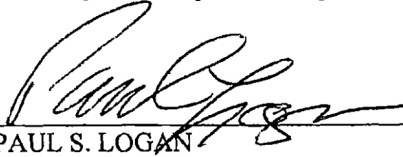
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