ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW JERSEY, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 05-1097, and consolidated cases **Complex**

On Petitions for Review of Final Actions
of the United States Environmental Protection agency

BRIEF OF PETITIONER-INTERVENOR ADIRONDACK MOUNTAIN CLUB

ADIRONDACK MOUNTAIN CLUB
NEIL WOODWORTH
MARISA TEDESCO
IAN BROWN
301 Hamilton Street
Albany, NY 12201
Phone: (518) 449-3870

CARTER, CONBOY, CASE, BLACKMORE, MALONEY & LAIRD, P.C.
LEAH W. CASEY (D.C. Bar Roll #49608)
Attorneys for Adirondack Mountain Club
Office and P.O. Address
20 Corporate Woods Boulevard
Albany, NY 12211-2362
Phone: (518) 465-3484

Dated: January 26, 2007

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned certifies as follows:

A. PARTIES AND AMICI

(I-iii) All parties, intervenors, and amici appearing in this consolidated action are listed in the Brief of Government Petitioners.

(iv) Circuit Rule 26.1 Disclosure

The Adirondack Mountain Club is a membership supported, nonprofit organization devoted to the protection and wise recreational use of New York State's forest preserve lands in the Adirondacks and Catskills. The Adirondack Mountain Club has no parent corporation and is not held by any publicly traded corporation.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief of Government Petitioners.

C. RELATED CASES

The consolidated cases, separately or jointly, have not been before this or any other court for review.

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GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of all acronyms and abbreviations used in this brief:

ADK	Adirondack Mountain Club
CAA	Clean Air Act, 42 U.S.C. §§7401 et. seq.
CAMR	The Clean Air Mercury Rule
HAPs	Hazardous Air Pollutants, 42 U.S.C. §§7412(a)(6) & (b)
MACT	Maximum Achievable Control Technology
MSRC	U.S. EPA Office of Air Quality Planning and Standards, and Office of Research and Development Mercury Study Report to Congress, EPA-452-97-003 (December 1997) available at http://www.epa.gov/ttn/oarpg/t3/reports/volume2.pdf
NESHAP	National Emissions Standards for Hazardous Air Pollutants
PSD	Prevention of Significant Deterioration

STANDING

ADK is a member-supported, non-profit organization devoted to the protection and wise recreational use of New York State's forest preserve lands in the Adirondacks and Catskills. ADK has over 30,000 members with 25 chapters spread throughout the State of New York, New Jersey, and Massachusetts. ADK has standing by virtue of the fact that its members own property, vacation and recreate in areas that are being adversely affected by mercury deposition.

BACKGROUND

The effects of mercury pollution in the Northeast are well-documented. Mercury pollution poses serious threats to public health and the environment.

The Adirondacks and Catskills are located downwind of numerous coal-burning power plants, whose emission of mercury contribute significantly to mercury pollution in these regions. See Comments of NY Attorney General Eliot Spitzer, OAR-2002-0056-5460[JA__]. The largest single source of mercury emissions in the United States is coal-fired electric utilities.[1]

In 1997, the EPA found that roughly 60 percent of the total mercury deposited in the U.S. is attributed to anthropogenic air emission sources. This percentage is estimated to be even higher in certain regions (e.g., northeastern United States). 65 Fed. Reg. at 79827. Further, a 2007 independent study estimates that in the United States mercury emissions from coal-fired power plants are responsible for 40 percent to 65 percent of mercury deposition in the Northeast.[2]

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[1] Evers, et.al. 2007. Biological Mercury Hotspots in the Northeastern United States and Southern Canada, BioScience Vol 57 No 1 (34), available at: http://www.hubbardbrookfoundation.org/filemanager/filedownload/phpfcyQt7/Evers%20et%20al%20BioScience%201-07.pdf ("Evers 2007 Study"); see also, MSRC, Vol. I: Executive Summary at 2-1 (EPA's own findings supportive)[JA__].

[2] Driscoll, et.al. 2007. Mercury Contamination in Forest and Freshwater Ecosystems in the Northeastern United States. (25) 17-28 available at: http://www.hubbardbrookfoundation.org/filemanager/filedownload/phpv9Ebww/Driscoll%20et%20al%20BioScience%201-07.pdf ("Driscoll 2007 Study"), referenced at OAR-2002-0056-6615.2[JA__].

Atmospheric deposition is the major contributor to the formation of biological mercury hotspots. Evers 2007 Study at 34. Two new independent studies identify five known and nine suspected biological hotspots in northeastern North America, including the central Adirondacks. Driscoll 2007 Study at 17-28 & Evers 2007 Study at 35.

Ninety-six percent of the lakes in the Adirondack region and forty percent of the lakes in New Hampshire and Vermont exceed the recommended EPA action level for methylmercury in fish.[3] High mercury levels in fish from six reservoirs in the Catskills have prompted advisories that infants, children under the age of 15, and women of childbearing age not to eat any fish from these reservoirs.[4] The state of New York has posted thirty-two mercury health warnings covering 59,228 acres of our lakes. More than fifty New York state lakes, rivers and reservoirs are said to have fish that are unsafe to eat due to high mercury levels.[5] Current levels of mercury deposition in the Northeast are four to six times higher than the levels recorded in 1900. Evers 2007 Study at 41.

Children and fetuses exposed to mercury can suffer from poor attention span, language development, impaired memory and vision, problem processing information and, impaired fine motor coordination. One in twelve women of childbearing age have unsafe levels of mercury in their bloodstream. This works out to approximately 300,000 at risk children born each year with increased risk for neurological problems and developmental disorders to mercury expose alone. [6] It

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[3] Hubbard Brook Research Foundation, Testimony to the United States Environmental Protection Agency in Response to the EPA's 2004 Mercury Regulatory Package, 2, *available at* http://www.hubbardbrook.org/hbrf/HBRF_mercury_comments.pdf.[JA__].

[4] White, *Mercury Advisories an Early Warning of Atmospheric Pollution in the Catskills*, Kaatskill Life, 12 (Spring 2005).

[5] New York Department of Environmental Protection, Chemicals in Sportfish and Game: 2006-2007 Health Advisories, 2-3, available at http://www.health.state.ny.us/environmental/outdoors/fish/docs/fish.pdf.

[6] CDC. *Blood and hair mercury levels in young children and women of childbearing age---United States,1999 and 2000,* at140-43, available at http://www.cdc.gov/mmwR/preview/mmwrhtml/mm5008a2.htm.

is estimated that fish studied in the Northeast had mercury levels ten times higher than the EPA human health criteria. Evers 2007 Study at 37

As mercury is emitted it enters the atmosphere. Atmospheric mercury can be transported over a range of distances before it is deposited, potentially resulting in deposition on local, regional, continental and/or global scales.[7]

> "When mercury falls in rain or snow as wet deposition, it may flow into bodies of water like lakes and streams. When it falls out of the air as dry deposition, it may eventually be washed into those bodies by rain. Bacteria in soils and sediments convert mercury to methylmercury. In this form, it is taken up by tiny aquatic plants and animals. Fish that eat these organisms build up methylmercury in their bodies. As ever-bigger fish eat smaller ones, the methylmercury is concentrated further up the food chain. This process is called "bioaccumulation". Id.

Further, according to Keeler et.al., a seasonal pattern for mercury in precipitation is clearly evident, with increased mercury concentrations and deposition observed during the spring and summer months. During these months there is generally a greater amount of precipitation which leads to significantly higher concentrations of atmospheric mercury deposition. Keeler et.al., Long-Term Atmospheric Mercury Wet Deposition at 71-83, OAR-2002-0056-5834[JA___].

Atmospheric mercury deposition clearly affects mercury accumulations in soils and lake sediments. Mercury assimilation by plant foliage may provide a substantial input of methylmercury (MeHg) to ecosystems. Miller et.al., Estimation and Mapping of Wet and Dry Deposition Across Northeastern North America at 53-70, OAR-2002-0056-6309[JA__].

As atmospheric mercury enters the soil, biological and chemical processes transform elemental mercury into methylmercury. Methylmercury is the most toxic form of mercury, and does not degrade or disappear like other persistent organic pollutants. Bioaccumulation of methylmercury

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[7] U.S. Environmental Protection Agency: *Human Exposure to Mercury* available at http://www.epa.gov/mercury/exposure.htm#1[JA__].

increases as it goes up the food chain. As a result of bioaccumulation smallmouth bass and common loons can reach methylmercury levels one hundred times greater than those levels found in insects. Ultimately humans eat fish with high levels of methylmercury and it enters the bloodstream causing severe health effects to our bodies. Id.

Mercury is a highly toxic chemical and is linked to many adverse health effects, including neurological problems and endocrine disruption in humans, fish and wildlife. Mercury's effect on the central nervous system is comparable to that of lead, especially for unborn fetuses and very young children whose brains are still developing. Children and fetuses exposed to mercury can suffer poor attention span and language development, impaired memory and vision, problems processing information, and impaired fine motor coordination. Consumption of mercury-contaminated fish can also harm cardiovascular and immune systems in adults.

Recent studies have shown the detrimental impacts of mercury emissions on wildlife. The first study found that anthropogenic input of mercury into the environment has an elevated risk to fish and wildlife, particularly in the Northeast. Rimmer et.al., Mercury Concentrations in Bicknell's Thrush and Other Insectivorous Passerines in Montane Forests of Northeastern North America at 223-240, OAR-2002-0056-5851[JA___].

A second study found that high mercury concentrations in fish native to Minnesota's Voyageurs National Park are largely attributable to man-made sources such as coal-fired power plants. The study mentions that both watershed and lacustrine factors exert important controls on the bioaccumulation of methylmercury.[8]

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[8] Wiener, et.al., *Mercury in Soils, Lakes, and Fish in Voyageurs National Park (Minnesota): Importance of Atmospheric Deposition and Ecosystem Factors.* at Environmental Science and Technology, available at: http://www.eenews.net/Greenwire/2006/09/07/archive/12/?terms=Mercury

A 2007 study published in the journal of BioScience discusses biological mercury hotspots in the Northeastern United States and Canada providing clear evidence that "hotspots" are forming in the Northeast. This study mentions that three things contribute to biological hotspots: the elevated atmospheric mercury deposition from local sources, high landscape sensitivity, and large water level manipulations. There is a scientific link between atmospheric mercury and fish advisories. Evers 2007 Study at 35.

The Northeast includes several mercury "hot spots," where high mercury levels have been recorded in fish, loons, eagles, and other animals.[9]

One of the most studied species dealing with mercury contamination is the common loon. Mercury is present in two-thirds of Adirondack loons at levels that negatively impact their reproductive capacity, and in turn, pose a significant risk to their survival.[10] Study of the loon is significant because the common loon is a keystone species, representing the overall well-being of the Northeast's ecological niche; similar to a "canary in the coal mine." Loons have high levels of mercury in their bloodstream because they are higher up in the food chain, and therefore, their bioaccumulation of mercury is greater. A recent study found that seventeen percent of the loons tested in New York State were estimated to be at risk for harmful effects from mercury contamination. Loons considered to be highest at risk were found in acidic, low alkalinity lakes in the Adirondack Park.[11] High levels of mercury are correlated with behavioral changes in common

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[9] David C. Evers, *Mercury Connections: The Extent and Effects of Mercury Pollution in Northeastern North America*, BioDiversity Research Institute 19(2005), available at http://www.nwf.org/wildlife/pdfs/MercuryinWildlifeReport.pdf OAR-2002-0056-3460[JA__].

[10] Jenkins, et.al., *Acid Rain in the Adirondacks: A Research Summary*. Adirondack Lakes Survey Corporation. October 2005. available at: http://www.adirondacklakessurvey.org/sosindex,.htm[JA__].

[11] Schoch, N., and D.C. Evers. (2002) *Monitoring Mercury in Common Loons: New York Field Report, 1998-2000*[JA__].

loons that lead to decreased productivity, decreased survival rates for juvenile loons, and possibly increased susceptibility to disease.[12] Twenty-five percent of loons found in the central Adirondacks (New York) have elevated levels of mercury found in their bloodstream, while forty-three percent of loons found in the western portion of the Upper Kenebec River, Maine were found to have elevated mercury levels. Evers 2007 Study at 33.

Significant behavioral differences occur in immature loons with high mercury levels, including increased preening and decreased time spent riding on parents' backs.[13] These behavioral changes result in increased exposure to predators and energy expenditure, contributing to increased death rates. In Maine, loons in the highest mercury risk category fledged thirty-seven percent fewer young than low risk pairs. Evers, supra 11.

Otters and mink in the northeastern United States also have levels of mercury in their systems affecting their reproductive success. Problems associated with mercury accumulation appear not to be limited to surface waters and wildlife that use them. Mercury is also accumulating in songbirds in mountain forests, like the Bicknell's thrush - a terrestrial, insect eating songbird - in the western Maine mountains. Evers, supra 8. Sampling of Bicknell's thrush indicated significant increases in methylmercury traces found in the bloodstream, across twenty-one mountaintops in northeastern North America. One hundred seventy-eight woodland birds, the entire testing sample, had elevated levels of mercury in their blood and feathers. [14] Eaglet mercury exposure in Maine highlights geographic mercury "hot spots" that demonstrate a general agreement with mercury findings in

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[12] Evers, et.al. (2001) *Assessing the impacts of methylmercury on piscivorus wildlife as indicated by the Common Loon, 1998-2000.* [JA__].

[13] Nocera, J.J., and Taylor, P.D. (1998) *In situ behavioral response of Common Loons associated with elevated mercury (Hg) exposure.* Conservation Ecology 2 (2):10., available at http://www.ecologyandsociety.org/vol2/iss2/art10/[JA__].

[14] David C. Evers, BioDiversity Research Institute, NY Times July 25, 2006.

common loons and fish.[15] Wildlife in the Catskill Mountains "are potentially at greater ecological risk for mercury accumulation." Evers, supra 8.

ARGUMENT

I.THE EPA'S RULEMAKING IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO THE EPA'S OWN FINDINGS.

A. Epa's De-listing Rule Is Arbitrary and Capricious

The following is offered in further support of Point II, C of the Government Petitioners' Brief.

The EPA's 1997 US Mercury Study Report to Congress, the 1998 Utility Air Toxics Study, and its final regulatory findings stated in its December 2000 rule entitled, "Utility Air Toxics Determination" all found that mercury is a public health hazard and that coal-fired power plants are to be regulated under section 112 of the Clean Air Act. CAMR is a complete reversal from the EPA's previous stance and ignores the agency's own findings without justification and without true explanation.

According to EPA's 1997 US Mercury Study Report, all three forms of mercury (elemental, inorganic, and methylmercury) are hazardous to human health. Of the three forms of mercury, methylmercury poses the greatest health risk to humans. Neurotoxicity is the most sensitive indicator of adverse health effects in humans exposed to methylmercury. Although small quantities of mercury may be emitted as fugitive particulate matter (PM) from coal storage and handling, the primary source of mercury emissions from both coal and oil combustion in utility boilers is the combustion stack.[16]

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[15] DeSorbo, C. R. and D. C. Evers. *Evaluating exposure of Maine's Bald Eagle population to Mercury: assessing impacts on productivity and spatial exposure patterns.* Report BRI 2006-02. BioDiversity Research Institute at 5-7.

[16] MSRC, Volume II at 4-10[JA__].

The 1997 study noted:

> "Methylmercury is rapidly and extensively absorbed through the gastrointestinal tract. This form of mercury is distributed throughout the body and easily penetrates the blood-brain and placental barriers in humans and animals. Methylmercury transport into tissues appears to be mediated by the formation of a methylmercury-cysteine complex. This complex is structurally similar to methionine and is transported into cells via a widely distributed neutral amino acid carrier protein. It is hypothesized that methylmercury metabolism may be related to a latent or silent period observed in epidemiological studies observed as a delay in the onset of specific adverse effects. Methylmercury has a relatively long biological half-life in humans; estimated range from 44 to 80 days. Excretion occurs via the feces, breast milk, and urine." MSRC, Volume V, OAR-2002-0056-5934[JA__].

Methylmercury is of greatest concern to human health. Exposure occurs via transport of mercury to water bodies and sediments with subsequent bioaccumulation of methylmercury in the aquatic food-web of which humans are a part. Data presented in the 1997 EPA report (as well as other exposure assessments) indicates that most human exposure is likely to be due to methylmercury in food – primarily fish. MSRC, Volume VII[JA__]. However, mercury exposure may occur through fish consumption or other routes such as the ingestion of methylmercury-contaminated drinking water and dermal uptake through soil and water. MSRC, Volume 1 at 2-5[JA__].

Based on its own 1997 study, the EPA concluded in February 1998 that mercury from coal-fired utilities is the hazardous air pollutant (HAP) of greatest potential concern and merits additional research and monitoring.[17] Thereafter, in December 2000, the EPA found via section 112 that it was "appropriate and necessary" to regulate coal and oil fired utilities. 65 Fed. Reg. at 79826.

In direct contradiction to the representations made in conjunction with CAMR, the EPA asserted:

> "The Administrator has concluded that there is a plausible link between methylmercury concentrations in fish and mercury emissions from coal-fired electric utility steam generating units. The

[17] Utility Air Toxics Study Report to Congress. Executive Summary. http://www.epa.gov/ttn/atw/combust/utiltox/utilexec.pdf[JA__].

> Administrator also found that regulation of HAP emissions from coal- and oil-fired electric utility steam generating units under section 112 is appropriate and necessary. It is appropriate and necessary because electric utility steam generating units are the largest domestic source of mercury emissions, and mercury in the environment presents significant hazards to public health and the environment.
>
> It is necessary to regulate HAP emissions from coal-and oil-fired electric utility steam generating units under section 112 of the CAA because the implementation of other requirements under the CAA will not adequately address the serious public health and environmental hazards. Therefore, the EPA is adding coal-and oil-fired electric utility steam generating units to the list of source categories under section 112(c) of the CAA." Id.

The 2000 study demonstrates the EPA's cognizance of the dangers of mercury generally as well as the specific hazard to human health. "Based on the assessment of hazards and risks due to emissions of HAPs from electric utility steam generating units mercury is the HAP of greatest concern." Id.

The 2000 study also found that people eating contaminated fish have the greatest risk of developing mercury poisoning. "Most of the mercury currently entering U.S. water bodies and contaminating fish is the result of air emissions which, following atmospheric transport, deposit onto watersheds or directly to water bodies. 65 Fed. Reg. at 79827.

Further, EPA concluded in a 2001 report on water quality, that in contrast to acute poisoning episodes, neurotoxic effects from relatively low-level exposure to methylmercury in the diet are more subtle, but nonetheless significant. Reported effects include deficits in memory, language, learning, and intelligence. Dietary methylmercury is almost completely absorbed into the blood and distributed to all tissues including the brain. It also readily passes through the placenta to the fetus and fetal brain.[18]

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[18] EPA, *Water Quality Criterion for the Protection of Human Health: Methylmercury. Chapter 3 Toxicological Basis for Criteria*, Office of Science & Technology, Office of Water, Washington DC 20460. Pub No. EPA-823-R-01-001. January 2001. available at: http://www.epa.gov/waterscience/criteria/methylmercury/document.html &

B. Cap-and-Trade is Arbitrary and Capricious

The following is offered in further support of the government petitioners' arguments contained in Point III of the Government Petitioners' Brief.

i. Previous Agency Action

Even while interpreting the CAA to permit MACT standards to contain a limited form of emissions averaging, in the Hazardous Organic NESHAP in 1994, EPA specifically concluded that the Act barred it from allowing inter-source trading, saying:

> In setting the standard for a category or subcategory, the Administrator is required to determine a floor for the entire category or subcategory, and then set a standard applicable to each source within that category that is at least as stringent as the floor and requires the maximum achievable emission reductions considering certain factors. In determining whether the standard should be more stringent than the floor and by how much, the Administrator is to consider, among other factors, the cost of achieving the additional emission reductions. The statute does not limit how the standard is to be set beyond requiring that it be applicable to all sources in a category, be written as a numerical limit wherever feasible, and be at least as stringent as the floor. Therefore, the relevant statutory language is broad enough to permit the Administrator to exercise discretion to allow sources to meet MACT through the use of emissions averaging provided the standard applies to every source in the category. 59 Fed. Reg. at 19,426.

However, averaging does not cross source boundaries, and the standard is no less stringent than the floor. That the EPA concluded that averaging is permissible should not and can not be construed as evidence that the proposed cap-and-trade program is permissible.

Similarly, when EPA interpreted the CAA to permit averaging between affected sources in the Primary Aluminum NESHAP, the agency concluded that it was constrained to allow such averaging:

> only if it can be demonstrated that the total quantity of any particular HAP that may be emitted by that portion of a contiguous major source that is subject to the NESHAP will not be greater under the averaging mechanism than it would be if each

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Mahaffey et.al., *Blood Organic Mercury and Dietary Mercury Intake: National Health and Nutrition Examination Survey: 1999-2000.* Environ. Health Perspectives 112(5): 562-570, 562 available at http://www.ehponline.org/members/2003/6587/6587.pdf[JA__].

> individual affected source complied separately with the applicable standard. Under this rigorous test, the practical outcome of averaging is equivalent in every respect to compliance by the discrete sources, and the statutory policy embodied in the MACT floor provisions is therefore fully effectuated.
>
> Strict limits on the scope and nature of averaging across sources are necessary to ensure that no HAP is emitted by that portion of a major source subject to a NESHAP in quantities that are greater than those that would result from compliance by each discrete affected source within the facility. These limits include: (1) No averaging can be permitted between differing pollutants, (2) no averaging can be permitted between sources that are not part of the same major source, (3) no averaging can be permitted between sources within the same major source that are not subject to the same NESHAP, (4) statistical discounts must be derived and applied to account for the variability in emissions by the sources to be averaged, and (5) no averaging can be permitted between existing sources and new sources. 62 Fed. Reg. at 52,388.

EPA's proposed trading program under the authority of section 112(d) is completely inconsistent with the statute's single-source focus and with the agency's own interpretations of the law.

ii. Case Law and Legislative Intent

In *ASARCO, Inc. v. EPA*, 578 F.2d 319(D.C. Cir. 1978), the court struck down EPA's attempt to authorize section 111 pollution trading. It was held that even the limited emission trading conceived of by the agency – which would have allowed existing plants to avoid section 111 standards when they made changes that increased emissions so long as offsetting emission reductions were identified elsewhere at the same plant site – was inconsistent with the purpose of section 111. As the court described the statute:

> Section 111's provisions mandating New Source Performance Standards were passed because Congress feared that the system of state plans designed to keep air pollution below nationally determined levels was insufficient by itself to achieve the goal of protecting and improving air quality. The New Source Performance Standards are designed to enhance air quality by forcing all newly constructed or modified buildings, structures, facilities, or installations to employ [best demonstrated controls]. *Id.* at 327.

Thus, section 111 standards of performance are supposed to apply uniformly to all pollution-generating equipment, and the notion of intra-source trading runs counter to that overall purpose.

In *Alabama Power Co. v. Costle*, 636 F.2d 323(D.C. Cir. 1980), the court concluded that EPA was obliged to allow some form of intra-source trading to avoid the application of the PSD permit requirements, in part because "the PSD provisions express a purpose of ensuring that economic growth occurs in a manner consistent with preservation of clean air." *Alabama Power* is distinguishable from the matter currently before the court because it addresses the proper interpretation of the statutory term "source" and the agency's current proposal relies on the statutory term "standard of performance" for authority; however, the case is instructive none-the-less.

In *Alabama Power*, the court stressed that "the offsetting changes must be within the same source, as defined by EPA." The Supreme Court similarly found that the language of the CAA was open to the interpretation that trading between units at the same physical "source," but the Court defined that concept in a way that would not permit the kind of trading that EPA proposes. Furthermore, the Court understood "source" to be "any discrete, but integrated, operation which pollutes." *Id.,* citing *Chevron v. NRDC*, 467 U.S. 837,860-61(1984).

First, and most obviously, "standards of performance" apply to "sources,"[19] and interpreting "standard of performance" to allow the trading that the courts have prevented EPA from interpreting "source" to allow would render superfluous the requirement that "sources" be regulated.

Second, when it amended the CAA in 1990, Congress legislated against the backdrop of these judicial decisions and while it made specific provision for trading in several parts of the statute, it did not include trading in section 111. Title IV of the 1990 amendments, for instance, has elaborate requirements mandating a program for, and regulating the conduct of, trading for the purposes of reducing pollution which contributes to acid rain. 42 U.S.C. § 7651-7651(o). In addition, Congress

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[19] See 42 U.S.C. § 741 1(b)(l)(B) (EPA must develop "standards of performance for new sources"); (state plans are to "establish[ ] standards of performance for any existing source"). EPA's regulations likewise reflect the coextensive scope of the standard and the regulated equipment, defining "affected facility" for the NSPS program to mean "any apparatus to which a standard is applicable." 40 C.F.R. § 60.2.

spelled out the circumstances in which intra-source trading would be allowed in certain kinds of ozone non-attainment areas, (see 42 U.S.C. § 7511a(c)(6)-(8)) and for certain sources of HAPs (see 42 U.S.C. § 7412(g)(1)) as a means by which such facilities could make changes without making "modifications" that would subject them to stringent controls.

Congress's manifested intent that every individual source meet the same standard is fundamentally inconsistent with a cap-and-trade program in which some plants would be able to operate at pollution levels higher than the technology based emissions standard because they have traded with other plants.

The Conference Committee for the 1970 CAA Amendments explained that section 111 "require[s] that new major industry plants such as power plants, steel mills, and cement plants achieve a standard of emission performance based on the latest available control technology, processes, operating methods and other alternatives."[20] The Conference Committee report explains that the provision "provides for national standards of performance on emission from new stationary sources."[21] Furthermore, it notes that "[t]hese sources, important in themselves and involved in industries of national scope, must be controlled to the maximum practicable degree regardless of their location."[22]

Moreover, although the EPA relies, here, on the term "best system" ("MACT") for the authority to instigate a novel regulatory scheme under section 111, nothing in the legislative history suggests that Congress intended MACT to be interpreted so broadly. 69 Fed. Reg. at 4,686. To the contrary, the MACT is consistently understood to be the best system that an *individual* plant could implement. For example, the Senate explained:

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20 1970 LH at 130.

21 Id. at 133.

22 Id.

> "Standards of performance". . . refers to the degree of emissions control which can be achieved through process changes, operation changes, direct emission control, or other methods. The Secretary should not make a technical judgment as to how the standard should be implemented. He should determine the achievable limits and let the owner or operator determine the most economic, acceptable technique to apply.[23]

Likewise, the legislative history of the 1990 Amendments reaffirms that Congress intended MACT to apply to the methods of individual plants not to a novel inter-plant regulatory system. For example, although Senator Simpson explained that Congress had reverted to the 1970 definition of "standards of performance" in order to give sources significant flexibility, he made clear that this flexibility is understood in the context of a plant meeting a specific standard.[24] Thus, the legislative history suggests that the MACT mandate was intended to apply within the constraint of a command and control system.

CONCLUSION

ADK hereby requests that the Court vacate the agency actions on review in this matter.

Dated: January 26, 2007

Respectfully submitted,

CARTER, CONBOY, CASE, BLACKMORE,
MALONEY & LAIRD, P.C.

By:_____
LEAH W. CASEY

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[23] S. Rep. No. 91-1196, at 17, reprinted in 1970 Legislative History ("LH") at 417.

[24] 1990 LH at 1149.