UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB, Plaintiff, v. STEPHEN L. JOHNSON, Administrator, U.S. Environmental Protection Agency, Defendant.	Case No. 1:01CV01537 and Consolidated Cases Judge Paul L. Friedman

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT ON REMEDY

Sierra Club filed these consolidated actions under section 304(a)(2) of the Clean Air Act ("CAA") ("the citizen suit provision"), 42 U.S.C. § 7604(a)(2), seeking, in relevant part, to compel Defendant Stephen L. Johnson, Administrator of the United States Environmental Protection Agency ("EPA"), to take action to regulate emissions of hazardous air pollutants ("HAPs") under CAA section 112(c)(3) and (k)(3)(B), and 112(c)(6), and emissions of volatile organic compounds ("VOCs") from consumer and commercial products under CAA section 183(e). 42 U.S.C. §§ 7412 (c)(3) and (k)(3)(B), (c)(6) and 7511b(e). A number of Sierra Club's claims in this lawsuit were resolved by the Parties in whole or in part through the Revised Partial Consent Decree ("Consent Decree") entered by the Court on May 22, 2003, and amended on April 1, 2005. Attachment 1. The Consent Decree's provisions include deadlines for EPA to propose and promulgate a set number of emission standards under section 112(c)(3) and (k)(3)(B), and section 112(c)(6). The Consent Decree does not resolve, however, all of Sierra Club's mandatory duty claims pursuant to CAA section 112(c)(3) and (k)(3)(B) and section

112(c)(6).

The pending motions for summary judgment address EPA's remaining obligations under CAA section 112(c)(3) and (k)(3)(B) and 112(c)(6) to issue emission standards for those source categories listed pursuant to those sections, for which emission standards have not yet been issued. The motions also address EPA's obligation to issue regulations or, as appropriate, control techniques guidelines ("CTGs"), for the three groups of product categories contained on the current section 183(e) list for which regulations or CTGs have not yet been issued.

To date, EPA has issued emission standards for 15 source categories listed pursuant to section 112(c)(3) and (k)(3)(B); emission standards for all but four source categories, under section 112(c)(6); and national regulations and CTGs for the categories of consumer and commercial products contained in Group I of the section 183(e) list. These actions did not discharge the mandatory duties at issue. EPA agrees that it has not yet completed emission standards obligations for the 50 remaining area source categories listed pursuant to CAA section 112(c)(3) and (k)(3)(B), or the four remaining source categories under section 112(c)(6). Declaration of Steve Page, Director of the Office of Air Quality Planning and Standards ("OAQPS"), Office of Air and Radiation, United States Environmental Protection Agency, ¶¶ 15, 22, 24, 29 (June 10, 2005) ("Page Declaration") (Attachment 2).[1/] EPA further agrees that it has not yet completed regulatory action for the three remaining product groupings (currently 15 categories) on the section 183(e) list. *Id*. ¶ 26.

[1/] Sierra Club maintains that EPA has only 49 categories to act upon under section 112(c)(3) and (k)(3)(B). SC Proposed Order, ¶ 1. The discrepancy is due to a disagreement over the number of categories on the list under that subsection. The content of the list, however, is not subject to review by this Court. *See* CAA section 112(e)(4) (precluding review of listing decision until final emission standards are issued).

Thus, EPA does not contest liability on the outstanding obligations identified above, but does contest the remedy requested by Sierra Club. EPA requests that the Court allow the Agency until 2012 to promulgate the remaining emission standards under section 112(c)(3) and (k)(3)(B) and section 112(c)(6) according to the following timetable.

Completion Date[2/]	Number of Source Categories to Be Completed
December 15, 2007	4
December 15, 2008	6[3/]
December 15, 2009	10
December 15, 2010	10
December 15, 2011	10
December 15, 2012	all remaining source categories necessary to meet statutory requirements[4/]

[2/] If EPA determines prior to issuance of the proposed rule, that the proposal could have a significant economic impact on a substantial number of small entities, the final rule completion deadlines specified in here must be extended by 6 months to account for the requirements of the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 609(b). *See* Page Decl. ¶¶ 41-42.

[3/] EPA intends to complete emission standards for the remaining source categories under section 112(c)(6) by December 15, 2008. Completion of these standards will also satisfy the obligation to develop emission standards for these same source categories under section 112(c)(3) and (k)(3)(B), because these categories are contained on the 112(c)(3) and (k)(3)(B) list. Page Decl. ¶ 32 n.7.

[4/] As explained by Mr. Page, EPA has previously modified the source category lists developed pursuant to section 112(c)(3) and (k)(3)(B) and section 112 (c)(6). If that occurs again, depending on the change to the list, the total number of standards to be issued in the final year could increase or decrease. The number of source categories for which emission standards must be completed by 2012 is therefore not specified in this table. Page Decl. ¶ 32 n.8.

EPA will complete standards for any remaining listed source categories counting toward meeting the statutory percentage thresholds under 112(c)(3) and (k)(3)(B) and 112(c)(6) by

(continued...)

Page Decl. ¶ 32. Finally, EPA will complete the remaining product categories under section 183(e) in three groups, taking final action by September 15, 2007; September 15, 2009; and September 15, 2011. Each action will address one group of categories as required by the statute. Page Decl. ¶ 43.

Sierra Club contends that EPA can complete all of these regulatory actions by June 15, 2008. The Court should reject Sierra Club's proposal as impracticable. For the reasons set forth in the Page Declaration, the schedule proposed by EPA represents the reasonable minimum time for EPA to complete its remaining regulatory obligations, as described above. Accordingly, the Court should deny the relief requested in Sierra Club's motion and instead order the remedy proposed by EPA.

BACKGROUND

I. STATUTORY BACKGROUND

A. Section 112

The purpose of section 112 as a whole is to regulate emissions of hazardous air pollutants ("HAP"). To meet this goal, Congress established a complex process set forth in Section 112(a)-(s). The statute addresses standards for both major and area sources of HAP emissions. "Major sources" are stationary sources or groups of stationary sources that emit 10 tons or more of any

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[4/](...continued)
December 15, 2012. Once EPA completes the emission standards for all remaining source categories, it intends to issue notices that explain how it has satisfied the requirements of section 112(c)(6) and section 112(c)(3) and (k)(3)(B), in terms of issuing emission standards for the source categories that account for the statutory thresholds identified in 112(c)(6) and 112(c)(3) and (k)(3)(B). Those final actions, like any other final action under the CAA, would be subject to judicial review in the relevant court of appeals pursuant to CAA section 307(b), 42 U.S.C. § 7607(b). Page Decl. ¶ 32 n.8.

HAP per year or 25 tons or more of any combination of HAPs per year. 42 U.S.C. § 7412(a)(1). In relevant part, "[a]rea sources" are stationary sources that emit HAPs, but do not qualify as major sources. *Id*. § 7412(a)(2).

Section 112 establishes a comprehensive program for regulating source categories that emit HAP. There are two primary aspects to regulation under section 112. The first aspect concerns the listing of major and area source categories for regulation under section 112, and the second one concerns the promulgation of section 112(d) emission standards for listed source categories. The listing of a source category is a condition precedent to the requirement to promulgate emission standards under section 112(d). The pending motions for summary judgment concern the second aspect of regulation under section 112 – the establishment of emission standards for source categories listed pursuant to section 112(c)(3) and (k)(3)(B) and 112(c)(6).

1. Section 112(c)(3) and (k)(3)(B)

Section 112(c)(3) and (k)(3)(B), 42 U.S.C § 7412(c)(3), (k)(3)(B), govern the listing and regulation of area sources. Section 112(k)(3)(B), which requires EPA to publish a strategy to control emissions of HAP from area sources in urban areas, provides, in pertinent part, that:

a. EPA shall identify not less than 30 HAPs which, as the result of emissions from area sources, present the greatest threat to public health in the largest number of urban areas; and

b. EPA shall list area source categories emitting these 30 HAPs and shall assure that the "sources accounting for 90 per centum or more of the aggregate emissions of each of the 30 identified [HAPs]" are regulated.

Section 112(c)(3) similarly provides that EPA shall list sufficient categories to ensure that "area sources representing 90 percent of the area source emissions of the 30 [identified HAPs]" are regulated. In addition, section 112(c)(3) requires that EPA promulgate the emission standards by November 15, 2000.

Congress provided for three alternative types of standards for a source listed under these provisions. Under section 112(d)(2), EPA imposes emission standards that require "the maximum degree of reduction in emissions of [HAPs]" that EPA concludes are achievable based on consideration of factors identified in the statute. These are referred to as "maximum achievable control technology" or "MACT." Under section 112(d)(4), EPA sets emission standards based on health thresholds for pollutants for which such thresholds have been set (and providing "an ample margin for safety"). Finally, under section 112(d)(5), EPA establishes emission standards for area sources that use "generally available control technologies ["GACT"] or management practices."

2. Section 112(c)(6)

Section 112(c)(6) requires EPA to take action with respect to seven specific HAPs.[5/] 42 U.S.C. § 7412(c)(6). The statute establishes two distinct obligations. First, by November 15, 1995, EPA shall list sufficient source categories to ensure that sources accounting for at least 90 per cent of the aggregate emissions of each of these specific pollutants are subject to regulation.

[5/] Alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8- tetrachlorodibenzofurans, and 2,3,7,8-tetrachlorodibenzo-p-dioxin. 42 U.S.C. § 7412(c)(6).

The list can include both major and areas sources.[6] Second, by November 15, 2000, EPA shall publish emission standards applicable to these sources pursuant to 112(d)(2) or (d)(4). Thus, for these categories, EPA must use MACT or health threshold levels to set emission standards; GACT is not an option.

B. Section 183(e)

CAA section 183, 42 U.S.C. § 7511b, requires EPA to take measures to control emissions of VOCs, which are precursors for the formation of groundlevel ozone. These measures are intended to reduce ozone in ozone nonattainment areas – areas that violate the National Ambient Air Quality Standard ("NAAQS") for ozone. Section 183(e) requires EPA to take steps to control VOC emissions from consumer and commercial products[7] by either (1) regulating the entities involved in manufacturing, importing, and distributing such products through a national rule;[8] or (2) by regulating users of such products (*i.e.*, stationary source facilities where the

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[6] Because the 112(c)(6) list includes both types of sources, there is some overlap between this list and the list established under section 112(c)(3) and (k)(3)(B). For example, mercury cell chlor-alkali plants emit pollutants specifically listed in section 112(c)(6) and are listed and regulated as a category under that provision. At the same time, the emissions from these plants also meet the standard for listing and regulation as a category under section 112(c)(3) and (k)(3)(B). Page Decl. ¶ 19 n.4.

[7] "Consumer or commercial product" is defined as "any substance, product (including paints, coatings, and solvents), or article (including any container or packaging) held by any person, the use, consumption, storage, disposal, destruction, or decomposition of which may result in the release of volatile organic compounds. The term does not include fuels or fuel additives regulated under section 7545 of this title, or motor vehicles, non-road vehicles, and non-road engines as defined under section 7550 of this title." 42 U.S.C. § 7511b(1)(B).

[8] The regulations must require the use of best available controls. 42 U.S.C. § 7511(b)(e)(3)(A). "Best available controls" are defined as "the degree of emissions reduction that the Administrator determines, on the basis of technological and economic feasibility, health, environmental, and energy impacts, is achievable through the application of the most effective (continued...)

products are used) through CTGs.

Section 183(e)(2) requires that, by November 15, 1993, EPA must submit a report to Congress addressing VOC emissions from consumer and commercial products. In that report, submitted in March 1995, EPA described the findings of its four-year study of VOC emissions from such products (the "Study"). Page Decl. ¶ 20. Section 183(e)(3)(A) also requires EPA, upon submitting the report, to list for regulation the categories of consumer or commercial products that account for at least 80 percent of the VOC emissions, on a reactivity-adjusted basis, in areas that violate the ozone NAAQS. Section 183(e)(3)(A) requires EPA to divide the list of product categories into four groups to establish priorities for regulation. Every two years after publishing the list, EPA is to regulate the product categories in one of the four groups until all four groups have been completed. 42 U.S.C. § 7511b(e)(3)(A).

Such regulation of a product category can be accomplished either by promulgating a national emission standard or by issuing a CTG. EPA can use a CTG if EPA determines that the CTG will be "substantially as effective" in reducing VOC emission in areas violating the ozone NAAQS. Under section 182(b)(2), 42 U.S.C. § 7511a(b)(2), a CTG triggers a responsibility for States to submit reasonably available control technology ("RACT") rules for stationary sources of VOC as part of their State Implementation Plans. EPA defines RACT as the lowest emission limit that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility. In order to issue a

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[8/](...continued)
equipment, measures, processes, methods, systems or techniques, including chemical reformulation, product or feedstock substitution, repackaging, and directions for use, consumption, storage, or disposal." *Id*. ¶ 7511b(e)(1)(A).

CTG in lieu of regulations, EPA determines whether RACT prescribed by the CTG will result in substantially the same degree of VOC emission reductions as would a national rule requiring best available controls for a given category of consumer or commercial products.

II. REGULATORY BACKGROUND

In 1999, EPA issued the list of source categories pursuant to section 112(c)(3) and (k)(3)(B).[9/] 64 Fed. Reg. 38,706 (July 19, 1999). The current list contains 70 source categories, and EPA has promulgated emission standards for 15 of those source categories. Page Decl. ¶ 15. EPA issued the list of source categories under section 112(c)(6) in 1998, and that list is published at 63 Fed. Reg. 17,838 (April 10, 1998). Page Decl. ¶ 16. In 2002, EPA modified the section 112(c)(6) list and removed several categories. 67 Fed. Reg. 68,124 (Nov. 8, 2002). Page Decl. ¶ 17. Between 1990 and 2003, EPA promulgated emissions standards under section 112(d) for over 170 major source categories. These standards included over 30 source categories listed pursuant to section 112(c)(6). Page Decl. ¶ 18.

In March 1995, EPA completed the Study to meet the requirements of section 183(e)(2)(A). Page Decl. ¶ 20. EPA also published a Federal Register Notice, entitled "Consumer and Commercial Products: Schedule for Regulation." That Notice included the initial "listing" of categories of consumer and commercial products that EPA had identified for regulation pursuant to section 183(e). 60 Fed. Reg. 15,264, 15,267 (March 23, 1995). EPA also divided the list into four preliminary groups and proposed a timetable for the issuance of national regulations or CTGs for those product categories. EPA's compliance with this and

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[9/] Since issuing the list, EPA has made several revisions to the list. *See, e.g.*, 67 Fed. Reg. 70,427, 70,428 (Nov. 22, 2002).

related requirements of section 183(e) was confirmed in *Allied Local and Regional Manufacturers Caucus et al v. EPA*, 215 F.3d 61 (D.C. Cir. 2000).

On September 11, 1998, EPA published final national rules for the following three product categories contained in EPA's Group I (as proposed in March 1995): autobody refinishing coatings, 63 Fed. Reg. 48,806; consumer products, *id*. at 48,819; and architectural and industrial maintenance coatings, *id*. at 48,848. At the same time, the Agency also published its final listing decision for these three product categories, confirming that it was appropriate to regulate these categories under section 183(e). 63 Fed. Reg. 48,792; Page Decl. ¶ 22.

In July 1999, EPA published the final determination in which it concluded that it was appropriate to regulate VOC emissions from the following three additional Group I product categories under section 183(e): wood furniture manufacturing coatings, aerospace coatings, and shipbuilding and ship repair coatings. In that final determination, EPA explained that it was appropriate to regulate these three product categories via the mechanism of a CTG in lieu of a national rule. Thus, EPA has completed regulations or CTGs for each of the product categories included in Group I of the initial list. Page Decl. ¶ 22.

In March 1999, EPA revised the initial list of product categories and groupings for regulation pursuant to section 183(e). 64 Fed. Reg. 13,422 (March 18, 1999). The current list identifies fifteen product categories from the original list, which are, in turn, divided amongst the three remaining groups required by the statute (i.e., Groups II-IV). *Id*. The 15 listed categories have not yet been regulated pursuant to section 183(e). EPA anticipates that it may revise the groups. Page Decl. ¶ 23.

III. LITIGATION BACKGROUND

The Consent Decree imposes obligations on EPA under several different provisions of the CAA.[10/] In most relevant part, the Consent Decree requires EPA to promulgate emission standards for 6 source categories[11/] listed under section 112(c)(3) and (k)(3)(B), two of which are also categories listed under section 112(c)(6). The Consent Decree, ¶ 2(d)(i) and (f)(i), required EPA to take final action on emissions standards for mercury cell chlor-alkali plants, which is a category under both section 112(c)(6) and section 112(c)(3) and (k)(3)(B), by November 28, 2003. *See infra* n.6. The Agency has met this obligation. Page Decl. ¶ 19. The deadlines for the remaining five source categories range from November 30, 2005, to December 20, 2007.[12/] Page Decl. ¶ 19.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 n.4 (1986) (citing

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[10/] The Consent Decree also required EPA to promulgate emission standards for 18 specified categories of sources pursuant to section 112(e)(1)(E) (Decree 2(a)). EPA has promulgated standards for 16 of these categories. Pursuant to an amendment to the Decree, standards for the last two categories are due to be completed in September 2005.

[11/] The Other Solid Waste Incinerators category, for which the Consent Decree requires establishing emission standards under section 129(a)(1)(E) (Decree 2(e)), is also a source category under section 112(c)(3) and (k)(3)(B).

[12/] The five remaining source categories are: (1) Oil and Gas Production Facilities, (2) Gasoline Distribution Facilities (Stage I), (3) Hospital Sterilizers, (4) Stationary Internal Combustion Engines, and (5) Other Solid Waste Incinerators.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986)).

ARGUMENT

EPA recognizes that it has not yet discharged all of the mandatory duties under CAA section 112(c)(3) and (k)(3)(B) and 112(c)(6), and 183(e). The Agency must set emission standards for additional source categories pursuant to section 112(c)(3) and (k)(3) and 112(c)(6) and take regulatory action on additional product categories under section 183(e). Pursuant to the CAA citizen suit provision, the appropriate remedy is an order requiring EPA to complete these specific mandatory duties. 42 U.S.C. § 7604. As explained below, the schedule should be reasonable and ensure that the Agency has sufficient time to consider the technical and legal issues at stake. The public interest is not served by requiring the Agency to issue rules that fall short of meeting the substantive requirements of section 112(c)(6), 112(c)(3) and (k)(3)(B), and 183(e) or the applicable procedural requirements. *See* CAA section 307(d), 42 U.S.C. § 7607(d) (procedures for rulemaking to set emissions standards).

The schedule proposed by EPA represents the reasonable minimum time in which EPA can complete the obligations at issue here; taking procedural or analytical shortcuts in order to expedite this schedule could seriously jeopardize both the soundness of the regulatory action and its legal defensibility. Page Decl. ¶¶ 32, 59-61. Sierra Club's proposal, which would require EPA to complete all the actions at issue by June 15, 2008, is both impracticable and unsupported. Page Decl. ¶¶ 60-61. Moreover, Sierra Club's proposed order exceeds the scope of the remedy authorized by the citizen suit provision to the extent it would require EPA to act on the area sources and the consumer and commercial products on the current lists, thereby improperly precluding EPA's discretionary authority to modify these lists.

I. THIS COURT HAS EQUITABLE DISCRETION TO DETERMINE A REASONABLE SCHEDULE FOR AGENCY ACTION WHERE COMPLIANCE WITH STATUTORILY MANDATED DEADLINE IS IMPOSSIBLE OR INFEASIBLE

A district court has broad discretion to fashion equitable remedies. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1982); *American Lung Ass'n v. Browner*, 884 F. Supp. 345, 347 (D. Ariz. 1984). In a suit alleging violation of a Congressionally mandated duty, "[t]he sound discretion of [a] . . . court does not embrace enforcement . . . of a party's duty to comply with an order that calls [on] him to do an impossibility." *Natural Res. Defense Council v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1975) ("*Train*"). Thus, a statutory deadline should not be enforced to the extent that it is impossible or infeasible to comply with such a deadline. *American Lung Ass'n v. Browner*, 884 F. Supp at 347.

In *Train*, the leading case on the subject of an agency's failure to meet statutory deadlines, the D.C. Circuit recognized two types of circumstances that might necessarily delay agency action and make it infeasible to comply with a particular deadline: (1) budgetary and manpower constraints, and (2) the need for an agency to have more time to sufficiently evaluate complex technical issues. 510 F.2d at 712-13. With respect to the latter, "[t]he public has a significant interest in ensuring that the government does not promulgate rules via a process that emphasizes expediency over quality and accuracy." *Cronin v. Browner*, 90 F. Supp. 2d 364, 373 (S.D.N.Y. 2000).

The public interest in sound regulations that will survive judicial review "is of paramount importance." *Sierra Club v. Thomas*, 658 F. Supp. 165, 172 (N.D. Cal. 1987). Accordingly, "it would be inappropriate to set an infeasible schedule in order to punish a delinquent agency." *Id*. "Indeed, by decreasing the risk of later judicial invalidation and remand to the agency, additional

time spent reviewing a rulemaking proposal before it is adopted may well ensure earlier, not later, implementation of any eventual regulatory scheme." *Sierra Club v. Thomas*, 828 F.2d 783, 798-99 (D.C. Cir. 1987). *See also United Steelworkers of America v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (holding judicial imposition of overly hasty timetable on agency would ill serve the public interest); *Atlantic Terminal Urban Renewal Area Coalition v. New York City Dep't of Envtl. Protection*, 740 F. Supp. 989, 997 (S.D.N.Y. 1990) (Many courts, when "faced with violations of . . . seemingly absolute deadlines have concluded that the only practical response . . . is to require compliance within a reasonable time."); *Maine Ass'n of Handicapped Persons v. Dole*, 623 F. Supp. 920, 926 (D. Me. 1985) (recognizing "the need to implement clear and effective regulations capable of withstanding the scrutiny of challenges following enactment."); *Natural Resources Defense Council, Inc. v. New York State Dept. of Envtl. Conservation*, 700 F. Supp. 173, 181 (S.D.N.Y. 1988) (in evaluating a remedy, the court must consider the complexity of the subject and "the necessity of dealing with the issues on a pragmatic basis.").

In short, when an agency has missed a statutory deadline, a court should examine the relevant facts and circumstances and evaluate the time frame needed by the agency to make well-reasoned, scientifically supportable, and defensible decisions.

II. EPA'S PROPOSED SCHEDULE REPRESENTS THE REASONABLE MINIMUM TIME NECESSARY FOR EPA TO COMPLETE THE REQUIRED ACTIONS

A. EPA's Schedule Is Based On A Carefully Considered Appraisal of the Amount of Work That Must Be Accomplished

The schedule proposed by EPA encompasses its obligation to set emission standards for the 50 remaining source categories under section 112(c)(3) and 112(k)(3)(B) and section 112(c)(6)[13/] and its obligations to complete either regulations or CTGs, as appropriate, for the three remaining groups on the section 183(e) list, which together comprise 15 categories of consumer or commercial products. The Page Declaration sets forth a detailed description of the work necessary for EPA to promulgate emission standards for these 50 source categories and to regulate consumer and commercial products under section 183(e). As explained therein, on average, the Agency requires about 50 months to complete a national rule promulgating emission standards under section 112 or section 183(e). Page Decl. ¶¶ 34, 46. If, however, EPA determines that a CTG would be the appropriate mechanism to regulate emissions from a given product category under section 183(e), EPA can complete that process in approximately 24 months.[14/] Page Decl. ¶ 49. All of these procedures are very fact-intensive and require the Agency to gather a substantial amount of information, much of which will not be readily available, before proceeding with any analysis of the appropriate actions. Moreover, the facts

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[13/] The four remaining source categories for which emission standards have not yet been developed pursuant to section 112(c)(6) are all area source categories that are included on the section 112(c)(3) and (k)(3)(B) list. Based on this fact, and for simplicity, the brief refers to 50 source categories for which EPA has outstanding emission standards obligations pursuant to section 112(c)(3) and (k)(3)(B) and 112(c)(6).

[14/] At this point, EPA cannot determine definitively how many of the 15 product categories at issue can be regulated through CTGs consistent with the standard of section 183(e)(5). Page Decl. ¶ 44.

for each category will be unique, meaning that the information gathered in one rulemaking will not usually expedite another.

Even Sierra Club recognizes that the Agency cannot complete final action on 50 area source categories and 15 categories of consumer and commercial products simultaneously, but must proceed on a staggered schedule that will allow the Agency to complete some requirements before beginning others. The Agency's proposal to complete all obligations by December 15, 2012, is reasonable, given the magnitude of the tasks at issue.

B. The Reasonableness of EPA's Proposed Remedy Is Even More Apparent When Considered in the Context of the Agency's Other Mandatory Obligations.

In *Train*, the D.C. Circuit recognized that practical circumstances, including "budgetary and manpower constraints," can affect the amount of time needed for rulemaking. 510 F.2d at 712-13. EPA, like all agencies, has finite resources based on Congressional appropriations. In evaluating the reasonableness of EPA's schedule, the Court must consider the Agency's competing mandatory obligations. Mr. Page has provided an overview of other nondiscretionary duties on which OAQPS is currently working. Page Decl. ¶ 30. Of course, prior to December 2007, the Agency must complete the obligations imposed by the Consent Decree.

The Agency's proposed schedule is premised on a significant increase in the number of area source categories OAQPS will be working on each year. Between 1990 and 2003, OAQPS worked on, on average, about 5 area source categories per year. By 2008, EPA will be working on all of the remaining area source categories (*i.e.*, 42 source categories) for which emission standards had not yet been promulgated. Page Decl. ¶ 57. This increase reflects the seriousness of the Agency's commitment to finish these rules in an expeditious manner, but with sufficient

thoroughness to ensure that the final decisions will meet the statutory standards and, if necessary, survive judicial review.

III. THE SCHEDULE PROPOSED BY SIERRA CLUB IS UNREASONABLE AND, IN PART, EXCEEDS THE SCOPE OF THE REMEDY AUTHORIZED BY THE CITIZEN SUIT PROVISION

A. Sierra Club Improperly Requests That the Schedule Bind EPA to Take Action Based on the Current Lists.

The citizen suit provision authorizes the court to compel EPA to perform duties that are mandatory under the Act. The statute, however, does not allow this Court to restrict the discretion afforded to the Agency by Congress. *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) ("[T]he only question for the district court to answer [in a nondiscretionary duty suit] is whether the agency failed to comply with [a] deadline."). Congress plainly required EPA to establish a list and to regulate listed sources and products. Congress, however, did not limit EPA's discretion to revise the lists as the rulemakings proceeded. Section 112(c)(1) authorizes EPA to revise the list. *See also* section 112(e)(4) (precluding judicial reviews of EPA's decision to add a category to list until EPA has issued emission standards for such category). Such flexibility is also inherent in the statutory structure. Congress required EPA to list sufficient categories to reach a set threshold for regulation. As the rulemakings proceed, EPA may determine that its initial list will either fall short of the threshold or exceed it. Under these circumstances, the list would have to change to conform to the facts.[15/] *See* 67 Fed. Reg. 70,427, 70,428 (Nov. 22, 2002) (revising section 112(c)(3) and (k)(3) list); 67 Fed. Reg. 68,124 (Nov. 8, 2002) (revising section 112(c)(6) list).

[15/] EPA would have the discretion to regulate in excess of the statutory threshold, but cannot be compelled to do so in a citizen suit.

Flexibility to revise the list is also inherent in section 183(e). *See* 64 Fed. Reg. 13,422 (March 18, 1999) (revising section 183(e) list). Again the need for modification is inherent as information gathered during rulemakings may show that the Agency under or over estimated the number of categories necessary to meet the threshold, or in the event that EPA determines it is appropriate to regulate categories that exceed the 80% threshold. Also, section 183(e) allows EPA to group the product categories to establish priorities. Both the categories and the groupings may shift over time. These priorities also may shift over time. EPA may revise both the categories and the groupings to meet the threshold percentage set by the statute.

In sum, to the extent that Sierra Club's proposed order requires that EPA must regulate each of the categories on the current lists, the relief exceeds the scope of the remedy under the citizen suit provision. EPA has discretion to modify the current lists. Therefore, the relief should be properly confined to require EPA to act on a set number of categories, while recognizing that EPA may revise the list. The question of whether the Agency modifies the list in the future is immaterial to the discharge of its mandatory duties. As long as the Agency proceeds in accord with the schedule until the threshold statutory percentages have been reached, its statutory obligations will be performed.

B. Sierra Club's Schedule is Unreasonable.

Sierra Club asks the Court to require EPA to complete rulemakings for approximately 50 area source categories by June 15, 2008, by promulgating rules for 10 categories every 6 months between June 15, 2006, and June 15, 2008. Sierra Club also requests that EPA be required to

complete setting standards under section 112(c)(6) by December 15, 2007.[16] Sierra Club further requests that EPA be required to complete all actions for the three remaining groups (currently 15 categories) by June 15, 2007. This time period, which extends three years from the filing of this brief, is inadequate for the 65 actions at issue. Such a schedule would force EPA to take procedural[17] or analytical shortcuts that would seriously undermine the soundness of the Agency's decisions and the legal defensibility of the Agency's actions. Page Decl. ¶¶ 6-62.

The primary reason advanced by Sierra Club in support of this schedule is that Congress required EPA to issue MACT standards for 40 major source categories in two years while also requiring that the Agency promulgate emissions standards for both large and small municipal waste combustors and medical waste incinerators during the same two years. *See* SC Br. at 14 (citing section 112(e)(1)(A) and section 129(a)(1)(B)-(C)). As an initial matter, the plain language of the statute does not support the suggestion that these time frames are relevant to determining the reasonable time needed to complete the 65 categories at issue here. Section 112(c)(6) and section 112(c)(3) allowed five years for the completion of the required standards. Section 183(e) allows two years for EPA to address each group of product categories; thus the statute would allow EPA six years to complete the remaining three categories.

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[16] Sierra Club contends that the standards EPA has promulgated pursuant to section 112(c)(6) do not address PCBs. SC Br. at 16. This issue, however, is not a subject of the present motions. As described in Mr. Page's Declaration, ¶ 22 n.8, once EPA completes emission standards for the remaining source categories under section 112(c)(6), it intends to issue a notice that explains how it has satisfied the requirements of section 112(c)(6) in terms of issuing emission standards for the source categories that account for the statutory thresholds identified in section 112(c)(6). That final action, like any other final action under the CAA, would be subject to judicial review in the D.C. Circuit pursuant to CAA section 307(b).

[17] CAA section 307(d), 42 U.S.C. § 7607(d) establishes detailed procedures for rulemaking to set emissions standards.

Moreover, Congress was well aware that the MACT rules would take more than two years. The Conference Report accompanying the final bill for the 1990 Amendment (Conference Report, No. 101-952, at 338 (1990), *reprinted in* 1 *A Legislative History of the Clean Air Act Amendments of 1990*, at 1788 (Attachment 3), demonstrates that Congress knew that the rulemaking to address the first 40 categories was underway well before 1990. Several years prior to 1990, EPA began developing a hazardous organic NESHAP ("HON"), applicable to the synthetic organic chemical manufacturing industry, which at that time was disaggregated into several hundred individual categories. The Conference Report states that "in selecting categories for standards in this group [112(e)(1)(A) - the first 40 categories], the Administrator shall, at the Administrator's discretion, pick the priority elements of the hazardous organic NESHAP which is under development." The Conference Report clarified that Congress never intended for EPA to start and finish MACT for 40 distinct source categories within a two-year time frame as Sierra Club claims. Instead, Congress intended that EPA spend the first two years after the enactment of the 1990 Amendment completing setting standards for the priority elements of the HON, an effort Congress acknowledged was already under development and which in large part covered one industry.

In addition, Sierra Club errs in suggesting that the completion of the area source categories is "much less demanding" than the MACT rules. SC Br. at 14. First, Sierra Club claims that EPA intends to use "generally available control technology" ("GACT") for many sources and that such rulemakings are much simpler than setting MACT standards. Sierra Club relies mainly on EPA's notice, *The National Air Toxics Program: The Integrated Urban Strategy*, 64 Fed. Reg. 38,706 (July 19, 1999) ("Strategy") for this proposition. However, the

Strategy does not state, as Sierra Club claims, that issuing a GACT or a "flexible-GACT" (as described below) is simpler or quicker than issuing a MACT. On the contrary, the Strategy does not distinguish the amount of time and effort needed for a MACT or GACT rule and instead specifies an average four-year time frame for developing either a MACT or GACT. 64 Fed. Reg. at 38,725.

In fact, there are additional difficulties in a rulemaking for area sources that are not in the same process for major sources. Area sources often involve a number of small businesses and different types of facilities, thus increasing the time necessary to gather information needed to develop the emission standard. Page Decl. ¶ 36. Furthermore, existing research tends to focus on major sources, instead of the smaller area sources, which can again make it more difficult to gather the necessary information. *Id*. Finally, often, the smaller area sources have a difficult time responding to EPA's information requests because, unlike the companies operating major sources, such sources usually do not have personnel and resources focused on environmental compliance. *Id*. Due to these difficulties, information collection and analysis may be more challenging and time consuming in a rulemaking for area sources.

Furthermore, EPA does not rely on administrative convenience in determining whether MACT or GACT is appropriate. EPA has explained that MACT standards are used "for those area sources whose emissions pose the greatest threat to human health and the environment and for which the technology to achieve maximum reductions in HAP emissions is appropriate." 64 Fed. Reg. at 38,723. The GACT "approach will be used to address source categories that present a human health risk or environmental concern, but where GACT is a more appropriate approach for reducing HAP emissions than MACT. To make these standard-setting decisions, we'll

consider economic feasibility and other factors that could lead us to GACT." *Id*.

Finally, EPA has explained that it *may* use a flexible GACT "that would apply to several area source categories where more flexibility is appropriate (*e.g*., where there are very few area sources, they are confined to a limited geographic area or areas, or they contribute to localized public health or environmental risks). *Id*. (emphasis added). EPA, however, has never promulgated a flexible GACT standard. Thus, while Sierra Club is correct that EPA has options in choosing how to regulate area sources, there is no support for either (1) its claim that EPA has stated that the GACT or flexible-GACT process is simpler or more expeditious that a MACT rulemaking or (2) its suggestion that EPA can choose one over the other based on time constraints.

Sierra Club also cites to EPA's experience since 1990 in regulating air toxics and the fact that EPA has started a number of area source category rulemakings as reasons to justify its proposed schedule. Because these rulemakings are so specific to the facts of each category, the knowledge obtained in one procedure does not usually reduce the work required for another. With respect to the 20 categories that EPA has already begun, EPA has factored their progress into its proposed schedule. Nothing in Sierra Club's brief shows that there could be further expedition.

In arguing that EPA can complete its actions under section 183(e) in two years, Sierra Club again points to the two-year time period for MACT promulgation in section 112(e)(1). The assumption that Congress expected EPA to begin and end this process within two years is contradicted by the Conference Report. Sierra Club also makes the bald assertion that the process under section 183(e) "is not demanding." SC Br. at 17. This characterization is

contradicted by the fact that Congress allowed EPA eight years to complete the four groups of regulations or CTGs contemplated under this provision. Furthermore, the Page Declaration, ¶¶ 49-52, establishes that developing emission controls for consumer and commercial products is far from a simple process, even when the Agency is able to proceed through a CTG rather than a national rule.

CONCLUSION

The Court should deny the relief requested in Sierra Club's motion for summary judgment and instead grant EPA's motion on remedy.

Respectfully submitted,

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