

## NESHAP/Clean Air Act: Federal Court Addresses Residual Risk Timing Issue



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

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Co-Author: Mary Suskie

The United States District Court for the Northern District of California (“Court”) addressed in a June 26th Order an issue involving the Section 112 Clean Air Act National Emission Standards for Hazardous Pollutants (“NESHAPs”). See *Citizens for Pennsylvania, et al. v. Wheeler*, 2020 WL 3481425.

A focus of the decision is whether Section 112 of the Clean Air Act requires the United States Environmental Protection Agency (“EPA”) to perform a risk assessment:

... every time it revises technology-based standards for a hazardous pollution source, or only in connection with its initial adoption of technology-based standards for the pollution source.

The issue arose in the context of a citizen suit action involving the coke oven NESHAP.

The modern version of the Clean Air Act was enacted in 1970. It included a section that created a “system of national emission standards for hazardous air pollutants.”

The 1990 amendments to the Clean Air Act restructured Section 112. With the revisions, Congress listed “189 air pollutants as hazardous air pollutants.” Hazardous air pollutants are those pollutants that are known or suspected to cause cancer or other serious health effects or adverse environmental effects.

Congress directed EPA to revise that initial list on a regular basis. This was undertaken to eliminate EPA’s discretion in establishing NESHAPs for hazardous air pollutants. Along with categorizing the sources of the pollution into “major sources” and “area sources,” Congress also adopted a “two-phase approach” for determining the emission standards of hazardous air pollutants. Technology-based standards along with the previous risk-based approach found in the original 1970 language.

The technology-based phase ensures that companies are implementing the same “technology, techniques, and practices that their best-performing peers use.” This must be assessed every eight years by EPA to determine if the standards should be updated.

The risk-based phase supplements the technology phase. It is used to reflect “Congress’ concern about ‘lingering public health risk’ not eliminated by ‘the initial standard’ mandating the adoption of maximum achievable control technology.” In other words, EPA must determine whether more health protective standards are necessary.

Congress stressed that what would force EPA to step in would be “lifetime excess cancer risk to the individual most exposed to emissions from a source” in excess of one in one million. This is to “provide an ample margin of safety to protect public health.”

Citizens for Pennsylvania's Future, Gasp, Louisiana Bucket Brigade, and Sierra filed a Clean Air Act citizen suit against EPA asking the Court to:

. . . complete both a technology review and a residual risk review for each of the two source categories in this case, Coke Oven Batteries and Coke Ovens: Pushing, Quenching, And Battery Stacks.

Plaintiffs stated that these tasks were non-discretionary under Section 112.

Coke Ovens convert coal into coke (a component in steel production) and emit benzene and lead, among other substances, that can be harmful to human health. These two substances are listed as hazardous air pollutants under Section 112.

EPA had taken no action beyond promulgating the initial technology-based standards for coke oven batteries in 1993, a revision to those standards in 2005, issuing risk-based standards for coke oven batteries in 2005, establishing technology-based standards for pushing, quenching, and battery stacks in 2003, and amending those same standards in 2005 after a litigation settlement.

EPA conceded three of the four claims in plaintiffs' action. The federal agency admitted to not performing technology review of the initial technology-based standards. Further, it conceded failure to perform the first residual risk review in relation to pushing, quenching, and battery stacks. The parties agreed that both of these actions must be taken. However, the deadline was in dispute. In reference to coke oven batteries, a technology-based review was determined to be overdue.

EPA did not concede that a second residual risk review was needed for the coke oven batteries. Plaintiffs contended this was necessary because:

EPA revised the technology-based standards during its 2005 technology review.

The Court considered the relevant language of the Clean Air Act. It determined that EPA is not required to revise risk-based standards when revising technology-based standards. The language used by Congress was deemed not clear cut in that they must or must not revise the risk standards when revising the technology standards. Therefore, the Court determined that it could not interpret the language to force EPA to revise the risk-standards.

The Court imposed a deadline for when EPA is to complete the technology review and risk review of the pushing, quenching, and battery stacks along with the technology review of the coke oven batteries. These must be completed within 30 months of the ruling.

A copy of the decision can be downloaded [here](#).