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*Prepped by Ollie Stewart*

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**223) II-I-1**

*Docket Number:*

**A-2002-05**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

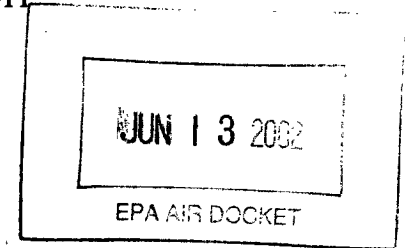
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AMERICAN FOUNDRYMEN'S SOCIETY, et al., )

Petitioners, )

v. )

U.S. ENVIRONMENTAL PROTECTION  
AGENCY )

Respondent. )  
\_\_\_\_\_



Civil No. 00-1208

SETTLEMENT AGREEMENT

1. This Agreement is made by and between Petitioners the American Foundrymen's Society, the North American Die Casting Association, and the Non-Ferrous Founders' Society ("Petitioners") and Respondent the U.S. Environmental Protection Agency ("EPA") in connection with the petition for judicial review of the National Emission Standard for Hazardous Air Pollutants for Secondary Aluminum Production pending before the U.S. Court of Appeals for the District of Columbia Circuit in American Foundrymen's Society, et al. v. EPA (Civ. No. 00-1208). This Agreement is the culmination of new settlement discussions which commenced after the parties lodged an earlier settlement agreement with the Court on July 31, 2000, and this Agreement is intended by the parties to entirely supplant that earlier agreement.

2. EPA agrees that it will prepare a notice of proposed rulemaking which will propose to amend 40 C.F.R. § 63.1500 and 40 C.F.R. § 63.1503 in the National Emission Standards for Hazardous Air Pollutants for Secondary Aluminum Production, Subpart RRR of 40 C.F.R. Part 63, in the manner set forth in Attachment A to this Agreement. EPA agrees that the EPA

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Administrator will sign this notice of proposed rulemaking no later than May 10, 2002. After considering any public comments received concerning the proposed amendments, the EPA Administrator will sign a notice taking final administrative action concerning the notice of proposed rulemaking no later than December 13, 2002.

3. EPA agrees that it will prepare a notice of direct final rulemaking and an accompanying proposed rule to amend 40 C.F.R. § 63.1501 in the National Emission Standards for Hazardous Air Pollutants for Secondary Aluminum Production, Subpart RRR of 40 C.F.R. Part 63, in the manner set forth in Attachment B to this Agreement. EPA agrees that the EPA Administrator will sign these notices no later than May 10, 2002. If EPA receives no adverse comments concerning the notice of direct final rulemaking to amend 40 C.F.R. § 63.1501 and accompanying proposal within 30 days from the date of publication in the FEDERAL REGISTER, the new compliance date for affected sources which are constructed or reconstructed at an existing aluminum die casting facility, aluminum foundry, or aluminum extruding facility will take effect 60 days after the date of publication in the FEDERAL REGISTER. If EPA receives any adverse comments concerning the notice of direct final rulemaking and accompanying proposal, EPA will withdraw the direct final rule and take final action concerning the accompanying proposed rule as soon as practicable after the close of the comment period.

4. Petitioners acknowledge that they have been informed by EPA that: (1) EPA is also engaged in settlement discussions with the Petitioner in Aluminum Association v. U.S. Environmental Protection Agency (Civ. No.00-1211) concerning other aspects of the NESHAP for Secondary Aluminum Production, (2) any settlement which may be reached pursuant to such discussions may require that EPA propose other amendments to Subpart RRR of 40 C.F.R. Part

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63, and (3) EPA intends to propose any amendments to Subpart RRR of 40 C.F.R. Part 63 which may be required by such a settlement as part of the same rulemaking which is required by this Agreement. EPA agrees that it will not enter into a settlement agreement with the Petitioner in Aluminum Association v. U.S. Environmental Protection Agency (Civ. No.00-1211) which would require that EPA propose any amendments of Subpart RRR which are materially inconsistent with the amendments set forth in Attachment A and Attachment B, and that it will promptly furnish to Petitioners a copy of any amendments which any such settlement agreement may require EPA to propose.

5. In the previous settlement agreement executed by the parties, EPA agreed that it would allow aluminum die casting facilities and aluminum foundries that are subject to Subpart RRR as it is presently codified to satisfy their 40 C.F.R. § 63.9(b) Initial Notification requirements by timely submitting to the appropriate State or EPA Regional Office a copy of a specified portion of a complete response to an Information Collection Request ("ICR") that EPA intended to issue to effectuate that agreement. The filing deadline for those facilities that elected to comply with 40 C.F.R. § 63.9(b) by filing an Initial Notification instead was July 21, 2000. In view of the intent of the parties to entirely supplant the prior settlement agreement and the administrative process that it contemplated with the provisions of this Agreement, the parties agree that a new policy concerning compliance with 40 C.F.R. § 63.9(b) by aluminum die casting facilities and aluminum foundries must now be adopted. EPA therefore agrees that those aluminum die casting facilities and aluminum foundries that are subject to Subpart RRR as presently codified and that elected not to file an Initial Notification prior to July 21, 2000, as permitted by the prior settlement agreement, will not be deemed to be in violation of 40 C.F.R.

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§ 63.9(b) provided that they file the Initial Notification required by that provision within sixty (60) days after the date that the comment process concerning this Agreement required by Clean Air Act Section 113(g) has been completed and the Petitioners are advised in writing by EPA counsel that the EPA Administrator and the Attorney General have decided to affirm the terms of this Agreement. EPA agrees that it will promptly inform each of the States and the EPA Regional Offices to which the Initial Notifications must be submitted of the new date by which such Initial Notifications must be received under this Paragraph.

6. EPA recognizes that some individual aluminum die casting facilities or aluminum foundries which may be within the applicability provisions of Subpart RRR as presently codified may no longer be subject to Subpart RRR if EPA takes final action to adopt the amendments set forth in Attachment A. EPA agrees that the submission by an aluminum die casting facility or aluminum foundry of an Initial Notification pursuant to 40 C.F.R. § 63.9(b) will not be subsequently construed to require that facility to comply with the requirements established by Subpart RRR if that facility does not meet the applicability criteria in 40 C.F.R. § 63.1500 on the date that compliance is first required. Petitioners agree that: (1) any aluminum die casting facility that submits an Initial Notification under 40 C.F.R. § 63.9(b) based on the currently codified Subpart RRR, but subsequently determines that it will not meet the applicability criteria in 40 C.F.R. § 63.1500 on the date that compliance is first required, should notify the responsible State or EPA Regional Office of the change in applicability, and (2) any aluminum die casting facility or aluminum foundry that does not meet the applicability criteria in 40 C.F.R. § 63.1500 on the date that compliance is first required, but later changes the nature of its activities or operations in a manner which brings it within such criteria, will then become subject to the

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requirements of Subpart RRR.

7. Pursuant to the prior settlement agreement, EPA prepared and published an Advance Notice of Proposed Rulemaking ("ANPR"), announcing that it intended to propose amendments to 40 C.F.R. Part 63, Subpart RRR, to remove aluminum foundries and die casters from this source category and to propose an alternative NESHAP for aluminum foundries and die casters. 65 FR 55489, September 14, 2000. Pursuant to the prior settlement agreement, EPA also prepared and published a Proposed Rule to stay the effectiveness of Subpart RRR as applied to aluminum foundries and die casters during the pendency of the rulemaking to adopt an alternative NESHAP for aluminum foundries and die casters. 65 FR 55491, September 14, 2000. The parties agree that the EPA Administrator will sign a notice taking final action on the proposed rule to stay Subpart RRR by withdrawing the proposal, and announcing that EPA will take no further action concerning the ANPR, within the same period established by Paragraph 2 of this Agreement for issuance of the proposed amendments required by this Agreement.

8. The provisions of this Agreement can be modified at any time by mutual consent of counsel for the Petitioners and counsel for EPA.

9. If EPA does not issue a Final Rule amending the National Emission Standards for Hazardous Air Pollutants for Secondary Aluminum Production, Subpart RRR of 40 C.F.R. Part 63, in the manner set forth in Attachment A or Attachment B to this Agreement, or fails to satisfy any other provision of this Agreement, Petitioners shall have the right to move the Court to vacate the order holding this case in abeyance. The filing of such a motion shall constitute Petitioner's sole remedy in the event any requirement set forth in this Agreement is not met. Petitioner agrees to give EPA thirty (30) days notice prior to exercising its right under this

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paragraph.

10. Except as expressly provided in this Settlement Agreement, none of the parties waives or relinquishes any legal rights, claims, or defenses it may have.

11. Nothing in the terms of this Agreement shall be construed to limit or modify the discretion accorded EPA under the Clean Air Act or by general principles of administrative law.

12. In the event that EPA issues Final Rules which amend 40 C.F.R. § 63.1500, 40 C.F.R. § 63.1501, and 40 C.F.R. § 63.1503 in the National Emission Standards for Hazardous Air Pollutants for Secondary Aluminum Production, Subpart RRR of 40 C.F.R. Part 63, in the manner set forth in Attachment A and Attachment B to this Agreement, Petitioners shall within fifteen (15) days thereafter stipulate to the dismissal with prejudice of the petition for review in American Foundrymen's Society, et al. v. EPA (Civ. No. 00-1208), in accordance with Rule 42 of the Federal Rules of Appellate Procedure. Each party shall bear its own costs of litigation, including attorneys' fees.

13. The parties to this agreement agree and acknowledge that final approval of this Settlement Agreement is subject to the requirements of Section 113(g) of the Clean Air Act, 42 U.S.C. 7413(g). That section requires that the Administrator provide notice of any proposed settlement agreement in the Federal Register and provide a period of at least thirty days following publication to allow persons who are not parties or intervenors in the litigation to comment in writing. The Administrator or the Attorney General, as appropriate, must consider those comments in deciding whether to consent to the agreement and may withdraw or withhold consent to the Settlement Agreement if the comments disclose facts or considerations which indicate that such consent is inappropriate, improper, inadequate or inconsistent with the

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requirements of the Act.

14. The commitments by EPA in this Agreement are subject to the availability of appropriated funds. No provision of this 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.

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## Attachment A to Settlement Agreement

### General

#### **§63.1500      Applicability.**

(a) The requirements of this subpart apply to the owner or operator of each secondary aluminum production facility, as defined in §63.1503.

(b) The requirements of this subpart apply to the following affected sources, located at a secondary aluminum production facility that is a major source of hazardous air pollutants (HAPs) as defined in §63.2:

- (1) Each new and existing aluminum scrap shredder;
- (2) Each new and existing thermal chip dryer;
- (3) Each new and existing scrap dryer/delacquering kiln/decoating kiln;
- (4) Each new and existing group 2 furnace;
- (5) Each new and existing sweat furnace;
- (6) Each new and existing dross-only furnace;
- (7) Each new and existing rotary dross cooler; and
- (8) Each new and existing secondary aluminum processing unit.

(c) The requirements of this subpart pertaining to dioxin and furan (D/F) emissions and associated operating, monitoring, reporting and recordkeeping requirements apply to the following affected sources, located at a secondary aluminum production facility that is an area source of HAPs as defined in §63.2:

- (1) Each new and existing thermal chip dryer;
- (2) Each new and existing scrap dryer/delacquering kiln/decoating kiln;
- (3) Each new and existing sweat furnace;

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(4) Each new and existing secondary aluminum processing unit, containing one or more group 1 furnace emission units processing other than clean charge.

(d) The requirements of this subpart do not apply to facilities and equipment used for research and development that are not used to produce a saleable product.

(e) The owner or operator of a secondary aluminum production facility subject to the provisions of this subpart, is subject to the title V permitting requirements under 40 CFR parts 70 and 71, as applicable. The permitting authority may defer the affected facility from the title V permitting requirements until December 9, 2004, if the secondary aluminum production facility is not a major source and is not located at a major source as defined under 40 CFR 63.2, 70.2, or 71.2, and is not otherwise required to obtain a title V permit. If an affected facility receives a deferral from title V permitting requirements under this section, the source must submit a title V permit application by December 9, 2005. The affected facility must continue to comply with the provisions of this subpart applicable to area sources, even if a deferral from title V permitting requirements has been granted to the facility by the permitting authority.

(f) An aluminum die casting facility, aluminum foundry, or aluminum extrusion facility shall be considered to be an area source if it does not emit, or have the potential to emit considering controls, 10 tons per year or more of any single listed HAP or 25 tons per year of any combination of listed HAPs from all emission sources which are located in a contiguous area and under common control, without regard to whether or not such sources are regulated under this subpart or any other subpart. In the case of an aluminum die casting facility, aluminum foundry, or aluminum extrusion facility which is an area source and is subject to regulation under this subpart only because it operates a thermal chip dryer, no furnace operated by such a facility shall

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be deemed to be subject to the requirements of this subpart if it melts only clean charge, internal scrap, or customer returns.

**§63.1503 Definitions.**

Aluminum scrap means fragments of aluminum stock removed during manufacturing (i.e., machining), manufactured aluminum articles or parts rejected or discarded and useful only as material for reprocessing, and waste and discarded material made of aluminum.

Clean charge means furnace charge materials including molten aluminum; T-bar; sow; ingot; billet; pig; alloying elements; aluminum scrap known by the owner or operator to be entirely free of paints, coatings, and lubricants; uncoated/unpainted aluminum chips that have been thermally dried or treated by a centrifugal cleaner; aluminum scrap dried at 343 °C (650 °F) or higher; aluminum scrap delacquered/decoated at 482 °C (900 °F) or higher, and runaround scrap.

Cover flux means salt added to the surface of molten aluminum in a group 1 or group 2 furnace, without agitation of the molten aluminum, for the purpose of preventing oxidation.

Customer returns means any aluminum product which is returned by a customer to the aluminum company that originally manufactured the product prior to resale of the product or further distribution in commerce, and which contains no paint or other solid coatings (i.e., lacquers).

Group 1 furnace means a furnace of any design that melts, holds, or processes aluminum that contains paint, lubricants, coatings, or other foreign materials with or without reactive fluxing, or processes clean charge with reactive fluxing.

Group 2 furnace means a furnace of any design that melts, holds, or processes only clean

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charge and that performs no fluxing or performs fluxing using only nonreactive, non-HAP-containing/non-HAP-generating gases or agents.

Internal scrap means all aluminum scrap regardless of the level of contamination which originates from castings or extrusions produced by an aluminum die casting facility, aluminum foundry, or aluminum extrusion facility, and which remains at all times within the control of the company that produced the castings or extrusions.

Reactive fluxing means the use of any gas, liquid, or solid flux (other than cover flux) that results in a HAP emission. Argon and nitrogen are not reactive and do not produce HAPs.

Runaround scrap means scrap materials generated on-site by aluminum casting, extruding, rolling, scalping, forging, forming/stamping, cutting, and trimming operations and that do not contain paint or solid coatings. Uncoated/unpainted aluminum chips generated by turning, boring, milling, and similar machining operations may be clean charge if they have been thermally dried or treated by a centrifugal cleaner, but are not considered to be runaround scrap.

Scrap dryer/delacquering kiln/decoating kiln means a unit used primarily to remove various organic contaminants such as oil, paint, lacquer, ink, plastic, and/or rubber from aluminum scrap (including used beverage containers) prior to melting.

Secondary aluminum production facility means any establishment using clean charge, aluminum scrap, or dross from aluminum production, as the raw material and performing one or more of the following processes: scrap shredding, scrap drying/delacquering/decoating, thermal chip drying, furnace operations (i.e., melting, holding, sweating, refining, fluxing, or alloying), recovery of aluminum from dross, in-line fluxing, or dross cooling. A secondary aluminum production facility may be independent or part of a primary aluminum production facility. For

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purposes of this subpart, aluminum die casting facilities, aluminum foundries, and aluminum extrusion facilities are not considered to be secondary aluminum production facilities if the only materials they melt are clean charge, customer returns, or internal scrap, and if they do not operate sweat furnaces, thermal chip dryers, or scrap dryers/delacquering kilns/decoating kilns. The determination of whether a facility is a secondary aluminum production facility is only for purposes of this subpart and any regulatory requirements which are derived from the applicability of this subpart, and is separate from any determination which may be made under other environmental laws and regulations, including whether the same facility is a “secondary metal production facility” as that term is used in 42 U.S.C. §7479(1) and 40 C.F.R. §52.21(b)(1)(i)(A) (“prevention of significant deterioration of air quality”).

Thermal chip dryer means a device that uses heat to evaporate oil or oil/water mixtures from unpainted/uncoated aluminum chips. Pre-heating boxes or other dryers which are used solely to remove water from aluminum scrap are not considered to be thermal chip dryers for purposes of this subpart.

## Attachment B to Settlement Agreement

### §63.1501      Dates.

(a) The owner or operator of an existing affected source must comply with the requirements of this subpart by March 24, 2003.

(b) Except as provided in §63.1501(c), the owner or operator of a new affected source that commences construction or reconstruction after February 11, 1999 must comply with the requirements of this subpart by March 24, 2000 or upon startup, whichever is later.

(c) The owner or operator of any affected source which is constructed or reconstructed at any existing aluminum die casting facility, aluminum foundry, or aluminum extrusion facility which otherwise meets the applicability criteria set forth in §63.1500 must comply with the requirements of this subpart by March 24, 2003 or upon startup, whichever is later.