ORAL ARGUMENT NOT YET SCHEDULED

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

No. 15-1180 (and consolidated cases)

ARIPPA,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Final Administrative Action of the
United States Environmental Protection Agency

PROOF OPENING BRIEF OF ENVIRONMENTAL PETITIONERS

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DATED: December 6, 2016

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARIPPA, *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 15-1180 (and consolidated cases)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Chesapeake Climate Action Network, Clean Air Council, Downwinders at Risk, and Environmental Integrity Project (collectively, "Environmental Petitioners") hereby submit this certificate as to parties, rulings, and related cases.

(A) Parties, Intervenors and *Amici*

(i) Parties, Intervenors, and *Amici* Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to This Case

Petitioners:

15-1180 ARIPPA

15-1191 Utility Air Regulatory Group

15-1192 Chesapeake Climate Action Network, Clean Air Council, Downwinders at Risk, and Environmental Integrity Project.

Respondents:

The respondent in all cases is the U.S. Environmental Protection Agency ("EPA"). Also listed as a respondent in case 15-1192 is Gina McCarthy, Administrator of the U.S. Environmental Protection Agency.

Intervenors:

15-1180 Chesapeake Bay Foundation, Chesapeake Climate Action Network, Clean Air Council, Downwinders at Risk, and Environmental Integrity Project have been granted leave to intervene on behalf of Respondent EPA.

15-1191 Chesapeake Bay Foundation, Chesapeake Climate Action Network, Clean Air Council, Downwinders at Risk, and Environmental Integrity Project have been granted leave to intervene on behalf of Respondent EPA.

15-1192 Utility Air Regulatory Group has been granted leave to intervene on behalf of Respondents EPA and Gina McCarthy.

(iii) *Amici* in This Case

None at present.

(B) Circuit Rule 26.1 Disclosure for Environmental Petitioners

See disclosure form filed separately.

(C) Ruling Under Review

Petitioners seek review of the final action taken by EPA at 80 Fed. Reg. 24,218 (Apr. 30, 2015) and entitled "Reconsideration on the Mercury and Air Toxics Standards (MATS) and the Utility New Source Performance Standards."

(D) Related Cases

This case and the consolidated cases have been coordinated for argument before the same panel as Case No. 16-1127, Murray Energy Corporation v. EPA. In addition, Environmental Petitioners are aware of the following related cases currently pending in this court:

13-1200: Chesapeake Bay Foundation v. EPA

15-1015: Chesapeake Climate Action Network v. EPA

16-1168: ARIPPA v. EPA

DATED: December 6, 2016

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1) and D.C. Circuit Rules 26.1 and 28(a)(1)(A), Chesapeake Climate Action Network, Clean Air Council, Downwinders at Risk, and Environmental Integrity Project (collectively, "Environmental Petitioners") make the following disclosures:

Chesapeake Climate Action Network

Non-Governmental Corporate Party to this Action: Chesapeake Climate Action Network ("CCAN").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: CCAN, a corporation organized and existing under the laws of the State of Maryland, is a grassroots, non-profit organization founded to transition the region towards clean-energy solutions to climate change,

specifically in Maryland, Virginia, and Washington, D.C. CCAN's mission is to educate and mobilize citizens in a way that fosters a rapid societal switch to clean-energy sources. This mission includes ensuring that facilities that contribute to global warming, such as coal-fired power plants, do not impact the health of CCAN's members or the environment through emitting dangerous toxics.

Clean Air Council

Non-Governmental Corporate Party to this Action: Clean Air Council ("CAC").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: CAC is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. CAC is a not-for-profit organization focused on protection of public health and the environment.

Downwinders at Risk

Non-Governmental Corporate Party to this Action: Downwinders at Risk.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Downwinders at Risk, a nonprofit corporation organized and existing under the laws of the State of Texas, is a diverse grassroots citizens group dedicated to reducing toxic industrial air pollution in North Texas and to continued education and advocacy concerning cement plant pollution.

Environmental Integrity Project

Non-Governmental Corporate Party to this Action: Environmental Integrity Project ("EIP").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: EIP, a corporation organized and existing under the laws of the District of Columbia, is a national nonprofit organization that advocates for more effective enforcement of environmental laws.

DATED: December 6, 2016

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

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

BDT	Best demonstrated technology
EPA or the agency	U.S. Environmental Protection Agency and Gina McCarthy
ESPs	Electrostatic precipitators
MACT	Maximum achievable control technology
MATS	Mercury and air toxics standard
mmBTU	Million British thermal units
NSPS	New source performance standards
PM	Particulate matter

INTRODUCTION

In 2011, Respondents U.S. Environmental Protection Agency and Gina McCarthy (collectively, "EPA" or "the agency") proposed standards to govern emissions of hazardous air pollution from electric generating units, colloquially known as power plants. The proposed standards included a limit on existing coal-fired power plants' emissions of particulate matter, as a "surrogate" for several metallic hazardous air pollutants, including lead, arsenic, cadmium, and selenium. Under the proposal, all particulate matter emitted from a power plant's stack, including both "filterable" particulates and "condensable" particulates, would count towards the limit—.03 pounds per million British thermal units (mmBTU) of electric power input. EPA claimed that this standard discharged the legal duty to set the strictest standard "achievable" considering cost and other statutory factors, because it would require power plants to use the most-effective technology for controlling particulate matter—a fabric filter—and additional reductions would require the installation of multiple particulate controls in series, at unreasonable cost.

In the 2012 final rule, EPA significantly weakened the particulate standard. EPA kept the numeric limit the same at .03 pounds per mmBTU, but determined that only "filterable" particulates will be counted in measuring compliance. The agency acknowledged that this revised standard does not require power plants to

install fabric filters, undermining the rationale advanced in the proposal for why the particulate standard was the strictest "achievable."

Because the weakened final-rule standard for particulates was not previewed in the proposal, environmental groups were unable to object to it in comments. Accordingly, the groups petitioned EPA to convene a reconsideration proceeding under Clean Air Act § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), which would enable interested parties to submit comments addressing the revised particulate standard. EPA denied the petition, and the environmental groups petitioned for review of the denial. The groups now seek to compel EPA to convene a proceeding to reconsider the revised particulate standard.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under Clean Air Act §§ 307(b)(1) and 307(d)(7)(B), 42 U.S.C. §§ 7607(b)(1) & (d)(7)(B), to review the final action taken by EPA at 80 Fed. Reg. 24,218 (Apr. 30, 2015), JA____, entitled "Reconsideration on the Mercury and Air Toxics Standards (MATS) and the Utility New Source Performance Standards; Final Action." Petitioners filed a timely petition for review of this action on June 29, 2015.

STATUTES AND REGULATIONS

Pertinent statutes are in a separate addendum.

ISSUE PRESENTED

Whether EPA's refusal to convene a proceeding to reconsider the particulate standard for existing coal-fired power plants violated Clean Air Act § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B).

STATEMENT OF FACTS

I. STATUTORY BACKGROUND.

A. MACT Standards For Hazardous Air Pollution.

In the 1990 amendments to the Clean Air Act, Congress replaced the previous risk- and health-based approach to regulating hazardous air pollution—which "worked poorly," S. Rep. No. 101-228, at 128 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3513 (1993)—with a technology-based approach intended to "eliminat[e] much of EPA's discretion." *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008).

For each hazardous air pollutant emitted by a major source, the 1990 Clean Air Act Amendments require EPA to establish a "maximum achievable control technology" (or MACT) standard, through a two-step process. 42 U.S.C. § 7412(d)(2)-(3). The agency begins by calculating the minimum stringency of the standard, which EPA calls the "floor." *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 629 (D.C. Cir. 2000). The MACT floor is equal to the "average emission limitation achieved by the best performing 12 percent of the existing sources (for which the

Administrator has emissions information)" for existing-source categories or subcategories with 30 or more sources, or "the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information)" for existing-source categories or subcategories with fewer than 30 sources. 42 U.S.C. § 7412(d)(3)(A), (B). Regardless of cost, the MACT standard cannot be "less stringent" than this floor. *Id.* § 7412(d)(3); *Sierra Club v. EPA*, 479 F.3d 875, 880 (D.C. Cir. 2007).

After EPA establishes MACT floor levels, § 7412(d)(2) requires EPA to consider whether a more-stringent "beyond-the-floor" standard should be established. *Nat'l Lime Ass'n*, 233 F.3d at 629; EPA-HQ-OAR-2009-0234-20371 ("2013 Beyond-the-Floor Memo") at 1, JA____ (consideration of beyond-the-floor standard required by § 7412(d)(2)); Response to Comments ("RTC"), EPA-HQ-OAR-2009-0234-20126 vol.1 at 661, JA____ (same). EPA is directed to take account of cost and other statutory factors, but ultimately § 7412(d)(2) requires EPA "to set the most stringent standards achievable, that is, standards 'based on the maximum reduction in emissions which can be achieved by application of [the] best available control technology.'" *Sierra Club*, 479 F.3d at 877 (citing 42 U.S.C. § 7412(d)(2) and quoting S. Rep. No. 101-228, at 133, 1990 U.S.C.C.A.N. at 3518). *Accord Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 857-58 (D.C.

Cir. 2001). "This is not a cost-effectiveness or cost-benefit test." S. Rep. No. 101-228, at 169, 1990 U.S.C.C.A.N. at 3554.

B. Proceedings for Reconsideration.

The Clean Air Act provides for judicial review of emission standards established by EPA under § 7412, but "[o]nly an objection … raised with reasonable specificity during the period for public comment … may be raised during judicial review." 42 U.S.C. § 7607(d)(7)(B). Where changes made by EPA between issuance of the proposed rule and the final rule have the effect of preventing interested persons from raising an objection in comments, the Act provides a remedy:

> If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within [the time for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

Id.

The Act provides for judicial review of a denial of reconsideration by EPA. *Id.* § 7607(b) & (d)(7)(B). If the predicates for reconsideration are satisfied, this Court may "vacate [EPA's] refusal and direct the Administrator to convene a

reconsideration proceeding." *Util. Air Regulatory Grp. v. EPA*, 744 F.3d 741, 747 (D.C. Cir. 2014).

II. FACTUAL BACKGROUND.

A. Power Plants' Emissions of Hazardous Metals.

In 2011, EPA found that power plants were "by far the largest U.S. anthropogenic source" of several pollutants that Congress designated as hazardous in the 1990 Amendments to the Clean Air Act, 42 U.S.C. § 7412(b)(1). 81 Fed. Reg. 24,420, 24,422/3-23/1 (Apr. 25, 2016), JA____-__; 76 Fed. Reg. 24,976, 24,999/1 (May 3, 2011), JA____. Among the hazardous air pollutants emitted by power plants are several hazardous metals, including arsenic, lead, cadmium, chromium, nickel, selenium, and mercury. 76 Fed. Reg. at 24,978/1, JA____. In fact, EPA found that power plants accounted for very large proportions of <u>total</u> U.S. emissions of arsenic (62 percent), cadmium (39 percent), chromium (22 percent), nickel (28 percent), selenium (83 percent), and mercury (50 percent). 77 Fed. Reg. 9304, 9310/1-2 (Feb. 16, 2012), JA____ (percentages of total U.S. emissions in 2005 inventory); EPA-HQ-OAR-2009-0234-19914 at 6 tbl.3, 9 tbl.6, JA____, ____. EPA's data also show that power plants are among the largest industrial sources of lead emissions. The 41 tons of lead emitted each year by coal-fired power plants accounts for more than fifteen percent of total lead emissions from stationary sources. EPA, *2014 National Emissions Inventory Data*,

https://www.epa.gov/air-emissions-inventories/2014-national-emissions-inventory-nei-data (last updated Nov. 1, 2016); Decl. of Ranajit Sahu ¶ 4.

Like other hazardous air pollutants, these metals were listed under § 7412 of the Clean Air Act due to their "inherently harmful characteristics," even at low levels of exposure. 80 Fed. Reg. 75,025, 75,031/1 (Dec. 1, 2015), JA____; S. Rep. No. 101-228, at 5, 1990 U.S.C.C.A.N. at 3391. Even in small doses, they "cause or contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." H.R. Rep. No. 101-490, pt.1, at 315 (1990). Lead, in particular, is known to cause grave neurological damage at low levels of exposure, particularly in children. 76 Fed. Reg. at 25,005/1, JA____; EPA, *What Are the Health Effects of Lead?*, https://www.epa.gov/lead/learn-about-lead#effects (last updated Sept. 8, 2016), JA____. Arsenic, nickel, cadmium, and chromium are carcinogens for which, as Congress recognized, "no exposure is safe." 136 Cong. Rec. 36,112/2 (1990).[1]

B. Control of Particulate Matter.

EPA frequently requires MACT controls for particulates (also called particulate matter or PM) as a "surrogate" for hazardous metals, because hazardous

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[1] Arsenic, nickel, and chromium are classified as human carcinogens, and cadmium is classified as a probable human carcinogen. 80 Fed. Reg. at 75,029/2, JA____.

metals are constituents of the particulate matter that industrial facilities emit. 76 Fed. Reg. at 25,038/1, 25,039/3, JA____-__. According to EPA, "the best [particulate] controls provide the best controls of metal emissions." RTC vol.1 at 749, JA____. This Court has approved EPA's use of particulates as a surrogate for hazardous metals provided that certain conditions are met. *See Sierra Club v. EPA*, 353 F.3d 976, 984 (D.C. Cir. 2004).

Particulates can be "filterable" or "condensable." Filterable particulates are "[particulates] in the stack with an aerodynamic diameter less than or equal to a nominal 10 micrometers," while condensable particulates are "materials that are vapors or gases at stack conditions but form solids or liquids upon release to the atmosphere." 76 Fed. Reg. at 25,060/2, JA____.

According to EPA, electrostatic precipitators ("ESPs") and fabric filters "are the most commonly applied [particulate] control technologies in U.S. coal-fired [power plants]. Newer units have tended to install [fabric filters], which usually provide better performance than ESPs." *Id.* at 25,014/2, JA____. Further, according to EPA, "[i]t is commonly accepted that a [fabric filter]… is the technology that provides the best level of [particulate] emission reduction for coal-fired [power plants]." EPA-HQ-OAR-2009-0234-20221 ("2012 Beyond-the-Floor Memo") at 2, JA____. *See also* 76 Fed. Reg. at 24,976/2, JA____ (The "[b]est demonstrated technology for control of both filterable PM_{10} and filterable $PM_{2.5}$

emissions from steam generating units is based upon the use of a [fabric filter] with coated or membrane filter media bags.").

EPA has decades of data and experience relevant to the performance of fabric filters and electrostatic precipitators in reducing particulate emissions at coal-fired power plants through the New Source Performance Standards ("NSPS") program. That program, which applies to both new coal-fired power plants and existing coal-fired power plants that are modified after issuance of the standard, requires limits on particulate matter, not as a surrogate for hazardous metals, but as a harmful pollutant in its own right. *See* 42 U.S.C. § 7411(a)(2), (b)(1)(B). NSPS must reflect "the best system of emissions reduction which … the Administrator determines has been adequately demonstrated." *Id.* § 7411(a)(1).

EPA adopted the first particulate limits for new and modified coal-fired power plants in 1971, setting a limit of .1 pounds of filterable particulate per mmBTU. 36 Fed. Reg. 24,876, 24,878/3 (Dec. 23, 1971), JA____. In 1979, based on a reevaluation of control technology performance, including fabric filters and ESPs, EPA strengthened the filterable limit to .03 lb/mmBTU. 44 Fed. Reg. 33,580, 33,581/1, 33,584/1-85/2, 33,609/1-2 (June 11, 1979), JA____, ____-__, ____.

In 2005, recognizing that "the performance of fabric filters and ESP installed on coal-fired steam generating units [had] improved as a result of advanced control

device designs and other performance enhancements," EPA strengthened the NSPS once more, adopting a new filterable particulate limit of .015 lb/mmBTU. 70 Fed. Reg. 9706, 9714/3 (Feb. 28, 2005), JA____; 71 Fed. Reg. 9866, 9867/3 (Feb. 27, 2006), JA____. EPA explained that, even though the NSPS standard of .015 lb/mmBTU applied only to new and modified plants, it was achievable by all existing coal-fired power plants. 70 Fed. Reg. at 9715/1, JA____. In the 2006 final rule, however, EPA adopted a weaker alternative to accommodate the continued use of ESPs, allowing modified units to comply with a 99.8 percent ash-reduction alternative instead of the .015 lb/mmBTU limit. 71 Fed. Reg. at 9872/2, JA____ ("ESPs can be modified to cost-effectively achieve" the ash-reduction alternative).

In the 2011 NSPS, EPA recognized that fabric filters, and not ESPs, are the "best" technology for control of particulates. 76 Fed. Reg. at 25,060/3, JA____. EPA explained that 2010 data on power plant emissions demonstrated that 63 existing units were using fabric filters and keeping their filterable particulate emissions below .015 lb/mmBTU, and that 94 percent of tests in the database were below an equivalent limit expressed in terms of total particulates. *Id.* at 25,064/3, JA____. Accordingly, EPA eliminated the ash-reduction alternative, making all newly modified coal-fired power plants subject to the filterable particulate limit of .015 lb/mmBTU. 77 Fed. Reg. at 9450/3, JA____. EPA rejected a commenter's suggested standard of .03 pounds of total particulates per mmBTU as insufficiently

stringent. EPA-HQ-OAR-2011-0044-5759 ("NSPS RTC") at 12-13, JA____ ("[A] more stringent standard would be indicative of the [best system of emission reduction].").[2]

III. REGULATORY BACKGROUND.

A. EPA's Proposal To Set A .03 Limit For Total Particulate Matter.

On May 3, 2011, in the same federal register notice as the proposed NSPS, EPA proposed a MACT floor limit of .03 lb/mmBTU on existing coal-fired power plants' particulate emissions as a surrogate for their non-mercury hazardous metal emissions.[3] 76 Fed. Reg. at 25,027 tbl.10, 25,037/3, 25,038/1, 25,039/3, JA____, ____-__. EPA specified that both filterable particulates and condensable particulates would count towards the total particulate limit. *Id.* at 25,039/3, JA____. *See also* NSPS RTC at 11, JA____ (compliance with total particulate limit "determined by adding the measured condensable PM plus the measured filterable PM"). EPA explained that this total particulate limit was roughly equivalent to a filterable-only limit of .015 lb/mmBTU. 76 Fed. Reg. at 25,064/3, JA____.

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[2] EPA subsequently revised the 2012 NSPS to reinstate the ash-reduction alternative, without explanation. 78 Fed. Reg. 24,073, 24,080 tbl.3 (Apr. 24, 2013), JA____. A challenge to that action is pending in this Court. Sierra Club v. EPA, No. 13-1200 (D.C. Cir. June 24, 2013).

[3] EPA set a separate standard for mercury. 76 Fed. Reg. at 25,027 tbl.10, JA____.

Considering whether to set a beyond-the-floor limit more stringent than the total particulate floor of .03 lb/mmBTU, EPA determined that the floor would require power plants to install and use fabric filters, which EPA viewed as "the technology that provides the best level of [particulate] emission reduction for coal-fired EGUs." *Id.* at 25,046/2, JA____; EPA-HQ-OAR-2009-0234-2924 ("2011 Beyond-the-Floor Memo") at 2, JA____ ("The [beyond-the-floor] analysis assumed that … a new [fabric filter] would need to be installed at the facility to comply with the non-[mercury] metallic [hazardous air pollutant] standard for PM."); 2012 Beyond-the-Floor Memo at 2, JA____. EPA concluded that the only way to achieve an additional reduction in emissions below what could be achieved with fabric filters would be to install multiple particulate controls in series, and that the cost of installing duplicate controls would be unreasonable. 76 Fed. Reg. at 25,046/2, 25,047/2, JA____-__. On that basis, EPA declined to propose a beyond-the-floor standard for particulates. *Id.*

B. EPA's Final Rule Setting The Same .03 Limit For Just Filterable Particulate Matter.

In the final rule, EPA changed the MACT floor for particulates. EPA kept the numeric limit unchanged at .03 lb/mmBTU, but decided that only a fraction of the total particulates—*i.e.*, just filterable particulates and not condensable particulates—will be counted towards the limit. 77 Fed. Reg. at 9367 tbl.3,

JA____. Condensable particulates represent 57% of total coal-fired power plant particulate emissions on average and 61% of total particulate emissions at the median coal-fired power plant. Sahu Decl. ¶ 8. EPA admits that the condensable fraction is even higher at some plants, ranging as high as "over 95%." RTC vol.1 at 750, JA____. The effect of excluding condensable particulates is to make the .03 lb/mmBTU standard much less stringent. Because condensable particulates are not counted, the final-rule filterable-only standard allows power plants to emit (1) much more filterable particulate matter than under a total-particulate standard of .03 lb/mmBTU (approximately 150% more on average) and (2) unlimited quantities of consensable particulate matter. Sahu Decl. ¶ 8.

The final-rule filterable-only limit of .03 lb/mmBTU is identical to the NSPS limit EPA adopted for new and modified coal-fired power plants in 1979—an outdated standard which has since been superseded by stricter limits. *See supra* at 9-11. It is half as stringent as the newest NSPS limit of .015 lb/mmBTU (filterable), which EPA finalized together with the § 7412 rulemaking. 77 Fed. Reg. at 9450/3, JA____.

EPA admits that the filterable-only particulate limit, unlike the proposed-rule limit, will not require existing coal-fired power plants to upgrade to fabric filters. RTC vol.1 at 596, JA____ ("We maintain that the standards are achievable at all time, even with an ESP[.]"). EPA also concedes that "a significant number of

[power plants] may already be in compliance with the final filterable PM limits" because "all coal-fired EGUs currently have some form of PM control installed." *Id.* at 597, JA____.

EPA made no effort to determine whether its substantially weakened final standard secures the maximum achievable reduction in particulates, as required by § 7412(d)(2). EPA did not even consider setting a beyond-the-floor standard for the filterable-only limit, even though EPA admits the final-rule MACT floor is not strong enough to require fabric filters, the technology EPA claims is "achievable," "demonstrated," and "best" for controlling particulate emissions from coal-fired power plants. 76 Fed. Reg. at 25,046/2 (proposed standards require fabric filter); 24,980/3 (proposed standards are "achievable"); 25,060/3 (fabric filter is the "best demonstrated technology," or "BDT," for control of particulates); 25,059/3 (BDT "has been adequately demonstrated (taking into account the cost [and] any non-air quality health and environmental impacts and energy requirements), JA____, ____, ____-__.

C. EPA's Denial of Reconsideration.

Concerned environmental groups, including two of the petitioners here, submitted a petition for reconsideration within the period for judicial review, objecting to the weakened particulate standard. EPA-HQ-OAR-2009-0234-20187, JA____. The petition explains that EPA failed to undertake any beyond-the-floor

analysis for the final-rule filterable limit, that EPA's rationale for rejecting a beyond-the-floor limit for the total-particulate standard in the proposed rule cannot justify refusing to set one for the weaker filterable-particulate standard in the final rule, and that a beyond-the-floor limit more stringent than .03 lb/mmBTU (filterable) is achievable using fabric filters. *Id.* at 10-11, JA____-__.

On April 30, 2015, EPA denied the petition for reconsideration. 80 Fed. Reg. 24,218, JA____. In a memorandum accompanying the denial, EPA gave the following reasons for its decision:

1. The public had an opportunity to comment on "the [beyond-the-floor] analysis for PM[.]"
2. Because "upgraded ESPs … achieve a performance very similar to existing [fabric filters]," "the issue is not of central relevance."
3. EPA "do[es] not agree" with Petitioners' objection and "believes that its decision not to set beyond-the-floor emission limits for PM is reasonable."

EPA-HQ-OAR-2009-0234-20493 ("Recon Denial Memo") at 123-24, JA____-__.

SUMMARY OF ARGUMENT

EPA's refusal to convene a proceeding to reconsider the weakened final-rule particulate standard contravenes § 7607(d)(7)(B), which states that EPA "shall" convene a proceeding for reconsideration if a two-prong test is satisfied. 42 U.S.C.

§ 7607(d)(7)(B). Under the first prong, it was "impracticable" for Petitioners to object to the weakened particulate standard during the comment period because EPA did not adopt it until the final rule, after the comment period had closed, and EPA did not preview the weakened standard in the proposed rule. The first prong also is satisfied for the independent reason that the "grounds" for Petitioners' objection arose after the comment period. Specifically, EPA weakened the standard in the final rule, undermining its proposed-rule beyond-the-floor analysis, while failing to conduct a new beyond-the-floor analysis or consider whether a standard more stringent than .03 lb/mmBTU (filterable) is achievable with a fabric filter. EPA's vague assertion that Petitioners had the opportunity to comment on "the beyond-the-floor analysis for PM" misses the point, because Petitioners did not have the opportunity to comment on the beyond-the-floor analysis (or lack thereof) for the weakened final-rule standard, which is the target of Petitioners' objection.

Under the second prong of § 7607(d)(7)(B), Petitioners' objection is "of central relevance" because it goes to whether the final-rule particulate standard is unlawful and must be changed. Petitioners object that EPA failed to conduct an analysis to determine whether the final-rule particulate standard secures the maximum reduction in emissions that is "achievable" considering cost and other statutory factors, *id.* § 7412(d)(2), that a standard more stringent than .03

lb/mmBTU (filterable) is "achievable," and that EPA must comply with the Act. Further, these statutory violations, if proved, are highly consequential. The record demonstrates that the final-rule standard for particulate matter—which governs emissions of carcinogenic and neurotoxic pollutants known to be harmful in small quantities —is dramatically weaker than the standard EPA proposed, and that a far more stringent standard is achievable.

EPA's statement that it disagrees with Petitioners' objection and believes it has acted reasonably is irrelevant to the test for reconsideration under § 7607(d)(7)(B). If EPA disagrees with Petitioners' objections on the merits, EPA is free to reach that conclusion in a reconsideration proceeding, after affording Petitioners comment opportunity and the other procedural protections guaranteed by § 7607(d)(7)(B).

STANDARD OF REVIEW

This Court reviews final actions EPA takes under § 7412 of the Act to determine if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 7607(d)(9). When a "statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (internal citation and quotations omitted). When a statutory provision is ambiguous, *Chevron* deference is owed to EPA's

interpretation only if the Act confers "authority to determine the particular matter at issue in the particular manner adopted," *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013), and EPA's interpretation carries "the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 233 (2001).

EPA's action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem," *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), or failed to "identif[y] and explain[] the reasoned basis for its decision," *Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C. Cir. 1996). An agency's action is also arbitrary if the agency has not considered statutory requirements, *see Massachusetts v. EPA*, 549 U.S. 497, 532-34 (2007); has not explained how its action comports with those requirements, *see Mountain Communications, Inc. v. FCC*, 355 F.3d 644, 648-49 (D.C. Cir. 2004); or has acted in a way that frustrates the purpose of a statute as the agency itself interprets it, *see BP West Coast Products v. FERC*, 374 F.3d 1263, 1274 (D.C. Cir. 2004).

STANDING

Petitioner environmental organizations have standing to bring this suit on behalf of their members. *See Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Petitioners' members live, work, and recreate near existing coal-fired power plants regulated by the EPA's rule. Through the air

they breathe and the food they eat, these members are harmed by their exposure to particulate emissions, including hazardous metal emissions, from those power plants. They also suffer other harm including additional health risks and a diminished ability to engage in and enjoy recreational and aesthetic interests. *See* Declarations. Because the particulate standard in the rule is less stringent than the Clean Air Act requires, EPA's refusal to reconsider the standard prolongs and increases the harm to Petitioners' members. This Court can redress this harm by ordering EPA to convene a proceeding to reconsider the particulate standard, in which EPA will be bound to follow the requirements of the Clean Air Act. If EPA strengthens the particulate standard, existing coal-fired power plants will have to reduce their particulate emissions, including their hazardous metal emissions. *See, e.g.*, *Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012).

ARGUMENT

EPA "shall" convene a proceeding for reconsideration when (1) it was impracticable to raise an objection during the public comment period or the grounds for the objection arose after the comment period and (2) the objection is of central relevance to the outcome of the rule. 42 U.S.C. § 7607(d)(7)(B).

As explained below, these predicates are met here.

I. PETITIONERS COULD NOT HAVE RAISED THEIR OBJECTIONS TO THE FINAL-RULE PARTICULATE STANDARD DURING THE COMMENT PERIOD.

It was "impracticable" for Petitioners to object to the weakened particulate standard during the comment period because EPA did not adopt it until the final rule, after the comment period had closed, and EPA did not preview the weakened standard in the proposed rule. Nor could Petitioners have anticipated at the time they submitted their comments that EPA would substantially weaken the particulate floor in the final rule and fail to conduct any beyond-the-floor analysis for the weakened floor. *See Portland Cement Ass'n v. EPA*, 665 F.3d 177, 186 (D.C. Cir. 2011) ("we do not require telepathy").

Further, the "grounds" for Petitioners' objections arose when EPA weakened the particulate standard in the final rule. 42 U.S.C. § 7607(d)(7)(B). While EPA claimed that the proposed-rule limit would require the use of fabric filters, which EPA claims is the demonstrated technology that most effectively controls particulate emissions, EPA admits that the the final-rule limit will not require power plants to use fabric filters. Yet EPA does not deny that the use of fabric filters is achievable, or that fabric filters can achieve much greater particulate reductions than the final rule requires. In addition, EPA relied on its claim that the floor would require fabric filters to justify declining to establish beyond-the-floor standards in the proposed rule, but EPA gave no reason for not establishing a

beyond-the-floor limit based on fabric filters in the final rule. These "grounds" for Petitioners' objection to the filterable-only standard arose after the close of the comment period.

For each of these reasons—it was "impracticable" for Petitioners to object to the filterable-only particulate standard during the comment period, and the "grounds" for the objection arose after the close of the comment period—the first part of the test of § 7607(d)(7)(B) is satisfied.

EPA's claim that the public had an opportunity to comment on "the [beyond-the-floor] analysis for PM," Recon Denial Memo at 123, JA____, is irrelevant. Petitioners had the opportunity to comment on "the [beyond-the-floor] analysis" for the stronger particulate standard that EPA proposed. They had no opportunity to comment on EPA's beyond-the-floor analysis—or lack thereof—for the far weaker particulate standard that EPA promulgated in the final rule. In particular, Petitioners could not comment that weakening the standard to the point that it no longer requires fabric filters undermines EPA's proposed-rule rationale for not establishing a beyond-the-floor standard, which relied on the claim that the stronger proposed-rule standard would require the use of fabric filters. Nor could Petitioners comment that EPA failed to conduct a new beyond-the-floor analysis, or that .03 lb/mmBTU (filterable) is not the maximum emission reduction achievable.

II. PETITIONERS' OBJECTIONS ARE OF CENTRAL RELEVANCE.

Petitioners object to the final-rule particulate standard on the ground that it violates the Clean Air Act as interpreted by EPA and this Court. According to the agency, "[a]fter EPA establishes MACT floor levels, [Clean Air Act §] 112(d)(2) requires EPA to consider whether more stringent [beyond-the-floor] standards should be established." 2013 Beyond-the-Floor Memo at 1, JA____ . Yet here EPA failed to consider whether a beyond-the-floor limit more stringent than .03 lb/mmBTU (filterable) is achievable. Further, although the Clean Air Act requires EPA "to set the most stringent standards achievable, … that is, standards based on the maximum reduction in emissions which can be achieved by application of [the] best available control technology," *Sierra Club v. EPA*, 479 F.3d at 877 (internal citations and quotations omitted), here EPA admits that the final rule does not require the best technology—as determined by EPA—for controlling particulate emissions—namely, fabric filters. Because these objections go to whether the final-rule particulate standard is unlawful and must be changed, they are of central relevance to the outcome of the rule. *See Natural Res. Def. Council v. Thomas*, 805 F.2d 410, 438 (D.C. Cir. 1986) (objection that a rule violates statutory requirements is "[c]ertainly" of central relevance).

Further, Petitioners' statutory objections are highly consequential, calling into question the stringency of the standard governing emissions of particulate

matter as a surrogate for multiple hazardous air pollutants—including lead, arsenic, cadmium, and chromium—that are known to be harmful at low levels of exposure. *Supra* at 7. The record demonstrates that the final rule standard for these dangerous pollutants is dramatically weaker than the standard EPA proposed, and that a far more stringent standard is achievable. EPA itself has recognized, since at least 2006, that a standard twice as stringent as the final-rule standard—.015 lb/mmBTU versus .03 lb/mmBTU—is achievable with a fabric filter. *Supra* at 9-10.

This is more than sufficient to satisfy § 7607(d)(7)(B). Indeed, under the plain language of the statute, Petitioners' objections need not be meritorious, but only "of central relevance" to the outcome. 42 U.S.C. § 7607(d)(7)(B). An objection that goes to whether a standard complies with the statute is necessarily of central relevance to the outcome, because EPA is obligated to comply with the statute. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016) ("Where a statute is clear, the agency must follow the statute.").

To be "relevant," an objection, like a piece of evidence, "need not be conclusive: 'A brick is not a wall.'" *United States v. Foster*, 986 F.2d 541, 545 (D.C. Cir. 1993) (quoting 1 McCormick on Evidence § 185, at 776 (J. Strong ed., 4th ed. 1992)). Indeed, EPA itself has recognized that § 7607(d)(7)(B) does not require Petitioners to show that their objection is meritorious. Rather, EPA has recognized in prior decisions that § 7607(d)(7)(B) requires the agency to convene a

proceeding for reconsideration if an objection "provides substantial support for the argument that the regulation should be revised." *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 125 (D.C. Cir. 2012), *rev'd in part on other grounds sub nom. Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014) (emphasis added). By pointing out that EPA has itself concluded that a limit more stringent than .03 lb/mmBTU (filterable) is achievable with a fabric filter, and that EPA failed even to consider this question once it was presented in this rule, Petitioners' objections provide "substantial support" for the "argument" in favor of a stricter standard.[4]

EPA misses the point when it asserts that the particulate matter reductions achievable with upgraded electrostatic precipitators are "very similar" to the particulate matter reductions achieved by existing fabric filters. Recon Denial Memo at 124, JA____. EPA may deny reconsideration only if Petitioners'

[4] In other respects, this case is unlike *Coalition for Responsible Regulation.* There, this Court ruled that, in the face of overwhelming scientific consensus that greenhouse gas emissions contribute to climate change that endangers human health and welfare, petitioners' objection that EPA failed to consider a handful of dissenting studies did not provide "substantial support" for an argument that the endangerment finding should be reversed. 684 F.3d at 125. Here, by contrast, Petitioners object to a violation of the plain language of a prescriptive statutory provision intended to limit EPA's discretion; their objection is grounded in EPA's own legal interpretation and technical conclusions; and EPA failed to articulate, or identify any evidence to support, a contrary conclusion that a filterable-only standard of .03 lb/mmBTU secures the maximum achievable reduction in particulates.

objection is not centrally relevant, and Petitioners' objections—that the filterable particulate standard does not secure the maximum achievable reduction, and that a significantly stronger standard is achievable—are centrally relevant regardless of whether EPA now asserts that some ESPs are very similar to some fabric filters.[5]

EPA's claim that it lacks data on power plant emissions, Recon Denial Memo at 123, JA____, is likewise not a lawful basis for denying reconsideration. Apart from the irrationality of relying on lack of data as a reason to deny comment opportunity, EPA's claimed lack of data does not show that it was practicable to comment on the filterable-only standard, or indicate that Petitioners' objections are not centrally relevant. 42 U.S.C. § 7607(d)(7)(B). Moreover, if EPA wishes to claim that a lack of data excuses its failure to comply with § 7412(d)(2), it may do so on reconsideration, in accordance with the procedural requirements of § 7607(d) and subject to subsequent judicial review of the final action on reconsideration.

[5] EPA's claim is also irrelevant to the merits of the issue the agency must address on reconsideration. The question under § 7412(d)(2) is not whether some ESPs are similar to some fabric filters, but what level of emissions reduction is "achievable" considering cost and the other statutory factors, 42 U.S.C. § 7412(d)(2), and EPA itself has determined that a standard much lower than the one in the final rule is achievable.

III. EPA'S DISAGREEMENT WITH PETITIONERS IS NOT A LAWFUL BASIS FOR DENYING RECONSIDERATION.

EPA also denied reconsideration on the ground that the agency "do[es] not agree" with Petitioners' objection and believes its decision not to set beyond-the-floor emissions limits "is reasonable." But whether EPA agrees with Petitioners or believes that it has acted reasonably is not the test for reconsideration under § 7607(d)(7)(B). EPA may decline to reconsider an issue only if it was practicable for Petitioners to raise their objection during the comment period and the grounds for their objection arose before the close of the comment period, or if Petitioners' objection is not centrally relevant. *Id.* § 7607(d)(7)(B). EPA's *post hoc* merits claims are irrelevant under this standard.

If EPA wishes to claim that the final rule particulate standard secures the maximum achievable reduction, conduct a new beyond-the-floor analysis, or otherwise argue, notwithstanding Petitioners' objections, that the revised standard is lawful and reasonable, the agency is free to do so in a reconsideration proceeding. But articulating such claims in denying Petitioners' petition for reconsideration "is not an adequate substitute for an opportunity for notice and comment." *Kennecott Corp. v. EPA*, 684 F.2d 1007, 1019 (D.C. Cir. 1982).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court reverse EPA's denial of reconsideration of the particulate standard for existing

coal-fired power plants and direct EPA to convene a proceeding to consider whether a more-stringent standard is "achievable" within the meaning of § 7412(d)(2).

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Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing **Proof Opening Brief of Environmental Petitioners** contains 5,767 words, as counted by counsel's word processing system, and thus complies with the applicable word limit established by the Court.

DATED: December 6, 2016

/s/ Neil Gormley
Neil Gormley

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2016, I have served the foregoing **Proof Opening Brief of Environmental Petitioners** on all registered counsel through the Court's electronic filing system (ECF).

/s/ Neil Gormley
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