ORAL ARGUMENT SCHEDULED FOR MAY 18, 2017

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

MURRAY ENERGY CORPORATION, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	Case No. 16-1127 (and consolidated cases)

NON-GOVERNMENTAL ORGANIZATION INTERVENORS' OPPOSITION TO MOTION TO CONTINUE ORAL ARGUMENT

The Non-Governmental Organization Intervenors[1] oppose the Environmental Protection Agency's motion for an indefinite adjournment of the scheduled oral argument in this challenge to EPA's Supplemental Finding that It is Appropriate and Necessary to Regulate Hazardous Air Pollutants From Coal- and

[1] American Lung Ass'n; American Public Health Ass'n; Chesapeake Bay Foundation; Chesapeake Climate Action Network; Clean Air Council; Conservation Law Foundation; Citizens for Pennsylvania's Future; Downwinders at Risk; Environmental Defense Fund; Environmental Integrity Project; National Ass'n for the Advancement of Colored People; Natural Resources Council of Maine; Natural Resources Defense Council; Physicians for Social Responsibility; The Ohio Environmental Council, and the Sierra Club. The State and Industry Respondent-Intervenors will file separate oppositions to EPA's motion.

Oil-Fired Electric Utility Stream Generating Units, 81 Fed. Reg. 24,420 (Apr. 25, 2016) ("Supplemental Finding").

Coming well after the close of briefing and only 30 days before the scheduled oral argument, EPA's motion is premised solely upon new EPA managers' wish to "closely review" (Mot. 1, 5) and "carefully scrutiniz[e]" (Mot. 6) the Supplemental Finding, with a view to possibly "reconsider[ing] all or part" of it, Mot. 8. While studiously avoiding the word "abeyance," the motion seeks an indefinite cessation of proceedings in this Court.

The motion does not come close to supplying the requisite "extraordinary cause" to continue a case that has already been set for oral argument. *See* D.C. Cir. Rule 34(g). EPA fails to identify any good reason for the Court to decline to exercise its "virtually unflagging obligation" to decide a case over which it has jurisdiction. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014); *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976).

EPA's cited reason for the requested delay is that the agency needs time to decide whether to invoke its "inherent authority to reconsider past decisions" (Mot. 5), and revisit EPA's Supplemental Finding that regulation of power plants' toxic emissions is "appropriate." But this Court already has specifically, unanimously, and pointedly rejected that very revisory power as contrary to the unambiguous terms of the statute. In *New Jersey v. EPA*, 517 F. 3d 574 (D.C. Cir. 2008), *reh'g*

en banc denied (May 20, 2008), *cert. dismissed sub nom. EPA v. New Jersey*, 555 U.S. 1162, *and cert. denied sub nom. Utility Air Reg. Group v. EPA*, 555 U.S. 1169 (2009), this Court held that EPA lacks the power administratively to undo an affirmative "appropriate and necessary" finding under 42 U.S.C. 7412(n)(1). Instead, *New Jersey* squarely holds that, under the unambiguous terms of the statute, if it does not want to regulate hazardous air pollutants from power plants despite having made an affirmative finding, EPA must follow the special, health-protective provisions for "delisting" sources that is set forth in section 112(c)(9)(B), 42 U.S.C. 7412(c)(9)(B).

Because the revised administrative finding EPA posits as the reason for the requested continuance would violate the statute and this Court's precedent, an administrative "review" in contemplation of such a revision does not constitute "extraordinary" (or even minimally proper) cause for staying consideration of the case. Further weighing against EPA's requested relief are the facts that regulated entities have already installed the necessary pollution control equipment and complied with the regulation that EPA now seeks to place under a prolonged litigative cloud; that the public and states rely upon the rule to deliver massive health and environmental benefits; and that the rule was adopted only after egregious delays, decades after Congress directed EPA to act swiftly.

BACKGROUND

Frustrated with the extremely slow progress under prior law, in the 1990 Clean Air Act Amendments Congress directed EPA to control emissions of statutorily identified hazardous pollutants to the maximum degree achievable. 42 U.S.C. 7412(b), 7412(c), 7412(d). The hazardous pollution regime in section 112 contains many provisions to protect the public from these uniquely harmful pollutants, including provisions that any source categories listed for regulation may be "delisted" only if EPA can make specific scientific findings concerning the absence of risk to public health and the environment. 42 U.S.C. 7412(c)(9)(B).

For power plants, or electric generating units ("EGUs"), such regulation was made contingent upon a further study and findings; Congress provided that EPA "shall regulate" EGUs "if the Administrator finds such regulation is appropriate and necessary after considering the results of the study." 42 U.S.C.7412(n)(1)(A).

After completing scientific studies called for under the statute, EPA concluded in 2000 that regulation of hazardous air pollutant emissions from EGUs "is appropriate and necessary." 65 Fed. Reg. 79,825, 79,826 (Dec. 20, 2000). Based on that finding, EPA added EGUs to the section 112(c) list of source categories that must be regulated, 65 Fed. Reg. at 79,830, and commenced a process for developing regulations pursuant to section 112(d).

Four years later, EPA changed course, and proposed removing EGUs from the list of source categories – not by following the section 112(c)(9) delisting procedure, but by a new administrative action "revising" its December 2000 "appropriate and necessary" determination so as to find that regulation under section 112(d) was not "appropriate" or "necessary." 69 Fed. Reg. 4,652 (May 5, 2004).[2] In a final rule issued in 2005, EPA announced that it would not be issuing emissions standards for EGUs under section 112(d) because, contrary to the 2000 determination, it had now concluded that regulation of EGUs under section 112 was neither "appropriate" nor "necessary." *See* 70 Fed. Reg. 15,994 (June 7, 2005).

Based solely on this revised determination, EPA declared that it had removed coal- and oil-fired EGUs from the section 112(c) source list. *Id*. at 16,032-33. The agency did not claim that it had satisfied the delisting criteria set out in section 112(c)(9).[3] The agency instead made the same argument suggested

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[2] Together with its effort to remove coal- and oil-burning power plants from the ambit of section 112, EPA proposed to adopt a mercury pollution emissions trading scheme, to be known as the Clean Air Mercury Rule, under section 111(d). 69 Fed. Reg. at 4,686, 4698-99.

[3] Under section 112(c)(9), before EPA may delist a source category, it must find that "no source in the category … emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source," and that "emissions [of hazardous air pollutants] from no source in the category or subcategory … exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source." 42 U.S.C. 7412(c)(9)(B)(i, ii).

by the present motion, asserting that it had "inherent authority" to revise its "appropriate and necessary" finding and had employed that authority to conclude that the December 2000 finding "lacked foundation." *Id*. at 16,033.

States, Native American tribes, and public health and environmental groups, including many of the respondent-intervenors in this case, challenged that decision. These challengers urged, *inter alia*, that EPA had violated the statute by refusing to regulate power plants without making the findings required by section 112(c)(9) as a precondition for deleting any source category from the section 112(c) list.

In *New Jersey v. EPA*, this Court agreed with challengers, ruling that because EGUs were in fact listed sources, EPA was required to make the specific findings mandated by section 112(c)(9)(B) before removing these sources from the list of source categories. 517 F.3d at 582-83. The panel acknowledged the general principle that agencies may revisit prior policy decisions, but explained that Congress "undoubtedly can limit an agency's discretion to reverse itself, and in [CAA] section 112(c)(9) Congress did just that, unambiguously limiting EPA's discretion to remove sources, including EGUs, from the section 112(c)(1) list once they have been added to it." 517 F.3d at 583. The *New Jersey* Court rejected EPA's argument that section 112(n)(1)'s provisions authorizing EPA to determine whether regulation of power plants was "appropriate and necessary" rendered it "reasonable" for the Agency to bypass section 112(c)(9)'s otherwise unambiguous

delisting mandate. 517 F.3d at 583. The court reasoned that section 112(n)(1) "governs how the Administrator decides whether to list EGUs; it says nothing about delisting EGUs, and the plain text of [CAA] section 112(c)(9) specifies that it applies to the delisting of 'any source.'" *Id*. at 582. "'EPA may not,'" this Court explained, "'construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.'" *Id*. (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001)) (alteration in original).

After a lengthy rulemaking process and based on a massive record, EPA issued the Mercury and Air Toxics Standards in 2012. EPA both reaffirmed the 2000 "appropriate and necessary" finding based upon an updated scientific and technical record and promulgated detailed standards pursuant to section 112(d) for regulation of hazardous air pollutant emissions from coal- and oil-fired power plants. EPA noted that studies completed since the 2000 finding "confirm serious health risks from [hazardous air pollutant] exposure," 77 Fed. Reg. 9304, 9336 (Feb. 12, 2012), and that EGUs are the "by far the largest" sources of mercury and many other congressionally-listed hazardous air pollutants, such as hydrogen fluoride gas, hydrogen chloride gas, selenium and arsenic, 76 Fed. Reg. at 24,999-25,006. EPA reaffirmed its 2000 "appropriate and necessary" finding, and promulgated emissions standards for coal- and oil-fired power plants, 77 Fed. Reg. at 9310-11, with compliance required by April 15, 2015.

On petitions for review, this Court upheld the rule in its entirety, rejecting a large number of statutory and record-based challenges brought by industry, states, and environmental groups. *White Stallion Energy Center, LLC v. EPA*, 748 F. 3d 1222 (D.C. Cir. 2014). The Court was unanimous on all issues except one – the permissibility of EPA's conclusion in 2012 that the statute was best interpreted as not allowing the Agency to evaluate the costs of regulation as part of the initial decision whether it was "appropriate" to regulate power-plant emissions of hazardous pollutants, *e.g.*, 77 Fed. Reg. at 9323-24, an issue on which Judge Kavanaugh dissented, 748 F.3d at 1258-66.

Granting certiorari on the cost issue alone, the Supreme Court concluded that EPA had unreasonably interpreted the statute as not allowing it to consider costs as part of the "appropriate and necessary" determination under section 112(n)(1)(A). *Michigan v. EPA*, 135 S. Ct. 2699 (2015). The Court reasoned that the statutory phrase requires "at least some attention to cost," and that EPA's interpretation implausibly "precludes the Agency from considering *any* type of cost—including, for instance, harms that regulation might do to human health or the environment." *Id*. at 2707. Citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), the Court rejected arguments that it could affirm on the basis of EPA's consideration of costs in the setting of emissions standards or in the Regulatory Impact Analysis, pointing out that EPA itself had not relied upon these rationales.

Id. at 2710-11. Accordingly, the Supreme Court reversed this Court's judgment and – despite explicit requests from petitioners that it vacate the rule, *e.g.*, Br. of Petitioners State of Michigan, *et al*. at 5, 19, 48 (S. Ct. No. 14-46, filed Jan. 20, 2015) – remanded for further proceedings.

Upon remand to this Court, the *White Stallion* panel entertained motions on whether to vacate the rule while EPA performed the further analysis required by *Michigan*. Per Curiam Order, ECF No. 1567220 (Aug. 11, 2015). After considering extensive briefing from the parties[4] – including detailed and unrebutted evidentiary proffers from EPA and Respondent-Intervenors concerning the adverse impacts that vacating the Rule would have for public health and for the power industry[5] – and after holding oral argument on December 4, 2015, the panel

[4] ECF No. 1574809 (filed Sept. 24, 2015) (industry and state petitioners' joint motion, seeking vacatur); ECF. No. 1574817 (petitioner Tri-State Gen. & Transm. Ass'n, Inc.'s motion to govern, seeking vacatur); ECF No. 1574825 (filed Sept. 24, 2015) (EPA motion seeking remand without vacatur); ECF No. 1574820 (joint motion of state and non-governmental organization respondent-intervenors seeking remand without vacatur) (filed Sept. 24, 2015); ECF No. (industry respondent-intervenors' motion, seeking remand without vacatur). *See also* ECF Nos. 1579194, 1579227, 1579258, 1579186, 1579245, 1579252 (the parties' respective responses, filed on Oct. 21, 2015); ECF Nos. 1581957, 1581995, 1581996, 1581955, 1582027 (replies, filed on Nov. 4, 2015).

[5] *See, e.g.*, Respondent's Motion to Govern Future Proceedings, McCabe Decl. ¶¶ 21-32 (ECF. No. 1574825); Joint Motion of State, Local Government and Public Health Respondent-Intervenors for Remand Without Vacatur, Exhs. 1-6 (ECF No. 1574820); Motion of Industry Respondent Intervenors to Govern Future Proceedings, Exhs. A & B (ECF No. 1574868).

unanimously determined that the Rule should be remanded "without vacatur." Per Curiam Order, ECF No. 1588459 (Dec. 15, 2015).

In response to the Supreme Court's decision, EPA commenced a new rulemaking to reevaluate its section 112(n)(1) "appropriate" finding in light of costs. 80 Fed. Reg. 75,025 (Dec. 1, 2015) (proposed rule). EPA considered cost under two independent approaches. Under its principal approach, EPA considered factors including the annual costs of complying with the rule as a percentage of the power sector's annual sales; the annual capital expenditures associated with complying with the Rule compared to the sector's average annual expenditures between 2000-2011; the impact of the standards on retail electricity prices and electric system reliability. 80 Fed. Reg. at 75,031-37. EPA considered these costs in relation to the Standards' achievement of aims that Congress had specified in the statute itself, noting that power plants are "by far the largest anthropogenic source of mercury, selenium, hydrogen chloride, and hydrogen fluoride emissions, and a significant source of metallic [hazardous air pollutants] emissions including arsenic, chromium, nickel, and others," *id.* at 75,029; and that the toxics emitted by power plants cause a variety of serious and widespread hazards to public health, particularly for children and other vulnerable populations. *See id.* at 75,029. EPA also pointed to the significant emission reductions that the Standards were expected to obtain. *Id.* at 75,033.

EPA found that the statute did not require a formal cost-benefit analysis and that such a way of considering costs was not optimal for assessing hazardous air pollution control in part because many of the key benefits are difficult to quantify or monetize. But EPA concluded that the cost-benefit review performed as part of its Regulatory Impact Analysis provided an alternative means of assessing cost, and that it also supported finding regulation appropriate. *See* 80 Fed. Reg. at 75,040-41. After considering public comment, EPA issued its final Supplemental Finding that, considering cost, regulation of power plants under section 112 is "appropriate and necessary." 81 Fed. Reg. at 24,426-27.

Industry parties and states filed petitioned for review of the Supplemental Finding; states, power companies, and public health and environmental organizations intervened in support of EPA. After an extensive briefing process, the Court scheduled the case for oral argument on May 18, 2017.

ARGUMENT

I. *New Jersey* Holds that the Act's Unambiguous Terms Foreclose EPA from Undoing the Finding Via Administrative Reconsideration, Rendering Futile the "Review" that is the Basis for the Requested Continuance.

The Court saw this movie almost a decade ago, and gave it three thumbs down. In *New Jersey*, the Court had before it an EPA rule, promulgated after a change in administrations, that purported to determine that EPA's 2000 "appropriate and necessary" finding was incorrect, and to delist power plants based upon a *new* finding that regulation of power plants hazardous emissions under section 112 was *not* appropriate or necessary. 517 F.3d at 578. There, as here, EPA claimed that it had "inherent authority" to revisit the 2000 affirmative finding, "correct its own mistake," and reach a different result. *Id.* at 583. And as here, EPA argued that delisting power plants consequent to such a revised finding could proceed without satisfying the delisting requirements of 42 U.S.C. 7412(c)(9)(B). *See* Final Brief of Respondent EPA, *New Jersey v. EPA*, No. 05-1097 at 21-33 (filed July 23, 2007) ("EPA *New Jersey* Br.") (Attachment).

The *New Jersey* Court rejected EPA's arguments, holding that the statute's unambiguous terms denied EPA the authority to reconsider its finding:

> EPA maintains that it possesses authority to remove EGUs from the section 112 list under the "fundamental principle of administrative law that an agency has inherent authority to reverse an earlier administrative determination or ruling where an agency has a principled basis for doing

> so." Resp't Br. at 22 (citing *Williams Gas Processing–Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006); *Dun & Bradstreet Corp. Found. v. USPS*, 946 F.2d 189, 193 (2d Cir. 1991)). An agency can normally change its position and reverse a decision, and prior to EPA's listing of EGUs under section 112(c)(1), nothing in the CAA would have prevented it from reversing its determination about whether it was "appropriate and necessary" to do so. Congress, however, undoubtedly can limit an agency's discretion to reverse itself, and in section 112(c)(9) Congress did just that, unambiguously limiting EPA's discretion to remove sources, including EGUs [power plants], from the section 112(c)(1) list once they have been added to it. This precludes EPA's inherent authority claim for "EPA may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001). As this court has observed, "when Congress has provided a mechanism capable of rectifying mistaken actions ... it is not reasonable to infer authority to reconsider agency action." *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir.1984). Indeed, EPA's position would nullify section 112(c)(9) altogether, not just with regard to EGUs, for EPA is unable to explain how, if it were allowed to remove EGUs from the section 112 list without regard to section 112(c)(9), it would not also have the authority to remove any other source by ignoring the statutory delisting process.

New Jersey, 517 F. 3d at 582-83.

The Court also rejected EPA's contention "that it would be anomalous for [the agency] to be forced to await a court order to correct 'its own mistake' in listing coal- and oil-fired EGUs as a source under section 112(c)(1), observing that "Congress was not concerned with what EPA considers 'anomalous'" when it enacted the statute's air toxics provisions, "but rather with the fact that EPA had failed for decades to regulate [hazardous air pollutants] sufficiently." *Id.* at 583.

Without even citing *New Jersey*, and in reliance upon some of the same arguments and authority the agency unsuccessfully urged there, *see* EPA *New Jersey* Br. 22-24, 31-32, EPA's motion assumes that the agency has the right here to do just what *New Jersey* specifically held the statute prohibits. *Compare New Jersey*, 517 F. 3d at 583 (concluding that statute "precludes EPA's inherent authority claim") *with* Mot. at 5 (claiming "inherent authority" to revisit the Finding).

Coal- and oil-fired power plants are listed as a section 112 source category, 65 Fed. Reg. 79,825 (2000); 67 Fed. Reg. 6,521 (2002), and EPA has made a final finding (albeit one still subject to judicial review) that regulation is "appropriate." Unless the courts overturn the supplemental finding, the only way power plants can avoid meeting emissions standards under section 112(d) standards is if EPA delists them under section 112(c)(9)(B) after making the required findings. Nor do EPA's references to general provisions in Executive Order 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017) (cited in Mot. 7), support its motion. That Order could not, and does not purport to, alter the statutory limits on EPA's authority.

Yet EPA does not seek a delay in this litigation in order to consider delisting coal- and oil-fired power plants – nor reasonably could it, since the Supplemental Finding does not address delisting. Indeed, in *White Stallion*, this Court upheld EPA's denial of a petition to delist EGUs, 748 F.3d 1222, 1248-49

(noting that petition "did not demonstrate that EPA could make either of the two predicate findings required for delisting under 112(c)(9)(B)"), and no party sought Supreme Court review of that decision. No such delisting action was considered as part of the Supplemental Finding; any delisting proceeding would be a new administrative process that is logically and legally distinct from the administrative proceeding before the Court here.

To be sure, parties aggrieved by an affirmative "appropriate and necessary" finding may challenge it (and the section 112(d) standards) via timely petitions for judicial review. That is what happened in *White Stallion* and *Michigan*, and that is what Petitioners here are doing in the instant petitions for review. But what *EPA* may not do, under the statute and *New Jersey*, is *administratively* undo such a finding without following the requirements of section 112(c)(9) – thereby circumventing the statute's detailed and specific delisting provisions. The administrative "review" EPA's motion posits is irreconcilable with the statute's unambiguous terms as determined in *New Jersey*.

EPA's motion also intimates that EPA might want to use its "review" of the Supplemental Finding to make other changes in the underlying air toxics standards – stating vaguely that the Supplemental Finding "implicates significant and legal and policy issues about a CAA rule of national importance." Mot. 6. But all that was before EPA in the Supplemental Finding – and all that is before the Court in

these petitions – is the straightforward yes/no question whether, considering the relevant factors including cost, regulation is "appropriate." In *White Stallion*, the Court finally decided the myriad of other challenges relating to the evidentiary foundations for the health and environmental hazards identified by EPA, the proper scope and content of power plant regulation under section 112, and other subjects.[6] The Supreme Court did not take up any of these issues, which were not before EPA in the remand proceeding that led to the Supplemental Finding and are not at issue here. If EPA wants to revisit these or any other portions of Mercury and Air Toxics Standards, it would need to start a new rulemaking, which would not affect the issue presented here nor warrant any delays in this litigation.

[6] *See*, *e.g.*, *White Stallion*, 748 F.3d at 1242-43 (EPA permissibly considered cumulative health hazards); 1243 (EPA properly regulated EGUs under section 112(d) rather than employing petitioners' preferred ad hoc approach); 1244-45 (EPA properly determined to promulgate states "for all listed HAPs emitted by EGUs," rather than "pick[ing] and choos[ing]"); 1245-47 (upholding finding "that mercury emissions posed a significant threat to public health"); 1246 (upholding Rule's minimum stringency levels); 1247 (EPA reasonably declined to classify EGUs as major sources and area sources); 1247-48 (rejecting industry challenges to calculation of maximum achievable control technology ("MACT") floor); 1248 (EPA properly prescribed MACT standards for acid gases, rather than less stringent health-based emission standards); 1248 (upholding EPA's denial of delisting petition); 1249 (rejecting challenges to EPA's analysis regarding risks from non-mercury toxics); 1249-50 (rejecting arguments that EPA should have promulgated separate standards for circulating fluidized bed EGUs); 1250-51 (rejecting multiple challenges to standards for lignite-fired units).

II. EPA's Stated Desire to Review the Supplemental Finding is Not a Valid Basis for a Continuance.

EPA argues that if oral argument were held in the midst of the agency's review, "counsel would likely be unable to represent the current Administration's conclusive position on the Supplemental Finding," and that it would be "improper" for arguing counsel to "speculate as to the likely outcome of the current Administration's review." Mot. 7.

These concerns do not justify the requested delay. First, as noted in Part I above, because of the statute's unambiguous requirements as established in *New Jersey*, administrative "review" of the "appropriate" finding cannot change the result. Moreover, that parts of the Supplemental Finding may not fully accord with the current Administration's views in all particulars is no extraordinary event; it is how the rule of law works. Rare is the agency official who administers only laws and policies that correspond exactly to what he would have adopted had he been in office at the relevant time; with rare exceptions, officials are duty-bound to execute the law on the books.

And even if the federal government were to take the unusual step of refusing to defend the Supplemental Finding at oral argument, respondent–intervenors enjoy "full party status," *U.S. ex rel. Eisenstein v. City of N.Y., N.Y.*, 556 U.S. 928, 932–34 (2009), and may defend the laws on the books when the government does

not.[7] The administrative record that is the sole basis for review, *Camp v. Pitts*, 411 U.S. 138, 142 (1973), is complete and before the Court. So long as petitioners maintain their challenges to the Supplemental Finding, respondent–intervenors stand ready to defend it, and should be allowed to.

III. The Public Interest Strongly Disfavors EPA's Request for Further Delays in Resolving Challenges to the Rule.

While EPA claims that its continuance might save "the resources of the parties and the court" (Mot. 8), there is no chance that a continuance would serve judicial economy. As demonstrated above, EPA cannot unilaterally change its mind on the one issue that is before the Court – whether regulation is "appropriate." And since Petitioners wish to maintain their challenges, these fully-briefed challenges should be heard and decided. The parties, amici, and the Court have spent substantial resources on this case, and EPA's motion does not come

[7] *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2684-89 (2013) (intervenors defended federal statute after Justice Department declined); *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 477, 482-84 (9th Cir. 2011) (upholding private conservation intervenors' right to defend Bureau of Land Management regulations that agency no longer defended); *Flying J. Inc. v. Van Hollen*, 578 F.3d 569, 571-74 (7th Cir. 2009) (upholding private company permitted to intervene and defend Wisconsin statute regulating gasoline sales after state government declined to defend); *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1110-11 (9th Cir. 2002) (environmental intervenors could defend Forest Service's Roadless Rule despite absence of appeal by agency); *Nat'l Wildlife Fed'n v. Lujan*, 928 F.2d 453, 456-60, 463 (D.C. Cir. 1991) (mining association allowed to defend Interior Department regulations against environmental group's challenge after Interior did not appeal; district court judgment for environmental plaintiffs reversed)

close to demonstrating "extraordinary cause," D.C. Cir. Rule 34(g), to put off argument and indefinitely delay the litigation.

Halting judicial review at this late stage would leave the MATS in a protracted limbo state, potentially for a very long time. *See N.Y. Repub. State Comm. v. SEC*, 799 F.3d 1126, 1136 (D.C. Cir. 2015) ("people cannot reliably order their affairs in accordance with regulations that remain for long periods under the cloud of categorical legal attack").[8]

This limbo state is especially problematic here. EPA's motion would mean that a rule that has been a generation in the making, *see White Stallion*, 517 F.3d at 1231-33 (outlining history), and has been subject to multiple reviews and administrative processes would be further subject to a continuing cloud. Yet Congress contemplated an EPA decision within a few years of 1990 amendments.

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[8] This Court has emphasized that statutory regimes with fixed periods for pre-enforcement judicial review like Clean Air Act's, *see* 42 U.S.C. 7607, reflect congressional judgments on the importance of expeditious resolution of regulatory challenges. *See Ala. Power Co. v. Costle*, 606 F.2d 1068, 1075 (D.C. Cir. 1979) ("The judicial review provisions as well as other features of the Clean Air Act Amendments set a tone for expedition of the administrative process that effectuates the congressional purpose to protect and enhance an invaluable national resource, our clean air."); *Eagle-Picher Industries v. EPA*, 759 F.2d 905, 916 (D.C. Cir. 1985) (Superfund statute's broad pre-enforcement review regime represents congressional judgement on need to avoid "needless delays in the implementation of an important national program"). *See also* S. Rep. 101-228 at 372 (1989), CAA Legis. Hist. at 8712 (stating that "efficient implementation of the [Clean Air] Act's regulatory program" would be frustrated by "delay [of] judicial review of EPA actions," and warning of potential that "petitions for reconsideration" may be used "as a delay tactic").

See 42 U.S.C. 7412(n)(1)(A) (3-year deadline for study that was to inform basis for finding).

Granting EPA's request on grounds as threadbare as those offered here would invite strategic games by federal agencies of the kind this Court has denounced, *i.e.*, efforts to stave off possibly inconvenient judicial rulings by announcing policy "reviews" and, on that basis, "perpetually dodge review." *See American Petroleum Institute v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012); *see also Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990) ("If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely."). This Court should proceed with its review.

CONCLUSION

EPA's motion should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing response was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 4773 words.

CERTIFICATE OF SERVICE

I certify that on April 21, 2017, the foregoing Response was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ Sean H. Donahue

APPENDIX:

Excerpt of Brief of Respondent EPA,

New Jersey v. EPA, No. 05-1097 (filed July 23, 2007)

In the Section 112(n) Rule under review, EPA revised its initial December 2000 Finding and concluded that it is neither appropriate nor necessary to regulate power plants under section 112. In doing so, EPA found that the December 2000 Finding lacked foundation and that new information before the Agency supported reversing that finding. Based on EPA's final determination that it is neither appropriate nor necessary to regulate power plants under section 112, EPA removed power plants from the list of source categories to be regulated under section 112.

B. EPA Has Authority to Revise a Section 112(n)(1)(A) Finding Without Applying The Delisting Criteria in Section 112(c)(9).

1. EPA has implied authority to revise a section 112(n)(1)(A) determination.

Congress granted EPA authority in CAA section 112(n)(1)(A) to determine whether regulation of power plant emissions under section 112 is "appropriate and necessary." Pursuant to section 112(n)(1)(A), EPA cannot regulate power plants under section 112 *unless* such regulation is, in EPA's judgment, both "appropriate and necessary," applying the criteria set forth in that subsection. As Government Petitioners put it, section 112(n) plays a "threshold role" with respect to the regulation of power plants. See Government Br. at 16.

While recognizing that section 112(n) plays a "threshold role" with respect

to power plant regulation, Government Petitioners take the position that EPA only has the authority to make a section 112(n)(1)(A) determination once, and that if the determination is wrong or no longer valid, EPA is powerless to correct its error, no matter how wrong and flawed it may be. See Government Br. at 12-14. This position is supported neither by the statutory text nor by principles of administrative law.

In the first place, it is a fundamental principle of administrative law that an agency has inherent authority to reverse an earlier administrative determination or ruling where an agency has a principled basis for doing so. As the Supreme Court stated in American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397, 416 (1967), an agency "faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice." "[T]his kind of flexibility and adaptability . . . is an essential part of the office of a regulatory agency." Id. Similarly, the Supreme Court more recently observed:

> "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis," Chevron, supra at 863-64, for example, in response to changed factual circumstances, or a change in administrations.

National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 575 U.S. 967, 981 (2005). Likewise, this Court has stated that:

> [A]n agency is free to discard precedents or practices it no longer believes correct. Indeed, we expect that an [] agency may well change its past practices with advances in knowledge in its given field or as its relevant experience and expertise expands.

Williams Gas Processing Gulf Coast Co. v. FERC, 475 F.3d 319, 326. (D.C. Cir. 2006) (quoting Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1296 (D.C. Cir. 2004) (per curiam)).

Government Petitioners argue that EPA lacks authority to revise a section 112(n)(1)(A) determination inasmuch as Congress failed to *mandate* periodic review by EPA of a section 112(n)(1)(A) determination, whereas Congress did mandate periodic review of certain other determinations under the Act. See Government Br. at 13. Government Petitioners fail to recognize that there is a clear distinction between language that *mandates* periodic EPA review of some determination, and language that *precludes* review of such a determination. In the absence of any preclusive language, EPA retains its inherent administrative authority to revise a section 112(n)(1)(A) determination where it has a principled basis for doing so. See Dun & Bradstreet Corp. Found. v. United States Postal Service, 946 F.2d 189, 193 (2d Cir. 1991) ("It is widely accepted that an agency

may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review.") (citation omitted).

2. EPA may revise a section 112(n)(1)(A) determination without applying the delisting criteria in section 112(c)(9).

In section 112(n)(1)(A), Congress directed EPA to regulate power plant emissions under section 112 *only* where it is both appropriate and necessary to do so. Thus, an affirmative section 112(n)(1)(A) determination is a prerequisite to any regulation of power plants under section 112. EPA's express authority in section 112(n)(1)(A) to determine whether power plants should be regulated at all under section 112 necessarily encompasses the authority to remove power plants from the section 112(c) list of source categories to be regulated under section 112 where EPA determines that it has erred in concluding that regulation of power plants is appropriate and necessary or finds that new information has undermined the validity of a previous determination.

Government and Environmental Petitioners take the position that even if EPA is correct that it is, in fact, neither "appropriate" nor "necessary" to regulate power plants under section 112, EPA must nonetheless, as a result of an initial erroneous 112(n)(1)(A) determination, retain power plants on the section 112 list

and regulate power plants under section 112. See Government Br. at 15-19; Environmental Br. at 14-17. Petitioners contend that EPA can only avoid inappropriate or unnecessary regulation of power plants under section 112 if it makes a different set of findings than set forth in section 112(n)(1)(A) – namely, the findings set forth in section 112(c)(9) required for removing ordinary source categories from the section 112(c) list of categories to be regulated. But this argument ignores the threshold nature of the section 112(n)(1)(A) criteria and stands the statutory framework on its head.

Petitioners contend that their statutory interpretation must be adopted under step one of a Chevron analysis. See Environmental Br. at 15. Under step one of a Chevron analysis, the statute must be construed in its entirety, and the Court cannot confine itself to reading a particular statutory provision in isolation. See, e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) ("In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity of – certain words or phrases may only become evident when placed in context."); Northeast Maryland Waste Disposal Auth. v. EPA, 358 F.3d 936, 944 (D.C. Cir. 2004) ("As the Supreme Court has instructed, 'the words of a statute must be read in their context and with

a view to their place in the overall statutory scheme.'") (citation omitted).

Reading section 112 in its entirety, it is simply not the case that Congress has unambiguously expressed an intent to compel unnecessary and inappropriate regulation of power plants. Logically, if EPA makes a determination under section 112(n)(1)(A) that power plants should not be regulated at all under section 112 because it is neither appropriate nor necessary to do so, this determination *ipso facto* must result in removal of power plants from the section 112(c) list of source categories to be regulated under section 112. To the extent that the section 112(n)(1)(A) criteria and the section 112(c)(9) delisting criteria may be deemed to conflict, the section 112(n)(1)(A) language takes precedence through application of the fundamental rule of statutory construction that "[s]pecific terms prevail over the general in the same . . . statute which might otherwise be controlling." Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932). Section 112(n)(1)(A) focuses specifically on power plants. Section 112(c)(9) does not.

In short, the intent of Congress is not clear with respect to the applicability of the section 112(c)(9) delisting criteria to power plants. Accordingly, this case cannot be decided under step one of the Chevron test, and the Court must proceed

to step two of that test.[4] Under Chevron step two, to uphold EPA's construction, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached . . . ." Chevron, 467 U.S. at 843 n.11.

EPA's construction of the statute as allowing EPA to correct or revise a section 112(n)(1)(A) determination and to remove power plants from the section 112(c) list without applying section 112(c)(9) delisting criteria is reasonable and entitled to deference under step two of Chevron.

Petitioners' argument that EPA's interpretation somehow frustrates the general framework set forth by Congress in section 112 does not withstand scrutiny. See Government Br. at 13-14; Environmental Br. at 19. While Petitioners correctly observe that Congress generally established a framework in section 112 that promoted rapid regulation of hazardous air pollutants, Petitioners overlook that Congress singled out power plants for *different* treatment and made

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[4] Accordingly, the gloss on the Chevron step one standard set forth by this Court in Engine Manufacturers Ass'n v. EPA, 88 F.3d 1075 (D.C. Cir. 1996), and cited by Petitioners does not apply. See Government Br. at 16; Environmental Br. at 15-16. However, even if Engine Manufacturers Ass'n were applied, EPA can make the showing set forth in that case to avoid application of Chevron step one. "[A]s a matter of logic and statutory structure," applying section 112(c)(9) to power plants does not make sense. See 88 F.3d at 1089. To do so would undermine Congress' specific instructions regarding the regulation of power plants set forth in section 112(n)(1)(A).

clear that it did not want to subject power plants to the framework it established for other source categories. Instead, Congress granted EPA considerable discretion to determine whether it is appropriate and necessary to regulate power plants at all under section 112, and then set no deadline for making such a determination. In short, there is no reason to conclude based on the general rigid framework applicable to other source categories that Congress intended to prevent EPA from revising a section 112(n)(1)(A) determination.

Petitioners' argument that EPA is obligated to apply section 112(c)(9) criteria because EPA previously applied various *other* section 112 requirements to power plants based on the December 2000 Finding is also misplaced. See Environmental Br. at 17-18. Although it is correct that between the time of the December 2000 Finding and the Section 112(n) Rule EPA applied certain other section 112 requirements to power plants, EPA did so during this period based on the fact that it had made a positive "appropriate and necessary" finding that was still in place. EPA has now reversed that finding.

Petitioners' reliance on language in CAA sections 112(c)(6) and 112(c)(3) likewise is misplaced. See Government Br. at 16; Environmental Br. at 18-19. Congress directed EPA in section 112(c)(6) to list by November 1995 sources accounting for 90 percent of the aggregate emissions of certain hazardous air

pollutants, including mercury, and to establish standards for such sources by November 2000. But, in doing so, Congress made clear that this provision "shall not be construed to require [EPA] to promulgate standards" for power plants. 42 U.S.C. § 7412(c)(6). Accordingly, section 112(c)(6) further underscores that Congress had reservations about regulating power plants under section 112 notwithstanding its recognition that power plants may be a significant source of mercury.

Section 112(c)(3) addresses EPA's listing of "area sources" to be regulated under section 112. Area sources are defined as stationary sources of hazardous air pollutants that are not "major sources." 42 U.S.C. § 7412(a)(2). Environmental Petitioners argue that EPA's interpretation of section 112(n)(1)(A) as allowing it to correct a section 112(n)(1)(A) "appropriate and necessary" determination relating to power plants would also enable EPA to revise section 112(c)(3) area source listing determinations without applying section 112(c)(9) delisting criteria – a result they contend would be "absurd." Environmental Br. at 18. Petitioners are mistaken. Section 112(c)(3) is distinguishable from section 112(n)(1)(A), and the "absurd results" Petitioners contemplate do not actually exist. Congress expressly applied section 112(c)(9) delisting criteria to area sources, but not to power plants. Moreover, Petitioners' section 112(c)(3) argument has been waived

because Petitioners failed to raise any concern regarding section 112(c)(3) during the period for public comment. See 42 U.S.C. § 7607(d)(7)(B) (providing that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review.").

This Court's decision in American Methyl Corp. v. EPA, 749 F.2d 826 (D.C. Cir. 1984), which is cited by Petitioners (see Environmental Br. at 18), is also distinguishable. In American Methyl, this Court held that EPA could not reconsider a waiver granted under CAA section 211(f), 42 U.S.C. § 7545(f), allowing the sale of a new fuel additive, but had to instead take action under CAA section 211(c), 42 U.S.C. § 7545(c), to prohibit the sale of the fuel additive. CAA sections 211(c) and section 211(f) are not analogous to CAA sections 112(c)(9) and 112(n)(1)(A). First, the Court in American Methyl relied heavily on legislative history that expressly set forth Congress' intent that having granted a waiver for a fuel additive under section 211(f), EPA must act to subsequently restrict the sale of such fuel additives through proceedings under section 211(c). See 749 F.2d at 834-35. There is no comparable legislative history here indicating Congress intended to preclude EPA from exercising its inherent authority to reconsider a section 112(n)(1)(A) determination. Second, CAA sections 211(c)

and 211(f) address precisely the same thing – fuel additives. By contrast, CAA section 112(n)(1)(A) alone specifically addresses power plants. Third, in section 211(f) Congress placed an express time limitation within which EPA must make a waiver determination, whereas here, Congress did not place any time limitation on making a section 112(n)(1)(A) determination.

Where EPA has determined, as it did here, that it erred in adding power plants to the section 112(c) list in the first place, it is even more apparent that EPA has the authority to correct that initial error and remove power plants from the list of source categories to be regulated without applying the section 112(c)(9) delisting criteria. Indeed, EPA has always interpreted the section 112(c)(9) criteria as inapplicable where the original listing of a source category was inconsistent with statutory listing criteria. See 69 Fed. Reg. 4652, 4689 (Jan. 30, 2004) (citing examples where EPA removed a source category from the section 112(c) list without following the criteria in section 112(c)(9) due to an error at the time of listing). For example, in 1992, EPA listed asphalt concrete manufacturers as a major source category under section 112(c)(1), and then in 2002, delisted that source category without following the criteria in section 112(c)(9) because it determined that the initial criteria for listing had not been met. Id. See 67 Fed.

Reg. 6521, 6522 (Feb. 12, 2002).[5]

Furthermore, the merits of EPA's initial finding have never been subject to judicial review.[6] If EPA cannot correct its own mistake and remove power plants from the section 112(c) list based on its revised section 112(n)(1)(A) finding, this would lead to an anomalous result: that power plants challenging EPA's initial December 2000 determination (when such determination became ripe for review) could obtain relief from this Court – namely, vacatur of the initial section 112(n)(1)(A) determination upon a finding of error – that they could not obtain

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[5] Contrary to Petitioners' suggestion (see Environmental Br. at 16), EPA did not adopt any different interpretation of the Act in a 1991 Federal Register notice. The 1991 notice is nothing more than a notice of availability of a preliminary draft list of source categories to be regulated under section 112, and a request for information and comment on issues and proposed positions. The notice does not represent or set forth any final EPA position on any issue. After consideration of comments, consistent with its action in the instant rule, EPA concluded in 1991 that it had no authority to regulate power plants if the requirements of section 112(n)(1)(A) had not been met. 57 Fed. Reg. 31,576, 31,584 (July 16, 1992). As to the statement in the 1991 notice concerning section 112(c)(9) and power plants, that statement was made in conjunction with a proposed regulatory option (a proposal to list power plants absent any section 112(n)(1)(A) findings) that EPA did not pursue and that was contrary to the plain language of section 112(n)(1)(A). EPA's final interpretation concerning the relationship of section 112(n)(1)(A) to section 112(c)(9) has been set forth in the Section 112(n) Rule after notice-and-comment rulemaking.

[6] See UARG v. EPA, No. 01-1074, 2001 WL 936363 (D.C. Cir. July 26, 2001) (finding Court lacked jurisdiction to review EPA's initial December 2000 Finding based on 42 U.S.C. § 7412(e)(4)).

from EPA, even where the error is conceded by the Agency. EPA should not have to await an adverse ruling from the Court to correct its own mistake. Cf. Natural Gas Clearinghouse v. FERC, 965 F.2d 1066, 1073 (D.C. Cir. 1992) ("[A]n agency, like a court, can undo what is wrongfully done by virtue of its [prior] order.") (citation and quotation marks omitted); Cleveland Nat'l Air Show, Inc. v. United States Dep't of Transp., 430 F.3d 757, 765 (6th Cir. 2005) ("A government agency, like a judge, may correct a mistake, and no principle of administrative law consigns the agency to repeating the mistake into perpetuity.").

In short, EPA has reasonably concluded that the specific "appropriate" and "necessary" criteria of section 112(n)(1)(A) alone govern whether power plants shall be regulated under section 112, and that the delisting criteria at section 112(c)(9) do not apply to EPA action under section 112(n)(1)(A).

II. EPA HAS ADOPTED REASONABLE INTERPRETATIONS OF THE TERMS USED IN CAA SECTION 112(n)(1)(A)

As discussed above, the condition precedent for regulating power plants under section 112 is a determination by EPA that such regulation is both "appropriate" and "necessary." The terms "appropriate" and "necessary" are not defined in section 112(n)(1)(A). In the absence of any statutory definition, EPA