ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 12-1100 (and consolidated cases)

WHITE STALLION ENERGY CENTER, LLC, et al.
Petitioners,
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Respondent.

On Petition for Review of EPA Final Action, 77 Fed. Reg. 9,304

BRIEF OF PUBLIC HEALTH, ENVIRONMENTAL, AND ENVIRONMENTAL JUSTICE GROUP RESPONDENT INTERVENORS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the parties, rulings, and related cases are fully set forth in the Joint Brief of State, Industry, and Labor Petitioners, pp. i-vii, subject to the modifications noted in the Brief for Respondent, pp. i-ii, except that the following additional entities and individuals have been granted leave to participate as amici curiae in support of respondent:

American Thoracic Society, American College of Preventive Medicine, American College of Occupational and Environmental Medicine, National Association for the Direction of Respiratory Care, and American College of Chest Physicians, William W. Buzbee, Jody Freeman, Oliver A. Houck, Richard J. Lazarus, Robert V. Percival, and Zygmunt J.B. Plater.

DATED: February 21, 2013

/s/ Darin T. Schroeder
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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1(a) and D.C. Circuit Rule 26.1(a), Respondent-intervenors American Academy of Pediatrics, American Lung Association, American Nurses Association, American Public Health Association, Chesapeake Bay Foundation, Citizens for Pennsylvania's Future, Clean Air Council, Conservation Law Foundation, Environment America, Environmental Defense Fund, Izaak Walton League of America, National Association for the Advancement of Colored People, Natural Resources Council of Maine, Natural Resources Defense Council, Ohio Environmental Council, Physicians for Social Responsibility, Sierra Club, and Waterkeeper Alliance state that none of them has any parent corporation and no publicly held corporation owns 10% or more stock in any of them.

Pursuant to D.C. Circuit Rule 26.1(b), the general nature and purpose of each of the respondent-intervenors, insofar as relevant to the litigation, is as follows:

The American Academy of Pediatrics is a national nonprofit corporation consisting of pediatricians and pediatric sub-specialists and researchers.

The American Lung Association ("ALA") is a national nonprofit organization dedicated to a world free of lung disease and to saving lives by preventing lung disease and promoting lung health. ALA's Board of Directors

includes pulmonologists and other health professionals.

The American Nurses Association is a national nonprofit organization dedicated to promoting the health, safety, and well-being of individuals and communities through high standards and excellence in the nursing profession. Its members care for patients on a daily basis, including infants, young children, and the elderly whose health and healthy development is threatened by the harmful health effects of mercury and other hazardous air pollution.

The American Public Health Association is a national nonprofit corporation consisting of public health researchers, health service providers, administrators, teachers, and other health workers and public health advocates.

The Chesapeake Bay Foundation, Inc., is a not-for-profit organization dedicated to restoring and protecting the Chesapeake Bay and its tributary rivers.

Citizens for Pennsylvania's Future ("PennFuture") is a statewide public interest membership organization established and existing under the laws of the Commonwealth of Pennsylvania that works to restore and protect the environment and safeguard public health.

The Clean Air Council is a not-for-profit organization focused on protection of public health and the environment.

Conservation Law Foundation is a regional, nonprofit, nonpartisan, member-supported environmental advocacy organization that works in four program

areas—Clean Energy & Climate Change, Clean Water & Healthy Forests, Healthy Oceans & Healthy Communities, and Environmental Justice—to protect people, natural resources, and communities in the six-state New England region.

Environment America ("EA") is a federation of state-based, member-funded environmental advocacy organizations with a mission to protect America's air, water, and open spaces. EA represents the interests of its state organizations and their members by bringing actions to enforce the federal environmental laws.

The Environmental Defense Fund is a nonprofit membership organization dedicated to addressing the most pressing public health and environmental problems on behalf of more than 350,000 members in all fifty states.

The Izaak Walton League of America, a corporation organized and existing under the laws of the State of Illinois, is a not-for-profit, membership organization dedicated to protecting our nation's soil, air, woods, waters, and wildlife, to ensure a high quality of life for all people now and in the future.

The National Association for the Advancement of Colored People ("NAACP") is a national nonprofit corporation with a mission to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination.

The Natural Resources Council of Maine is a nonprofit membership organization dedicated to preserving the quality of the air, water, forests, and other

natural resources of the state of Maine, for the benefit of present and future generations.

The Natural Resources Defense Council ("NRDC") is a nonprofit membership organization of approximately 350,000 members nationwide focused on protection of public health and the environment.

The Ohio Environmental Council is a nonprofit corporation that works to inform, unite, and empower Ohio citizens to protect the environment and conserve Ohio's natural resources.

Physicians for Social Responsibility is a national nonprofit organization of medical and public health professionals and lay advocates dedicated to promoting peace, strengthening public health and child health, supporting environmental integrity, and articulating robust, non-nuclear national security policies.

The Sierra Club is a national nonprofit membership organization dedicated to the protection and enjoyment of the environment.

Waterkeeper Alliance is a national nonprofit organization which serves as an umbrella organization for other waterkeeper programs throughout North America and other countries. Waterkeeper Alliance focuses on citizen advocacy on the issues that affect our waterways.

DATED: February 21, 2013

/s/ Darin T. Schroeder
Darin T. Schroeder

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Amici	Combined Brief of *Amici Curiae* in Support of Respondent, Doc. #1417795
APA	Administrative Procedure Act
CAA or Act	Clean Air Act
EEI	Edison Electric Institute
EGU	Electric Utility Steam Generating Unit, as defined in 42 U.S.C. §7412(a)(8)
Env. Comments	Comments of Environmental and Public Health Groups on "National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units; Proposed Rule; 76 Fed. Reg. 24,976 (May 3, 2011), EPA-HQ-OAR-2009-0234-18487
EPA	United States Environmental Protection Agency
EPA Br.	Brief for Respondent, Doc. #1416613
FR	Federal Register
HAP	Hazardous Air Pollutant, as defined in 42 U.S.C. §7412(a)(6)
JA	Joint Appendix
Joint Br.	Joint Brief of State, Industry, and Labor Petitioners, Doc. #1401252
MATS Rule	Mercury and Air Toxics Standards, *National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units*, 77 Fed. Reg. 9,304 (Feb. 16, 2012)

NMA	National Mining Association
Petitioners	State, Industry, and Labor Petitioners
RTC	Responses to Public Comments on EPA's *National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units,* Vol. 1 (Dec. 2011), EPA-HQ-OAR-2009-0234-20126
States Br.	Brief of State and Local Intervenor Respondents, Doc. # ___
Mercury TSD	*Technical Support Document: National-Scale Mercury Risk Assessment Supporting the Appropriate and Necessary Finding for Coal- and Oil-Fire Electric Generating Units* (March. 2011), EPA-HQ-OAR-2009-0234-3057
UARG	Utility Air Regulatory Group

STATUTES AND REGULATIONS

All applicable statutes and regulations are found in the addendum to Respondent EPA's brief.

STATEMENT OF FACTS

A. FACTUAL BACKGROUND

Coal- and oil-fired electric generating units (EGUs) are the largest industrial source of hazardous air pollution, annually emitting over 386,000 tons of 84 separate toxics, including arsenic, cadmium, chromium, nickel, selenium, acid gases, and mercury. Even in small doses these pollutants cause serious, often irreversible risks of cancer, birth defects, neurodevelopmental problems in children, and chronic and acute health disorders to the respiratory and central nervous systems including nerve and organ damage.[1] They also cause serious harms to wildlife and ecosystems.[2]

The health damage caused by air toxics is borne disproportionately by communities of color and the poor.[3] Members of these disadvantaged groups are exposed to more hazardous air pollutants than other Americans because they are

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[1] 77 FR 9,304, 9,310 (Feb. 12, 2012); 76 FR 24,976, 25,000-05 (May 3, 2011) (citing the many peer-reviewed studies in EPA's record); Env. Comments at I-2 to I-15 (JA __); EPA Br. at 10; Amici at 13-20.

[2] For a full explication of these harms, *see* Env. Comments at I-18 to I-38 (JA __).

[3] Env. Comments at I-17.

more likely to live in close proximity to coal-fired power plants.[4] Their health suffers as a result.[5]

People of color are also disproportionately burdened by toxic air pollution because they are more likely than the general population, for cultural and economic reasons, to consume local fish and other wildlife as an important component of their diet.[6] Because mercury contamination of fish and wildlife is now pervasive, *see* States Br. 2-4; Env. Comments at I-8 to I-38, (JA __), these populations are especially at risk.

B. REGULATORY BACKGROUND

As EPA and its amici discuss in detail, Congress overhauled Section 112 in 1990 in response to years of inaction by EPA. The new program directed EPA to control hazardous emissions to the maximum degree achievable. *See* EPA Br. 5-9; Amici at 22-26. For EGUs, such regulation was deferred pending completion of a further study and findings; Congress directed 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).

EPA completed the Utility Study in 1998, EPA Br. 11, after an extensive public process that included Petitioners. 60 FR 35,393 (July 7, 1995) (JA __);

[4] 77 FR 9,445; Organizational Declaration of Jacqueline Patterson ¶¶ 4-5 (Addendum 1).
[5] 77 FR 9,445; Patterson Dec. ¶¶ 4-5.
[6] *See* 76 FR 25,089-90; Patterson Dec. ¶ 6.

UARG Comments, I-D-129 (July 31, 1995) (JA __); NMA Comments, I-D-131 (July 31, 1995) (JA __). In Spring 2000, EPA solicited information from the public and held a public meeting after announcing its intent to decide whether regulating EGUs under Section 112 was "appropriate and necessary," a decision the agency was required to make by December 15, 2000. 65 FR 10,783-84 (Feb. 29, 2000); 65 FR 18,992 (April 10, 2000); Minutes, Public Meeting: Utility Air Toxics Regulatory Determination (June 13, 2000), *available at* www.epa.gov/ttn/atw/combust/utiltox/pubmtgmin6.pdf (JA __). Petitioners submitted testimony urging EPA not to find EGU regulation appropriate and necessary. Minutes at 17-25; UARG Comments, II-K-3[D] at 67-85 (June 13, 2000) (JA __); EEI Comments, II-K-3[A] at 60-72 (June 13, 2000) (JA __). In December 2000, EPA concluded that EGU regulation "is appropriate and necessary" and listed coal- and oil-fired EGUs under Section 112. 65 FR 79,825, 79,830-31 (Dec. 20, 2000).

Following this Court's decision vacating EPA's flawed 2005 mercury rules, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), EPA proposed Section 112 regulations in 2011. 76 FR 24,976. The agency again solicited and received comments on whether EGU regulation is appropriate and necessary, from Petitioners and many others. In the final MATS Rule, EPA reaffirmed its 2000 finding and its decision to list EGUs. 77 FR 9,310-11.

SUMMARY OF ARGUMENT

Petitioners' various attacks on the EGU finding are meritless. EPA's decision that it is "appropriate and necessary" to list and regulate EGUs was based on an exhaustive record in which the 2000 finding and additional evidence EPA subsequently collected were fully exposed to public comment. EPA's decisions to consider the environmental effects of hazardous pollutants and not to consider compliance costs when making the threshold finding not only reflect permissible constructions, but indeed are the most reasonable interpretations of the Act. And EPA thoroughly and convincingly explained its departure from the analyses underlying its vacated 2005 rulemaking.

ARGUMENT

I. EPA'S FINDING THAT HAZARDOUS POLLUTANTS FROM EGUS SHOULD BE REGULATED IS LAWFUL.

A. EPA's EGU Finding is Procedurally Sound.

Petitioners' procedural attacks on EPA's EGU finding seek only to further delay pollution reductions that are already lamentably overdue. There was no shortage of process here: EPA engaged in 15 years of study, proposal, comment, and responses to comment before issuing the MATS Rule. *See supra* at 3. The statute requires nothing further.

Contrary to Petitioners' argument (Joint Br. 38), Section 307(d)(1)(C) requires notice-and-comment rulemaking only for "regulation[s]." 42 U.S.C.

§7607(d)(1)(C). Section 112(n) clearly distinguishes EPA's EGU finding from a "regulation:" "The Administrator shall *regulate* under this section if the Administrator *finds* such *regulation* is appropriate and necessary." 42 U.S.C. §7412(n)(1)(A) (emphasis added). Because the EGU finding is not a regulation, it is not subject to Section 307(d).

Further, Section 307(d)(1)(C)'s reference to regulation under Section 112(n) was evidently a scrivener's error. *See* EPA Br. 34 n.9. The reference to subsections 112(m) and (n) in Section 307(d)(1) was first introduced in House Bill 3030, at a time when those subsections addressed subjects other than EGUs. EGUs were addressed in Section 112(l), which went unmentioned in the 307(d)(1) amendments. H.R. Rep. No. 101-490 (1990), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990 at 3072, 3110-12 (1993) ("1990 Leg. Hist."). At conference, amendments to Section 112 were duly renumbered, but Section 307(d)(1) amendments were not. *Id.* at 1526, 1589. That failure is confirmed by Section 307(d)(1)(C)'s reference to non-existent Sections 112(g)(1)(D) and (F). Consequently, "the best reading of the Act," *U.S. Bank of Or. v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 461 n.10 (1993), is that Congress did not intend to apply Section 307(d)'s rulemaking requirements to actions under Section 112(n).

The structure of Section 112 further confirms the inapplicability of Section 307(d)(1) in this instance. "[S]ection 112(n)(1) governs how the Administrator decides whether to list EGUs," *New Jersey*, 517 F.3d at 582. Section 112(e)(4) makes clear that listing decisions are reviewable *only* as part of the regulations EPA ultimately promulgates. 42 U.S.C. §7412(e)(4). Taking comment on these threshold decisions at the regulation stage is consistent with the statutory structure, *see* EPA Br. 33-34, and comports with Circuit precedent predating both Sections 112 and 307(d) teaching that "[n]either the Clean Air Act nor the APA requires that an agency hold two separate rulemaking proceedings as to different parts of one rule." *Nat'l Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 780 n.2 (D.C. Cir. 1976).[7]

Regardless, EPA did seek and receive public input on its impending EGU finding in 2000. *See supra* at 3. It reaffirmed and provided additional opportunity

[7] Although petitioners do not assert that the APA applied, EPA's actions were sufficient to meet its requirements. *See* 65 FR 10,784 (stating EPA will "make a finding as to whether it is appropriate and necessary to control" hazardous emissions from EGUs); *Ethyl Corp. v. EPA,* 541 F.2d 1, 48 (D.C. Cir. 1976) (APA requires notice "sufficiently descriptive of the 'subjects and issues involved' so that interested parties may offer informed criticism and comments").

for public comment on the EGU finding in 2011. 76 FR 24,976. These comment opportunities were more than adequate.[8]

And even if these multiple comment opportunities were somehow procedurally flawed, petitioners have not identified any error "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." 42 U.S.C. §7607(d)(8); *see also* 5 U.S.C. §706(2)(A) ("prejudicial error" standard).

In the final rule, after considering all of petitioners' arguments, EPA reaffirmed its 2000 finding. 77 FR 9,362. Petitioners claim that the vast resources invested in this rulemaking should be squandered, and the process of controlling EGU air toxics should be delayed, so that EPA can pointlessly reaffirm a decision it has made twice already. The Clean Air Act neither requires nor authorizes such waste where petitioners have not demonstrated a "'substantial likelihood' that the rule would have been 'significantly changed' absent the alleged error." *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1148 (D.C. Cir. 2002)

[8] As EPA explains, *Thomas v. EPA*, 802 F.2d 1443 (cited in Pet. Br. 27-28), is irrelevant. *See* EPA Br. 35-36. *Thomas* addressed whether "private correspondence" could create a nondiscretionary duty to regulate that was enforceable by third parties against a later Administrator if issued in violation of notice-and-comment requirements. *Id.* at 1446. Thus *Thomas* did not involve extensive public process like that conducted here, or the distinct statutory framework described above. *See supra* at 2.

(quoting 42 U.S.C. §7607(d)(8)). *See also NRDC v. EPA*, 822 F.2d 104, 121 (D.C. Cir. 1987) (applying APA prejudicial error standard).

B. The EGU Finding Rests Upon a Reasonable Interpretation of the Act.

i. EPA Reasonably Excluded Costs from the EGU Finding.

EPA reasonably concluded that Section 112(n) does not mandate consideration of costs. The Supreme Court has "refused to find implicit in ambiguous sections of the CAA an authorization to consider costs" because such authorization is often "expressly granted" elsewhere in the Act. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 467 (2001). In light of Sections 112(c) and (d), which specify exactly when and how cost is to be taken into account in setting standards under Section 112, EPA's interpretation is at least reasonable. *See* 77 FR 9,327; EPA Br. 53-54.[9]

The mechanics of Section 112 provide further support for EPA's interpretation. The cost of regulating hazardous pollutants depends upon industry-specific control technologies and methods identified when EPA sets emission standards under Section 112(d), and not yet identified at the prior listing stage. *See*

[9] Petitioners' reliance on *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000), is misplaced, as that court merely deferred to EPA's discretion to consider costs under Section 110(a)(2)(d)(i). Here, EPA's interpretation of Section 112 as not mandating consideration of costs is likewise entitled to deference.

Mossville Envtl. Action Now v. EPA, 370 F.3d 1232, 1235-36 (D.C. Cir. 2004) (describing the standard-setting process). And even in the standard-setting process, the statute allows EPA to take costs into consideration only with respect to potential "beyond the floor" standards. 42 U.S.C. §7412(d)(2); *Nat'l Lime Ass'n v. EPA,* 233 F.3d 625, 629 (D.C. Cir. 2000) (noting that in contrast to the Section 112(d)(2) inquiry, the "minimum stringency standards" under Section 112(d)(3) "apply without regard to … costs"). Folding consideration of not-yet-identified costs into the threshold Section 112(n) EGU finding would be discordant with this statutory structure.

ii. EPA Reasonably Considered Environmental Harms in Making the EGU Finding.

While EPA's EGU finding can be upheld on health grounds alone, the Agency's interpretation of the statute as permitting consideration of environmental harms was equally reasonable. Closely-related provisions demonstrate that Congress was concerned with the environmental consequences of hazardous pollutants. *See* EPA Br. 47 (citing Section 112(b)(2)). Congress specifically recognized the harm posed by hazardous pollutants to fish, wildlife and ecosystems during its deliberations over the 1990 amendments. *See, e.g.,* Env. Comments at I-18-38 (JA __-__); 1990 Leg. Hist. at 8471 (air toxics "cause widespread environmental degradation"); 1990 Leg. Hist. at 3343-44 (describing impacts on fish and other Great Lakes wildlife). Precluding agency consideration of

environmental effects would be impractical given that health effects and environmental effects are often closely interrelated. *See* 76 FR 25,000; Amici at 19.

II. EPA BASED ITS EGU FINDING ON EXTENSIVE AND COMPELLING EVIDENCE.

A. The 2000 Finding Was Fully Justified by Available Data.

Contrary to Petitioners' assertions (Joint Br. 22, 23, 27), EPA's 2000 EGU finding was based on voluminous evidence drawn from multiple Congressionally-mandated and peer-reviewed studies (*see supra* at 2-3*;* EPA Br. at 7-8), two EPA information collection requests seeking fuel and hazardous emissions data from EGUs nationwide, and public comments received in writing and at a public meeting. *See supra* at 3; 65 FR 79,826-27; 76 FR 24,993.

Petitioners do not even acknowledge, let alone rebut, the compelling evidence supporting the EGU finding. Assessing these harms in 2000, EPA found that nearly 4 million women, or 7% of all U.S. women of childbearing age, were exposed to mercury at levels harmful for fetal brain development. 65 FR 79,827. Of these, about 580,000 women were exposed to mercury at three to four times the health-protective level. 76 FR 24,995. Exposures at this level can result in debilitating neurodevelopmental problems for children, including seriously delayed development, 65 FR 79,829, precisely the type of harms Congress sought to address under Section 112. *See supra* at 2 n.1*,* EPA Br. 21-24.

EPA found in 2000 that mercury in fish is mainly attributable to mercury air emissions. EPA also found that approximately 60% of mercury deposition resulted from domestic sources, with 18% attributable solely to U.S. EGUs. 65 FR 79,827; 76 FR 24,995.[10]

Given the persistence of mercury in the environment and the grave threats it poses to public health, EPA was not obligated to delay its 2000 EGU finding pending further study. *Sierra Club v. EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999).[11] Nor was EPA required, before it could act, to quantify EGU contributions to methylmercury in fish. *E.g.*, *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 535 (D.C. Cir. 2009) (reasonable to ground health-based findings on qualitative information).

B. EPA's 2011 Analyses Reaffirm the 2000 Finding.

Although its 2000 EGU finding was fully justified, EPA prudently completed additional assessments of EGU air toxics after the significant delays resulting from EPA's flawed 2005 actions. *See* 76 FR 24,978. These included a peer-reviewed mercury risk assessment finding that EGU emissions in 2016 would

[10] In the 2011 proposal, EPA presented evidence that EGUs are responsible for as much as 30% of total mercury deposition in highly-exposed waterways, with an average contribution of 5%. 76 FR 25,009.

[11] Petitioners err in asserting (Joint Br. 13) that the 2000 finding did not describe alternative control strategies. *See* 65 FR 79,828-29 (discussing evaluation of technologies presented in Chapter 13 of Utility Study).

cause or significantly contribute to human exposures exceeding health-protective levels in 29% of the 3,100 watersheds modeled, 77 FR 9,339; a peer-reviewed inhalation study finding that chromium and nickel emissions from 6 of 16 modeled facilities would pose unacceptable lifetime cancer risks, *id.* at 9,319; an assessment of EGU-attributable mercury deposition confirming significantly higher deposition in areas nearest high-emitting EGUs, 76 FR 25,013; and an updated technology assessment showing improved availability of emission controls for hazardous pollutants, *id*. at 25,013-14.

The Act does not require an appropriate and necessary finding for each hazardous pollutant. EPA Br. 61-62. However, EPA carefully considered the health risks associated with acid gases. EPA described the potential for *cumulative* risks to public health from EGU acid gas emissions in conjunction with other toxic and criteria pollutant emissions from EGUs and other sources, but explained that its analysis did not take into account such synergistic effects or address acceptable levels of acute acid gas exposures. *See* 76 FR 25,016, 25,050. Recognizing that EGUs account for an overwhelming fraction of the large volume of toxic acid gases emitted in the U.S., *id.* at 25,005, EPA stated its concern "about the potential for acid gas emissions to add to already high atmospheric levels of other chronic respiratory toxicants." 76 FR 25,016. *See also* 77 FR 9,363; Amici at 14-16.

EPA's analyses underscored the importance of reducing hazardous pollutants from EGUs, and confirmed the soundness of EPA's 2000 EGU finding. Moreover, these assessments were based on projected EGU emissions in 2016, after implementation of the Cross State Air Pollution Rule ("CSAPR") and other Clean Air Act requirements. 77 FR 9,363. The subsequent vacatur of CSAPR, *see EME Homer City v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), suggests that EPA overestimated hazardous pollution reductions expected from other Clean Air Act requirements.

EPA fully reexamined the risk assessments regarding mercury and non-mercury pollutants, considered the impacts of all federally-enforceable regulations, and reviewed alternative control strategies. EPA reaffirmed the only conclusion the evidence could reasonably support – that hazardous pollutants from EGUs pose significant hazards to public health and the environment, and that regulation under Section 112(d) is the only means to ensure permanent reductions in those risks.

III. EPA PROPERLY JUSTIFIED ITS REJECTION OF THE INTERPRETATIONS UNDERLYING THE UNLAWFUL 2005 RULE.

There is no merit to Petitioners' contention (Joint Br. 32-33) that EPA did not adequately explain its departure from statutory interpretations underlying the 2005 "delisting rule." While even *well-founded* agency interpretations are not "carved in stone," *Chevron U.S.A., Inc. v. NRDC*, 467 U.S 837, 863 (1984); *see*

Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Svcs., 545 U.S. 967, 981 (2005), the prior interpretations that Petitioners invoke supported rules that were vacated in their entirety, *New Jersey*, 517 F.3d at 583-84, and were part of a policy initiative marked by palpable discomfort with Section 112(n)(1) as enacted.

For two years, the administration actively promoted legislation to delist EGUs from Section 112(d) standards. *See* S.485, 107th Cong. §3(r)(5) (2003); S.131, 109th Cong. §3(a)(5) (2005). Only after legislative efforts failed on March 9, 2005, did EPA sign the delisting and Clean Air Mercury rules. 70 FR 15,994 (March 29, 2005) (signed March 15, 2005); *see also* EPA Office of Inspector General, *Additional Analyses of Mercury Emissions Needed Before EPA Finalizes Rules for Coal-Fired Electric Utilities* 16 (Feb. 3, 2005) (finding that senior agency management instructed staff to craft rule to "achieve same results as" a separate rule controlling other EGU air pollution, "instead of basing the [Section 112(d)] standard on an unbiased determination of what the top performing [EGUs] were achieving in practice").

In any event, EPA more than satisfied any obligation to explain its change in views, *see*, *e.g.*, 76 FR 24,989 (observing that Section 112(n)'s text does not limit regulation to "only those HAP[s] for which a hazard finding has been made"; that the statute requires the Agency to regulate EGUs "under section 112"; and that, as *National Lime* exemplifies, "regulation under section 112 for major sources

requires MACT standards for *all HAP* emitted from the source category"); 77 FR 9,323; 76 FR 24,986-93; RTC at 18-33 (JA __). *See also* EPA Br. 40 (citing technical flaws in 2005 analysis); Mercury TSD at 48-50 (same) (JA __).

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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CERTIFICATE OF COUNSEL FOR COMPLIANCE WITH COURT ORDER AND WORD LIMITS

In accordance with Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rule 32(a), I hereby certify that the foregoing Brief of Public Health, Environmental and Environmental Justice Group Respondent-Intervenors contains 3120 words as counted by the Microsoft Office Word 2010 word processing system. Pursuant to Circuit Rule 28(d)(4), I certify that the Public Health, Environmental and Environmental Justice Group Intervenors, the State and Local Intervenors, and the Industry Intervenors are filing separate briefs in accordance with this Court's August 24, 2012 Order. I further certify that the combined words of the Public Health, Environmental and Environmental Justice Group Intervenors, the State and Local Intervenors, and the Industry Intervenors do not exceed 9,375, as mandated by this Court's August 24, 2012 Order.

DATED: February 21, 2013

/s/ Darin T. Schroeder
Darin T. Schroeder

CERTIFICATE OF SERVICE

I, Darin Schroeder, a member of the Bar of this Court, hereby certify that on February 21, 2013, I electronically filed the foregoing "Brief of Environmental and Public Health Intervenors" with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate ECF system.

DATED: February 21, 2013

/s/ Darin T. Schroeder
Darin T. Schroeder

Addendum 1

DECLARATION OF JACQUELINE PATTERSON

I, Jacqueline Patterson, declare as follows:

1. I am the Director of the Environmental and Climate Justice Program of the National Association for the Advancement of Colored People (NAACP). I have held this position since October 2009.

2. NAACP is a national nonprofit, civil rights organization with over 300,000 members and 1200 local branches nationwide. Founded in 1909, the NAACP is the nation's oldest and largest civil rights organization, with a mission to ensure the political, educational, social, and economic equality of all persons and to eliminate race-based discrimination.

3. NAACP considers mercury and air toxics pollution from power plants a civil rights issue that goes to the core of its organizational mission. NAACP has conducted extensive research on the harms from power plants borne by communities of color. This research culminated in the Coal Blooded report (available at http://www.naacp.org/pages/coal-blooded1), which concluded that polluting power plants are concentrated in communities of color. As a result of this pattern, communities of color are disproportionately burdened by a range of negative environmental, health, and economic impacts from that pollution. In addition to well-documented health problems, residents of these communities suffer from lost work days, depressed property values, and lower investment in local small businesses. Children in these communities are at greater risk of

cognitive impairment from lead exposure that would truncate their educational and life opportunities.

4. The Coal Blooded report shows that the average per capita income of the 8.1 million Americans who live within three miles of a coal-fired power plant ($18,594) is significantly lower than the national average ($21,587). Moreover, of these 8.1 million people living within three miles of a coal-fired plant, 36.3% are people of color, a percentage significantly higher than the proportion of people of color in the U.S. population as a whole—29.2%. I am aware, based on the American Lung Association's report *Emissions of Hazardous Air Pollutants from Coal-fired Power Plants*, that ground-level impacts of non-mercury metal and other persistent hazardous air pollutants released from coal-fired power plants are greatest near the source, especially within a mile of the facility. Associated public health costs are two to five times greater for communities near coal-fired power plants than those for populations further away. I am aware that the ALA's report also indicates that socially disadvantaged populations are at greater risk of adverse health effects from air pollution, with one study finding that nearly 50% of the risks for premature mortality of power plant-related exposures were borne by the 25% of the population lacking a high school education. Socially disadvantaged populations also are more likely to lack access to health care and to live in conditions associated with asthma exacerbations.

5. I am also aware of other reports that show that the burden of air quality impacts resulting from coal-fired power plants is borne disproportionately by communities of color, in terms of both exposure and effect. A recent study conducted by scientists from the Yale School of Forestry and Environmental Studies for the National Institute of Environmental Health Sciences, *Environmental Inequality in Exposures to Airborne Particulate Matter Components in the United States*, concluded that non-Hispanic blacks have higher exposures than whites to 13 of the 14 components of particulate matter studied, including hazardous air pollutants like chlorine and nickel, and that Hispanics have the highest exposures of all groups. I am also aware of a recent report by the American Lung Association, *Too Many Cases, Too Many Deaths: Lung Cancer in African Americans*, that shows that lung cancer disproportionately impacts African Americans. African American men in particular face increased lung cancer risks (37 percent higher than the risks for white men) despite the fact that their overall exposure to cigarette smoke, the primary risk factor for lung cancer, is lower than for white men. One likely contributor to this racial disparity in lung cancer rates, according to the same study, is living with poor environmental conditions, including high levels of toxic air pollution. Overall, African American neighborhoods face exposures to toxic air pollution 1.5 times higher than other communities on average. In fact, community pollution levels increase as the

income level of residents declines, and 68 percent of African Americans live within 30 miles of a coal-fired power plant, compared to only 56 percent of whites. The increased risk of cancer imposed on communities of color by power plants underscores the importance to our organization and its members of defending the Mercury and Air Toxics Rule.

6. I am also aware that studies indicate that racial minorities and the poor are disproportionately exposed to mercury pollution through fish consumption. One such study by the American Lung Association entitled *Emissions of Hazardous Air Pollutants from Coal-fired Power Plants* shows that the consumption of fish and aquatic organisms is the primary pathway of exposure to mercury, and that the amount of mercury in people correlates with intake. A 2005 study of Baltimore Harbor anglers indicates that African Americans are at greater risk of eating contaminated fish than Caucasians for reasons of cultural identity and because of greater need to supplement their diets. As that study shows, African Americans more often consume their catch, more often provide their catch to their families, place a higher importance on the reduction of food expenses as a motivation to fish, and are less likely to prepare their fish using risk-reducing techniques than anglers of other races. I am also aware that several studies correlate local mercury emissions with mercury levels in freshwater fish.

7. NAACP members live, work and recreate in places where they are exposed to emissions from power plants. They are directly and adversely affected by emissions of mercury and air toxics from those plants.

8. NAACP's Environmental and Climate Justice Program and NAACP branches have engaged in extensive education and advocacy to combat these injustices, including: teach-in meetings in Colorado, Florida, Illinois, Indiana, Michigan, New Jersey, Ohio, and Wisconsin on the impact of coal pollution on communities and the planet; town hall meetings where oral testimonies were presented to educate community members on the threat of coal fired power plants and actions that can be taken to address the hazard; press conferences in Michigan, Illinois, Florida, and Ohio, resulting in over 200 press hits in print, radio, internet and TV media; and individualized op-eds on the protection and defense of safeguards for clean air, including specific reference to the Mercury and Air Toxics Rule.

9. NAACP and its members participated directly in the public process for the Mercury and Air Toxics Rule, including organizing testimony presented at hearings in Chicago and encouraging members and the public to comment in writing, resulting in submission of over 1000 comments. NAACP has consistently urged the U.S. Environmental Protection Agency (EPA) to promulgate a rule that is highly protective of health and the environment.

10. According to EPA, the Mercury and Air Toxics Rule will, when fully implemented, reduce the power sector's annual mercury emissions by 75 percent, its annual hydrogen chloride emissions by 88 percent, and its fine particulate emissions by 19 percent. In addition, EPA projects that the MATS Rule will reduce sulfur dioxide—an air pollutant which causes respiratory and other harm—by 41 percent. These reductions will have especially pronounced benefits for communities of color.

11. If industry and state petitioners in these consolidated lawsuits are successful, the Mercury and Air Toxics Rule could be struck down, weakened, or delayed, prolonging and increasing the harm to NAACP's members and the disproportionate burdens borne by communities of color.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on 2/21/2013

/s/
Jacqueline Patterson