No. 15A886

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MICHIGAN, ET AL., APPLICANTS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON APPLICATION FOR IMMEDIATE STAY OF FINAL AGENCY ACTION

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

The Solicitor General, on behalf of the federal respondent, respectfully files this memorandum in opposition to the application for a stay.

INTRODUCTION

Last Term, this Court held that the Environmental Protection Agency (EPA) had improperly failed to consider compliance costs when evaluating whether it was "appropriate and necessary" to regulate hazardous air pollutant emissions from power plants under the Mercury and Air Toxics Rule (Rule), 77 Fed. Reg. 9310 (Feb. 16, 2012). Michigan v. EPA, 135 S. Ct. 2699, 2704 (2015) (quoting 42 U.S.C. 7412(n)(1)(A)). That Rule establishes

national standards that apply directly to affected power plants, and it obtains significant public health and environmental benefits and thus advances the core purposes of the Clean Air Act (CAA). In accordance with this Court's decision, EPA initiated a new rulemaking in which the agency will take account of costs in reevaluating whether such regulation is "appropriate and necessary." 42 U.S.C. 7412(n)(1)(A). EPA expects to issue a final revised regulatory determination by April 15, 2016. In December 2015, a panel of the D.C. Circuit unanimously declined to vacate the Rule pending EPA's final "appropriate and necessary" determination.

Last week -- more than eight months after this Court's ruling on the merits, and more than two months after the D.C. Circuit declined to vacate the Rule -- the applicant States asked this Court to stay the Rule for the approximately six weeks remaining before EPA expects to issue its revised determination. They argue that the D.C. Circuit violated the judicial review provision of the Administrative Procedure Act (APA), 5 U.S.C. 706(2), which they interpret to forbid the established practice of remand without vacatur. They assert that a stay is necessary to protect their ability to seek this Court's review of the D.C. Circuit's refusal to vacate the Rule, and to avoid compliance costs that will be borne by regulated power plants.

Those arguments lack merit, and applicants are not entitled to relief. For many reasons, this Court is unlikely to grant applicants' yet-to-be-filed certiorari petition. Those reasons include (1) the fact that this case is governed by the CAA, not the APA; (2) the absence of any conflict among the circuits with respect to the question presented; and (3) the fact that the Court's ultimate resolution of the vacatur issue would have no practical impact on EPA's regulatory program.

The D.C. Circuit reasonably exercised its discretion not to vacate the Rule under its settled circuit precedent approving remand without vacatur in appropriate circumstances. That circuit precedent is consistent with this Court's teachings and with the established practice of other courts of appeals. Applicants do not assert any legally cognizable irreparable harm to their own interests, and their proposed stay would undermine the Rule's significant contributions to protecting public health and the environment. Applicants' request should be denied.

STATEMENT

1. The core purpose of the CAA is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b)(1). The CAA achieves this objective by, inter alia, requiring EPA to regulate emissions of "hazardous air pollutants" from various categories of stationary

sources. See 42 U.S.C. 7412. The CAA generally requires EPA to publish and revise a list of stationary source categories that emit hazardous air pollutants, and to regulate such emissions from those categories. 42 U.S.C. 7412(c) and (d). The CAA contains a special provision addressing the circumstances under which EPA must list fossil-fuel-fired power plants for regulation under the program. 42 U.S.C. 7412(n)(1)(A). That provision states that EPA "shall regulate [power plants] under [Section 7412], if [EPA] finds such regulation is appropriate and necessary." Ibid.

In 2000, EPA found that it was "appropriate and necessary" to regulate power plants, and it accordingly listed such plants under 42 U.S.C. 7412. 65 Fed. Reg. 79,830-79,831 (Dec. 20, 2000). In 2012, EPA promulgated the Rule, which (1) reaffirmed EPA's prior "appropriate and necessary" finding, and (2) issued substantive standards restricting the emission of hazardous air pollutants -- including mercury and other pollutants toxic to human health and the environment -- from power plants. See 77 Fed. Reg. at 9310-9311, 9367-9369. The Rule applied the standards directly to power plants, and it did not impose any obligations on States. When issuing the Rule, EPA expressed its view that the costs of regulating power plants "should not be considered" when making the "appropriate and necessary" finding under Section 7412(n)(1)(A). Id. at 9326.

2. Applicants (along with various industry groups and regulated entities) petitioned for review of the Rule in the D.C. Circuit. In 2014, that court upheld the Rule in full. White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014) (per curiam). This Court granted certiorari to consider "whether it was reasonable for EPA to refuse to consider cost" when making the Section 7412(n)(1)(A) "appropriate and necessary" finding. Michigan, 135 S. Ct. at 2704. The Court ultimately held that EPA "must consider cost -- including, most importantly, cost of compliance -- before deciding whether regulation [of power plants] is appropriate and necessary." Id. at 2711. The Court made clear, however, that EPA retained discretion as to the precise way in which it would take account of costs when making the finding. Ibid.

In their merits briefs in this Court, applicants had requested that the Court vacate the Rule.[1] The Court did not grant that relief. Michigan, 135 S. Ct. at 2712. Instead, the Court remanded the case to the D.C. Circuit "for further proceedings consistent with this opinion." Ibid. Applicants did not seek rehearing or any other post-decision relief from this Court.

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[1] See Michigan Pet. Br. 5, 19, 48; Michigan Reply Br. 22; see also Nat'l Mining Ass'n Pet. Br. 45; Nat'l Mining Ass'n Reply Br. 15.

3. In response to the Court's decision, EPA commenced a new rulemaking to reevaluate its Section 7412(n)(1)(A) "appropriate and necessary" finding. On December 1, 2015, EPA published a proposal that considers costs and proposes to find that regulation of hazardous emissions from power plants remains "appropriate and necessary." 80 Fed. Reg. 75,027, 75,029-75,041. EPA has received public comments on that proposal, and it expects to take final action on it by April 15, 2016. See App., infra, 16a.

In the meantime, the parties had returned to the D.C. Circuit in accordance with this Court's remand order. That court solicited briefing and heard oral argument concerning the appropriate form of relief in light of this Court's decision and the pending EPA administrative proceedings. On December 15, 2015, the same D.C. Circuit panel that had originally heard the case issued a three-paragraph, per curiam order that unanimously remanded the proceeding to EPA, without vacatur of the Rule. App., infra, 2a. As support for that disposition, the court cited its prior decision in Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-151 (D.C. Cir. 1993). Ibid. The court also noted EPA's representation "that [EPA] is on track to issue a final finding under 42 U.S.C. § 7412(n)(1)(A) by April 15, 2016." Ibid.

Neither applicants nor any other party sought rehearing or rehearing en banc in the D.C. Circuit. No party has yet filed a petition for certiorari seeking review of the D.C. Circuit's remand order.

ARGUMENT

Applicants have asked (Appl. 15) this Court to issue a stay or injunction that would suspend the legal effect of the Rule until either (1) EPA determines that regulating power plants is "appropriate and necessary" under Section 7412(n)(1)(A); or (2) this Court resolves applicants' forthcoming petition for certiorari challenging the D.C. Circuit's refusal to vacate the Rule. The Court should deny that request.

To obtain a stay pending the filing and disposition of a petition for certiorari, a party must show (1) a "reasonable probability" that the Court will grant certiorari; (2) a "fair prospect that a majority of the Court will vote to reverse the judgment below"; and (3) a "likelihood that irreparable harm will result from the denial of a stay." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). When conducting this analysis in close cases, the Court will "balance the equities and weigh the relative harms to the applicant and to the respondent." Ibid. To obtain an injunction pending appeal, a party must show that (1) "the legal rights at issue are indisputably clear"; and (2) an injunction is "necessary or appropri-

ate in aid of [this Court's] jurisdictio[n] [in accordance with 28 U.S.C. 1651(a)]." Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301, 1303 (1993) (Rehnquist, J., in chambers) (citation and internal quotation marks omitted).

For at least four overarching reasons, applicants cannot satisfy either of those standards. First, this Court is unlikely to grant certiorari to review the D.C. Circuit's unpublished order declining to vacate the Rule pending EPA's further action. Second, because the D.C. Circuit reasonably declined to vacate the Rule in accordance with settled administrative-law principles, it is unlikely that five Justices will vote to overturn that decision. Third, applicants cannot show that they will suffer irreparable harm in the six-week period between now and April 15, 2016, when EPA expects to finalize its "appropriate and necessary" determination. Finally, the requested stay would harm the public interest by undermining reliance interests and the public health and environmental benefits associated with the Rule. The application lacks merit and should be denied.

1. Applicants indicate (Appl. 1) that they plan to file a petition for certiorari challenging the D.C. Circuit's decision not to vacate the Rule pending EPA's forthcoming "appropriate and necessary" determination. Although applicants do not fully explain what the basis of that petition will be, they apparently plan to argue that the D.C. Circuit's decision violates the

remedial provision of the APA, 5 U.S.C. 706(2), as well as the Court's prior decision in this case. See Appl. 12-13. This Court is unlikely to grant any such petition.

a. Applicants' basic argument is that the D.C. Circuit's refusal to vacate the Rule conflicts with the APA's directive that a reviewing court "shall * * * set aside" agency action that is not in accordance with law. 5 U.S.C. 706(2). Emphasizing Congress's use of the term "shall," applicants construe Section 706(2) as categorically requiring that courts must always vacate agency action found to be unlawful. They assert that the D.C. Circuit violated Section 706(2) by declining to vacate the Rule. See generally Appl. 5, 8, 13.

This Court is unlikely to grant certiorari to review those arguments because Section 706(2) does not apply to this case. Rather, this case is governed by the CAA's own judicial-review provision, 42 U.S.C. 7607(d)(9). Unlike Section 706(2), that provision does not state that unlawful agency action "shall" be set aside, but provides instead that "the court may reverse" such action. Ibid. (emphasis added). That language indicates that courts have discretion to fashion an appropriate remedy in response to a successful challenge to agency action under the CAA. See, e.g., Martin v. Franklin Capital Corp., 546 U.S. 132, 136 (2005) ("[T]he word 'may' clearly connotes discretion.") (citation omitted); see also Natural Res. Def. Council v. EPA,

489 F.3d 1250, 1263 (D.C. Cir. 2007) (Randolph, J., concurring) (noting difference between APA and CAA standards and concluding that courts have "remedial discretion" under Section 7607(d)(9)).[2]

For other reasons as well, this Court is unlikely to grant applicants' forthcoming petition for certiorari. Most importantly, applicants do not and cannot allege any split of authority among the courts of appeals on the question whether remand without vacatur is permitted under either the APA or CAA review provisions. The D.C. Circuit has long recognized that this remedy is appropriate at least in some circumstances, and other circuits have reached the same conclusion.[3] No court of

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[2] Section 7607(d)(9)'s standard of review unambiguously applies to applicants' challenge to the Rule. By its terms, that provision covers "any action of the [EPA] Administrator to which [42 U.S.C. 7607(d)] applies," 42 U.S.C. 7607(d)(9), a category that includes "the promulgation or revision of any * * * emission standard or limitation under [42 U.S.C. 7412(d)]." Ibid. EPA promulgated the Rule and reaffirmed its "appropriate and necessary" determination through a Section 7412(d) rulemaking. Section 7607(d) also indicates that Section 7607(d)(9)'s standard applies to "any regulation under [42 U.S.C. 7412(n)]," 42 U.S.C. 7607(d)(1)(C), but EPA has taken the position, based on the statute's history, that the reference to Section 7412(n) is a scrivener's error. EPA C.A. Br. 34-35 n.9 (Apr. 8, 2013).

[3] See, e.g., Natural Res. Def. Council v. United States EPA, 808 F.3d 556, 584 (2d Cir. 2015); Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1290 (11th Cir. 2015); National Org. of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs, 260 F.3d 1365, 1380 (Fed. Cir. 2001); Central Me. Power Co. v. Federal Energy Regulatory Comm'n, 252 F.3d 34, 48 (1st Cir. 2001); Central & S.W. Servs., Inc. v. United States EPA, 220 F.3d 683, 692 (5th Cir. 2000),

appeals has held that vacatur is required in every case where agency action is held to be unlawful. And although some judges on the D.C. Circuit have expressed disagreement with circuit precedent permitting remand without vacatur in certain circumstances, see, e.g., Milk Train, Inc. v. Veneman, 310 F.3d 747, 755-756 (2002) (Sentelle, J., dissenting); Checkosky v. SEC, 23 F.3d 452, 490-493 (1994) (per curiam) (Randolph, J.), "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).[4]

Even apart from the fact that Section 706(2) does not apply here, this case would be an especially poor vehicle in which to address the propriety of remand without vacatur, since the Court's ultimate resolution of that issue would have no practical impact on whether hazardous air pollutants from power plants are regulated under Section 7412. EPA has represented, and

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cert. denied, 532 U.S. 1065 (2001); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1399, 1401, 1405-1406 (9th Cir. 1995); Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150 (D.C. Cir. 1993).

[4] Applicants cite (Appl. 8) two decisions in which this Court has used mandatory language to paraphrase the APA's judicial-review provision. In neither of those decisions, however, did the Court consider -- much less conclusively decide -- the question whether Section 706(2) precludes remand without vacatur when an agency rule is found to be unlawful. Nor did either decision discuss Section 7607(d)(9), the CAA judicial-review provision actually at issue here.

applicants do not dispute (see Appl. 13-14), that the agency is on track to take final action on its proposed "appropriate and necessary" determination by April 15, 2016. That is well before this Court would likely rule on applicants' forthcoming certiorari petition, and many months before it could reasonably be expected to decide the case on the merits if certiorari were granted.

In its final action, EPA will either confirm that regulation of power plants is "appropriate and necessary" or determine that it is not. That decision will be subject to judicial review at the behest of an aggrieved party. The determination whether remand without vacatur was appropriate, however, bears only on whether the Rule should remain in effect during the brief interim period until EPA decides on remand whether regulation of power plants under the CAA's hazardous-emissions program is "appropriate and necessary." Once EPA issues that finding, the D.C. Circuit's decision to remand without vacatur will have no continuing practical effect.[5]

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[5] Once EPA issues its forthcoming "appropriate and necessary" determination, any aggrieved party that challenges that determination in court can also seek a stay of that new rule pending the disposition of its petition for review. Any such request would be evaluated under the traditional stay criteria. For purposes of the "likelihood of success" prong of the stay inquiry, however, the relevant question would be whether the challenge to the new rule was likely to succeed, i.e., whether the reviewing court was likely to hold that EPA's analysis of cost was arbitrary, capricious, or otherwise contrary to law. Any doubt as to the propriety of the D.C. Circuit's earlier

In the government's view, the question whether remand without vacatur was appropriate will become moot when EPA issues a revised "appropriate and necessary" determination. Applicants assert that the case will remain live under the "capable of repetition yet evading review" exception to the mootness doctrine. Appl. 14. That exception does not apply here because there is no "reasonable expectation that the same complaining party will be subject to the same action again." Davis v. Federal Election Comm'n, 554 U.S. 724, 735 (2008) (citation and internal quotation marks omitted). And even if the dispute between the parties was not technically moot, the Court would not likely grant review in a case where its resolution of the vacatur issue would have no practical impact on EPA's regulation of power plants.

b. Applicants assert (Appl. 4-6) that this Court's prior decision in this case conclusively establishes that the Court will grant certiorari to address the D.C. Circuit's December 2015 order. That is not correct. Any petition for certiorari from the D.C. Circuit's December 15, 2015, order would address

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decision to remand without vacatur would be irrelevant to that stay inquiry, and it would likewise be irrelevant to the reviewing court's ultimate determination whether the new determination is valid. Thus, once EPA completes the current remand proceedings, this Court's resolution of the question that applicants seek to present in their forthcoming certiorari petition would have no bearing on EPA's ongoing authority under Section 7412(n)(1)(A) to regulate power plants after considering costs.

the propriety of the court's decision to remand the case to EPA without vacating the Rule. The Court in Michigan neither decided that issue nor expressed any view as to its proper resolution.

As noted above, applicants' merits briefs asked this Court to vacate the Rule, see Michigan Pet. Br. 5, 19, 48; Michigan Reply Br. 22, but the Court did not grant that relief, see Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015). Instead, it remanded the case to the D.C. Circuit, thereby allowing that court to consider the parties' arguments and determine the appropriate remedy. Ibid. Applicants could have sought rehearing of that aspect of the Court's decision, see Sup. Ct. R. 44, but they did not do so.

The fact that this Court ruled for applicants on the merits does not imply any particular view as to the proper remedy for EPA's failure to consider compliance costs as part of the "appropriate and necessary" determination when it initially promulgated the Rule. Michigan, 135 S. Ct. at 2712; see Appl. 4-6. As noted above, the D.C. Circuit and other courts of appeals have long recognized that remand without vacatur can be an appropriate remedy in certain circumstances. See p. 10, supra. Because the question whether that remedy is appropriate arises only when an agency action is held to be deficient in

some respect, this Court's merits ruling simply posed that remedial question rather than answering it.[6]

2. Applicants recognize that their application should be granted only if their entitlement to relief is "indisputably clear" and there is a "fair prospect that the majority of the Court will vote to reverse the judgment below." Appl. 3 (citation and internal quotation marks omitted). Applicants cannot satisfy that demanding standard.

As noted above, the D.C. Circuit's remedial authority in this case is governed by the CAA's judicial-review provision, 42 U.S.C. 7607(d)(9). That provision states that the reviewing court "may reverse" -- not "shall reverse" -- an EPA action "found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. 7607(d)(9)(A). Even judges who believe that remand without vacatur is impermissible in APA cases governed by Section 706(2) have recognized that Section 7607(d)(2) grants "remedial discretion" in CAA cases. See Natural Res. Def. Council, 489 F.3d at 1261-1262 (Randolph, J., concurring).

Remedial discretion is also appropriate in cases governed by the APA's judicial-review provision, 5 U.S.C. 706(2).

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[6] Although Judge Kavanaugh dissented from the relevant aspects of the D.C. Circuit's original decision upholding the Rule, he did not dissent from the D.C. Circuit's December 15, 2015, decision remanding without vacatur.

Although Section 706(2) directs that courts "shall * * * set aside" unlawful agency action, the D.C. Circuit and the courts of appeals have long recognized that the word "shall" in this context does not require vacatur in every case where agency action is found to be deficient. 5 U.S.C. 706(2) (emphasis added); see p. 10, supra (citing cases). That approach is consistent with this Court's longstanding reluctance "to displace courts' traditional equitable authority absent the 'clearest command' or an 'inescapable inference' to the contrary." Miller v. French, 530 U.S. 327, 340 (2000) (citation omitted). This Court has indicated that Congress's use of the word "shall" does not necessarily displace that traditional equitable authority. See Hecht Co. v. Bowles, 321 U.S. 321, 322, 330 (1944) (construing statutory provision stating that an injunction "shall be granted," and explaining that this language did not evince Congress's "plain" desire to depart from "traditional equity practice"); see generally Ronald M. Levin, "Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 Duke L.J. 291 (2003) (defending legitimacy of remand-without-vacatur remedy under the APA).

The discretion conferred by Sections 7607(d)(9) and 706(2) is not unlimited. The D.C. Circuit has explained that "[t]he decision whether to vacate depends" on both (1) "the seriousness of the order's deficiencies (and thus the extent of doubt

whether the agency chose correctly)," and (2) "the disruptive consequences of an interim change that may itself be changed [by the agency on remand]." Allied-Signal, 988 F.2d at 150-151 (citation and internal quotation marks omitted); see App., infra, 2a. The D.C. Circuit and other courts of appeals have applied that commonsense approach and granted remand without vacatur in numerous cases.[7]

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[7] See, e.g., EME Homer City Generation, L.P. v. EPA, 795 F.3d 118, 132 (D.C. Cir. 2015) (finding the rule's emissions budgets "invalid," but remanding without vacatur in light of the "substantial disruption" vacatur would have for emissions trading markets); National Ass'n of Clean Water Agencies v. EPA, 734 F.3d 1115, 1161 (D.C. Cir. 2013) (remanding EPA environmental standards for further explanation); Mississippi v. EPA, 744 F.3d 1334, 1362 (D.C. Cir. 2013) (per curiam) (remanding final rule to EPA because the rule's flaw was a "curable defect" and "vacating a standard because it may be insufficiently protective would sacrifice such protection as it now provides") (citation omitted), cert. denied, 135 S. Ct. 53 (2014); California Cmtys. Against Toxics v. United States EPA, 688 F.3d 989, 994 (9th Cir. 2012) (per curiam) (declaring EPA's action invalid after EPA conceded flaws in its reasoning, but remanding without vacatur because vacatur would be "economically disastrous" to the affected industry party); Natural Res. Def. Council v. United States EPA, 571 F.3d 1245, 1276 (D.C. Cir. 2009) (per curiam) (considering whether EPA could "cure" the legal flaws in a rule when deciding to vacate some, but not all, of the rule's provisions); North Carolina v. EPA, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam) (granting remand without vacatur on rehearing to "at least temporarily preserve the environmental values covered by [the rule]," notwithstanding the "fundamental flaws" identified by the court); Sierra Club v. United States EPA, 167 F.3d 658, 664 (D.C. Cir. 1999) (declining to vacate rule because "EPA may be able to explain" its reasoning on remand); Idaho Farm Bureau Fed'n, 58 F.3d at 1405-1406 (finding a "significant procedural error" that would normally render the action "invalid," but remanding without vacatur in order to preserve a species listed as endangered).

The D.C. Circuit reasonably exercised its discretion when it declined to vacate the Rule here. See App., infra, 2a (citing Allied-Signal, 988 F.2d at 150-151). EPA had previously explained that hazardous air pollutants emitted from power plants pose serious hazards to public health and the environment. EPA Mot. to Govern Future Proceedings 12-18 (Sept. 24, 2015). EPA noted that mercury emissions in particular are extremely dangerous to children and developing fetuses. Id. at 13. EPA also noted that in 2016 alone the Rule is expected to result in between 4200 and 11,000 fewer premature deaths from respiratory and cardiovascular illness; 3100 fewer emergency room visits for children with asthma; over 250,000 fewer cases of respiratory symptoms and asthma exacerbation in children; and 4700 fewer non-fatal heart attacks. Id. at 15-16. EPA also emphasized that regulated entities would not suffer significant disruptive consequences, and that EPA was acting quickly to reevaluate its "appropriate and necessary" finding by April 15, 2016. Id. at 9-12, 18-20; see App., infra, 2a (noting EPA's representation that it was "on track to issue a final finding" by that date).

The applicable judicial-review provision and this Court's decision in Michigan thus left the D.C. Circuit with discretion to decide whether the Rule should remain in effect pending EPA's "appropriate and necessary" determination on remand. The court

reasonably exercised that discretion when it declined to vacate the Rule. Whatever the proper scope and application of the remand-without-vacatur remedy in APA cases, applicants cannot plausibly argue that their entitlement to relief is "indisputably clear." Turner Broad., 507 U.S. at 1301 (Rehnquist, J., in chambers).

3. Applicants also fail to establish that they will suffer irreparable harm if the Rule is not stayed or enjoined. Applicants assert that they are entitled to relief in light of (1) the "billions of dollars in compliance costs" that have already been spent to comply with the Rule; (2) the $158 million per year in ongoing monitoring, recordkeeping, and reporting costs necessitated by the Rule; and (3) the possibility that this Court will be unable to grant effective relief at a later date in the absence of a stay. See Appl. 9-10, 13-14. Those arguments lack merit.

a. Applicants emphasize (Appl. 9, 12) that substantial sums have been spent by power plants to comply with the Rule since its promulgation in 2012. But applicants themselves assert (Appl. 9) that those costs "ha[ve] already been lost" and are "irrecoverable." Such past harm is not a sufficient basis for obtaining a stay or injunction because the purpose of such relief is to prevent future harm. See Hollingsworth, 558 U.S. at 190 (applicant must show "a likelihood that irreparable harm

will result from the denial of a stay") (emphasis added); see also Winter v. Natural Res. Def. Council, 555 U.S. 7, 22 (2008) (explaining that, to obtain a preliminary injunction, an applicant must show that he "is likely to suffer irreparable harm before a decision on the merits can be rendered") (citation omitted); 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.1, at 139 (2d ed. 1995) ("A presently existing actual threat must be shown.").

b. Applicants also assert (Appl. 9) that the Rule imposes ongoing monitoring, reporting, and recordkeeping requirements, entailing compliance costs of approximately $158 million per year. But States are not directly regulated by the Rule, and applicants themselves have not incurred and will not incur those costs. Rather, the Rule imposes the requirements on individual power plants. See 77 Fed. Reg. at 9367-9369; see generally Ruckelshaus v. Monsanto Co., 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers) (noting that an applicant for a stay "must meet a heavy burden of showing * * * that the applicant will suffer irreparable injury") (emphasis added; citation omitted) Although many regulated entities were aligned with applicants in seeking judicial review of the Rule, no power plant or industry group has joined applicants' present request for a stay, and the majority of the regulated entities that

challenged the Rule did not seek vacatur of the Rule in the D.C. Circuit on remand.[8]

Keeping the Rule in effect for the short period of time before EPA issues a revised "appropriate and necessary" determination will simply maintain the status quo, and it will not unduly burden the regulated power plants. Conversely, granting a stay would overturn the status quo and could create confusion and uncertainty for such plants, as it could upset contractual commitments and construction plans that power plants have already made.[9] In any event, "ordinary compliance costs are typically insufficient to constitute irreparable harm." Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 115 (2d Cir. 2005); see, e.g., A.O. Smith Corp. v. FTC, 530 F.2d 515, 527-528 (3d Cir. 1976).[10]

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[8] The absence of any concrete injury to applicants themselves -- as opposed to regulated entities that have not requested a stay -- also calls into question applicants' standing to seek this Court's review of the D.C. Circuit's December 15, 2015, decision. Although applicants were petitioners in Michigan, there was no reason to examine their standing at that time, since industry petitioners that were directly regulated by the Rule also invoked this Court's jurisdiction. See, e.g., Massachusetts v. EPA, 549 U.S. 497, 518 (2007).

[9] See generally Mot. of Industry Resp. Intervenors to Govern Future Proceedings 13-18 (Sept. 24, 2015); Consolidated Response of Industry Resp. Intervenors in Opp. to Pet. Motions to Govern Future Proceedings 4-8 (Oct. 21, 2015).

[10] Most regulated sources have already complied with the Rule, and all sources have had the opportunity to seek administrative relief through EPA's Office of Enforcement and Compli-

c. Applicants' litigation conduct in the most recent phase of this case further undermines their assertions of irreparable harm. This Court issued its decision in Michigan on June 29, 2015. Applicants did not then seek rehearing to request vacatur of the Rule. The D.C. Circuit solicited briefing and heard oral argument on the vacatur issue, and it issued its decision declining to vacate the Rule on December 15, 2015. Applicants then waited more than two months -- until February 23, 2016 -- to file their application in this Court. Their requested stay would expire by its own terms, moreover, as soon as EPA issues its revised "appropriate and necessary" determination, which EPA anticipates will occur by April 15, 2016. See Appl. 15. Applicants' months of delay in seeking six weeks' worth of relief suggests that their assertions of irreparable harm are overstated.

d. Applicants are also wrong to suggest (Appl. 14) that this Court can "preserve its jurisdiction [over their forthcoming petition for certiorari] by staying the Rule now." The stay that applicants request would not prevent EPA from completing its current rulemaking and issuing a revised "appropriate and necessary" determination. Once that determination is issued,

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ance Assurance if their continued operation is critical for maintaining reliability. See App., infra, 16a-20a.

the D.C. Circuit's decision to remand without vacatur will have no continuing practical effect.

Whether applicants' challenge to the D.C. Circuit's remand-without-vacatur order will then become moot depends on the application of the "capable of repetition yet evading review" exception to the circumstances here. See p. 13, supra. But that inquiry will not depend in any way on whether the Rule was allowed to remain in effect during the last few weeks before April 15, 2016. Indeed, rather than simply preserving the Court's jurisdiction to decide the remand-without-vacatur question, entry of the requested stay would have the practical effect of deciding that question in applicants' favor, by divesting the Rule of operative legal effect until EPA issues a revised "appropriate and necessary" determination. The requested stay therefore is not "necessary or appropriate in aid of [this Court's] jurisdiction[]." 28 U.S.C. 1651(a).

4. Applicants' claimed harms are in any event outweighed by the significant benefits of keeping the Rule in place for the six weeks until EPA expects to issue its revised "appropriate and necessary" finding.

First, a stay would undermine the significant public health and environmental benefits achieved by the Rule. EPA originally estimated that full compliance with the Rule in 2015 alone would lead to an 88% reduction in hydrogen chloride emissions, a 75%

reduction in mercury emissions, a 41% reduction in sulfur dioxide emissions, and a 19% reduction in particulate matter emissions from coal-fired units greater than 25 megawatts. See 77 Fed. Reg. at 9424. Each of those air pollutants is associated with serious public health and environmental effects, such as delayed development and learning disabilities in children, cancer, lung irritation and damage to kidneys, reproductive problems in fish and fish-eating mammals and birds, and environmental degradation due to acidification. See 77 Fed. Reg. 9632 (Feb. 17, 2012); 76 Fed. Reg. 24,978, 24,994-24,997, 25,000-25,005, 25,016 (May 3, 2011); 65 Fed. Reg. at 79,827-79,830. As noted above, EPA also expects that full compliance with the Rule in 2016 will result in a wide array of quantifiable health benefits, including 11,000 fewer premature deaths from respiratory and cardiovascular illness and 3100 fewer emergency room visits for children with asthma. See p. 18, supra; 77 Fed. Reg. at 9429 (Tbl. 9); see also 77 Fed. Reg. at 9305-9306. To the extent that a stay induced regulated parties to cease complying with the Rule's requirements -- and a stay would serve no evident practical purpose if it did not have some such effect -- the stay would likely entail a corresponding impairment of public health.

In addition to the significant public health and environmental benefits of the Rule, various States are currently

relying on the emission reductions obtained by the Rule for regulatory planning under a number of EPA programs. See App., infra, 23a-25a. For example, States rely on such reductions for purposes of (1) requesting area redesignations from nonattainment to attainment of national ambient air quality standards and for setting enforceable limits in planning for attainment of those standards; (2) demonstrating reasonable progress under the CAA's regional haze program; and (3) calculating total maximum daily loads of mercury in waterbodies under the Clean Water Act. Ibid. Accordingly, a stay of the Rule could complicate state implementation of other environmental programs, especially given the ongoing nature of States' regulatory planning. A stay could also disrupt the status quo and perhaps ultimately increase compliance costs borne by sources that have taken steps toward installing controls. See p. 21, supra. That may explain why no regulated entity has joined applicants' request for a stay of the Rule.

In short, the balance of the equities weighs strongly against granting applicants' stay request. This Court should allow the Rule to remain in effect for the anticipated six-week period that remains until EPA issues its revised "appropriate and necessary" determination in April 2016.

CONCLUSION

The application to stay or enjoin the Rule should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MARCH 2016

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1100 **September Term, 2015**

EPA-77FR9304

Filed On: December 15, 2015

White Stallion Energy Center, LLC,

Petitioner

v.

Environmental Protection Agency,

Respondent

American Academy of Pediatrics, et al.,
Intervenors

Consolidated with 12-1101, 12-1102, 12-1147, 12-1172, 12-1173, 12-1174, 12-1175, 12-1176, 12-1177, 12-1178, 12-1180, 12-1181, 12-1182, 12-1183, 12-1184, 12-1185, 12-1186, 12-1187, 12-1188, 12-1189, 12-1190, 12-1191, 12-1192, 12-1193, 12-1194, 12-1195, 12-1196

BEFORE: Garland, Chief Judge; Rogers and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the joint motion of Certain State and Industry petitioners to govern further proceedings, the motion of Tri-State Generation and Transmission Association Inc. to govern proceedings on remand from the U.S. Supreme Court and supplement thereto, the joint motion of the State, Local Government, and Public Health respondent-intervenors for remand without vacatur, the motion of respondent EPA to govern future proceedings, the motion of Industry respondent-intervenors to govern future proceedings, the response of EPA to petitioners' motions to govern future proceedings, the response of Certain State and Industry petitioners to motions to govern further proceedings of respondent and respondent-intervenors, the response of Tri-State Generation and Transmission Association Inc. to motions to govern and the supplement

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1100 **September Term, 2015**

thereto, the joint response of the State, Local Government, and Public Health respondent-intervenors to State and Certain Industry petitioners' motions to govern, the consolidated response of Industry respondent-intervenors to petitioners' motions to govern future proceedings, the response of the Utility Air Regulatory Group ("UARG") to federal respondent's motion to govern future proceedings, the joint reply brief of the State, Local Government, and Public Health respondent-intervenors, the reply brief of Certain State and Industry petitioners in support of their joint motion to govern further proceedings, the reply of Tri-State Generation and Transmission Association Inc. and the supplement thereto, the reply of EPA in support of its motion to govern future proceedings, the reply of Industry respondent-intervenors in support of their motion to govern future proceedings, and the oral arguments of counsel, it is

ORDERED that the proceeding be remanded to EPA without vacatur of the Mercury and Air Toxics Standards final rule. *See Allied-Signal, Inc. v. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). In so doing, we note that EPA has represented that it is on track to issue a final finding under 42 U.S.C. § 7412(n)(1)(A) by April 15, 2016.

Pursuant to D.C. Cir. Rule 36, this disposition will not be published. The Clerk is directed to withhold the issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

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

White Stallion Energy Center, LLC, et al., Petitioners, v. United States Environmental Protection Agency, Respondent.	No. 12-1100 (and consolidated cases)

DECLARATION OF JANET G. MCCABE

I. Background

1. I, Janet G. McCabe, declare under penalty of perjury under the laws of the United States of America that the following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge or on information contained in the records of the United States Environmental Protection Agency (EPA) or on information supplied to me by employees under my supervision and employees in other EPA offices.

2. I am the Acting Assistant Administrator for the Office of Air and Radiation (OAR) at the EPA, a position I have held since July 19, 2013. I previously served as the Principal Deputy to the Assistant Administrator for this office from November 2009 to July 18, 2013. OAR is the headquarters-based EPA office that

administers the Clean Air Act and develops national programs, technical policies and regulations for controlling air pollution and protecting public health and welfare. OAR is concerned with preventing and responding to air quality issues including industrial air pollution, pollution from vehicles and engines, toxic air pollutants, acid rain, stratospheric ozone depletion and climate change.

3. Prior to joining the EPA, I served as the Executive Director of Improving Kids' Environment, Inc., and as an adjunct faculty member at the Indiana University School of Medicine, Department of Public Health. From 1993 to 2005, I held several leadership positions in the Indiana Department of Environmental Management's Office of Air Quality and was the office's Assistant Commissioner from 1998 to 2005. Before coming to Indiana in 1993, I served as Assistant Attorney General for environmental protection for the Commonwealth of Massachusetts and Assistant Secretary for Environmental Impact Review. I received an undergraduate degree from Harvard College in 1980 and J.D. from Harvard Law School in 1983.

4. As part of my duties as Acting Assistant Administrator of the Office of Air and Radiation, I oversee the development and implementation of regulations, policy and guidance under section 112 of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §7412, the national emission standards for hazardous air pollutants ("NESHAP") program, including development of the NESHAP for coal- and oil-fired electric utility steam generating units ("power plants") that is the subject of this litigation. Section 7412(c) of the Act requires EPA to regulate emissions of the

approximately 180 hazardous air pollutants listed in section 7412(b) from stationary industrial sources, referred to as "source categories." 42 U.S.C. § 7412(c). The statute requires EPA to list for regulation all source categories that contain at least one major stationary source.[1] *Id.* The statute also requires EPA to list and regulate area sources[2] of hazardous air pollutants consistent with sections 7412(c)(3) and (c)(6).[3] *Id.* §§ 7412(c)(3), (6). As required under the Act, EPA has developed a list of major and area source categories that must meet section 7412(d) emission standards to control their emissions of hazardous air pollutants.

5. For all hazardous air pollutants emitted by major sources EPA is required to establish emissions standards, commonly known as "maximum achievable control technology floor" or "MACT floor" standards, that require sources in the listed category to control their emissions to the levels of the best performing 12 percent of sources in that category for source categories with 30 or more sources. *See also id.* § 7412(d)(3)(B) (requiring MACT floors to be based on the performance of the

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[1] Section 7412(a)(1) defines a major source as any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit at least 10 tons per year of any single hazardous air pollutant or more than 25 tons per year of any combination of hazardous air pollutants.

[2] Section 7412(a)(2) area sources are stationary sources of hazardous air pollutants that are not major sources.

[3] For specific hazardous air pollutants identified in section 7412(c)(6), EPA is required to identify sources, including area sources, that account for at least 90 percent of the aggregate emissions of the identified pollutants, and regulate those sources based on emissions standards that reflect the best performing sources or with respect to a health threshold under 7412(d)(4).

best 5 sources for source categories with less than 30 sources). EPA must also determine whether to establish MACT standards more stringent than the MACT floor after considering cost, energy requirements and non-air quality health and environmental effects. *Id.* § 7412(d)(2). EPA is specifically authorized to subcategorize a source category by class, type or size of sources. *Id.* § 7412(d)(1). Under the statute, EPA may provide sources up to three years to come into compliance once standards are established, and EPA and title V permitting authorities – usually state agencies – may provide sources an additional year if it necessary "for the installation of controls." *Id.* § 7412(i)(3)(A); 40 C.F.R. § 63.6(i).

6. The 1990 CAA Amendments established a unique provision—section 7412(n)(1)—for EPA to determine whether to list power plants for regulation of hazardous air pollutants. *See* 42 U.S.C. § 7412(n)(1)(A); *see also New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008). Under section 7412(n)(1)(A), Congress directed EPA to perform a study of the hazards to public health of hazardous air pollutant emissions from power plants ("Utility Study") reasonably anticipated to occur after implementation of the title IV acid rain program and other CAA programs and also determine alternative control strategies for hazardous air pollutant emissions from such sources and report those findings to Congress by November 1993, or within 3 years.[4] *Id.* Section 7412(n)(1)(A) further provides that EPA shall regulate power

[4] EPA completed the Utility Study in 1998.

plants pursuant to section 7412 if the Agency determines that regulation of hazardous air pollutant emissions from power plants is appropriate and necessary, after considering the results of the section 7412(n)(1)(A) Utility Study. *Id.*

7. Section 7412(n)(1)(B) directs the Agency to conduct a study of mercury emissions from power plants, municipal waste combustion units, and other sources, including area sources of mercury ("Mercury Study") and to report the findings of this study to Congress within 4 years after November 15, 1990.[5] *Id.* § 7412(n)(1)(B). In conducting the Mercury Study, Congress instructed EPA to "consider the rate and mass of such emissions, the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies." *Id.* Prior to publication, EPA subjected the Mercury Study to two extensive external peer reviews. *See* 77 Fed. Reg. 9304, 9307 (Feb. 12, 2012). Congress separately tasked the National Institute of Environmental Health Sciences and the National Academy of Sciences to perform additional independent studies to determine the threshold level of mercury exposure below which adverse human health effects are not expected to occur in even the most sensitive members of the population. *Id.* This exposure level is commonly referred to as the reference dose.

[5] EPA completed the Mercury Study in 1997. Notwithstanding the statutory requirement that this study be completed before the Utility Study, EPA completed the Mercury Study first and used many of the results of that study to develop the mercury related information in the Utility Study.

8. In December 2000, after considering the studies required by section 7412(n)(1) and other relevant information, including mercury emissions data from power plants, the EPA made a finding that it is appropriate and necessary to regulate hazardous air pollutants from coal and oil-fired electric generating units and listed those sources pursuant to section 7412(c), making coal- and oil-fired power plants subject to regulation under section 7412(d). 65 Fed. Reg. 79,825, 79,825-31 (Dec. 20, 2000) (2000 finding). Specifically, EPA found that coal- and oil-fired power plants "are the largest domestic source of mercury emissions, and mercury in the environment presents significant hazards to public health and the environment." *Id.* at 79,830. The Agency took note that the National Academy of Sciences study had confirmed EPA's own research concluding that "mercury in the environment presents a significant hazard to public health." *Id.* Moreover, in the 2000 finding, EPA explained that it is appropriate to regulate hazardous air pollutant emissions from coal- and oil-fired units because we identified certain control options that we believed would effectively reduce those emissions from such units. *Id.* The 2000 finding also concluded that it is "necessary" to regulate hazardous air pollutant emissions from power plants under section 7412 "because the implementation of other requirements under the CAA will not adequately address the serious public health and environmental hazards arising from such emissions identified in the Utility [Study] and confirmed by the [National Academy of Sciences] Study, and which section 7412 is intended to address." *Id.*

9. In May 2011, EPA proposed for comment section 7412(d) standards for coal- and oil-fired power plants. 76 Fed. Reg. 24,976 (May 3, 2011). In that action, the EPA confirmed that the 2000 finding and listing of power plants remain valid based on consideration of the information available at the time of that finding, and the Agency reaffirmed that it is appropriate and necessary to regulate hazardous air pollutant emissions from coal- and oil-fired power plants after conducting new peer-reviewed analyses demonstrating that such emissions from power plants continue to pose hazards to public health and the environment and that those hazards will not be addressed through implementation of the other CAA provisions applicable to power plants. EPA revised the new analyses in response to comments by EPA's Science Advisory Board and public comments and confirmed the appropriate and necessary finding and listing of power plants when the Agency issued the final Mercury and Air Toxics Standards (the "Rule"). *See* 77 Fed. Reg. at 9362-64.

10. The final Rule set numeric emission standards to control mercury, other hazardous metals (e.g., arsenic and nickel), and hazardous acid gases (e.g. hydrogen chloride, hydrogen cyanide, and hydrogen fluoride) from power plants. The rule also established work practice standards to control emissions of organic hazardous air pollutants such as dioxins and furans. EPA provided alternative or surrogate standards for non-mercury metal hazardous air pollutants and acid gas hazardous air pollutants. Specifically, for non-mercury metals, EPA established filterable particulate matter and total metals limits as surrogates for the individual non-mercury metal

hazardous air pollutants, and for acid gas hazardous air pollutants, EPA established hydrogen chloride and sulfur dioxide as surrogates. The surrogate standards allow many affected facilities to utilize monitoring devices that are already in place, thus lowering the compliance costs for the affected units. *See* 76 Fed. Reg. at 25,038-39.

11. This declaration is filed in support of the EPA's Motion for Remand without Vacatur in *White Stallion Energy Center, LLC v. EPA*, No. 12-1100 (and consolidated cases) (D.C. Cir.).

II. Public Health and Environmental Benefits of the Rule

12. Hazardous air pollutants emitted from coal- and oil-fired power plants are associated with serious adverse health and environmental effects. Mercury emitted from power plants may be transformed in the environment into methylmercury, a highly toxic persistent pollutant that accumulates in the food chain, especially the tissue of fish. People consuming these methylmercury-contaminated fish also ingest and bioaccumulate the methylmercury, which can cause neurotoxic effects. Children, and even more so developing fetuses, are especially susceptible to methylmercury effects because their developing bodies are more highly sensitive to its effects. 76 Fed. Reg. at 24,977-8. Children who are prenatally exposed to even low concentrations of methylmercury are at increased risk of poor performance on neurobehavioral tests, such as those measuring attention, fine motor function, language skills, visual spatial abilities, and verbal memory. *Id.* at 25,018. According to the National Academy of Sciences, these neurodevelopmental effects from

methylmercury exposure include the ability of children to learn and succeed in school. *Id.* at 25,001.

The population at highest risk are children of women who consume large amounts of fish and other seafood during pregnancy. Some portions of the population, including anglers, Asian-Americans, and members of some Native American Tribes are particularly affected because of increased fish consumption due to cultural and economic reasons. In fact, they may have methylmercury exposures that are twice as high as the average U.S. population. *Id.* at 24,978, 24,984. In addition, mercury has been linked to adverse environmental effects, including adverse reproductive effects on numerous species of fish, as well as adverse behavioral, physiological, and reproductive effects in several species of fish-eating birds and mammals. *Id.* at 24,983, 25,012-13.

13. In addition to mercury, the Rule reduces emissions of several other hazardous air pollutant metals linked to serious health impacts. Adverse noncancer health effects associated with non-mercury hazardous air pollutants include chronic health disorders (e.g., irritation of the lung, skin, and mucus membranes, effects on the nervous system, and damage to the kidneys), and acute health disorders (e.g., lung irritation and congestion, alimentary effects such as nausea and vomiting, and liver, kidney and nervous system effects). *See id.* at 24,978. Hazardous air pollutant metals such as arsenic, nickel, and chromium have been classified as human carcinogens, and cadmium is classified as a probable human carcinogen. Hazardous air pollutant metals

such as lead and selenium also have potentially serious noncancer health effects. Children are more sensitive to the effects of lead than adults and no safe blood level has been determined for children. Fetuses exposed to lead in the womb may be born prematurely or have lower weights at birth; exposure in the womb, in infancy, or in early childhood may also slow mental development and cause lower intelligence later in childhood. Exposure to selenium can cause severe respiratory effects. *Id.* at 25,005.

14. Acid gas hazardous air pollutants such as hydrogen chloride, hydrogen fluoride, and hydrogen cyanide add to already high atmospheric levels of other chronic respiratory toxicants and to environmental degradation due to acidification. *Id.* at 25,016; *see also* 77 Fed. Reg. at 9362. Many sensitive ecosystems are already experiencing acidification, and recent evidence indicates that hydrogen chloride can be transported long distances and aggravate acidification in locations distant from emissions sources. 77 Fed. Reg. at 9362.

15. In conjunction with the final Rule, the EPA conducted a Regulatory Impact Analysis (RIA) pursuant to Executive Orders 12,866 and 13,563. Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards, December 2011, Docket No. EPA-HQ-OAR-2009-0234-20131, Att. A. The EPA estimated that the annual monetized benefits of the Rule in 2007 dollars would range between $37 to $90 billion, using a 3 percent discount rate, and $33 billion to $81 billion using a 7 percent discount rate. Att. A at 3 (ES-1). The cost of the Rule, which accounted for

compliance, monitoring, and reporting costs, was estimated at $9.6 billion in 2007 dollars. *Id.* at 46 (3-31). The net annual quantifiable benefits of the Rule, once fully implemented in 2016, would exceed the Rule's total costs by between $27 billion and $80 billion in 2007 dollars at a 3 percent discount rate, or $24 to $71 billion using a 7 percent discount rate. *Id.* at 101 (8-1). We concluded that implementation of the Rule "is expected, based purely on economic efficiency criteria, to provide society with a significant net gain in social welfare, even given the limited set of health and environmental effects we were able to quantify." *Id.*

16. When analyzing the costs and benefits for this Rule, the EPA applied peer-reviewed methods and explained in detail the empirical basis for our conclusions. In keeping with the directives of the Executive Orders, in the RIA EPA characterized in detail the sources of uncertainties affecting our benefits estimates, including the many unquantifiable health and environmental benefits associated with reductions in hazardous air pollutants attributable to the Rule. *See* 77 Fed. Reg. 9432; *see also, e.g.*, Att. A at 11-15 (ES-9 to -13) (listing the many human health benefits that could not be quantified or monetized). There are many obstacles to fully quantifying and monetizing these benefits, including gaps in toxicological data, uncertainties in extrapolating results from high-dose animal experiments to estimate human effects at lower doses, limited ambient and personal exposure monitoring data, difficulties in tracking diseases such as cancer that have long latency periods, and insufficient economic research to support the valuation of the health impacts often associated

with exposure to individual hazardous air pollutants. Att. A at 57-61 (4-62 to -66). For example, EPA could quantify and monetize only one of the benefits attributable to reductions in mercury, and the Agency could not quantify or monetize any of the benefits attributable to reductions in the other hazardous air pollutant emissions from power plants because of unavailable data and uncertainties associated with input parameters. *See* 77 Fed. Reg. at 9305-9306; Att. A. at 52-89 (4-57 to -94). The many unquantifiable benefits of the Rule, e.g., reducing the incidence of cancer or reducing adverse effects on brain development and memory functions aside from IQ loss, are nonetheless important.

17. Hazardous air pollutant emissions from power plants can be controlled effectively with the controls used to reduce emissions of filterable particulate matter and sulfur dioxide. Because of this close relationship between reductions of the criteria pollutants filterable particulate matter (also called fine particulate matter) and sulfur dioxide and reductions of hazardous air pollutant emissions, the standards established in the Rule necessarily yield reductions in emissions of filterable particulate matter and sulfur dioxide (a particulate matter precursor).[6] The Agency has developed metrics to quantify and monetize benefits associated with reductions in those criteria

[6] In fact, because of the close relationship between reductions of these criteria pollutants and hazardous air pollutants, EPA established filterable particulate matter and sulfur dioxide as surrogates for non-mercury metal hazardous air pollutants and acid gas hazardous air pollutants, respectively. This allows sources to comply with their hazardous air pollutant emission reduction obligations by demonstrating reductions in filterable particulate matter and sulfur dioxide emissions.

pollutants. Based on the projected reductions in ambient levels of fine particulate matter associated with the Rule's compliance, EPA estimated that the Rule would result in significant quantifiable public health benefits, including avoidance of 4,200 to 11,000 premature deaths, 4,700 nonfatal heart attacks, 2,600 hospitalizations for respiratory and cardiovascular diseases, 540,000 lost work days, and 3.2 million days when adults restrict normal activities. Att. A, at 5 (ES-3). *See also id.* at 90-94 (5-3 to -7, tbls. 5-1, 5-2) (summarizing quantified and monetized benefits from improved human health associated with reductions in primary and secondarily formed fine particulate matter).

III. Estimated Timeframe for Completing Analysis of Cost Considerations for a Revised "Appropriate & Necessary" Finding

18. As part of my duties as Acting Assistant Administrator of OAR, I am involved in the prioritization and allocation of resources to meet the legal requirements of the CAA as well as the air quality needs of the country. I am familiar with the processes and time periods allotted for the EPA to take regulatory actions under the CAA. Responding to the Supreme Court's remand in this case is a high priority for OAR and we are fully committed to providing the resources necessary to complete our action on remand quickly.

19. EPA has already begun the process of reviewing available information relevant to cost as part of its CAA section 7412(n)(1)(A) "appropriate and necessary" finding in response to the Supreme Court's decision in *Michigan v. EPA*. Relevant

staff have been assigned to the project, and we have established a detailed internal schedule with the goal of completing the proposed consideration of cost in the next few months. EPA will also provide a public comment period to allow for input from stakeholders. The Agency is committed to completing this process on an expedited basis, and intends to finalize our analysis of cost considerations for the appropriate and necessary finding as close to April 15, 2016 as possible.

IV. Effects of Remand Without Vacatur on Regulated Sources and States

20. Many units affected by the Rule are in compliance with the final standards consistent with the April 16, 2015 compliance date. As discussed above, in the final rule, EPA gave all sources up to three years to comply. EPA also included additional flexibilities to allow some sources an opportunity to obtain further compliance extensions under section 7412. The Rule was upheld and all petitions for review dismissed by the D.C. Circuit in April 2014, a year prior to the compliance date. Although EPA will not have complete emission reporting data for the Rule until after the reporting deadline in October of this year, according to a survey by SNL Energy,[7] those units that have already come into compliance with the Rule represent half of the domestic coal-fired generation capacity. Eric Wolff, *Supreme Court's*

[7] SNL Financial is a subscriber-based service that collects, standardizes and disseminates relevant information – including news and analysis — for a variety of industries, including the energy sector. http://www.snl.com/Sectors/Energy/

Eventual MATS Ruling Will Be (Mostly) Moot, May 14, 2015, https://www.snl.com/InteractiveX/Article.aspx?cdid=A-32620730-13109, (Att. E).

21. The actions the industry have taken or announced in response to the Rule are notable. Pollution controls have been purchased and in most cases installed. The Institute of Clean Air Companies estimates that almost 400 units totaling over 180 gigawatts[8] (GW) of capacity have installed mercury controls. Institute of Clean Air Companies, Mercury Installation List, http://c.ymcdn.com/sites/www.icac.com/resource/resmgr/Mercury/Mercury_Installation_List_-_.pdf, (Att. F). Since 2012, nearly 50 GW of capacity have either updated existing controls or installed new controls that reduce acid gases and sulfur dioxide, and about 19 GW of particulate matter controls were updated or installed.[9] While some controls that have been installed in order to comply with the Rule require lower initial capital investment in relation to operating costs, for many control technologies, a significant portion of the cost of compliance is associated with the initial capital expenditure. Some coal- and oil-fired units, representing almost 2 GW of capacity, have switched to burning natural gas.[10]

22. According to the National Association of Clean Air Agencies (NACAA), which has been surveying states periodically throughout the Rule's compliance period,

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[8] A gigawatt (GW) is equal to 1,000 megawatts (MW).
[9] SNL Financial, http://www.snl.com, Energy Database (subscriber only).
[10] SNL Financial, http://www.snl.com, Energy Database (subscriber only) (last visited March, 23, 2015).

states have granted 189 extensions to power plants for the installation of controls since the Rule was promulgated. National Association of Clean Air Agencies, Survey of MATS Compliance Extension Requests, August 11, 2015, http://www.4cleanair.org/sites/default/files/Documents/MATSextensionrequests-table-August-2015.pdf, (Att. G). The Association's survey did not ask states to specify how many units were covered by each extension, thus some of these extensions may have been for entire plants while others may have been for individual units. For perspective, when the Rule was promulgated, EPA estimated that there were approximately 1,400 units at 600 plants that were affected by the Rule. Att. A at 18 (3-3). The Association also reports that at least some of the extensions were for less than one full year and others were limited to only some of the Rule's requirements. For example, some extensions were granted for a six-week time period in order to honor contractual capacity commitments that had been made to system operators that ran several weeks past the April 2015 compliance deadline and some extensions extended the deadline for complying with the requirements regarding a single hazardous air pollutant or group of pollutants. Att. E.

23. For those units that were approved in accordance with 40 CFR Part 63.6(i) to operate for up to an additional year past the April 16, 2015 compliance deadline, and are planning to install controls by the 2016 deadline, many will have already made significant investments or entered into contractual commitments in order to meet that extended deadline. The controls that are expected to be installed

would include sorbent injection systems, fabric filters, and various types of acid gas controls. Those controls have expected installation times (from design, construction, installation and testing) of 9 to 36 months. *See generally*, Assessment of Technology Options Available to Achieve Reductions of Hazardous Air Pollutants, prepared by URS for Exelon Corporation, April 2011 (Att. H). In addition, the regulations implementing the extension provisions require extension requests to include, among other things, a description of the controls to be installed and compliance schedule that provides the dates when the necessary construction will begin and end. 40 C.F.R. § 63.6(i)(6)(i). Thus, sources that received extensions in order to install controls will have already taken significant steps to do so. A vacatur rather than remand at this point could ultimately increase costs of compliance with the Rule for these companies, given the confusion of unraveling or delaying contractual commitments and construction plans, only to have to re-instate those arrangements if EPA reaffirms that it is appropriate to regulate power plants under section 7412. In that same vein, vacatur would certainly have negative implications for the companies that design, fabricate, and supply the control technologies required by the Rule.

24. For those units that received an extension and are planning to shut down, remand without vacatur will largely maintain the status quo. As explained above, EPA will act quickly on remand. If EPA concludes that regulation of power plants is appropriate after considering cost, such units could shut down as planned on April 16, 2016. If EPA reaches the opposite conclusion, those sources could continue

to operate. We believe that many of the units that have determined that it is not economically justifiable to install controls are likely to be smaller, older plants that already operate intermittently. *See* Att. A at 50 (3-35); *see also, e.g.*, Tri-State First Emergency Motion, Doc. # 1565685, at 2 (describing small size and infrequent operation of Nucla Station).

25. Existing CAA authorities have allowed compliance with the Rule to proceed while maintaining the stability of the grid, and the Agency is working with sources to address the few circumstances in which potential threats to electric reliability may exist. EPA provided unprecedented flexibilities to power plants to ensure that implementation would occur with limited impact to electric reliability. Specifically, for reliability-critical units, EPA interpreted the phrase "installation of controls" in the CAA section 7412(i)(3)(B) extension provision to apply to units that do not plan to install controls if the units are needed to run while replacement units or transmission upgrades are being constructed to address the potential electric reliability issues. Thus, these units can run without controlling their hazardous air pollutant emissions for up to an additional year pursuant to the statutory extension provision. As noted above, EPA has also been working with reliability critical units that need additional time past April 16, 2016, pursuant to the aforementioned December 2011 EPA Enforcement Response Policy.

V. Disruptive Consequences of Vacatur

26. The Rule is the only federal standard regulating emissions of hazardous air pollutants from coal- and oil-fired power plants. Hazardous air pollutants emitted by power plants include metals (e.g., lead, mercury, arsenic, cadmium, chromium, and nickel), organics (e.g., acetaldehyde, benzene, and formaldehyde), and acid gases (e.g., hydrogen chloride and hydrogen flouride). *See* 76 Fed. Reg. at 25,003-5. The power sector is the largest anthropogenic source of many hazardous air pollutants in the United States, including mercury, hydrogen chloride, hydrogen fluoride, selenium, arsenic, chromium, cadmium, nickel, and others. EPA estimates that in 2005 the power sector emitted 50 percent of total domestic anthropogenic mercury emissions, 62 percent of total domestic arsenic emissions, 39 percent of total domestic cadmium emissions, 22 percent of total domestic chromium emissions, 82 percent of total domestic hydrogen chloride emissions, 62 percent of total domestic hydrogen flouride emissions, 28 percent of total domestic nickel emissions, and 83 percent of total domestic selenium emissions. 77 Fed. Reg. at 9310.

27. As previously discussed, major progress towards compliance with the Rule has already occurred. A vacatur of the Rule now would endanger the emission reductions required by the Rule by eliminating the only federally enforceable requirements for existing coal- and oil-fired power plants to control, monitor, and report their hazardous air pollutant emissions. The emission reductions required by the Rule are significant: the EPA estimated that in 2015, the Rule would reduce

mercury emissions from U.S. coal-fired power plants by 75 percent, hydrogen chloride emissions (as a surrogate for acid gases) by 88 percent, and fine particulate matter emissions (which includes non-mercury metals) by 19 percent. *See* 77 Fed. Reg. at 9424. Moreover, mercury emissions from power plants affect not only deposition, exposures, and risk today, but may also contribute to future deposition, exposure, and risk due to the persistent nature of mercury in the environment. 76 Fed. Reg. at 25,015. As EPA noted in the proposed rule, the delay in issuing mercury regulations under section 7412 has already resulted in hundreds of additional tons of mercury being emitted to the environment, and that mercury will remain part of the global burden of mercury. *Id.* A vacatur now would only compound that impact.

28. Although the Rule's estimated 2015 emission reductions do not account for the approximately 200 plants that received a one-year extension, it is our understanding that only 22 of those plants, representing less than 1% of the coal-fired generating capacity in the country, were granted the additional time—up to one year—to operate without installation of controls in order to provide grid reliability before retiring. *See* Att. E. The majority of the units receiving an extension did so on the basis of needing more time to install controls, and, as noted above, should already be well on their way to compliance. Without a standard in place, plants that have already installed controls could choose not to operate those controls. Plants that have yet to complete construction and installation of controls could halt that activity. In addition, power plants would be under no federal obligation to monitor and report

their hazardous air pollutant emissions. While more than 80 other industrial source categories are currently subject to emissions standards that limit these emissions and require routine monitoring and reporting, existing power plants, representing a major portion of all anthropogenic hazardous air pollutant emissions in the United States, would have no federally mandated requirements to control, monitor, or report those emissions.

29. When promulgated, the Rule was already decades overdue. A complete vacatur of the Rule would interrupt or delay the implementation of enforceable requirements to control, monitor, and report hazardous air pollutant emissions and could delay those requirements further still by requiring EPA to conduct a rulemaking to re-establish all aspects of the Rule, as opposed to conducting a rulemaking to remedy the sole deficiency identified by the Supreme Court in *Michigan*. For reference, the Rule took almost 4 years to issue after the D.C. Circuit vacated the Section 7412(n) Revision Rule in 2008. *See New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

30. Vacatur would also have significant disruptive consequences for other regulatory programs. For example, when requesting area redesignations from nonattainment to attainment, states are required to provide ten-year projections of maintenance of the national ambient air quality standards ("NAAQS") for criteria pollutants, and some of those recently approved redesignations have already incorporated emission reductions associated with the Rule into those ten-year

maintenance plans. *See, e.g.*, 80 Fed. Reg. 44,873 (July 28, 2015); North Carolina Dept. of Envt. and Natural Resources, Div. of Air Quality, Redesignation Demonstration and Maintenance Plan for the Charlotte-Gastonia-Salisbury, North Carolina 2008 8-Hour Ozone Marginal Nonattainment Area (April 16, 2015) at 32, *available at* http://daq.state.nc.us/planning/metrolina/Charlotte_2008_Ozone_Redesignation_and_Maintenance_SIP_Narrative_Final_04-16-15.pdf (Att. I) (indicating North Carolina's incorporation of the Rule into its future emissions inventory projections). Similarly, under the CAA's regional haze program, states have relied on the Rule for purposes of demonstrating reasonable progress towards natural visibility conditions in national parks and wilderness areas, and EPA has approved a number of regional haze plans based in part on the Rule's emission limits. States are also permitted to rely on reductions under the Rule in creating enforceable limits in the context of attainment planning for the 2010 1-hr SO_2 NAAQS, because of the potential co-benefit reductions of SO_2 in complying with the Rule's acid gas standards. *See* 80 Fed. Reg. 51,051, 51,077-78 (August 21, 2015). In the water quality planning context, states are required under the Clean Water Act to calculate total maximum daily loads (TMDLs), which establish the maximum amount of pollutant that a waterbody can receive and still meet water quality standards. In the case of mercury TMDLs, states rely on national air emission standards to limit mercury in order to reduce deposition into water bodies. *See, e.g.*, Northeast States Regional Mercury TMDL, at xii, 39, 44, available at http://www.epa.gov/region1/eco/tmdl/pdfs/ne/Northeast-Regional-

Mercury-TMDL.pdf (Att. J) ("The Northeast region's ability to achieve the calculated TMDL allocations is dependent on the adoption and effective implementation of national and international programs to achieve necessary reductions in mercury emissions. Given the magnitude of the reductions required to implement the TMDL, the Northeast cannot reduce in-region sources further to compensate for insufficient reductions from out-of-region sources.").

31. Remand without vacatur would not have significant disruptive consequences for regulated sources. In addition to capital investments that sources have already made to comply with the Rule, financial planning decisions, contractual commitments, and bids into the electricity market have also already assumed compliance with the Rule. For example, PJM Interconnection, Midcontinent Independent System Operator (MISO) Energy, and Southwest Power Pool Electric Energy Network[11] all report that the construction to install controls for compliance with the Rule is well underway. In MISO, for example, operators have already

[11] PJM Interconnection, MISO Energy, and Southwest Power Pool Electric Energy Network are regional transmission organizations operating in the United States. Regional transmission organizations coordinate, control, and monitor electric transmission grids. PJM serves all or part of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia. MISO serves all or part of North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Wisconsin, Illinois, Indiana, Michigan and parts of Montana, Missouri, Kentucky, Arkansas, Texas, Louisiana, and Mississippi. The Southwest Power Pool serves all or part of Kansas, Oklahoma, New Mexico, Texas, Arkansas, Louisiana, Missouri, Mississippi and Nebraska.

entered into contracts for installation of all of the mercury and acid gas controls necessary under the Rule. In addition, the costs of operating controls are typically included in the bids that owners make into capacity market auctions, such as PJM's recent auction to cover the next three years. There are also likely ongoing efforts by utilities to recover costs of compliance, in either the organized markets or state proceedings, such as decisions by state commissions to allow utilities to pass on the costs of the compliance with the Rule to their customers. Vacatur may require untangling the market actions that have taken place in reliance on compliance with the Rule, and doing so would be unnecessarily disruptive given that the Agency expects to complete its cost consideration in approximately seven months.

32. Vacatur of the Rule would have severe disruptive consequences for public health and the environment, and would also interfere with other EPA programs. Remand without vacatur, in contrast, would preserve the benefits provided by the Rule without significant disruptive consequences for regulated sources.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of September, 2015.

Janet G. McCabe
Acting Assistant Administrator
Office of Air and Radiation
United States Environmental
Protection Agency