ORAL ARGUMENT NOT YET SCHEDULED

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

No. 05-1162 (and consolidated cases) COMPLEX

STATE OF NEW JERSEY, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

Petition for Review of Final Actions of the
United States Environmental Protection Agency

PROOF OPENING BRIEF OF ENVIRONMENTAL PETITIONERS

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DATED: January 12, 2007

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES COURT OF APPEALS
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v.	)	(COMPLEX)
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	)	
UNITES STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	
	)	

ENVIRONMENTAL PETITIONERS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Petitioners Chesapeake Bay Foundation, Environmental Defense, National Wildlife Foundation, Natural Resources Council of Maine, Natural Resources Defense Council, The Ohio Environmental Council, Sierra Club, United States Public Interest Research Group, and Waterkeeper Alliance ("Environmental Petitioners") submit this certificate as to parties, rulings, and related cases.

(A) Parties and Amici

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

Pursuant to D.C. Circuit Rule 28(a)(1)(A), the requirement to identify parties, intervenors, and *amici* who appeared below is inapplicable because case D.C. Circuit No. 05-1162 (and consolidated cases) are not appeals from the ruling of a district court.

(ii) Parties to the Challenges to the EPA Delisting Rule: 70 Fed. Reg. 15,994 (March 29, 2005)

Petitioners

The following parties appear in these consolidated cases as petitioners:

In case no. 05-1097, filed March 29, 2005, the State of New Jersey, State of California, State of Connecticut, State of Maine, Commonwealth of Massachusetts, State of New Hampshire, State of New Mexico, State of New York, State of Vermont.

In case no. 05-1104, filed April 1, 2005, the Commonwealth of Pennsylvania, Department of Environmental Protection.

In case no. 05-1116, filed April 11, 2005, the State of Delaware.

In case no. 05-1118, filed April 8, 2005, the State of Wisconsin.

In case no. 05-1158, filed May 18, 2005, Chesapeake Bay Foundation, Inc., Conservation Law Foundation, Waterkeeper Alliance.

In case no. 05-1159, filed May 18, 2005, Environmental Defense, National Wildlife Federation and Sierra Club.

In case no. 05-1160, filed May 18, 2005, Natural Resources Council of Maine, Ohio Environmental Council and U.S. Public Interest Research Group.

In case no. 05-1163, filed May 18, 2005, Natural Resources Defense Council.

In case no. 05-1174, filed May 27, 2005, State of Illinois.

In case no. 05-1176, filed May 27, 2005, the State of Minnesota.

Respondent

The United States Environmental Protection Agency is respondent in these consolidated cases.

Intervenors

The following parties have intervened in these consolidated cases for Respondent: Utility Air Regulatory Group, Cinergy Corp., PPL Corp., PSEG Fossil LLC, NRG Energy, Inc., Florida Power & Light Company, State of Alabama, State of Indiana, State of Kansas, State of Nebraska, State of North Dakota, State of South Dakota.

The following parties have intervened in these consolidated cases for Petitioners: Physicians for Social Responsibility, American Nurses Association, The American Public Health Association, American Academy of Pediatrics, Adirondack Mountain Club, Aroostook Band of Micmac Indians, Houlton Band of Maliseet Indians, Penobscot Indian Nation, The Passamaquoddy Tribe at Pleasant Point (Sipayik), The Passamaquoddy Tribe at Indian Township, The City of Baltimore.

Amici

The following parties appear as amici in these consolidated cases:

In support of respondent EPA: Washington Legal Foundation.

(iii) Parties to the Challenges to the EPA Clean Air Mercury Rule: 70 Fed. Reg. 28,606 (May 18, 2005)

Petitioners

The following parties appear in these consolidated cases as petitioners:

In case no. 05-1162, filed May 18, 2005, the State of New Jersey, State of California, State of Connecticut, State of Maine, Commonwealth of Massachusetts, State of New Hampshire, State of New Mexico, State of New York, Commonwealth of Pennsylvania, State of Vermont, State of Wisconsin.

In case 05-1164, filed May 19, 2005, Ohio Environmental Council, Natural Resources Council of Maine, U.S. Public Interest Research Group.

In case 05-1167, filed May 19, 2005, Natural Resources Defense Council.

In case 05-1175, filed May 27, 2005, State of Minnesota.

In case 05-1183, filed May 31, 2005, State of Delaware.

In case 05-1189, filed May 27, 2005, State of Illinois.

In case 05-1263, filed July 12, 2005, Mayor and City Council of Baltimore.

In case 05-1264, filed July 13, 2005, Southern Montana Electric Generation & Transmission Cooperative, Inc. (which has since moved for voluntary dismissal of its petition for review, January 5, 2005).

In case 05-1267, filed July 14, 2005, Chesapeake Bay Foundation, Inc., Environmental Defense, National Wildlife Federation, Sierra Club, Waterkeeper Alliance.

In case 05-1270, filed July 15, 2005, American Coal for Balanced Mercury Regulation, Alabama Coal Association, Coal Operators & Associates, Inc., Maryland Coal Association, Ohio Coal Association, Pennsylvania Coal Association, Virginia Coal Association, West Virginia Coal Association.

In case 05-1271, filed July 15, 2005, ARIPPA.

In case 05-1275, filed July 18, 2005, Utility Air Regulatory Group.

In case 05-1277, filed July 18, 2005, United Mine Workers of America, AFL-CIO.

In case 05-1280, filed July 18, 2005, Producers for Electric Reliability.

Respondent

The United States Environmental Protection Agency is respondent in these consolidated cases.

Intervenors

The following parties have intervened in these consolidated cases for Respondent: Utility Air Regulatory Group, Edison Electric Institute, State of Alabama, State of Kansas, State of Nebraska, State of South Dakota, State of North Dakota, Producers for Electric Reliability.

Amici

No parties appear as amici in these consolidated cases.

(iv) Parties to the Challenges to EPA's Final Action on Reconsideration: 71 Fed. Reg. 33,388 (June 9, 2006)

Petitioners

The following parties appear in these consolidated cases as petitioners:

In case no. 06-1211, filed June 19, 2006, the State of New Jersey, State of California, State of Connecticut, State of Delaware, State of Illinois, State of Maine, State of Minnesota, State of New Hampshire, State of New Mexico, State of New York, State of Rhode Island, State of Vermont, State of Wisconsin, the Commonwealths of Massachusetts and Pennsylvania, and the Michigan Department of Environmental Quality.

In case no. 06-1220, filed June 23, 2006, National Congress of American Indians, Little River Band of Ottawa Indians, Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Jamestown S'Klallam Tribe, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Little Traverse Bay Bands of Odawa Indians, Lower Elwha Klallam Tribe, Lummi Nation, Minnesota Chippewa Tribe, Nisqually Tribe, Swinomish Indian Tribe Community.

In case no. 06-1231, filed June 26, 2006, American Nurses Association, The American Public Health Association, American Academy of Pediatrics, Chesapeake Bay

Foundation, Inc., Conservation Law Foundation, Environmental Defense, National Wildlife Federation, Natural Resources Council of Maine, Natural Resources Defense Council, Ohio Environmental Council, Physicians for Social Responsibility, Sierra Club, U.S. Public Interest Research Group, Water Keeper Alliance.

In case no. 06-1287, filed July 26, 2006, Mayor & City Council of Baltimore.

In case no. 06-1291, filed August 8, 2006, American Coal for Balanced Mercury Regulation, Alabama Coal Association, Coal Operators and Associates of Kentucky, Maryland Coal Association, Ohio Coal Association, Pennsylvania Coal Association, Virginia Coal Association, West Virginia Coal Association.

In case no. 06-1293, filed August 8, 2006, ARIPPA.

In case no. 06-1294, filed August 8, 2006, Alaska Industrial Development and Export Authority.

Respondent

The United States Environmental Protection Agency is respondent in these consolidated cases.

Intervenors

No parties appear as intervenors in these consolidated cases.

Amici

No parties appear as amici in these consolidated cases.

(v) Circuit Rule 26.1 Disclosures for Environmental Petitioners

Chesapeake Bay Foundation. Chesapeake Bay Foundation has no parent companies, and no publicly held company has a 10% or greater ownership interest in Chesapeake Bay Foundation.

The Chesapeake Bay Foundation is a nonprofit corporation with 177,000 members, organized in Maryland and dedicated solely to restoring and protecting the Chesapeake Bay and its tributary rivers.

Environmental Defense. Environmental Defense has no parent companies, and no publicly held company has a 10% or greater ownership interest in Environmental Defense.

Environmental Defense, a nonprofit organized in New York State, represents more than 300,000 members dedicated to protecting the environmental rights of all people.

National Wildlife Foundation. National Wildlife Federation has no parent companies, and no publicly held company has a 10% or greater ownership interest in National Wildlife Federation.

National Wildlife Federation is a nonprofit corporation organized and existing under the laws of the Commonwealth of Virginia, with more than 1,000,000 members nationwide. National Wildlife Federation's mission is to inspire Americans to protect wildlife for our children's future.

Natural Resources Council of Maine. Natural Resources Council of Maine has no parent companies, and no publicly held company has a 10% or greater ownership interest in Natural Resources Council of Maine.

Natural Resources Council of Maine, a corporation organized and existing under the laws of the state of Maine, is a nonprofit membership organization dedicated to preserving the quality of the air, water, forest and other natural resources of the state of Maine, for the benefit of its people and its environment.

Natural Resources Defense Council. Natural Resources Defense Council has no parent companies, and no publicly held company has a 10% or greater ownership interest in Natural Resources Defense Council.

Natural Resources Defense Council, a nonprofit incorporated under the laws of New York State, represents 526,621 members in its efforts to restore integrity to air, land and water; defend endangered natural places; establish sustainability and good stewardship of the earth; and protect the long-term welfare of present and future generations by protecting nature.

The Ohio Environmental Council. The Ohio Environmental Council has no parent companies, and no publicly held company has a 10% or greater ownership interest in The Ohio Environmental Council.

The Ohio Environmental Council, a nonprofit corporation organized and existing under the laws of the State of Ohio, works to inform, unite, and empower Ohio citizens to protect the environment and conserve natural resources.

Sierra Club. Sierra Club has no parent companies, and no publicly held company has a 10% or greater ownership interest in Sierra Club.

Sierra Club, a nonprofit incorporated in California, has over 750,000 members committed to the protection of the wild places of the earth, the promotion of responsible uses of the earth's resources, and the protection and restoration of the quality of the natural and human environment.

United States Public Interest Research Group. United States Public Interest Research Group has no parent companies, and no publicly held company has a 10% or greater ownership interest in United States Public Interest Research Group.

United States Public Interest Research Group is a nonprofit corporation organized and existing under the laws of Washington, District of Columbia. United States Public Interest Research Group, a national organization with members around the country, is dedicated to delivering persistent, result-oriented public-interest activism that protects our environment, encourages a fair, sustainable economy, and fosters responsive, democratic government.

Waterkeeper Alliance. Waterkeeper Alliance has no parent companies, and no publicly held company has a 10% or greater ownership interest in Waterkeeper Alliance.

Waterkeeper Alliance, a nonprofit incorporated in New York State, is the international center of a network of nonprofit groups that work to protect communities, ecosystems, and water quality; promote watershed protection; and advocate for its members.

(B) Rulings Under Review

Environmental Petitioners in these consolidated cases seek review of final actions by EPA:

1. A rule entitled "Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the Section 112(c) List," 70 Fed. Reg. 15,994 (March 29, 2005) [JA ___-____].

2. A rule entitled "Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units," 70 Fed. Reg. 28,606 (May 18, 2005) [JA ___-___].

3. A rule entitled "Revision of December 2000 Clean Air Act Section 112(n) Finding Regarding Electric Utility Steam Generating Units; and Standards of Performance for New and Existing Electric Utility Steam Generating Units: Reconsideration, Final Rule," 71 Fed. Reg. 33,388 (June 9, 2006) [JA ___-____].

(C) Related Cases

The matter on review has not been previously heard in this or any other court. There are no related cases pending before the Court.

DATED: January 12, 2007

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Clean Air Act, 42 U.S.C. §§ 7401-7671q

*Authorities upon which we chiefly rely are marked with asterisks.

REGULATIONS

FEDERAL REGISTER

LEGISLATIVE HISTORY

OTHER AUTHORITIES

GLOSSARY

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

112(c) List	List of Sources Subject to Regulation Pursuant to 42 U.S.C. §7412
BART	Best Available Retrofit Technology, 42 U.S.C. §§7491(b)(2), (g)(2)
Class I area	Certain national parks and national wilderness areas, international parks, national memorial parks, 42 U.S.C. §7472(a).
CAA, the Act	Clean Air Act, 42 U.S.C. §7401 et seq.
CAIR	Clean Air Interstate Rule, 70 Fed. Reg. 72,268 (November 22, 2005)
CAMR	Clean Air Mercury Rule, 70 Fed. Reg. 28,606 (May 18, 2005)
Delisting Action/Rule	70 Fed. Reg. 15,994 (March 29, 2005)
EPA	United States Environmental Protection Agency
Government Petitioners	State and municipal Petitioners
HAPs	Hazardous air pollutants, 42 U.S.C. §7412(a)(6), §7412(b)
IQ	Intelligence quotient
MACT	Maximum achievable control technology, 42 U.S.C. §7412(d)
NOAA	National Oceanic and Atmospheric Administration
NO_x	Nitrogen oxides
NRC	National Research Council
NSPS	New Source Performance Standards, 42 U.S.C. §7411(a)
Power plant	Electric utility steam generating facility

PSD	Prevention of Significant Deterioration, 42 U.S.C. §§7470-7492
Reconsideration Rule	71 Fed. Reg. 33,388 (June 9, 2006)
Reconsideration-RTC	EPA Response to Significant Public Comments on Reconsideration (May 31, 2006)
SO_2	Sulfur dioxide

JURISDICTIONAL STATEMENT

(A) Agency. Respondent U.S. Environmental Protection Agency ("EPA") has jurisdiction to implement the Clean Air Act ("CAA" or "Act"). 42 U.S.C. §7601.

(B) Court of Appeals. This Court has jurisdiction to review final EPA actions (including promulgation of national regulations) challenged in this proceeding. 42 U.S.C. §7607(b)(1).

(C) Timeliness. Each consolidated petition addressed herein was filed within sixty days after publication in the Federal Register of the challenged final actions and therefore all are timely.

Statement of Issues Presented.

1. Whether EPA acted unlawfully and arbitrarily by removing coal- and oil-fired electric utility steam generating units ("power plants") from the CAA §112(c) list of industries requiring regulation under §112(d) for their hazardous air pollutants ("HAP"), without first making the determinations required by §112(c)(9).

2. Whether EPA acted unlawfully and arbitrarily by attempting to "undo" its determination that §112(d) regulation of power plants is "appropriate and necessary," by relying on a substitute §111(d) mercury rulemaking and coincidental mercury reductions from a nitrogen oxide and sulfur dioxide trading program under §110(a)(2)(D).

3. Whether EPA acted unlawfully and arbitrarily by adopting a mercury trading rulemaking under §111(d).

Statutes and Regulations. Pertinent statutes and regulations appear in the addendum to Government Petitioners' brief.

Statement of the Case. These petitions seek vacatur of three final agency actions that remove power plants from the list under CAA §112(c) requiring the maximum achievable reductions of toxic air emissions from listed industries, and substitute an illegal cap-and-trade program for mercury alone.

I. FACTUAL AND PROCEDURAL BACKGROUND

The electric power industry is among the nation's largest domestic emitters of toxic air pollution and the single largest industrial emitter of mercury air pollution. Nationwide, approximately 1,100 coal-fired units at more than 450 existing power plants emit 48 tons of mercury into the air each year. 69 Fed. Reg. 4,652, 4,691 (Jan. 30, 2004); 65 Fed. Reg. 79,825, 79,827 (Dec. 20, 2000). Power plants also emit tens of thousands of tons of other air toxics, including hydrogen chloride, arsenic and lead. 65 Fed. Reg. at 79,828.

Mercury contamination of air and watersheds imposes devastating impacts on environmental and human health. According to EPA, over 40 states had issued mercury fish consumption advisories in 2003 urging certain citizens – including children and women who are pregnant, may become so, or are nursing – to avoid or limit specific kinds of fish. In 21 of these states the mercury warnings apply statewide.[1] Mercury advisories blanket significant segments of our recreational waterways. Some 13,068,990 lake acres and 766,872 river miles (approximately 32 percent and 24 percent of

[1] U.S. EPA, *Fact Sheet: National Listing of Fish Advisories* (Aug. 2004), available online at http://www.epa.gov/waterscience/fish/advisories/factsheet.pdf, cited in OAR-2002-0056, Item 5460, Exh. E, p. 7 [JA __].

nationwide totals, respectively) were subject to advisories for mercury contamination in 2003.[2]

The threats posed by toxic chemicals in power plant air emissions are both serious and long-lasting. Mercury is deposited on soil and in water, where it persists and transforms chemically into a highly toxic form (methylmercury) that bio-accumulates in fish.[3] Human exposure to mercury most commonly occurs through the consumption of contaminated fish. Mercury is particularly toxic to developing fetuses and young infants exposed during periods of rapid brain development.[4] Hundreds of thousands of children born in the U.S. each year are at risk of serious harm from exposure to high maternal blood-mercury levels resulting from contaminated fish consumption.[5] Mercury's risks include delayed developmental milestones, reduced neurological test scores and, at high doses, cerebral palsy.[6] Significant evidence also links methylmercury exposure to cardiovascular disease in adults.[7] A large body of scientific literature exists documenting numerous risks to wildlife.[8]

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[2] *Id.*
[3] U.S. EPA, *Mercury Study Report to Congress*, EPA-452/R-97-005 (December 1997) ("Mercury Report to Congress"), Vol. I: Executive Summary, A-92-55, Item I-A-126, at 2-3 to 2-6 & Vol. III: Fate and Transport of Mercury in the Environment, A-92-55, Item I-A-21, at 2-12 to 2-14 [JA__].
[4] National Research Council, *Toxicological Effects of Methylmercury* (prepublication copy July 2000) ("NRC Report"), A-92-55, Item I-A-137, at 12-14, 44, 60-61 [JA__].
[5] *See* NRDC *et al.*, Pet. for Reconsideration, OAR-2002-0056, Item 6270, at 14 n.8 (citing Kathryn R. Mahaffey *et al.*, *Blood Organic Mercury and Dietary Mercury Intake: National Health and Nutrition Examination Survey, 1999 and 2000*, 112 Envt'l Health Persp. 562 (Apr. 2004) & Mahaffey, *Methylmercury: Epidemiological Update*, Presentation at Fish Forum 2004) [JA__].
[6] NRC Report at 3, 12-14.
[7] U.S. EPA, *Regulatory Impact Analysis of the Clean Air Mercury Rule: Final Report*, Appendix C (March 2005), OAR-2002-0056, Item 6201 [JA__].
[8] *See generally* Biodiversity Research Institute, *Mercury Connections: The Extent and Effects of Mercury Pollution in Northeastern North America*, at 12-13, 16, 18 & 20

The economic impact of this mercury contamination is significant: total costs of lost U.S. population IQ points due to *in utero* exposure to methylmercury from all sources has been estimated at $3.1 billion to $19.9 billion per year.[9] By contrast, estimated benefits from $86 million to $4.9 billion per year could accrue from the avoided cardiovascular events and premature mortality from even a modest 70 percent cut in power plant mercury.[10]

Studies before EPA during this rulemaking indicate that local mercury air pollution contributes significantly to the creation of areas of high mercury concentrations ("hotspots") in nearby waterways.[11] For example, in Florida and Wisconsin, reducing incinerator mercury emissions rapidly lowered mercury levels in local fish.[12] Research done in the Chesapeake Bay watershed, indicates that coal-fired power plants have the greatest impact on mercury levels in local waters rather than more distant waters.[13] An EPA-sponsored study found that approximately 70 percent of mercury collected at a

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(2005) (documenting high mercury levels in loons, forest songbirds and otters), OAR-2002-0056, Item 6490.13 [JA__].

[9] G. Rice & J.K. Hammitt, Harvard University Center for Risk Analysis, *Economic Valuation of Human Health Benefits of Controlling Mercury Emissions from U.S. Power Plants* (2005) ("Harvard Risk Center Study"), OAR-2002-0056, Item 5749 [JA__].

[10] Letter from Arthur Marin, Northeast States for Coordinated Air Use Management ("NESCAUM"), to EPA Air Docket OAR-2002-0056, item 5747, at 4 (Feb. 22, 2005) (summarizing findings of Harvard Risk Center Study).

[11] *See* Gerald J. Keeler et al., *Sources of Mercury Wet Deposition In Eastern Ohio, USA*, 40 Evtl. Sci & Tech. 5874-5881 (Sept. 2006) ("Steubenville Study"), Appendix B of Decl. of William M. Auberle, P.E., attached hereto as Addendum I; *see also* OAR-2002-0056, Items 6742-6752 (Preliminary Steubenville Study results before EPA during the rulemaking).

[12] *See* Comments of Hubbard Brook Research Foundation, OAR-2002-0056, Item 2038, at 13-16 (citing Atkeson et al. 2002 & Hrabik and Watras 2002) [JA__].

[13] *See* NRDC *et al.*, Pet. for Reconsideration, at 54-55 (citing Mark Cohen, NOAA, *Modeling the Fate and Transport of Atmospheric Mercury in the Chesapeake Bay Region* (May 17, 2004) & Mark Cohen, NOAA, *Modeling the Deposition and Transport of Atmospheric Mercury to the Great Lakes (and the Chesapeake Bay)* (Jun 27-Jul. 2, 2004)) [JA__].

monitoring station in Steubenville, Ohio, located downwind from several coal combustion facilities (including power plants), was attributable to air emissions from those sources.[14]

The 1990 Clean Air Act Amendments.

Frustrated by EPA's decades-long failure to control air toxics, Congress amended the Clean Air Act in 1990. *See Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 633-634 (D.C. Cir. 2000). Abandoning its earlier approach, Congress listed more than 180 hazardous air pollutants in the text of the statute, 42 U.S.C. §7412(b)(1), and required EPA to list all industrial categories with "major" sources of HAPs by November 1991, *id.* §7412(c)(1). Congress said EPA "shall" regulate all listed major and "area" source categories under §112(d), *id.* §7412(c)(2), and must establish emission standards for each HAP emitted. *Id.* §7412(d)(1)-(2); *see Nat'l Lime*, 233 F.3d at 634 ("clear statutory obligation to set emission standards for each listed HAP").

For each category of major sources, such as power plants, EPA's standards must require at each major source in the category the "maximum" degree of reduction in each emitted HAP that is "achievable" for the category – an approach known as "Maximum Achievable Control Technology" or "MACT."[15] 42 U.S.C. §7412(d)(2); *see Nat'l Lime*, 233 F.3d at 629. Section 112 also establishes strict schedules for EPA to issue MACT standards for listed categories and for source compliance. 42 U.S.C. §§7412(c)(5), (e)(1),

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[14] Steubenville Study at 5874, 5877 (Table 2), Appendix B of Auberle Decl. ; OAR-2002-0056, Items 6742-6752 (preliminary Steubenville Study results).

[15] The record in this case shows that a MACT standard would require approximately 90 percent reductions from current levels of power plant mercury emissions and similarly protective limits for other HAPs. Praveen Amar, Ph.D & P.E., *et al.*, NESCAUM, *State and Local Air Pollution Control Officials' Recommendations for Utility MACT Standards*, at 14-24 (Oct. 2002), OAR-2002-0056, Item 2886 [JA__].

(i)(3)(A). New major sources of HAPs generally must comply with MACT standards immediately, *id.* §7412(i)(1), and existing sources must comply with MACT standards "as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard," *id.* §7412(i)(3)(A).

Congress required EPA within 3 years of November 1990 to "perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter," and to report the results of that study to Congress. *Id.* §7412(n)(1)(A). Congress further declared that EPA "shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study." *Id.*

EPA failed to include power plants on the initial list of source categories containing major sources and missed statutory deadlines for issuing the required studies; by the late 1990s EPA had largely refused to deal with this very large hazardous pollution source.[16] In 1998, EPA produced its utility study.[17] Noting the neurotoxicity and bioaccumulative nature of mercury and referencing its "complete assessment of the health effects, exposures, risks, ecological effects, sources, and control technologies," EPA concluded that there was "a plausible link between anthropogenic releases of mercury from industrial and combustion sources in the United States and methylmercury

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[16] EPA was sued for leaving power plants off the initial list, and agreed – in settling that litigation – to undertake the study and make the regulatory determination by a date certain. Settlement Agreement, *NRDC v. EPA*, No. 92-1415 (D.C. Cir. Oct. 26, 1994).

[17] U.S. EPA, *Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units – Final Report to Congress* ("Utility HAPs Study"), Vol. I, at pp. 7-1 & 7-45, A-92-55, Item I-A-90 [JA__].

in fish" and that "mercury emissions from utility units may add to the existing environmental burden."[18]

The EPA Listing Decision.

On December 20, 2000, EPA belatedly made its regulatory determination concerning HAP emissions from power plants.[19] EPA concluded, *inter alia*, that coal-fired power plants emit a significant number of HAPs on the §112(b) list and that these toxic air emissions would increase with projected growth in the coal-fired utility industry.[20] EPA confirmed that utility units are the largest source of anthropogenic mercury in the country, that mercury can have serious toxicological effects on both wildlife and humans, and that serious public health impacts could result from HAPs (such as nickel) emitted by oil-fired units.[21] EPA concluded that it was "appropriate and necessary" to regulate coal- and oil-fired power plants under §112(n)(1)(A).[22] The agency found that "[t]here are a number of alternative control strategies that are effective in controlling some of the HAP emitted from electric utility steam generating units,"[23] and EPA added coal- and oil-fired power plants to the §112(c) list of major source categories of HAPs for which the agency must develop §112(d) control standards. 65 Fed. Reg. at 79,826, 79,830-31.

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[18] *Id.* (citing Mercury Report to Congress, *supra* note 3).
[19] 65 Fed. Reg. 79,825.
[20] *Id.* at 79,829.
[21] *Id.* at 79,830.
[22] *Id.*
[23] *Id.* at 79,830. EPA's fact sheet accompanying the regulatory determination, noted that such controls are cost-effective: most power plant mercury could be eliminated "at a cost far lower than 1 percent of utility industry revenues." Comments of Clean Air Task Force ("CATF") *et al.* (June 29, 2004), II-61 to 62, OAR-2002-0056, Item 3459 [JA __].

EPA was required by settlement agreement (*supra* note 16) to propose MACT standards by 2003 and adopt final standards by 2004, later modified to early 2005. Existing power plants were to be subject to protective MACT standards covering all listed HAP emissions by no later than 2008. *See* 42 U.S.C. §7412(i)(3)(A).

EPA 2004/2005 Rulemaking Process.

EPA initially assembled a Working Group of governmental representatives, scientists, environmental groups, and industry officials to begin the process of crafting the required §112 MACT standards. After holding 14 meetings between August 2001 and March 2003, EPA abruptly disbanded the task force without explanation. "It was a huge decision that demonstrated that [EPA's] desire wasn't to regulate mercury in the way that Congress and a federal advisory committee and other stakeholders had anticipated," said the executive director of a nonpartisan association of state air quality officials. [24]

Nine months later, EPA proposed to abandon §112 MACT protections in favor of a mercury pollution trading scheme under a different statutory provision, CAA §111. This scheme, later the "Clean Air Mercury Rule" ("CAMR"), authorizes individual sources to trade pollution allowances in order to meet an aggregate target.[25] The initial phase of the two-phase program proposed by EPA was expressly tied to the amount of mercury that EPA expected would be emitted by coal-fired power plants after a separate non-mercury control program, the so-called "Clean Air Interstate Rule" ("CAIR"), went into effect.[26] Although EPA also nominally proposed a MACT standard, EPA's

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[24] Comments of Waterkeeper Alliance (June 15, 2004), at 21 & nn.15-17, OAR 2002-0056, Item 2575 [JA __] (quoting from Eric Pianin, *Proposed Mercury Rules Bear Industry Mark*, Washington Post, December 30, 2003, at A17).
[25] 69 Fed. Reg. 4652 (Jan. 30, 2004) (publishing proposal signed on December 15, 2003).
[26] *Id.* at 4698 & n.15.

Inspector General found that "EPA senior management instructed EPA staff to develop a standard for mercury that would achieve the same results as CAIR – emissions of 34 tons annually – instead of basing the standard on an unbiased determination of what the top performing units were achieving in practice."[27] In other words, EPA decided as a policy matter it did not want MACT limits for power plants, but instead would base standards on the estimated mercury reductions coincident to a different, non-mercury related program effective only in 28 eastern states.[28]

Investigations further revealed that EPA's "proposal to regulate mercury emissions from coal-burning power plants was written using key language provided by utility lobbyists,"[29] including virtually verbatim text from a memo prepared by lawyers for Latham & Watkins, the former employer of key EPA political officials developing the rule.[30]

In 2005, EPA finalized two rules, one removing power plants from the §112(c) list of MACT-regulated sources (the "Delisting Rule"), 70 Fed. Reg. 15,994 (Mar. 29, 2005), and the other establishing CAMR, 70 Fed. Reg. 28,606 (May 18, 2005). In its Delisting Rule, EPA reversed its 2000 determination that §112 regulation was "appropriate and necessary," and on that basis alone removed coal-fired power plants from the §112(c) list. 70 Fed. Reg. at 28,608 (delisting power plants "[b]ased solely on

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[27] U.S. EPA, Office of Inspector General, *Additional Analyses of Mercury Emissions Needed Before EPA Finalizes Rules for Coal-Fired Electric Utilities*, at 16 (Feb. 3, 2005), OAR 2002-0056, Item 5686 [JA__].

[28] 70 Fed. Reg. 25,162 (May 12, 2005) (finalizing CAIR).

[29] Comments of CATF and NRDC (Jan. 3, 2005), at 20 n.47 [JA __] (quoting Tom Hamburger & Alan C. Miller, *Mercury Emissions Rule Geared to Benefit Industry, Staffers Say*, Los Angeles Times, Mar. 16, 2004, at A1).

[30] Comments of CATF *et al.* (June 29, 2004), at p. II-9 n.23, OAR-2002-0056, Item 3459 [JA __] (comparing Latham & Watkins memorandum and proposal).

the revised finding"). By doing so, EPA opened the door for CAMR, which in final form establishes a two-phase, nationwide pollution target of 38 tons in 2010 and 15 tons in 2018, and permits sources to bank pollution credits in order to avoid making later reductions – delaying ultimate attainment of the 15-ton target until many years after 2018. *Id.* at 28,606, 28,629-30. The final rule claimed that CAMR – this §111 mercury trading program – rendered regulation under §112 no longer "necessary."

EPA also justified the final rule – for the first time, without notice or opportunity for public comment – with an argument that §112 regulation is not "appropriate" either, because of the incidental mercury reductions due to CAIR (the separate regulatory program that established state budgets for nitrogen oxides ("NO_x") and sulfur dioxide ("SO_2") reductions in the eastern U.S.) or, separately, those due to CAMR. EPA based this decision on its estimate that the remaining mercury pollution from power plants would not – if one ignored all other mercury pollution – cause public health problems.

CAMR and the Delisting Rule closely tracked legislation to amend the Act that the administration attempted to steer through Congress between 2002 and 2005, which would have repealed the MACT program for power plants and substituted a mercury trading scheme nearly identical to CAMR.[31] The bill failed to pass either body of Congress, however, suffering an unsuccessful Senate Environment Committee vote on March 9, 2005, with no vote ever scheduled in the House.[32] EPA signed CAMR and the Delisting Rule six days after the bill failed to pass out of the Senate committee.

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[31] Clear Skies Act, S. 131, 109th Cong. (2005).
[32] *See* Shankar Vedantam, *Senate Impasse Stops Bush's 'Clear Skies' Measure*, Washington Post, March 10, 2006, at A4.

Numerous parties filed petitions for review in this Court challenging both final rules. Several citizen groups and States also petitioned for administrative reconsideration of both rules. Having denied the public the chance to weigh in on its new approach, EPA had no choice but to grant these petitions and allow additional public comment. In response, EPA issued a third rule on June 9, 2006 (the "Reconsideration Rule"), substantially affirming the final rules issued in 2005. 71 Fed. Reg. 33,388. Multiple petitioners also challenged this rule and, by order dated August 21, 2006, this Court consolidated challenges to all rules.

II. SUMMARY OF ARGUMENT

EPA's delisting unlawfully avoids §112 MACT standards by circumventing the clear requirements of CAA §112(c)(9), which became applicable to coal- and oil-fired utilities from the moment EPA added the industry to the §112(c) list in 2000. It is uncontested that EPA failed to make either of the §112(c)(9) determinations. Instead EPA advances several different theories claiming authority to "revisit" the regulatory determination it made in December 2000, and then undo the listing decision without satisfying §112(c)(9). In this fashion, EPA evades its obligation to issue a MACT standard for the industry. EPA's arguments are unlawful and arbitrary and capricious.

Other statutory requirements bar EPA from unmaking its prior listing decision. Section 111 – one of the provisions EPA relies on to address mercury pollution (but only mercury, and only weakly) – is not a lawful mechanism to control power plant HAPs. EPA's §111 rule contravenes the statute both because it regulates HAP emissions and because it does so through an emissions trading approach that fails to achieve the

"continuous emission reductions" from all covered source and states as required by the Act.

Nor may EPA undo its regulatory determination or listing decision in reliance on far later and uncertain mercury reductions resulting from other pollution programs, because this reliance upsets Congress's expeditious schedule for securing public health protections against power plant HAP emissions.

III. STANDING

Petitioning organizations represent the interests of their over 2 million members, and their various organizational interests in environmental and public health protections, particularly the protection and improvement of air and water quality that results from reduced emissions of toxic air emissions. The attached declarations detail these interests (Addendum II).

Environmental Petitioners' members live, work, and recreate in communities where coal- and oil-fired power plants are located. For this reason, Petitioners' members are exposed directly to the HAPs emitted by such plants, including arsenic, cadmium, lead, and dioxins, and to the accompanying risk of adverse health effects including, *inter alia*, carcinogenic effects. In particular, these members are exposed to mercury emitted by coal-fired units and nickel emitted by oil-fired units. 65 Fed. Reg. at 79,827.

Mercury pollution deposits nearby its sources, as shown by EPA-sponsored research demonstrating that up to 70 percent of the mercury deposited at a monitoring site in the Ohio River Valley can be traced back to local coal-combustion. Auberle Decl. ¶ 12 (Addendum I). As detailed *supra*, mercury contaminates freshwater fish in the majority of states and is linked with significant adverse health effects in humans. Petitioners'

members include women of child-bearing age and nursing mothers who have eliminated from their diets freshwater fish (which would otherwise be an excellent source of protein) due to mercury contamination. Petitioners' members are also parents, guardians, uncles, and aunts who have reduced or eliminated freshwater fish from their children's diets because of mercury contamination. Petitioners' members include anglers, who have curtailed their freshwater fishing, have curtailed freshwater fishing instruction to their children, and/or no longer consume their catch because of mercury contamination in local freshwater fish.

The challenged rules significantly under-control power plants by removing them from the list of industries for which MACT standards must be developed, by failing to include standards for any HAP other than mercury, by delaying substantial reductions in mercury for nearly twenty years, and by substituting instead a weakened cap-and-trade program for coal-fired power plant mercury emissions. Furthermore, because CAMR does not reduce mercury emissions from each coal-fired power plant, but is even projected by EPA to increase mercury from many plants, the rule fails to mitigate mercury hot spots. Auberle Decl. ¶¶ 12, 14, 15. As a result, the challenged regulations prolong and potentially increase Petitioners' members' direct exposure to toxic air pollution, including mercury, from coal- and oil-fired plants and the resulting threat of adverse health effects. If the challenged standards are vacated, the utility industry will be restored to the list of industries for which MACT regulation is required, and EPA's mandatory duty to issue MACT standards for all HAPs emitted by power plants would resume. *Izaak Walton League of Am. v. Johnson*, 400 F.Supp.2d 38, 44 (D.D.C. 2005). This issuance of MACT standards would lead to significantly lower toxic emissions from

the industry on a faster timetable than the EPA regulations. MACT regulation would reduce several HAPs by approximately 90 percent or more in 3 years. *See supra* note 17. EPA's rule, by contrast, will only achieve 69 percent reduction in mercury alone, and will not be fully implemented until after 2020. Implementing MACT thus seriously lowers the risk of significant adverse health effects to Petitioners' members.

IV. ARGUMENT

A. EPA's Removal of Coal- and Oil-Burning Power Plants from the CAA §112(c) List Contravenes the Statute.

1. The Clean Air Act's Plain Text Demonstrates that EPA May Not Delist an Industry Without First Making the Determinations Required by §112(c)(9).

EPA listed coal- and oil-burning power plants under §112(c) in December 2000. 65 Fed. Reg. at 79,826; *see also* 67 Fed. Reg. 6521, 6524 (Feb. 12, 2002) (including such units on regulatory list). Once an industrial source category is listed, the Act contains only one provision for removing it from the §112(c) list: §112(c)(9). Section 112(c)(9) states that EPA may delete "any source category" upon making either or both of the following findings, "as applicable:"

> (i) In the case of hazardous air pollutants emitted by sources in the category that may result in cancer in humans, a determination that no source in the category . . . emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source . . . .
>
> (ii) In the case of hazardous air pollutants that may result in adverse health effects in humans other than cancer or adverse environmental effects, a determination that emissions from no source in the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source.

42 U.S.C. §7412(c)(9)(B). By its plain terms, the law does not authorize EPA to delist "any source category" without first making these demonstrations.[33] No other language in §112(c)(9) or elsewhere in the Act exempts the utility industry, once it has been listed, from §112(c)(9)'s delisting restrictions.[34]

EPA does not contest that it has removed power plants from the §112(c) list without satisfying the §112(c)(9) delisting determinations. 70 Fed. Reg. at 16,033. On this basis alone, EPA's delisting violates the statute. *See Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) ("When a statute requires an agency to make a finding as a prerequisite to action, [the agency] must do so.").

2. Nothing in §112(n) Makes §112(c)(9) Inapplicable to the Utility Industry.

Although §112(n) does not exempt power plants from §112(c)(9)'s delisting requirements, EPA argues that it does so silently by creating "an entirely different structure and predicate for assessing whether Utility Units should be listed for regulation under section 112." 70 Fed. Reg. at 16,032 (emphasis added). EPA attempts to infer from the study provisions of §112(n)(1) authority to avoid the §112(c)(9) text.

"[T]o avoid a literal interpretation at *Chevron* step one, [EPA] must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). Here, EPA's reliance on §112(n)(1)(A) does not remotely meet the *Engine Mrfs.* showing, as that section

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[33] *See Dep't of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning").

[34] Separately, §112(c)(9)(A) authorizes EPA to delist source categories that do not emit any listed HAPs, demonstrating that Congress knew how to and did craft only narrowly tailored delisting authority. 42 U.S.C. §7412(c)(9)(A).

merely provides a process for deciding whether to regulate utility units under §112. Section 112(n)(1)(A) does not even address, far less authorize, the removal of power plants from the §112(c) list once EPA has placed them there. Such silence cannot show that Congress did not mean or could not have meant what §112(c)(9) says. Thus, once EPA made the regulatory determination and listing decision in December 2000, §112(c)(9) controlled any potential delisting and §112(n)(1)(A) became irrelevant.

EPA recognized that §112(c)(9) would control the delisting of utilities when it considered including utilities on the initial list of source categories in 1991:

> [I]t would require an action to delete the utility categories from the list if the section 112(n)(1) study concludes that these categories do not warrant regulation under section 112. Such a deletion action would be subject to the risk-based findings required under section 112(c)(9).

56 Fed. Reg. 28,548, 28,551 (June 21, 1991) (emphasis added). The logic underlying EPA's 1991 concession applies equally now, and the agency has provided no reason to find otherwise.

3. Nothing in §112(e)(4) Shows that §112(c)(9) Does Not Apply to the Utility Industry or Does Not Mean What it Says.

Section 112(e)(4) provides that, notwithstanding the Act's review provisions, judicial review of a source category listing decision is unavailable until emissions standards are issued. 42 U.S.C. §7412(e)(4). As a constraint on judicial review, this language does not authorize EPA to do anything, much less reverse its regulatory finding or delist power plants outside of §112(c)(9). Nor does it create any ambiguity as to the legal consequences of any listing decision, including for power plants.

Indeed, §112(e)(4) clearly states that a listing decision is not "final agency action subject to judicial review" in the limited sense that a court may not review it until the final emissions standards are issued for the category. 42 U.S.C. §7412(e)(4). It does not

say, as EPA appears to suggest (70 Fed. Reg. at 16,033/1), that other provisions of the Act, including §112(c)(9), do not apply to an industrial category until such time as judicial review is available.

Just as Congress can determine when judicial review of agency action is appropriate, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990), as here, Congress may also impose requirements on EPA before such review. EPA offers no support for its view that §112(c)(9) is not such a requirement. If delaying judicial review authorized EPA to revoke listing decisions at any time under the agency's "inherent authority," 70 Fed. Reg. at 16,033, the agency would never have to meet §112(c)(9)'s requirements. *See American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) ("EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area.").

EPA's current position is also directly at odds with its acknowledgment that the 2000 listing decision triggered specific legal consequences under §112. EPA has acknowledged, for example, that listing triggered §112(c)(2)'s requirement to issue §112(d) MACT standards for power plants. 67 Fed. Reg. 6521, 6524, 6535 n.b (Feb. 12, 2002). Similarly, EPA's own regulations provide that the listing decision triggered §112(g)(2)(B)'s requirement that sources obtain case-by-case MACT standards as a precondition for new plant construction. 40 C.F.R. §63.40(c) (new source MACT triggered at "such time as [electric utility] units are added to the source category list pursuant to section 112(c)(5) of the Act"); *see also* Memorandum from John Seitz, U.S. EPA, to Regional Air Office Directors at 1 (Aug. 1, 2001) (Exh. 3 to Pet's Motion to Stay) [JA__]. Indeed EPA agrees that its listing decision triggered §112(e)(4). 70 Fed.

Reg. at 15,996. Section 112(c)(9) is no different from the other requirements of §112; it applies when a source category – any source category, without limitation – is listed.

4. EPA Cannot Delist Categories by Just Declaring that the Original Listing Decision Was a Mistake.

EPA last argues that it can avoid §112(c)(9)'s delisting requirements whenever it decides that "the source category at issue did not meet the statutory criteria for listing at the time of listing." 70 Fed. Reg. at 16,033. Where Congress has spoken to the particular issue – as it has in §112(c)(9) – an agency has no inherent authority to avoid the Act simply by asserting a mistake has been made. *American Methyl Corp. v. EPA,* 749 F.2d 826, 835 (D.C. Cir. 1984). Because §112(c)(9) contains no exception, EPA's argument merely seeks to elevate a policy preference – the desire not to regulate power plants under §112(d) – above the unambiguously expressed intent of Congress. *See Engine Mfrs. Ass'n*, 88 F.3d at 1089 (EPA cannot "avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.").

EPA's interpretation not only reads into §112(c)(9) an exception that does not exist, but also leads to absurd results. Section 112(c)(3) requires EPA to list categories of area sources based on its conclusions about the threat they present to public health and the environment. 42 U.S.C. §7412(c)(3).[35] In this regard, it is analogous to §112(n)(1)(A), which requires EPA to decide whether to regulate power plants based on its consideration of the public health hazards they cause. *Id.* §7412(n)(1)(A). If EPA could, as it suggests, delist power plants just by claiming that its original listing decision

[35] In accordance with §112(c)(3)'s criteria, EPA has listed 70 categories of area sources. *See Sierra Club v. Johnson*, 444 F. Supp.2d 46, 49 (D.D.C. 2006).

was erroneous, it could also delist any area source category at any time without meeting §112(c)(9)'s delisting requirements – an outcome that Congress expressly prohibited. *Id.* §§7412(c)(9)(B)(i)-(ii) (applying §112(c)(9) to area source delistings); *see New York v. EPA*, 413 F.3d 3, 39 (D.C. Cir. 2005) (statutes must be construed so that "if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant") (internal citations omitted).

Requiring EPA to satisfy the §112(c)(9) requirements whenever it removes a category from the §112(c) list is both consistent with the Act's text and reasonable. As noted above, the 1990 changes to §112 were animated largely by Congressional frustration with EPA's sluggish pace regulating air toxics. It is therefore unsurprising that the law makes the listing of source categories a simple process but sets a high bar for delisting.

Finally, it is irrelevant that EPA has previously delisted categories without following §112(c)(9) merely by determining that they did not contain any major sources. 70 Fed. Reg. at 16,033. It is undisputed that the utility industry contains major HAP sources, and in any event EPA's prior practice does not alter the plain meaning of §112(c)(9). *See F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 598 (D.C. Cir. 1996) ("[W]e do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation.").

* * * * *

Because EPA failed to comply with the clear requirements of §112(c)(9), its delisting is unlawful and must be vacated.

B. EPA Has Illegally Undone its Regulatory Determination.

EPA posits that it can simply undo its earlier listing decision and §112(n)(1)(A) regulatory determination by now asserting that §112 regulation of the utility industry is neither "appropriate" nor "necessary." 70 Fed. Reg. at 16,000-01. Specifically, EPA argues that CAMR (enacted under §111(d)) or, alternatively, CAIR (enacted under §110(a)(2)(D)) can lawfully supplant §112 regulation of utility mercury emissions and thereby obviate the need for §112 regulation. EPA's reliance on CAMR and CAIR as surrogates for §112 regulation is unlawful and arbitrary. Moreover, the §111(d) CAMR approach is itself unlawful.

1. The Plain Language of §111(d) Precludes Regulation of Power Plant HAPs.

The CAA Amendments of 1990 contain two provisions prohibiting HAP regulation under §111(d) – one originating in the House and one in the Senate. The Statutes at Large, which EPA admits control here,[36] reflect these twin provisions in parentheses: §111(d) applies to "any air pollutant … which is not included on a list published under section 7408(a) (or emitted from a source category which is regulated under section 112) [House amendment] (or 112(b) [Senate amendment])." Clean Air Act Amendments, Pub. L. No. 101-549, §§ 108, 302, 104 Stat. 2399, 2467, 2574 (1990). Thus, the text of §111(d)(1)(A) makes clear that EPA may not set standards for a pollutant that is "emitted from a source category which is regulated under section 112" or included on the §112(b) list of hazardous air pollutants. *Id.* Mercury is a HAP emitted

[36] *See* 70 Fed. Reg. at 16,030.

by source categories regulated under §112[37] and is on the §112(b) list. Therefore, EPA may not set §111 standards for mercury.

Indeed, EPA itself rejected §111 as a lawful mechanism to control mercury from power plants when the agency listed power plants under §112 in 2000. *See* Letter from Bob Perciasepe, former Assistant Administrator in EPA's Office of Air and Radiation, to EPA (June 28, 2004), OAR-2002-0056, Items 3343 & 3344 [JA__] (EPA in 2000 "concluded firmly that it was . . . unlawful" to regulate power plant HAP emissions under §111). Significantly, EPA does not dispute or even respond to these comments.

Rather than follow this straightforward reading, EPA now manufactures HAP authority under §111(d) by attempting to exploit a non-substantive difference between the two amendments to §111. It is undisputed that the Senate amendment bars §111 regulation of HAPs. 70 Fed. Reg. at 16,031/2-3. But EPA argues that the House amendment can be read to allow §111(d) standards for HAPs listed under §112(b) – in direct conflict with the Senate ban – and bars them only with respect to particular industrial categories already regulated under §112, on the theory that "a" source category does not mean "any" source category. 70 Fed. Reg. at 16,031/3-16,032/1. EPA then reasons that because it has (unlawfully) delisted power plants, they are not regulated under §112. To complete its evasion of §111(d), EPA then argues that because its preferred reading of the House version and the undisputed meaning of the Senate version conflict, the Clean Air Act is ambiguous and the agency is free to choose whichever interpretation it prefers. *Id.*

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[37] *See* 71 Fed. Reg. 70,651, 70,652-53, 70,660-61 (Dec. 6, 2006) (§112 mercury standards for industrial and commercial boilers); 68 Fed. Reg. 70,904, 70,920 (Dec. 19, 2003) (§112 mercury standards for mercury cell chlor-alkali plants).

EPA's attempt to fabricate and then exploit a non-existing conflict must be rejected. Read together – as they must be, since both appear in the Statutes at Large – the House and Senate versions make clear that Congress did not intend EPA to set §111(d) standards for any §112 HAPs emitted by power plants. Indeed, that is the only reading that comports with both versions individually and does not create a conflict. A court must interpret a statute "'as a symmetrical and coherent regulatory scheme,' . . . and 'fit, if possible, all parts into an harmonious whole.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal citations omitted).

EPA's alternative reading of "a source category" refuses to give "a" its plain meaning of "any," actually strives to create internal conflict between the two amendments, and then renders the Senate Amendment void. *See New York v. EPA*, 413 F.3d at 39 (statutes must be construed so that "if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"). Reading the two amendments congruently, by contrast, would comport with EPA's own acknowledgment that the House amendment can be read to apply to any source category and prohibit use of §111. 70 Fed. Reg. at 16,031/2.

Other sections of the 1990 Amendments affirm that Congress knew how to craft variances from the plain prohibition on using §111 to regulate listed HAPs. Sections 129 and 112(n)(5), both enacted in 1990, expressly permit §111 regulation for select HAPs and select HAP-emitting sources. 42 U.S.C. §§7429(a)(1)-(2) (directing EPA to regulate identified HAPs from solid waste incineration units under §111, not under §112); *id.* §7412(n)(5) (directing EPA to study the risks of hydrogen sulfide, a listed HAP, and "implement a control strategy . . . using authorities under this chapter including sections

[111] and [112]"). By contrast, §111(d) plainly prohibits what EPA has done. *See, e.g.*, *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061-63 (D.C. Cir. 1995) (declining to "imply authority" for agency action under one statutory provision when a nearby statutory provision expressly grants that authority in a different context; "mention of one thing implies exclusion of another thing") (internal quotation marks omitted).

Furthermore, the statutory structure and context reinforce what the plain language already makes clear: §111(d) may not be used to regulate utility HAPs. Before the 1990 Amendments, EPA was barred from regulating mercury or other listed HAPs under §111(d). *See* 42 U.S.C. §7411(d)(1) (1990) (authorizing §111(d) regulation only for "any air pollutant . . . which is not included on a list published under section . . . 112(b)(1)(A)"); 36 Fed. Reg. 5931 (Mar. 31, 1971) (listing mercury under §112(b)(1)(A)). Neither the House nor Senate amendment changed this status quo, a fact confirmed by their legislative origins. Both amendments were plainly for housekeeping purposes – housekeeping which became necessary because the then-existing version of §111(d) referred to §112(b)(1)(A), a subsection that no longer exists under the amended Act. Accordingly, a section of the legislation amending the Act (§108) titled "Miscellaneous Guidance" contains the House amendment, while the Senate amendment appears in a section (§302) titled "Conforming Amendments." 104 Stat. at 2467, 2574. These are purely ministerial amendments with no legislative history. EPA's position that they effected a drastic and momentous change to §111 – authorizing HAP regulation never before allowed – is therefore insupportable. *See United States v. Neville*, 82 F.3d 1101, 1105 (D.C. Cir. 1996) (silence in legislative history accompanying subtle

legislative change suggests that no significant alterations to preexisting scheme were intended).

EPA next argues that a "literal reading" of the House amendment might create difficulties by prohibiting §111(d) regulation of even non-HAPs emitted from source categories regulated under § 112, so EPA must be able to regulate power plant HAPs under §111(d). *See* 70 Fed. Reg. at 16,031; 69 Fed. Reg. at 4685. The question of non-HAP regulation under §111(d) is not even before this Court, however, making EPA's peculiar argument inapposite. With regard to HAPs, the House and Senate amendments share a core congruency: neither allows regulation of power plant HAPs under §111(d).

In any event, even if EPA can interpret the amendments to conflict, the Senate amendment must prevail. "The established rule is that if there exists a conflict in the provisions of the same act, the last provision in point of arrangement must control." *Lodge 1858, Am. Fed. of Gov't Employees v. Webb*, 580 F.2d 496, 510 & n.31 (D.C. Cir.), *cert. denied*, 439 U.S. 927 (1978) (citing over 80 cases to that effect). In the 1990 Amendments, the Senate amendment appears in §302, whereas the House amendment is in §108. Accordingly, the last in order – the Senate amendment – controls.

Finally, EPA's resort to §§112(c)(6) and (d)(7) for support, *see* 69 Fed. Reg. at 4684, is similarly unavailing. Section 112(c)(6) neither says nor implies anything about EPA's authority to regulate utility HAP emissions. Likewise, §112(d)(7) operates as a prohibition on EPA, not as a grant of authority.

2. CAMR's Trading is Unlawful.

Even if EPA were permitted to regulate utility HAPs under §111, its rule violates the Act by allowing inter-source, intra-state and interstate mercury emissions trading. While the delisting action and §111 rule are unlawful for the reasons set forth above and the Court need not reach the trading question, CAMR's trading scheme – in which individual sources and even entire states experience mercury increases for over twenty years – is independently unlawful and arbitrary and capricious.

a. Plain statutory language prohibits CAMR trading.

Section 111(d)(1) instructs States to "establish[] standards of performance for any existing source" for relevant air pollutants.[38] 42 U.S.C. §7411(d)(1). "Standard of performance," in turn, is governed by two separate statutory provisions, §111(a) and §302. Section 111(a) defines "standard of performance" to mean the "best system of emission reduction" taking into account various enumerated factors. 42 U.S.C. §7411(a)(1). Section 302(l) defines "standard of performance" "when used in this [Act]" to mean "a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction." *Id.* §§ 7602 & 7602(l) (emphases added). EPA has long recognized that §111 performance standards are governed by §302(l)'s definition of "standard of performance," as well as by §111(a)'s definition.[39] In sum, the statute mandates that each State plan apply the best system of emission reduction "to any existing source" – on a

[38] This section of our brief assumes that §111 may be used to regulate HAPs solely for the purpose of demonstrating why EPA's remaining statutory interpretations are also unlawful.

[39] *See, e.g.*, 48 Fed. Reg. 2658, 2667 (Jan. 20, 1983) (reading §302(l) to apply to NSPS for process furnaces).

source-specific basis – and that each source subject to this standard demonstrate "continuous emission reduction[s]."

Attempting to evade these plain requirements, EPA first protests that "'continuous' is not defined" in the statute, 70 Fed. Reg. at 28,617; but EPA does not and cannot argue that "continuous emission reduction" is ambiguous. Moreover, the lack of a statutory definition does not render a term ambiguous. *See Goldstein v. S.E.C.*, 451 F.3d 873, 878 (D.C. Cir. 2006). EPA then absurdly proceeds to equate §302(l)'s mandate for "continuous emission reduction" with a mandate authorizing emission increases (including increases in one year and reductions in other years).[40] 70 Fed. Reg. at 28,617. EPA concedes that each source must achieve continuous emission reductions under §§302(l) and 111(d)(1) "standards of performance." *See id.* (arguing that CAMR satisfies the "requirement of 'continuous' emissions reductions because all of a source's emissions must be covered by allowances"). But EPA fails to note that the possession of "allowances" is actually a term of art for the right not to reduce emissions. Moreover, §302(l) plainly does not speak in terms of "continuous allowance possession," nor does EPA justify its interpretations severing "continuous" from "emission reductions" and abandoning the need for reductions from particular sources.

Indeed, as a result of EPA's rule, 432 utility units out of approximately 1,100 nationwide are projected to increase mercury emissions above current levels between now and 2018, and 129 units are expected to do so thereafter. *See* NRDC *et al.*, Pet. for Recons., Attachment (July 18, 2005), OAR-2002-0056, Item 6277 [JA __]; U.S. EPA,

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[40] *See* U.S. EPA, *Reponse to Significant Public Comments on Reconsideration* (May 31, 2006) ("EPA Reconsideration-RTC"), at 301-02, OAR-2002-0056, Item 6722 [JA__] (alleging that sources can increase their current emissions and still comply with the "standard of performance" requirement under §111(d)).

Reponse to Significant Public Comments on Reconsideration (May 31, 2006) ("EPA Reconsideration-RTC"), at 302 [JA __]. This result – which directly contravenes the statutory mandates for source-specific, continuous reductions – illustrates the unlawfulness of EPA's rule.

CAMR also flouts the statutory mandate that each State plan include "the best system of reduction" for "any existing source."[41] That is, each State plan must reduce emissions from any and all existing sources covered by its plan. In defiance of these requirements, EPA authorizes and expects many states to actually increase their mercury emissions under EPA's new rule. Indeed, EPA admits that compared to 1999 mercury levels, 19 states will increase mercury emissions over the course of the rule's first phase, and five states will continue experiencing emission increases indefinitely after 2018. EPA Reconsideration-RTC, at 177-78, 302 [JA __]; NRDC *et al.*, Pet. for Recons., Attachment (July 18, 2005), OAR-2002-0056, Item 6277 [JA __].

EPA tries to sidestep the plain statutory language of §§111(a) and 302 by proffering two irrelevant points: (1) that CAMR will achieve "reductions in nationwide Hg emissions"; and (2) that standards of performance must be "achievable." EPA Reconsideration-RTC, at 302. EPA never does explain how achieving "reductions in nationwide Hg emissions" discharges the plain statutory obligation in §111(d)(1) that "each State" plan satisfy the "best system of emission reduction" standard from "any existing source." Similarly, while standards of performance must be "achievable," 42 U.S.C. §7411(a), the statute provides no authority to skirt the mandate that continuous

[41] 42 U.S.C. §§7411(a)(1) & (d) (emphasis added). *See New York v. EPA*, 443 F.3d 880, 889 (D.C. Cir. 2006) (use of word "any" as modifier intended "to cover all of the ordinary meanings of the [modified] phrase.").

emission reductions be achieved at any existing source subject to the standards. Nor does EPA explain why additional source-specific reductions are not achievable given available controls.

Finally, EPA's convoluted interpretation of §§111(a) and (d)(1) leads to a topsy-turvy outcome where "reduction" can actually mean "increase." EPA admits that CAMR is designed not to require mercury-specific emission reductions until 2018, and that any earlier mercury reductions are merely coincidental, occurring under CAIR caps on other non-HAP pollutants. 70 Fed. Reg. at 28,617-19 (Phase I cap based entirely on mercury levels coincident with NO_x and SO_2 regulation). Yet EPA pretends that this approach – even during CAMR's Phase I itself – satisfies §111(d)'s "best system of emission reduction" for mercury. *Id.* (arguing conclusorily that "[a] Phase I cap based on 'co-benefits' fulfills EPA's obligation to set a standard of performance based on the best system of emissions reduction that has been adequately demonstrated."). Completely missing is any attempt to determine the degree to which utilities can secure achievable HAP reductions now. Accordingly, EPA's rule allowing emissions increases until 2018 and beyond from numerous power plants (and entire states) violates the plain language of §111(a), §111(d) and §302(l).

b. Court precedents prohibit CAMR's mercury trading.

This Court has previously rebuffed EPA's efforts to authorize pollution trading under §111. In *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), the Court rejected even a limited emission trading scheme, whereby existing plants could avoid §111 standards when making changes that increased emissions so long as offsetting emission reductions could be identified elsewhere at the same plant site. As the court explained,

the concept of intra-source trading contravenes the §111 mandate that New Source Performance Standards ("NSPS") "enhance air quality by forcing all newly constructed or modified buildings, structures, facilities, or installations to employ [best demonstrated controls]," and by allowing operators to "avoid installing the best pollution technology" and thereby "postpone[] the time when the best technology must be employed." *Id.* at 327-28.[42] The §111 rule's provision for intra-state and inter-state mercury trading contravenes these statutory concerns even more than the intra-source trading invalidated in *ASARCO*, allowing not just pollution control avoidance but degraded local air quality (because of CAMR's nationwide trading structure) and trading across multi-year time periods.

ASARCO was the law when Congress amended the Act in 1990, yet Congress made no allowances for trading under §111, while at the same time it expressly authorized intra-state and inter-state trading under other provisions of the Act. *See, e.g.*, 42 U.S.C. §§7651-7651*o* (extensive trading under Acid Rain program); *id.* §7511a(c)(6)-(8) (trading in certain kinds of ozone nonattainment areas). The absence of such trading authorization is significant, confirming what the language and structure of §111 make clear: §111 standards are technology-forcing and meant to apply uniformly to new and modified sources, regardless of their location. *See, e.g.*, *Ethyl Corp.*, 51 F.3d at 1061-63 (declining to "imply authority" for agency action under one statutory provision when a nearby statutory provision expressly grants that authority in a different context).

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[42] It is telling that EPA entirely failed to respond to – let alone rebut – Petitioners' *ASARCO* arguments. *Compare* CATF *et al.*, Comments (June 29, 2004), at IV, OAR-2002-0056, Item 3459 [JA___] *with* U.S. EPA, *Response to Significant Public Comments on the Proposed Clean Air Mercury Rule* (March 15, 2005), at 5-12, -13, OAR-2002-0056, Item 6209 [JA___].

3. EPA's Reliance on CAIR to Supplant §112 Regulation is Equally Unlawful.

EPA also argues that CAIR by itself, without CAMR, is sufficient justification to evade §112 regulation of power plants, even while conceding that it estimates CAIR will only reduce mercury emissions 29 percent by 2020. 70 Fed. Reg. at 16,018. EPA's reliance on CAIR is unlawful and arbitrary and capricious.

a. Relying on CAIR conflicts with the Act.

CAIR requires 28 eastern states and the District of Columbia to meet EPA-assigned emissions budgets for SO_2 and NO_x. It does not require states to regulate power plants at all, nor does it specify pollution control requirements for states that do choose to regulate them. *See* 70 Fed. Reg. at 28,618 (EPA recognizing that states may choose not to regulate the utility industry under CAIR, but instead achieve equivalent SO_2 and NO_x reductions from other sectors). Nonetheless, EPA speculates that, under CAIR, utilities will install scrubbers and other technologies meant to reduce SO_2 and NO_x emissions – technologies that coincidentally and providentially yield some mercury emissions reductions as a "fringe" or "co-benefit." 70 Fed. Reg. at 28,618-19.

By invoking CAIR as an effective substitute for §112 regulation, EPA flouts the Act's careful timeline established in the 1990 Amendments for the evaluation and regulation of HAPs. *See* 42 U.S.C. §7412(c)(1) (requiring all categories of major HAP sources to be listed for regulation by November 1991), *id.* §7412(n)(1)(A) (completion of Utility HAP Study by November 1993) & *id.*, §7412(e)(1) (ensuring that EPA would determine sufficiently in advance of November 2000 whether to promulgate standards).[43]

[43] Even assuming *arguendo* that EPA correctly left power plants off the initial list, notwithstanding the plain language of §112(c)(1) and the fact that "[n]o one would

In short, Congress created a unidirectional system whereby EPA would promptly study the need for MACT standards and then quickly promulgate such standards as needed. EPA's reliance on CAIR – a program not even proposed until 2004, not finalized until 2005, and not expected to be fully implemented until 2020 or later[44] – defies this timeline and subverts the plain requirements for expeditious evaluation and regulation of utility HAPs.

In order to justify jettisoning the MACT requirement and timeline in favor of CAIR, EPA asserts further that the hazards remaining from mercury emissions after CAIR is in place are not sufficient to justify MACT standards. But, as this industry represents 42 percent of domestic anthropogenic emissions of mercury, 70 Fed. Reg. at 16,017-16,018 (Table VI-2), this view can only follow from EPA's newly-minted "utility attributable" approach to power plant mercury – under which EPA translates the statute's command to "study . . . the hazards to public health reasonably anticipated to occur as a result of" power plant HAP emissions, into permission to quantify only the incremental public health effects of power plant mercury in a limited subset of fish. 70 Fed. Reg. at 15,998 ("EPA has concluded that its inquiry under section 112(n)(1)(A) may reasonably focus solely on whether the utility HAP emissions themselves are posing a hazard to public health.") (emphasis added).

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dispute that certain Utility Units would meet the definition of a 'major source' based on the quantity of HAP emitted from such units," 70 Fed. Reg. at 15,995 n.4, EPA was still obliged to issue §112 standards by the end of 2002. 42 U.S.C. §7412(c)(5) (requiring standards "within 2 years after the date on which such category or subcategory is listed" for certain later-listed categories).

[44] The CAIR Phase II cap for SO_2 and NO_x will be put in place in 2015, but prior banking of allowances will delay the full implementation of all control equipment for SO_2 and NO_x reductions until 2020 or later. *See, e.g.*, 70 Fed. Reg. at 16,019; EPA Reconsideration-RTC at 181-82 [JA ___].

In addition to reflecting an absurd approach to the significant public health problem posed by mercury-contaminated fish, EPA's interpretation that "as a result of" means "solely as a result of" is unreasonable. First, §112(n)(1)(A) focuses on the public health "hazards" which result from power plants, and the term "hazard" in ordinary usage includes an element of contribution to an ultimate harm by specifying that a "hazard" is a "source of danger."[45] Second, the phrase "a result of" is very different from "solely a result of," and EPA's contrary interpretation leads to the absurd conclusion that if a public health threat is 99 percent due to power plants, and 1 percent due to something else, it can ignore power plants.[46] Third, EPA has interpreted a parallel use of virtually identical language elsewhere in §112 not to require sole causation.[47]

b. Relying on CAIR is arbitrary and capricious.

EPA's conclusion that CAIR can "effectively" substitute for MACT regulation is contrary to the evidence before the agency and, for this reason, is arbitrary and capricious. *See Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 798 (D.C. Cir.

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[45] Merriam-Webster Online, http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=hazard.

[46] If Congress had intended sole causation in §112(n), it would have said so, as it has done elsewhere in §112 and elsewhere in the Act. *Cf.* 42 U.S.C. §7412(b) ("No substance, practice, process or activity regulated under [the stratospheric ozone protection program] shall be subject to regulation under this section *solely* due to its adverse effects on the environment." (emphasis added)).

[47] 42 U.S.C. §7412(k)(3)(B) ("[t]he strategy shall – (i) identify not less than 30 hazardous air pollutants which as the result of emissions from area sources, present the greatest threat to public health in the largest number of urban areas"); 64 Fed. Reg. 38,706, 38,716-18 (July 19, 1999) (implementing this section and interpreting the "as a result of" phrase as simply identifying the commercial sector to which the provision as a whole is applicable, not as limiting the analysis of the public health effects to those "solely the result of" those emissions and those emissions alone).

1984). It is not an overstatement to say that, in relying on incidental mercury reductions from CAIR,[48] EPA ignores time, space, and matter.

First, as described above, CAIR is not expected to be fully implemented until 2020 and beyond. MACT standards, by contrast, must take effect "as expeditiously as practicable" for existing sources, generally within three years of a final MACT standard – that is, by 2008 in the context of this rulemaking. 42 U.S.C. §§7412(i)(1), (3). Over that time, CAIR will allow an estimated 380 more tons of mercury to be emitted than MACT controls would have allowed between 2008 and 2020. *See* NRDC *et al.*, Pet. for Recons., at 57-58 & n.47 (May 31, 2005), OAR-2002-0056, Item 6270 [JA __]. Yet, by focusing on the estimated health risks from power plants in 2020, EPA entirely fails to analyze the public health threat from these pollution levels in the intervening decade.

Second, MACT regulation applies uniformly nationwide, but CAIR applies to roughly half the nation only, leaving the Western states totally unregulated. *See* 70 Fed. Reg. at 28,618. This discrepancy alone suffices to prevent CAIR from being an adequate substitute for MACT. Such partial regulation will inevitably yield localized mercury "hotspots," which can only be avoided through plant-by-plant controls. Auberle Decl. ¶ 15. Moreover, available evidence indicates that EPA's rule depends on gross underestimates of local mercury deposition. Specifically, EPA's conclusion that non-§112 programs would sufficiently reduce mercury contamination relied on an estimate that "deposition from U.S. power plants constitutes about 8 percent of the total deposition on average, and about 16 percent at the watersheds with the highest total deposition (depending on the region)." Decl. of Jeffrey R. Holmstead ¶ 58, attachment to EPA's

[48] Many of these critiques also apply to EPA's reliance on CAMR to reduce "utility-attributable" mercury pollution.

Opp'n to Mot. for Stay Pending Review (July 18, 2005), D.C. Cir. Case No. 05-1097 and consolidated cases; 70 Fed. Reg. at 16,019. But the actual observed deposition rate from the EPA-sponsored Steubenville, Ohio study shows that as much as 70 percent of deposited mercury is due to local combustion, including power plants.[49]

Finally, EPA only examines the impact of CAIR – indirectly and speculatively – on mercury, while ignoring the many other HAPs emitted by coal- and oil-fired power plants, including nickel, arsenic, and dioxins.[50] Moreover, even its analysis of mercury from power plants is grossly inadequate; EPA only considers the public health threat from freshwater fish caught by recreational and subsistence fishers, not the numerous other sources of mercury contamination in marine and estuarine fish, and fish caught commercially or raised in aquaculture.[51] To allege that CAIR renders MACT standards "inappropriate" and "unnecessary" despite these fundamental deficiencies is arbitrary and contrary to the overwhelming evidence before EPA.

A recent D.C. Circuit decision underscores the arbitrariness of EPA's substitution of CAIR for MACT. In *Utility Air Regulatory Group v. EPA*, ___F.3d ___, 2006 WL 3590194 (D.C. Cir. Dec. 12, 2006), the court upheld EPA's so-called "BART Rule,"

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[49] Steubenville Study at 5874, 5877 (Table 2), Appendix B of Auberle Decl. By contrast, EPA recently noted that its model "predicts for 2001 that utility coal combustion contributes 44 percent to Hg deposition at . . . Steubenville." 71 Fed. Reg. at 33,392. EPA has not reconciled either this estimate or the Steubenville estimate with its previous reliance, in undoing the regulatory determination, on a maximum of 16 percent utility contribution to local deposition. 70 Fed. Reg. at 16,019.

[50] U.S. EPA, *Utility HAPs Study*, Vol. 2 at Appendix E (Feb. 1998).

[51] *See, e.g.*, 70 Fed. Reg. at 28,641-42 (monetizing only the benefits from reducing mercury exposure from freshwater, recreationally-caught fish); NRDC *et al.*, Pet. for Reconsideration (May 31, 2005), at 53, OAR-2002-0056, Item 6270 [JA ___] (citing Douglas Rae & Laura Graham, U.S. EPA, *Benefits of Reducing Mercury in Saltwater Ecosystems: A Case Study* (Jan. 2004), which also examined contribution to risk from marine fish consumption).

which permits certain states to implement CAIR instead of Best Available Retrofit Technology ("BART") to achieve the "reasonable progress" required in Class I areas. 42 U.S.C. §7491(b). The court assured itself that, under the BART Rule, CAIR is allowed to replace BART only in states regulated by CAIR, and only if the substitution will "achieve greater reasonable progress than would be achieved through the installation and operation of BART." *Util. Air Regulatory Group*, 2006 WL 3590194, at *3 (internal quotation marks omitted). Reliance on CAIR as a substitute for BART therefore does not release states from their visibility-related obligations. *Id.* ("'[A state] cannot assume that CAIR will satisfy all of its visibility-related obligations.'") (quoting 70 Fed. Reg. 39,104, 39,143/3 (July 6, 2005)). Moreover, the BART Rule ensures that "each mandatory Class I Federal area located within [a] State" will meet its visibility goals. *Id.* (internal quotation marks omitted). In short, the BART Rule allows CAIR to replace BART only if it guarantees "aggregate improvement (relative to BART)" and "universal, area-specific absence of degradation." *Id.* at *7 (emphasis omitted). "[O]n this metric, CAIR-for-BART is far better than BART [alone]," the court reasoned, and is therefore satisfactory under the statute's "reasonable progress" provision. *Id.*

By contrast, EPA's mercury rule contains none of the safeguards of the BART Rule. EPA's reliance on CAIR to control mercury emissions fully releases states – including states not regulated by CAIR – from their obligation to regulate utility HAPs under a MACT standard, on the ground that CAIR negates the need for MACT standards altogether. There is no residual requirement that each state, let alone each source, meet §112's source-specific technology requirements for which CAIR acts as a substitute. In contrast to the BART Rule, there is no "universal, area-specific" guarantee of compliance

when CAIR serves as a substitute for the controlling regulatory regime, §112. EPA instead has authorized a full-on substitution of CAIR for MACT, thereby releasing all states from the governing §112 requirements for regulating utility HAP emissions, flouting the Act's plain language, and ignoring overwhelming evidence of CAIR's inadequacies.

Conclusion

Environmental Petitioners respectfully request that the Court vacate the agency actions (including the rule provisions) challenged herein.

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Environmental Petitioners' Initial Opening Brief contains 10,285 words, as counted by counsel's word processing system.

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