ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW JERSEY, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 05-1097, and consolidated cases **Complex**

On Petitions for Review of Final Actions
of the United States Environmental Protection Agency

OPENING BRIEF OF GOVERNMENT PETITIONERS

The States of New Jersey, California, Connecticut, Delaware, Illinois, Maine, Massachusetts, Michigan Department of Environmental Quality, Minnesota, New Hampshire, New Mexico, New York, Pennsylvania Department of Environmental Protection, Rhode Island, Vermont, and Wisconsin, and the City of Baltimore

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Dated: January 11, 2006

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certify as follows:

A. PARTIES AND AMICI

1. Parties to the Challenges to the EPA Delisting Rule: 70 Fed. Reg. 15994 (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

2. Parties to the Challenges to the EPA Clean Air Mercury Rule: 70 Fed. Reg. 28606 (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.

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.

The following party has intervened in these consolidated cases for Petitioners: Michigan Department of Environmental Quality.

Amici

No parties appear as amici in these consolidated cases:

3. Parties to the Challenges to EPA's Final Action on Reconsideration: 71 Fed. Reg. 33388 (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.

B. RULINGS UNDER REVIEW

Petitioners State of New Jersey et al, 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).

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).

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" published at 71 Fed. Reg. 33,388 (June 9, 2006).

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.

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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
Act/CAA	Clean Air Act, 42 U.S.C. §§ 7401 et seq.
CAIR	Clean Air Interstate Rule, 70 Fed. Reg. 72,268 (Nov. 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)
EGUs	Electric utility steam generating units
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)
ICR	Information collection request
MACT	Maximum achievable control technology, 42 U.S.C. § 7412(d)
NOAA	National Oceanic and Atmospheric Administration
NO_x	Nitrogen oxides
NSPS	New source performance standards
RTC	EPA Utility Report to Congress, 65 Fed. Reg. 79,825 (Dec. 20, 2000)
SO_2	Sulfur dioxide
Title IV program	42 U.S.C. §§ 7651-7651

JURISDICTIONAL STATEMENT

This Court has exclusive jurisdiction to review any "nationally applicable regulations promulgated, or any final action taken" by EPA under the Act. 42 U.S.C. § 7607(b). In these consolidated cases, Government Petitioners challenge EPA's nationally applicable regulations at 70 Fed. Reg. 15,994 (Mar. 29, 2005), and 70 Fed. Reg. 28,606 (May 18, 2005), and its final action on reconsideration of these regulations at 71 Fed. Reg. 33,389 (June 9, 2006). As set forth in the Certificate as to Parties, supra, Government Petitioners filed petitions for review of these regulatory actions within the sixty-day period provided in 42 U.S.C. § 7607(b).

STANDING

Government Petitioners suffer injuries due to EPA's mercury rules sufficient to confer standing. First, the rules impose a regulatory and economic burden on the states to either participate in a cap-and-trade program promulgated under section 111 of the Act, or obtain reductions in mercury emissions through other mechanisms. States have incurred economic costs in either promulgating state plans or joining the cap-and-trade program, and will continue to incur costs through the lifetime of the regulations. See Aff. of William O'Sullivan ("O'Sullivan Aff.") ¶ 4; 71 Fed. Reg. 75,117 (Dec. 14, 2006). Second, the rules will make it more difficult for states to comply with water quality standards required under the Clean Water Act. See O'Sullivan Aff. ¶ 7; 33 U.S.C. § 1313(d); West Virginia v. EPA, 362 F.3d 861, 868 (D.C. Cir. 2004) (Injury sufficient to confer standing found where an EPA rule made the state task of devising an adequate state implementation plan more difficult). Finally, the rules injure the interests of Government Petitioners by allowing continued high levels of mercury emissions from power plants. These emissions play a significant contributory role in ongoing impacts to the

natural resources of, and economic burden on, Government Petitioners. See Idaho v. ICC, 35 F.3d 585, 591 (D.C. Cir. 1994) (State standing established based on pollution damage to its natural resources)' O'Sullivan Aff.. ¶¶ 8-9; Decl. of Ray Vaughan ("Vaughan Decl") ¶¶ 3, 6-13; Comments of Hubbard Brook Research Foundation ("Hubbard Brook Comments") at 7-9, OAR-2002-0056-2038 [JA_]. These injuries can be redressed by a ruling from this Court vacating EPA's mercury rules and requiring the agency to establish source-specific emissions standards for all power plants as required under section 112 of the Act. See O'Sullivan Aff.. ¶¶ 8-9; Vaughan Decl. ¶¶ 14-17; Hubbard Brook Comments at 13; 42 U.S.C. § 7412(d).

STATEMENT OF ISSUES

1. In December 2000, EPA added EGUs to the list of sources subject to regulation under section 112 of the CAA, 42 U.S.C. § 7412, but has now removed EGUs from that list without satisfying the removal criteria in section 112(c)(9). Did EPA exceed its statutory authority, fail to observe procedure required by law, or otherwise act arbitrarily or capriciously?

2. In the Delisting Action, EPA rescinded its December 2000 conclusion that EGUs should be regulated pursuant to CAA section 112. Was EPA's decision to rescind the December 2000 conclusion in excess of statutory authority, arbitrary, capricious, or an abuse of discretion?

3. Through CAMR, EPA uses CAA section 111 to establish a cap-and-trade system for the regulation of a hazardous air pollutant, mercury. Did EPA exceed its statutory authority under CAA section 111(d) which prohibits the use of section 111 to regulate hazardous air pollutants and/or act arbitrarily and capriciously in light of the requirements for a "standard of performance" under section 111?

STATUTES AND REGULATIONS

The relevant provisions of the Act are 42 U.S.C. §§ 7411 (Standards of performance for new stationary sources), and 7412 (Hazardous air pollutants). The rules were promulgated at 40 C.F.R. Parts 60, 63, 72, and 75. The rules, together with relevant portions of statutory and regulatory provisions and legislative history, are contained in the Addendum.

STATEMENT OF THE CASE

State and municipal petitioners ("Government Petitioners") seek review of two rules promulgated by the Environmental Protection Agency ("EPA") relating to the emission of hazardous air pollutants ("HAPs") from electric utility steam generating units ("EGUs" or "power plants"). In 2000, EPA concluded that such emissions, including mercury, warranted regulation pursuant to section 112 of the Clean Air Act ("Act") and added power plants to a list of sources subject to such regulation (the "112(c) List"). 65 Fed. Reg. 79,825, 79,830-31 (Dec. 20, 2000). Having taken that action, EPA was required to establish plant-specific limits on power plant emissions reflecting the maximum degree of reduction in HAP emissions achievable for similar sources. See 42 U.S.C. § 7412(d)(3). EPA was further prohibited from removing power plants from the 112(c) List unless certain criteria were met. See 42 U.S.C. § 7412(c)(9).

EPA failed to meet its statutory duties and instead published two rules that seek to exempt power plants - emitters of more than 150,000 tons of HAPs annually, including over 30% of the nation's mercury emissions, U.S. EPA, Mercury Study Report to Congress, EPA-452/R-97-005 (Dec. 1997) ("RTC"), at ES-5, 14-1 [JA_] - from the stringent regulatory framework of section 112. In the first rule, the "De-Listing Action," EPA removed EGUs from the 112(c) List without attempting to satisfy the statutory removal criteria. 70 Fed. Reg. at 16,002-16,008. EPA

then promulgated in the second rule, the "Clean Air Mercury Rule" ("CAMR"), regulations under section 111 that govern power plant mercury emissions through a cap-and-trade scheme, not the statutorily-required plant-specific approach. 70 Fed. Reg. at 28,624-30. Petitioners ask this Court to correct EPA's legal errors, vacate the rules, and direct the agency to promulgate emission standards for the hazardous air pollutants emitted by power plants under section 112 as required by the Act. By orders dated December 8, 2005, and August 21, 2006, this Court consolidated these petitions and designated New Jersey v. EPA (No. 05-1097) as the lead case.

STATEMENT OF FACTS

A. Hazardous Air Pollutant Regulation Under the Clean Air Act

The 1970 Amendments added section 112 to the Act, which specified that the EPA Administrator must list each "hazardous air pollutant for which he intends to establish an emission standard." Pub.L. 91-604, § 4(a), 84 Stat. 1685. After a pollutant was listed, the Act required EPA to propose emission standards set at a level that "provides an ample margin of safety to protect the public health" from the pollutant. Id.

Between 1970 and 1990 when the Act was again amended, EPA established standards under section 112 for only seven hazardous air pollutants. Nat'l Mining Ass'n v. EPA, 59 F.3d 1351, 1353 and n.1 (D.C. Cir. 1995) (citing S. Rep. No. 228, 101st Cong., at 131 (1989)). Of these seven, mercury, along with asbestos and beryllium, were the first pollutants listed as hazardous. See 36 Fed. Reg. 5,991 (Mar. 31, 1971). For even these listed pollutants, EPA established emission standards for only a small subset of their sources. Nat'l Mining Ass'n, 59 F.3d at 1353 and n.1 (citing S. Rep. No. 228, 101st Cong., at 128 (1989) and H.R. Rep. No. 490(I), 101st Cong., at 322 (1990)).

To address the slow pace of EPA's regulatory action, the 1990 Amendments to the Act completely restructured the regulation of HAPs under section 112. Id. These amendments continued the Act's distinct treatment of HAPs[1], and required EPA to set the "most stringent standards achievable" for sources of HAPs which are standards "based on the maximum reduction in emissions which can be achieved by application of [the] best available control technology" ("MACT Standards").[2] Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855, 857 (D.C. Cir. 2001). The new amendments established a list of 188 HAPs, 42 U.S.C. § 7412(b)(1), set a mandatory schedule for issuing emissions standards for the major sources of these pollutants, 42 U.S.C. §§ 7412(c) and (e), and established a "non-discretionary duty" on EPA to promulgate technology-based emission standards for all categories of major emitting sources of listed HAPs. See S. Rep. 101-228, at 3385, 3518, 3541, reprinted in 1991 U.S.C.C.A.N.; 42 U.S.C. § 7412(b),(c), and (e). The only exception to the mandatory standards applies to source categories either: a) listed for regulation because of a single HAP which was later removed from the list of HAPs under section 112; or b) for which EPA makes a formal determination that the emissions of no source in the category exceeds risk thresholds set by Congress. See 42 U.S.C. § 7412(c)(9)(B).

The 1990 Amendments imposed an additional requirement on EPA before regulating EGUs under section 112. Section 112(n) required EPA to perform by 1993 a study of the health

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[1] See H.R. Rep. No. 101-490, at 3339 (May 21, 1990) ("The Clean Air Act distinguishes between two categories of pollutants: hazardous air pollutants and criteria or conventional air pollutants.")

[2] For existing major sources of HAPs, MACT standards must be no less stringent than the "average emission limitation achieved by the best performing 12 percent of the existing sources." 42 U.S.C. § 7412(d)(3)(A).

hazards posed by toxic substances emitted from EGUs and determine whether it is "appropriate and necessary" to regulate such emissions as HAPs under section 112. 42 U.S.C. § 7412(n). Once such a determination was made and EGUs were placed on the source category list, Congress required that EPA "shall" regulate EGUs under section 112 through the promulgation of MACT standards. Id.

B. EGU Study and Appropriate and Necessary Determination

EPA undertook the study of hazards to public health reasonably expected to be caused by power plant emissions and in February 1998, five years after the statutory deadline, the agency released its utility report to Congress and the public. 65 Fed. Reg. 79,825 (Dec. 20, 2000). EPA concluded that "mercury from coal-utilities is the HAP of greatest potential concern," RTC, at ES-26, [JA_], and estimated that approximately sixty percent of the total mercury deposited in the United States comes from "U.S. anthropogenic air emission sources; the percentage is estimated to be even higher in certain regions (e.g., northeast U.S.)." 65 Fed. Reg. at 79,827.

On December 20, 2000, after years of peer-reviewed scientific and technical study including a National Academy of Sciences report, numerous public hearings, and extensive public comment, EPA published its regulatory finding on the emissions of HAPs from EGUs. 65 Fed. Reg. 79,825. In this action, EPA added EGUs to the section 112 List of source categories after concluding that the "regulation of HAP emissions from [EGUs] under section 112 of the [Act] is appropriate and necessary." Id. at 79,826 ("[T]his notice adds coal- and oil-fired [EGUs] to the list of source categories under section 112(c) of the CAA."). EPA determined that: "[m]ercury is highly toxic, persistent, and bioaccumulates in food chains"; "[m]ost of the U.S. population consumes fish and is exposed to methylmercury as a result"; and "[m]ost of the

mercury currently entering U.S. water bodies and contaminating fish is the result of air emissions." Id. at 79,829-30. The agency further found that EGUs:

> are the largest source of mercury emissions in the U.S., estimated to emit about 30 percent of current anthropogenic emissions. There is a plausible link between emissions of mercury from anthropogenic sources (including coal-fired electric steam generating units) and methylmercury in fish. Therefore, mercury emissions from [EGUs] are considered a threat to public health and the environment.[3]

Id. at 79,827. In 2002, EPA formally revised the section 112(c) List to reflect the addition of EGUs pursuant to the December 20, 2000 notice. 67 Fed. Reg. 6,521 (Feb. 12, 2002).

C. 2004 Proposed Rulemaking

On January 30, 2004, EPA proposed two regulatory alternatives to control mercury emissions from EGUs. 69 Fed. Reg. 4,652 (Jan. 30, 2004). The first alternative maintained EPA's December 2000 listing of EGUs and "appropriate and necessary" determination and sought to regulate EGU emissions under section 112 either through MACT standards, or a cap-and-trade plan under section 112. Id. at 4,659-83. Under the second regulatory alternative, EPA proposed to remove EGUs from the section 112(c) List by revising its December 2000 "appropriate and necessary" determination, id. at 4,683-89, and instead use section 111 of the Act to set standards and a cap-and-trade program for mercury emissions from coal-fired EGUs and nickel emissions from oil-fired EGUs, id. at 4,689-4,706.

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[3] Mercury converts to methylmercury, a toxic compound, after mercury is "precipitated from the air and deposited into water bodies or land." 70 Fed. Reg. at 16,011. For the sake of simplicity, this brief will refer to mercury concentrations in waterbodies and fish tissue, while recognizing that the actual compound at issue is frequently methylmercury.

D. The Final Rules

In the final Delisting Rule, EPA followed the second regulatory alternative of the proposed rule and removed EGUs from the 112(c) List. See 70 Fed. Reg. 15,994. This delisting did not follow the removal requirements of section 112(c)(9), but was instead based solely on the agency's rescission of the December 2000 "appropriate and necessary" determination. Id. at 16,002. As support, EPA "newly interpreted" section 112(n)(1)(A) to require EGU regulation under section 112 only if no other authorities under the Act, "if implemented," would eliminate the public health threat posed by EGU emissions. Id. at 15,997-99. EPA concluded that mercury reductions from two rules yet to be finalized - the Clean Air Interstate Rule ("CAIR") and CAMR - addressed mercury from EGUs sufficiently so that their regulation under section 112 was neither appropriate nor necessary. Id. at 15,997-16,002.[4]

CAIR was published on May 12, 2005, 70 Fed. Reg. 25,162 (May 12, 2005), and CAMR followed six days later. CAMR regulates mercury emissions from EGUs under section 111 of the Act, entitled "Standards of performance for new stationary sources." 42 U.S.C. § 7411. The rule establishes performance standards for new sources under section 111(b) and a cap-and-trade system for mercury from existing power plants under section 111(d). 70 Fed. Reg. at 28,624-30. This system caps nationwide mercury emissions from coal-fired EGUs at thirty-eight tons beginning in 2010 and fifteen tons beginning in 2018, reductions of 21% and 69% respectively from the approximately forty-eight tons currently emitted from EGUs. 69 Fed. Reg. at 4,691; 71

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[4] CAIR establishes budgets for emissions of nitrogen oxides ("NO_x") and sulfur dioxide ("SO_2") for the twenty-eight states in the eastern United States. 70 Fed. Reg. at 28,618. CAIR does not regulate EGUs directly and contains no mercury reduction requirements. See id.; 70 Fed. Reg. at 25,209.

Fed. Reg. at 33,395. Regulated power plants can either reduce their mercury emissions under the plan or buy credits for such reductions from other plants. 70 Fed. Reg. at 28,632. Credits can also be "banked" to meet future compliance requirements, potentially substantially delaying full implementation of the plan.[5] Id. at 28,629. EPA predicts that as of 2020 — two years after mercury emissions are supposed to be capped at fifteen tons per year — actual mercury emissions will still be at least twenty-four tons per year. Id. at 28,619.

Several parties petitioned for reconsideration of the rules, and on October 28, 2005, EPA granted reconsideration on several issues. 70 Fed. Reg. 62,200. On June 9, 2006, EPA issued its decision on reconsideration to continue with the final Delisting Rule. The agency made only two changes to CAMR relating to state mercury allocations under the cap-and-trade plan and the standards of performance for certain new sources. 71 Fed. Reg. 33,389.

SUMMARY OF ARGUMENT

Both the plain language and purpose of the Act dictate a ruling in petitioners' favor as EPA's mercury rules violate the Act in at least three ways, each warranting that the rules be vacated.

EPA's first error is to disregard the plain language of section 112. The Delisting Rule, which removed EGUs from the list of regulated sources under section 112, is based solely on EPA's rescission of its December 2000 regulatory determination under section 112(n). Section 112(n), however, grants EPA no authority to make such a rescission, and the agency has thus

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[5] See Congressional Research Service, Mercury Emissions from Electric Power Plants: An Analysis of EPA's Cap-and-Trade Regulations, The Library of Congress (Apr. 15, 2005), OAR-2002-0056-5686 [JA__] (reporting that EPA officials do not expect full compliance with the 2018 cap until 2025 or beyond).

exceeded its statutory authority with the rule. Moreover, a rescission of the December 2000 determination provides no basis to remove EGUs from the section 112(c) List. Section 112(c)(9) alone establishes the requirements necessary to remove "any" source from the list of regulated sources and applies unambiguously to all such sources. EPA admits that it has not met those requirements in the Delisting Rule but contends that section 112(n) somehow exempts power plants from the requirements of section 112(c)(9) and allows the agency to arbitrarily reverse course regarding their regulation. The plain language of the Act, however, belies EPA's claims as section 112(n) evinces a clear congressional desire that EPA "shall regulate [EGUs] under this section" following an appropriate and necessary determination.

EPA's second legal error is its "new interpretation" of a discrete portion of section 112(n) to support a "revised" determination that regulation of EGUs under section 112 is no longer appropriate and necessary. EPA's legal interpretation of section 112(n) contravenes the Act and cannot be squared with Congress's clear desire that all major sources of HAPs be regulated in an expeditious manner through the implementation of plant-specific technology-based standards to address the unique public health threat that HAPs pose. Neither CAIR nor CAMR provide any basis on which EPA may "revise" its determination.

EPA's third error is to disregard the scope of, and requirements for, regulation under section 111 of the Act. CAMR establishes mercury emissions standards through a cap-and-trade system under section 111. Subsection (d) of section 111, however, explicitly limits the scope of that section to those air pollutants that are not "emitted from a source category which is regulated under section 7412 of this title." Mercury is a listed HAP under section 112, emitted from a number of source categories currently regulated by section 112, and therefore not subject to

regulation by section 111. Even if EPA can regulate mercury under section 111, CAMR fails to meet the requirement that standards of performance under that section reflect the "best system of emission reduction . . . adequately demonstrated." 42 U.S.C. § 7411(a). CAMR fails to meet this standard as the rule: a) will allow many power plants to increase their mercury emissions for years; b) sets emission reduction standards that are already significantly exceeded by numerous existing power plants; c) is expected to take at least two decades to reach full implementation; and d) fails to address public health impacts of mercury "hot-spots" near power plants.

STANDARD OF REVIEW

The Court should reverse an agency action if it is arbitrary, in excess of statutory authority, or without observance of procedure required by law. 42 U.S.C. § 7607(d)(9). An agency rule is arbitrary and capricious if the agency relied on factors that Congress did not intend it to consider, failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the record, or is so implausible that it could not be the product of agency expertise. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983).

In evaluating EPA's interpretation of the statute, the Court must first "determine whether, based on the Act's language, legislative history, structure and purpose, 'Congress has directly spoken to the precise question at issue.' If so, EPA must obey." New York v. EPA, 413 F.3d 3, 18 (D.C. Cir. 2005) (quoting Chevron v. NRDC, 467 U.S. 837, 842 (1984)). If that evaluation is inconclusive, EPA's interpretation must nevertheless be rejected under Chevron if "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." Chevron, 467 U.S. at 845.

ARGUMENT

POINT I

EPA EXCEEDED ITS STATUTORY AUTHORITY AND VIOLATED THE CLEAN AIR ACT BY REMOVING EGUS FROM THE SECTION 112 LIST WITHOUT COMPLYING WITH THE MANDATED PROCEDURE

EPA acted without statutory authority and contravened the clear expression of Congress's intent when the agency removed EGUs from the list of source categories without following the procedure laid out in section 112(c)(9). An agency is bound by the limits of the authority delegated to it, and where the language is clear, as here, the agency simply has no discretion to deviate from the statute's mandate. See Arlington Cent. School Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2459 (2006).

A. EPA exceeded its statutory authority in revising the 112(n) determination

EPA's delisting action is based solely on the agency's revision of its six-year-old determination pursuant to section 112(n) of the Act that EGUs should be regulated under section 112. 70 Fed. Reg. at 16,002. The plain language of section 112(n), however, clearly indicates that Congress gave EPA only limited authority to make a single regulatory determination. See 42 U.S.C. § 7412(n). EPA's action was thus unlawful and must be vacated.

Section 112(n) requires EPA to "perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by EGUs," report the results of that study to Congress by 1993, and requires that the agency "shall regulate [EGUs] under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study." 42 U.S.C. § 7412(n)(1)(A). Nothing in this language authorizes EPA to revisit the appropriate and necessary determination once made. If the initial listing was in error, the

regulatory avenue Congress provided EPA to delist EGUs is section 112(c)(9). See 42 U.S.C. § 7412(c)(9) ("Deletions from the list"). Indeed, if Congress had wanted to authorize EPA to periodically revisit its determination - as EPA asserts - Congress would have done so, as it did in other subsections of the Act. See, e.g., 42 U.S.C. § 7412(b) (EPA shall "periodically review the list established by [112(b)]. . . and, where appropriate, revise such list by rule"); 42 U.S.C. § 7409(d)(1) (EPA to perform periodic review of national air quality standards). No such provision is present in section 112(n), however, and "it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." City of Chicago v. Envtl. Def. Fund, 511 U.S. 318, 338 (1994).

EPA attempts to avoid the plain language of the Act by asserting an "implied" authority based solely on the lack of a deadline in section 112(n)(1)(A) by which EPA must make its appropriate and necessary determination. See 70 Fed. Reg. at 16,001-16,002. From this, EPA claims "sufficient discretion under section 112(n)(1)(A) - in terms of both the substance and the timing of the appropriate and necessary finding - that nothing precludes us from revising our. . . finding." Id. (emphasis added). The tenets of statutory construction, however, do not require Congress to employ superfluous language to proscribe the bounds of agency authority. See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it"); New York v. EPA, 443 F.3d at 880, 887 (D.C. Cir. 2006) ("Only in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use.").

Moreover, the context of the 1990 amendments to the Act, see infra at I.B., indicate that Congress - far from providing implied authority and discretion to EPA - moved to limit the

agency's discretion to promote rapid regulation of HAPs. See S. Coast Air Quality Mgmt. District, No. 04-1200, slip op. at 20 (D.C. Cir. 2006) ("EPA's interpretation of the Act in a manner to maximize its own discretion is unreasonable because the clear intent of Congress in enacting the 1990 Amendments was to the contrary."). Indeed, because of Congress' concern for the prompt and effective regulation of HAP emissions, section 112 does not allow judicial review of the listing until emissions standards are promulgated. See 42 U.S.C. § 7412(e)(4); 65 Fed. Reg. at 79,831; S. Rep. No. 101-228, at 3559 ("The Administrator's determination of priorities is given insulation from court challenge because of the complexity of the balancing involved and the extended nature of the litigation that might ensue if all of the schedule were open to challenge in court."). The provision for judicial review at such time does not render the listing any less final. As "[a]n agency construction of a statute cannot survive judicial review if a contested regulation reflects an action that exceeds the agency's authority," EPA's Delisting Rule, based on a faulty claim of implied authority, must fail. Aid Ass'n for Lutherans v. U.S. Postal Serv., 321 F.3d 1166, 1174 (D.C. Cir. 2003).

B. EPA's Delisting Rule Contravenes the Plain Language of Section 112(c)(9)

Even if EPA has authority to revise its appropriate and necessary determination, EPA still may not remove EGUs from the section 112(c) List without following the mandated procedure. Once a source is listed – as EGUs were with the December 20, 2000 Notice of Regulatory Finding, 65 Fed. Reg. 79,825 – EPA is authorized to remove that source from the list under only two circumstances, neither of which is the case here. See 42 U.S.C. § 7412(c)(9).

First, under 112(c)(9)(A), EPA shall delete a source if "the sole reason" that the source was included on the list is the emission of a unique chemical substance and EPA determines that

"there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects." 42 U.S.C. §§ 7412(c)(9)(A); 7412(b)(3)(9)(C). Here, EPA acknowledges, and the scientific literature and the Act itself are clear, that mercury causes significant adverse impacts to both human health and the environment. See, e.g., 42 U.S.C. § 7412(b); 70 Fed. Reg. at 16,011-12; 69 Fed. Reg. at 4,657; RTC, at 7-13 to -18 [JA_].

Second, under section 112(c)(9)(B), EPA "may delete any source category from the list under this subsection . . . whenever the Administrator makes the [applicable] determination." 42 U.S.C. § 7412(c)(9)(B). For non-cancerous pollutants such as mercury, section 112(c)(9) requires "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)(ii).

Here, EPA failed to make the determination that is a mandatory prerequisite to removing EGUs from the list of regulated sources under section 112. Indeed, EPA has plainly acknowledged that the agency used section 112(n) itself as the basis for delisting EGUs. See 70 Fed. Reg. at 15,994 ("The EPA is revising the regulatory finding that it issued in December 2000 pursuant to section 112(n)(1)(A) of the [Act], and based on that revision, removing coal- and oil-fired [EGUs] from the CAA section 112(c) source category list.") (emphasis added)).

EPA offers no justification for its action sufficient to depart from the literal interpretation of the Act. The agency's argument rests on its claim that section 112(n)(1)(A) "occupies the

field in section 112 with regard to Utility Units," and therefore EGUs are not subject to the section 112(c)(9) delisting requirements. 70 Fed. Reg. at 16,032-33. However, "[f]or EPA to avoid a literal interpretation . . . it 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." Friends of the Earth v. EPA, 446 F.3d 140, 146 (D.C. Cir. 2006) (quoting Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1089 (D.C. Cir. 2006)). The language of section 112(n)(1)(a) itself provides that EPA "shall" regulate EGUs under section 112 if the"appropriate and necessary" determination is made. 42 U.S.C. § 7412(n)(1)(A). Section 112(n), in other words, plays a threshold role, not a preemptive one. The presence of an express exemption for EGUs from section 112(c)(6), where no such exemption exists in section 112(c)(9) further supports the conclusion that Congress did not mean to preempt the regulatory scheme of section 112 through section 112(n)(1)(A). Compare 42 U.S.C. § 7412(c)(6) with 42 U.S.C. § 7412(c)(9); see Russello v. United States, 464 U.S. 16, 23 (1983) ("where Congress includes language in one section of a statute, but omits it in another . . . it is generally presumed that Congress acts intentionally . . . in the disparate inclusion or exclusion").

The legislative framework and history of the 1990 Amendments supports the Act's plain language. First, Congress created a strict framework for effective and expeditious regulation of HAPs, "precisely because it believed EPA had failed to regulate enough HAPs under previous air toxics provisions." Nat'l Lime Ass'n v. EPA, 233 F.3d 625, 634 (D.C. Cir. 2000). Because "very little has been done since the passage of the 1970 Act to identify and control hazardous air pollutants" Congress greatly restricted EPA's discretion. See S. Rep. No. 101-228, at 3, 1990 U.S.C.C.A.N. at 3389. It is only logical, then, that Congress intended section 112(c)(9) to apply

to EGUs once listed as the delisting requirements complement the legislature's desire to limit EPA's discretion and promote regulation of all major sources of HAPs.

Second, section 112(n) was the product of a congressional compromise and introduced only to "determine the nature of utility boiler emissions and whether their control is warranted enacted as part of the 1990 amendments to the Act." S. Rep. 101-228, at 414, 1990 U.S.C.C.A.N. at 3794. EPA's broad claims of discretion to avoid the requirements of section 112(c)(9) must fail as the agency may not interpret the Act "in a way that completely nullifies textually applicable provisions meant to limit its discretion." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 458 (2001).

POINT II

EPA'S ACTION VIOLATES THE CAA BY EXEMPTING EGUS FROM SECTION 112 BASED ON AN ERRONEOUS "NEW INTERPRETATION" OF SECTION 112(n) AND CAMR AND CAIR

EPA ignored section 112(c)(9) and removed power plants from the 112(c) List based solely on its rescission of its December 2000 appropriate and necessary determination. 70 Fed. Reg. at 16,002. Even assuming EPA had the authority to take such action, EPA's Delisting Rule must still be vacated because EPA's rescission of the December 2000 determination relies on a "new" interpretation of section 112(n) that is contrary to the language and purpose of the Act. The agency's regulatory conclusion – that CAMR and CAIR obviate the need for EGU regulation – is similarly contrary to clear congressional intent and lacks support in the record.

A. EPA's Interpretation Ignores the Purpose, Structure and Context of Section 112(n).

EPA's Delisting Rule rescinds the agency's listing of EGUs as a source regulated under section 112 based on a new legal interpretation of section 112(n). See 70 Fed. Reg. 15,997-99. According to EPA's new interpretation, two threshold questions must be answered affirmatively before EPA can conclude that regulation of EGUs is appropriate and necessary. The first question is: Are the power plant mercury emissions that remain after the CAA's other requirements have been implemented (the "Remaining Emissions") – standing alone – responsible for causing hazards to human health? See 70 Fed. Reg. at 15,997-16,002 (explaining EPA's new understanding of 42 U.S.C. § 7412(n)(1)(A)); 70 Fed. Reg. at 16,022-25 (concluding that the Remaining Emissions do not result in hazards to human health); 70 Fed. Reg. at 16,028 (insisting that EPA cannot consider the effects of power plant emissions in combination with emissions from other sources). If the answer is "no," EPA concludes that it is not "appropriate" to regulate power plant emissions under section 112 and the inquiry ends. See 70 Fed. Reg. at 16,000.

EPA also concludes that even if regulation of power plant emissions under section 112 is "appropriate," it may not be "necessary." According to EPA, such regulation is "necessary" "only if there are no other authorities available under the CAA that would, if implemented, effectively address the remaining HAP emissions from Utility Units." 70 Fed. Reg. at 16,001 (emphases added).

EPA's approach based on EPA's new legal interpretation contravenes the Act. First, section 112(n) does not limit EPA to consider public health impacts arising solely from EGU

emissions. Rather, the section requires EPA to assess the "hazards to public health reasonably anticipated to occur as a result of emissions from [EGUs]." 42 U.S.C. § 7412(n)(1)(A) (emphasis added). EPA's interpretation therefore inserts a new requirement into the act as it reads "as a result of" to mean "solely as a result of." If Congress had intended EPA to focus on hazards resulting solely as a result of EGU emissions, it would have used the word "solely," as it has numerous times even within section 112. See 42 U.S.C. §§ 7412 (b)(2); 7412(b)(3)(A); 7412(r)(4)(B). Cf. New York v. EPA, 443 F.3d 880, 887 (D.C. Cir. 2006) (rejecting EPA's expansive interpretation as "the court must presume that Congress acted 'intentionally and purposely'" when Congress expressly includes a limitation). This statutory context reinforces the plain meaning of "as a result of" to include results that are caused by EGU emissions acting in concert with other sources of mercury. Cf. Kreindler & Kreindler v. United Tech. Corp., 985 F.2d 1148, 1158 (2d Cir. 1993) (the phrase "based upon" does not mean based "solely" upon).

Second, the Act requires EPA to study the hazards posed by EGU emissions after imposition of the "requirements" of the Act, not those emissions projected to be remaining after "authorities" not yet enacted take effect. See 42 U.S.C. § 7412(n)(1)(A). The plain meaning of "requirement" as something "necessary" or "an essential condition" indicates that Congress wanted EPA to look at existing requirements actually imposed on EGUs by the 1990 Amendments such as the Title IV program for SO_2, not authorities that may be implemented as EPA asserts. See New Webster's Dictionary 815 (1984). Here, EPA identifies CAIR and CAMR as available authorities and then looks to the year 2020 to determine if any EGU emissions then remaining pose a threat. Nothing in section 112(n) suggests that the legislature, in 1990, intended that EPA look ahead thirty years and consider the effects of regulatory programs that

would not be promulgated for fifteen years to determine whether regulating EGUs under section 112 was appropriate and necessary. On the contrary, Congress gave EPA until 1993 to study the health hazards reasonably anticipated to occur as a result of EGU mercury emissions, 42 U.S.C. § 7412(n)(1)(A), and clearly expected an appropriate and necessary determination shortly thereafter. EPA utterly fails to explain how its interpretation can possibly comport with the congressional intent for rapid and stringent HAP regulation found in the 1990 Amendments.

Finally, EPA's interpretation would "abrogate[] the enacted statutory text" of section 112. See Sierra Club v. EPA, 294 F.3d 155, 161 (D.C. Cir. 2002) (citing Appalachian Power Co. v. EPA, 249 F.3d 1032, 1041 (D.C. Cir. 2001)). Rather than considering the purpose, structure and context of Section 112(n), see Chemical Manuf. Ass'n v. EPA, 217 F.3d 861, 864-67 (D.C. Cir. 2000), EPA's new interpretation focuses on one sentence: "The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [EGUs] of [HAPs] after the imposition of the requirements of this chapter." 70 Fed. Reg. at 15,997. From this sentence, EPA "extrapolates" its new questions for determining whether regulation of power plant HAP emissions pursuant to section 112 is "appropriate and necessary." Id.

This new interpretation leads EPA to ignore three critical aspects of section 112. The framework of section 112 establishes that regulation provide for an ample margin of safety for public health, 42 U.S.C. § 7412(d)(4); (c)(9)(B)(ii), and address environmental impacts of HAPs, 42 U.S.C. § 7412(f);(c)(9)(B)(ii), and is generally structured to recognize the contributory impacts of the various sources of HAPs by requiring MACT standards for all major sources regardless of the significance of their respective emissions. EPA, however, determines that, in

assessing whether EGU regulation under section 112 is appropriate and necessary, the agency does not have to provide for an ample margin of safety for public health, 70 Fed. Reg. at 15,998, and does not have to address the environmental impacts of EGU emissions in the Delisting Rule, but rather only public health impacts, 70 Fed. Reg. at 15,997-98. EPA also determines that the Act constrains it to examine only the health effects caused solely by power plant emissions, i.e., in isolation from all other mercury source emissions, and cannot consider the contributory impacts of EGU emissions to overall mercury loading in our waterbodies. See 70 Fed. Reg. at 16,028-29. EPA, in other words, determines that Congress meant for all of the facets of effective regulation under section 112 to be abandoned simply because they are not referenced in the single line of text EPA chose to consider.

Congress, however, does not modify fundamental aspects of a regulatory scheme in vague terms or ancillary provisions. Gonzales v. Oregon, 126 S. Ct. 904, 921 (2006) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. at 468). It is also "emphatically not within an agency's authority to set regulatory priorities that clearly conflict with those established by Congress." See Sierra Club v. Johnson, 444 F. Supp. 2d 46, 58 (D.D.C. 2006). The plain language of section 112 exhibits Congress's priorities for the regulation of HAPs that cannot be disregarded on the weight of a single "extrapolated" line of statutory text. See Sierra Club v. EPA, 294 F.3d at 161 ("the most reliable guide to congressional intent is the legislation the Congress enacted").

B. CAMR And CAIR Do Not Obviate The Need For, Or Appropriateness Of, EGU Regulation Under Section 112

EPA's conclusion that EGU regulation is not appropriate under section 112 because of CAMR and CAIR also contravenes the Act and is unsupported by the record such that the Delisting Rule must be vacated. Section 112 provides a regulatory framework evincing congressional priorities for HAP regulation. First, the MACT emission standards of section 112 "require the maximum degree of reduction in emissions." 42 U.S.C. § 7412(d)(2)(emphasis added). Second, MACT standards under section 112 apply to all major sources of the listed pollutants. 42 U.S.C. § 7412(f)(4). These technology-based standards are designed to protect both the environment and public health. See, e.g., 42 U.S.C. § 7412(d) (permitting EPA to create so-called "beyond-the-floor" standards based on "environmental impacts and energy requirements"). Third, after standards are set, section 112 requires the installation of pollution controls and full compliance within three years. 42 U.S.C. § 7412(i)(3). In other words, section 112 is designed to address the pressing public health threat posed by HAPs.

In contrast, CAMR and CAIR fail to effect any of the congressional priorities for HAP regulation. While a MACT standard for power plants under section 112 would require approximately 90% reductions of mercury emissions[6], CAMR requires only a 20% reduction for the next decade. As a cap-and-trade program, CAMR will also only reduce emissions at those power plants that do not buy credits for emission reductions and will do nothing to protect

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[6] MACT standards require emission standards for existing sources to be no less stringent than the average emission limitation achieved by the best performing 12% of existing sources. 42 U.S.C. § 7412(d)(3). Of the eighty EGUs for which EPA has data, the top 12% have an average control efficiency for mercury of more than 93%. See 69 Fed. Reg. at 4,673; EPA Memoranda by Bill Maxwell ("Maxwell Memoranda") (Nov. 26, 2003), OAR-2002-0056-0006 [JA_] and (Oct. 21, 2005), OAR-2002-0056-6305 [JA_].

communities and areas near such plants. In fact, EPA's own modeling predicts mercury emission increases under the plan in sixteen states and numerous individual plants until 2018. Compare http://www.epa.gov/ttn/atw/combust/utiltox/unitxunit2.xls (Column F) (listing EPA's unit-specific 1999 emission data) with EPA's Final CAMR Unit Mercury Allowances (final two columns), OAR-2002-0056-6155 [JA_]. Finally, CAMR's timeline for compliance is drastically longer than section 112 regulation as CAMR requires no significant reductions until 2018 when its second-phase cap becomes effective. See 70 Fed. Reg. at 28,606. Compliance with the second-phase cap is expected to be significantly delayed due to the banking of emission credits; a 69% reduction in mercury emissions from EGUs will not likely occur until at least 2025. See 70 Fed. Reg. at 28,619 (EPA estimating that under CAMR, EGU mercury emissions in 2020 will still be 24.3 tons); see also Congressional Research Service, supra note 5.

EPA also asserts that the indirect reduction in mercury emissions from EGUs resulting from CAIR provides an alternative basis for its determination that it is not appropriate to regulate EGUs under section 112. 70 Fed. Reg. at 16,004. CAIR, however, is limited to the establishment of emission budgets for NO_x and SO_2 for twenty-eight states in the eastern portion of the country and the District of Columbia, and EPA expects mercury emissions increases under CAIR in areas not addressed. See 70 Fed. Reg. at 28,639. Furthermore, states may seek to comply with CAIR by regulating sources other than power plants, and even if they do regulate power plants, nothing in CAIR requires states to address mercury emissions. See 70 Fed Reg. at 25,162. Thus, EPA's assertion that CAIR will reduce mercury emissions from power plants to levels protecting public health is based purely on an assumption of the indirect benefits to mercury emissions that EPA speculates will result from control technologies used to reduce NO_x

and SO_2 emissions. This assumption is tenuous at best as there is no guarantee that EGUs, even if they are regulated, will use the pollution controls that EPA expects. In light of the congressional mandate in the 1990 Amendments to rapidly and effectively control HAP emissions such as mercury, EPA's assumptions and speculation provide no basis for removing EGUs from section 112.

In sum, CAMR and CAIR will take decades longer to reach full implementation than section 112, while providing for only a portion of the mercury emission reductions achieved under section 112 and no comparable public health assessment to address lingering threats. While EPA may believe its cap-and-trade plan to be better policy, the agency may not impose such policy choices over the statute's express mandate, and its approach must be rejected. See Sierra Club v. Johnson, 444 F. Supp. 2d at 58.

C. EPA's Public Health Conclusion in the Delisting Rule is Contrary to the Act and Arbitrary and Capricious

Finally, EPA based its "revised" delisting determination on a public health analysis that considered only those impacts on public health that result solely from EGU mercury emissions and only one pathway of exposure. This approach fails to protect the public and defies the plain language of the Act, and must be rejected.

First, as mercury moves from power plants, to waterways, and to fish, the mercury bioaccumulates, getting more concentrated at every level of the food chain, and joins with mercury from other sources such as incinerators. See RTC [JA_], 65 Fed. Reg. at 79,827; Hubbard Brook Comments, at 6 [JA_]. The impact on an individual is then determined by the cumulative level of mercury in fish consumed, regardless of where that mercury originated. Any

individual who consumes more than 0.1 micrograms of mercury per kilogram of his or her body weight per day is exceeding health safety criteria. See 65 Fed. Reg. at 79827. EPA's limited analysis, however, recognizes a health threat only where this safety level is exceeded solely because of mercury from EGUs.

EPA's approach has been rejected by this Court and must be rejected here. This Court has recognized that "an analysis cannot treat an identified environmental concern in a vacuum," but must address the accumulated impacts of various sources. Grand Canyon Trust v. FAA, 290 F.3d 339, 346 (D.C. Cir. 2002); see also Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000). Research indicates that approximately 630,000 U.S. babies are annually born to mothers whose blood levels of mercury exceed safety levels. See Comments of New Jersey et al., Decl. of Alan Stern ¶¶ 7-8, OAR-2002-0056-5460 [JA_]. For these babies, each additional increment of utility-attributable mercury carries a predictable risk of additional IQ loss and other neurological effects. Id. at ¶ 10; see also National Research Council, Toxicological Effects of Methylmercury at 56-60 and 112-117, OAR-2002-0056-5927; 5928; 5929 [JA_]. EPA's health analysis fails to address these incremental impacts and consequently, leaves unaddressed these thousands of babies affected by EGU mercury emissions.

Second, EPA considered only a single pathway through which people are exposed to mercury: "freshwater fish caught and consumed by recreational and subsistence anglers." 70 Fed. Reg. at 16,012. Thus, EPA's analysis disregarded all marine fish, commercially caught fish, and fish caught in estuaries such as the Chesapeake Bay. Id. These pathways account for millions of pounds of fish consumed by U.S. citizens annually and are significant pathways through which mercury reaches people. See e.g., EPA Technical Support Document ("TSD") at

24, OAR-2002-0056-6186 [JA_] (recognizing that marine fish represent more than four million metric tons of caught fish in the United States annually).

EPA attempts to justify its disregard of other pathways of mercury exposure by claiming that analysis of U.S. EGU mercury impacts on marine and estuarine fish is uncertain, and that commercial fish do not represent a significant dietary pathway of U.S. EGU mercury. See EPA TSD, at 34 [JA_]. The statutory responsibility facing EPA, however, is to assess all impacts from EGU emissions that are "reasonably anticipated." 42 U.S.C. § 7412(n)(1)(A). Individuals who ingest mercury through marine and commercial fish can be expected to suffer health impacts by the mercury additionally ingested through the single pathway EPA considered. By excluding the pathways through which individuals are exposed to mercury, EPA has disregarded the plain language of section 112(n) and abdicated its statutory responsibility. EPA's approach must be rejected.

POINT III

CAMR'S REGULATION OF MERCURY UNDER SECTION 111 IS CONTRARY TO THE STATUTE

As EPA concedes, if the Delisting Rule is unlawful, CAMR similarly cannot stand. See Letter from Jeffrey R. Holmstead, EPA, to Peter C. Harvey, Attorney General of New Jersey (June 24, 2005) attached to Comments of New Jersey et al., OAR2002-0056-6282 [JA_]("staying the final section 112 rule would necessitate staying the final CAMR rule."); EPA's Opp. to Mot. for Stay Pending Review at 20 (July 18, 2005)(admitting same). Assuming, however, that EPA may exempt EGUs from regulation under section 112 – which EPA may not, as demonstrated

above – EPA still violates the Act by regulating mercury, a potent neurotoxin, under section 111 with a cap-and-trade program.

A. EPA's Attempt to Regulate Mercury Under Section 111 is Contrary to the Plain Language of the Act

Section 111 authorizes EPA to promulgate New Source Performance Standards ("NSPS"), technology-based standards for new sources of "air pollution which may reasonably be anticipated to endanger public health and welfare." 42 U.S.C. § 7411(b)(1)(A). Subsection (d) of Section 111 provides authority for regulation of existing sources, but is explicitly limited to those air pollutants that are not "emitted from a source category which is regulated under section 7412 of this title." 42 U.S.C. § 7411(d)(1). Thus, listed HAPs emitted from source categories regulated under section 112 are not to be regulated under section 111. Id. Mercury is a listed HAP under section 112, 42 U.S.C. §§ 7412(b)(1), 7412(c)(6), and is emitted from a number of source categories currently regulated by section 112. E.g., 71 Fed. Reg. 76,518 (Dec. 20, 2006) (establishing emission standards for HAPs including mercury from Portland Cement manufacturers); 69 Fed. Reg. 55,238 (Sept. 13, 2004) (establishing emission standards for mercury emissions from Industrial, Commercial, and Institutional Boilers and Process Heaters). Therefore, EPA may not regulate mercury emissions from EGUs under section 111, See Arlington Cent. School Dist. Bd. of Educ., 126 S. Ct. at 2459 (statutory construction analysis begins with the statute's plain language).

EPA attempts to avoid this clear limit on the scope of section 111(d) by claiming a conflict between the 1990 House and Senate versions of the amendments to section 111(d). See 70 Fed. Reg. at 16,030. Slightly differing language in the versions, however, does not alter

Congress' expressed intent that section 111 was not meant to regulate HAPs. See 42 U.S.C. § 7411(d)(1). Ambiguity between the amendment versions cannot be relied upon to avoid the plain meaning of the statute, but rather, the versions must be harmonized in light of the Act as a whole. See, e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000); Citizens to Save Spencer County v. EPA, 600 F.2d 844, 851, 890 (D.C. Cir. 1979). Under these established canons of statutory interpretation, EPA's attempt to regulate existing sources of mercury under section 111 must be rejected.

The regulatory framework and legislative history of the Act further support the finding that listed HAPs emitted from source categories regulated under section 112 may not be regulated under section 111. First, the statutory limits on the applicability of section 111(d) demonstrate that it serves a backstop role in the Act to account for existing sources of air pollutants that are not controlled under any other provision. 42 U.S.C. § 111(d)(1). Second, as noted supra, Congress explicitly recognized the differences between sections 112 and 111 and the need to regulate HAPs under the former. See S. Rep. No. 101-228, at 167, 1990 U.S.C.C.A.N. at 3552 ("An emissions limitation based on section 112(d) will, in most cases, be more stringent than a new source performance standard for the same category of sources or pollutants . . . that is appropriate as this program is for the control of extremely harmful air pollutants"). Section 112 was enacted to address the public health threat posed by HAPs and required EPA to set standards at a level providing an ample margin of safety to protect the public health. 42 U.S.C. § 7412(c)(9)(B)(ii). In contrast, section 111 was largely designed as a technology forcing provision to promote long-term economic benefits through nationalized standards. See H.R. Rep.. 95-294,

at 186 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1264 ("[T]he best technology requirement [of Section 111] was intended to create incentives for improved technology").

B. Even if EPA Has Authority to Regulate Mercury Emissions from EGUs Under Section 111, CAMR Violates the Requirements of That Section.

Section 111 requires EPA to set a standard of performance defined as an air pollutant emissions standard that "reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1) (emphasis added). See also 42 U.S.C. §§ 7411(g)(4)(B), 7602. CAMR violates this express mandate of section 111 because: (1) existing sources already utilize control technologies that achieve much greater emission reductions than what CAMR requires; (2) the rule will actually result in future emission increases in many states; and (3) the rule will perpetuate dangerous, local "hot-spots" of mercury severely endangering public health. As CAMR conflicts with the language, purpose and intent of the CAA, and is not supported by a reasoned analysis, the Court should vacate CAMR as an abuse of discretion and arbitrary and capricious rulemaking. 42 U.S.C. § 7607(d)(9)(A); see Nat'l Asphalt Pavement Assoc. v. Train, 539 F.2d 775, 786 (D.C. Cir. 1976).

1. CAMR Violates Section 111 Because Currently Utilized Control Technologies and Source Specific Mercury Controls Achieve Substantially Greater Emission Reductions Than CAMR Requires.

Section 111 requires EPA to propose regulations establishing air pollutant emission standards that, applying the "best system of emission reduction," reflect the degree of achievable

emission limitation. 42 U.S.C. §§ 7411(a)(1) (emphasis added) and (f)(1). CAMR will result in a 21% emission reduction by 2010 through an annual emissions cap of thirty-eight tons from a 1999 base line level of forty-eight tons. In contrast, EPA's estimates predict that existing sources will already have reduced their emissions to thirty-one tons - seven tons better than CAMR's phase one requirement - as of 2010. 70 Fed. Reg. at 28,619. EPA offers no explanation for how a cap set at a level seven tons above what the agency expects EGUs to be emitting at the time it becomes operational can possibly reflect the best system of reduction.

Full implementation of CAMR will ultimately result in reductions of mercury emissions from power plants of 69% somewhere around 2025. See 69 Fed. Reg. at 4,691; 71 Fed. Reg. at 33,395; Congressional Research Service, supra note 5. EPA's data, however, demonstrates that the current best performing power plants reduce their mercury emissions by an average of 93%.[7] EPA in fact concluded that currently available control technologies have shown "mercury capture in excess of 90 percent." 65 Fed. Reg. 79,828. Thus CAMR requires only a fraction of the efficiency achieved by existing and available control technologies. In fact, existing power plants of every category established by EPA currently exceed CAMR's performance standards for new sources.[8] These weak standards are unsupportable given Section 111's express language. See 42 U.S.C. § 7411(a)(1).

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[7] This percentage is derived from the average of the actual emissions achieved by the top 12% of the eighty coal-fired sources for which EPA has data (ten units, two that are coal-refuse-fired units and eight that are bituminous-fired). See 69 Fed. Reg. at 4,673; EPA Maxwell Memoranda [JA_].

[8] For instance, CAMR's new source limit is 74% for plants burning bituminous coal while the best performing bituminous plant (Mecklenberg Co-Gen Facility) achieves 98.8% reductions in its mercury emissions. See October 21, 2005 Memorandum from Bill Maxwell to Robert Wayland at 7-10, OAR-2002-0056-6305 [JA_]; 70 Fed. Reg. at 28,610 (establishing emissions limits which were converted to a percentage reduction format).

The weak standards are further diluted by EPA's subcategorization scheme in establishing the NSPS. 70 Fed. Reg. at 28,612. Although EPA "may" subcategorize based upon different classes, types, and sizes, 42 U.S.C. § 7411(b)(2), EPA is nevertheless statutorily required to implement standards that "reflect the degree of emission limitation achievable through the application of the best system of emission reduction." 42 U.S.C. § 7411(a)(1). EPA's subcategorization scheme, based on the different types of coal EGUs burn, fails to reflect that "a number of Utility Units co-fire different ranks of coal." 70 Fed. Reg. at 28,612-13. Moreover, EPA further subcategorizes units burning subbituminous coal based upon the type of pollution control that is being utilized. Id. at 28,615 (EPA setting different NSPS limits for subbituminous-coal burning EGUs based on the type of Flue Gas Desulfurization or "FGD"system used); EPA's Response to Significant Public Comments at 265, OAR-2002-0056-6722 [JA_]. Subcategorization based on technology, however, defeats the very purpose of establishing NSPS limits, because, as EPA itself acknowledged, subcategorization based on the type of air pollution control device "leads to situations where floors are established based on performance of sources that are not the best performing." 69 Fed. Reg. 394, 403 (Jan. 5, 2004). CAMR presents this situation, as a power plant using a wet FGD system is allowed to emit twice the amount of mercury as a power plant similar in every other respect except its use of a dry FGD system. 70 Fed. Reg. at 62,216.

2. CAMR Violates Section 111 Because the Rule Will Result in Emission Increases in Some States Even Beyond 2018.

CAMR further violates section 111's requirement that standards reflect the best system of emission reduction achievable because EPA's program will actually result in emission increases

in numerous states and individual plants. Comparing CAMR budgets to 2003 actual mercury emissions, sixteen states can increase their mercury emissions between now and 2018 while four states can continue to lawfully increase their emissions even beyond 2018. Compare Unit specific estimated mercury emission rates in 1999, at http://www.epa/gov/ttn/atw/combust/utiltox/unitxunit2.xls with 70 Fed. Reg. at 28,649-50. The difference between the allowed emissions under CAMR and states' actual emissions amounts to eighteen tons of excess mercury for the period between 2010 and 2018, a result that Congress could not have intended in enacting section 111. A program that allows emissions increases clearly violates section 111. See 42 U.S.C. § 7411(a)(1).

3. CAMR Cannot Be The Best System of Emission Reduction Adequately Demonstrated Because EPA Ignored Critical Nonair Quality Health and Environmental Impacts Resulting From the Cap-and-Trade Program

Finally, section 111 requires a standard of performance that takes into account "any nonair quality health and environmental impact." 42 U.S.C. § 7411(a)(1). Well-documented and adverse health and environmental impacts from mercury emissions include mercury "hot-spots," areas where the species living in waterbodies exhibit consistently high levels of mercury contamination. See Decl. of David Evers, Ex. B at 19, OAR-2002-0056-5460 [JA_]. At least nine such hot-spots have been identified in the area from New York to Nova Scotia, affecting both the environment and public health in those areas. Id.; see also Decl. of Charles Driscoll ¶ 4, OAR-2002-0056-5460 [JA_]; Hubbard Brooks Comments, at 13-14 [JA_].

Research has repeatedly noted that EGU air mercury emissions play a significant role in the creation of these hot-spots. Hubbard Brooks Comments, at 7-11 [JA_]. An EPA-funded

study found that approximately 70% of mercury wet deposition in Steubenville, Ohio, which is located in close proximity to several major coal-fired power plants, is attributable to the local sources. See Gerald J. Keeler et al., Sources of Mercury Wet Deposition in Eastern Ohio, USA, 40 Environ. Sci. & Technol. 5874 (2006), OAR-2002-0056-6748 [JA __]. Emission reductions from local source contributors have also been accompanied by significant decreases in the mercury concentrations in fish in local waterbodies, highlighting the role these local sources play. See Hubbard Brook Comments at 13-14 [JA_]. The record therefore reflects that individual EGUs can have significant impacts on local hot-spots of mercury contamination and a cap-and-trade program allowing individual plants to avoid any reduction can reasonably be anticipated to impact public health and the environment.

EPA has previously recognized the potential impacts of a cap-and-trade system for hazardous pollutants. See EPA, Tools of the Trade, A Guide to Designing and Operating a Cap and Trade Program for Pollution Control at 2-5 (June 2003), available at http://www.epa.gov/airmarkets/international/tools.pdf [JA_] (command and control regulations work better than cap-and-trade programs where emissions are toxic and have serious local health impacts). In fact, a cap-and-trade program has never been attempted for a neurotoxin such as mercury and EPA's Office of Inspector General concluded that CAMR as initially proposed failed to adequately address either the potential for hot-spots or the potential impact on children. See EPA Office of Inspector General, Evaluation Report: Additional Analyses of Mercury Emissions Needed Before EPA Finalizes Rules for Coal-Fired Electric Utilities (Feb. 3, 2005), OAR-2002-0056-5686 [JA_].

In the final mercury rules, EPA neglects the potential impacts of a cap-and-trade program for mercury, instead erroneously concluding that the final rule is "not significant" in light of CAIR, 70 Fed. Reg. at 28,639, and referring to the CAMR docket generally for a discussion of any impacts, 70 Fed. Reg. at 28,616. First, EPA's reliance on CAIR is misplaced as the agency acknowledges that CAIR will result in "both increases and decreases in [mercury] deposition" with increases expected in areas not covered by CAIR. 70 Fed. Reg. at 28,639. Thus, CAIR provides no assurance to individuals living in the twenty-two states not under its authority. See 70 Fed. Reg. at 28,618.

Second, the rest of the CAMR docket also fails to address the environmental and public health impacts of the cap-and-trade plan. The rulemaking relied on a modeling program to estimate the levels of mercury deposition in the future and concluded, "we do not currently have any facts before us that would lead us to conclude that utility-attributable hot spots exist."See 70 Fed. Reg. at 16,027-28 (emphasis added). By looking solely for "utility-attributable" hot-spots, however, EPA ignores the threats to public health posed by mercury hot-spots created by EGU emissions acting with other sources of the pollutant. As noted supra, EPA coined the "utility-attributable" term in the context of its flawed interpretation of section 112(n)(1)(A). Just as EPA's interpretation was unlawful for section 112, the interpretation equally contradicts the mandate by section 111 that EPA consider both the health and environmental impacts resulting from a promulgated performance standard. See 42 U.S.C. § 7411(a)(1).

Finally, EPA's reliance on large-scale modeling to predict future hot-spots is misplaced. Hot-spots are frequently created not by generalized mercury deposition over large areas, but rather by local sources such as those studied in Ohio and watershed characteristics such as the

terrain and surrounding ground cover. See Comments of New Jersey et al., Evers Decl., Ex. B at 4, 19 [JA_]. EPA's model averages the impacts from mercury emissions over 500 square miles using thirty-six square kilometer grids, and misses the local hot-spots that pose threats to the public and the environment. See Comments of The New Hampshire Department of Environmental Services at 3, OAR-2002-0056-6490 [JA_].

For these reasons, EPA set standards that contravene Congress' intent that standards of performance in Section 111 drive technology and provide for the best system of emission reduction and must be overturned.

CONCLUSION

Because EPA exceeded its statutory authority and acted arbitrarily and capriciously, Government Petitioners respectfully request that the Court vacate the Delisting Rule, 70 Fed. Reg. 15,994, and vacate CAMR, 70 Fed. Reg. 28,606, with instructions to EPA to promulgate emissions standards for HAPs emitted by EGUs under section 112 of the Act.

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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 Government Petitioners' Initial Opening Brief contains 10,370 words, as counted by counsel's word processing system.

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