ORAL ARGUMENT HELD DECEMBER 6, 2007

DECISION ISSUED FEBRUARY 8, 2008

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-1097
(and consolidated cases)
COMPLEX

STATE OF NEW JERSEY, *et al.*,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petitions for Review of Final Action of the U.S. Environmental Protection Agency

---

Petition for Rehearing or for Rehearing *En Banc* of Respondent-Intervenor Utility Air Regulatory Group

---

Henry V. Nickel
F. William Brownell
Lee B. Zeugin
HUNTON & WILLIAMS LLP
1900 K Street, NW
Washington, D.C. 20006
(202) 955-1500

Counsel for the Utility Air Regulatory Group

March 24, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW JERSEY, et al.	)	
	)	
Petitioners,	)	
v.	)	**No. 05-1097 and**
	)	**Consolidated Cases**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	
	)	

CERTIFICATE AS TO PARTIES

Pursuant to Circuit Rules 35 and 28(a)(1), the following information is provided on behalf of the undersigned counsel for Respondent-Intervenor the Utility Air Regulatory Group ("UARG").

(A)(1) Parties and Amici. To the best of counsel's knowledge, all petitioners, respondents, intervenors, and amici appearing in this case are listed below.

Petitioners: 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, Pennsylvania Dept. of Environmental Protection, Commonwealth of Pennsylvania, State of Delaware, State of Wisconsin, State of Illinois, State of Minnesota, Waterkeeper Alliance, Conservation Law Foundation, Chesapeake Bay Foundation, Environmental

Defense, National Wildlife Federation, Sierra Club, Natural Resources Council of Maine, Ohio Environmental Council, United States Public Interest Research Group, Natural Resources Defense Council, City of Baltimore, 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, Anthracite Region Independent Power Producers Association ("ARIPPA"), Integrated Waste Service Association, UARG, United Mine Workers of America - American Federation of Labor/Congress of Industrial Organizations, Producers for Electric Reliability, Alaska Industrial Development and Export Authority.

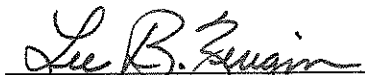
Respondent: United States Environmental Protection Agency.

Intervenors: Physicians for Social Responsibility, American Nurses Association, American Public Health Association, American Academy of Pediatrics, City of Baltimore, Adirondack Mountain Club, State of Wyoming, State of Michigan, State of Rhode Island and Providence Plantations, UARG, Cinergy Corp., PPL Corp., PSEG Fossil LLC, NRG Energy, Florida Power and Light, State of Alabama, State of Indiana, State of South Dakota, State of Nebraska, Edison Electric Institute, State of North Dakota, Producers for Electric Reliability, National Mining Association, State of Michigan Dept. of Environmental Quality,

Maine Indian Tribes, National Congress of American Indians & Individual Treat Tribes, WEST Associates, Duke Energy Indiana Incorporated, Duke Energy Kentucky Incorporated, Duke Energy Ohio Incorporated.

Amici: Washington Legal Foundation, State of West Virginia Department of Environmental Protection.

Respectfully submitted,



Henry V. Nickel
F. William Brownell
Lee B. Zeugin
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

Dated: March 24, 2008

Counsel for Utility Air Regulatory Group

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

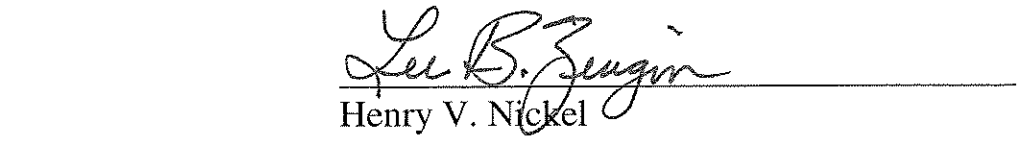
STATE OF NEW JERSEY, et al.	)	
	)	
Petitioners,	)	
v.	)	**No. 05-1097 and**
	)	**Consolidated Cases**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	
	)	

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Respondent-Intervenor Utility Air Regulatory Group ("UARG") files the following statement:

UARG is a not-for-profit association of individual electric generating companies and national trade associations that participates collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

Respectfully submitted,



Henry V. Nickel
F. William Brownell
Lee B. Zeugin
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

Dated: March 24, 2008

Counsel for Utility Air Regulatory Group

TABLE OF AUTHORITIES

FEDERAL CASES

Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984) 1, 4, 13

King v. St. Vincent's Hospital, 502 U.S. 215 (1991) 14

Nat'l Lime Association v. EPA, 233 F.3d 625 (2000) 6

Nat'l Asphalt Pavement Association v. Train, 539 F.2d 775 (D.C. Cir. 1976) 1, 5, 8, 9, 10, 11

Synovus Financial Corp. v. Board of Governors, 952 F.2d 426 (D.C. Cir. 1991) 8

Thomas v. State of New York, 802 F.2d 1443 (D.C. Cir. 1986) 1, 7

United Savings Association v. Timbers of Inwood Forest, 484 U.S. 365 (1988) 13

FEDERAL STATUTES

Clean Air Act ("CAA"), 42 U.S.C.§ § 7401-7671q

42 U.S.C. § 7411, CAA § 111 ..... 4, 5, 8

42 U.S.C. § 7412 (c), CAA § 112 (c) 2, 4, 7, 8, 11, 14, 15

42 U.S.C. § 7412 (c)(1), CAA § 112 (c)(1) 11, 13

42 U.S.C. § 7412 (c)(9), CAA § 112 (c)(9) 3, 4, 13, 14

42 U.S.C. § 7412 (c)(9)(B), CAA § 112 (c)(9)(B) 14, 15

42 U.S.C. § 7412 (d), CAA § 112 (d) 1, 3, 6, 7, 8, 11, 15

42 U.S.C. 7609(d)(1)(C), § CAA § 307 (d)(1)(C) 2, 6, 10, 12

42 U.S.C. § 7412 (e)(4), CAA § 112 (e)(4) 9

42 U.S.C. § 7412 (n)(1)(A), CAA § 112 (n)(1)(A) 2, 4, 6, 7, 8, 11, 12

FEDERAL REGISTER

65 Fed. Reg. 79,825 (Dec. 20, 2000) 2

69 Fed. Reg. 4652 (Jan. 30, 2004) 2, 6, 10

70 Fed. Reg. 15,994 (Mar. 29, 2005) 2

CONCISE STATEMENT OF THE ISSUES AND THEIR IMPORTANCE

The Utility Air Regulatory Group ("UARG") requests rehearing *en banc* of these consolidated cases. Rehearing *en banc* is required because the panel's decision conflicts with prior decisions of this Circuit in *Thomas v. State of New York,* 802 F.2d 1443 (D.C. Cir. 1986) and *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775 (D.C. Cir. 1976). Rehearing *en banc* is also required because the panel's decision reflects a fundamentally flawed approach to the Supreme Court's *Chevron*[1] decision -- an approach which needs to be corrected given the expansive role that this Court plays in reviewing final agency action under the Clean Air Act ("CAA" or "the Act") and other national regulatory statutes.

The panel in this case struck down a final rule of the U.S. Environmental Protection Agency ("EPA" or "the Agency") that removed electric generating units ("EGUs") from the list of sources whose hazardous air pollutant ("HAP") emissions are to be regulated under § 112(d) of the CAA. In doing this, the panel has set EPA on a remarkable course of action, one that Congress never intended the Agency to pursue and one that is inconsistent with prior decisions of this Court.

By its plain terms, the CAA authorizes EPA to regulate EGU HAP emissions under § 112 *only* where the Agency has determined, after notice and comment rulemaking, that "such regulation is appropriate and necessary." CAA

---

[1] *Chevron, U.S.A. v. NRDC,* 467 U.S. 837 (1984).

§ 112(n)(1)(A), CAA § 307(d)(1)(C). On December 20, 2000, in the closing days of the Clinton Administration, then-EPA Administrator Browner issued, without notice-and-comment rulemaking, what she characterized as a "notice of regulatory finding." 65 Fed. Reg. 79,825 (2000). In the notice, she announced her "conclusion" that regulation of mercury emissions from coal-fired EGUs was "appropriate and necessary." Based on this finding, she also added EGUs to the list of source categories to be regulated pursuant to CAA §§ 112(c) and (d).

Following this preliminary action, EPA proposed maximum achievable control technology (MACT) standards under § 112(d). In that rulemaking, EPA requested comment not only on proposed MACT standards, but also on alternative regulatory approaches under other CAA provisions and whether EGUs even met § 112(n)(1)(A)'s criteria for regulation under § 112. *See* 69 Fed. Reg. 4652 (2004).

On March 29, 2005, following this notice-and-comment rulemaking, the EPA Administrator concluded that the December 2000 notice "lacked foundation" and that regulation of EGUs under CAA § 112 was *neither* "appropriate" *nor* "necessary." EPA therefore removed EGUs from the § 112(c) list of source categories and terminated rulemaking on the proposed MACT standards, and instead promulgated an EGU regulatory program under § 111. 70 Fed. Reg. 15,994 (2005).

In its decision, the panel invoked *Chevron* step one to conclude that EPA's March 29, 2005 rulemaking decision to remove EGUs from the § 112(c) list and not

to regulate EGUs under § 112(d) was unlawful under the "plain text and structure of section 112," Slip op. at 17, notwithstanding the Agency's determination – which the panel's decision nowhere reached[2] -- that such rulemaking is neither "appropriate" nor "necessary." According to the panel, only *following* promulgation of § 112(d) MACT standards that EPA found were neither "appropriate" nor "necessary" could the court hear challenges to the legality of EGU regulation under § 112(d). As the panel sees it, this anomalous result -- compelling promulgation of legally defective MACT standards -- was *specifically mandated by Congress* in § 112(c)(9).

As discussed below, the panel's decision conflicts with this Court's decision in *Thomas* because it gives legislative rulemaking effect to a "notice" that was not the product of notice-and-comment rulemaking. The panel's decision also conflicts with this Court's decision in *National Asphalt* because it requires EPA to adopt final emission standards in the face of a rulemaking record demonstrating that the source category does not satisfy the statutory criteria for listing.

Finally, the panel's decision is based on a singular focus on § 112(c)(9), which authorizes EPA to remove from the § 112(c) list lawfully listed major source categories based on "health" and "environmental" criteria. The panel concludes, as

---

[2] The panel expressly declined even to "reach [the] contention that . . . EPA was arbitrary and capricious in reversing its determination that regulating EGUs under section 112 was 'appropriate and necessary.'" *See* Slip op. at 12.

a *Chevron* step one matter, that the word "any" in this subsection compels promulgation of legally deficient § 112(d) MACT standards unless the § 112(c)(9) "de-listing" criteria are met and, in doing so, ignores the language and intent underlying § 112(n)(1)(A), § 112(e), § 112(c)(1), and § 112(c)(9) itself. The panel's singular focus on an isolated snippet of language in a subsection of § 112 violates the obligation imposed by the Supreme Court in *Chevron* that "the meaning of a word must be ascertained in context," *Chevron* at 861.

ARGUMENT

CAA § 112(n)(1)(A) authorizes EPA to regulate EGUs only after conducting § 307(d) rulemaking that results in a final decision that it is "necessary and appropriate" to regulate one or more EGU HAP emissions "under § 112."

In this case, EPA Administrator Browner published a "notice of regulatory finding" adding EGUs to the list of § 112 source categories based on a § 112(n)(1)(A) determination, made without rulemaking, that regulation of EGU mercury emissions was "appropriate and necessary." 65 Fed. Reg. 79,825. In issuing that notice, Administrator Browner explained that "it is unnecessary to solicit ... public comment on today's finding ... [because] [t]he regulation developed subsequent to the finding will be subject to public review and comment." *Id.* at 79,831. Later, EPA confirmed that the listing was "not yet final agency action" because "the entire predicate for ... [the] listing decision (*both legal and*

factual) is susceptible to further comment and administrative review." EPA's Reply in Support of Motion to Dismiss at 4 (emphasis added).[3]

The CAA regime for "listing" and then regulating a source category is not a new one. Rather, it dates back to the 1970 CAA. In 1976, this Court explained in *National Asphalt* that a *Federal Register* notice "listing a particular source category [for regulation under CAA § 111] is action taken in the course of promulgating final standards." 539 F.2d at 779 n.1. A "very important aspect" of rulemaking to establish CAA emission standards, therefore, is "whether the[] [rules] comport with" the Act's listing criteria. *Id.* at 780. While over thirty years have passed since *National Asphalt*, the CAA regime for listing and standard setting has changed little.

If the statutory criteria for listing a source category (in the case of EGUs, a § 112(n)(1)(A) rulemaking finding) do not support a listing, there can be no statutory basis for regulating the source category. Regulation of a source category that cannot be listed would be *ultra vires*. *See National Asphalt,* 539 F.2d at 780. Nevertheless, the panel here found that Administrator Browner's preliminary December 2000 § 112(c) listing notice -- a notice based on a § 112(n) finding made without notice and comment and in anticipation of rulemaking -- *required* EPA to regulate the EGU source category under § 112(d) even though EPA subsequently

[3] Based on these representations that Administrator Browner's "notice" of a finding under § 112(n)(1)(A) was not "final," this Court dismissed a petition for review filed by UARG challenging the lawfulness of that notice. Order, *Utility Air Regulatory Group v. EPA,* No. 01-1074 (2001).

determined *through rulemaking* that that listing did not meet the statutory criteria for regulating *any* EGU HAP under § 112. Because the panel's decision conflicts with the law of this Circuit, with fundamental principles of administrative law, and with the CAA itself, rehearing *en banc* should be granted.

I. The Inconsistency of the Panel Decision with *Thomas v. New York* Requires Rehearing.

Regulation of EGUs under § 112 requires a finding under § 112(n)(1)(A) at the conclusion of a rulemaking under § 307(d)(1)(C). Prior to the completion of that rulemaking and a final decision to regulate under § 112 one or more HAPs emitted by EGUs, EPA has *no authority* to regulate any EGU emission of a HAP under CAA § 112.

The panel's decision stands the CAA on its head. According to the panel, Administrator Browner's December 2000 notice, which *preceded any rulemaking*, compelled EPA to adopt final MACT standards for EGUs, even though the Administrator later concluded -- *after rulemaking* -- that the § 112(n)(1)(A) criteria for regulating EGUs could not be satisfied.[4] As a result, according to the panel, a

[4] EPA has construed § 112(n)(1)(A) as requiring a finding that regulation of a specific HAP emitted by EGUs is "necessary and appropriate" to regulate that HAP. 69 Fed. Reg. 4660, col. 1. As a result, for EPA to list EGUs under § 112(c), it would have had to find that regulation of *all* HAPs emitted by EGUs is "necessary and appropriate" under § 112(d) MACT standards, because this Court has construed § 112(d) as requiring regulation of *all* HAPs emitted by a major source. *See Nat'l Lime Assn. v. EPA,* 233 F.3d 625, 633 (2000). Administrator Browner made no such finding. Indeed, she identified only one pollutant emitted by coal-fired EGUs -- mercury -- in her December 2000 notice, making her § 112(n)(1)(A) "finding" a

departing EPA Administrator can bind future EPA Administrators to list and to regulate EGUs under § 112(c) and (d), even though this source category is found after the statutorily required rulemaking *not* to meet the § 112(n)(1)(A) criteria for regulation under § 112.

In the mid-1980s in *Thomas v. State of New York*, this Court addressed whether a letter sent by the EPA Administrator to the Secretary of State in the last days of the Carter Administration, in which the outgoing Administrator concluded that acid deposition was "endangering" public health in the U.S. and Canada, obligated future EPA Administrators to take regulatory action under CAA § 115, which required regulation after an "endangerment finding." In one of his last opinions on this Court, then Judge Scalia found that an agency statement that binds subsequent Administrators is a statement of future effect designed to implement law or policy, and is therefore a "rule." 820 F.2d at 1446. Because the Administrator had not issued the "endangerment" finding through notice-and-comment rulemaking but instead issued it in a letter, this Court found that it was not a "rule" and, therefore, could have no binding effect. *Id.* at 1447.

In this case, the December 2000 notice that regulation of EGU mercury emissions is "appropriate and necessary" is simply that -- a notice announcing a

---

facially unlawful attempt to regulate *all* EGU HAP emissions. But, because that determination was found to be non-final, this Court dismissed UARG's petition to review it. Note 3 *supra.*

non-final action under § 112(n)(1)(A) *issued without rulemaking*. Accordingly, under *Thomas,* it cannot bind the Agency to take any particular future course of action under § 112(d) or (n). The only "final action" adopted after rulemaking here is the 2005 CAA § 112(n)(1)(A) rulemaking determination that regulation of EGU emissions is neither "appropriate" nor "necessary" under § 112, a final action that precludes regulation of EGUs under § 112(d) or any other provision of § 112.

Because this panel decision is wholly at odds with the *Thomas* decision, this case should be heard *en banc* to resolve a decisional conflict in this Circuit.[5]

II. The Inconsistency of the Panel's Decision With *National Asphalt* Requires Rehearing.

As this Court explained in *National Asphalt*, a source category could only be listed under § 111(a) if the category "may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare." 539

[5] The panel declined to consider UARG's *Thomas* argument because it concluded that "EPA had steadfastly refused to join it." Slip op. at 13 n.3. As this Court recognized in *Synovus Financial Corp. v. Board of Governors,* 952 F.2d 426, 433 (D.C. Cir. 1991), however, nothing in the D.C. Circuit rules or the Federal Rules of Appellate Procedure "forbids an intervenor from raising, or the reviewing court from considering, an issue not mentioned by petitioner or respondent but fully litigated in the agency proceedings and potentially determinative of the outcome of judicial review." More importantly, in making the *Thomas* argument, intervenors were not raising a new issue but simply presenting the argument that this Court's precedent in *Thomas* resolved the central issue in the case -- whether the 2000 notice obligated EPA to regulate EGUs under § 112(c) and (d). The rules of this Court require that an intervenor "must avoid repetition of ... legal arguments," Circuit Rule 28(e), and the *Thomas* argument was a non-duplicative argument in support of EPA's action. Finally, members of this court are required to follow established precedent and are not excused from considering that precedent on the grounds that another party failed to cite or rely on the case in their argument.

F.2d at 778. And because "[t]he preliminary determination of the Administrator in listing a particular source category is action taken in the course of promulgating final standards," *id.* at 779 n.1, a source category for which listing is an essential predicate cannot be regulated under a program absent a valid listing.

Under *National Asphalt,* therefore, if the Agency concludes during rulemaking for a source category that the criteria for listing that category are not met, NSPS cannot be promulgated for the category. Furthermore, if EPA takes final action to list a source category and to promulgate NSPS, the lawfulness of the listing decision is subject to judicial review at the end of that rulemaking. If the listing decision is vacated, the NSPS must also be vacated. *See id.* at 780 ("[o]ne very important aspect of the proposed regulations is whether they comport with section 111's [listing] requirement.").

Similarly, in enacting § 112(e)(4) in 1990, Congress provided that a § 112(c) listing decision (which is a predicate to § 112(d) regulation) would not become final until after completion of a rulemaking on "emission standards for such pollutant or source." In that rulemaking, EPA must determine whether the § 112 criteria for listing -- *i.e.,* for EGUs, whether § 112 regulation is "appropriate and necessary" -- are satisfied and if not, it must terminate the § 112(d) rulemaking.

Confronted with the fact that EPA had in the past consistently removed source categories from the § 112(c) "major source category" list when it was found,

as a factual matter, that the source category did not meet the "major source" listing criteria,[6] the panel characterized those EPA prior actions as a "statutory violation[] [that] cannot excuse" ignoring the de-listing criteria of § 112(c)(9). Slip op. at 16. In other words, contrary to *National Asphalt,* the panel found that absent a delisting under § 112(c)(9), EPA must take final action *to list* a source category and *to adopt* § 112(d) MACT standards, even though the Administrator has concluded after rulemaking that the source category does not meet the CAA listing criteria. For the following reasons, § 112 nowhere mandates final action listing a source category that is found after rulemaking not to meet the statutory criteria for listing.

First, the panel's holding ignores the plain language of CAA § 112(n)(1)(A) and § 307(d)(1)(C), which communicate Congress's intent that EPA is to regulate EGUs under § 112 only if it "finds such regulation is appropriate and necessary" *after conducting a § 307(d) notice-and-comment rulemaking*. Notably, the panel did not take issue with EPA's decision, as part of its March 2005 final rules, that the December 2000 regulatory notice "lacked foundation," and that EPA had subsequently determined that regulation of EGUs under § 112 was *neither* "appropriate" *nor* "necessary." Indeed, the panel expressly declined to reach the petitioners' challenge to that aspect of the 2005 final rules.

---

[6] *See* 69 Fed. Reg. 4689 col. 2.

Under the plain language of the CAA, EGUs cannot simultaneously be listed under CAA § 112(c) – and, thus, subject to regulation under CAA § 112(d) – and at the same time have been found by EPA *not* to warrant regulation under CAA § 112, based on the Agency's determination following rulemaking under § 112(n)(1)(A) that regulation of EGUs is neither "appropriate" nor "necessary." Yet that anomalous situation is precisely what the panel's decision has created.

Second, consistent with *National Asphalt*, § 112(e) makes clear that a decision to "list" a source category is not "final" until EPA has completed a rulemaking under § 112(d). In any rulemaking leading to final action, the choice for EPA is to act or not to act. EPA did that here, and decided that it had no factual basis to take final action listing EGUs and regulating them under § 112(d). Here, the panel effectively interpreted § 112(c) to require EPA to make a final decision to list EGUs, and to regulate them under § 112(d), without regard to the § 112(n)(1)(A) rulemaking determination that the "necessary and appropriate" criteria for regulating EGU were not met. This result reads the requirement for a § 112(n)(1)(A) *rulemaking* determination authorizing EGU regulation under § 112 out of the Act.

Third, CAA § 112(c)(1) provides that EPA "shall publish, and shall from time to time, ... *revise, if appropriate, in response to public comment or new information*, a list of all categories and subcategories of major sources and area sources" (emphasis added). It is hard to imagine a clearer indication that Congress

expected that EPA would *and should* periodically revise the subsection (c) source category list as "appropriate," based on "public comment or new information," where the original basis for listing was found to have no lawful basis either because the source category is not in fact "major," or because (for EGUs) regulation is found to be neither "appropriate" nor "necessary" after rulemaking. The panel steadfastly ignored this language even as it was purporting to ferret out "unambiguously expressed" congressional intent on the face of CAA § 112.

Finally, the panel conclusion that the December 2000 notice "finding" that listing of EGUs under § 112(a) is "necessary and appropriate" condemned EPA to adopt a legally deficient final MACT standards for EGUs is inconsistent with CAA's plain language. Contrary to the panel's holding, *see* Slip op. at 8, a finding that regulation of EGUs is "appropriate and necessary" under CAA § 112(n)(1)(A) does not require that a source category be listed under § 112(c) and regulated under § 112(d). By its plain terms, § 112(n)(1)(A) provides that EGUs are to be regulated "under *this section*" following an "appropriate and necessary" finding. Therefore, any preliminary decision to regulate under § 112 using MACT standards may be changed to a different form of § 112 regulation, or no § 112 regulation at all, following a notice-and-comment rulemaking under § 307(d)(1)(C).

Because the panel's decision is inconsistent with the CAA listing/regulation regime and with this court's *National Asphalt* decision, rehearing *en banc* is needed.

III. Rehearing *En Banc* Is Needed to Address the Panel's Misapplication of *Chevron*.

According to the panel, "once the Administrator determined in 2000 that EGUs should be regulated under Section 112 and listed them under section 112(c)(1)" in a *non-final* "notice," EPA "had no authority to delist them without taking the steps required under section 112(c)(9)." *See* Slip op. at 13. Because EPA "concedes that it never made the findings section 112(c)(9) would require in order to delist EGUs," the panel held, the Agency's "purported removal of EGUs from the section 112(c)(1) list . . . violated the CAA's plain text and must be rejected under step one of *Chevron*." *Id.* at 14.

In *Chevron*, the Supreme Court instructed that, in determining whether *Chevron* step one applies, the "court ... employ[s] *traditional tools of statutory construction* ... [to] ascertain [ ] that ... Congress had an intention on the precise question at issue." 467 U.S. at 843 n.9 (emphasis added). Application of "traditional tools of statutory construction" requires a court to examine both the statutory context and the history of a word or phrase. In particular, the "meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate . . . the true meaning." *Id.* at 861. In other words, "[s]tatutory construction" is a "holistic endeavor," *United Savings Ass'n v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988), a characterization that reflects the "cardinal rule" that a "statute is to be read as a whole," since the "meaning of

statutory language, plain or not, depends on context." *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

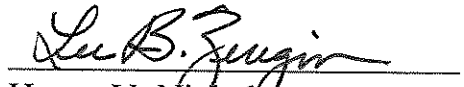
In this case, nothing on the face of § 112(c)(9)(B) requires EPA to reject the clear congressional directions found in § 112(n)(1)(A) and other subsections of § 112 as summarized above. To the contrary, § 112(c)(9)(B) can and should be read in harmony with the rest of the Act. Section 112(c)(9)(B) says that the "Administrator *may* delete any source category from the list under this subsection ... whenever the Administrator makes the following determination or determinations, as applicable." The subparagraph then provides two risk-based criterion for deleting properly listed source categories from the § 112(c) list.

According to the panel, the word "any" in this subparagraph controls this case as a *Chevron* step one matter, because it makes clear that the "delisting" criteria of § 112(c)(9) apply to "*any* source category." Slip op. at 14. But nowhere does this provision say that a preliminary listing notice controls subsequent Agency action, or that rulemaking is unnecessary for a listing notice to become final, or that the Administrator lacks authority to consider in a standard setting rulemaking whether the legal or factual predicates for a listing notice have been satisfied. All § 112(c)(9) does is give the Administrator discretionary ("may delete") authority *not* to regulate a source category under § 112 if certain health and environmental criteria are met. Because EPA concluded after rulemaking that final action to regulate

EGUs under § 112 was neither "appropriate" nor "necessary," a *Chevron* step one analysis actually tells us that the § 112(c)(9)(B) delisting criteria were never triggered, because absent a final action *to list* EGUs under § 112(c) there was nothing *to de-list.*

In sum, in this case, EPA specifically determined after rulemaking that the regulation of EGUs under § 112 was neither "appropriate" nor "necessary." *Had* the panel read CAA § 112 "as a whole," it could not have concluded, as it did, that even after rulemaking determining that regulation of EGUs under § 112 was neither "appropriate" nor "necessary," the Agency was nevertheless required to keep EGUs on the § 112(c) source list and promulgate legally deficient § 112(d) MACT standards. Because the decision of the panel takes a subparagraph of one section of the CAA out of context to impose on EPA, as a *Chevron* step one matter, a result that is at odds with the law of this Circuit and CAA § 112 itself, rehearing *en banc* is needed.

Respectfully submitted,



Henry V. Nickel
F. William Brownell
Lee B. Zeugin
Hunton & Williams
1900 K Street, NW
Washington, DC 20006
(202) 955-1500
Counsel for the Utility Air Regulatory Group

Dated: March 24, 2008

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Petition for Rehearing has been served this 24th day of March, 2008 on the following counsel of record in the manner indicated.

Jon M. Lipschultz
Eric G. Hostetler
Wendy Lynn Blake
U.S. Department of Justice
Environment and Natural Resources Division
PO Box 23986
L'Enfant Plaza Station
Washington, DC 20026-3986
Eric.Hostetler@usdoj.gov
For Respondent EPA
(via electronic mail and first class mail)

Jean P. Reilly, Deputy Attorney General
Christopher D. Ball, Deputy Attorney General
Christine F. Lewis, Deputy Attorney General
Jung W. Kim, Deputy Attorney General
Amy C. Donlon, Deputy Attorney General
R.J. Hughes Justice Complex
25 Market Street, PO Box 093
Trenton, New Jersey 08625
Christopher.ball@dol.lps.state.nj.us
Jung.kim@dol.lps.state.nj.us
Christine.lewis@dol.lps.state.nj.us
kevin.auerbacher@dol.lps.state.nj.us
(via electronic mail)

Patrick C. Lynch, Attorney General
Terence J. Tierney, Asst. Attorney General
150 South Main Street,
Providence, RI 02903
Ttierney@riag.ri.gov
(via electronic mail)

Bill Lockyer, Attorney General
Susan Durbin, Deputy Attorney General
California Department of Justice
1300 I Street
PO Box 944255
Sacramento, California 94244-2550
FAX 916-322-5609
susan.durbin@doj.ca.gov
(via electronic mail)

Alan F. Hoffman
Asst. Attorney General's Office
State of Michigan
Box 30217
Lansing, MI 48909
hoffmanaf@michigan.gov
For Michigan DEQ
(via electronic mail)

Lawrence E. Long, Attorney General
Roxanne Giedd, Deputy Attorney General
500 East Capitol Street
Pierre, SD 57501-5070
(605) 773-3215
Roxanne.giedd@state.sd.us
(via electronic mail and first class mail)

Richard Blumenthal, Attorney General
Matthew Levine, Assistant Attorney General
PO Box 120
55 Elm Street
Hartford, Connecticut 06141-0120
mathew.levine@po.state.ct.us
(via electronic mail)

G. Steven Rowe, Attorney General
Gerald Reid, Assistant Attorney General
Department of the Attorney General
State House Station #6
Augusta, Maine 04333-0006
jerry.reid@maine.gov
(via electronic mail)

Martha Coakley, Attorney General
William L. Pardee, Asst. Attorney General
Environmental Protection Division
1 Ashburton Place, Suite 1813
Boston, Massachusetts 02108
bill.pardee@ago.state.ma.us
(via electronic mail)

Kelly A. Ayotte, Attorney General
Maureen D. Smith, Asst. Attorney General
Office of the Attorney General
33 Capitol Street
Concord, New Hampshire 03301-6397
Maureen.smith@doj.nh.gov
(via electronic mail)

Gary King, Attorney General
Christopher D. Coppin, Special Counsel
Stephen R. Farris, Assistant Attorney General
Karen Fisher, Assistant Attorney General
New Mexico Attorney General's Office
PO Drawer 1508
Santa Fe, New Mexico 87504
sfarris@ago.state.nm.us
kfisher@ago.state.nm.us
(via electronic mail)

Andrew M. Cuomo, Attorney General
Peter Lehner, Assistant Attorney General
Jared Snyder, Assistant Attorney General
Jacob Hollinger, Assistant Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224
jacob.hollinger@oag.state.ny.us
(via electronic mail)

William H. Sorrell, Attorney General
Kevin O. Leske, Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609-1001
kleske@atg.state.vt.us
(via electronic mail)

Susan Shinkman, Chief Counsel
Robert A. Reiley, Assistant Counsel
Richard Mather, Sr., Deputy Chief Counsel
Penn. Dept. of Env. Protection
PO Box 8464
Harrisburg, PA 17105
rmather@state.pa.us
rreiley@state.pa.us
(via electronic mail)

Patrick Crank, Attorney General
Nancy Vehr, Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
(307) 777-6869
nvehr@state.wy.us
(via electronic mail)

Kathy Kinsey
Judah Prero
Assistant Attorneys General
Maryland Department of the Environment
1800 Washington Blvd., Suite 6048
Baltimore, Maryland 21230
(via first class mail)

M. Jane Brady, Attorney General
Valerie Csizmadia, Deputy Attorney General
102 West Water Street, Third Floor
Dover, DE 19904
jane.brady@state.de.us
(via electronic mail)

J.B. Van Hollen, Attorney General
Thomas J. Dawson, Asst. Attorney General
State of Wisconsin
PO Box 7857
Madison, WI 53707-7857
dawsontj@doj.state.wi.us
(via electronic mail)

Ann Alexander, Attorney General
Gerald T. Karr
State of Illinois
188 West Randolph Street, 20th Floor
Chicago, IL 60601
gkarr@atg.state.il.us
aalexander@atg.state.il.us
(via electronic mail)

Lori Swanson, Attorney General
Allan C. Williams, Assistant Attorney General
State of Minnesota
445 Minnesota Avenue
Bremer Tower, Suite 900
St. Paul, MN 55101-2127
(via first class mail)

Troy King, Attorney General
Milt E. Belcher, Asst Attorney General
Alabama Attorney General's Office
11 South Union Street
Montgomery, Alabama 36130-0152
afarmer@ago.state.al.us
mbelcher@ago.state.al.us
(via electronic mail & first class mail)

Steve Carter, Attorney General
Thomas M. Fisher, Solicitor General
State of Indiana
302 West Washington Street
Indianapolis, IN 46204-2770
tfisher@atg.state.in.us
vtachtiris@atg.state.in.us
(via electronic mail)

Wayne Stenehjem, Attorney General
Lyle Witham, Asst. Attorney General
State of North Dakota
600 East Boulevard Avenue
Bismarck, ND 58505-2210
lwitham@state.nd.us
(via electronic mail)

Jon C. Bruning, Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
(via first class mail)

Paul M. Seby, Special Assistant Attorney General
McKenna, Long & Aldridge LLP
1875 Lawrence St., Suite 200
Denver, CO 80202
pseby@mckennalong.com
(via electronic mail and first class mail)

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Avenue, NW
Washington, DC 20036
dpopeo@wfl.org
(via electronic mail and first class mail)

Riyaz A. Kanji
KANJI & KATZEN, PLLC
101 North Maine Street
Suite 555
Ann Arbor, Michigan 48104
rkanji@kanjikatzen.com
pkatzen@kanjikatzen.com
For National Congress of American Indians and certain Individual Treaty Tribes
(via electronic mail)

Scott Edwards, Esq., Legal Director
Waterkeeper Alliance
50 South Buckhout Street
Irvington, New York 10533
914.674.0622, ext. 13
sedwards@waterkeeper.org
For Chesapeake Bay Foundation and Waterkeeper Alliance
(via electronic mail)

Mark J. Rudolph
Senior Counsel
Office of Legal Services
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304
(via first class mail)

Bradford Kuster, Esq.
New Hampshire Advocacy Center
27 North Main Street
Concord, NH 03301-4930
bkuster@clf.org
For Conservation Law Foundation
(via electronic mail)

James Samuel Pew
Earthjustice Legal Defense Fund
1625 Massachusetts Avenue, NW
Suite 702
Washington, DC 20036
jpew@earthjustice.org
For Environmental Defense, National Wildlife Federation, and Sierra Club
(via electronic mail)

Ann Brewster Weeks
Jonathan Frederick Lewis
18 Tremont Street, Suite 530
Boston, MA 02108
aweeks@catf.us
jlewis@catf.us
For Natural Resources Council of Maine, Ohio Environmental Council and U.S. PIRG
(via electronic mail)

Jon Pirie Devine, Jr.
Natural Resources Defense Council
1200 New York Avenue, NW, Suite 400
Washington, DC 20005
jdevine@nrdc.org
For Natural Resources Defense Council
(via electronic mail)

Jon A. Mueller
Chesapeake Bay Foundation
6 Herndon Ave.
Annapolis, MD 21403
410-280-3513
jmueller@savethebay.cbf.org
(via electronic mail)

Ralph S. Tyler, III, City Solicitor
Shari T. Wilson
Dawn S. Lettman
Joshua Neal Auerbach
Baltimore City Department of Law
100 Holliday Street
Suite 101, City Hall
Baltimore MD 21202
Joshua.auerbach@baltimorecity.gov
For the City of Baltimore
(via electronic mail and first class mail)

John Duval Walke
Natural Resources Defense Council
1200 New York Avenue, NW
Suite 400
Washington, DC 20005
Jwalke@nrdc.org
For Natural Resources Defense Council; Ohio Environmental Council
(via electronic mail)

Neal John Cabral
Stewart Todd Leeth
McGuireWoods
One James Center, 901 East Cary Street
Richmond, VA 23219-4030
ncabral@mcguirewoods.com
sleeth@mcguirewoods.com
For American Coal for Balanced Mercury Regulation, Alabama Coal Association, Coal Operators & Associates, Inc., Maryland Coal Association, Ohio Coal Association, and Pennsylvania Coal Association
(via electronic mail)

Carol A. Fizpatrick
Bart E. Cassidy
Manko, Gold & Katcher
40 City Avenue, Suite 500
Bala Cynwyd, PA 19004
Bcassidy@mgkflaw.com
For ARIPPA
(via electronic mail)

James B. Vasile
Brian Randel Gish
Davis, Wright Tremaine LLP
1500 K Street
Suite 450
Washington, DC 20005-1272
briangish@dwt.com
For Alaska Industrial Development and Export Authority
(via electronic mail)

Judith Ellen Rivlin
Grant F. Crandall
United Mine Workers of America
8315 Lee Highway
Fairfax, VA 22301-2215
jrivlin@umwa.org
gcrandall@umwa.org
For United Mine Workers of America
(via electronic mail)

Charles Knauss
Robert Zener
BINGHAM MCCUTCHEON LLP
2020 K Street, NW
Washington, DC 20006
chuck.knauss@bingham.com
robert.zener@bingham.com
For Producers for Electric Reliability
(via electronic mail)

Peter Glaser
Troutman and Sanders LLP
401 9th Street, NW, Suite 1000
Washington, DC 20004-2134
peter.glaser@troutmansanders.com
For the National Mining Association
(via electronic mail)

Leah Walker Casey
Carter, Conboy, Case, Blackmore
Maloney & Laird, PC
20 Corporate Woods Boulevard
Albany, NY 12211-2362
lcasey@carterconboy.com
For Adirondack Mountain Club
(via electronic mail)

William M. Bumpers
Debra J. Jezouit
Baker Botts, L.L.P.
1299 Pennsylvania Ave., NW
Washington, DC 20004-2400
william.bumpers@bakerbotts.com
debra.jezouit@bakerbotts.com
For PPL Corporation, PSEG Fossil LLC, NRG Inc., and Florida Power & Light Company
(via electronic mail)

Peter H. Wyckoff
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037
peter.wyckoff@pillsburylaw.com
For Duke Energy Indiana, Inc., Duke Energy Kentucky, Inc., and Duke Energy Ohio, Inc.
(via electronic mail)

Henri D. Bartholomot
Edison Electric Institute
701 Pennsylvania Avenue, NW
Washington, DC 20004
HBartholomot@eei.org
For the Edison Electric Institute
(via electronic mail)

Harold Patrick Quinn, Jr.
National Mining Association
101 Constitution Avenue, NW
Suite 500 East
Washington, DC 20001
(via first class mail)

Joseph C. Stanko
Hunton & Williams LLP
1900 K Street,
Washington, DC 20006
jstanko@hunton.com
For West Associates
(via electronic mail)

John Timothy Suttles, Jr.
Southern Environmental Law Center
200 West Franklin Street
Suite 330
Chapel Hill, NC 27516
jsuttles@selcnc.org
For Physicians for Social Responsibility, American Nurses Assoc. and the American Public Health Assoc.
(via electronic mail)

Lee B. Zeugin

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 6, 2007 Decided February 8, 2008

No. 05-1097

STATE OF NEW JERSEY, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

UTILITY AIR REGULATORY GROUP, ET AL.,
INTERVENORS

Consolidated with Nos.
05-1104, 05-1116, 05-1118, 05-1158, 05-1159, 05-1160,
05-1162, 05-1163, 05-1164, 05-1167, 05-1174, 05-1175,
05-1176, 05-1183, 05-1189, 05-1263, 05-1267, 05-1270,
05-1271, 05-1275, 05-1277, 06-1211, 06-1220, 06-1231,
06-1287, 06-1291, 06-1293, 06-1294

On Petitions for Review of the Final Action of the
Environmental Protection Agency

James S. Pew argued the cause for Environmental Petitioners. With him on the briefs were *John D. Walke*, *Jon Devine*, *Scott Edwards*, *Jon A. Mueller*, *Ann Brewster Weeks*, *Jonathan F. Lewis*, *Brad Kuster*.

Vanya S. Hogen, *Colette Routel*, *Sarah I. Wheelock*, *Riyaz A. Kanji*, *Philip E. Katzen*, and *Ann Tweedy* were on the briefs for petitioners National Congress of American Indians and Treaty Tribes. *Brian B. O'Neill* entered an appearance.

Bart E. Cassidy and *Meredith DuBarry Huston* were on the briefs for petitioner ARIPPA. *Carol F. McCabe* entered an appearance.

Scott C. Oostdyk, *Neal J. Cabral*, *Grant F. Crandall*, *Judith Ellen Rivlin*, and *Eugene M. Trisko* were on the briefs for petitioners American Coal for Balanced Mercury Regulation, et al. and United Mine Workers of America, AFL-CIO.

James B. Vasile, *Brian R. Gish*, *Susan E. Reeves*, and *Robert K. Reges* were on the briefs for petitioner Alaska Industrial Development and Export Authority.

Anne Milgram, Attorney General, Attorney General's Office of the State of New Jersey, *Christopher D. Ball* and *Ruth E. Carter*, Deputy Attorneys General, *Edmund G. Brown, Jr.*, Attorney General, Attorney General's Office of the State of California, *Susan Durbin*, Deputy Attorney General, *Richard Blumenthal*, Attorney General, Attorney General's Office of the State of Connecticut, *Matthew Levine*, Assistant Attorney General, *Joseph R. Biden, III*, Attorney General, Attorney General's Office of the State of Delaware, *Valerie S. Csizmadia*, Deputy Attorney General, *Lisa Madigan*, Attorney General, Attorney General's Office of the State of Illinois, *Ann Alexander*, Assistant Attorney, *G. Steven Rowe*, Attorney

General, Attorney General's Office of the State of Maine, *Gerald D. Reid*, Assistant Attorney General, *Douglas F. Gansler*, Attorney General, Attorney General's Office of the State of Maryland, *Kathy M. Kinsey* and *Judah Prero*, Assistant Attorneys General, *Martha Coakley*, Attorney General, Attorney General's Office of the Commonwealth of Massachusetts, *William L. Pardee*, Assistant Attorney General, *Michael A. Cox*, Attorney General, Attorney General's Office of the State of Michigan, Michigan Department of Environmental Quality, *Thomas L. Casey*, Solicitor General, *Alan F. Hoffman* and *Neil D. Gordon*, Assistant Attorneys General, *Lori Swanson*, Attorney General, Attorney General's Office of the State of Minnesota, *Alan C. Williams*, Assistant Attorney General, *Kelly A. Ayotte*, Attorney General, Attorney General's Office of the State of New Hampshire, *Maureen D. Smith*, Senior Assistant Attorney General, *Gary King*, Attorney General, Attorney General's Office of the State of New Mexico, *Karen L. Reed*, Assistant Attorney General, *Andrew M. Cuomo*, Attorney General, Attorney General's Office of the State of New York, *Jacob Hollinger*, Assistant Attorney General, *Robert A. Reiley*, Assistant Counsel, Commonwealth of Pennsylvania, Department of Environmental Protection, *Patrick C. Lynch*, Attorney General, Attorney General's Office of the State of Rhode Island, *Terence Tierney*, Special Assistant Attorney General, *William H. Sorrell*, Attorney General, Attorney General's Office of the State of Vermont, *Kevin O. Leske*, Assistant Attorney General, *J.B. Van Hollen*, Attorney General, Attorney General's Office of the State of Wisconsin, *Thomas J. Dawson*, Assistant Attorney General, and *William R. Phelan, Jr.*, Attorney, for the City of Baltimore, Maryland, were on the briefs for Government Petitioners. *Jean P. Reilly* and *Kevin P. Auerbacher*, Assistant Attorneys General, Attorney General's Office of the State of New Jersey, *Peter H. Lehner*, Assistant Attorney General, Attorney General's Office of the State of Connecticut, *Christopher D. Coppin*, Assistant Attorney General, Attorney

General's Office of the State of New Mexico, *Gerald T. Karr*, Assistant Attorney General, Attorney General's Office of the State of Illinois, entered appearances.

Henry V. Nickel, *F. William Brownell*, *David G. Scott*, and *Lee B. Zeugin* were on the briefs for petitioner Utility Air Regulatory Group.

Eric G. Hostetler, Attorney, U.S. Department of Justice, argued the cause for respondent. With him on the brief were *John C. Cruden*, Deputy Assistant Attorney General, *Jon M. Lipshultz* and *Matthew R. Oakes*, Attorneys, and *Carol S. Holmes* and *Howard J. Hoffman*, Counsel, U.S. Environmental Protection Agency. *Wendy L. Blake*, Attorney, U.S. Environmental Protection Agency, entered an appearance.

Lee B. Zeugin argued the cause for Industry State Intervenors and State *Amici Curiae*. With him on the briefs were *Troy King*, Attorney General, Attorney General's Office of the State of Alabama, *Milt E. Belcher*, Assistant Attorney General, *Wayne Stenehjem*, Attorney General, Attorney General's Office of the State of North Dakota, *Paul Seby*, Special Assistant, *Lyle Witham*, Solicitor General, *Steve Carter*, Attorney General, Attorney General's Office of the State of Indiana, *Thomas M. Fisher*, Assistant Attorney General, *Lawrence E. Long*, Attorney General, Attorney General's Office of the State of South Dakota, *Roxanne Giedd*, Deputy Attorney General, *Mark J. Rudolph*, Senior Counsel, State of West Virginia, Department of Environmental Protection, *Peter H. Wyckoff*, *Henri D. Bartholomot*, *Jon C. Bruning*, Attorney General, Attorney General's Office of the State of Nebraska, *Jodi Fenner*, Assistant Attorney General, *Patrick Crank*, Attorney General, Attorney General's Office of the State of Wyoming, *Nancy Vehr*, Assistant Attorney General, *Henry V. Nickel*, *F. William Brownell*, *Lee B. Zeugin*, *William M.*

Bumpers, *Debra J. Jezouit*, and *Peter Glaser*. *Valerie M. Tachtiris*, Assistant Attorney General, Attorney General's Office of State of Indiana, *Jay A. Jerde* and *Vicci M. Colgan*, Assistant Attorneys General, Attorney General's Office of State of Wyoming, *Kevin C. Newsom*, *Harold P. Quinn, Jr.*, and *Claudia M. O'Brien* entered appearances.

Leah W. Casey was on the brief for intervenor for petitioner Adirondack Mountain Club.

Charles H. Knauss, *Sandra P. Franco*, and *David G. Scott, II* were on the brief for intervenors Producers for Electric Reliability and West Associates. *Karma B. Brown* entered an appearance.

John T. Suttles, Jr. was on the brief for intervenors Physicians for Social Responsibility, et al.

Peter Glaser, Daniel J. Popeo, and *Paul D. Kamenar* were on the brief for *amicus curiae* Washington Legal Foundation in support of respondent.

Before: ROGERS, TATEL and BROWN, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: Before the court are petitions for review of two final rules promulgated by the Environmental Protection Agency regarding the emission of hazardous air pollutants ("HAPs") from electric utility steam generating units ("EGUs"). The first rule removes coal- and oil-fired EGUs from the list of sources whose emissions are regulated under section 112 of the Clean Air Act ("CAA"), 42 U.S.C. § 7412. *Revision of December 2000 Regulatory Finding* ("Delisting Rule"), 70 Fed. Reg. 15,994 (Mar. 29, 2005). The second rule

sets performance standards pursuant to section 111, 42 U.S.C. § 7411, for new coal-fired EGUs and establishes total mercury emissions limits for States and certain tribal areas, along with a voluntary cap-and-trade program for new and existing coal-fired EGUs. *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units* ("CAMR"), 70 Fed. Reg. 28,606 (May 18, 2005).

Petitioners contend that the Delisting Rule is contrary to the plain text and structure of section 112. In response, EPA and certain intervenors rely on section 112(n), which sets special conditions before EGUs can be regulated under section 112, to justify the rule. We hold that the delisting was unlawful. Section 112 requires EPA to regulate emissions of HAPs. Section 112(n) requires EPA to regulate EGUs under section 112 when it concludes that doing so is "appropriate and necessary." In December 2000, EPA concluded that it was "appropriate and necessary" to regulate mercury emissions from coal- and oil-fired power plants under section 112 and listed these EGUs as sources of HAPs regulated under that section. In 2005, after reconsidering its previous determination, EPA purported to remove these EGUs from the section 112 list. Thereafter it promulgated CAMR under section 111. EPA's removal of these EGUs from the section 112 list violates the CAA because section 112(c)(9) requires EPA to make specific findings before removing a source listed under section 112; EPA concedes it never made such findings. Because coal-fired EGUs are listed sources under section 112, regulation of existing coal-fired EGUs' mercury emissions under section 111 is prohibited, effectively invalidating CAMR's regulatory approach. Accordingly, the court grants the petitions and vacates both rules.

I.

In 1970, Congress added section 112 to the CAA. Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1685 (1970). In its original form, section 112 required EPA to list HAPs that should be regulated because they could "cause, or contribute to, an increase in mortality or an increase in serious irreversible[] or incapacitating reversible[] illness." *Id.* § 112(a)(1). Over the next eighteen years, however, EPA listed only eight HAPs, established standards for only seven of these and as to these seven addressed only a limited selection of possible pollution sources. *See Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1353 n.1 (D.C. Cir. 1995); S. COMM. ON ENV'T & PUB. WORKS, CLEAN AIR ACT AMENDMENTS OF 1989, S. REP. NO. 101-228, at 131 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3516.

In 1990, Congress, concerned about the slow pace of EPA's regulation of HAPs, altered section 112 by eliminating much of EPA's discretion in the process. *See, e.g.*, *Nat'l Lime Ass'n.* v. *EPA*, 233 F.3d 625, 633-34 (D.C. Cir. 2000). Three aspects of the amendments are relevant here.

First, Congress required EPA to regulate more than one hundred specific HAPs, including mercury and nickel compounds. CAA § 112(b)(1). Further, EPA was required to list and to regulate, on a prioritized schedule, *id.* § 112(e)(1)-(3), "all categories and subcategories of major sources and areas sources" that emit one or more HAPs, *id.* § 112(c)(1). In seeking to ensure that regulation of HAPs reflects the "maximum reduction in emissions which can be achieved by application of [the] best available control technology," S. REP. NO. 101-228, at 133, *reprinted in* 1990 U.S.C.C.A.N. at 3518; *see, e.g.*, CAA § 112(g)(2)(A), Congress imposed specific, strict pollution control requirements on both new and existing sources of HAPs. Congress specified that new sources must

adopt at minimum "the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator." *Id.* § 112(d)(3). Existing sources (with certain exceptions) must adopt emission controls equal to the "average emission limitation achieved by the best performing 12 percent of the existing sources." *Id.* § 112(d)(3)(A).

Second, Congress restricted the opportunities for EPA and others to intervene in the regulation of HAP sources. For HAPs that result in health effects other than cancer, as is true of mercury, Congress directed that the Administrator "may delete any source category" from the section 112(c)(1) list only after determining 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." *Id.* § 112(c)(9). Third parties may not challenge the Administrator's decision to add a pollutant to the list under section 112(b) or a source category or subcategory to the list under section 112(c) until "the Administrator issues emission standards for such pollutant or category." *Id.* § 112(e)(4).

Third, Congress required the Administrator to evaluate regulatory options with care and to meet certain conditions before listing EGUs as an HAP source under section 112(c)(1). Specifically:

> [t]he Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [EGUs] of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the

> Administrator's report to Congress alternative control strategies for emissions which may warrant regulation under this section. *The Administrator shall regulate [EGUs] under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.*

Id. § 112(n)(1)(A) (emphasis added).

The study of public health hazards required by section 112(n)(1)(A) was finally completed in 1998. This study found "a plausible link between anthropogenic releases of mercury from industrial and combustion sources in the United States and methylmercury in fish" and that "mercury emissions from [EGUs] may add to the existing environmental burden." EPA, OFFICE OF AIR QUALITY PLANNING AND STANDARDS, STUDY OF HAZARDOUS AIR POLLUTANT EMISSIONS FROM ELEC. UTIL. STEAM GENERATING UNITS--FINAL REPORT TO CONG. 7-1, 45 (1998). On December 20, 2000, the Administrator announced — in light of the study mandated by section 112(n)(1)(A), as well as subsequent information and consideration of alternative feasible control strategies — that it was "appropriate and necessary" to regulate coal- and oil-fired EGUs under section 112 because, as relevant, mercury emissions from EGUs, which are the largest domestic source of mercury emissions, present significant hazards to public health and the environment. *Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units*, 65 Fed. Reg. 79,825, 79,827 (Dec. 20, 2000) ("2000 Determination"). "As a result the source category for Coal- and Oil-Fired [EGUs] was added to the list of source categories under section 112(c)" on December 20, 2000. *National Emission Standards for Hazardous Air Pollutants: Revision of Source Category List Under Section 112 of the Clean Air Act*

("2002 Notice of Listing"), 67 Fed. Reg. 6521, 6522, 6524 (Feb. 12, 2002).

In early 2004, EPA proposed two regulatory alternatives to control emissions from coal- and oil-fired EGUs. The first was similar to EPA's proposal in 2000 — regulation under section 112 through issuance of Maximum Achievable Control Technology standards, *see, e.g.*, CAA § 112(g)(2)(A), or implementation of a cap-and-trade system. The second proposed removing EGUs from the list of HAP sources prepared pursuant to section 112(c)(1) and instead regulating their emissions under section 111.[1] *Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units*, 69 Fed. Reg. 4652, 4659-61, 4683, 4689 (Jan. 30, 2004). After receiving public comment, EPA chose the second alternative, announcing in March 2005 that it was removing EGUs from the section 112(c)(1) list, Delisting Rule, 70 Fed. Reg. at 16,002-08, 16,032, and regulating mercury emissions from coal-fired EGUs under section 111, CAMR, 70 Fed. Reg. at 28,610, 28,624-32.

---

[1] Section 111 requires the Administrator to "establish[] . . . standards of performance," CAA § 111(b)(1)(B), for pollutants from new sources that in the Administrator's judgment "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 111(b)(1)(A). "Standards of performance" are designed to limit emissions to reflect "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." *Id.* § 111(a)(1). Existing sources of pollutants are regulated under section 111(d).

EPA justified its decision to delist EGUs by explaining that it "reasonably interprets section 112(n)(1)(A) as providing [] authority to remove coal- and oil-fired units from the section 112(c) list at any time that it makes a negative appropriate and necessary finding under the section." Delisting Rule, 70 Fed. Reg. at 16,032. It based this interpretation on the "entirely different structure and predicate for assessing whether [EGUs] should be listed for regulation under section 112" as set forth in section 112(n)(1)(A), *id.*, and on the absence of a temporal "deadline" for deciding "whether regulation of [EGUs was] appropriate and necessary" under section 112, *id.* at 16,001. It also interpreted "section 112(c)(9) [delisting] criteria . . . not [to] apply" to EGUs because their inclusion in the list established by section 112(c)(1) was not a "final agency action[]," and claimed, contrary to the 2000 Determination, that "the source category at issue did not meet the statutory criteria for listing at the time of listing." *Id.* at 16,033.

Having decided that it possessed the authority to delist EGUs without making the findings required by section 112(c)(9), EPA explained that the delisting of EGUs was justified because their regulation under section 112 was neither "appropriate" nor "necessary." The potential mercury emissions reductions achievable under CAMR figured prominently in EPA's explanation of its delisting of coal-fired EGUs, *id.* at 16,005, which EPA promulgated in May 2005. CAMR established plant-specific "standards of performance" for mercury emissions from new coal-fired EGUs under section 111(b). 70 Fed. Reg. at 28,613-16. Relying on sections 111(b) and (d), it also established a national mercury emissions cap for new and existing EGUs, allocating each state and certain tribal areas a mercury emissions budget. This was supplemented by a voluntary cap-and-trade program. *Id.* at 28,616, 28,622,

28,629.[2]

II.

New Jersey and fourteen additional States, the Michigan Department of Environmental Quality, the Pennsylvania Department of Environmental Protection, the City of Baltimore ("Government Petitioners"), and various environmental organizations ("Environmental Petitioners") contend that EPA violated Section 112's plain text and structure when it did not comply with the requirements of section 112(c)(9) in delisting EGUs. Because we agree, we do not reach their alternative contention that even if this delisting was lawful, EPA was arbitrary and capricious in reversing its determination that regulating EGUs under section 112 was "appropriate and necessary." Government and Environmental Petitioners further contend that CAMR is inconsistent with provisions of section 111, and that both the Delisting Rule and CAMR should be vacated. Certain intervenors — including various industry representatives, States, and state agencies — join EPA in urging the lawfulness of the two rules.

The court reviews the challenges to the final rules to determine whether EPA's promulgation of them was arbitrary or capricious, an abuse of discretion, or otherwise not in

---

[2] Upon reconsideration, EPA made no substantive change to the Delisting Rule but revised CAMR's State mercury allocations and the statistical analysis used for new source performance standards; EPA declined to stay CAMR. *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*, 71 Fed. Reg. 33,388, 33,388-89, 33,395-96 (June 9, 2006).

accordance with law. *See* CAA § 307(d)(9)(A), 42 U.S.C. § 7607(d)(9)(A). Challenges to EPA's interpretation of the CAA itself are governed by the familiar two-pronged test of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under step one, the court asks "whether Congress has directly spoken to the . . . issue." *Id.* at 842. If Congress's intent "is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. However, if the court determines that "Congress has not directly addressed the precise question at issue," then, under step two, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The agency's interpretation need not be the only permissible reading of the statute, nor the interpretation that the court might have originally given the statute. *Id.* at 843 n.11.

Petitioners contend that once the Administrator determined in 2000 that EGUs should be regulated under Section 112 and listed them under section 112(c)(1), EPA had no authority to delist them without taking the steps required under section 112(c)(9). We agree.[3]

Section 112(c)(9) provides that:

---

[3] Certain intervenors also contend, citing *Thomas v. New York*, 802 F.2d 1443, 1446-47 (D.C. Cir. 1986), that the Administrator's determination in December 2000 to list EGUs as a source under section 112(c)(1) was not binding for lack of notice and comment and, consequently, that EPA was never required to comply with section 112(c)(9)'s delisting process for EGUs. We need not consider this contention, however, because EPA has steadfastly refused to join it. *See New York v. Reilly*, 969 F.2d 1147, 1154 n.11 (D.C. Cir. 1992); *see also Util. Air Regulatory Group v. EPA*, No. 01-1074, 2001 WL 936363, at *1 (D.C. Cir. July 26, 2001).

> The Administrator may delete *any* source category from the [section 112(c)(1) list] . . . whenever the Administrator . . . [determines] 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. [emphasis added]

EPA concedes that it listed EGUs under section 112. Thus, because section 112(c)(9) governs the removal of "*any* source category" (emphasis added) from the section 112(c)(1) list, and nothing in the CAA exempts EGUs from section 112(c)(9), the only way EPA could remove EGUs from the section 112(c)(1) list was by satisfying section 112(c)(9)'s requirements. Yet EPA concedes that it never made the findings section 112(c)(9) would require in order to delist EGUs. EPA's purported removal of EGUs from the section 112(c)(1) list therefore violated the CAA's plain text and must be rejected under step one of *Chevron*.

EPA offers several arguments in an attempt to evade section 112(c)(9)'s plain text, but they are not persuasive. First, EPA seeks to reach step two of *Chevron* and obtain judicial deference to its interpretation by maintaining that section 112(n)(1) makes section 112(c)(9) ambiguous because "[l]ogically, if EPA makes a determination under section 112(n)(1)(A) that power plants should not be regulated at all under section 112 . . . [then] this determination *ipso facto* must result in removal of power plants from the section 112(c) list." Resp't Br. at 26. But this simply does not follow. Section 112(n)(1) governs how the Administrator decides whether to list EGUs; it says nothing about delisting EGUs, and the plain text of section 112(c)(9) specifies that it applies to the delisting of "any source." In the context of the CAA, "the word 'any' has an expansive

meaning." *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006) (citations omitted); *see also id.* at 885-86. Moreover, where Congress wished to exempt EGUs from specific requirements of section 112, it said so explicitly. For example, section 112(c)(6) expressly exempts EGUs from the strict deadlines imposed on other sources of certain pollutants. Furthermore, EPA concedes that listing EGUs under section 112(c) triggered application of some subparts of section 112, *see, e.g.*, 2002 Notice of Listing, 67 Fed. Reg. at 6521, 6524, 6535 n.b; CAA § 112(c)(2), but provides no persuasive rationale for why the comprehensive delisting process of section 112(c)(9) does not also apply. Its brief states only that previous applications of section 112 provisions in response to EGUs' listing were undertaken "based on the fact that [EPA] had made a positive 'appropriate and necessary' finding that was still in place. EPA has now reversed that finding." Resp't Br. at 28. This explanation deploys the logic of the Queen of Hearts, substituting EPA's desires for the plain text of section 112(c)(9). Thus, EPA can point to no persuasive evidence suggesting that section 112(c)(9)'s plain text is ambiguous. It is therefore bound by section 112(c)(9) because "for [] EPA to avoid a literal interpretation at *Chevron* step one, 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," *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996), showings EPA has failed to make.

Second, EPA maintains that it possesses authority to remove EGUs from the section 112 list under the "fundamental principle of administrative law that an agency has inherent authority to reverse an earlier administrative determination or ruling where an agency has a principled basis for doing so." Resp't Br. at 22 (citing *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006); *Dun & Bradstreet*

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

Finally, EPA states in its brief that it has previously removed sources listed under section 112(c) without satisfying the requirements of section 112(c)(9). But previous statutory violations cannot excuse the one now before the court. "[W]e do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation." *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 598 (D.C. Cir. 1996). EPA suggests that it would be "anomalous" for it to be forced to await a court order to correct "its own mistake" in listing coal- and oil-fired EGUs as a source under section 112(c)(1). Resp't Br. at 32; *see also id.* at 33 (citing

Cleveland Nat'l Air Show, Inc. v. DOT, 430 F.3d 757, 765 (6th Cir. 2005)). However Congress was not preoccupied with what EPA considers "anomalous," but rather with the fact that EPA had failed for decades to regulate HAPs sufficiently. *See, e.g.*, *Nat'l Lime Ass'n*, 233 F.3d at 634 (citing S. REP. NO. 101-228, at 128, *reprinted in* 1990 U.S.C.C.A.N. at 3513). In the context of this congressional concern, EPA's disbelief that it would be prevented from correcting its own listing "errors" except through section 112(c)(9)'s delisting process or court-sanctioned vacatur cannot overcome the plain text enacted by Congress.

Accordingly, in view of the plain text and structure of section 112, we grant the petitions and vacate the Delisting Rule. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). This requires vacation of CAMR's regulations for both new and existing EGUs. EPA promulgated the CAMR regulations for existing EGUs under section 111(d), but under EPA's own interpretation of the section, it cannot be used to regulate sources listed under section 112; EPA thus concedes that if EGUs remain listed under section 112, as we hold, then the CAMR regulations for existing sources must fall. Resp't Br. at 99, 101-02; *see also* Delisting Rule, 70 Fed. Reg. at 16,031. EPA promulgated the CAMR regulations for new sources under section 111(b) on the basis that there would be no section 112 regulation of EGU emissions and that the new source performance standards would be accompanied by a national emissions cap and a voluntary cap-and-trade program. *See* CAMR, 70 Fed. Reg. at 28,608-10, 28,614-15, 28,619, 28,622; *see also id.* at 28,616. Given that these vital assumptions were incorrect, the court must vacate CAMR's new source performance standards and remand them to EPA for reconsideration, for "[s]everance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own." *Davis County Solid Waste Mgmt.*

v. EPA, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (citations omitted). In view of our disposition, the court does not reach other contentions of petitioners or intervenors.