No. 09-495

IN THE

Supreme Court of the United States

AMERICAN CHEMISTRY COUNCIL, AMERICAN FOREST AND PAPER ASSOCIATION INC., AMERICAN PETROLEUM INSTITUTE, NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION,

Petitioners,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*

The Chamber of Commerce of the United States of America (the "Chamber") represents 300,000 direct members and indirectly represents an underlying membership of three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.[1] Members of the Chamber span numerous industries that operate facilities throughout the United States. Many of these facilities emit air pollutants regulated under the Clean Air Act, including, but not limited to, National Emission Standards for Hazardous Air Pollutants ("NESHAPs") promulgated by the U.S. Environmental Protection Agency ("EPA") pursuant to Section 112, 42 U.S.C. §7412. More generally, the Chamber's members have a strong interest in the finality of administrative rules and regulations, an interest severely undermined by the decision below.

SUMMARY OF ARGUMENT

For a business to operate, it must have some degree of certainty to identify its ongoing and upcoming obligations. Changes to manufacturing facilities, in particular, often require substantial amounts of capital investment to purchase and install required equipment. When new regulations

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that the brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

are promulgated, long-term planning is needed to ensure that sufficient resources, labor and time are available for a facility to come into compliance. To these ends, procedural certainty and finality of agency actions are vital.

Procedural certainty comes from a regular and orderly administrative process. Congress and courts have provided numerous procedural protections to promote and maintain the integrity of the administrative process, such as requiring all interested parties to make their concerns known to the agency during the rulemaking process. "Finality ordinarily assures regularity of administrative process and avoids unfairness to parties who have relied on a final decision." *Blanco Oil Co. v. FERC*, 598 F.2d 152, 163 (D.C. Cir. 1979). Congress has recognized the importance of imparting finality into the administrative process, imposing strict time limits on the jurisdiction of courts to review agency actions.

In this case, the D.C. Circuit eschewed a sixty-day limitation on seeking judicial review imposed by Congress under the Clean Air Act, choosing instead to rely on claims by the petitioners below (hereinafter referred to as "Sierra Club") that circumstances had changed since the time of promulgation which the D.C. Circuit found made the regulation now "worth" challenging many years later. In so doing, the D.C. Circuit vacated a regulation that was promulgated in 1994, and relied on by EPA and regulated entities since that time, based on a test that provides no clear, objective standard to determine whether a regulation can truly be considered "final." Rather, it looked to the

subjective belief and concerns of the challenging party. As a direct result of allowing this challenge to be brought outside the normal review process, the D.C. Circuit vacated these long-standing provisions without a record on which to review, and without giving the parties an opportunity to fully address the merits. The D.C. Circuit's decision below, therefore, has circumvented and undermined the regular order of the administrative process and has rendered virtually impossible the finality sought by Congress.

Moreover, the D.C. Circuit's expansive application of its so-called "constructive reopening" doctrine is not limited to the Clean Air Act, but applies broadly to virtually all areas of administrative actions.

As this case shows, the sudden judicial "reopening" of a regulation long after the statutory period for challenges has passed can have enormous ripple effects on myriad other agency rules and orders that have been relied on as apparently final regulations for years. If it stands, for example, the D.C. Circuit's decision calls into doubt at least 35 standards that expressly incorporated the now-vacated provisions. Many of these standards have been in place for over a decade, and industry has spent millions to ensure compliance with these standards. The long-settled expectations and investments of industry are now upset, with no clear path for industry to ensure compliance with standards that now may be applicable.

In promulgating the general provisions for startup, shutdown and malfunctions ("SSM"), EPA necessarily recognized that technology standards

may not be met at all times, often for reasons out of the operator's control. Industry, after making substantial investment in reliance on EPA's long-standing regulation, is now subject to potential enforcement actions or citizen suits for emissions during events that EPA has long-recognized may be impossible to control.

To protect the integrity of the administrative process and remove incentives for parties to sit on their rights only to upset long-standing investments, Supreme Court review of the D.C. Circuit's decision below is warranted.

ARGUMENT

I. The D.C. Circuit's Subjective Reopening Test Disrupts the Orderly Administrative Process and Eviscerates the Finality of Regulations Relied on by Industry.

A. Industries need the finality of statutory time limits to protect the substantial investment needed to comply with regulations.

Industry relies on an orderly administrative process to make the often significant investments required to comply with new regulations. Final resolution of administrative actions is essential to this orderly process.

Congress and courts have long sought to protect an orderly administrative process, including consummation of that process. Both the Administrative Procedure Act and the Clean Air Act

seek to ensure adequate public participation so that interested parties may make their case before the agency, presenting information the agency needs to understand the costs, benefits, and any potential problems with proposed regulations. 5 U.S.C. §553; 42 U.S.C. §7607(d). Courts are then limited to the administrative record in reviewing agency action; that is, the information made available to the agency during its deliberative process. 5 U.S.C. §706; 42 U.S.C. §7607(d)(7). This ensures that the administrative process is fair prior to imposing restrictions on regulated entities, and that regulatory agencies have all the relevant information before them.

This process also ensures there is a consummation to agency action; "If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 555 (1978) (quoting *ICC v. Jersey City*, 322 U.S. 503, 514 (1944)).[2] *See also Sierra Club v. Block*, 576 F. Supp. 959, 965 (D. Or. 1983) ("The integrity of the administrative process is threatened when agencies'

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[2] This Court has warned against petitioners turning administrative proceedings into "a game or a forum to engage in unjustified obstructionism" by failing to provide meaningful comment. *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 553-54. Here, Sierra Club did not comment on the legality of the general SSM provision when proposed in 1993.

intentions and participants' expectations as to the finality of administrative decisions are not upheld in the face of subsequent challenges."). Indeed, the D.C. Circuit rejected Sierra Club's attempt to assert that EPA "actually" reopened the issue in subsequent rulemakings to restart the statutory time limit on seeking review. *Sierra Club v. EPA*, 551 F.3d 1019, 1024-25 (D.C. Cir. 2008).

Statutory time limits on seeking judicial review serve the important purpose of providing finality to the administrative process. Statutes of limitation established by the legislature are intended to "cut off rights, justifiable or not," in order to bring a final resolution. *Kavanagh v. Noble*, 332 U.S. 535, 539 (1948). A jurisdictional time limit imposed by Congress on seeking judicial review of agency action "is intended and in fact brings finality to the administrative process and reflects 'a deliberate congressional choice to impose statutory finality on agency [action], a choice [courts] may not second-guess.'" *W. Neb. Res. Council v. EPA*, 793 F.2d 194, 198 (8th Cir. 1986) (quoting *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985)) (first alteration in original). *See also JEM Broad. Co. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) (quoting *Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1035, 1040 (D.C. Cir. 1991)) ("Congress has 'determined that the agency's interest generally lies in prompt review of agency regulations,' and '[w]e accord heavy weight to that view.'") (alteration in original).

In addition to conserving administrative resources, the finality brought about by statutory time limits on review "protect[s] the reliance

interests of regulatees who conform their conduct to the regulations." *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981). By providing express statutory time frames for implementation of new Clean Air Act regulatory requirements, Congress recognized that facilities need an appropriate time to come into compliance. Plans must be developed, funding must be established, capital investments must be made, and equipment must be obtained and installed to meet new requirements in the time period allowed. EPA has recognized that "an appropriate time of regulatory certainty" and "a sufficient period of time for planning long-term capital improvements" is required for industry to make investments and address regulatory requirements. *New York v. EPA*, 413 F.3d 3, 37 (D.C. Cir. 2005) (upholding EPA's use of ten-year period for use of plantwide applicability limits under Clean Air Act's New Source Review program). Similarly, public sector facilities subject to new requirements must be able to raise public funds to take the necessary actions, which can be time-consuming. Judicial reopening of regulations industry has long relied upon well beyond the applicable limitations period, as the D.C. Circuit has done in this case, throws this scheme into disarray.

B. Under the subjective "reopening" test adopted below, industry could never rely on the finality of administrative actions, despite Congress's express limits on judicial review.

There is no dispute that the Sierra Club could have challenged the legality of the SSM provision at the time it was adopted. Instead, it raised its

challenge years later and contended that changes to the SSM plan requirements "significantly altere[d] the stakes of judicial review" compared to when the SSM provision was issued in 1994. Corrected Final Opening Br. and Addendum of Environmental Petitioners, at 31, *Sierra Club v. EPA*, No. 02-1135 (D.C. Cir. filed Mar. 19, 2008) (quoting *Kennecott Utah Copper v. DOI*, 88 F.3d 1191, 1226-27 (D.C. Cir. 1996)). Neither the text of the regulation, nor EPA's interpretation of it, has changed in the many intervening years since its adoption. Yet, the D.C. Circuit found that "from the perspective of environmental petitioners' interests and allocation of resources the general duty 'may not have been worth challenging in [1994], but the [revised] regulations gave [that duty] a new significance'" and allowed the untimely claim to move forward because it found that new circumstances "changed the calculus for petitioners in seeking judicial review." *Sierra Club*, 551 F.3d at 1026 (quoting *Kennecott*, 88 F.3d at 1227). The D.C. Circuit has created a subjective test with no clearly defined parameters for the agency, the public, or industry to determine when an agency action is "final."

Shortly after its decision below, the D.C. Circuit again had occasion to utilize this subjective test for constructive reopening, reaching the opposite conclusion on similar facts. *Natural Res. Def. Council v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009). In that case, the D.C. Circuit, in another 2-1 opinion, declined to find constructive reopening to allow untimely challenges to two provisions, finding, for one, the "stakes" for review were not "quantitatively different" from when the provision was issued in 1989, and, for the other, the provision "if unlawful,

seems worth challenging in its own right" when issued in 1980. *Id.* at 1266, 1270-71. There is no appreciable difference in the factual circumstances of these two cases, and the D.C. Circuit made no findings distinguishing the two cases. But in one case the court found the issue may not have been "worth" challenging during the statutory limitations period, and thus allowed review later, while in the other case the court found the issue "seem[ed] worth challenging" during the limitations period, and disallowed later review. These inconsistent findings highlight the difficulty in applying the ad hoc, subjective test for jurisdiction fashioned by the D.C. Circuit. If the decision below is allowed to stand, industry will never be able to predict what future regulatory changes or rulings might be deemed to affect sufficiently the "stakes" for judicial review in the judgment of potential adverse parties and the court.

The decision below further illustrates the unfairness and havoc that results from adopting a subjective test to determine the limits of a Court's jurisdiction. After finding it had jurisdiction, the D.C. Circuit went on to invalidate the 14-year old rule based on an issue that was not raised in the subsequent actions by EPA, and thus had no record for review, and that had not even been fully briefed by the parties. *Sierra Club*, 551 F.3d at 1030 (J. Randolph) (in dissent). As the Petitioners here point out, and as EPA argued in its merits brief (Final Br. of Resp'ts, at 27-30, *Sierra Club v. EPA*, No. 02-1135 (D.C. Cir. filed Mar. 14, 2008)), the proper procedure should have been to require a petition for rulemaking and establish a record for review. Pet. at 15-22. At least in those circumstances, the affected

parties and the public would have had an opportunity to comment fully on the proposed change, and the agency would have been required to make the requisite findings before the SSM general provision, which required facilities to minimize their emissions during periods of SSM, was replaced by standards originally issued for steady-state operation. Had the court below required these procedures, a record would have been developed and any briefing before the court would have been able to address the false premise on which the D.C. Circuit decided the case—*i.e.*, that Section 112(d) does not permit a standard for SSM periods that requires sources to minimize emissions. Under the D.C. Circuit's decision, regulated entities will now be forced to comply with standards during those periods without any agency determination that those standards are "achievable," as Section 112(d)(2) of the Act requires. *See, infra*, Part II.

C. The decision below effectively eliminates the Clean Air Act's strict time limits on judicial review and reopens numerous, longstanding regulatory rules.

The Clean Air Act is intended to address this nation's air pollution problems. 42 U.S.C. §7401(b). In so doing, Congress included numerous, often aggressive time frames for regulation and compliance. *See, e.g., id.* §7502(a)(2) (requiring attainment with NAAQS within 5 years of designation as nonattainment). This "sense of urgency concerning environmental protection" manifests itself in strict time limits Congress imposed on seeking judicial review of agency actions under the Act. *Peabody Coal Co. v. Train*, 518 F.2d

940, 943 (6th Cir. 1975). *See also* S. Rep. No. 92-414, at 83 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3756 ("In order to maintain the integrity of the time sequences provided throughout the [Clean Water] Act, the section would provide that any review sought must be filed within 30 days of the date of the challenged promulgation or other action."). In the Clean Air Act, Congress imposed a sixty-day limit on judicial review of agency actions. 42 U.S.C. §7607(b).

Standards under Section 112(d) become effective immediately for new sources, and existing sources must comply with new standards within three years. 42 U.S.C. §7412(d)(1), (i)(3)(A). EPA may provide an extension of time up to one additional year "if such additional period is necessary for the installation of controls." *Id.* §7412(i)(3)(B). With these strict time frames, industry must rely on a regular administrative process with an end in sight to ensure sufficient time to design, fund, construct, and install the controls necessary to meet these requirements. Moreover, these standards require substantial investment by regulated entities. EPA estimated that annual costs in 2000 to meet the requirements of Section 112, as amended in 1990, were $780 million (1990$) ($840 million by 2010). EPA, *The Benefits and Costs of the Clean Air Act*, EPA 410-R-99-001, at 25-26 (1999), *available at* http://www.epa.gov/oar/sect812/prospective1.html.

When issuing subsequent source-specific standards, EPA made a determination whether the general provisions promulgated in 1994 were applicable to that source category. 59 Fed. Reg. 12,408, 12,408/3-12,409/1, 12,412/1 (Mar. 16, 1994). Based on the 1994 regulations, the SSM provision

was considered a default requirement that was applicable. If EPA believed that the standard for steady-state operations could be applied during SSM events, in whole or in part, for a particular source category, EPA proposed specific SSM provisions for that source category. *See, e.g.*, 40 C.F.R. §§63.342(b)(1) (Subpart N - Chromium Electroplating and Chromium Anodizing Tanks), 63.5320(a) (Subpart TTTT - Leather Finishing Operations).

EPA has determined that standards for 35 source categories are "immediately affected" by the D.C. Circuit's decision. *See* Letter to Counsel from Adam M. Kushner, Director, Office of Civil Enforcement, at 2, Table 1 (July 22, 2009) ("Kushner Letter"), *available at* http://www.epa.gov/compliance/civil/caa/ssm-memo080409.pdf.[3] Ten of these standards were promulgated at least ten years prior to the D.C. Circuit's decision, including gasoline distribution, pulp and paper, halogenated solvent cleaners, secondary lead smelting, marine loading operations, aerospace manufacturing, shipbuilding and ship repair, printing and publishing, primary aluminum, and flexible polyurethane foam production. Twenty-two of these standards are at least five years old,

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[3] EPA also identified an additional 74 standards, which include specific SSM provisions "that exempts or excuses compliance during SSM events" and is "in addition to, or in lieu of, a cross-reference to 40 C.F.R. §§63.6(f)(1) and (h)(1)." Kushner Letter at 2, Table 2. Even in these cases, the general acceptance of the policy behind the SSM decision made these provisions, for the most part, uncontroversial (and unchallenged by Sierra Club). Yet, they are all now called into question by the D.C. Circuit's decision.

including, in addition to those noted above: combustion sources at pulp mills, steel pickling, Portland Cement, wool fiberglass, secondary aluminum, primary lead, publicly owned treatment works, ferroalloy production, municipal solid waste landfills, paper and other web coating, metal furniture, and boat manufacturing. These standards, and their promulgation dates, are listed below.[4]

Source Category	Subpart	Issue Date	Fed. Reg.
Halogenated Solvent Cleaners	T	12/2/94	59 Fed. Reg. 61801
Gasoline Distribution (Stage 1)	R	12/14/94	59 Fed. Reg. 64303
Secondary Lead Smelters	X	6/23/95	60 Fed. Reg. 32587
Aerospace Manufacturing	GG	9/1/95	60 Fed. Reg. 45948
Marine Vessel Loading Operations	Y	9/19/95	60 Fed. Reg. 48388
Shipbuilding & Ship Repair (surface coating)	II	12/15/95	60 Fed. Reg. 64330

[4] *See generally* EPA, *National Emission Standards for Hazardous Air Pollutants (NESHAP), available at* http://www.epa.gov/ttn/atw/mactfnlalph.html (last updated Sept. 2, 2009).

Source Category	Subpart	Issue Date	Fed. Reg.
Printing and Publishing (surface coating)	KK	5/30/96	61 Fed. Reg. 27132
Primary Aluminum	LL	10/7/97	62 Fed. Reg. 52384
Pulp and Paper (non-combustion)	S	4/15/98	63 Fed. Reg. 18504
Flexible Polyurethane Foam Production	III	10/7/98	63 Fed. Reg. 53980
Ferroalloys Production	XXX	5/20/99	64 Fed. Reg. 27450
Primary Lead Smelting	TTT	6/4/99	64 Fed. Reg. 30194
Portland Cement Manufacturing	LLL	6/14/99	64 Fed. Reg. 31898
Wool Fiberglass Manufacturing	NNN	6/14/99	64 Fed. Reg. 31695
Steel Pickling	CCC	6/22/99	64 Fed. Reg. 33202
Publicly Owned Treatment Works	VVV	10/26/99	64 Fed. Reg. 57572
Secondary Aluminum	RRR	3/23/00	65 Fed. Reg. 15689

Source Category	Subpart	Issue Date	Fed. Reg.
Pulp and Paper (combustion)	MM	1/12/01	66 Fed. Reg. 3180
Boat Manufacturing	VVVV	8/22/01	66 Fed. Reg. 44217
Paper and Other Web (surface coating)	JJJJ	12/4/02	67 Fed. Reg. 72329
Municipal Solid Waste Landfills	AAAA	1/16/03	68 Fed. Reg. 2227
Metal Furniture (surface coating)	RRRR	5/23/03	68 Fed. Reg. 28605
Primary Copper Smelting (area sources)	EEEEEE	1/23/07	72 Fed. Reg. 2930
Secondary Copper Smelting (area sources)	FFFFFF	1/23/07	72 Fed. Reg. 2930
Primary Nonferrous Metals (area sources)	GGGGGG	1/23/07	72 Fed. Reg. 2930
Acrylic/ Modacrylic Fiber (area sources)	LLLLLL	7/16/07	72 Fed. Reg. 38864

Source Category	Subpart	Issue Date	Fed. Reg.
Chromium Compounds (area sources)	NNNNNN	7/16/07	72 Fed. Reg. 38864
Flexible Polyurethane Foam Production and Fabrication (area sources)	OOOOOO	7/16/07	72 Fed. Reg. 38864
Lead Acid Battery Mfg.(area sources)	PPPPPP	7/16/07	72 Fed. Reg. 38864
Clay Ceramics Manufacturing (area sources)	RRRRRR	12/26/07	72 Fed. Reg. 73180
Secondary Nonferrous Metals (area sources)	TTTTTT	12/26/07	72 Fed. Reg. 73180
Electric Arc Furnace Steelmaking Facilities (area sources)	YYYYY	12/28/07	72 Fed. Reg. 74088
Iron and Steel Foundries (area sources)	ZZZZZ	1/2/08	73 Fed. Reg. 225

Source Category	Subpart	Issue Date	Fed. Reg.
Paint Stripping and Miscellaneous Surface Coating Operations (area sources)	HHHHHH	1/9/08	73 Fed. Reg. 1737
Ferroalloys Production (area sources)	YYYYYY	12/23/08	73 Fed. Reg. 78637

Industry has expended substantial sums of money over the years to comply with these Section 112 requirements, which have now been upset by the D.C. Circuit's decision. Some stark examples follow.

- Gasoline Distribution (Subpart R) (59 Fed. Reg. 64,303 (Dec. 14, 1994)): EPA estimated the required capital investment was on the order of $117 million, and estimated annual costs of $16 million. *See* EPA Fact Sheet, *Final Air Toxics Rule for Gasoline Distribution Facilities*, at 4 (Nov. 23, 1994), *available at* http://www.epa.gov/ttn/atw/gasdist/gdifact.pdf.

- Printing and Publishing (Subpart KK) (61 Fed. Reg. 27,132 (May 30, 1996)): Implementation of the regulation was estimated to cost $40 million annually (including capital recovery over a ten-year period). 61 Fed. Reg. at 27,135.

- Pulp, Paper, and Paperboard (Subpart S) (63 Fed. Reg. 18,504 (Apr. 15, 1998)): EPA estimated that industry would expend $496 million in capital costs for this standard, and $125 million in annual costs. 63 Fed. Reg. at 18,582.

- Marine Tank Vessel Loading Operations (Subpart Y) (60 Fed. Reg. 48,388 (Sept. 19, 1995))[5]: EPA estimated capital costs expected to result from the regulations of approximately $266 million to $440 million, and annual costs of $60 million to $100 million. 60 Fed. Reg. at 48,390.

- Primary Aluminum (Subpart LL) (62 Fed. Reg. 52,384 (Oct. 7, 1997)): EPA estimated the total capital costs of $160 million, with a total annualized cost of $40 million. 62 Fed. Reg. at 52,391. Industry asserted these costs were substantially higher. *Id.* at 52,396.

- Flexible Polyurethane Foam Production (Subpart III) (63 Fed. Reg. 53,980 (Oct. 7, 1998)): EPA estimated the total capital costs of $74 million, with a total annualized cost of $8.1 million. 63 Fed. Reg. at 53,988.

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[5] EPA provided a staggered compliance schedule for certain control requirements under this standard, but the final rule included an automatic extension for these sources based on comments that more time would be needed due to a limited number of experienced contractors available and potential permitting delays. 60 Fed. Reg. at 48,392-48,393.

- Paper and Other Web Coating (Subpart JJJJ) (67 Fed. Reg. 72,329 (Dec. 4, 2002)): EPA estimated the total capital costs of $222 million. 67 Fed. Reg. at 72,338. Estimated total annualized costs were $69 million. *Id.*

With the D.C. Circuit's overturning of these standards, which have been in place for years and with which industry has long complied, industry must now scramble to ensure their facilities are not in violation of the newly applicable standards developed for steady-state operations. This may require additional controls, new work practices, and a myriad of actions, which require time to plan and raise capital. All the while, facilities may face enforcement risk because, as noted above, when the SSM general provisions were incorporated into subsequent standards SSM was not at issue during development of virtually all of those rules.

Also, EPA is now applying the D.C. Circuit's ruling in this case to other industries outside Section 112, without notice and comment. For example, despite the fact that EPA failed to provide any notice of its action in the proposed rule, EPA has determined that the D.C. Circuit's ruling applies to waste incinerators regulated under Section 129 of the Clean Air Act. 74 Fed. Reg. 51,368, 51,375 (Oct. 6, 2009). Without seeking any data or comment, EPA simply removed an exemption for SSM that had been in place since 1997 for hospital, medical and infectious waste incinerators.

II. By Reopening the Section 112 Standards Without First Requiring Petitioners to Seek Relief from EPA, the D.C. Circuit has Required Industry to Comply with Standards During SSM Periods Without an Opportunity to be Heard on Whether Compliance is Feasible.

Section 112(d)(2) provides that standards for hazardous air pollutants must require the maximum reduction of emissions that EPA, "taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable . . .." 42 U.S.C. §7412(d)(2). Section 112(d)(3) provides that the maximum reduction that is "deemed achievable" for new sources shall not be less stringent that the emission control "achieved in practice by the best controlled similar source." *Id.* For existing sources, the emission control deemed achievable shall not be less stringent than "the average emission limitation achieved by the best performing 12 percent of the existing sources." *Id.* at §7412(d)(3).

In the Section 112 emission standards containing SSM exemptions, EPA did not make a finding that compliance with otherwise applicable limits during SSM events was "achievable," nor that such compliance had in fact been "achieved in practice" by the best controlled similar source or best performing 12 percent of existing sources. That is so because the SSM exemptions relieved industry from compliance with regular emission standards during such SSM events.

Indeed, the basic premise of the SSM exemptions was that compliance was *not* "achievable" during SSM events. In proposing the SSM provision in 1993, EPA recognized that special situations may occur "such as unpredicted and reasonably unavoidable failures of air pollution control systems, *when it is technically impossible to properly operate these systems*." 58 Fed. Reg. 42,760, 42,777/3 (Aug. 11, 1993) (emphasis added). For example, in the hazardous pollutant standard for arsenic, EPA found process upsets and equipment malfunctions can result in increased emissions. 51 Fed. Reg. 27,956, 27,973 (Aug. 4, 1986) ("These monitoring data [from the ASARCO-Tacoma smelter] have shown that arsenic concentrations dramatically increased when increased fugitive emissions were released during upsets of the copper converters and when malfunctions of control equipment resulted in an increase in emissions."). While EPA has found that many malfunctions could be addressed by taking reasonable measures, EPA also recognized that malfunctions can result from actions out of the facility's control, such as: unexpected failure of monitoring system components (for example, monitoring equipment, data acquisition equipment); catastrophic events (for example, fire, lightening, extreme weather/storms, flood, earthquake, meteors, and other acts of God); loss of utilities (for example, power, gas, water, as applicable to equipment); and sudden and unavoidable failure of control or process equipment, not due to poor operation or maintenance. *See* EPA, *Secondary Aluminum NESHAP 40 CFR Part 63 Subpart RRR: Example Malfunction Plan for Plant ABC*, at 7 (Apr. 3, 2003),

available at http://www.epa.gov/ttn/atw/alum2nd/malfunctionplanver-6.pdf.[6]

When the D.C. Circuit in this case reopened and invalidated the SSM exemption, the achievability of otherwise applicable emission standards during SSM periods became relevant for the first time. And yet, because petitioners had not first filed a petition with EPA to request reopening, industry is now being required to comply during SSM periods without ever having had the opportunity to submit evidence to the agency concerning achievability, and without EPA ever having made the achievability finding the statute requires. In short, the D.C. Circuit's belated reopening of these standards, without first requiring an agency petition, has not only upset long-settled expectations, but has also resulted in a process denying the regulated industry the basic procedural rights guaranteed by the Clean Air Act.

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[6] EPA's recognition of the difficulty of achieving standards during SSM periods has been supported by the courts, which have long held that EPA must account for malfunctions in developing technology-based standards, such as those under the Clean Water Act. *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1257, 1272-73 (9th Cir. 1977) (finding "upset provision" was necessary for Clean Water Act discharge limit based on what is "achievable" because exceedances occur that are "beyond the control of the permit holder" and because it is "impossible and impracticable to set a standard that could be met 100 percent of the time"); *FMC Corp. v. Train*, 539 F.2d 973, 986 (4th Cir. 1976) ("Plant owners should not be subject to sanctions when they are operating a proper treatment facility. Such excursions are provided for by the ambient air standards established under the Clean Air Act, 40 C.F.R. ss 50.4-50.10, and this Court sees no reason why appropriate excursion provisions should not be incorporated in these water pollution regulations.").

And it is far from clear that such compliance is, in fact, achievable. Startup and shutdown of units, for example, may require different emission standards, simply because the equipment operates differently during those times. It may take time for units to heat up and cool down before reaching the optimum operational efficiency. It also may be difficult to measure emissions during these periods, because emissions are below the detection limit or the control system takes time to become fully operational. That is why EPA exempted such periods from the emission limits applicable during periods of steady-state operation, and instead applied a duty to minimize emissions.

If the D.C. Circuit had required Sierra Club to follow the regular order of the administrative process and file a petition for rulemaking, it would have had a record before it showing, for example, that in many cases during periods of malfunction, bypassing emission controls may be required to avoid an explosion or serious harm to the public or workers. "For some combustion units, malfunctions are by their nature unsafe conditions which can lead to excessive combustible mixtures in a furnace that can result in explosions, equipment damage and personnel hazards." Comments of the Council of Industrial Boiler Owners on NESHAP from the Portland Cement Manuf. Indus., Proposed Rule, at 10 (Sept. 4, 2009) (EPA-HQ-OAR–2002–0051-2846.1), *available at* www.regulations.gov. EPA also has recognized that power failures at municipal landfills may require flaring for safe operation. EPA, *How to Prepare a Startup, Shutdown, Malfunction Plan for Collection and Control Systems at Municipal Solid Waste Landfills*, EPA-456/R-03-006,

at A-3 to A-5 (Dec. 2003), *available at* http://www.epa.gov/ttn/atw/landfill/lfssm12_03.pdf.

Other cases have been reported of power failures that have required facilities to use a flare system to bring units to a safe operating state. *See, e.g.*, Larry Altman, *Wilmington refinery suffers blackout*, dailybreeze.com, Mar. 11, 2009, http://www.dailybreeze.com/ci_11893024; Matt Scalian, *Power outage causes flaring at Norco plant*, New Orleans Metro Real-Time News, Oct. 23, 2008, http://www.nola.com/news/index.ssf/2008/10/power_outage_causes_flaring_at.html. These power failures are more often outside the control of the facility, and the operator must make a fast decision how to address such malfunctions to ensure the safety and well-being of the workers and the public. The D.C. Circuit's decision places these operators in an untenable position of potentially violating the Clean Air Act or potentially causing serious injuries to workers and the public.

The potential for such events was the impetus of the SSM provision now vacated by the D.C. Circuit. EPA made a legitimate policy decision with respect to standards issued under Section 112, and the Sierra Club should have been required to petition EPA to reassess this policy, not circumvent the strict time limits imposed by Congress for review. This Court, therefore, should grant the petition for a writ of certiorari to bring back order to the administrative process, which has been undermined by the D.C. Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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