ORAL ARGUMENT NOT YET SCHEDULED

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

No. 11-1184

SIERRA CLUB,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator,

Respondents.

Petition for Review of Final Administrative Action of the
United States Environmental Protection Agency

PROOF BRIEF FOR PETITIONER

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Dated: January 30, 2012

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SIERRA CLUB, Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, and LISA P. JACKSON, Administrator, Respondents.	Case No. 11-1184

SIERRA CLUB'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rules 27(a)(4) and 28(a)(1), Petitioner Sierra Club hereby certifies as follows:

(A) Parties and Amici

(i) Parties, Intervenors, and Amici Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to This Case

Petitioners:

The Petitioner in this case is Sierra Club.

Respondents:

The Respondents are the United States Environmental Protection Agency and Lisa P. Jackson, Administrator (collectively, "EPA").

Movant-Intervenors:

American Chemistry Council, Council of Industrial Boiler Owners, and National Association of Clean Water Agencies are Movant-Intervenors for Respondents.

(iii) *Amici* in This Case

As yet, there are no *amici curiae*.

(iv) Circuit Rule 26.1 Disclosures

See disclosure forms filed with the Petition for Review and Motions to Intervene.

(B) Rulings Under Review

Sierra Club seeks review of the final action taken by respondent at 76 Fed. Reg. 15,308 (March 21, 2011) entitled, "Completion of the Requirement to Promulgate Emission Standards."

(C) Related Cases

Sierra Club is not aware of any related cases.

DATED: January 30, 2012

Respectfully submitted,

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RULE 26.1 DISCLOSURE STATEMENT OF SIERRA CLUB

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Petitioner Sierra Club makes the following disclosures:

The following are parent companies, subsidiaries, or affiliates of Sierra Club that have issued shares or debt securities to the public: None.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

Dated: January 30, 2012

Respectfully submitted,

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

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

§ 112(c)(6) Memo	EPA, Emission Standards for Meeting the Ninety Percent Requirement Under Section 112(c)(6) of the Clean Air Act, EPA-HQ-OAR-2004-0505-0006
"the Act" or "CAA"	Clean Air Act
Aerospace Facilities	Aerospace Manufacturing and Rework Facilities
APA	Administrative Procedure Act
Chemical Plants	Synthetic Organic Chemical Manufacturing Industry
Def. Opp.	Defendant's Cross Motion For Summary Judgment On Remedy, *Sierra Club v. Jackson*, D.D.C. No. 01-1537
"EPA" or "the agency"	Respondents U.S. Environmental Protection Agency and Lisa P. Jackson, Administrator
GACT	Generally Available Control Technology
HAPs	Hazardous Air Pollutants
HCB	Hexachlorobenzene
HWC	Hazardous Waste Combustors
JA	Joint Appendix
MACT	Maximum Achievable Control Technology
MWC	Municipal Waste Combustors

MWI	Medical Waste Incinerators
Opp. To Cross-Mot.	Respondents' Opposition To Petitioner's Cross-Motion For Summary Vacatur And Reply In Support Of Motion To Hold Case In Abeyance
PAHs	Polycyclic Aromatic Hydrocarbons
PBTs	Persistent, Bioaccumulative Toxics
PCBs	Polychlorinated Biphenyls
POM	Polycyclic Organic Matter
SERRF	Southeast Resource Recovery Facility

JURISDICTIONAL STATEMENT

(A) Agency. Respondents U.S. Environmental Protection Agency and Lisa P. Jackson, Administrator, (collectively, "EPA" or "the agency") have jurisdiction to regulate emissions of hazardous air pollutants (also called "HAPs" or "air toxics") under Clean Air Act (also called "the Act" or "CAA") § 112, 42 U.S.C. § 7412.

(B) Court of Appeals. This Court has exclusive jurisdiction to review the final EPA actions, taken at 76 Fed. Reg. 15,308 (March 21, 2011), JA__, challenged in this proceeding. 42 U.S.C. § 7607(b)(1).

(C) Timeliness. The petition for review was timely filed within the 60-day window of CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1), on May 20, 2011.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in an addendum to this brief.

STATEMENT OF ISSUES PRESENTED

1. Given that: (a) EPA acknowledges that the Clean Air Act required it to assure that sources accounting for ninety percent of the aggregate emissions of polychlorinated biphenyls, polycyclic organic matter, and hexachlorobenzene are subject to emission standards for these specific pollutants; and (b) EPA has not done so; is EPA's claim to have satisfied the requirements of Clean Air Act § 112(c)(6), 42 U.S.C. § 7412(c)(6) unlawful or arbitrary and capricious?

2. Did EPA's failure to provide notice or opportunity to comment on the challenged action contravene the notice and comment requirements in § 553 of the Administrative Procedure Act, 5 U.S.C. § 553?

STATEMENT OF FACTS

I. FACTUAL BACKGROUND.

The three hazardous air pollutants at issue in this case are polychlorinated biphenyls ("PCBs"), polycyclic organic matter ("POM"), and hexachlorobenzene ("HCB"). These pollutants are especially harmful to human health and the environment because they are persistent, bioaccumulative toxics ("PBTs"), meaning that they do not break down in the environment but bioaccumulate in biota, their concentration increasing as they progress up the food chain. *See* S. Rep. No. 101-228, at 154-55 (1989), 5 Committee on Environment and Public Works, S. Prt. 38, 103rd Cong, 1st Sess. Legislative History of the Clean Air Act Amendments of 1990 at 8494-95 (1993) ("Legislative History").

PCBs are probable human carcinogens, linked particularly to liver tumors. EPA, Integrated Risk Information System: Polychlorinated biphenyls ("PCBs") (CASRN 1336-36-3) ("EPA, IRIS: PCBs"), last updated July 21, 2011, http://www.epa.gov/iris/subst/0294.htm, JA__. They can also cause skin problems, like chloracne; damage to the immune system; neurodevelopmental

damage to exposed infants; and other health problems. EPA, Polychlorinated Biphenyls (PCBs): Health Effects of PCBs, last updated Aug. 8, 2008, http://www.epa.gov/epawaste/hazard/tsd/pcbs/pubs/effects.htm, JA__. Humans are often exposed to PCBs by eating them, *see* EPA, IRIS: PCBs ("Highly exposed populations include some nursing infants and consumers of game fish, game animals, or products of animals contaminated through the food chain."), JA__. PCBs are especially toxic when eaten. 72 Fed. Reg. at 53,152, 53,153/2 (Sept. 18, 2007), JA__. PCBs tend to accumulate in fatty tissues; as a result, public authorities may ban or warn against eating fish caught in PCB-contaminated waters. *E.g.*, H.R. Rep. No. 101-490 (1990), at 320, 2 Legislative History at 3344. PCBs can form as a result of combustion, *see, e.g.*, 74 Fed. Reg. 51,368, 51,390/3 (Oct. 6, 2009), JA__, and are also released when PCB-containing materials are burned, *see id.* at 51,391/1, JA__. *See also* EPA, Polychlorinated Biphenyls (PCBs): Basic Information, last updated Dec. 29, 2010, http://www.epa.gov/epawaste/hazard/tsd/pcbs/pubs/about.htm (discussing ways that PCBs are released and that people are exposed to them).

As defined in the Clean Air Act, 42 U.S.C. § 7412(b)(1) n.4, POM consists of a range of chemical compounds, including polycyclic aromatic hydrocarbons ("PAH") such as naphthalene. 76 Fed. Reg. 57,106, 57,308/3 (Sept. 15, 2011), JA__. PAH and naphthalene are at least probable human carcinogens. *Id.* at

57,308/3-09/1, JA__-__. POM can also cause skin problems and may affect reproduction and child development. *Id.* at 57,308/3, JA__; EPA, Polycyclic Organic Matter (POM), last updated Nov. 6, 2007, http://www.epa.gov/ttn/atw/hlthef/polycycl.html, JA__. POM typically results from combustion. Petroleum refineries, coke ovens, and aerospace facilities are significant sources of POM emissions. 67 Fed. Reg. 68,124, 68,126-27 tbl.1 (Nov. 8, 2002), JA__-__.

HCB is a probable human carcinogen. 65 Fed. Reg. 77,026, 77,028/1 (Dec. 8, 2000), JA__. It primarily harms the liver, causing both liver damage and liver tumors, and also causes kidney tumors. 71 Fed. Reg. 43,906, 43,922/2 (Aug. 2, 2006), JA__. The liver problems can also be accompanied by neurological effects. *Id.*, JA__. Skin lesions may also occur. EPA, Integrated Risk Information System, Hexachlorobenzene (CASRN 118-74-1), last updated Mar. 7, 2011, http://www.epa.gov/iris/subst/0374.htm#addoral, JA__. People are predominantly exposed to HCB by eating foods, like fish, that become contaminated because they inhabit contaminated environments. 65 Fed. Reg. at 77,028/1-2, JA__. HCB is also toxic when inhaled or absorbed through the skin. *Id.* at 77,028/1, JA__. HCB is not purposefully manufactured, but is a byproduct of chemical manufacturing processes and production of several pesticides. *Id.*, JA__.

II. STATUTORY BACKGROUND.

A. Clean Air Act.

In the Clean Air Act Amendments of 1990, Congress took extraordinary steps to protect public health and the environment from hazardous air pollutants — substances like mercury, lead, dioxins and PCBs that can cause cancer and other serious adverse health effects. The Amendments reflect Congress' keen awareness of the threat posed by these hazardous air pollutants and frustration with EPA's decades-long failure to address it:

> In the 20 years since [the 1970 Clean Air Act] was enacted, EPA has acted to establish standards under section 112 for seven hazardous air pollutants. This is only a small fraction of the many substances associated (at some level of concentration) with cancer, birth defects, neurological damage, or other serious health effects.
>
> ***
>
> EPA has estimated that emissions of toxic air pollutants may cause some 1,600 to 3000 cancer cases a year. Numerous studies, including EPA's July 1989 "Analysis of Air Toxics Emissions, Exposures, Cancer Risks, and Controllability in Five Urban Areas" suggest that area wide lifetime access cancer risks from urban air toxics may range from about 1 in 10,000 to 1 in 1,000, and that cancer incidence may range from 1 to 23 excess cases per year per million population. These are exceptionally high levels of risk.
>
> ***
>
> Toxic emissions can also cause an array of serious illnesses besides cancer. These include birth defects, damage to the brain or other parts of the nervous system, reproductive disorders, and genetic mutations.

H.R. Rep. No. 101-490, at 151-154 2 Legislative History at 3175-3178. *See also* S. Rep. No.101- 228 at 127-129, 154-155, 5 Legislative History at 8467-69, 8494-95.

Rather than rely on EPA to identify which pollutants are "hazardous" as the 1970 Clean Air Act did, the Clean Air Act Amendments of 1990 established an "initial list" of 188 "hazardous air pollutants." 42 U.S.C. § 7412(b)(1). And, instead of having EPA set health-based standards for each such pollutant, Congress required EPA to promulgate regulations for the categories of sources that emit hazardous air pollutants. The 1990 Amendments require EPA to list categories of "major" and "area" sources of these hazardous air pollutants,[1] 42 U.S.C. § 7412(c)(1), (c)(3), (c)(6), and to set standards for the listed categories in accordance with the substantive mandates of § 112(d) and the schedule established in § 112(e). 42 U.S.C. § 7412(d)(1)-(5); § 7412(e). *See National Lime Ass'n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000) ("Congress added the list of pollutants to be regulated, regulation deadlines, and minimum stringency requirements to the Clean Air Act precisely because it believed EPA had failed to regulate enough HAPs under the previous air toxics provisions.").

The Clean Air Act requires EPA to list all categories of major sources. 42 U.S.C. § 7412(c)(1). For these categories, the agency must set emission standards under the highly protective requirements of § 112(d)(2)-(3). 42 U.S.C.

[1] A "major" source of hazardous air pollutants is any source with the potential to emit at least ten tons per year of any single HAP or twenty-five tons per year of any combination of HAPs. 42 U.S.C. § 7412(a)(1). An "area" source is any source that is not "major." 42 U.S.C. § 7412(a)(2).

§ 7412(c)(2), (d)(1). It is well established that regulations under these provisions – also known as "maximum achievable control technology" or "MACT" rules – must include emission standards for each hazardous air pollutant that a category emits. *E.g.*, *Sierra Club v. EPA*, 479 F.3d 875, 883 (D.C. Cir. 2007) ("As we explained, EPA has a 'clear statutory obligation' to set emission standards for each listed HAP.'") (quoting *National Lime*, 233 F.3d at 634). Each standard must reflect the maximum degree of reduction in emissions that is achievable, considering cost and other factors. 42 U.S.C. § 7412(d)(2). Further, irrespective of cost and the factors enumerated in § 112(d)(2), each standard must, at a minimum, reflect the emission level achieved by the relevant best performing sources in the category. 42 U.S.C. § 7412(d)(3). *See Sierra Club*, 479 F.3d at 880; *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 861 (D.C. Cir. 2001). However, "[w]ith respect to pollutants for which a health threshold has been established, the Administrator may consider such threshold level, with an ample margin of safety, when establishing emission standards under this subsection." 42 U.S.C. § 7412(d)(4).

The Clean Air Act's requirements for regulating area sources of hazardous air pollutants are generally less stringent. The Act does not require EPA to list all area sources. Rather, § 112(c)(3), the primary area source listing provision, requires EPA to list "sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the

30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section." *Id.* § 7412(c)(3). Further, the Act generally gives EPA discretion to set less protective "generally available control technology" ("GACT") standards rather than MACT standards for area sources. *Id.* § 7412(d)(5). GACT standards need only "provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants." *Id.*

In § 112(c)(6), the statutory provision at issue in the present case, the Clean Air Act makes an exception to the normal regulatory scheme. Section 112(c)(6) provides

> With respect to alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the Administrator shall, not later than five years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsections (d)(2) or (d)(4) of this section. Such standards shall be promulgated not later than 10 years after November 15, 1990.

Id. § 7412(c)(6). *See* S. Rep. 101-228, at 154-55, 5 Legislative History, at 8494-95 (discussing effects on human health and environment of persistent bioaccumulative toxics). Thus, it establishes an additional listing requirement above and beyond those in § 112(c)(1) and § 112(c)(3) by requiring EPA to list enough source categories to account for ninety percent of the aggregate emissions of the persistent

and bioaccumulative hazardous air pollutants § 112(c)(6) enumerates, regardless of whether they are major or area source categories. 42 U.S.C. § 7412(c)(6). In addition, § 112(c)(6) requires EPA to ensure that these sources are subject to MACT standards under § 112(d)(2) or § 112(d)(4) standards regardless of whether they are major or area sources, closing off EPA's otherwise available discretion to regulate area sources of these hazardous air pollutants under the less stringent GACT provisions of § 112(d)(5). *Id.*

In the 1990 Clean Air Act Amendments, Congress also enacted § 129, which requires MACT standards for all solid waste incinerators. *See National Lime*, 233 F.3d at 631 (§ 129 "establishes emission requirements virtually identical to section 7412's"). Unlike § 112(d), which requires EPA to issue standards for all the hazardous air pollutants listed in § 112(b), § 129 requires EPA to set emission standards for nine pollutants, some of which are hazardous air pollutants, and authorizes the agency to set standards for other pollutants. 42 U.S.C. § 7429(a)(4).

B. Administrative Procedure Act.

Because the EPA final action at issue here is not governed by Clean Air Act § 307(d), it is subject to the procedural requirements set forth in § 553 of the Administrative Procedure Act (APA), 5 U.S.C § 553. The APA requires agencies to publish notice of proposed rules in the Federal Register and provide an opportunity for interested persons to submit comments before a final rule is

adopted. As Congress emphasized when establishing these procedures, an agency's "knowledge is rarely complete, and it must learn the viewpoints of those whom the regulation will affect…. [Public] participation… in the rulemaking process is essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interests." S. Doc. No. 248, 79th Cong., 2d Sess. 19-20 (1946).

Agencies must follow this procedure when they engage in rulemaking. 5 U.S.C. § 553(b)-(c). *Id*. The APA defines "rulemaking" as an agency's "process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). It defines a "rule" as, among other things, "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4).

III. REGULATORY BACKGROUND.

A. EPA's Failure To Assure That Source Categories Accounting For Ninety Percent Of The Aggregate Emissions Of The § 112(c)(6) Pollutants Are Subject To Standards.

Although the Clean Air Act required EPA to issue its § 112(c)(6) list no later than November 15, 1995, 42 U.S.C. § 7412(c)(6), the agency did not issue a final

listing until 1998. 63 Fed. Reg. 17,838 (April 10, 1998), JA__.[2] By that time, the agency already had issued regulations for several of the source categories that, it would later claim, account for significant percentages of one or more of the § 112(c)(6) pollutants. These categories included:

1. Coke ovens. 58 Fed. Reg. 57,898 (October 27, 1993). *See* EPA, Emission Standards for Meeting the Ninety Percent Requirement Under Section 112(c)(6) of the Clean Air Act, EPA-HQ-OAR-2004-0505-0006 ("§ 112(c)(6) Memo"), at 16, JA__ (showing, in Table 1.1 Updated 112(c)(6) 1990 Baseline Inventory, that coke oven charging, topside, and door leaks account for more than six percent of all POM emissions).[3]
2. Synthetic Organic Chemical Manufacturing Industry ("Chemical Plants"), 59 Fed. Reg. 19,402 (April 22, 1994). *See* § 112(c)(6) Memo at 16, JA__ ("chlorinated solvents production," which is part of the Chemical Plants category, accounts for more than fifty-five percent of all HCB emissions).[4]
3. Aerospace manufacturing and rework facilities ("aerospace facilities"), 60 Fed. Reg. 45,948 (September 1, 1995). *See* § 112(c)(6) Memo at 16, JA__ (aerospace facilities account for more than twenty percent of all POM emissions).

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[2] EPA purported to amend the list in 2002, removing several categories and adding one. 67 Fed. Reg. 68,124, 68,125/1-26/1 (Nov. 8, 2002), JA__-__.

[3] In its 1998 listing, EPA reports POM emissions using three measures: (1) "extractable organic matter (EOM)"; (2) "the sum of seven polynuclear aromatic hydrocarbon compounds that are probably carcinogens (7-PAH)"; and (3), "the sum of the sixteen PAHs measured in EPA test method 610." 63 Fed. Reg. at 17842/2, JA__. EPA ultimately announced "we have decided to use only the 16-PAH baseline inventory for determining the 90 percent threshold for POM under section 112(c)(6)." § 112(c)(6) Memo at 9, JA__.

[4] *See* § 112(c)(6) Memo at 21, JA__ (showing that chlorinated solvents production facilities are subject to Chemical Plants rule).

4. Petroleum refineries. 60 Fed. Reg. 43,244 (August 18, 1995). *See* § 112(c)(6) Memo at 17, JA__ (petroleum refineries account for more than thirteen percent of all POM emissions).
5. Municipal waste combustors (MWC). 60 Fed. Reg. 65,387 (December 19, 1995). *See* § 112(c)(6) Memo at 16, JA__ (MWC account for more than fifty-one percent of all PCB emissions.
6. Medical waste incinerators (MWI). 62 Fed. Reg. 48,348 (September 15, 1997). *See* 112(c)(6) Memo at 16, JA__ (MWI account for more than twenty-five percent of all PCB emissions).
7. Primary Aluminum Reduction Plants. 62 Fed. Reg. 52384 (October 7, 1997). *See* § 112(c)(6) Memo at 17, JA__ (primary aluminum production plants account for more than eight percent of all POM emissions).

With only one exception, however, EPA's rules for these categories do not include emission standards for the relevant § 112(c)(6) pollutants and do not even mention § 112(c)(6), far less address the agency's obligations under this provision. The only exception is EPA's rule for Primary Aluminum Reduction Plants, which includes emission standards for POM.

EPA's failure to assure that the listed sources were subject to standards continued even after the agency published its § 112(c)(6) listing in 1998:

- In 1998, EPA issued final standards for pulp and paper mills. 63 Fed. Reg. 18,504 (April 15, 1998). EPA claimed in its 1998 listing that these facilities account for more than seven percent of all POM emissions. 63 Fed. Reg. at 17,849, JA__. *See* § 112(c)(6) Memo at 17, JA__ (pulp and paper mills account for more than eight percent of all POM emissions).
- In 1999, EPA issued final standards for pesticide manufacturing. 64 Fed. Reg. 33,550 (June 23, 1999). EPA claimed in its 1998 listing that these facilities account for more than thirty-one percent of all HCB emissions. 63 Fed. Reg. at 17,849, JA__. *See* § 112(c)(6) Memo at 16, JA__ (pesticide manufacturing accounts for more than forty-four percent of all HCB emissions).

- In 1999, EPA issued final standards for hazardous waste combustors. 64 Fed. Reg. 52,828 (Sept. 30, 1999). EPA claimed in its 1998 listing that these facilities account for more than seventeen percent of all PCB emissions. 63 Fed. Reg. at 17,849, JA__. *See* § 112(c)(6) Memo at 16, JA__ (same).

In these rules as well, EPA neither acknowledged its § 112(c)(6) obligation nor set standards for the relevant § 112(c)(6) pollutants.

B. EPA's Interpretations Of § 112(c)(6) And § 112(d)(2).

EPA has advanced varying interpretations of § 112(c)(6). In its 1998 § 112(c)(6) listing, EPA took the position that neither § 112(c)(6) nor § 112(d)(2) – the provision under which § 112(c)(6) requires EPA to set emission standards – required the agency to set standards for any specific pollutant. 63 Fed. Reg. at 17,841/2-3, JA__. In particular, EPA asserted that § 112(c)(6) does not address which pollutants EPA must regulate and that the substance of the agency's § 112 standards are governed by § 112(d). *Id.* at 17,841/3, JA__. EPA further claimed that "[l]ike section 112(c)(6), [§ 112(d)(2)] does not mandate any particular percentage reduction in emissions of any particular HAP." *Id.* Consistent with these positions, EPA repeatedly failed to set emission standards – or set "no control standards" – for one or more of the hazardous air pollutants that source categories emitted. *E.g.*, *National Lime*, 233 F.3d at 633-634.

Since 2007 – when this Court ruled for the third time that EPA has a "clear statutory obligation" to set standards for all the hazardous air pollutants that a source category emits when the agency promulgates MACT standards under § 112, *Sierra Club*, 479 F.3d at 883 (quoting *National Lime*, 233 F.3d at 633-634); *see also Mossville Envtl. Action Now v. EPA*, 370 F.3d 1232, 1242 (D.C. Cir. 2004) – EPA has advanced a different interpretation of § 112(c)(6). Abandoning its previous assertion that § 112(c)(6) says nothing about which pollutants the agency must regulate, EPA now claims the provision's requirement to assure that sources are subject to standards under § 112(d)(2) or § 112(d)(4) is "ambiguous as to whether standards for listed source categories must address all HAP or only the section 112(c)(6) HAP for which the source category was listed." 76 Fed. Reg. 9450, 9457/1 (February 17, 2011) ("Gold Mine Facilities Rule"), JA__ (emphasis added). The agency further asserts that § 112(c)(6) "is obviously intended to ensure controls for specific persistent, bioaccumulative HAP, and this purpose is served by a reading which compels regulation under section 112(d)(2) only of the HAP for which a source category is listed under section 112(c)(6), rather than for all HAP." *Id.* at 9457/2, JA__. *See also* 76 Fed. Reg. 15,554, 15567/2-3 (March 21, 2011) ("Area Source Boilers Rule"), JA__ (same). Thus, EPA now agrees that

it must, at a minimum, set standards for the "the section 112(c)(6) HAP for which the source category was listed," 76 Fed. Reg. at 9457/1, JA__.[5]

In 1998, EPA also took the position that, although § 112(c)(6) expressly directs EPA to assure that sources accounting for ninety percent of the seven listed hazardous air pollutants "are subject to standards under subsection (d)(2) or (d)(4)," the agency could take credit under § 112(c)(6) for source categories subject to standards under Clean Air Act § 129. 63 Fed. Reg. at 17,845/2-3. EPA still maintains this position. As noted above, two § 129 categories, MWC and MWI, account for more than seventy-six percent of all PCB emissions. Although § 129 authorizes EPA to set numerical emission standards for PCBs and other hazardous air pollutants, 42 U.S.C. § 7429(a)(4), the agency has not done so.

[5] EPA continues to argue that § 112(d)(2) does not require it to set standards for any particular hazardous air pollutants. *See, e.g.*, 76 Fed. Reg. at 9457/2, JA__. Although EPA "acknowledges that major sources regulated under section 112 must be subject to MACT standards for all HAP emitted from the source category consistent with *National Lime*," 76 Fed. Reg. at 9457 n.3, JA__, the agency's lawyers have argued in litigation that the obligation to set standards for each HAP comes from § 112(c)(1) rather than § 112(d). *See* Brief for Respondent at 27, 32-33, *Desert Citizens Against Pollution v. EPA*, D.C. Cir. No. 11-1113, JA__. Sierra Club, a petitioner in case No. 11-1113, disputes that litigation position.

C. EPA's 2011 Determination Claiming That It Has Completed The Emission Standards Required By § 112(c)(6).

Although § 112(c)(6) required EPA to complete the necessary standards no later than November 15, 2000, 42 U.S.C. § 7412(c)(6), the agency did not even claim to have met this requirement until March 21, 2011, when it issued the Determination challenged here. 76 Fed. Reg. at 15,308/3 , JA__ ("Determination"). EPA provided no prior notice of or opportunity for comment on the Determination.

Apart from boilerplate, the Determination consists of a conclusion by EPA that EPA "has completed sufficient standards to meet the 90 percent requirement" under § 112(c)(6) and a reference to a memorandum that allegedly "document[s] the actions [EPA] has taken to meet these requirements." *Id.* The memorandum to which EPA's Determination refers (the § 112(c)(6) Memo) is, essentially, an updated inventory of the § 112(c)(6) pollutants. It provides a brief history of EPA's 1998 listing, summarizes the agency's subsequent additions and deletions of source categories from that listing, and updates the baseline inventory emissions of the § 112(c)(6) pollutants. § 112(c)(6) Memo at 1-15, JA__-__. It then provides appendices showing the percentage of emissions of the § 112(c)(6) pollutants that EPA attributes to different source categories and listing the emission standards that, according to EPA, satisfy § 112(c)(6)'s ninety percent requirement. *Id.* at 16-28, JA__-__.

Neither the § 112(c)(6) Memo nor the Determination provides any explanation of how the listed regulations satisfy EPA's obligations under § 112(c)(6). In particular, although any claim that EPA's current standards satisfy § 112(c)(6)'s "90 percent requirement" necessarily depends on an interpretation of what this provision "require[s]," 76 Fed. Reg. at 15,308, JA__, those documents contain no such interpretation. Had EPA provided notice and an opportunity for comment on the Determination, Sierra Club would have pointed out that under the plain meaning of the Clean Air Act and under the interpretation of the Clean Air Act that EPA advanced in its Gold Mine Facilities Rule and Area Source Boilers Rule, the agency has not satisfied its obligations under § 112(c)(6).

IV. PRIOR LITIGATION.

A. Challenges To EPA's Implementation Of § 112(c)(6).

When EPA issued its 1998 § 112(c)(6) listing and advanced its claim that the Clean Air Act does not require emission standards for the hazardous air pollutants that § 112(c)(6) specifically enumerates, Sierra Club sought review in this Court. *Sierra Club v. EPA*, No. 98-1270 (D.C. Cir. filed June 9, 1998). Because EPA's interpretation was contained in a listing, that case was dismissed for lack of jurisdiction under § 112(e)(4). Amended Order in *Sierra Club v. EPA*, No. 98-1270 (Feb. 24, 1999).

After EPA failed to issue standards for the source categories it listed under § 112(c)(6) by November 15, 2000 – as § 112(c)(6) required the agency to do, 42 U.S.C. § 7412(c)(6) – Sierra Club filed a deadline suit in district court. *Sierra Club v. Whitman*, No. 01-1558 (D.D.C. filed July 18, 2001).[6] In that case, EPA argued that the question of whether EPA had set the standards required by § 112(c)(6) should be resolved not in a deadline suit but in a petition for review of a future notice in which the agency "explain[ed] how it has satisfied the requirements of section 112(c)(6) in terms of issuing emission standards for the source categories that account for the statutory thresholds identified in section 112(c)(6)." Defendant's Cross Motion For Summary Judgment On Remedy, *Sierra Club v. Jackson*, D.D.C. No. 01-1537 ("Def. Opp."), at 19 n.16, JA__. The agency represented to the district court that this notice, "like any other final action under the CAA, would be subject to judicial review in the D.C. Circuit pursuant to CAA section 307(b)." *Id.*

Agreeing with EPA, the district court set a remedial deadline for EPA to complete its obligations under § 112(c)(6) but declined to order EPA to set the standards required by that provision, finding that the D.C. Circuit "is the exclusive

[6] That case was consolidated with other deadline cases under *Sierra Club v. Whitman*, No. 01-1537 (D.D.C. filed July 16, 2001). The consolidated cases are now captioned *Sierra Club v. Jackson*, and this brief refers to them accordingly.

forum for substantive review of EPA regulations promulgated under Section 112 of the Clean Air Act." *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 60 (D.D.C. 2006). *See also id.* at 59 (noting EPA's representation that it would "issue a notice that explains how it has satisfied the requirements of section 112(c)(6)") (citing Def. Opp. at 19 n.16, JA__).

B. Challenges To Specific Rules In Which EPA Refused To Set Standards For § 112(c)(6) Pollutants.

In addition to seeking judicial review of EPA's programmatic refusal to ensure that the source categories listed under § 112(c)(6) are "subject to standards" as that provision requires, Sierra Club also challenged specific rules in which the agency failed to set standards for the § 112(c)(6) pollutants.

After EPA announced in its 1998 listing that MWC account for more than fifty-one percent of all PCB emissions, the agency issued a rule for small MWC in 2000 that did not include standards for PCBs. Sierra Club challenged that rule in *Sierra Club v. EPA*, No. 01-1054 (D.C. Cir. filed February 5, 2001).[7] In 2003, Sierra Club and EPA agreed to address the agency's failure to set PCB standards in the district court deadline suit (*Sierra Club v. Jackson*) or future litigation rather

[7] This challenge was consolidated with other petitions for review and decided in *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936 (D.C. Cir. 2004).

than litigating it in this Court. Reply Brief of Petitioners Sierra Club and New York Public Interest Group, *Northeast Maryland Waste Disposal Authority*, D.C. Cir. No. 01-1053, at 17. Thus, although this Court granted Sierra Club's petition for review of the small MWC rule, 358 F.3d at 953-955, its decision did not address EPA's failure to set standards for PCBs. As noted above, EPA later successfully argued in *Sierra Club v. Johnson* that the district court lacked jurisdiction to reach this issue. 444 F. Supp. 2d at 60.[8]

Sierra Club also sought to challenge EPA's failure to set PCB standards when the agency issued court-ordered revisions of its emission standards for hazardous waste combustors (HWC) and large MWC, having raised this objection during the comment period for these rules. *Sierra Club v. EPA*, No. 05-1441 (D.C. Cir. filed December 8, 2005) (HWC); *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir. filed July 7, 2006) (MWC). In both cases, however, EPA obtained a voluntary remand of the challenged rules before briefing commenced. Although EPA obtained a remand in the HWC case more than two years ago and in the MWC case more than three years ago, the agency has not yet responded to the Court's remand orders in either case.

[8] EPA has not yet responded to this Court's remand order in *Northeast Maryland Waste Disposal Authority*.

V. EFFECTS OF EPA'S INTERPRETATION AND IMPLEMENTATION OF § 112(c)(6).

More than a decade after Congress required EPA to complete its obligations under § 112(c)(6) – a statutory provision that according to EPA "is obviously intended to ensure controls for specific persistent, bioaccumulative HAP," 76 Fed. Reg. 9,457/2, JA__ – EPA has not set a single emission standard for PCBs or HCB. Sources accounting for less than fifty-one percent of all POM emissions are subject to standards for POM. *See supra* at 11-13.

The result of EPA's refusal to set standards for these pollutants is that people living in exposed communities – communities located near coke ovens, waste incinerators, petroleum refineries, and other sources of the § 112(c)(6) pollutants – are being deprived of protection that Congress "obviously" intended EPA to provide. 76 Fed. Reg. at 9,457/2, JA__.

STANDARD OF REVIEW

This Court reviews the final actions EPA takes under § 112 of the Act to determine if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). EPA's construction of the Clean Air Act's statutory provisions is reviewed pursuant to *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). Under *Chevron*, "[i]f the intent of Congress 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." 467 U.S. at 842-43. If the statute is ambiguous, the agency's interpretation must be rejected under *Chevron* step two if, among other things, "the agency has [not] offered a reasoned explanation for why it chose that interpretation." *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011), or the interpretation "frustrate[s] the policy that Congress sought to implement," *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008)(internal quotation marks and citation omitted).

EPA's action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), or failed to "identif[y] and explain[] the reasoned basis for its decision," *Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C. Cir. 1996). In particular, an agency's action is arbitrary if the agency has not considered statutory requirements, *see Massachusetts v. EPA*, 549 U.S. 497, 532-534 (2007), has not explained how its action comports with those requirements, *see Mountain Communications, Inc. v. FCC*, 355 F.3d 644, 648-649 (D.C. Cir. 2004), or has acted in a way that frustrates the purpose of a statute as the agency itself interprets it. *See BP West Coast Products v. FERC*, 374 F.3d 1263, 1274 (D.C. Cir. 2004).

SUMMARY OF ARGUMENT

EPA agrees that § 112(c)(6) requires it to assure that sources accounting for ninety percent of the emissions of the hazardous air pollutants that § 112(c)(6) enumerates are, at a minimum, subject to emission standards for these specific pollutants. Yet sources accounting for ninety percent of the emissions of PCB, POM, and HCB are not subject to standards for these pollutants, and EPA does not claim they are. Thus, EPA's Determination that it has satisfied the requirements of Clean Air Act § 112(c)(6) is flatly unlawful under the agency's own interpretation of the statute.

EPA's claim is also unreasonable and arbitrary and capricious. Although EPA claims that it has satisfied the requirements of § 112(c)(6), the agency does not say what it thinks these requirements are or why it believes it has satisfied them. Nor does EPA explain or even acknowledge the direct conflict between its claim to have satisfied § 112(c)(6) and its interpretation of § 112(c)(6) as requiring emission standards that the agency has not established. Further, although EPA does not claim to have assured that sources accounting for ninety percent of the emissions of PCB, POM, and HCB are subject to standards for these pollutants, any such claim would be completely unexplained and unsupported by the record.

Finally, because the Determination purports to terminate both EPA's nondiscretionary duty to issue emission standards under § 112(c)(6) and citizens'

ability to enforce that duty, it is a legislative rulemaking subject to the APA's notice and comment requirements. Therefore, EPA's failure to provide notice and an opportunity for comment on the Determination violated the APA.

STANDING

As shown in the attached declarations, Sierra Club members live near municipal waste incinerators, pesticide manufacturers, petroleum refineries, and coke ovens and are harmed by emissions of PCBs, HCB, and POM from those facilities.

Sierra Club member Jesse Marquez lives less than three miles from a municipal waste incinerator at the Southeast Resource Recovery Facility (SERRF) in Long Beach, CA, and regularly drives within 500 feet of it. Decl. of Jesse Marquez ¶ 8. Classified by EPA as a large municipal waste incinerator, SERRF emits forty-two tons of hazardous air pollutants each year. *Id.* ¶ 9. Incinerators like SERRF account for more than half of total nationwide emissions of PCBs. § 112(c)(6) Memo at 16, JA__. Also near Mr. Marquez's home, within three and one-half miles, are at least three petroleum refineries that emit POM—the ConocoPhillips refinery, the BP/Arco refinery, and the Tesoro refinery. Decl. of Jesse Marquez ¶ 6, 7. Regular exposure to these PCB and POM emissions increases Jesse Marquez's risk of developing cancer and respiratory, immune, reproductive, and neurological ailments. *Id.* ¶¶ 7, 9, 10. His awareness of these

risks decreases his enjoyment of outdoor activities such as hiking and picnicking, and causes him to forego recreational opportunities, including birdwatching. *Id.* ¶ 15. It also affects his social life. *Id.*

Club member Eric Uram grew up fishing in and around the Great Lakes region. Decl. of Eric Uram ¶ 6. His ability to fish and consume his catch has been significantly impaired by emissions of PBTs that bioaccumulate in fish, including PCBs emitted by the French Island incinerator. *Id.* ¶ 7, 11. He does not fish in the Black River, even though he would like to, because of PCB emissions from municipal waste incineration. *Id.* ¶ 11.

Club member Karla Land lives six miles from the GB Biosciences pesticide manufacturing facility and seven miles from the ExxonMobil Baytown petroleum refinery. Amended Decl. of Karla Land ¶ 4. Emissions of HCB from the pesticide plant and of POM from the refinery reach her home. *Id.* ¶¶ 6, 7. Ms. Land used to enjoy relaxing in her yard but, due to air pollution, no longer spends much time there. *Id.* ¶ 11. She does not fish in the nearby San Jacinto River, even though she would like to, because of the dangers posed by PBTs, including HCB. *Id.* ¶ 13.

Club member Richard Quiggle lives about a mile from the Erie Coke plant, which emits POM. Decl. of Richard Quiggle ¶¶ 2, 4. Almost every day, he walks his dog within view of the plant. He often rides his bike along the shores of Lake Erie, also within view of the plant. When there is a breeze, he can smell the

emissions from its smoke stacks. *Id.* ¶ 3, 9. His concerns about health risks from this pollution diminish his enjoyment of cycling and walking his dog. *Id.* ¶ 9, 11. Mr. Quiggle regularly gardens in his yard and consumes local produce. *Id.* ¶ 10. He is concerned about heightened risks to his health from exposure to POM through these activities. *Id.* ¶ 10, 11. Mr. Quiggle and his ex-wife have both been diagnosed with cancer. *Id.* ¶¶ 6, 7.

EPA's determination that it has no further obligation under § 112(c)(6) to promulgate standards for PBT emissions will prolong and increase the injuries sustained by these Sierra Club members. Vacatur of EPA's determination would require EPA to assure that the sources accounting for ninety percent of the emissions of PCB, POM and HCB are subject to standards for these pollutants, thereby reducing Sierra Club members' exposure to these pollutants and the harms that result.

EPA's failure to provide for notice and comment prior to issuance of its § 112(c)(6) determination caused procedural injury to Sierra Club's members. Given the opportunity, Sierra Club and its members would have participated in the administrative process by submitting comments and supporting evidence challenging EPA's determination that it has fulfilled its obligations under § 112(c)(6). Decl. of Neil Carman ¶ 8, 9. EPA might then have promulgated the standards that § 112(c)(6) requires.

These injuries are germane to Sierra Club's purpose, which includes advocacy for stronger protections against air pollution. *Id.* ¶ 2. Adjudication of this challenge to a nationwide rule does not require the participation of individual Sierra Club members. Accordingly, Sierra Club has standing to bring this lawsuit on behalf of its members. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 181 (2000).

ARGUMENT

I. EPA'S CLAIM TO HAVE SATISFIED CLEAN AIR ACT § 112(c)(6) IS UNLAWFUL AND ARBITRARY.

A. EPA's Claim To Have Satisfied Clean Air Act § 112(c)(6) Is Unlawful Under *Chevron* Step One.

EPA does not claim anywhere in the record that sources accounting for ninety percent of PCB, POM, and HCB emissions are subject to standards for these pollutants. Nor could the agency make such a claim. EPA has not set PCB or HCB standards for any source, and has set POM standards for sources that account for far less than ninety percent of aggregate emissions of POM. Nonetheless, EPA asserts that it "has completed sufficient standards to meet the 90 percent requirement" in § 112(c)(6). 76 Fed. Reg. at 15,308/3, JA__.

That claim is unlawful under the agency's own interpretation of the Clean Air Act. According to EPA, § 112(c)(6)'s mandate to assure that sources are subject to standards under subsection (d)(2) or (d)(4) "requires" it either to set

standards for all the hazardous air pollutants emitted by the sources it lists under § 112(c)(6), or to set standards for the specific hazardous air pollutants enumerated in § 112(c)(6):

> Section 112(c)(6) requires that "sources accounting for not less than 90 per centum of the aggregate emissions of each such [specific] pollutant are subject to standards under subsection (d)(2) or (d)(4)." This language can reasonably be read to mean standards for the section 112(c)(6) HAP or standards for all HAP emitted by the source.

76 Fed. Reg. at 9457/1-2, JA__ (emphasis added). *See also* 76 Fed. Reg. at 15,567/2-3, JA__ (same); Brief for Respondent at 32, *Desert Citizens Against Pollution v. EPA*, D.C. Cir. No. 11-1113, JA__ (same). Thus, it is undisputed that, at the very least, § 112(c)(6) unambiguously "requires" the agency to assure that the sources listed under § 112(c)(6) are subject to standards "for the § 112(c)(6) HAP." 76 Fed. Reg. at 9457/1-2, JA__. *See Chevron*, 467 U.S. at 842-843 ("If the intent of Congress 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.").[9]

[9] EPA's contention that the Clean Air Act allows it to set standards only for the § 112(c)(6) hazardous air pollutants when it issues regulations for sources listed under § 112(c)(6) has been challenged by Sierra Club in *Desert Citizens*, No. 11-1113, a currently pending case. The Court need not address that issue here, however. Because EPA has not assured that source categories accounting for ninety percent of the aggregate emissions of PCB, POM and HCB are subject to standards even for these hazardous air pollutants, the agency's claim that it has satisfied § 112(c)(6) is unlawful (and arbitrary) irrespective of whether the agency also contravened the Clean Air Act by failing to ensure that such sources are subject to standards for the other hazardous air pollutants they emit.

B. EPA's Claim To Have Satisfied § 112(c)(6) Is Unlawful Under *Chevron* Step Two And Arbitrary And Capricious.

Although EPA claims that it has "completed sufficient standards to meet the 90 percent requirement," 76 Fed. Reg. at 15,308/3, JA__, the agency does not even say what it thinks the relevant "requirement" is, far less explain how its action comports with that requirement. Notably, EPA has advanced varying interpretations of § 112(c)(6), and now claims that § 112(c)(6) is ambiguous with respect to whether it requires EPA to set standards for all the pollutants that listed source categories emit or just the § 112(c)(6) pollutants. *See supra* at 13-15. Thus, EPA is (or should be) well aware of the need to articulate and support its interpretation of § 112(c)(6) in any action purporting to satisfy this provision's "requirement." EPA's failure to do so renders its claim both arbitrary and unreasonable under *Chevron* step two. *See Massachusetts*, 549 U.S. at 532-533 (agency action is arbitrary where it "rests on reasoning divorced from the statutory text"); *Vill. of Barrington*, 636 F.3d at 660 (court defers to agency interpretation under *Chevron* "only if the agency has offered a reasoned explanation for why it chose that interpretation").

Even more egregiously, EPA's determination conflicts directly with the agency's own interpretation of the Act as requiring it to assure that these sources are subject to standards for the "for the § 112(c)(6) HAP" and the agency's own conclusion that Congress "obviously intended" it "to ensure controls" for these

hazardous air pollutants. 76 Fed. Reg. at 9457/2, JA__; 76 Fed. Reg. at 15,567/2-3, JA__. Rather than attempting to explain this conflict, EPA simply ignores it; nowhere does the agency indicate how its claim to have satisfied § 112(c)(6) can be reconciled with this interpretation of § 112(c)(6), given that sources accounting for ninety percent of the aggregate emissions of PCBs, POM and HCB are not subject to standards for PCBs, POM and HCB. *See Shays*, 528 F.3d at 932 (rejecting, under *Chevron* step two, agency definitions that conflicted with statutory purpose); *Mountain Communications*, 355 F.3d at 648-49 (holding action arbitrary where "[t]he Commission [] has not even tried to explain how its position can be reconciled with the statutory provision"); *BP West Coast Products*, 374 F.3d at 1274 (holding action arbitrary where it conflicted with agency's own interpretation of statute: "If FERC interprets section 1803 to apply only to filed rates, then it may not extend the benefits of that provision to unfiled rates based only on speculation about what would have happened had they in fact been filed.").

Finally, although EPA does not claim that it has assured that the sources accounting for ninety percent of the emissions of PCBs, POM, and HCB are subject to standards for these pollutants, any such claim would be completely unexplained and unsupported by the record. *See State Farm*, 463 U.S. at 42-43 ("agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the

choice made.'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

II. EPA'S FAILURE TO PROVIDE NOTICE AND OPPORTUNITY TO COMMENT ON ITS FINAL §112(c)(6) DETERMINATION IS UNLAWFUL.

A. The Determination Was A Rulemaking Subject To The APA's Notice And Comment Requirements.

EPA's Determination purports to discharge the agency's § 112(c)(6) obligation to assure that sources accounting for ninety percent of the aggregate emissions of PCBs, POM, and HCB are subject to standards under Clean Air Act § 112(d)(2) or § 112(d)(4). 76 Fed. Reg. at 15,308/3, JA__. Before the Determination, the agency was still subject to a nondiscretionary duty to issue the emission standards that § 112(c)(6) requires, and the public could still enforce this duty under Clean Air Act § 304(a)(2), 42 U.S.C. § 7604(a)(2). By issuing the Determination, EPA seeks to eliminate this statutory duty – even though, as discussed above, the agency has yet to set PCB or HCB emission standards for any source and has set POM standards for far less than ninety percent of the sources that emit POM.

"The APA broadly defines rules subject to § 553 procedures, and carves out only limited exceptions." *Batterton v. Marshall*, 648 F.2d 694, 704 (D.C. Cir. 1980). EPA's attempt to cut off its obligations under § 112(c)(6) fits easily within

the APA's definition of a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy…." 5 U.S.C. § 551(4). The very purpose of the Determination is to "announce" EPA's completion of its §112(c)(6) duties. 76 Fed. Reg. at 15,308/2, JA__. By asserting that EPA has fulfilled this statutory obligation, the agency implements § 112(c)(6) in accordance with its own policy goal of eliminating any enforceable statutory obligation to set additional standards for the sources emitting the § 112(c)(6) pollutants.

Nor is the Determination subject to any exception to the APA's notice and comment requirements for such rulemaking. By purporting to curtail EPA's undisputed obligation to set standards for PCBs, POM, and HCB, the Determination "altered the legal regime." *NRDC v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011). Before the Determination, EPA was subject to a nondiscretionary duty to set these standards; after the Determination it is not. Accordingly the Determination is neither a policy statement nor an interpretative rule, *see* 5 U.S.C. § 553 (b)(3)(A), but a legislative rule for which notice and comment is required. *See NRDC*, 643 F.3d at 320 ("Given that the Guidance document changed the law, the first merits question – whether the Guidance is a legislative rule that required notice and comment – is easy.").

Because the Determination is a rule for which the APA required notice and comment, EPA's failure to provide notice and comment was unlawful. 5 U.S.C. § 706(2)(D); *Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) (vacating EPA rule for failure to comply with APA notice and comment procedure); *Util. Solid Waste Activities Group v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001) (same).

B. EPA's Lawyers' Claim That The § 112(c)(6) Determination Is An Order Rather Than A Rule Is Meritless.

Attempting to defend the agency's failure to provide the requisite notice and comment opportunity prior to issuing the Determination, EPA's lawyers have asserted that the Determination is not a "rule" at all, Respondents' Opposition To Petitioner's Cross-Motion For Summary Vacatur And Reply In Support Of Motion To Hold Case In Abeyance ("Opp. To Cross-Mot.") at 12, but just a "simple accounting" that "does not purport to interpret EPA's obligations under section 112(c)(6)" and does not "alter any legal relationships," *id.* at 14.

As shown above, the Determination fits easily within the APA's definition of a "rule," "the breadth [of which] cannot be gainsaid," *Batterton*, 648 F.2d at 700, and EPA cannot evade the applicable notice and comment requirements simply by calling it something else. *See e.g. Sugar Cane Growers Co-Op. of Florida v. Veneman*, 289 F.3d 89, 95-96 (D.C. Cir. 2002). *See also Center for*

Auto Safety v. NHTSA, 710 F.2d 842, 846 (D.C. Cir. 1983) (APA's definition of rule "is broad enough to include nearly every statement an agency may make") (quoting *Batterton*, 648 F.2d at 700). *See supra* at 31-32.

In any event, EPA's lawyers' description of the rule as a "simple accounting" is wrong. By announcing that EPA "has completed the emission standards required by" § 112(c)(6), 76 Fed. Reg. at 15,308/2, JA__ (emphasis added), the Determination necessarily reflects an interpretation of what these provisions "require[]," regardless of whether the agency chose to articulate or explain that interpretation. In addition, the Determination substantially "alter[s] the legal regime," *NRDC*, 643 F.3d at 320: by purporting to satisfy EPA's statutory obligations under § 112(c)(6), it would terminate EPA's statutory obligation and the public's statutory right to enforce that obligation. *See LeFevre v. Sec'y, Dep't of Veterans Affairs*, 66 F.3d 1191, 1196-97 (Fed. Cir. 1995) (rejecting agency argument that its decision not to take action was not a substantive rule).

Moreover, EPA's lawyers' efforts to discount the significance of the Determination by calling it a mere accounting or certification of past agency actions conflicts irreconcilably with EPA's commitment to issue a final § 112(c)(6) determination that "like any other final action under the C[lean] A[ir] A[ct], would be subject to judicial review in the D.C. Circuit pursuant to C[lean] A[ir] A[ct] section 307(b)." *Compare* Def. Opp. at 19 n.16, JA__, *with* Opp. to Cross-Mot. at

13-14 (likening the Determination to EPA actions found unreviewable). If the Determination had no legal effect as EPA's lawyers insinuated, *but see supra* at 34, it would not be reviewable final action. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (to be "final," "action must be one by which rights or obligations have been determined, or from which legal consequences will flow.") (citation and internal quotation marks omitted); *NRDC*, 643 F.3d at 319 (questions of finality and ripeness, like those concerning APA rulemaking, turn on "whether the [action] announces a binding change in the law") (citing *Bennett*, 520 U.S. at 177); *id.* at 321 (inquiries into whether the agency action was final and whether the agency action was a rule are essentially the same)).[10]

In attempt to show that the Determination is something other than a "rule" under the APA, EPA's lawyers have described it as "an 'adjudication' culminating

[10] In district court, EPA successfully argued that its substantive compliance or non-compliance with § 112(c)(6) was reviewable only in the context of "a notice that explains how [EPA] has satisfied the requirements of section 112(c)(6) in terms of issuing emission standards for the source categories that account for the statutory thresholds identified in section 112(c)(6)" and that this notice "like any other final action under the CAA would be subject to judicial review in the D.C. Circuit pursuant to CAA section 307(b)." Def. Opp. at 19 n.16; *Sierra Club*, 444 F. Supp. 2d at 59-60 (citing Def. Opp. at 19 n.16 as support for decision not to require EPA to issue specific standards under § 112(c)(6)). Given that this issue was litigated and decided in *Sierra Club*, EPA is estopped from arguing otherwise now. *See Novak v. World Bank*, 703 F.2d 1305, 1309 (D.C. Cir. 1983) ("collateral estoppel prevents the relitigation of any *issue* that was raised and decided in a prior action.") (citing *Allen v. McCurry*, 449 U.S. 90 (1980)) (emphasis in original).

in an 'order.'" Opp. to Cross-Mot. at 12. *See* 5 U.S.C. § 551(6), (7). As the Supreme Court has explained, however, "adjudication" is used to resolve past disputes between ascertainable parties, while rulemaking is used to establish a legal or policy position of general applicability and future effect. *United States v Florida East Coast Railway*, 410 U.S. 224, 244-45 (1972); *see also Mistretta v. United States*, 488 U.S. 361, 392 (1989) ("all rulemaking is nonjudicial in the sense that rules impose standards of general application divorced from the individual fact situation which ordinarily forms the predicate for judicial action"); *Independent Bankers Ass'n of Georgia v. Board of Governors of Federal Reserve System*, 516 F.2d 1206 (D.C. Cir. 1975) ("[a]s a general matter, agencies employ rulemaking procedures to resolve broad policy questions affecting many parties" and "[a]djudicatory hearing procedures are used in individual cases"). As reflected by EPA's lawyers' failure to offer any legal or factual support for their claim, the Determination plainly does not relate to individual parties or facts; instead, it affects EPA itself and the public at large, and its purpose is to curtail the agency's legal obligation to set nationally applicable emission standards. *Sugar Cane Growers Coop.*, 289 F.3d at 95-96 (rejecting as "simply absurd" agency's effort to characterize its announcement affecting future agency action as the product of an informal adjudication).

Finally, EPA's lawyers' argument that receiving comment on the Determination "would not have improved the Agency's performance," Opp. to Cross-Mot. at 16, lends no support to their claim that the Determination was not a rule under the APA. EPA's obligation to provide notice and a comment opportunity does not depend on whether the agency believes the comments will be helpful, but on whether the action at issue is a rule. In any event, it is to be hoped that EPA's lawyers are wrong on this point too. Commenters would have explained, *inter alia*, that EPA has not met its obligations under § 112(c)(6). *See* Decl. of Neil Carman at ¶¶ 6-9. Had EPA taken comment, the agency may have realized that: (1) its claim to have satisfied § 112(c)(6) is directly at odds with its acknowledged obligation to assure that sources accounting for ninety percent of PCB, POM, and HCB emissions are subject to emission standards for these pollutants; and (2), attempting to cut off its § 112(c)(6) obligation without having set standards to control these extraordinarily dangerous hazardous air pollutants frustrates Congress's "obvious[] inten[t]." 76 Fed. Reg. at 9457/2, JA__.

CONCLUSION

For the reasons given above, Sierra Club respectfully requests that this Court vacate the Determination.

Dated: January 30, 2012

Respectfully submitted,
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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Proof Brief of Petitioner contains 8,872 words, as counted by counsel's word processing system.

DATED: January 30, 2012

/s/ James S. Pew
James S. Pew

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2012 I have served the foregoing **Proof Brief of Petitioner** on all registered counsel through the Court's electronic filing system (ECF).

/s/ James S. Pew
James S. Pew