ORAL ARGUMENT NOT YET SCHEDULED

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

No. 05-1097 (and consolidated cases) COMPLEX

STATE OF NEW JERSEY, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Respondent.

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

FINAL REPLY BRIEF OF ENVIRONMENTAL PETITIONERS

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GLOSSARY

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

112(c) List	List of Sources Subject to Regulation Pursuant to 42 U.S.C. §7412
CAA, the Act	Clean Air Act
CAMR	Clean Air Mercury Rule
EPA	United States Environmental Protection Agency
HAPs	Hazardous Air Pollutants
MACT	Maximum Achievable Control Technology
NSPS	New Source Performance Standards
EGU	Electric Utility Steam Generating Unit
Br.	Environmental Petitioners' Opening Brief
EPA Br.	EPA Response Brief

SUMMARY OF ARGUMENT

EPA's brief confirms that the Agency violated the literal meaning of the Clean Air Act by removing electric steam generating units ("EGUs") from the §112(c) list without satisfying §112(c)(9)'s requirements. The statutory provision that EPA prefers over the plain language of §112(c)(9) does not even address delisting. And the Agency may not invoke an alleged mistake to avoid the constraint on its discretion imposed by that plain language. Nothing in the logic or structure of the statute provides the extraordinarily convincing showing needed to demonstrate that Congress could not have meant what it said in §112(c)(9).

EPA's brief further confirms that the substitute §111 regulation EPA adopted to avoid §112 regulation violates the statute repeatedly. The Agency's arguments in support of its "Clean Air Mercury Rule" ("CAMR") strive to create statutory conflict between House and Senate Amendments adopted in the Statutes at Large, ignoring caselaw requiring statutes to be construed harmoniously with no provisions rendered void. Instead, the Agency's strained interpretation reads the Senate amendment out of the Act.

The mercury trading feature of EPA's §111 regulation independently violates plain statutory language and controlling precedent in this Court. EPA contravenes the plain language of §111(d)(1) and §302 by eschewing the requirement that "each State" plan achieve "continuous emission reductions" from "any existing source" in favor of the Agency's approach, which EPA projects will result in total mercury increases from 19 states and nearly 40% of EGUs nationwide.

I. EPA FAILS TO DEMONSTRATE ITS REMOVAL OF EGUs FROM THE §112(c) LIST SATISFIES THE STATUTE'S EXPRESS DELISTING REQUIREMENTS.

A. EPA's Statutory Interpretation Conflicts With §112's Literal Meaning.

Plain statutory language prohibits EPA from delisting EGUs without satisfying §112(c)(9)'s conditions. 42 U.S.C. §7412(c)(9); Environmental Petitioners' Opening Brief ("Br.") at 14-15. EPA does not dispute that it lawfully placed EGUs on the §112(c) list, nor that the Agency has not made the §112(c)(9) determinations prior to delisting. Nor does EPA's brief offer a textual reading of §112(c)(9) that contradicts Petitioners' plain language interpretation. *Compare* Br. at 14-15 *with* EPA Response Brief ("EPA Br."), at 20-26. EPA revealingly avoids interpreting §112(c)(9) and points instead to another provision, §112(n)(1)(A), as the reason not to follow §112(c)(9)'s plain language. EPA Br. at 26.

But the "precise question at issue" under a *Chevron* step one analysis, *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), is whether EPA may delist without following §112(c)(9). EPA Br. 24- 26. EPA identifies no language in §112(n)(1)(A) mentioning or governing delistings. Nor is there indication in any other statutory language, structure or legislative history suggesting any source category delisting is governed by authority outside of §112(c)(9). Br. at 14-19. Thus, even if §112(c)(9) and §112(n)(1)(A) conflict as EPA suggests, and they do not, *see infra* at 4, it is §112(c)(9) that is more "specific" with respect to the authority for delistings. EPA Br. at 26; *see also National Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 336 (2002) (specific statutory language controls more general language only where there is a conflict between the two).

EPA suggests in passing that EGUs are not "ordinary source categories" that can only be removed from the §112(c) list after satisfying §112(c)(9) requirements. EPA Br. at 25. But §112(c)(9) governs delisting of "any source category," 42 U.S.C. §7412(c)(9). EPA admits that

EGUs are a "source category," *see* EPA Br. at 17, 20, and the Agency offers no textual reading why "any" should not have its accepted "expansive meaning" of "one or some indiscriminately of whatever kind." *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006) (*quoting United States v. Gonzales*, 520 U.S. 1, 5 (1997)). The literal meaning of §112(c)(9) accordingly prohibits removing EGUs from the §112(c) list without first satisfying §112(c)(9) requirements.

Thus, EPA's brief confirms that literal statutory language bars the Agency from removing EGUs from the §112(c) without first making the §112(c)(9) determinations.

B. EPA Cannot Overcome §112's Literal Meaning.

1. EPA's Reliance On §112(n) Is Misplaced.

EPA attempts to avoid the literal meaning of §112(c)(9) by asserting that "express authority in §112(n)(1)(A) to determine whether power plants should be regulated at all under §112 necessarily encompasses the authority to remove power plants from the §112(c) list" of categories for which §112 standards are required. EPA Br. at 24 (emphasis added). Similarly, EPA claims that "[l]ogically," if it no longer believes §112 regulation is necessary and appropriate, that reversed opinion "*ipso facto* must result in the removal of power plants from the §112(c) list." *Id.* at 26.

To overcome a statute's literal meaning the Agency must provide much more than beliefs or "*ipso facto*" assertions. As this Court has emphasized, EPA "must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, [Congress] almost surely could not have meant it." *New York*, 443 F.3d at 889 (*quoting Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088-1089 (D.C. Cir. 1996)). EPA does not remotely satisfy this requirement.

EPA argues that Congress' intent "is not clear" with regard to whether §112(c)(9) governs delisting power plants and that the *Engine Mfrs.* test therefore does not apply. EPA Br. at 26-27 & n4. But EPA cannot overcome literal meaning or satisfy the *Engine Mfrs.* test just by baldly asserting the Act "is not clear." *Id.* at 26. Certainly, the mere existence of §112(n)'s directives (to study and report to Congress and make a determination based on that study prior to the initial decision to regulate EGUs under §112) does not "demonstrate" that Congress "almost certainly could not have meant" §112(c)(9) to govern EGUs' removal from the §112(c) list. *See New York,* 443 F.3d at 888, 889.

Next, addressing the *Engine Mfrs.* showing in cursory fashion, EPA contends that delisting EGUs under §112(c)(9) "would undermine Congress' specific instructions regarding the regulation of power plants set forth in section 112(n)(1)(A)."[1] EPA Br. at 27 n4. Yet there is no conflict between the §112(n)(1)(A) process and the §112(c)(9) delisting provisions.[2] The former is silent on delisting; the latter governs delisting exclusively. Moreover, once the utility industry is added to the §112(c) list, numerous statutory provisions follow logically and legally. *See* Br. at 17-18; § I.C. *infra.* Revealingly, EPA disputes only the application of §112(c)(9) among the statutory provisions that it concedes §112(c) listing to have triggered. EPA Br. at 28.

EPA utterly fails to show how applying §112(c)(9) to EGUs would undermine §112(n), and thus does not make the "extraordinarily convincing" showing (*Appalachian Power Co. v.*

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[1] Tellingly, EPA and Industry both mischaracterize the Act's §112(n) directive, paraphrasing it in the negative, *i.e.* as a directive not to regulate the industry unless a determination is made, although the text of §112(n)(1)(A) clearly states that the EPA Administrator "shall regulate" once the determination is made. *Compare* EPA Br. at 6, 20 & Ind. Br. at 4, 5, 15 *with* 42 U.S.C. §7412(n)(1)(A).

[2] Because no part of §112 even purports to contradict the literal meaning of §112(c)(9), caselaw holding that statutes must be read in their entirety (*see* EPA Br. at 25-26) lends no support to the Agency's argument.

EPA, 249 F.3d 1032, 1041 (D.C. Cir. 2001)) that Congress "almost surely could not have meant" what it said in §112. *New York*, 443 F.3d at 889.

2. Congress Knew How To Exempt EGUs From §112 Provisions When It Wished.

EPA misses the point by imagining general Congressional "reservations" to regulate EGUs under §112 in §112(c)(6)'s narrow, express exemption for EGUs (EPA Br. at 29), even though §112(c)(9) contains no such exemption. "[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal citation omitted). The express exemption in §112(c)(6) demonstrates that Congress knew how to exempt EGUs from §112(c) provisions[3] but did not do so in §112(c)(9).

3. EPA's Inherent Authority Arguments Are Misplaced And Unsupported By The Cited Cases.

EPA's alternative "inherent authority" arguments provide no basis for delisting EGUs without satisfying §112(c)(9)'s requirements. *See* EPA Br. at 22. Citing inapposite cases, EPA insists that it always has "inherent authority to reverse an earlier administrative determination" so long as it "has a principled basis for doing so." *Id.* at 22-23. However, no such authority exists in the face of clear statutory language dictating otherwise. *See, e.g., Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 485 (2001) ("EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.").

None of EPA's cited cases involves an agency's exercise of discretion in the face of specific statutory limits on discretion. EPA's citation to *American Trucking Ass'ns v. Atchison,*

[3] EPA's response affirms this point. EPA Br. at 118 (describing the specific exception from §112 standards found in §129 for solid waste incineration units).

Topeka & Santa Fe Ry., 387 U.S. 397, 416 (1967) ("*Atchison*") (EPA Br. at 22), for example, conveniently fails to include the sentence immediately following their selected quote: "Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of law . . . , to adapt their rules and practices to the Nation's needs . . . ."[4] *Id.* at 416 (emphasis added). Here, EPA is clearly acting outside the "limits of law" by delisting EGUs without complying with §112(c)(9).

In *National Cable & Telecomms. Ass'n, Inc. v. Brand X Internet Servs.*, 545 U.S. 967 (2005), EPA Br. at 22-23, the Court only allowed the Federal Communications Commission to reverse an earlier policy where statutory "silence suggest[ed] . . . that the Commission has the discretion to fill the consequent statutory gap." *Id.* at 997. Here, no such silence or gap exists. On the contrary, §112(c)(9) is clear, contains no gap (as it covers "any source category") and forecloses Agency discretion.[5]

EPA fundamentally fails in its efforts to distinguish *American Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984), which does address a specific statutory provision limiting an agency's discretion to reverse itself. Although EPA claims *American Methyl* is distinguishable because the Court "relied heavily" on legislative history, EPA Br. at 30-31, its holding confirms the basic and obvious point that where Congress has expressly provided a statutory mechanism to govern later action, no discretion exists to find another way to undertake such action. 749

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[4] Moreover, the change in agency position affirmed by the *Atchison* Court was consistent with clear statutory language and the absence of an express exception. *Id.* at 419-22.

[5] 42 U.S.C. § 7412(c)(9). Nor are the remaining two cases EPA cites on point (EPA Br. at 23), since the underlying statutes in both "did not address [the] precise issue" in question, and statutory "silence instead g[ave] [the Agency] flexibility in determining [what steps to take to address that specific point]." *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1295 (D.C. Cir. 2006); *see also Williams Gas Processing Gulf Coast Co. v. FERC*, 475 F.3d 319, 323, 325 (D.C. Cir. 2006) (finding agency discretion only because underlying statute did not define key issue in case).

F.2d at 835. EPA's inherent authority claim in *American Methyl* failed because Congress had specifically "provided a mechanism for correcting error . . . ." *Id.* at 835. Here, §112(c)(9) provides the sole mechanism for reversing listing decisions.

EPA also attempts to distinguish *American Methyl* by arguing that: (1) although the statutory provisions there both addressed fuel additives, §112(n)(1)(A) "alone specifically addresses power plants"; and (2) that case's provisions (unlike §112(n)) imposed a time limit on EPA's decision-making process. EPA Br. at 30-31. Those arguments miss the point. Because §112(c)(9) is the only statutory mechanism for removing "any" source category from the §112(c) list, it displaces any inherent authority the agency might have had theoretically to accomplish the same end differently. EPA's strained arguments in service of roving authority to correct alleged "error" (*id.* at 31) cannot contravene plain statutory language.

Finally, if EPA could delist EGUs just by declaring its original listing decision a mistake, it also could delist any area source category just by declaring it erred in finding the category "presents a threat of adverse effects to human health or the environment." 42 U.S.C. §7412(c)(3); *see* Br. at 18-19. Significantly, EPA does not dispute such mistake-based delistings would contravene the statute, but argues that its delisting action challenged here does not because "Congress expressly applied section 112(c)(9) delisting criteria to area sources, but not to power plants." EPA Br. at 29. Again, EPA ignores the plain language of §112(c)(9), which applies to "any source category." 42 U.S.C. §7412(c)(9) (emphasis added). Given that expansive language, Congress did not need to say that §112(c)(9) applies to EGUs, any more than it needed to say §112(c)(9) applies to any other listed category of major or area sources. *See New York*, 443 F.3d at 887 ("Only in a Humpty Dumpty world would Congress be required

to use superfluous words while an agency could ignore an expansive word that Congress did use," construing expansive word "any") (internal citation omitted).

Because EPA's inherent authority argument cannot be limited to EGUs, it is so sweeping that it effectively nullifies a limit that Congress placed on EPA's authority to delist, and leads to the absurd result of authorizing delistings that undisputedly would be unlawful otherwise. *See NRDC v. Reilly*, 983 F.2d 259, 268 (D.C. Cir. 1993) (rejecting statutory interpretation that nullified Congress' decision to limit EPA discretion).[6]

EPA fails to overcome the clear Congressional intent expressed in the literal language of §112; accordingly, "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." *Chevron* at 842-843. An agency receives "no deference" on the question whether a statute is ambiguous. *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991). Here Congress could not have spoken more clearly to the issue of delisting and such inquiry must begin and end with the plain language of §112(c)(9).

C. EPA Cannot Wish Away Or Distinguish Its Previous Acknowledgments That Listing EGUs Triggered Consequences Under §112.

EPA's claim that listing EGUs under §112(c) did not trigger §112(c)(9)'s delisting requirements is directly at odds with the Agency's earlier acknowledgment, as well as its regulations, under which EGU listing expressly triggers other §112 provisions, including §112(c)(2)'s requirement to issue §112(d) emission standards, §112(g)(2)(B)'s requirement for

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[6] EPA argues Petitioners did not raise a "concern regarding section 112(c)(3)" during the comment period. EPA Br. at 29-30. The Clean Air Act, however, requires only that an "objection" to a rule be "raised with reasonable specificity," 42 U.S.C. §7607(d)(7)(B), not every conceivable reason for the objection. The relevant "objection" here is that EPA misreads the Act by claiming "inherent authority" to correct mistakes and delist source categories without satisfying §112(c)(9).

case-by-case standards as a precondition for new plant construction, and §112(e)(4)'s protection of listing decisions from judicial review. 40 C.F.R. §63.40(c); Br. at 17-18.

EPA tries mightily, EPA Br. at 32 n.5, but fails, to distance itself from its longstanding acknowledgment that deletion of EGUs from the §112(c) list "would be subject to the risk-based findings required under §112(c)(9)." *Cf.* Br. at 16 (quoting 56 Fed. Reg. 28,548, 28,551 (June 21, 1991)). Unable to counteract its prior interpretation or history, EPA first offers the irrelevant observation that the damaging statement was made in the preamble to a proposal that EPA did not adopt; but EPA does not and cannot say it failed to adopt the proposal based on any alleged incorrectness in that interpretation. EPA Br. 32 n.5. EPA next argues that the statement was "contrary to the plain language of section 112(n)(1)(A)," *id.*, but fails to back even that statement, identifying no language in §112(n)(1)(A) that addresses delisting or that contradicts §112(c)(9)'s exclusive authority. Indeed, EPA's 1991 interpretation of §112(c)(9) discusses §112(n)(1), without ever suggesting that §112(n)(1)(A) is relevant to EGU delisting. 56 Fed. Reg. at 28,551.

EPA's lawyers now attempt to dismiss the Agency's other previous applications of §112 requirements to EGUs, discussed in Br. at 17-18, by claiming that they were based only on its "appropriate and necessary" finding, and not on the listing decision. EPA Br. at 28. EPA's own prior statements belie that claim and make clear that EPA's previous findings that other §112 provisions were triggered necessarily rested on the statutory consequences of its listing decision, not on the Agency's opinion that regulation of EGUs was appropriate and necessary. *See* 40 C.F.R. §63.40(c) (§112(c)(5) listing triggers §112(g)(2)(B) standards) & Memorandum from John Seitz, U.S. EPA, to Regional Air Office Directors, at 1 (Aug. 1, 2001) (same) ("Seitz Memo") [JA-4454]; *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.

29, 50 (1983) (agency may not rely on *post hoc* rationalizations). This much is apparent from the face of the statute too, which makes clear that it is the listing decision, not an appropriate and necessary finding, that triggers §112 requirements. *See* 42 U.S.C. §§7412(c)(2) & 7412(c)(5).

EPA has never identified any basis, let alone a rational one, for concluding that listing EGUs triggered §112(c)(2), §112(e)(4) and §112(g)(2)(B) -- but not §112(c)(9). But EPA's own regulations and prior statements cannot be wished away, and they illuminate a gaping hole in EPA's statutory interpretation. Listing source categories is a threshold action under §112 that carries statutory consequences. Because EPA does not and cannot claim that none of these consequences apply to EGUs — it admits, for example, that the listing triggered case-by-case standards under §112(g)(2)(B), Seitz Memo at 1 [JA-4454], and the requirement to promulgate MACT standards under §112(d) — the Agency is left with the untenable claim that it can pick which statutory consequences it wishes to apply.[7] The impossible position into which EPA's statutory interpretation leads the agency further confirms that its interpretation cannot survive review under *Chevron* step one.

D. EPA's "Anomalous Result" Argument Lacks Merit.

EPA suggests that implementing §112(c)(9) as written would lead to an "anomalous result": that parties who oppose a listing can get relief from this Court that they cannot get from EPA "even where the error is conceded by the Agency." EPA Br. at 32-33. EPA argues that it "should not have to await an adverse ruling from the Court to correct its own mistake." *Id.* at 33.

EPA's argument ignores that under the statute a party dissatisfied with EPA's decision to place a category on the §112(c) list has two options for reversing that decision: (1) it can

[7] Elsewhere EPA makes much of the statute's failure to "expressly" apply §112(c)(9) to "power plants," EPA Br. at 29, but ignores that the statute does not "expressly" apply §112(c)(2), §112(g)(2)(B), or §112(e)(4) to power plants either, although EPA recognizes that those sections apply to EGUs once listed.

persuade EPA to delist the category by satisfying §112(c)(9); or (2), it can challenge the listing in a petition for review of final §112(d) regulations. *See* 42 U.S.C. §7412(e)(4).

Although EPA may regard that outcome to be "anomalous," it reflects express Congressional intent that, once listed, source categories may be removed from the §112(c) list only if EPA makes the §112(c)(9) determinations. That EPA has not made and is unable to make these determinations demonstrates that the Agency is attempting to avoid Congressionally-mandated §112 control of the largest source of airborne mercury in the nation even where EPA cannot assure this Court, Congress, and the public that no emissions of mercury from any EGU will "exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect ...." 42 U.S.C. §7412(c)(9)(B)(ii).

Finally, EPA's brief flatly misapplies the cases it offers in support of the proposition that an agency need not "await an adverse ruling from the Court to correct its own mistake," since the holdings in the quoted cases were in fact predicated upon a prior adverse court ruling. EPA Br. at 33; *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992). EPA's reference to *Natural Gas Clearinghouse* invokes a quotation from *United Gas Imp. Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965), offered by the *Natural Gas Clearinghouse* court: "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." EPA Br. at 33. But the previous two sentences in *Callery Props.* made clear that although the Federal Power Commission lacked authority to make reparation orders, it was "not so restricted where its order, which never became final, has been overturned by a reviewing court." 382 U.S. at 229. Both decisions, therefore, directly contradict rather than support the proposition for which EPA quotes them.

Moreover, neither decision rebuts the obvious proposition that there is nothing anomalous about courts having authorities (*e.g.*, vacatur) that agencies do not have (automatic repeal rights). Nor do these cases at all suggest that agencies need not follow statutory procedural and substantive requirements. Indeed, it would be not just anomalous but an extraordinary proposition of administrative and constitutional law if agencies could repeal their own rules without following legal requirements, simply by invoking the mantra of "mistake."[8]

II. EPA MAY NOT ADOPT §111 STANDARDS FOR EGU EMISSIONS OF LISTED HAPS.

EPA's brief confirms that the Agency adopted §111 standards for EGU mercury emissions only by reading the Senate amendment's prohibition on such §111 standards out of the Statutes at Large. Br. at 21-22. EPA does so despite its acknowledgment that the Statutes at Large must control (EPA Br. at 100), that the Senate amendment bars §111 regulation of HAPs (*id.* at 104), that the House and Senate amendments must be read harmoniously (*id.* at 112), and despite EPA's admission that the House and Senate amendments can be read harmoniously as Environmental Petitioners do to "bar section 111 standards for any hazardous air pollutant for all source categories ...." *Id.* at 105 (*quoting* 70 Fed. Reg. at 16,031).

EPA has no coherent rejoinder to either the point that its construction renders the Senate amendment void, or to the precedents rejecting such constructions where they can be prevented. Br. at 22 (citing *New York*, 413 F.3d at 39). EPA admits that the Senate amendment "retain[s] the pre-1990 approach of precluding regulation under CAA section 111(d) of any HAP listed under section 112(b)." EPA Br. at 104 (*quoting* 70 Fed. Reg. at 16,031).

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[8] EPA identifies past instances when it has delisted source categories by invoking error, without complying with §112(c)(9). EPA Br. at 31. But as this Court has observed, "we do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation." *F.J. Vollmer Co., Inc. v. Magaw*, 102 F.3d 591, 598 (D.C. Cir. 1996).

After a lengthy discourse about why it prefers its "somewhat more complex" interpretation of the House amendment, *id.* at 104-111, EPA manages only to offer a single, garbled sentence attempting to explain how the Agency gives "some" effect to the Senate amendment. EPA Br. at 112. But EPA's explanation is incoherent, since it turns on a distorted reading of the separately adopted House amendment. *Id.* at 112-113. EPA's brief finally confirms that its interpretation does render the Senate amendment void, because its interpretation "would allow regulation of [HAP] emissions under section 111(d)," *id.* at 112, despite EPA's admission that the Senate amendment "preclude[es] regulation under CAA section 111(d) of any HAP listed under section 112(b)." *Id.* at 104.

EPA fails to refute Environmental Petitioners' argument that the plain statutory reading that most readily "'fit[s] ... all parts into an harmonious whole,'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal citation omitted), prohibits EPA from setting §111 standards for pollutants like mercury "emitted from a source category which is regulated under section 112" or included on the §112(b) list of pollutants, as mercury is. *Compare* Br. at 20-22 (providing the harmonious reading) *with* EPA Br at 101 (recognizing the harmonious reading, but asserting it presents an unexplained "difficulty").

Rather than adopt the plain reading that harmonizes the two amendments and avoids conflict, EPA attempts to manufacture conflict by asking this Court to derive dispositive meaning from negative legislative history. *See* EPA Br. at 107-110; 116-117 ("House version of the amendment to section 111(d) was born as part of a proposed regulatory scheme that would have given EPA broad authority to decline to regulate under section 112 ....") (emphasis added). But this Court has admonished that it "will not use contestable negative inferences from one part of the legislative history to trump the plain words of the statute." *Florida Pub. Telecomms.*

Ass'n, Inc. v. F.C.C., 54 F.3d 857, 861 (D.C. Cir. 1995). The mere fact that Congress selected one portion of a House bill but not the other in enacting the 1990 Amendments from separate bills, does not provide any positive indication of the intended meaning of the portion Congress did select.

In truth, the "conflict" that EPA identifies is no conflict at all, but a non-substantive difference between two housekeeping amendments to §111(d), both of which are found in the Statutes at Large. Br. at 21-22; EPA Br. at 100 & n.32. EPA offers no explanation why Congress would quietly use a housekeeping amendment by the House, that even the Agency acknowledges was "a result of the rush toward final passage" of the Act, EPA Br. at 100, to sweep aside the law's two decades-long prohibition on HAP regulation under §111. *Compare* Br. at 23 *to* EPA Br. at 99-100.

Nor does *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 872 (D.C. Cir. 1979) support EPA's stretch to create conflict between the House and Senate amendments so the Agency can resolve the conflict to its liking by distorting the House amendment and reading the Senate amendment out of the Statutes at Large. EPA Br. at 102-104; Br. at 21-22. In *Spencer County*, the conflict was readily apparent between the text of separate sections of the Act, and EPA could not give harmonious effect to both, amounting to a "badly flawed" statutory scheme. *Spencer County,* 600 F.2d at 853-54. By contrast, here there is no "badly flawed" statutory scheme and EPA itself acknowledges the plain, harmonious interpretation barring §111 standards for HAPs from EGUs. EPA Br. at 105. Thus, *Spencer County* actually undermines EPA's already wobbly case.[9]

[9] EPA makes clear that it understands the breadth of Petitioners' arguments that there is no justification in the Act, its legislative history, or in EPA's changed policy preferences for issuance of any §111 standards for mercury emitted by EGUs, new or existing. *Compare* Br. at

Finally, EPA has it exactly backwards in asserting that §112(d)(7) authorizes §111 rules to substitute for §112 HAP regulation. EPA Br. at 118. Instead, §112(d)(7) prohibits §112 standards from supplanting §111 rules. 42 U.S.C. §7412(d)(7). Indeed, §112(d)(7) demonstrates that Congress intended §112 standards for HAPs and §111 standards for conventional air pollutants to apply to the same industries,[10] and that neither should be used as an excuse to avoid the other.

III. PLAIN STATUTORY LANGUAGE AND COURT PRECEDENT PROHIBIT CAMR TRADING.

EPA has interpreted §111(d)(1)'s requirements that "each State" plan satisfy the "best system of emission reduction" standard from "any existing source," 42 U.S.C. §7411(d)(1) (emphasis added), to authorize a "nationwide cap" approach that does not require mercury reductions in each State, and in which any given existing source also need not reduce emissions if it holds "allowances" – that is, legal rights to pollute. EPA Br. at 124, 128. Such an interpretation violates the plain language of the Act.

First, EPA does not deny that it projects entire States and nearly 40% of EGUs to increase mercury emissions under its trading approach.[11] Second, EPA avoids any textual explanation why its approach comports with the "each State" plan language in §111(d)(1). Br. at

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21 ("EPA may not set §111 standards for mercury") *with* EPA Br. at 116 (noting Petitioners' reading of House amendment has the result of prohibiting §111 standards for pollutants listed under §112(b)).

[10] That is, unless Congress provided an express exception, allowing §111 regulation for specifically identified HAPs, as it did in §129 for solid waste incinerators. Br. at 22; 42 U.S.C. §7429(a) & (b).

[11] *See* Br. at 26-27. EPA's own "Steubenville" study establishes that EGUs contribute significantly to local mercury deposition. Br. at 34. EPA's trading approach allows sources near polluted waterbodies to trade emissions with distant sources and exacerbate already harmful local EGU mercury deposition. While EPA attempts to discount the final Steubenville report (Keeler, *et al., Sources of Mercury Wet Deposition in Eastern Ohio*, 40 Evtl. Sci & Tech, 5874-5881 (September 2006)), EPA Br. at 65 n.21, the findings of the report were available to the Agency when it promulgated the rule. OAR 2002-0056, Items 6742-52 [JA-3905-4211].

27; EPA Br. at 120-142. Because it cannot explain this fundamental point, there is no basis for EPA's further contorted reading of "best system of reduction" for "each State" as authorization for increases in multiple States' emissions. EPA's brief similarly twists the obligation for "emission reduction[s]" from "any existing source" (42 U.S.C. §7411(d)(1)) by substituting a very different obligation "requir[ing] each source to cover its emissions with allowances," but not actually reduce emissions. EPA Br. at 128; Br. at 27-28.

EPA also unsuccessfully attempts to avoid §302's "standard of performance" definition, EPA Br. at 129-130, by ignoring two well-established principles of construction: (1) that statutes should be interpreted to "fit, if possible, all parts into an harmonious whole," *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133; and (2) "that specific statutory language should control more general language when there is a conflict between the two." *Gulf Power Co.*, 534 U.S. at 335 (emphasis added). Because the "standard of performance" definitions in §111(d)(1) and §302 do not conflict, EPA must give effect to both. *Compare* 42 U.S.C. §7411(d)(1) *to id.* §7602(l). But EPA's rule contravenes the plain language of §302(l) by reading "continuous emission reduction" for "a source" to be satisfied by a nationwide "overall cap" requiring sources to continuously hold or purchase allowances, and thereby avoid actually reducing emissions. 42 U.S.C. §7602(l); EPA Br. at 130; Br. at 25-26.

Finally, EPA's new arguments fail to distinguish this Court's controlling precedent in *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978). *Compare* Br. at 28-29 *to* EPA Br. at 131-133. The different facts in that case hardly undermine but in fact reinforce the conclusion that intra-state and inter-state pollution trading contravenes §111 by authorizing avoidance of the "best pollution control technology" for existing or new facilities. *ASARCO*, 578 F.2d at 327-28.

Indeed, EPA's brief only confirms that CAMR's design runs afoul of the determinative concerns in that case more egregiously than the limited inter-source trading there. EPA Br. at 132-33.

CONCLUSION

Environmental Petitioners respectfully request that the Court vacate the challenged agency actions (including the rule provisions) for the reasons stated herein and in our opening brief.

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Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing **Final Reply Brief of Environmental Petitioners** contains 5,182 words, as counted by counsel's word processing system.

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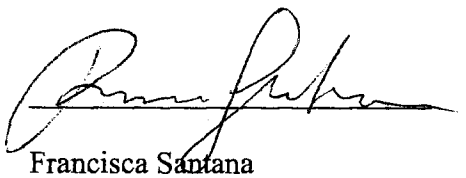

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