ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

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

FINAL REPLY BRIEF OF GOVERNMENT PETITIONERS

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

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

---

* Authorities upon which Government Petitioners chiefly rely are marked with asterisks.

PAGE

CASES (continued)

STATUTES

---

* Authorities upon which Government Petitioners chiefly rely are marked with asterisks.

PAGE

STATUTES (continued)

REGULATIONS

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* Authorities upon which Government Petitioners chiefly rely are marked with asterisks.

SUMMARY OF ARGUMENT

In its initial brief, the Environmental Protection Agency ("EPA") ignores the statutory framework and plain language of section 112 by claiming inherent authority to: (1) reconsider and reverse its December 2000 determination that regulation of electric utility steam generating units ("power plants") is appropriate and necessary under section 112 of the Clean Air Act, 42 U.S.C. §§ 7401 et seq. ("CAA" or "Act"); and (2) remove power plants from the section 112(c) list of source categories without following the express provisions of section 112(c)(9). EPA's De-listing Rule, 70 Fed. Reg. 15,994 (Mar. 29, 2005), violates the Act because first, section 112(c)(9) explicitly sets the criteria necessary to remove a currently listed source category, and second, the plain language of section 112(n) reveals Congress' unambiguous intent to constrain EPA discretion and impose on EPA a mandatory duty to regulate power plants under section 112 following the December 2000 determination.

The Clean Air Mercury Rule ("CAMR"), 70 Fed. Reg. 28,606 (May 18, 2005), is further based on an unreasonable interpretation of section 112(n)(1)(A) that contravenes first, the Act's structure and purpose, and second, the plain language of section 111(d) precluding mercury regulation under that section. Finally, CAMR is arbitrary and capricious because it does not meet the requirements for a standard of performance under section 111 and fails to address hotspots of mercury contamination, allowing certain sources to continue or even increase their mercury emissions for decades to come.

ARGUMENT

I. EPA may not avoid the express provisions of the Clean Air Act through claims of inherent authority.

Section 112 provides a clear framework for the regulation of hazardous air pollutants ("HAP") from power plants. See Opening Brief of Government Petitioners ("Gov. Br.") at 5-6. To avoid the Act's mandate, Respondents invoke claims of inherent authority and rely on a fundamentally flawed interpretation of the Act.[1] Respondents' claims of timeless and standardless agency discretion are without basis and must be rejected.

A. In claiming inherent authority, EPA ignores the Act's statutory framework.

Given the plain language requirements of section 112, EPA's burden is clear: "it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." Friends of the Earth v. EPA, 446 F.3d 140, 146 (D.C. Cir. 2006) (citation omitted). Respondents' arguments fail to meet this burden.

EPA's argument relies on the "fundamental principle of administrative law that an agency has inherent authority to reverse an earlier administrative decision." EPA Br. at 22. From this claim of inherent authority, EPA asserts the discretion to: (1) reconsider and revoke its determination that power plant regulation under section 112 is appropriate and necessary, EPA Br. at 21-23; and (2) remove power plants from the section 112(c) list of regulated source categories without following the express requirements of section 112(c)(9), EPA Br. at 24-33. EPA, however, has no inherent authority to reconsider and remove a listed source category from

[1] Respondents in this matter include State Respondent-Intervenors, and Industry Respondent-Intervenors ("Respondents").

section 112 regulation because Congress provided a clear statutory mechanism for de-listing "any" source category.[2] See 42 U.S.C. § 7412(c)(9); American Methyl Corp. v. EPA, 749 F.2d 826, 835 (D.C. Cir. 1984) ("when Congress has provided a mechanism capable of rectifying mistaken action . . . it is not reasonable to infer authority to reconsider agency action"); see also Nat'l Railroad Passenger Corp. v. Nat'l Assn. of Railroad Passengers, 414 U.S. 453, 458 (1974).[3] EPA's argument is therefore foreclosed by section 112 itself. See American Methyl, 749 F.2d at 835; Ethyl Corp. v. EPA, 51 F.3d 1053, 1061 (D.C. Cir. 1995).

EPA's attempts to distinguish American Methyl are entirely misguided. The ruling there was not dependent on legislative history as EPA asserts, EPA Br. at 30, but on the presence of a statutory mechanism by which EPA could correct a mistakenly granted waiver under section 211(f).[4] See American Methyl, 749 F.2d at 835 ("Congress has provided a mechanism for

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[2] EPA's attempt to analogize this matter to previous delistings is misguided. The attempted delisting here is not based on an error in the initial listing, but on a re-interpretation of the Act. See Gov. Pet. Comments In Re Petition for Reconsideration at 20-21, OAR-2002-0056-6280 [JA 2557-2258].

[3] The caselaw cited by EPA is misapplied in light of American Methyl and Ethyl Corp. EPA Br. at 21-24. The general premise of the cited cases - that administrative agencies possess the some power to reconsider decisions reached in the course of exercising quasi-judicial powers - is not at issue here. It is the application of claimed inherent authority to section 112 in light of the plain language and regulatory framework of that section that is at issue. See NRDC v. Abraham, 355 F.3d 179, 202 (2d Cir. 2004) (distinguishing Dun & Bradstreet Corp. Foundation v. USPS, 946 F.2d 189 (2d Cir. 1991)). None of the cases relied upon by EPA present either a regulatory framework or statutory language comparable to section 112.

[4] Notably, section 211(f) - which the court found to provide no inherent revocation authority to EPA - granted EPA more discretion than that found in Section 112(n). Compare 42 U.S.C. § 7545(f)(4) ("Administrator . . . may waive the prohibitions . . . if he determines that the applicant has established [the criteria for a waiver]") with 42 U.S.C. § 7412(n)(1)(A) ("Administrator shall regulate [power plants] under this section if the Administrator finds such regulation is appropriate and necessary") (emphases added).

correcting error"); see also Ethyl Corp., 51 F. 3d at 1061 ("[t]he language of section 211(c)(1) demonstrates that Congress crafted a very definite scheme in which the Administrator was to consider certain criteria before taking certain actions.") (emphasis added). Section 112(c)(9) exhibits a definite scheme for delisting sources and EPA fails to show why American Methyl should not control here.[5]

B. EPA's interpretation contravenes the plain language of section 112.

The plain language of section 112 further belies the agency's claims of broad discretion and inherent authority. Having made the appropriate and necessary determination in December 2000 and placed power plants on the section 112(c) list, EPA "shall" regulate under section 112 and removing "any" listed source category must meet section 112(c)(9) requirements.

Congress' use of "shall" normally conveys a mandatory obligation. See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998). In fact, the import of "shall" was clear to EPA as recently as October 2006 when the agency, in interpreting section 202 of the Act, argued:

> use of the word "shall" in Section 202(a)(1) reflects a congressional judgment that, once EPA has devoted the resources necessary to determine whether particular emissions cause air pollution that may reasonably be anticipated to endanger the public health or welfare, and has concluded that the statutory

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[5] EPA's remaining arguments to distinguish American Methyl are similarly unfounded. EPA Br. at 31. It is incorrect to ignore section 112(c)(9) because "section 112(n)(1)(A) alone specifically addresses power plants." Id. There is no language in section 112(n)(1)(A) that exempts a determination under that section from the delisting requirements in section 112(c)(9), which expressly applies to "any source category." 42 U.S.C. § 7412(c)(9). EPA also cannot rely on the lack of an express timeline for the section 112(n) determination to distinguish American Methyl because the question in both cases remains whether EPA has inherent authority to revoke previous determinations after they were made in light of express statutory provisions for such revocations, not how much time the agency was allowed to make the initial determinations.

> endangerment standard is satisfied, the directive that EPA must prescribe standards is an acceptable constraint on the agency's usual rulemaking discretion.

Brief for the Federal Respondent at 41-42, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120). Applied to section 112, EPA, having devoted the resources necessary to make the December 2000 determination, is now under a "directive" to prescribe maximum achievable control technology standards for power plants as required under section 112(d), and cannot claim the discretion to refute that directive based on inherent authority.

It is similarly clear that section 112(c)(9) applies to "any" listed source category, i.e., "indiscriminately of whatever kind," as long as the category is on the section 112(c) list – which power plants are. See Dep't of Housing and Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) ("'any' has an expansive meaning"); United States v. Gonzales, 520 U.S. 1, 5 (1997); NRDC v. EPA, 2007 U.S. App. LEXIS 13388, 16 (D.C .Cir. 2007). EPA's only response is to suggest disregarding section 112(c)(9) because "the section 112(n)(1)(A) language takes precedence." EPA Br. at 26. Section 112(n)(1)(A), however, does not address the delisting of a regulated source category - the action at issue here. Pursuant to the rules of statutory construction, the specific terms section of 112(c)(9) therefore prevail over any implied authority the agency may assert over power plants generally in section 112(n)(1)(A). See EPA Br. at 26 (quoting Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932)).[6]

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[6] Respondent-intervenors attempt to justify EPA's avoidance of its mandatory duty by arguing that the December 2000 determination was not a final action and cannot bind subsequent EPA administrators to the provisions of section 112(c)(9). Respondent-intervenors Br. at 16-18. Section 112(c)(9), however, is not limited to source categories listed in final agency actions but instead applies to any listed source category. See New Jersey et al., Comments to Final Delisting Rule, OAR-2002-0056-6280 at 19-22 [JA 2256-2259]. While section 112(e)(4) forecloses judicial review of listing actions, this limitation was designed to promote rapid promulgation of

EPA nonetheless urges the Court towards Chevron's step two by asserting that Congress has failed to "unambiguously express[] an intent to compel unnecessary and inappropriate regulation of power plants." EPA Br. at 26. EPA's only support for this position is the absence of any "preclusive language" in the statute restricting its inherent authority to revise the section 112(n) determination. EPA Br. at 23. This argument contravenes the established need to utilize normal tools of statutory construction in interpreting a statute. Chevron v. NRDC, 467 U.S. 837, 861 (1984). Moreover, "to suggest, as the [agency] effectively does, that Chevron step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power . . . is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." Oil, Chemical and Atomic Workers Internat'l Union AFL-CIO v. NLRB, 46 F.3d 82 (D.C. Cir. 1995) (citation omitted).

Here, it is clear that Congress did express an entirely unambiguous intent that: (1) EPA regulate power plants under section 112 following an affirmative appropriate and necessary determination; and (2) once sources are listed under section 112(c), they be delisted pursuant to section 112(c)(9). Section 112 reveals no gap in the regulation of power plant emissions through which EPA can assert either discretion or inherent authority. See Chevron, 467 U.S. at 843-44 (agency discretion "is warranted only when Congress has left a gap for the agency to fill."); South Coast Air Quality Management District v. EPA, 2007 U.S. App. LEXIS 13368, 7 (D.C. Cir. 2007) (EPA can not rely upon its policy preferences where Congress sought to reduce the agency's discretion).

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section 112 emission standards, not to grant EPA additional discretion to reconsider determinations and delay regulation of HAPs. See Gov. Br. at 14; Env. Br. at 16-18.

Taken to its logical conclusion, EPA's interpretation of section 112 could place power plants in perpetual regulatory limbo. According to EPA, by simply asserting "a principled basis for doing so," it can reverse the appropriate and necessary determination of its predecessor and either remove power plants from, or add power plants to, the list of sources regulated under section 112,[7] thereby removing power plants from any meaningful regulation in perpetuity without ever complying with the provisions of section 112(c)(9).[8] EPA Br. at 23. It is inconceivable Congress intended to allow such unfettered agency discretion given the regulatory framework's goal of placing all major sources of HAPs under emission standards by the year 2000. See 42 U.S.C. § 7412(e); cf. NRDC v. Abraham, 355 F.3d at 197, 200 (rejecting DOE's interpretation that would "eviscerate" provisions meant to limit the department's discretion).

II. Through CAMR, EPA exceeds its statutory authority and violates clear Congressional intent and the policy goals of the CAA.

Assuming *arguendo* that EPA possesses the inherent authority to disregard section 112(c)(9) and revise its December 2000 section 112 determination, the agency's rulemaking still violates the Act. First, the agency argues incorrectly that the language of section 112(n)(1)(A) can be reasonably interpreted to require an analysis contrary to the well-established policy goals

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[7] Respondent-intervenors cite Thomas v. New York, 802 F.2d 1443 (D.C. Cir. 1986)) as supporting this position. Thomas, however, dealt with different regulatory framework and centered on a letter from the then-EPA Administrator to the Secretary of State. Id. The determination here, required by statute and a settlement agreement, see Env. Br. at 6, fn 16, 16-18, based on years of study, a report to Congress, extensive public comment, and published in the Federal Register is easily distinguishable from the record presented in Thomas. See Gov. Br. at 6-7; 65 Fed. Reg. 79,825 (Dec. 20, 2000).

[8] Cf. OAR-2002-0056-2430, [JA 843] (Comments of a coalition of state air agencies, identifying MACT permits that were issued based on EPA's December 2000 decision) and EPA Br. at 28 (dismissing these permits as being "during the period" of EPA's now reversed appropriate and necessary determination).

of the Act generally, and section 112 specifically. Second, EPA errs in interpreting section 111(d) to allow regulation of mercury from power plants under that subsection. Finally, EPA is badly misguided in arguing that an appropriate standard of performance for mercury from power plants could include the proposed plan under CAMR.

A. EPA's interpretation of the phrase "appropriate and necessary" in section 112(n)(1)(A) violates the Act.

According to EPA's new interpretation, regulation is "appropriate and necessary" under section 112(n)(1)(A) only if power plant mercury emissions acting in isolation will pose a threat to only human health after the year 2020. See EPA Br. at 40, 46; Govt Br. at 18. Based on a deeply flawed public health analysis, Govt Br. at 24-26, EPA finds regulation is not appropriate and necessary and seeks to exempt the single largest source of mercury emissions in the United States from regulation under section 112 of the Act. EPA's unreasonable interpretation of section 112(n)(1)(A) must be rejected.

First, an agency's construction of a statute is permissible only to the extent that it is consistent with the statute's purpose and "[t]he [CAA's] purpose is to 'protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.'" Chemical Manufacturers Ass'n v. EPA, 217 F.3d 861, 866 (D.C. Cir. 2000).[9] Section 112 furthers this congressional purpose by requiring regulation of both major sources and area sources of HAPs.[10] See 42 U.S.C. § 7412(c)(3); Govt. Br. at 18-

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[9] While EPA limits its analysis to public health (disregarding environmental impacts), the CAA's core provisions all protect welfare as well as human health. See 42 U.S.C. § 7602(h) (defining welfare broadly to include environmental impacts); Govt. Br. at 18-21.

[10] See 1990 CAA Leg. History 8338, 8491 (Separate Addendum to Govt. Br. at Tab 14) (discussing area source regulation and the need for regulations of both large and small sources).

21. Here, EPA's re-interpretation of "appropriate and necessary" hinges on EPA's interpretation of the phrase "as a result of." EPA Br. at 35. Although EPA acknowledges that "as a result of" can be read to encompass actions that are a contributing cause to an ultimate harm, the agency chose to redefined the phrase to mean "solely as a result of."[11] EPA Br. at 36. By doing so, EPA impermissibly abandoned the Act's public health goals and left unaddressed those hundreds of thousands of individuals who are annually exposed to mercury levels above safety thresholds[12] and for whom any reduction in their exposure to mercury will yield health benefits.[13] See Chao v. Mallard Bay Drilling, 534 U.S. 235, 245 n.9 (2002) (rejecting agency interpretation inconsistent with Congressional intent to protect safety of every worker).

The true question – which EPA studiously avoids – is whether the contribution by power plants to the public health threat posed by mercury in the environment warrants section 112 regulation, not whether power plants, acting alone, cause unsafe mercury levels in individuals.[14]

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[11] This construction is also the genesis for EPA's arbitrary and capricious health analysis, which similarly fails to protect public health. See Gov. Br. at 24-26; N.J. et al., Comments In Re Reconsideration of the Mercury Rules (Dec. 19, 2005), OAR-2002-0056 at 23 [JA 2260].

[12] See New Jersey et al., Comments to Proposed Rule, OAR-2002-0056, Item 2823 at 6-8 [JA 955-957].

[13] See Govt. Petitioners Comments to Final Delisting Rule at 37-38, OAR-2002-0056, Item 6280 [JA 2233] (every additional increment of mercury to babies already excessively exposed to the toxin causes an additional, incremental impact including IQ loss). Indeed, since power plant mercury emissions account for as much as 67% of the mercury deposition in areas such as Steubenville, Ohio, reductions in those emissions may be the difference between safe and unsafe levels of mercury in many people. Even using EPA's flawed deposition modeling, reduction of power plant mercury is expected to result in a 16% decline in the mercury deposited in certain watersheds. EPA Br. at 67.

[14] In the true spirit of an *ignoratio elenchi*, EPA attempts to recast the question as whether Congress intended to require regulation of power plants where they "made some non-zero

EPA's construction of "appropriate and necessary," interpreting the phrase "as a result of" in a manner that fails to protect public health, and disregarding the contributory impact of power plant emissions on public health frustrates the policy that Congress sought to implement and cannot be squared with the purpose of the Act or section 112. See Chemical Manufacturers Ass'n v. NRDC, 470 U.S. 116, 151 (1985) (citation omitted).

Second, EPA's statutory construction gives no effect to the clear congressional intent for the expeditious regulation of HAPs. The agency's interpretation of "appropriate" in section 112(n)(1)(A) looks to the year 2020 – thirty years after the 1990 amendments that enacted section 112(n) – to determine whether hazards to public health are anticipated to occur at that time as a result of power plant emissions. EPA Br. at 34, 46. To justify this extremely attenuated timeline, EPA points to the lack of a deadline by which the agency is required to make the appropriate and necessary determination. EPA Br. at 54. EPA then claims that the language in section 112(n) requiring EPA to examine hazards to public health "after imposition of the requirements of [the Act]" justifies looking to the outer limits of the Clean Air Interstate Rule ("CAIR") and CAMR, regulations that were not finalized until 2006 and whose benefits will not occur until years, if not decades, later.[15] EPA's justifications, however, contravene the well-established rule that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."

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contribution to the global pool of mercury." EPA Br. at 37. Far from a non-zero contribution, power plants emit more than 150,000 tons of HAPs annually including approximately 48 tons of mercury.

[15] See 71 Fed. Reg. 33,388 (June 9, 2006) (CAMR Final Rule on Reconsideration); 71 Fed. Reg. 25,304 (Apr. 28, 2006) (CAIR Reconsideration; Final Rule).

U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993). Section 112(e)(1) sets a clear timeline by which emission standards for all source categories were to be set by November 2000. 42 U.S.C. § 7412(e)(1). [16] For EPA to now claim that "nothing precludes" it from looking thirty years beyond the 1990 amendments is therefore patently unreasonable and would negate the desired finality in agency decisions such as the December 2000 determination. See EPA Br. at 53; Dun & Bradstreet Corp. v. U.S. Postal Service, 946 F.2d at 193-194 (noting the "desirability of finality" in agency determinations).

B. EPA plainly errs in interpreting section 111(d) to allow regulation of mercury emissions from power plants under section 111.

The plain language of section 111(d) precludes regulating emissions of HAPs from existing power plants, including mercury, through a new source performance standard. Govt. Br. at 27-29; Env. Br. at 20-25. The controlling Statutes at Large contain provisions from each of the congressional chambers prohibiting HAP regulation under section 111(d). Taken together, these provisions prohibit section 111(d) from applying to: (1) any air pollutant "included on a list published under section . . . 112(b)" (Senate Amendment); or (2) "any air pollutant . . . emitted from a source category which is regulated under Section 112" (House Amendment). CAA Amendments, Pub. L. No. 101-549, §§ 108, 302, 104 Stat. 2399, 2467, 2574 (1990).

EPA's assertion of a conflict between the text of the House and Senate amendments, EPA Br. at 104, is quickly dispatched by simply applying the facts of this case to both amendments.

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[16] Section 112(n)'s requirement that EPA shall regulate power plants "under this section" reinforces the conclusion that emission standards for mercury from power plants were to be set by November 2000. 42 U.S.C. § 7412(n)(1)(A). The November 2000 deadline is further supported by the requirement that EPA consider, as the basis of its determination, a 1993 study. Id.; see also 42 U.S.C. § 7412(n)(1)(B) (requiring a study of mercury emissions from power plants by November 1994).

Mercury is included on the list of HAPs listed under section 112(b) and is thus barred from regulation under section 111(d) by the Senate Amendment. See 42 U.S.C. § 112(b)(1) (listing "mercury compounds"). Mercury is also emitted from numerous source categories regulated under section 112 and is therefore also barred from regulation under section 111(d) by the House Amendment. See Gov. Br. at 27 (noting mercury emission standards for several source categories). Rather than presenting a conflict, applying either, or both, of the amendments to the present issue yields the same result: regulation of mercury under section 111(d) is expressly barred by that section's plain language.

Undaunted, EPA gamely asserts that "pertinent legislative history supports EPA's conclusion that the House and Senate amendments to section 111(d) conflict." EPA Br. at 104. However, "where the language of a statute is clear and unambiguous on its face, the thrust of that language should not be controverted by seeking to show an inconsistent legislative intent." United States v. Western Pacific Railroad Co., 385 F.2d 161, 163 (10th Cir. 1967), cert. denied, 391 U.S. 919 (1968); see also Citizens to Save Spencer County v. EPA, 600 F.2d 844, 870 (D.C. Cir. 1979) ("It is a cardinal rule of statutory construction, however, that ambiguities should not be found where statutes are clear on their face."). Nevertheless, the history behind the 1990 amendments, even if relevant, clearly reveals Congress's desire to limit EPA discretion pertaining to HAP regulation. See Govt. Br. at 14, 16; Nat'l Lime Ass'n v. EPA, 233 F.3d 625, 634 (D.C. Cir. 2000) (Congress established the section 112 regulatory framework "precisely because it believed EPA had failed to regulate enough HAPs under previous air toxics provisions"). Avoiding this history, EPA instead pointed to "proposed changes to section 112" – most of which were never enacted – "that would have given EPA broad discretion" (emphasis

added). EPA Br. at 109. Despite EPA's apparent belief, however, legislative history linked to failed proposals does not trump the express language of actually enacted statutes and the legislative history of those provisions.[17]

C. CAMR exceeds EPA's statutory authority and is arbitrary and capricious.

After thirty years of regulating HAPs under the HAP section of the Act, CAMR is the first EPA rule to adopt a market based cap-and-trade program under section 111 for a potent neurotoxin. Even if this program is not barred by section 111(d), CAMR exceeds EPA's statutory authority, is not supported by the evidence in the record, and violates section 111(a)'s requirement that standards reflect the best demonstrated system of emission reduction. 42 U.S.C. § 7411(a)(1).

The agency argues at length that the definition of a standard of performance under section 111 can be stretched to include a cap-and-trade program. EPA Br. at 119-133. Where Congress wanted to authorize a pollutant trading program, however, it has shown the ability to explicitly do so. See 42 U.S.C. §§ 7651 et seq. EPA incredibly claims sufficient statutory authority, based on a single line of definitional text, to implement a regulatory trading program through CAMR that is comparable to the SO2 trading program – to which Congress devoted an entire title. Id. This is true interpretive hubris as Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in

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[17] In this argument, EPA badly misapplies Citizens to Save Spencer County, 600 F.2d at 853, which dealt with a clear conflict between two sections of the Act and there is no such conflict here. Importantly, Spencer County emphasized the rule that "statutory provisions, whenever possible, should be construed so as to be consistent with each other." Id. at 870. EPA acknowledged that such a construction is possible here, EPA Br. at 114, but declined to implement it.

mouseholes." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (citation omitted).

EPA's position, moreover, fails to distinguish between the Act's regulatory framework for HAPs and the regulatory framework for criteria pollutants. While there is ample indicia of Congress's comfort with capping and trading criteria pollutants, see EPA Br. at 128-129; Michigan v. EPA, 213 F.3d 663, 685-88 (D.C. Cir. 2000), no such comfort with trading HAPs is evident, as nothing in section 112's language or legislative history suggests that Congress contemplated, let alone authorized, trading HAPs.[18] "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 . . . in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983) (citation omitted).[19]

Even if EPA is authorized to cap-and-trade mercury under section 111, CAMR remains unlawful. EPA claims that just two elements are necessary in any promulgated standards to meet the statutory requirements of section 111: (1) limits that will achieve "real and meaningful nationwide emission reductions"; and (2) a structure that will achieve results in "as cost-effective a manner as is possible." EPA Br. at 135-136. The language of section 111, however, requires standards to reflect the "best system of emission reduction which . . . the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1).

EPA concedes that CAMR will only result in a 50% reduction in mercury emissions from

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[18] See also ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978) (section 111 trading program contravened Congress's intent that NSPS standards force "all newly constructed or modified . . . facilities" to employ the best demonstrated controls); Env. Br. at 28-29.

[19] Section 112(n)(5) further supports this position as it exhibits Congress's ability to specifically authorize HAP regulation under section 111. 42 U.S.C. § 7412(n)(5).

existing power plants by the year 2020, EPA Br. at 135. The record reveals that such reductions do not reflect the best demonstrated system of emission reduction. EPA concedes that the CAMR emissions caps until 2018 are based not on the best demonstrated system, but rather the co-benefits to mercury reduction expected from CAIR. EPA Br. at 135. The best performing power plants, burning every type of coal possible, already surpass the emission reductions required by CAMR in 2020. Govt. Br. at 29-31. Setting emission reduction targets for 2020 that are 43% weaker than the results currently achieved by the top 12% of existing power plants is a clear abuse of any discretion EPA may have under section 111 to consider costs of potential controls.[20] Id. at n.7.

EPA's only response to the contrast between current best performers and CAMR is that while "individual" power plants may do better than CAMR, this is irrelevant in a "national" standard of performance. EPA Br. at 137. EPA, however, tacitly admits that CAMR does not reflect the best demonstrated system nationally as it predicts that power plants in total will do seven tons per year better than the Phase I cap. See 70 Fed. Reg. at 28,619; Govt. Br. at 30. Even disregarding the achievements of best performing units, the agency has offered no reasoned explanation for why CAMR did not set the Phase One cap *at least* at the level that EPA has modeled as being achieved under CAIR. It is incongruous for EPA to suggest that a mercury cap that will be achieved with a seven ton per year margin the moment it becomes effective by power plants employing no mercury specific control technologies equates to the best system of mercury

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[20] The NSPS standards for new power plants are also arbitrary and capricious as they rely on a scheme that subcategorizes based on emission control technology, and fails to reflect the emission reductions achieved by existing plants. Gov. Br. at 29-31; Gov. Pet. Comments In Re Reconsideration of Mercury Rules at 24-32, OAR-2002-0056, Item 6479.1 [JA 2541].

reduction adequately demonstrated.

Finally, EPA's arguments confirm that the agency did not consider the health and environmental impacts of CAMR as required by law. See 42 U.S.C. § 7411(a)(1). Hotspots of mercury pollution exist and impact public health, and a cap-and-trade plan by its nature raises the very real risk of continuing or even exacerbating these hotspots as power plants avoid emission reductions by purchasing credits. Govt. Br. at 32-36. The agency's entire response to Petitioners' challenges on this matter was a general reference back to the section 112(n) health analysis and EPA's "utility hotspot analysis" in particular. EPA Br. at 142. No basis exists, however, for EPA's reliance on the utility hotspot analysis to satisfy the performance standard requirements of section 111. Govt. Br. at 24-26. They are, on their face, different requirements, and EPA has offered no explanation for why an analysis based entirely on its interpretation of section 112(n)(1)(A) suffices under section 111 where EPA's focus on "utility attributable" hotspots is baseless.

CONCLUSION

The rules at issue here should be vacated, and EPA directed to promulgate emission standards for all HAPs emitted by power plants pursuant to section 112(d) of the Clean Air Act.

Dated: July 23, 2007

Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Government Petitioners' Initial Opening Brief contains 5,250 words, as counted by counsel's word processing system.

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