ORAL ARGUMENT HELD ON DECEMBER 6, 2007
DECISION ISSUED ON FEBRUARY 8, 2008

IN THE 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

EPA'S RESPONSE TO TRIBAL MOVANTS UPDATED MOTION FOR COSTS OF LITIGATION [1/]

[1] Tribal Movants are the National Congress of American Indians, Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Jamestown S'Klallam Tribe, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, Lower Elwha Klallam Tribe, Lummi Nation, Minnesota Chippewa Tribe, Nisqually Tribe and Swinomish Indian Tribal Community.

Tribal Movants seek $369,027.75 as compensation for 1,181 hours of time claimed in association with this litigation. If awarded, this would constitute the second largest government fee payment under the Clean Air Act in the past decade, and would be both unreasonable and inconsistent with Movants' limited role in this case. Tribal Movants' primary tasks in this case were to file an opening brief, and later a reply brief, focused on a single issue: tribal treaty rights allegedly affected by the challenged Clean Air Mercury Rule. These two briefs, totaling 14,775 words (slightly more than the length of a single standard full-length brief) simply cannot justify the extraordinary number of hours Tribal Movants spent on this case or the fees they seek. Tribal Movants were not required to undertake the quantity and types of tasks undertaken by other petitioners in this action. Instead, they spent the equivalent of about thirty weeks of attorney time performing very limited tasks. While Tribal Movants have every right to litigate as they see fit, the United States should not be required to pay for more than a reasonable number of hours for the work reasonably performed.

BACKGROUND

This Court, in *New Jersey v. EPA*, 663 F.3d 1279, 1280 (D.C. Cir. 2011), determined that Tribal Movants are eligible for fee shifting and referred the Parties

to mediation to negotiate an appropriate fee award. Mediation was unsuccessful, and thus Tribal Movants have renewed their original motion for costs of litigation.

As explained more fully in the United States' April 8, 2011, response in opposition to Tribal Movants' original motion for costs of litigation (Doc. # 1302483), this case involved challenges to two primary EPA actions. The first – the "Delisting Rule" – removed power plants from the list of sources whose emissions are regulated under CAA section 112. 70 Fed. Reg. 15,994 (Mar. 29, 2005). The second action – the "Clean Air Mercury Rule" or "CAMR" – established performance standards under section 111 that limited mercury emissions from power plants. 70 Fed. Reg. 28,606 (May 18, 2005). Tribal Movants did not file petitions for review of either the Delisting Rule or CAMR, though they did intervene in support of petitioners challenging those rules. Tribal Movants filed a petition challenging only a third agency action at issue in this case – the "Reconsideration Rule." *See* Petition for Review filed June 23, 2006, in Case No. 06-1220. The Reconsideration Rule was an ancillary reconsideration proceeding in which EPA made two substantive changes to CAMR, but no substantive change to the Delisting Rule. *See* 71 Fed. Reg. 33,388 (June 9, 2006). This Court's decision in this case did not address the substance of the Reconsideration Rule. *See New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir.2008).

As noted, Tribal Movants' role in this case was quite limited: They filed a 9,791-word merits brief and a 4,984-word reply brief, but did not participate at oral argument. EPA considers research and briefing related to standing as part of the opening brief; and considers hours spent reviewing EPA's merits brief and drafting a reply to that brief as being properly consolidated. Thus, according to Tribal Movants' own task categorization, they spent 337.25 hours just developing their opening brief, including the development of a standing argument, and 241.5 hours reviewing EPA's response brief and then drafting their reply. Tribal Att. 3 ¶¶ 6-9. This is the equivalent of over 578 hours (14½ weeks of attorney time) spent simply writing two short briefs amounting to little more than a standard, 14,000-word merits brief. They claim an *additional* 180.25 hours of time (4½ weeks) for other tasks *prior to* filing their opening brief, and an additional 194.5 hours (nearly 5 weeks of time) for various tasks *after* filing their reply (excluding hours related to their fee petition). Tribal Att. 3 ¶¶ 1-5; 10-12. Finally, Tribal Movants seek 227.5 hours (over 5 ½ weeks of time) related to their attempt to seek fees. Tribal Att. 3 ¶¶ 13; Tribal Att. 1 at 5.

STANDARD OF REVIEW

Section 307(f) of the CAA, 42 U.S.C. § 7607(f), provides that "[i]n any judicial proceeding under this section, the court may award costs of litigation

(including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." Once entitlement to fees has been shown, the party seeking fees bears the burden of demonstrating the reasonableness of its claim. *Am. Petroleum Inst. v. EPA*, 72 F.3d 907, 912, 915 (D.C. Cir. 1996) ("API"); *Kennecott Corp. v. EPA*, 804 F.2d 763, 767 (D.C. Cir. 1986). If the Court deems a fee claim to be unreasonable, it may substantially reduce, or deny, the claim, depending on the nature and extent of the problems noted. *See Envtl. Defense Fund v. Reilly*, 1 F.3d 1254, 1258 (D.C. Cir. 1993).

ARGUMENT

A. Environmental Petitioners Performed Tasks that Tribal Movants Did Not.

Tribal Movants repeatedly point to the United States' $400,000 fee settlement with Environmental Petitioners in this case as an indicator of the reasonableness of the Tribes' own hours. Fee Reply at 6 (Doc. #1307051); Updated Motion at 2-3. Environmental Petitioners, however, were deeply involved in a number of litigation-related tasks that Tribal Movants were either not involved in at all or were only involved in tangentially. For example:

(A) Environmental Petitioners sought compensation for hundreds of hours related to briefing a stay motion that included more than 200 pages of declarations. Tribal Movants seek no hours related to the stay briefing.

(B) Environmental Petitioners spent significant time opposing EPA's motion to consolidate and hold this case in abeyance. Tribal Movants claim only two hours related to that motion. Tribes Att. 3, entry for 7/24/2006.

(C) Environmental Petitioners billed a large number of hours responding to a petition for rehearing *en banc*. Tribal Movants spent considerably less time on the *en banc* petition; the roughly 20 hours they *did* devote to this task appear to be simply related to reviewing and commenting on work performed by attorneys at other firms. Tribes Att. 3 at 3/25/08 - 4/22/08.

(D) Environmental Petitioners spent a significant amount of time preparing a lengthy and substantive response to United States' petition for a writ of certiorari. *See* Ex. A (Enviro. Cert Op.). Tribal Movants, by contrast, are seeking just over five hours related to their review of and comments on that document. Tribes Att. 3, on 10/23/08 and 12/2/08.

(E) Environmental Petitioners spent a significant period of time drafting and filing briefs seeking to expedite the issuance of the mandate. Tribal Movants spent about just over seven hours reviewing the motion and reply brief and the resulting decision. Tribes Att. 3 at 2/21/08 - 3/18/08.

(F) Though Environmental Petitioners were the only parties asked by the Court to attend and present argument, Tribal Movants billed more than 120 hours (three full weeks of attorney time) for oral argument preparation.

All together, approximately 950 hours for which Environmental Petitioners sought compensation were for tasks that *they* performed, but Tribal Movants did not. Tribal Movants' suggestion that the amount of work they performed in this case is analogous to the amount of work performed by Environmental Petitioners is badly misplaced. Additionally, the settlement with Environmental Petitioners resolved the claims of *ten* separate environmental groups, represented by several separate sets of counsel. Thus, the $400,000 settlement with Environmental Petitioners resolved multiple potential fee claims for myriad litigation-related tasks. Tribal Movants, by contrast, seek to resolve claims from a single set of counsel, for a very limited set of tasks, yet demand nearly the same amount.

B. Tribal Movants Claim Excessive Time For Drafting Their Opening and Reply Briefs.

As discussed above, Tribal Movants claim 337.25 hours for drafting their opening brief and developing their standing arguments, and an additional 241.5 hours for reviewing EPA's response brief and drafting a reply. Tribal Att. 3 ¶¶ 6-9. This is an extraordinary amount of time. While we do not doubt that Tribal Movants actually spent this time on the matter, they offer no explanation for *why*

the limited tasks in which they were involved *required* so much time. That is, there is no explanation of why the hours they claim are *reasonable*. This Court has recognized, in evaluating the reasonableness of a fee claim, "items of expense or fees that may not be 'unreasonable between a first class law firm and a solvent client, are not [always] supported by indicia of reasonableness sufficient to allow [the Court] justly to tax the same against the United States.' " *API*, 72 F.3d at 912 (citation omitted). The mere fact or amount of the settlement with Environmental Petitioners cannot by itself establish the reasonableness of Tribal Movants' claims. Additionally, their claims are not supported by the case law.

Tribal Movants first cite *EDF v. EPA*, 672 F.2d 42 (D.C. Cir. 1982); *Sierra Club v. EPA*, 769 F.2d 796 (D.C. Cir. 1985), and *Wilkett v. ICC*, 844 F.2d 867 (D.C. Cir. 1988), in support of their claim for 1,181 hours of compensable time. Updated Motion at 7 n.5. *EDF v. EPA* involved a petition filed by a single environmental group, the Environmental Defense Fund ("EDF"), to review regulations implementing a section of the Toxic Substances Control Act governing the use of polychlorinated biphenyls. 672 F.2d at 46. EDF, apparently the only petitioner in the case, sought compensation for 556 hours of attorney time for analysis of the record, preparation an opening brief, reply brief, and joint appendix, and preparation for and presentation of oral argument. *Id.* at 51 (adding 226 + 330

hours for the tasks described). A subset of those same tasks here apparently took Tribal Movants 736.25 hours, roughly 32% more time than EDF required to perform similar tasks. Tribal Att. 3 at ¶¶ 6-11. Further, if the Tribes' task labeled "Initial Case Prep/Doc Review" is considered analogous to EDF's "Analysis of Record," Tribal Movants' time is even more inflated in comparison with EDF's: with "Initial Case Prep/Doc Review" included, Tribal Movants spent a total of 816 hours on the same tasks that EDF completed in 556 hours - roughly 47% more - a difference made even more dramatic by the fact that, unlike EDF, Tribal Movants did not present oral argument.

Sierra Club v. EPA is equally unhelpful to the Tribal Movants. Tribal Movants give the impression that this Court approved payment for 800 hours of attorney time related to that case. Updated Motion at 7 n.5. The Court, however, only awarded fees "for hours that produced at least some results," and awarded fees for a total of 559 hours, after deducting time related to unsuccessful arguments advanced by petitioners. 769 F.2d at 807-08. Furthermore, though the Court did note that 800 hours of attorney time would not be unreasonable for a case involving direct review of detailed administrative regulations, it did so in a case where *all* of the named petitioners appear to have sought fees through the same motion. *See* 769 F.2d at 799. In short, the fee payment there was comprehensive.

The same is true here: if all petitioners (Environmental Petitioners *and* Tribal Movants) had submitted a *single* fee request in this case, a fee award for 800 hours of attorney time might well have been reasonable for tasks related to the primary briefing. Here, however, Tribal Movants seek fees for an excessive number of hours *in addition to* the $400,000 fee payment that has already been made to Environmental Petitioners.

Tribal Movants cite *Wilkett v. ICC*, 844 F.2d 867, 877 (D.C. Cir. 1988), for the proposition that the D.C. Circuit has held that "290 hours for a merits brief 'does not strike us as unreasonable.'" Updated Motion at 7 n.5. That 290 hours, however, reflected only 146.9 hours of *attorney* time; the remaining 143.1 hours was all law clerk time, chargeable at a far lower rate. While it might, with sufficient explanation from Tribal Movants, be proper to award fees for more than 146.9 hours of time for Tribal Movants' opening brief, an award based on the 337.25 hours Tribal Movants spent researching and writing their opening brief would be excessive and is unsupported by *Wilkett*. *See* 844 F.2d at 877. In sum, while the cases Tribal Movants cite indicate that in some circumstances this Court has awarded significant fees to prevailing parties, those cases do not establish, or even suggest, that Tribal Movants' request in this case is reasonable.

In our April 8, 2011 Response in Opposition to Tribal Movants' original motion for attorney fees, EPA relied, in part, on *American Petroleum Inst. v. EPA*, 72 F.3d 907, 917 (D.C. Cir.1996) ("API") and *Michigan v. EPA*, 254 F.3d 1087, 1093 (D.C. Cir. 2001). EPA previously relied on these two cases as establishing a "ballpark" of allowable hours for drafting an opening and reply brief. EPA Response (Dkt. No.1302483) at 14. But in fact, the briefs in *Michigan* were significantly shorter than those at issue here. *API*, however, still stands as a rough proxy for the reasonable number of hours for a below-full length brief. In *API* the opening brief was roughly 7,600 words long (roughly 22% shorter than the 9,791-word opening brief Tribal Movants filed here). *See* 1995 WL 17204530. The Court found that API reasonably spent 79 hours of time to preparing that brief. *API*, 72 F.3d at 917. Based on that assessment, here it would have been reasonable for Tribal Movants to spend roughly 22 percent more time, or 96 hours total, preparing their brief. While EPA acknowledges that each case is unique, that these assessments of reasonableness must be made on a case-by-case basis, and that in this case perhaps more hours were required given the nature of the rule being challenged, Tribal Movants seek compensation for over *four times* the number of hours found reasonable for an opening brief in *API*, even though the brief Tribal Movants filed here was only modestly longer than the opening brief in *API*.

Even aside from the original "ballpark" justification, Tribal Movants' hours related to their opening and reply briefs are excessive. As previously discussed, Tribal Movants are apparently claiming 337.25 hours for tasks related to their opening brief, and 241.5 hours related to their reply brief. In sum, then, Tribal Movants spent 578.75 hours (roughly 14½ weeks of attorney time) drafting two short briefs that amounted in total to little more than a single, full-length (14,000-word) merits brief. This is an extraordinary amount of time to spend drafting two briefs of such short length. Putting this into perspective, an experienced attorney, should be able to write a 10,000-word opening brief in a petition case in roughly 120 hours, or three weeks if the attorney works a 40-hour week. That same attorney should be able to write a 5,000-word reply brief in roughly 80 hours, or two weeks. Thus, the opening and reply briefs in this case could have been drafted by an experienced attorney in 200 hours, total. For purposes of this estimate, the United States is also willing to assume that some of the attorneys working on this matter were less experienced than others. Even accounting for inexperience and other uncertainties, it is hard to see how it would be appropriate to increase the reasonable number of hours expended by anything more than 50 percent - taking the 200-hour total to 300 hours.

The 578.75 hours that Tribal Movants claim related to drafting their short opening and reply briefs dwarfs even the United States' generous 300-hour estimate. Accordingly, the Court should find that Tribal Movants are only entitled to recover, at most, for 300 hours of time related to their opening and reply briefs.

C. The Tribes' Billing Records Are Impermissibly Vague.

Another significant issue is that the Tribal Movants' billing records are extremely vague, rendering assessment of the reasonableness of their hours even more difficult. For example, in the eleven-day period between July 11, 2005, and July 22, 2005, two attorneys spent a total of 45.5 hours performing tasks that are assigned extremely general descriptions such as "Research & review mercury reports and news articles" (3.5 hours on 7/15/2005); "Review of mercury reports and record materials" (5.75 hours on 7/18/2005); and "Review case materials" (8 hours). Thus, a solid week of billing time is ascribed to very vague tasks that essentially amount to an assertion that the Tribes' attorneys worked on undefined materials that, presumably are somehow relevant to the case. Such vague descriptions cannot support a successful fee claim. *See Role Models Am. Inc. v. Brownlee*, 353 F.3d 962, 971-72 (D.C. Cir. 2004) (discussing requirements for documenting time in a fee request). *See id.* at 974 (citing *In re Olson*, 884 F.2d 1415, 1428-29 (D.C. Cir.1989) (per curiam) (requiring some indication of the

subject matter on which the attorney's time was spent)). *See also Hensley*, 461 U.S. at 433-34 (where "documentation of hours is inadequate, the ... court may reduce the award accordingly.... [Additionally, the court should] exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary...."); *United Slate, Tile & Composition v. G & M Roofing*, 732 F.2d 495, 502, n.2 (6th Cir.1984) (supporting documentation "must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended...."). EPA, in Exhibit C of its response to Tribal Movant's original fee petition, lists each of the entries that are vague. (Doc. # 1302483). When attorneys fail to document a fee request adequately, the Court may estimate an appropriate amount to reduce the award. *See Role Models*, 353 F.3d at 973; *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

Tribal Movants attempt to cure this defect by submitting self-serving affidavits drafted years after many of the hours were expended, but such *post hoc* justifications do not satisfy the requirement that fee applicants submit "*contemporaneous* time records of hours worked and rates claimed" that sufficiently document the services rendered and prove their reasonableness. *In Re Donovan*, 877 F.2d 982, 994 (D.C. Cir. 1989) (emphasis added; citations omitted).

This issue was discussed in more detail in the United States April 8, 2011 response brief (Doc. # 1302483 at 18-20).

D. Tribal Movants Claim Excessive Time For Other Litigation-Related Tasks.

Tribal Movants *also* seek compensation for 350 hours of time for categories they have defined, including "Initial Case Prep/Doc Review" (79.75 hours); preparing an intervention motion (35 hours); reviewing a reconsideration notice (11.75 hours); preparing administrative comments (24.75 hours); working on a briefing schedule, a Rule 28(j) letter, and a docketing statement (24.75 hours); preparing a joint appendix (36.5 hours); preparing for oral argument (121 hours); and commenting on several post-decisional motions (37 hours). Tribal Att. 3 ¶¶ 1-5, 10-12. Again, the hours expended are extraordinary for the tasks described. The Tribes' work on post-decisional motions is discussed *supra*, *in* § A; the remainder are discussed below.

The hours associated with "Initial Case Prep/Doc Review" amount to roughly 80 hours of general review of background material. No specific task is associated with this review in the billing records. While *some* review of documentation is necessary prior to drafting an appellate brief, Tribal Movants have already billed for dozens of hours of preparatory research with respect to their opening brief and standing. Tribal Movants have failed to meet their burden to

explain why an additional 80 hours of general background research was necessary, and why the hours of review of similar topics prior to drafting their opening brief was not unnecessarily duplicative.[1/] These hours should be significantly reduced.

The 35 hours (nearly a full week of attorney time) a senior law firm partner devoted preparing an *unopposed* intervention motion are similarly excessive, as we discuss at pages 16-17 of EPA's April 8, 2011 Response Brief (Doc. # 1302483).[2/] Much of this work should have been delegated to junior level attorneys billing at substantially lower rates than those billed by senior partners. As this Court has made clear, "[b]illable hours in fee applications are susceptible to reduction for failure to allocate tasks efficiently to different attorneys based on experience." *Davis County* v. EPA, 169 F.3d 755, 761 (D.C. Cir. 1999).

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[1] For example, between September 12 and September 20, 2006, in time they ascribe to drafting their opening brief, Tribal Intervenors claim 25.25 hours of time for tasks variously described as "[r]eview & taking notes on recorded materials" (9/20), "[r]eview & taking notes on record documents" (9/19), "[r]eview & taking notes on documents in record" (9/18), and "[r]eview and taking notes on documents from the record" (9/12). There are numerous other examples of similar background research attributed to drafting the opening and reply briefs.

[2] Tribal Movants, in their May 9, 2011, Reply Brief, argued that EPA "has its math wrong" with respect to the claim that the Tribes billed "more than 40 hours" related to their intervention motion. EPA did not err: EPA ascribed 35 hours to intervention-related work between 8/10/05 and 8/15/05, and an additional 8 hours of intervention-related work on 7/19/05. Doc. 1302484 at 1-2. This totals more than 40 hours. Because vague descriptions make task categorization difficult, however, EPA is here adopts the Tribal Movants' own categorization of its hours as set out in Attachment 3 to their updated motion.

The more-than-35 hours Tribal Movants spent in the administrative process (time spent reviewing an administrative reconsideration notice and preparing their own administrative comments) are not recoverable litigation costs. As we discussed in our April 8, 2011, Response, the United States has waived sovereign immunity only with respect to "costs of litigation" under 42 U.S.C. § 7607(f), and administrative fees are not properly considered "costs of litigation." U.S. Resp. Br. at 16 (Doc. 1302483) citing *Michigan*, 254 F.3d at 1091.

The 2.5 hours Tribal Movants claim on August 1, 2006, related to the "[r]eview of rule 28 filing and edits to same," simply do not make sense in the context of this case. Tribal Movants filed a letter pursuant to Fed. R. App. P. 28(j) *more than a year later*, in October of 2007, but no party made *any* Rule 28 filing in the summer or fall of 2006. The remaining 26.5 hours claimed between June 13 and August 25, 2006, relate to filing a docketing statement and a briefing schedule. These too are grossly excessive, given the relative simplicity of the tasks involved. Similarly, allowing one set of petitioners 36.5 hours to assist in the preparation of their portion of a joint appendix, a ministerial task that essentially involves collection of documents already cited, is patently excessive, especially given that a large number of petitioners assisted in the preparation of this same document.

Perhaps the most time-consuming task Tribal Movants engaged in, beyond drafting merits briefs, was their preparation for oral argument. As previous discussed, Tribal Movants did not present oral argument. *See* Nov. 26, 2007 Order. Nonetheless, Tribal Movants billed 121 hours related to oral argument preparation. Tribal Att. 3 ¶ 11. This would be excessive even if the Tribes *did* argue. *See Wilkett*, 844 F.2d at 878 (finding 72.9 hours billed for preparation for a 15-minute oral argument "plainly excessive," and awarding half that number of hours). For example, in *API*, 72 F.3d at 917, the Court found unreasonable a fee petition seeking recovery for 116.25 hours spent on oral argument preparation, reducing the figure to 80 hours. In *Davis County*, the Court found that petitioners in that case were claiming an "unreasonably high" number of hours; as an example of petitioners' excess, the Court cited the 160 to 170 hours petitioners' counsel spent in preparation for oral argument. The Court ultimately reduced allowable time for oral argument preparation, oral argument, *and* settlement discussions to a total of 49 hours. 169 F.3d at 133-34. Greater reductions are appropriate here.

E. Tribal Movants Claim Excessive Time Related to Their Fee Motion.

Tribal Movants also request fees for the time spent preparing their fee motion. Again, however, the amounts they claim – 227.5 hours just for time spent on their fee claim – are grossly excessive. Tribal Att. 3¶¶ 13; Tribal Att. 1 at 5.

This 227.5 hours involved drafting several letters, a fee motion, a reply to that fee motion, a mediation statement, and an updated fee motion. Additionally, Tribal Movants attended a single mediation session that lasted roughly 5 hours.

In *Sierra Club v. EPA*, petitioners requested compensation for 69 hours of work related to a fee petition. 769 F.2d at 812. The Court noted that "the hours sought seem perhaps excessive for a fee petition of relatively ordinary difficulty," but awarded compensation for the requested time because the hours claimed were not contested by any party. *Id.* The Court nonetheless made clear that, in awarding fees for 69 hours of fee-related time in that case, it did not intend "to influence future panels should they be called upon to make similar determinations." *Id.* In short, 69 hours was seen as an unusually large number of hours to expend on a fee request. Here, Tribal Movants have expended more than three times as many hours in connection with their fee claim.

It is difficult to determine exactly how many hours were spent on each fee-related task because hours for specific tasks are often not differentiated in Tribal Movants' billing records. For example, on 4/19/11 an attorney spent 7.5 hours researching case law and drafting a reply brief. Tribal Att. 1 at 2. It is not clear how much time was spent on research and how much time was spent drafting. What is clear, however, is that an extraordinary number of hours was spent on

research. Research on fees comprised all or part of the task entries on 3/8/12, 2/3/12, 1/30/12, 5/3/11, 4/29/11, 4/25/11, 4/22/11, 4/19/11, 4/13/11 - 4/15/11, 4/11/11, 8/4/10, 4/19/10, and 11/2/09. Tribal Att. 1 and 3. Time billed to these entries, each of which contained a "research" component, totaled more than 70 hours. As with other tasks performed in the course of this litigation, Tribal Movants simply claim far too much time associated with their fee motions. EPA believes that it would be reasonable, in the circumstances, to reduce Tribal Movants' fee-related hours by 60 percent, from 227.5 hours to 91 hours.

CONCLUSION

Tribal Movants seek compensation for hours vastly greater than the United States has historically paid to similarly-situated litigants, and they seek much higher levels of compensation than other litigants, who worked on more tasks than Tribal Movants, accepted in settlement of their fee claims in this same case. For the foregoing reasons, EPA proposes the following as a reasonable number of hours for tasks performed by Tribal Movants:[3/]

[3] Since EPA's original filing regarding fees, this Court has determined that Tribal Movants *are* entitled to fees, and EPA has concluded that two of the cases it previously relied upon were based on very different factual settings. In light of these developments, EPA assessment of an appropriate fee payment has increased.

Task	Hours Requested	Reduced To	Reasons For Reduction
Initial Case Prep/Doc Review	79.75	20	Vague billing descriptions, duplicative of time billed for preparation of opening and reply briefs
Intervention Motion	35	15	Excessive time for an unopposed motion, vague billing descriptions
Administrative Work	36.5	0	Not recoverable - not litigation work
Briefing schedule/length; Rule 28j letter; Docketing/Issues Statements	29	15	Excessive time for tasks performed, vague billing descriptions
Opening brief/Standing	337.25	180	Excessive time for tasks performed, vague billing descriptions
Reply Brief/Review of Response Brief	241.5	120	Excessive time for tasks performed, vague billing descriptions
Joint Appendix/Final Briefs/Rule 28j letter	36.5	20	Excessive time for tasks performed, vague billing descriptions
Oral Argument Preparation	121	60	Excessive time for tasks performed, vague billing descriptions
Motion to Expedite/Petition for Rehearing/Petition for Cert.	37	20	Excessive time for tasks performed, vague billing descriptions
Fee Motions/Mediation and Associated Tasks	227.5	91	Excessive time for tasks performed
Total	1181	541	

In Exhibit E to its April 8, 2011 Response Brief, EPA calculated that the average billing rate for professionals billing on Tribal Movants' behalf was $305.125. *See* Doc. # 1302484. Tribal Movants have not challenged this $305.125 rate as a reasonable proxy for the average billing hour in this matter. Accordingly, EPA proposes multiplying this $305.125 rate by 541 hours, resulting in an appropriate fee award of $165,073.

For the reasons set forth above and in EPA's April 4, 2011, Response brief and accompanying attachments, this Court should award Tribal Movants no more than $165,073 in compensation for their work in this case.

Respectfully submitted,

Date: April 12, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2011 a copy of EPA'S RESPONSE TO TRIBAL INTERVENORS' UPDATED MOTION FOR COSTS OF LITIGATION was served via this Court's ECF system and also served by first-class mail, postage prepaid, on the following:

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Nos. 08-352 & 08-512

In the Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, *Petitioner*,
v.

STATE OF NEW JERSEY, ET AL., *Respondents*.

ENVIRONMENTAL PROTECTION AGENCY, *Petitioner*,
v.

STATE OF NEW JERSEY, ET AL., *Respondents*.

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

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QUESTION PRESENTED

Whether EPA may delete a category of sources of hazardous air pollutants from the list established under 42 U.S.C. 7412(c) without making the determinations specified in 42 U.S.C. 7412(c)(9) for deleting a category.

CORPORATE DISCLOSURE STATEMENT

The Adirondack Mountain Club is a membership supported, nonprofit organization devoted to the protection and wise recreational use of New York State's forest preserve lands in the Adirondacks and Catskills. The Adirondack Mountain Club has no parent corporation, and no publicly held company owns 10 percent or more of the Adirondack Mountain Club.

American Nurses Association is the only full-service professional organization representing the nation's 2.7 million registered nurses. American Nurses Association has no parent corporation, and no publicly held company owns 10 percent or more of the American Nurses Association.

The American Public Health Association is a nonprofit membership organization existing for the purpose of influencing policy and setting priorities in public health. American Public Health Association has no parent corporation, and no publicly held company owns 10 percent or more of the American Public Health Association.

The American Academy of Pediatrics is a not-for-profit corporation with 60,000 members dedicated to the health, safety, and well-being of infants, children, adolescents, and young adults. The American Academy of Pediatrics has no parent corporation, and no publicly held company owns 10 percent or more of the American Academy of Pediatrics.

The Chesapeake Bay Foundation is a nonprofit corporation with 146,000 members, dedicated solely to restoring and protecting the

Chesapeake Bay and its tributary rivers. The Chesapeake Bay Foundation has no parent corporation, and no publicly held company owns 10 percent or more of the Chesapeake Bay Foundation.

Conservation Law Foundation is a nonprofit organization that works to solve environmental problems that threaten New England. Conservation Law Foundation has no parent corporation, and no publicly held company owns 10 percent or more of Conservation Law Foundation.

Environmental Defense is a nonprofit membership corporation of 400,000 members dedicated to protecting the environmental rights of all people. Environmental Defense has no parent corporation, and no publicly held company owns 10 percent or more of Environmental Defense.

National Congress of American Indians is the oldest and largest national organization addressing American Indian interests, representing more than 250 Indian tribes and Alaskan Native villages. National Congress of American Indians has no parent corporation, and no publicly held company owns 10 percent or more of National Congress of American Indians.

National Wildlife Federation, a nonprofit organization with approximately four million members, is America's conservation organization protecting wildlife for our children's future. National Wildlife Federation has no parent corporation, and no publicly held company owns 10 percent or more of National Wildlife Federation.

Natural Resources Council of Maine is a nonprofit membership organization dedicated to

preserving the quality of the air, water, forest and other natural resources of the state of Maine, for the benefit of its people and its environment. Natural Resources Council of Maine has no parent corporation, and no publicly held company owns 10 percent or more of Natural Resources Council of Maine.

Natural Resources Defense Council is a nonprofit representing its 1.2 million members in efforts to restore integrity to air, land and water, defend endangered natural places, establish sustainability and good stewardship of the earth, and protect the long-term welfare of present and future generations by protecting nature. Natural Resources Defense Council has no parent corporation, and no publicly held company owns 10 percent or more of Natural Resources Defense Council.

The Ohio Environmental Council is a nonprofit corporation that works on behalf of its members to inform, unite, and empower Ohio citizens to protect the environment and conserve natural resources. The Ohio Environmental Council has no parent corporation, and no publicly held company owns 10 percent or more of The Ohio Environmental Council.

Physicians for Social Responsibility is a nonprofit corporation that represents 24,000 medical and public health professionals committed to, among other things, the achievement of a sustainable environment by addressing issues such as the proliferation of toxins and pollution. Physicians for Social Responsibility has no parent corporation, and no publicly held company owns 10 percent or more of Physicians for Social Responsibility.

Sierra Club is a nonprofit corporation with 750,000 members committed to the protection of the wild places of the earth, the promotion of responsible uses of the earth's resources, and the protection and restoration of the quality of the natural and human environment. Sierra Club has no parent corporation, and no publicly held company owns 10 percent or more of Sierra Club.

United States Public Interest Research Group is a nonprofit corporation dedicated to representing its members' interests in delivering persistent, result-oriented, public-interest activism that protects our environment, encourages a fair, sustainable economy, and fosters responsive, democratic government. United States Public Interest Research Group has no parent corporation, and no publicly held company owns 10 percent or more of United States Public Interest Research Group.

Waterkeeper Alliance is a nonprofit corporation that is the international center of a network of nonprofit organizations working to protect their communities, ecosystems, and water quality and promote watershed protection and advocate for their members. Waterkeeper Alliance has no parent corporation, and no publicly held company owns 10 percent or more of Waterkeeper Alliance.

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STATEMENT

The United States Environmental Protection Agency (EPA) and the Utility Air Regulatory Group (UARG) seek review of a decision of the U.S. Court of Appeals for the District of Columbia Circuit on the basis that the lower court misapplied the familiar legal principle that "[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." U.S. Pet. at 11-12 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984)); UARG Pet. at 22. Specifically, they argue that Congress's intent in the relevant statutory provisions of the Clean Air Act (CAA or Act) is not clear and that the EPA's interpretation of those provisions should have prevailed.

The court of appeals' unanimous decision reversed EPA's attempt to delete electric utility steam generating units (EGUs or power plants) from the list of industrial categories for which the Act requires protective air toxics standards. The Act contains only one provision authorizing such "delisting," 42 U.S.C. 7412(c)(9), which provides that EPA "may delete any source category from the list" if it makes specific determinations regarding the health and environmental effects of delisting. 42 U.S.C. 7412(c)(9)(B). Because EPA undisputedly had not made the necessary determinations, the court of appeals vacated the agency's delisting of EGUs as unlawful. U.S. Pet. App. at 2a-3a.

Statutory provisions

As originally enacted in 1970, the CAA required EPA to identify hazardous air pollutants (HAPs), *i.e.*, substances that "cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness," and establish source-specific emissions standards for these pollutants. Pub. L. No. 91-604, 84 Stat. 1676, 1685 (1970) (codified as amended at 42 U.S.C. 7412). Between 1970 and 1989, however, "'EPA . . . listed only eight substances as hazardous air pollutants . . . and . . . promulgated emissions standards for seven of them.'" *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000) (quoting H.R. Rep. No. 101-490, pt. 1, at 322 (1990); *see also Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1353 n.1 (D.C. Cir. 1995).

In 1990, Congress responded to the "almost complete failure of [CAA] § 112 to effectively control HAP emissions," Arnold W. Reitze, Jr., Stationary Source Air Pollution Law 139 (2005), by "entirely restructur[ing]" the provision. S. Rep. No. 101-228, at 128 (1989). *See also* Gary C. Bryner, Blue Skies, Green Politics: The Clean Air Act of 1990 and Its Implementation 148-49 (2d ed. 1995). Congress's amendments reflected its desire for a more expeditious and thorough regulation of HAPs by establishing strict deadlines for regulatory action and source compliance, eliminating much of EPA's discretion in the process. *Nat'l Lime Ass'n*, 233 F.3d at 634; *see also Nat'l Mining Ass'n*, 59 F.3d at 1352-53; U.S. Pet. App. 3a.

As evidence of its intent for swift EPA action, Congress specifically listed more than 180 HAPs to be regulated, 42 U.S.C. 7412(b)(1), established tight and mandatory deadlines for agency action including

issuance of emissions standards, 42 U.S.C. 7412(c)(5), (d)(1), (e)(1), required minimum stringency requirements for emissions standards, 42 U.S.C. 7412(d)(2), (d)(3), restricted EPA's discretion on removing sources or chemicals from the lists, 42 U.S.C. 7412(b)(3), (c)(9), and imposed limitations on judicial review, 42 U.S.C. 7412(e)(4).

The "lists" of pollutants and source categories are the central feature of the revamped section 7412; the inclusion of a HAP on the section 7412(b) list or a source category on the section 7412(c) list triggers EPA's statutory obligation to regulate such HAP or source category. 42 U.S.C. 7412(c)(2), (d)(1).

First, to ensure timely and effective regulation of HAP emissions under section 7412, Congress required EPA to list all major and area source categories of HAPs by November 1991, and to publish and revise at least every eight years a list of all categories and subcategories of major sources of the listed HAPs. 42 U.S.C. 7412(c)(1). By defining a "major" source to include any stationary source or group of stationary sources that emits or has the potential to emit 10 tons per year or more of any HAP or 25 tons per year or more of any combination of HAPs, 42 U.S.C. 7412(a)(1), Congress broadly required that the list of source categories include all sources determined to emit in excess of the threshold limits.

For EGUs, Congress required EPA first to conduct "a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units" of HAPs listed under section 7412(b) "after imposition of the requirements of this chapter." 42

U.S.C. 7412(n)(1)(A).[1] In accordance with the other deadlines it established when it amended section 7412, Congress established a deadline – November 15, 1993 – by which this study was to be completed. *Id.* If EPA determined that regulation of EGUs was appropriate and necessary after considering the results of this study, EPA was directed to regulate EGUs under section 7412, *i.e.*, to list EGUs as a source category under section 7412(c) and obey the statutory provisions applicable to listed source categories. *Id.*

Second, in accordance with Congress's desire for expeditious regulation of HAP emissions, Congress required EPA to establish strict emission standards for all listed categories by statutorily-fixed deadlines, which "shall be effective upon promulgation." 42 U.S.C. 7412(c)(2), (c)(5), (d)(1), (d)(2), (d)(3), (d)(10), (e)(1), (e)(5). Congress required EPA to issue emissions standards for at least 40 categories of sources by 1992; for at least 25 percent of listed categories by 1994; for an additional 25 percent by 1997; and for "all categories and subcategories" not later than November 15, 2000. 42 U.S.C. 7412(e)(1).

These emissions standards, known as Maximum Achievable Control Technology or "MACT" standards, must require of all major sources in a source category the maximum degree of reduction of each emitted HAP that is achievable for the category,

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[1] Section 7412(n)(1) also required EPA to conduct a study of mercury emissions from EGUs, and the National Institute of Environmental Health Sciences to conduct a study to determine the threshold for mercury concentrations in fish which may be consumed, including by sensitive populations, without adverse public health effects. 42 U.S.C. 7412(n)(1)(B), (n)(1)(C).

taking into consideration certain factors, including cost and non-air quality health and environmental impacts and energy requirements. 42 U.S.C. 7412(d)(2). New sources – which must comply with MACT immediately – must equal or exceed the emission control achieved in practice by the best-controlled similar source as determined by EPA. 42 U.S.C. 7412(d)(3); 42 U.S.C. 7412(i)(1). Standards for existing sources must be at least as stringent as the average emission limitation achieved by the best performing twelve percent of existing sources. 42 U.S.C. 7412(d)(3). Existing sources must comply with the standards "as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard." 42 U.S.C. 7412(i)(3)(A).

Third, to prevent serial legal challenges from delaying the regulatory process, Congress specified that the listing of a category or subcategory is "not final agency action subject to judicial review." 42 U.S.C. 7412(e)(4). Instead, section 7412(e)(4) permits judicial review of EPA's decision to list a source category for regulation under section 7412 after EPA develops and then issues MACT standards for that listed source category or subcategory. *Id.*

Fourth, further reflecting Congress's desire for stringent and thorough regulation of HAP emissions, Congress authorized EPA to remove "any" source category from the section 7412(c) list only after EPA first makes specific, risk-based findings. 42 U.S.C. 7412(c)(9). For HAPs that may cause cancer, EPA must determine that "no source in the category . . . emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed . . . ." 42 U.S.C.

7412(c)(9)(B)(i). For HAPs that do not have the potential to cause cancer, the agency must determine that "emissions from no source in the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source." 42 U.S.C. 7412(c)(9)(B)(ii).

EPA's Listing of EGUs

Although EPA was required to complete the congressionally mandated study by November 15, 1993, 42 U.S.C. 7412(n)(1)(A), EPA failed to do so. EPA settled a lawsuit filed by environmental groups to compel the agency to comply with the law, agreeing to specific dates by which to complete the required study and propose regulations if EPA determined that regulation of EGUs under section 7412 was appropriate and necessary. Settlement Agreement, *Natural Res. Def. Council v. EPA*, No. 92-1415 (D.C. Cir. Oct. 26, 1994). In a 1998 modification to the settlement agreement, EPA agreed to make the required determination by December 15, 2000. Stipulation for Modification of Settlement Agreement, *Natural Res. Def. Council v. EPA*, No. 92-1415 (D.C. Cir. Nov. 16, 1998).

In 1998, EPA transmitted its Final Report to Congress (RTC) after public notice and scientific peer review. 63 Fed. Reg. 10,378 (1998) (EPA's Electric Utility Hazardous Air Pollutant Study); *see also* 60 Fed. Reg. 35,394 (1995) (notice and comment for Draft Report). The report found that EGUs emitted numerous HAPs of concern, including mercury, which is toxic and poses a particular risk of mercury exposure to neurological development in fetuses and children (RTC at 7-16 to -18); lead and cadmium,

both heavy metals that tend to bio-accumulate and are toxic when inhaled or ingested (RTC at 8-16); arsenic, due to its carcinogenic effects (RTC at 10-34 to -35); dioxins, which tend to accumulate in the environment and are extremely toxic to humans and wildlife even in small amounts (RTC at 11-4, 11-27 to -28); hydrogen chloride, which has both acute and chronic effects on humans (RTC at 12-1, E-11 to -12); and hydrogen fluoride, which adversely impacts human health and wildlife (RTC at 3-15, 12-4 to -5, E-12 to -13).

The RTC was followed by a proposed information collection request (ICR) seeking further data bearing on whether EGUs should be regulated under section 7412, 63 Fed. Reg. 17,406 (1998), and numerous public comment opportunities, 65 Fed. Reg. 10,783 (2000) (February notice seeking additional information for its forthcoming section 7412(n) determination); 65 Fed. Reg. 18,992 (2000) (April notice of public meeting on whether EGUs should be regulated under section 7412, a determination which EPA noted that it was obliged to make on or before December 15, 2000).

On December 14, 2000, EPA issued its determination that regulation of HAP emissions from coal- and oil-fired EGUs under section 7412 was appropriate and necessary and added these sources to the section 7412(c) list. 65 Fed. Reg. 79,825 (2000); 67 Fed. Reg. 6,521 (2002). EPA's determination and listing were based on a fully developed administrative record that included its RTC, which was completed after public comment and scientific peer review, public submissions in response to the ICR, a National Academy of Sciences (NAS) study on EGU mercury emissions prepared for EPA,

a multi-agency study of various emissions control technologies, and comments received in response to its February and April 2000 Federal Register notices. 65 Fed. Reg. at 79,826.

Among other things, EPA found that the utility industry emitted approximately 46 tons of mercury in 1990 and was projected to emit approximately 60 tons in 2010 from 1,026 units at 426 coal-fired plants. *Id.* at 79,828. EPA concluded that mercury, which can change into methylmercury once deposited, is highly toxic to humans – especially to developing fetuses and children – and wildlife, is persistent, and bio-accumulates in the food chain. *Id.* at 79,829-30.

EPA also found that EGUs emitted a significant number of the 188 HAPs on the section 7412(b) list and are the leading anthropogenic sources of mercury emissions in the nation. *Id.* at 79,827-28. In 1990, EGUs were found to have emitted approximately 66 tons of arsenic, 86 tons of lead, 5 tons of cadmium, 146,000 tons of hydrogen chloride, and 19,500 tons of hydrogen fluoride. *Id.* at 79,828. EPA further determined that the estimated growth of the utility industry between 1990 and 2010 would result in an overall increase in HAP emissions. *Id.* at 79,829.

Accordingly, due to the public health and environmental concerns posed by mercury emissions and the link between coal consumption and mercury emissions, EPA determined that section 7412 regulation of EGUs was appropriate and necessary and listed EGUs under section 7412(c). *Id.* at 79,830. The agency found that regulation of power plants under section 7412 was appropriate because EGUs were the largest domestic source of mercury

emissions, mercury presented significant public health hazards, and there were various control options that would effectively reduce HAP emissions from EGUs. *Id.* The agency further found that regulation under section 7412 was necessary because the implementation of other CAA requirements would not adequately address the serious public health and environmental hazards arising from HAPs emitted by EGUs, as identified in the RTC and confirmed by the NAS study, that section 7412 was intended to address. *Id.*

With these findings, EPA added EGUs to the section 7412(c) list of source categories. *Id.*[2] EPA explained that EPA would be developing emissions standards under section 7412(d). *Id.* EPA also noted that pursuant to section 7412(e)(4), "today's finding is not subject to judicial review" and that "[a]s specified by [CAA] section 112(e)(4), judicial review would be available on both the listing decision and the subsequent regulation at the time that such final regulation is promulgated." *Id.* at 79,831.

UARG petitioned for review of EPA's December 2000 action. Acknowledging that section 7412(e)(4) expressly provides that listing decisions under section 7412(c) may not be reviewed until the promulgation of an associated emission standard, UARG asserted that it was not challenging a section 7412(c) listing decision, but rather EPA action taken under section 7412(n).

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[2] On February 12, 2002, pursuant to section 7412(c)(1), EPA included EGUs in its notice periodically updating the section 7412(c) list of source categories, stating that EGUs had been "[a]dded to [the CAA] 112(c) list [on] 12/20/2000." 67 Fed. Reg. 6,521.

A panel of the D.C. Circuit rejected UARG's jurisdictional argument, instead agreeing with EPA that listing of utility sources was subject to section 7412(e)(4)'s rule precluding review of listing decisions. The court therefore dismissed the petition. UARG Pet. App. at 233a-234a. UARG did not seek rehearing or review in this Court of the panel's July 26, 2001 Order.

In 2001, EPA assembled a Federal Advisory Committee Act working group, which included agency personnel, scientists, state and local agency representatives, industry, and environmentalists, to craft the required section 7412 MACT standard for EGUs. After holding numerous meetings between August 2001 and March 2003, EPA disbanded the task force without formal notice or explanation. Office of Inspector General, Additional Analyses of Mercury Emissions Needed Before EPA Finalizes Rules for Coal-Fired Electric Utilities, Rep. No. 2005-P-0003, at 6, 27-30, 37-38 (Feb. 3, 2005) (Ct. of Appeals App. (CA App.), at 1530).

Proposed Rule

Nine months after EPA abandoned the MACT standard working group, EPA proposed removing EGUs from the list of section 7412 source categories by "revising" its December 2000 "appropriate and necessary" determination instead of by following the section 7412(c)(9) delisting procedure. 69 Fed. Reg. 4,652 (2004). EPA cited no new scientific or public health studies of the public health hazards posed by EGU HAP emissions to support its proposed revision. *Id.* at 4,683-89.

EPA also proposed to adopt a mercury pollution emissions trading scheme under section 7411, which

requires EPA to promulgate "standards of performance" for new sources within categories of stationary sources that cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. 7411(b). The latter proposal – later denominated the Clean Air Mercury Rule (CAMR) – would establish an initial "cap" on aggregate EGU mercury emissions in 2010 and a lower limit in 2018 and authorize individual EGUs to trade pollution allowances. 69 Fed. Reg. at 4,686, 4698-99.

In its draft rule, EPA expressly recognized that the only reductions in EGU mercury emissions during the 2010-2017 timeframe of the CAMR would be those obtained as a side or "co" benefit of another regulatory proposal to control emissions of sulfur dioxide and nitrogen oxides. 69 Fed. Reg. at 4,687, 4,698. This other program became known as the Clean Air Interstate Rule (CAIR), a regional program promulgated under section 7410 designed to reduce interstate transport of criteria pollutants contributing to ozone and particulate exceedances in the eastern states. 70 Fed. Reg. 25,162 (2005). The CAIR was recently declared unlawful by the court of appeals and remanded to the agency.[3]

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[3] The court of appeals initially vacated the CAIR because it found the rule to be "fundamentally flawed." *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008). EPA petitioned for panel rehearing and rehearing *en banc*, seeking, among other things, the court's reconsideration of the vacatur due to the adverse impacts that would result. On December 23, 2008, the panel issued an order "remand[ing] these cases to EPA without vacatur of CAIR so that EPA may remedy CAIR's flaws in accord with [the court's] July 11, 2008 opinion[.]" *North Carolina v. EPA*, No. 05-1244, 2008 U.S. App. LEXIS 26084, at

Final Rules

In its 2005 final "Delisting Rule," EPA announced that it would not be issuing emissions standards for EGUs under section 7412(d) because, contrary to the 2000 determination, it had now concluded that regulation of EGUs under section 7412 was neither "appropriate" nor "necessary." 70 Fed. Reg. 15,994 (2005). In particular, EPA explained that reductions expected to result from the CAIR and the CAMR had obviated the need for section 7412 regulation. *Id.* at 16,004-16,005.

Based solely on this revised determination, EPA stated that it had removed coal- and oil-fired EGUs from the section 7412(c) source list. *Id.* at 16,032-33. The agency did not assert any new scientific understanding of EGU HAPs and their public health or environmental impact, nor did it claim that it had satisfied the delisting criteria set out in section 7412(c)(9). The agency instead maintained that it was not required to do so because it had lawfully determined the December 2000 finding "lacked foundation." *Id.* at 16,033. It also asserted that it had "inherent authority" to revise a finding that was not itself final agency action for judicial review purposes. *Id.*

Shortly after EPA published its Delisting Rule, EPA finalized its CAMR under section 7411 of the CAA. 70 Fed. Reg. 28,606 (2005). In lieu of MACT standards, the CAMR established mercury performance standards for new sources and a two-phase cap-and-trade program for existing EGUs.

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*5-6 (D.C. Cir. Dec. 23, 2008).

Unlike MACT standards, which would have required the maximum achievable degree of reduction of each of the HAPs that power plants emit, 42 U.S.C. 7412(d)(1); *see Nat'l Lime Ass'n*, 233 F.3d at 633-634, the CAMR did not address the significant amounts of lead, arsenic, and other non-mercury HAPs emitted by power plants. The CAMR required no mercury specific reductions until 2018, and was projected to reduce mercury to only approximately 24 tons by 2020, despite the "cap" of 15 tons by 2018. 70 Fed. Reg. at 28,618-19.

On reconsideration, EPA made only two changes to the CAMR not relevant here and otherwise reaffirmed both rules. 71 Fed. Reg. 33,388 (2006).

Legal Challenge and Decision Below

Respondents, which include 17 States, 11 Tribes and the National Congress of American Indians, a city, and various public health and environmental groups, petitioned for review of both EPA's final rule purporting to remove EGUs from the section 7412(c) list and also the CAMR. Respondents maintained that EPA violated its statutory authority by delisting EGUs without making the findings required by section 7412(c)(9) as a precondition for deleting any source category from the section 7412(c) list. Respondents also argued that both the delisting decision and the CAMR were unlawful for other independent reasons. A unanimous panel of the D.C. Circuit agreed with the first argument, which obviated the need to address the other arguments, and vacated both rules. U.S. Pet. App. at 2a-3a.

The court of appeals concluded that because it was undisputed that EGUs were in fact listed sources under section 7412, EPA was required to

make the specific findings mandated by section 7412(c)(9) before removing these sources from the list of source categories. *Id.* Because EPA conceded that it had failed to make the requisite determinations, the court determined that EGUs remained a listed source and that EPA's de-listing rule was invalid. *Id.* at 10a-11a.

The court acknowledged the general principle that agencies may revisit prior policy decisions, but stated that Congress "undoubtedly can limit an agency's discretion to reverse itself, and in [CAA] section 112(c)(9) Congress did just that, unambiguously limiting EPA's discretion to remove sources, including EGUs, from the section 112(c)(1) list once they have been added to it." *Id.* at 12a-13a. "'EPA may not,'" the court explained, "'construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.'" *Id.* at 13a (quoting *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001)).

The court of appeals rejected EPA's argument that section 7412(n)(1)'s provisions authorizing EPA to determine whether regulation of power plants under section 7412 was "appropriate and necessary" rendered section 7412(c)(9)'s delisting mandate ambiguous. *Id.* at 11a. The court reasoned that section 7412(n)(1) "governs how the Administrator decides whether to list EGUs; it says nothing about delisting EGUs, and the plain text of [CAA] section 112(c)(9) specifies that it applies to the delisting of 'any source.'" *Id.*

The court of appeals denied EPA's and UARG's petitions for rehearing *en banc* with no member of the court requesting a vote. *Id.* at 18a-19a.

REASONS WHY THE PETITIONS SHOULD BE DENIED

A. This Case Presents No Issue of Legal or Extraordinary Significance Warranting This Court's Review.

As petitioners recognize, EPA's statutory authority to delist EGUs is governed by familiar rules of statutory construction. Under *Chevron*, a court reviewing an agency's construction of the statute must first inquire "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "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." *Id.* at 842-43. The ruling below follows this well-settled principle and therefore, does not conflict with any decision of this Court or any other, whether in its specific result or its general approach to statutory construction.

Here, as the court of appeals determined, Congress has "spoken directly" to the "precise question" of how EPA may delete a source category from the section 7412(c) list: by following the delisting procedures in section 7412(c)(9). Section 7412(c)(9) prescribes that EPA "may delete any source category from the list under this subsection . . . whenever the Administrator makes . . . [specified] determinations." 42 U.S.C. 7412(c)(9)(B). By its plain terms, section 7412(c)(9) applies to "any source category." *Id.* EGUs are a source category on the section 7412(c) list. 65 Fed. Reg. 79,825; 67 Fed. Reg. 6,521. Therefore, the express language of section 7412(c)(9) required EPA to make the

specified findings prior to removing EGUs from the section 7412(c) list.

Moreover, "where Congress wished to exempt EGUs from specific requirements of [CAA] section 112, it said so explicitly." U.S. Pet. App. 11a. For example, section 7412(c)(6), as the court of appeals noted, "expressly exempts EGUs from the strict deadlines imposed on other sources of certain pollutants." *Id.* And as the court of appeals further noted, EPA recognized in 2002 that EGUs were subject to the requirements of section 7412 when EPA published its list of source categories, and has "provide[d] no persuasive rationale for why the comprehensive delisting process of [CAA] section 112(c)(9) does not also apply" to EGUs. U.S. Pet. App. 11a-12a (citing 67 Fed. Reg. at 6521, 6524, 6535 n.b).

Given the specific statutory language and context at issue, the decision below has no general legal or practical importance to agency decision-making. Section 7412(c) authorized EPA to delete "any source category" from the section 7412(c) list only after EPA makes the findings specified in the provision. 42 U.S.C. 7412(c)(9). Congress, therefore, did not leave EPA an inherent and "temporally unlimited" authority, U.S. Pet. at 12-13, 17, but rather, specifically limited EPA's discretion. This limitation established in section 7412(c)(9) is consistent with the highly rules-oriented statute governing regulation of HAP emissions. The general authority of administrative agencies to reverse course on policy matters is not implicated here, therefore, because the specific statutory language plainly provides otherwise.

Neither EPA nor UARG makes a viable case that the court of appeals committed error in finding that Congress has directly spoken on the issue of how any source category may be delisted.

First, EPA argues that the use of "may" in section 7412(c)(9)(B) leaves EPA discretion to allow the agency to delist in circumstances other than those specified. U.S. Pet. at 14. But that argument strains ordinary English usage and overlooks the statutory context. As section 7412(c)(9) makes clear, the use of "may" in section 7412(c)(9)(B) is permissive only, and merely grants EPA the discretion to decide whether to delete sources after the agency has made the specified "determinations." No reasonable reading of the provision confers discretion to delete sources for reasons different from those specified by Congress.

EPA's argument is particularly implausible in light of the demanding health and environmental findings specified by Congress in that subsection before removal of "any" source category. The strict requirements that "no source" emit pollutants that pose a risk and that there be an "ample margin of safety" – which apply equally to EGUs as to any other major or area source category listed under section 7412(c) – would be rendered practically meaningless if EPA retained discretion to delist a source category or subcategory on other grounds. *See Am. Trucking Ass'ns*, 531 U.S. at 485 (EPA may not interpret the Act "in a way that completely nullifies textually applicable provisions meant to limit its discretion").

Second, EPA's suggestion that Congress implicitly left EPA discretion to remove sources from the section 7412(c) list – by declaring the finding

that added them to the list void *ab initio* – conflicts with the overall structure of section 7412. The listing of pollutants and source categories has decisive significance throughout the section 7412 scheme; the respective lists identify what pollutants and sources must be regulated, establish obligations to promulgate standards, trigger numerous deadlines, and may be added to and deleted from according to specific standards and procedures. *See supra* pp. 2-6. EPA's attribution to Congress of an intent to allow EPA to remove sources from the list without following the express statutory provisions for delisting is inconsistent with this carefully wrought scheme.

Although EPA tries to bolster its case with the settled background principle that agencies may revisit past decisions, U.S. Pet. at 12, this has little import in construing a provision – section 7412(c)(9) – that was clearly intended to limit that power.

Moreover, EPA is not seeking to merely correct an "error." With its Delisting Rule, EPA not only disagreed with the December 2000 finding, but concluded that its finding was invalid *when made* and therefore ineffective to have subjected EGUs (and EPA) to the provisions of section 7412. 70 Fed. Reg. at 16,003-16,005; U.S. Pet. at 6-7. EPA's reversal of its December 2000 determination and listing, in other words, was an attempt to reverse and expunge a rule, which is little more than retroactive rulemaking. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-209 (1988) (stating that courts should be "reluctant" to find retroactive rulemaking authority "absent an express statutory grant").

Indeed, EPA did not offer any scientific or public health studies refuting the public health hazards posed by EGU HAP emissions to support its retroactive rulemaking. Instead, EPA sought to justify its reversal by relying upon two rules – the CAIR and the CAMR – which could not have been predicted in 2000 when EPA listed EGUs after determining that section 7412 regulation was appropriate and necessary. EPA's argument that the listing was void *ab initio* because EPA in 2000 did not consider rules that were proposed in 2004 therefore defies logic (even putting aside the later rules' legal flaws, *see infra* pp. 25-28).

Although EPA professes uncertainty as to why Congress would limit the agency's ability to "delist" EGUs, U.S. Pet. at 15, the answer is not elusive. As evident from the foregoing, section 7412(c)(9) is part of a statutory section replete with tight deadlines – one of which was included in section 7412(n)(1)(A) – and rigorous textual limits on EPA's discretion, which was intended to avoid a repeat of the lengthy delays and implementation failures of section 7412 during the 1970-1990 period. Those same concerns are implicated by EPA's attempt to substitute section 7412 regulation of EGUs, by delisting EGUs as a source category without following section 7412(c)(9), with the less stringent regulation that section 7411 provides.

Third, EPA argues that because the statute prohibits judicial review of listing decisions until standards are promulgated, its listing was only an "initial" decision that EPA is free to reconsider. U.S. Pet. at 11. Congress, however, has broad authority to impose limits on judicial review – which is what Congress did here, by providing that listing a source

category is not "final agency action *subject to* judicial review." 42 U.S.C. 7412(e)(4) (emphasis added). *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672-73 (1986) (stating that the presumption of judicial review may be overcome by specific statutory language).

This limitation on judicial review, however, did not alter the effect of listing according to the plain terms of the statute, *e.g.*, to promulgate emissions standards, 42 U.S.C. 7412(d)(1), at which point judicial review of the listing may be had. 42 U.S.C. 7412(e)(4). Instead, the judicial review provision further reflects Congress's intent to facilitate and expedite the regulatory process established by the amended section 7412. *See* U.S. Pet. App. at 13a-14a (Congress was concerned with EPA's failure "for decades to regulate HAPs sufficiently."). *Cf. NLRB v. United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 131-32 (1987) (finding that judicial review is allowed only as provided for in the statute to prevent "lengthy judicial proceedings in precisely the area where Congress was convinced that speed of resolution is most necessary").

UARG similarly argues, without basis, that the 2000 listing determination was "preliminary" and "announced without rulemaking" and therefore, the case presents an issue about the limits of one Administration's power to bind its successors to rulemaking. UARG Pet. at 28-29. Not only is the factual basis for UARG's claim incorrect, *see supra* pp.6-8, but in section 7412(c)(9), Congress prescribed the method by which any Administrator – whether the "listing" Administrator, or a successor – may delete a source category from the list of source categories. UARG's claim, therefore, lacks merit.

UARG also fails to show that the court of appeals' decision conflicts with any decision of this Court or any other. UARG's central argument is that this Court should intervene to exercise its "supervisory power" to discipline the D.C. Circuit for its "new approach" to statutory construction that overemphasizes small snippets of statutory text. UARG Pet. at 18, 20.

UARG, however, fails to show more than that UARG simply disagrees with a selection of cases in which the court of appeals found EPA's actions inconsistent with statutory text.[4] A reading of those decisions, like the one at issue here, reveals that the appeals court instead employed a conventional approach to statutory construction consistent with *Chevron*. Those decisions, like the decision in this case, were all unanimous. In none of the cases was a vote for rehearing en banc recorded, or certiorari granted.

Finally, the specific statutory provision that both petitioners erroneously rely upon to attack the decision below – section 7412(n)(1)(A) – is a unique subsection that does not authorize an alternative delisting path for EGUs. Within the careful structure of section 7412, which tightly constrains agency discretion in favor of timely and stringent regulation of HAPs, subsection (n) served only one function: to mandate that EPA decide whether to

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[4] *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006), *cert denied*, 127 S. Ct. 2127 (2007), *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006), *amended on denial of rehearing*, 489 F.3d 1245 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1065 (2008), *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 1121 (2007), *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008).

regulate power plants under section 7412 after considering the results of the study required by that subsection to be completed by November 15, 1993.

In accordance with section 7412(n)(1)(A)'s mandate, EPA conducted public health and other studies and considered alternative control strategies for emissions which may warrant regulation under section 7412. And after completion of the necessary studies and following extensive opportunity for public comment, EPA determined that regulation was appropriate and necessary and added EGUs to the section 7412(c) list. 65 Fed. Reg. 79,825; 67 Fed. Reg. 6,521. Once EGUs were listed, EPA was obliged to promulgate MACT standards for new and existing EGUs, and removal of such source category was limited to the standards and procedure in section 7412(c)(9).

In short, once EPA determined that regulation of EGUs under section 7412 was appropriate and necessary and placed power plants on the section 7412(c) list, section 7412(n)'s function was at an end; it no more governed delisting than it governed the content of regulation for power plants, the schedule for regulating them, or any other aspect of the regulatory process that Congress unambiguously addressed in other subsections.

EPA argues that the use of the terms "regulate" and "regulation" should be read to mean that EPA retained authority to withdraw a "necessary and appropriate" finding until standards are promulgated for EGUs. U.S. Pet. at 13. EPA's argument ignores that the agency not only determined that regulation of power plants under section 7412 was necessary and appropriate, but added them to the section 7412(c) list, which

triggered specific obligations under section 7412. Nothing in section 7412(n) mentions deletion of power plants from the section 7412(c) list or suggests that delisting may be done without meeting the specific requirements for delisting in section 7412(c)(9).

EPA's claim that it has "*continuing*, temporally unbounded" authority to simply reverse the appropriate and necessary determination is similarly incorrect. U.S. Pet. at 17. Subsection (n) required EPA to decide on the basis of a scientific study to be completed no later than November 1993 whether "regulation under [section 7412]" is appropriate and necessary. 42 U.S.C. 7412(n)(1)(A).

EPA's position that Congress vested EPA with unlimited authority in section 7412(n), therefore, is inconsistent with Congress's decision to impose a 1993 deadline for the precise study that was to form the basis for EPA's decision. Unlike the other subsections of section 7412 that expressly call upon EPA periodically to revisit specified issues, section 7412(n)(1) contemplates a single determination based upon this study. Therefore, as the court of appeals correctly concluded, EPA's power to delist EGUs was governed by the provisions expressly addressing delisting – not by an "interpretation" of section 7412(n).

UARG attempts to impugn EPA's motives when it made the 2000 "appropriate and necessary" determination by asserting that the determination was issued "in the closing hours of the Clinton Administration" and "[36] days before the Clinton administration left office." UARG Pet. at 3, 10. But the timing was not surprising; as the agency made clear in its notices leading up to its decision listing

EGUs, the action coincided with the December 15, 2000, deadline that EPA had agreed to in its settlement agreement executed years before. *See supra* pp. 6-7.

Finally, UARG asserts without any basis that it is "undisputed" that the 2000 finding was flawed because, UARG contends, EPA issued the notice of the 2000 determination and listing without rulemaking, completion by the agency of the necessary studies, or consideration of the required factors. UARG Pet. at 28. To the contrary, EPA's action was based on extensive scientific study and extensive public input and its validity may be challenged pursuant to section 7412(e)(4) after EPA promulgates emissions standards as required by section 7412(d). 65 Fed. Reg. 79,825 (describing the basis for EPA's finding and listing).[5] UARG's effort to portray EPA's determination as a hurried decision ignores the extensive, multi-year, public process, in which UARG participated, leading up to the determination, including review of comprehensive EPA and NAS studies on the effects of hazardous pollutants emitted by EGUs. *See supra* pp. 6-9.

In sum, EPA and UARG fail to show that Congress, in subsection (n), altered the fundamental details of the section 7412 regulatory scheme such that this Court's review is warranted. *See Am.*

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[5] For example, EPA found that EGUs are "the largest source of mercury emissions in the U.S., estimated to emit about 30 percent of current anthropogenic emissions. " 65 Fed. Reg. at 79,827. EPA found "a plausible link between emissions of mercury from anthropogenic sources (including coal-fired electric steam generating units) and methylmercury in fish" and therefore found EGU mercury emissions "a threat to public health and the environment." *Id.*

Trucking Ass'ns, 531 U.S. at 468 (stating that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions").

B. This Court Should Not Grant Review Due To The Legal Uncertainty Of EPA's Rules Underlying Its Delisting Decision.

As EPA acknowledges, a recent decision by the court of appeals in another Clean Air Act case declaring the CAIR unlawful casts into doubt the entire foundation upon which EPA relied in promulgating the rules at issue. U.S. Pet. at 19, n.4. *See North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), *amended in part on rehearing*, No. 05-1244, 2008 U.S. App. LEXIS 26084 (D.C. Cir. Dec. 23, 2008). Although the CAIR remains in place pending an EPA decision on remand, given the remanded CAIR's "deep" flaws, the content and details of any revised rule are far from certain. *North Carolina*, 531 F.3d at 929-30 (finding the CAIR to be "fundamentally flawed"). The existing regulatory uncertainty of the CAIR upon which EPA heavily relied in advancing both the Delisting Rule and the CAMR strongly militates against review by this Court at this time.

Further, granting certiorari would not have the effect of clearing the way for EPA's preferred cap and trade program as petitioners suggest. EPA supported its delisting decision based upon a new, but flawed, interpretation of section 7412(n) as well as the CAIR and the CAMR. *See, e.g.*, 70 Fed. Reg. at 15,997-16,002, 16010-11. The court of appeals, therefore, would still have to rule upon the other legal deficiencies raised in review petitions below – ones that the court of appeals did not need to reach.

Although EPA devoted significant portions of its petition to the policy merits of its favored "alternative" regulatory track for mercury emissions from EGUs, U.S. Pet. at 18-24, its substitute CAMR-CAIR regulatory regime is not the approach that Congress intended; indeed, it violates the CAA.

EPA justified its delisting decision and its cap and trade program based in part upon incidental reductions in mercury emissions from EGUs that EPA projected would result from implementation of the CAIR. 70 Fed. Reg. at 16,004, 16,010-11. But the court of appeals' recent decision holding the CAIR unlawful on multiple grounds now undermines EPA's justification for its Delisting Rule as well as the CAMR because EPA wholly relied on the CAIR to provide *all* of the reductions in mercury emissions until 2018. *Id.* at 16,010-11; 70 Fed. Reg. at 28,618-19. Indeed, EPA itself stated that "EPA may need to seek a remand to reconsider the CAMR and its section 7412(n)(1)(A) determination." U.S. Pet. at 19, n.4. Given that EPA must now comprehensively revise the CAIR, it seems highly doubtful that EPA could today affirm the 2005 determination EPA seeks to defend in this case – *i.e.*, that regulation of EGUs under section 7412 is not "appropriate and necessary" because of the availability of alternative regulatory mechanisms.

In addition to the CAIR, EPA also relied upon the CAMR to support its "revised" section 7412(n)(1)(A) determination and remove EGUs from the section 7412(c) list. The CAMR, however, was not an acceptable alternative to the stringent, deadline driven program that Congress imposed for HAPs. Although EGUs emit a significant number of the 188 hazardous air pollutants listed under section

7412, 65 Fed. Reg. at 79,827-28, the CAMR required no reductions of any of these other HAP emissions, such as arsenic, lead, and hydrochloric acid. Also, because the CAMR required no significant mercury reductions until 2018 and allowed banking of emissions credits, the CAMR was expected to result in smaller reductions over a much longer period of time. 70 Fed. Reg. at 28,619.

Moreover, the CAMR's emissions trading scheme was based on section 7411 of the Act. Section 7411(d), however, provides for regulation of existing sources only for air pollutants that are *not* "emitted from a source category which is regulated under section 7412." 42 U.S.C. 7411(d)(1). Here, mercury is a listed HAP under section 7412, 42 U.S.C. 7412(b)(1), (c)(6), and is emitted from a number of source categories regulated under section 7412, *see, e.g.*, 71 Fed. Reg. 76,518 (2006) (emissions standards for HAPs including mercury from Portland Cement manufacturers), the CAA appears to expressly bar regulation of mercury under section 7411.

The CAMR itself also was not a proper standard of performance and contained serious flaws. For example, EPA's own data predicted that the CAMR would yield an increase of mercury emissions in 19 states until 2018. Response to Significant Public Comments, at 177-178 (May 31, 2006) (CA App. 3846-47). Also, as a cap and trade program, the CAMR would only reduce emissions at those power plants that do not buy credits, which would leave unprotected communities and areas near and downwind from plants that purchase mercury pollution allowances.

Finally, in addition to the CAIR and the CAMR, EPA also relied upon a flawed interpretation of

section 7412(n) to justify its delisting decision. For example, according to EPA now, it could only regulate EGUs under section 7412 if the power plant mercury emissions remaining after the CAA's other requirements have been implemented, standing alone, are responsible for causing hazards to human health. 70 Fed. Reg. at 15,998, 16,001; U.S. Pet. at 6-7. Section 7412(n), however, did not limit EPA to considering public health impacts arising from EGU emissions in isolation; instead EPA was directed to consider hazards reasonably anticipated to occur "as a result of" HAP emissions from EGUs. 42 U.S.C. 7412(n)(1)(A). And EPA's listing of EGUs followed the completion of the study as Congress directed and EPA's determination in accordance with section 7412(n)(1)(A), *i.e.*, that regulation of EGUs under section 7412 was appropriate and necessary due to the public health hazards reasonably anticipated to occur as a result of HAPs emitted by EGUs based on this and other studies – the breadth and depth of which are discussed *supra* at pages 6-8 – as well as public input.

In sum, further regulatory developments – including a comprehensive agency review of how to address toxics from EGUs – are a certainty, regardless of the outcome of this case. For all of these reasons, the case is not suitable for review by this Court.

CONCLUSION

The petitions should be denied.