ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF CALIFORNIA, et al., Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 21-1035 (and consolidated cases)

RESPONDENT EPA'S UNOPPOSED MOTION
FOR VOLUNTARY VACATUR AND REMAND

Respondent the United States Environmental Protection Agency ("EPA") hereby respectfully moves for remand with vacatur of its action entitled "Pollutant-Specific Significant Contribution Finding for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, and Process for Determining Significance of Other New Source Performance Standards Source Categories." 86 Fed. Reg. 2542 (Jan. 13, 2021) ("Significant Contribution Rule"). As discussed below and in the attached declaration, EPA acknowledges that it failed to provide any public notice or opportunity for comment on the central elements of the Significant Contribution Rule, rendering it unlawful.

See 42 U.S.C. § 7607(d). Vacatur is warranted because the procedural defect here is clear, and, as discussed below and in the attached declaration, EPA does not presently intend to cure the defect through additional rulemaking. Vacatur would also forestall needless judicial proceedings and would have no disruptive consequences. Accordingly, EPA's request for vacatur should be granted.

Counsel for State and Municipal Petitioners states that they consent to the relief requested in light of EPA's clear failure to follow the notice and comment requirements in 42 U.S.C. § 7607(d) after determining that those requirements applied. Counsel for Public Health and Environmental Petitioners likewise states that they consent to the relief requested.

BACKGROUND

Clean Air Act Section 7607(d) establishes rulemaking procedures that govern EPA action under certain substantive sections of the Act. *See* 42 U.S.C. § 7607(d). This provision states that, among other things, EPA must provide a "notice of proposed rulemaking" that is published in the Federal Register and that must "specify the period available for public comment" on that proposal. *Id.* § 7607(d)(3). The rulemaking proposal must also include a "statement of [its] basis and purpose" describing the "factual data on which the proposed rule is based," the methodologies used to obtain and analyze the data, and "the major legal interpretations and policy considerations underlying the proposed rule." *Id.* § 7607(d)(3)(A)-(C). A final rule cannot be promulgated unless EPA has "allow[ed] any person to submit written

comments, data, or documentary information," *id.* § 7607(d)(5), and EPA must respond to significant public comments in its final rule, *id.* § 7607(d)(6)(B). These requirements apply to a set of EPA actions listed under § 7607(d)(A)-(U), including EPA rules promulgating or revising any standard of performance under Section 7411 of the Clean Air Act, *id.* § 7607(d)(1)(C), as well as "such other actions as the Administrator may determine." *Id.* § 7607(d)(1)(V).

Section 7411 of the Act requires EPA to list categories of stationary sources that the EPA Administrator finds in his or her judgment "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7411(b)(1)(A). This determination is typically understood to have two prongs: the "significant contribution" finding (concluding that the source category's emissions contribute significantly to air pollution), and the "endangerment" finding (concluding that such air pollution is dangerous). Once a category is listed under Section 7411(b)(1)(A), EPA must issue "standards of performance" for new sources in the source category under 7411(b)(1)(B). Those standards dictate a level of emission reduction based on the "best system of emission reduction" available to those facilities. *See id.* § 7411(b)(1)(B) & (a)(1).

In 2015, EPA promulgated for the first time a set of new source performance standards for greenhouse gas emissions from new, modified, and reconstructed coal- and gas-fired power plants. 80 Fed. Reg. 64,510 (Oct. 23, 2015). In that rule, EPA took the position that it had authority to issue such standards without making a new

significant contribution finding specifically for greenhouse gas emissions from the regulated sources because those sources comprised a source category that was already listed under Section 7411(b)(1)(A) as causing or contributing significantly to dangerous pollution. EPA explained that once it lists a source category, it may proceed to issue standards of performance for any individual pollutant under Section 7411(b)(1)(B), without being required to make an additional significant contribution finding for emissions of that pollutant. *See id.* at 64,529-30.

Even so, the 2015 rule also stated, in the alternative, that if Section 7411 were read to require that the Agency make a "pollutant-specific" significant contribution finding when issuing standards for a given pollutant under 7411(b)(1)(B) – in that case, a finding that power plants' emissions of greenhouse gas emissions *in particular* cause or contribute significantly to dangerous air pollution – then the "information and conclusions described [in the 2015 rule] should be considered to constitute the requisite [pollutant-specific finding]." *Id.* at 64,530. The Agency justified that finding on grounds that, among other things, greenhouse gas emissions from fossil-fuel-fired power plants "emit almost one-third of all U.S. [greenhouse gases] and comprise by far the largest stationary source category of [greenhouse gases] emissions." *Id.*

On April 4, 2017, EPA announced that it was reviewing the 2015 standards, 82 Fed. Reg. 16,329, and the judicial petitions for review of those standards were placed in abeyance. *See North Dakota v. EPA*, D.C. Cir. No. 15-1381, ECF No. 1688176. EPA issued a proposed rule to amend the 2015 standards for new, modified, and

reconstructed coal-fired power plants on December 20, 2018. 83 Fed. Reg. 65,424. The proposal explained that EPA was considering amending those existing emissions standards based on a different assessment of the "best system of emission reduction." *Id.*

EPA also proposed to retain its 2015 interpretation that no additional, pollutant-specific significant contribution finding was necessary to set emission standards under Section 7411(b)(1)(B). *Id.* at 65,432 n.25. EPA noted, however, that it would "consider comments" on "whether the EPA must make a new [significant contribution] finding each time the Agency regulates an additional pollutant by an already-listed source category." *Id.* EPA did *not* propose to interpret Section 7411 as requiring the Agency to identify any threshold or criteria for determining when a source category "causes, or contributes significantly," to dangerous air pollution. Indeed, EPA did not even mention this legal interpretation. EPA also did not propose or mention any threshold or criteria – quantitative or qualitative – that it might apply to this or other pollutant-specific significant contribution findings under such an interpretation. *See generally* 83 Fed. Reg. 65,424.

Then, on January 13, 2021, EPA issued the final Rule at issue here, the Significant Contribution Rule. In the Rule, EPA explained that it was not yet taking action to finalize any of the substantive amendments it had proposed to the 2015 standards for coal-fired power plants. 86 Fed. Reg. at 2544. Instead, the Rule addressed the Section 7411 significant contribution finding for greenhouse gas

emissions from fossil-fuel-fired power plants. First, the Rule promulgated a numerical threshold and associated criteria for determining which source categories' greenhouse gas emissions "contribute significantly" to endangerment. *Id.* at 2551-56. Specifically, the Rule stated that source categories whose emissions of greenhouse gases are 3 percent or less of U.S. greenhouse gas emissions are deemed to contribute *in*significantly to dangerous air pollution and so their greenhouse gas emissions cannot be regulated under Section 7411. *Id.* at 2552-53. For source categories emitting more than 3 percent of domestic emissions, their emissions could still be deemed insignificant – and so exempt from regulation – upon assessment of "secondary" criteria like the size of the source category's emissions as compared to global emissions from that same source category. *Id.* at 2554-55. None of this had been discussed in the proposed rule.

Second, the Rule applied that new threshold and used it to affirm EPA's previous conclusion (in the alternative) that power plants' emissions of greenhouse gases alone "cause, or contribute significantly," to dangerous air pollution – applying a "pollutant-specific" reading of Section 7411 that EPA had recently adopted in a separate Section 7411 rule for oil and gas sources. *Id.* at 2555-57. EPA explained that greenhouse gas emissions from this source category "cause, or contribute significantly," to dangerous air pollution, and thus are subject to new source performance standards under Section 7411, because fossil-fuel-fired power plants constitute 27 percent of domestic greenhouse gas emissions – well over the 3-percent

threshold. *Id.* at 2556. But the Rule announced that the new criteria barred EPA from establishing new source performance standards for all other source categories that emit greenhouse gases (like oil and gas production facilities, petroleum refineries, and boilers) because their emissions are 3 percent or less of total U.S. greenhouse gas emissions. *Id.* at 2552.

EPA also determined that the Rule was subject to the procedural requirements of Section 7607(d) of the Clean Air Act, as it fell within the scope of Section 7607(d)(1)(V). *Id.* at 2544.

Two petitions for review have been filed. The Court has not yet set a schedule for merits briefing.

ARGUMENT

In appropriate circumstances, this Court has discretion to vacate agency actions prior to full briefing on the merits, and the Court's exercise of this authority is warranted here. Vacatur of the Significant Contribution Rule is appropriate because the Rule is subject to the procedural requirements of Clean Air Act Section 7607(d), but EPA acknowledges that the "significant contribution" criteria promulgated in the Rule were never proposed or otherwise subject to public notice and comment in any respect, as required by Section 7607(d)(3), 42 U.S.C. § 7607(d)(3). This acknowledged failure renders the Rule plainly unlawful. Because, as explained below, EPA does not presently wish to remedy this clear procedural defect, an order vacating the Rule is appropriate and in the interests of justice.

As this Court recently explained, "vacatur is the normal remedy for a procedural violation, although we may remand to the agency without vacatur based on the seriousness of the order's deficiencies and the likely disruptive consequences of vacatur." *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020) ("*NRDC*") (internal quotation marks and citation omitted). Where an agency has not provided any opportunity for public notice and comment at all, the seriousness of the deficiency is patent and vacatur is typically appropriate. "[T]he entire premise of notice-and-comment requirements is that an agency's decisionmaking may be affected by concerns aired by interested parties through those procedures." *Id.* Accordingly, "the court typically vacates rules when an agency 'entirely fail[s]' to provide notice and comment." *Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 103 (D.C. Cir. 2013) (quoting *Shell Oil Co. v. EPA*, 950 F.2d 741, 752 (D.C. Cir. 1991)) (vacating an EPA final rule where the proposed rule failed to provide notice of the adopted amendments); *NRDC*, 955 F.3d at 85 ("[F]ailure to provide the required notice and to invite public comment . . . is a fundamental flaw that normally requires vacatur of the rule." (quoting *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009)); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021) ("[A]n agency that bypassed required notice and comment rulemaking obviously could not ordinarily keep in place a regulation while it completed that fundamental procedural prerequisite.").

EPA's acknowledged failure to provide any public notice or comment on the Significant Contribution Rule is this type of serious deficiency. The Clean Air Act requires EPA to publish a proposed rule whenever EPA sets standards of performance under Section 7411 or promulgates "such other actions as the Administrator may determine." 42 U.S.C. § 7607(d)(3), (d)(1)(C), (d)(1)(V). That proposal must describe "the factual data on which the proposed rule is based; the methodology used in obtaining the data and in analyzing the data; and the major legal interpretations and policy considerations underlying the proposed rule." *Id.* § 7607(d)(3)(A)-(C). And EPA must accept and respond to public comments on the proposed data, methodologies, and interpretations. *Id.* § 7607(d)(5), (d)(6)(B).

Here, EPA acknowledges that it issued this final Rule without observing any of these requirements, despite the Administrator's determination that this Rule was subject to the requirements in Section 7607(d). Decl. of Acting Assistant Administrator Joseph Goffman ¶¶ 9-13 ("Goffman Decl."); 86 Fed. Reg. at 2544. Nothing in the proposed rule discusses or even hints at the binding legal interpretation provided in the final Rule. Moreover, EPA acknowledges that it also failed to undertake significant analyses relevant to the underlying legal and factual questions. Goffman Decl. ¶¶ 17-19. The Agency's acknowledged failure to weigh relevant data and potential objections to proposed significance criteria in any respect before finalizing them is precisely the sort of error that casts serious, insurmountable "doubt" on "whether the agency chose correctly" when reaching the conclusions

advanced in this Rule. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993) (noting that the "seriousness" of a rule's "deficiencies" reflects "the extent of doubt whether the agency chose correctly").

Vacatur is also warranted because the Agency does not wish to cure the procedural defect at this juncture. Goffman Decl. ¶ 15. Instead, as explained in the declaration – and consistent with Executive Order 13990 directing EPA to review and, if appropriate, revise or rescind the Significant Contribution Rule at issue here – EPA wishes to undertake a wholesale reexamination of the legal interpretations advanced in this Rule. Goffman Decl. ¶ 16; *see* Executive Order 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

Even if EPA were to conclude that pollutant-specific significance criteria were appropriate, the Agency still would not intend to proceed with re-proposal of the existing Significant Contribution Rule. Goffman Decl. ¶ 17. Important substantive analyses were not performed before the Rule was promulgated, and would need to be conducted in the event EPA were to seek to re-promulgate these or other significance criteria. *Id.* This would include new analyses weighing the level of stationary source greenhouse gas emissions EPA should address to appropriately mitigate the public health and welfare impacts of greenhouse gas emissions, and, depending on those analyses, work to develop comprehensive estimates of the greenhouse gas emissions of other source categories listed under Section 7411. Goffman Decl. ¶¶ 18-19; *cf. Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 347 (D.C. Cir. 1989) ("The proper

course in a case with an inadequate record is to vacate the agency's decision and to remand the matter to the agency for further proceedings."). Given the depth and breadth of the review to be conducted, and the substantial possibility that the review may change the Agency's approach to the questions presented in the Rule, EPA does not plan to simply re-propose the existing Significant Contribution Rule. Goffman Decl. ¶¶ 15-17. Where a serious procedural defect will not be cured by remand without vacatur, remand with vacatur is appropriate. *See NRDC*, 955 F.3d at 85 ("In general, vacatur is the normal remedy for a procedural violation, although we may remand to the agency without vacatur based on the seriousness of the order's deficiencies and the likely disruptive consequences of vacatur." (internal quotation marks and citation omitted)).

Vacatur is further warranted because it would have no "disruptive consequences." *See id.*; *Allied-Signal*, 988 F.2d at 150-51; *see also Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 934 F.3d 649, 674 (D.C. Cir. 2019), *cert. denied*, 141 S. Ct. 160 (2020) ("A strong showing of one [vacatur] factor may obviate the need to find a similar showing of the other." (citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 (D.C. Cir. 2002)). The Significant Contribution Rule "re-affirmed" that fossil-fuel-fired power plants are appropriately regulated under Section 7411 and did not alter the standards themselves. Consequently, vacatur of the Significant Contribution Rule – including the new significant contribution finding made therein – would have no effect on existing regulation of the source category. Goffman Decl. ¶ 20. And the

significance criteria have not yet been applied to any other source category's greenhouse gases emissions, so no other performance standards would be affected by their retraction. Goffman Decl. ¶ 21.

Moreover, none of the other disruptive consequences that traditionally counsel in favor of remand without vacatur are present here. Specifically, no deleterious effects on public health and the environment would result from vacatur, and there are few (if any) reliance interests on this Rule given its recent promulgation. *See, e.g.*, *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (declining to vacate a rule issued without proper notice-and-comment procedures because it "may affect the EPA's ability to respond adequately to serious safety hazards"); *see also Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020) ("[A]lthough remand without vacatur remains an exceptional remedy, we have held that it is appropriate when vacatur would disrupt settled transactions."). Here, the longstanding regulatory regime will remain in place even after vacatur of this Rule. The standards to reduce the source category's emissions of harmful greenhouse gases will be unaffected by vacatur. Indeed, in the Agency's view, remanding the Rule *without* vacatur would have the most disruptive and deleterious consequences for public health and the environment, as it would leave in place a statutory interpretation constraining any further regulation of greenhouse gas emissions under Section 7411, even though that interpretation was promulgated without proper observance of law. Goffman Decl. ¶ 22. Likewise, those parties that might support the legal interpretation or criteria put

forward in the Significant Contribution Rule lack any reliance interests on the Rule because it has been in effect less than a week. 86 Fed. Reg. at 2542.

Nor will remand with vacatur have any disruptive consequences for the Court or the parties to this litigation. This matter is still at a nascent stage. The Court has not yet set deadlines for merits briefing or argument. And Petitioners consent to vacatur.

Because the procedural error here is patent and serious, and because vacatur will have no disruptive consequences, the Significant Contribution Rule should be vacated and remanded to EPA.

CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Court: (1) grant this motion and issue an order vacating and remanding the Rule entitled, "Pollutant-Specific Significant Contribution Finding for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, and Process for Determining Significance of Other New Source Performance Standards Source Categories," 86 Fed. Reg. 2542 (Jan. 13, 2021); and (2) dismiss as moot the above-captioned consolidated petitions for review, Nos. 21-1035, 21-1036, and 21-1063.

Respectfully submitted,

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DATED: March 17, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion for Voluntary Vacatur and Remand complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(2)(A) because it contains approximately 3,008 words, excluding exempted portions, according to the count of Microsoft Word.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Voluntary Vacatur and Remand have been served through the Court's CM/ECF system on all registered counsel this 17th day of March, 2021.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN