ORAL ARGUMENT NOT YET SCHEDULED

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

No. 13-1014

SIERRA CLUB, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

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

BRIEF FOR RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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December 11, 2013

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	)	Docket No. 13-1014

RESPONDENTS' CERTIFICATE OF COUNSEL

Pursuant to Circuit Rule 27(a)(4), counsel for Respondents United States Environmental Protection Agency and Gina McCarthy, Administrator, (collectively "EPA") submit this certificate as to parties, rulings, and related cases.

(A) Parties and Amici

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

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

(ii) Parties to These Cases

1. Petitioners:

Sierra Club

National Parks Conservation Association

Natural Resources Defense Council

2. Respondents:

United States Environmental Protection Agency

Gina McCarthy, Administrator

3. Intervenors:

The following are Intervenors on behalf of Respondents:

Utility Air Regulatory Group

Luminant Generation Company, LLC

Sandow Power Company, LLC

Big Brown Power Company, LLC

Oak Grove Management Company, LLC

Luminant Mining Company, LLC

Big Brown Lignite Company, LLC

Luminant Big Brown Mining Company, LLC

Luminant Holding Company, LLC

Luminant Energy Company, LLC

National Environmental Development Association's Clean Air Project

4. Amici:

None

(B) Rulings Under Review

The Agency action under review is a memorandum dated November 19, 2012 from Gina McCarthy, then-EPA Assistant Administrator for Air and Radiation, to EPA Regional Air Division Directors entitled "Next Steps for Pending Redesignation Requests and State Implementation Plan Actions Affected by the Recent Court Decision Vacating the 2011 Cross-State Air Pollution Rule."

(C) Related Cases

The case on review has not been previously before this Court or any other Court.

Respectfully submitted,

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GLOSSARY

BART	Best Available Retrofit Technology
CAA	Clean Air Act, , 42 U.S.C. §7401 et seq.
CAIR	Clean Air Interstate Rule
McCarthy Memorandum	Memorandum dated November 19, 2012 from Gina McCarthy, EPA Assistant Administrator for Air and Radiation, to EPA Regional Air Division Directors entitled "Next Steps for Pending Redesignation Requests and State Implementation Plan Actions Affected by the Recent Court Decision Vacating the 2011 Cross-State Air Pollution Rule"
NAAQS	National Ambient Air Quality Standard
NOx	Nitrogen Oxides
$PM_{2.5}$	Fine Particulate Matter
SIP	State Implementation Plan
SO_2	Sulfur Dioxide

JURISDICTION

The Court lacks jurisdiction because Petitioners lack standing and the challenged memorandum is not final agency action.

STATEMENT OF ISSUES

1. Whether Petitioners have standing.

2. Whether the memorandum dated November 19, 2012 from Gina McCarthy, EPA Assistant Administrator for Air and Radiation, to EPA Regional Air Division Directors entitled "Next Steps for Pending Redesignation Requests and State Implementation Plan Actions Affected by the Recent Court Decision Vacating the 2011 Cross-State Air Pollution Rule" ("McCarthy Memorandum") (JA XXXX-XX) is reviewable final agency action.

3. Whether the McCarthy Memorandum is a rule subject to notice and comment requirements.

4. Whether the statement in the McCarthy Memorandum that emission reductions resulting from application of EPA's Clean Air Interstate Rule can in appropriate circumstances be considered permanent and enforceable is arbitrary, capricious, or inconsistent with the Clean Air Act.

STATUTES AND REGULATIONS

Applicable statutes and regulations are contained in the Addendum to Petitioners' Brief.

STATEMENT OF THE CASE

In this case, Petitioners seek review of a memorandum dated November 19, 2012 from Gina McCarthy, EPA Assistant Administrator for Air and Radiation, to EPA Regional Air Division Directors entitled "Next Steps for Pending Redesignation Requests and State Implementation Plan Actions Affected by the Recent Court Decision Vacating the 2011 Cross-State Air Pollution Rule," JA XXXX-XX ("McCarthy Memorandum"). In the McCarthy Memorandum, then-Assistant Administrator McCarthy discusses in general terms the impact of this Court's decision in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 2857 (2013).

Under the Clean Air Act ("CAA"), EPA is required to promulgate "national ambient air quality standards" ("NAAQS") to protect public health and welfare. 42 U.S.C. § 7409(b). States have the responsibility to adopt State Implementation Plans ("SIPs") adequate to maintain air quality in "attainment" areas and to bring "nonattainment" areas into compliance with each NAAQS. *Id.* § 7410(a). SIPs for nonattainment areas must contain pollution control measures and must demonstrate that implementation of the SIP will achieve attainment of the NAAQS. *Id.*

§ 7502(c)(1). The control measures relied on in a SIP must be enforceable. *Id.* § 7410(a)(2)(A).

When an area that had been in nonattainment achieves the NAAQS, the Governor of the relevant State may submit to EPA a request for redesignation of any area (or portion of an area) within the State, and within 18 months of receiving a complete submittal, EPA "shall approve or deny such redesignation." 42 U.S.C. § 7407(d)(3)(D). The Act provides for redesignation to attainment if five criteria are met:

> i. EPA has determined that the area has attained the applicable NAAQS;
>
> ii. EPA has fully approved the applicable SIP under CAA section 7410(k);
>
> iii. EPA has determined that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP and other required reductions;
>
> iv. EPA has fully approved a maintenance plan under CAA section 7505a, that has been adopted by the State, which demonstrates that the area will maintain the NAAQS for at least 10 years after redesignation; and
>
> v. EPA has determined that the State containing the area seeking redesignation has met all applicable SIP requirements for that area under section 7410, with respect to SIPs generally, and under part D of CAA title 1, 42 U.S.C. §§ 7501-7515, with respect to SIP provisions for nonattainment areas.

42 U.S.C. §§ 7407(d)(3)(E), 7505a(a).

A significant confounding factor in the regulatory process for developing SIPs is that NAAQS nonattainment and maintenance problems in many States are caused in part by emissions transported from other States, often over vast distances. *See* 70 Fed. Reg. 25,162, 25,168-70 (May 12, 2005). To address this issue, Congress amended the CAA in 1977 to require that all SIPs contain provisions prohibiting emissions from particular stationary sources that "will prevent" attainment or maintenance of the NAAQS in other States. 42 U.S.C. § 7410(a)(2)(E) (1977). Because the statutory "will prevent" criterion established in 1977 proved difficult to meet in practice, *see Michigan v. EPA*, 213 F.3d 663, 674 (D.C. Cir. 2000), Congress significantly amended § 7410(a)(2)(D) in 1990, extending the reach of that provision to cover multiple sources and other emissions activities that "contribute significantly" to downwind nonattainment or maintenance problems, whether or not they can be shown to "prevent" attainment or maintenance.

Following the 1990 amendments, EPA and various States began an effort to address interstate contributions to ozone nonattainment in a cooperative and comprehensive fashion. Although a consensus was not reached, the technical work of this group provided much of the foundation for EPA's 1998 "NOx SIP Call." *See* 63 Fed. Reg. 57,356, 57,361 (Oct. 27, 1998). That rule required 22 States and the District of Columbia to restrict emissions of nitrogen oxides ("NOx"), an ozone

precursor, to address their interstate contributions to ozone nonattainment and established a mechanism to address such contributions -- the NOx Budget Trading Program. This Court upheld the NOx SIP Call in most significant respects in *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000).

In 2005, EPA promulgated the Clean Air Interstate Rule ("CAIR"), which was similar to the NOx SIP Call but was expanded to include annual NOx and sulfur dioxide ("SO_2") cap-and-trade programs to address significant contribution to nonattainment of the NAAQS for fine particulate matter ("$PM_{2.5}$"). 70 Fed. Reg. 25,162 (May 12, 2005).[1] CAIR was challenged by multiple petitioners and was initially vacated in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008). On panel rehearing, however, the Court modified the remedy to remand without vacatur to allow EPA to continue to administer CAIR pending further rulemaking. *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008).

In response to the *North Carolina* remand, EPA promulgated the Cross-State Air Pollution Rule, also referred to as the Transport Rule, 76 Fed. Reg. 48,208

[1] To address significant contribution to downwind ozone problems, CAIR established for each State covered by the rule a budget for NOx, an ozone precursor, during the ozone season, and for downwind $PM_{2.5}$ problems, it similarly established annual budgets for NOx and SO_2, which are $PM_{2.5}$ precursors.

(Aug. 8, 2011). Like CAIR, the Transport Rule created cap-and-trade programs for the control of NOx and SO_2 to address the significant contributions of upwind states to downwind ozone and $PM_{2.5}$ nonattainment and maintenance problems. The Transport Rule was vacated by the Court in *EME Homer City Generation Co. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012).[2] In the *EME Homer City* decision, the Court instructed EPA to continue to implement CAIR pending promulgation of a valid replacement rule. 696 F.3d at 37-38.

The McCarthy Memorandum articulated the Agency's view on *EME Homer City*'s effect on pending State submissions for redesignation of areas from nonattainment to attainment status, as well as State submissions requesting approval of SIPs where those submissions had relied on emission reductions under the Transport Rule. The McCarthy Memorandum was intended to assist the EPA regional offices tasked with determining whether requests for redesignation or SIP approval meet the criteria for approval. Specifically, the Memorandum was intended to help regional offices evaluate whether such requests adequately addressed the requirement that emission reductions be "permanent and

[2] On June 24, 2013, the Supreme Court granted petitions for writ of certiorari in *EPA v. EME Homer City Generation, L.P.*, No. 12-1182, and *American Lung Ass'n v. EME Homer City Generation, L.P.*, No. 12-1183, seeking review of that decision. The cases were argued on December 10, 2013.

enforceable" in order to support redesignation requests and State demonstrations that a SIP will attain or maintain the NAAQS. McCarthy Memorandum at 1-2 (JA XXXX-XX). In light of the Court's vacatur of the Transport Rule and its instruction to continue implementing CAIR, the McCarthy Memorandum recommends that it would be appropriate in certain circumstances for EPA regional offices to rely on emission reductions resulting from implementation of CAIR as "permanent and enforceable" until CAIR is replaced either by reinstatement of the Transport Rule upon further judicial review or by promulgation of a valid replacement rule. *Id.* Application of that recommendation to specific facts is left to the EPA Regions in making case-by-case decisions on pending requests for redesignation or SIP approvals.

The McCarthy Memorandum also addresses one pending action seeking approval of a state regional haze submission that had relied on CAIR. *Id.* at 2 (JA XXXX).[3] The McCarthy Memorandum states that because this Court had vacated

[3] Clean Air Act section 169A(b)(2)(A), 42 U.S.C. § 7491(b)(2)(A), requires states to revise their SIPs to contain measures addressing visibility, including a requirement that certain categories of existing major stationary sources built between 1962 and 1977 procure, install, and operate best available retrofit technology ("BART") as determined by the state. By regulation, EPA had determined that states could comply with this requirement by participating in CAIR, 40 C.F.R. § 51.308(e)(4) (2006), which was upheld by this Court in *Utility Air Regulatory Group v. EPA*, 471 F.3d 1333 (D.C. Cir. 2006). After

Footnote continued

the Transport Rule and instructed EPA to continue to implement CAIR, it would be appropriate to approve that action. *Id.* With regard to other pending actions regarding state regional haze submissions, the McCarthy Memorandum advises the Regions to await the outcome of then-pending petitions for rehearing of the Court's decision in *EME Homer City* (petitions that the Court subsequently denied on January 24, 2013). McCarthy Memorandum at 2 (JA XXXX).

STANDARD OF REVIEW

This case is subject to the standard of review set forth in the Administrative Procedure Act, 5 U.S.C. 706, under which the Court asks whether the challenged action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* This standard of review "is a narrow one," and the Court is not "to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The pertinent question is simply "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*,

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promulgation of the Transport Rule, EPA revised the regulation to provide that states could meet the BART requirement by participation in the Transport Rule trading programs. 77 Fed. Reg. 33,642 (June 7, 2012). That rule is under review in *Utility Air Regulatory Group v. EPA*, No. 12-1342 (D.C. Cir. filed Aug. 6, 2012).

463 U.S. 29, 43-44 (1983) (citation omitted). Particular deference is given to an agency with regard to technical matters within its area of expertise.[4]

Judicial deference also extends to an agency's interpretation of a statute it administers. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). Under the first step of *Chevron*, if Congress has "directly spoken to the precise question at issue," that intent must be given effect. 467 U.S. at 842-43. However, under *Chevron*'s second step, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

SUMMARY OF THE ARGUMENT

The petitions should be dismissed for lack of jurisdiction both because the Petitioners lack standing and because the McCarthy Memorandum is not final agency action.

Petitioners lack standing because they have failed to establish an injury-in-fact that is actual or imminent, but rather rely on lengthy chains of speculation. Petitioners do not claim harm from the Memorandum itself, but rather assert that EPA may rely on the Memorandum in making determinations regarding

[4] *See Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983); *see also, e.g., West Virginia v. EPA*, 362 F.3d 861, 867-68 (D.C. Cir. 2004); *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 73 (D.C. Cir. 2000).

redesignations to attainment and approvals of state regional haze plans. With regard to redesignations, Petitioners assert that, although the air quality in these areas is meeting the applicable NAAQS, their members may be injured if, at some point in the future, emission sources affecting the area that are subject to CAIR increase their emissions because CAIR is replaced by another program to control interstate transport of pollutants, and those increased emissions cause the area to violate the NAAQS. With regard to regional haze, Petitioners assert that their members may be injured if, at some point in the future, emission sources in States currently subject to CAIR increase their emissions because CAIR is replaced by another program, and those increased emissions result in reduced visibility in national parks. These allegations of injury are insufficient for standing purposes because they rely on a host of speculative assumptions about future events and the actions of third parties.

Furthermore, Petitioners' alleged injuries are not caused by the McCarthy Memorandum and would not be redressed by a decision in Petitioners' favor. EPA's policy of relying on emission reductions achieved through interstate programs in acting on redesignation requests and regional haze plan submissions pre-dates the McCarthy Memorandum, and the change in the legal circumstances reflected in the Memorandum was created by the decision in *EME Homer City*, not by the Memorandum. Furthermore, EPA Regions can determine on a fact-specific

basis that particular emission reductions resulting from implementation of CAIR are permanent and enforceable (in the redesignation context) or constitute BART (in the regional haze context) whether or not the McCarthy Memorandum is in effect. Thus, it is not likely that any potential injury would be remedied by a favorable decision of the Court.

The McCarthy Memorandum is not final agency action because it is not the consummation of the Agency's decision-making process and does not change legal rights or obligations. The Memorandum is not the consummation of the Agency's decision-making process because for the categories of agency actions to which the Memorandum applies, EPA must make a fact-specific, case-by-case decision through a notice and comment process. The Memorandum does not change existing law because EPA's policy of considering emission reductions from interstate trading programs, including CAIR, in redesignations, SIP approvals, and regional haze approvals pre-dates the McCarthy Memorandum. The Memorandum simply articulates the Agency's understanding of this Court's decision in *EME Homer City*, which requires EPA to continue to implement CAIR until a valid replacement is in place.

Because the McCarthy Memorandum is not final agency action it cannot be a rule subject to notice and comment requirements. This Court has recognized that an agency action that does not change existing law or policy is not a rule.

Even if the Court had jurisdiction, the petition should be denied because the views articulated in the McCarthy Memorandum are consistent with the Clean Air Act and this Court's decisions. EPA's determination that emission reductions from implementation of CAIR can be relied on in redesignation decisions and regional haze SIPs is a reasonable interpretation of the Clean Air Act, and thus should be upheld on the principles of *Chevron*. In the context of regional haze approvals, this Court has already held that it is reasonable for EPA to rely on emission reductions from CAIR, *Utility Air Regulatory Group*, 471 F.3d 1333, and the fact that CAIR may ultimately be replaced with another program that would have to ensure that the same pollutant transfer problems are addressed does not undermine the basis for that decision.

Furthermore, with regard to redesignations, EPA's interpretation of the statutory term "permanent and enforceable" is reasonable. Regulations are continually evolving in response to changed conditions, and Petitioners' attempt to read "permanent" as "eternal" is inconsistent with that fact. A more reasonable reading of the statute is that Congress was concerned that redesignations not be based on temporary measures, but rather on a continuing regulatory program. Given that the emission reductions resulting from CAIR are unlikely to be reversed as a factual matter and that any program that replaces CAIR must ensure that the same pollutant transport problems are addressed, EPA's determination that

reductions from CAIR are permanent and enforceable for the purpose of redesignations is reasonable.

The McCarthy Memorandum is entirely consistent with this Court's decisions in *North Carolina* and *EME Homer City*. While the Court has determined that CAIR must be replaced, it has also repeatedly ordered EPA to continue to implement CAIR, and has emphasized the importance of the reliance interests created by CAIR. *EME Homer City*, 696 F.3d at 38. Thus, EPA's consideration of CAIR in carrying out its responsibilities under the Clean Air Act is entirely consistent with this Court's decisions.

ARGUMENT

I. PETITIONERS LACK STANDING

Petitioners do not claim standing based on an injury to themselves, but rather associational standing based on alleged injuries to their members. Pet'rs Br. at 17. To establish associational standing, Petitioners must demonstrate that: (1) at least one identified member would have standing to sue in its own right; (2) the interests they seek to protect are germane to the organization's purposes; and (3) neither the claim asserted nor the relief requested requires the participation of individual members. *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 815 (D.C. Cir. 2006). To have standing an organization must identify a specific

member with a specific concrete injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494-97 (2009).

To establish that an identified member would have standing, the Petitioners must demonstrate that (1) the member has suffered an injury-in-fact that is both concrete and particularized and actual or imminent rather than conjectural or hypothetical; (2) there is a causal connection between the claimed injury and the challenged action and that the injury is not the result of the independent action of some third party; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Furthermore, "[w]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (citation omitted); *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002). Because Petitioners are not themselves the subject of the agency action being challenged, they must come forward with specific facts to demonstrate that they have an identifiable member who has suffered a redressable injury from the McCarthy Memorandum.

Petitioners fail to meet this burden. Petitioners' claims of injury-in-fact are entirely speculative. In their brief and accompanying declarations, Petitioners

allege that their members will suffer injury-in-fact from two possible actions by EPA. First, Petitioners identify two members in areas that EPA proposed to redesignate from nonattainment to attainment for the 1997 PM2.5 NAAQS (Chicago area) and the 1997 ozone NAAQS (Atlanta area). Pet'rs Br. at 19-20.[5] Petitioners assert that, although the air quality in these areas is meeting the applicable NAAQS, their members may be injured if, at some point in the future, emission sources affecting the area that are subject to CAIR increase their emissions because CAIR is replaced by another program to control interstate transport of pollutants, and those increased emissions cause the Chicago or Atlanta area to violate the NAAQS.

Second, Petitioners identify members who visit national parks where the visibility may be affected by emissions from sources in States where EPA has proposed to approve a regional haze SIP. Pet'rs Br. at 21-22. Petitioners assert that their members may be injured if, at some point in the future, emissions in

[5] EPA has finalized the redesignations of both the Chicago and Atlanta areas. 78 Fed. Reg. 60,704 (Oct. 2, 2013); 78 Fed. Reg. 72,040 (Dec. 2, 2013). Petitioners did not comment on the proposed redesignation for Chicago and, in fact, no adverse comments were received on the proposed redesignation. 78 Fed. Reg. at 60,705. EPA did receive adverse comments on the Atlanta redesignation. However, as EPA explained in the redesignation notice, those objections to the Atlanta redesignation have no basis in either law or fact. 78 Fed. Reg. at 72,045-48.

those States increase because CAIR is replaced by another program, and those increased emissions result in reduced visibility in the national parks visited by Petitioners' members.

In both cases, Petitioners' claim of injury is too speculative to qualify as actual or imminent. Petitioners rely completely on vague generalities and do not identify a specific facility that they assert will increase its emissions in the future. Second, their claims are speculative because they rely on a long chain of contingencies. With regard to redesignations, Petitioners are suffering no current injury because those areas are currently achieving the NAAQS. Thus, the air quality in those areas is meeting the applicable standards. Nor have Petitioners established any imminent risk of injury. CAIR was promulgated in 2005, and has been in effect for NOx emissions since January 1, 2009 and for SO2 emissions since January 1, 2010. Thus, facilities subject to CAIR chose their strategy for compliance (*e.g.*, construction of emission controls, purchase of allowances, or some combination) years ago, and current emission levels and air quality reflect those choices. Petitioners have presented no evidence to suggest that significant future changes in the availability or price of allowances are likely to occur or that such changes would cause facilities to alter their compliance strategies.

Moreover, Petitioners' claims of injury all stem not from the McCarthy Memorandum itself, but rather from how EPA may apply the McCarthy

Memorandum in future actions. In particular, Petitioners' alleged injuries are the result of how EPA may apply the Memorandum in determining whether to approve requested redesignations from nonattainment to attainment and whether to approve state submissions under the regional haze program. The McCarthy Memorandum simply lays out the general principle that, in specified circumstances, a regional office may consider emission reductions associated with CAIR to be permanent and enforceable in evaluating a redesignation request and that, in acting on the regional haze submittal from Connecticut, a similar conclusion can be drawn. Application of that principle to specific facts is left to the EPA Regions in making decisions on pending requests for redesignation or SIP approvals.

As this Court has previously recognized, when a party's claimed injury depends on discretionary action that the Agency will take in the future, the party lacks standing because its injuries, if any, would be caused not by the action being challenged, but rather by presumed future actions. *Louisiana Envtl. Action Network v. Browner*, 87 F.3d 1379, 1383-84 (D.C. Cir. 1996) ("*LEAN*"). The rationale of *LEAN* is clearly applicable here. Petitioners' claim of injury is based on an assumption of how both EPA and private parties will act in the future. However, as discussed above, EPA's future decisions will have to be based on the facts presented by each case. Moreover, affected parties will have notice and a full opportunity to comment on those decisions and those decisions will be

independently subject to judicial review. Thus, Petitioners simply have not demonstrated that they are likely to suffer an actual or imminent injury.

Furthermore, this Court has ordered EPA to continue to implement CAIR until the Agency replaces it with another regulatory program to address interstate transport of pollutants. *EME Homer City*, 696 F.3d at 37-38. Petitioners have presented no evidence to demonstrate that any such replacement program is likely to result in increased emissions from the unidentified sources that Petitioners allege affect air quality in Chicago, Atlanta, and the specified national parks. Nor have Petitioners presented any evidence that such an increase in emissions is likely to be sufficiently large either to cause an attainment area to return to nonattainment or to impair visibility in a national park. In short, Petitioners have presented nothing at all to demonstrate that their alleged injury is actual or imminent.

Moreover, there is no causal connection between the McCarthy Memorandum and Petitioners' alleged injuries, and any such injuries would not be redressed by a decision in Petitioners' favor. EPA's policy of relying on emission reductions achieved through interstate programs in redesignations and regional haze pre-dates the McCarthy Memorandum. With regard to redesignations, EPA has long relied on reductions achieved by the NOx SIP Call, as well as by CAIR. *See, e.g.*, 76 Fed. Reg. 80,253, 80,255 (Dec. 23, 2011). With regard to visibility, EPA had by regulation determined that States can satisfy their obligations to

impose BART controls by participating in CAIR, 40 C.F.R. § 51.308(e)(4) (2006), a rule upheld by this Court. *Util. Air Regulatory Grp. v. EPA*, 471 F.3d at 1340-41. After the replacement of CAIR by the Transport Rule, EPA determined that it was no longer appropriate to rely on CAIR, but that redesignations could instead rely on reductions associated with the Transport Rule. With regard to regional haze, EPA amended its regulations to provide that compliance with the Transport Rule would constitute BART. 77 Fed. Reg. 33,642. (That rule is under review in *Utility Air Regulatory Group v. EPA*, No. 12-1342 (D.C. Cir. filed Aug. 8, 2012)). In *EME Homer City*, this Court invalidated the Transport Rule and required EPA to continue to implement CAIR. 696 F.3d at 38. The McCarthy Memorandum simply recognizes that the decision in *EME Homer City* returned the legal landscape in this respect to the status quo ante, and thus it would be appropriate to utilize emission reductions resulting from implementation of CAIR in making redesignation determinations, acting on attainment demonstrations, and approving regional haze SIPs. Thus, even if somehow Petitioners could be harmed by a redesignation determination or a regional haze SIP approval that relies on CAIR, that harm would be the result of EPA's pre-existing policies and the decision in *EME Homer City*, rather than by virtue of the McCarthy Memorandum. *See Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 146-47 (D.C. Cir.

2012), *cert. granted in part*, 134 S. Ct. 418 (2013) (no standing where alleged injuries are the result of the operation of the statute).

Furthermore, EPA Regions can determine on a fact-specific basis that particular emission reductions resulting from implementation of CAIR are permanent and enforceable (in the redesignation context) or constitute BART (in the regional haze context) whether or not the McCarthy Memorandum is in effect. Thus, it is not likely that any potential injury would be remedied by a favorable decision of the Court. Moreover, given the large number and variety of sources affecting any given area, and the variability in emissions due to changes in such factors as weather, the economy, or fuel prices, Petitioners have presented no evidence to establish that it is likely that any action by EPA that might result from a favorable decision by the Court would change whether an area remains in attainment or would change the level of visibility in national parks.

Finally, Petitioners' claim of procedural injury, Pet'rs Br. at 26-28, is also without merit. The Supreme Court has made clear that deprivation of a procedural right *in vacuo* is not enough — a party seeking federal jurisdiction must assert a procedural injury that is connected to a concrete interest protected by the statute. *Summers*, 555 U.S. at 497. As demonstrated above, Petitioners have failed to establish that they will suffer any concrete harm from the McCarthy Memorandum.

Because they have no such injury, there is no basis for their claim of procedural injury.

None of the cases cited by Petitioners supports their claim of procedural injury. In *Center for Energy & Economic Development v. EPA*, 398 F.3d 653, 656-57 (D.C. Cir. 2005), the petitioners' standing was based on the fact that they were directly subject to the rule under review. In *Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012), standing was predicated on the fact that petitioner had members who were exposed to hazardous air pollutants being emitted from sources that the petitioner asserted were not being adequately regulated. Finally, in *New York Public Interest Group v. Whitman*, 321 F.3d 316, 325 (2d Cir. 2003), the plaintiff had members who lived near a facility that allegedly lacked a required permit, and in any event the decision predates the Supreme Court's decision in *Summers*. Thus, in each of those cases, the petitioner or plaintiff had alleged an ongoing concrete injury resulting from the challenged EPA action.

II. THE McCARTHY MEMORANDUM IS NOT FINAL AGENCY ACTION

Petitioners have invoked the Court's jurisdiction under Clean Air Act section 307(b), 42 U.S.C. § 7607(b), which is limited to review of "final" agency action. *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 193 (D.C. Cir. 2011). The standard for determining whether an agency action is final was established by the

Supreme Court in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). *See, e.g., Nat'l Ass'n of Homebuilders v. Norton,* 415 F.3d 8, 13 (D.C. Cir. 2005). To be final and reviewable, an agency action: (1) must mark the consummation of the agency's decision-making process; and (2) must be an action by which rights or obligations have been determined or from which legal obligations flow. *Id.*

The McCarthy Memorandum meets neither of these conditions. The Memorandum is not the consummation of the Agency's decision-making process because for the categories of agency actions to which the Memorandum applies, EPA must make a fact-specific, case-by-case decision through a notice and comment process. (For some situations, such as the Chicago and Atlanta redesignation requests and the Connecticut regional haze approval, EPA has already done so.) The McCarthy Memorandum simply articulates the consequences of the *EME Homer City* decision, *i.e.*, the Transport Rule was vacated and the Court instructed EPA to continue to implement CAIR. The EPA Regions must still apply those facts to each specific situation.

Furthermore, the McCarthy Memorandum itself makes clear that it is not announcing a generally applicable legal interpretation. The Memorandum simply states, "based on this direction from the Court, we believe that it will be appropriate to rely on CAIR emission reductions as permanent and enforceable *for certain actions in certain circumstances*." McCarthy Memorandum at 2 (emphasis

added) (JA XXXX). Specifically, the Memorandum is addressed only to the specific circumstance of Agency decisions that are currently in process and are affected by the *EME Homer City* decision. *Id.* Thus, while the McCarthy Memorandum advises EPA Regions (and the public) that EPA headquarters officials believe that CAIR emission reductions *may* be relied on in considering the referenced, pending redesignation and other SIP requests, it will still be up to the regional offices to make the final determinations on those requests.

Furthermore, it is not the case that the McCarthy Memorandum compels the conclusion that emission reductions from any particular facility subject to CAIR are permanent and enforceable. Each redesignation determination is subject to notice and comment, and if comments demonstrate that emissions from a particular facility are likely to increase, the Agency would have to take that into account. Tellingly, however, in neither their briefs nor their declarations did Petitioners identify any such facility. Nor did they do so in comments on the Chicago redesignation requests that they allege as one of the bases for their standing.[6]

[6] No adverse comments were submitted at all on the proposed Chicago redesignation. While EPA did receive adverse comments on the Atlanta redesignation related to the question of whether emission reductions associated with CAIR were permanent and enforceable, those comments did not identify any specific facilities. Furthermore, as EPA explained in the final redesignation notice, the comments are not only legally erroneous, but also lack a basis in fact.

Footnote continued

The McCarthy Memorandum also does not determine legal rights or obligations. First, as discussed above, rights and obligations are determined in subsequent EPA actions subject to notice and comment. In any future judicial challenge to those actions, the legality of EPA's final decision will be gauged with reference to applicable statutory and regulatory requirements, not the Memorandum.

Furthermore, the McCarthy Memorandum does not change existing law, and thus it is distinguishable from the EPA guidance documents considered in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), and *Natural Resources Defense Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011). EPA's determination that emission trading programs, including CAIR, may be considered permanent and enforceable in the redesignation context and BART in the regional haze context was well established long before the McCarthy Memorandum. As noted above, with regard to regional haze, that interpretation was even embodied in a regulation that was upheld by this Court. With regard to redesignations, EPA was similarly relying on emission trading programs as permanent and enforceable. *E.g.*, 76 Fed. Reg. at 80,255 (finding reductions associated with the NOx SIP Call,

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The emission reductions associated with CAIR had not only become facts on the ground, but had been incorporated into other regulatory actions. 78 Fed. Reg. at 72,045-48.

CAIR, and the Transport Rule to be permanent and enforceable); 76 Fed. Reg. 59,527, 59,528-29 (Sept. 27, 2011) (same). Because the McCarthy Memorandum does not change existing law, it is not reviewable final agency action. *Gen. Motors Corp. v. EPA*, 363 F.3d 442, 450-51 (D.C. Cir. 2004).

Rather than changing existing law, the McCarthy Memorandum simply states the Agency's view of the effect of this Court's opinion in *EME Homer City*. Specifically, in the Memorandum, EPA recognizes that in *EME Homer City*, the Court vacated the Transport Rule and instructed EPA to continue to implement CAIR. Thus, it was no longer the case that CAIR had been replaced, and in situations where EPA had intended to recognize the Transport Rule as the operative law, it should now recognize CAIR. As this Court has previously held, an agency's view of what the law requires is not reviewable final agency action. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 808 (D.C. Cir. 2006); *Am. Tele. & Tel. Co. v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001).

III. THE McCARTHY MEMORANDUM IS NOT A RULE

Because the McCarthy Memorandum is not final agency action, as demonstrated in section II above, it cannot be a rule, and thus is not subject to the Administrative Procedure Act's notice and comment requirements. As discussed above, EPA did not establish a new policy or legal interpretation, or create any

new rights or obligations in the McCarthy Memorandum. Rather, the Memorandum simply articulated the Agency's understanding of the effect of the decision in *EME Homer City*.

This Court has recognized that an agency action that does not set forth any policy judgments or statutory interpretations, or otherwise change the agency's approach to a particular matter, is not a rulemaking. In *Independent Equipment Dealers Ass'n v. EPA*, 372 F.3d 420 (D.C. Cir. 2004), then-Judge Roberts explained that where an EPA letter simply restated the Agency's position on an issue, but "tread no new ground" and "left the world just as it found it," the letter could not "be fairly described as implementing, interpreting, or prescribing law or policy." *Id.* at 428; *see also Indus. Safety Equip. Ass'n v. EPA*, 837 F.2d 1115, 1117 (D.C. Cir. 1988) (holding that an EPA publication was not a rule within the meaning of the APA where it did not "change any law or official policy presently in effect"). Similarly, because the McCarthy Memorandum does not change any law or policy, it is not a rule.

Furthermore, the EPA actions discussed in the McCarthy Memorandum (*i.e.*, redesignations and approvals of regional haze SIPs) are conducted through a notice and comment process. Thus, if Petitioners, or anyone else, believes that EPA's understanding of the effect of the *EME Homer City* decision is incorrect, or that

there is reason to believe that emissions from a particular source will significantly increase, they can address those issues through that process.

IV. NOTHING IN THE McCARTHY MEMORANDUM IS INCONSISTENT WITH THE CLEAN AIR ACT OR WITH THIS COURT'S DECISIONS

Even if the Court had jurisdiction to review the McCarthy Memorandum, there is no merit to Petitioners' claim that the mere fact that CAIR must eventually be replaced renders unlawful EPA's statement that emission reductions achieved through CAIR may be considered in making decisions on redesignation requests and the referenced pending regional haze submission. This Court has instructed EPA to continue to implement CAIR until it is replaced. CAIR remains in force to address certain interstate pollutant transport problems, and any replacement will also have to ensure that those problems are adequately addressed. Given EPA's obligation to implement all provisions of the Act, including acting on redesignations and SIP submissions, the Agency's determination that reductions from CAIR may be considered in that implementation is reasonable.

As a preliminary matter, while Petitioners rely heavily on the language in section 7407(d)(3)(E)(iii) that, in making a determination on a redesignation request, EPA must determine that the "improvement in air quality is due to permanent and enforceable reductions in emissions," that statutory language is applicable only to redesignations. 42 U.S.C. § 7407(d)(3)(E)(iii). The general SIP

provision, 42 U.S.C. § 7410(a)(2)(A), and the regional haze regulation, 40 C.F.R. § 51.308(d)(3), cited by Petitioners refer only to "enforceable" emission limitations. They do not use the term "permanent," although as a policy matter, EPA does require that control measures in a SIP submission, such as a nonattainment plan or regional haze plan, be permanent for the length of the relevant plan. There is no question that CAIR is enforceable. Sources in States subject to CAIR are required to hold sufficient allowances to cover their emissions each year, and if they fail to do so, they are subject to enforcement, including the imposition of civil penalties.

EPA's determination that emission reductions from implementation of CAIR can be relied on in making decisions on redesignation decisions and regional haze SIPs is reasonable, and thus should be upheld on the principles of *Chevron*. *Util. Air Regulatory Group*, 471 F.3d at 1340. The Court has already held that reliance on CAIR in the context of regional haze is reasonable. *Id.* at 1341 (there is no requirement for "EPA to impose a separate technology mandate for sources whose emissions affect Class I areas, rather than piggy-backing on solutions devised under other statutory categories.") The fact that CAIR will have to be replaced does not undermine the reasoning of that decision. The replacement for CAIR will have to ensure that the interstate pollutant transport problems addressed by CAIR are adequately addressed. Furthermore, as a practical matter, control equipment

being used to achieve current emission reductions is in place, and may have been incorporated into other regulatory requirements, and is likely to continue to be relied on under any future transport rule. *See* 78 Fed. Reg. at 72,045-48.

With regard to redesignation requests, the statutory term "permanent and enforceable" is not unambiguous. Congress was certainly aware that regulations do not stay in place for eternity, but are regularly revised in light of new circumstances or information. Nor would it be rational to assume that through the redesignation process Congress was intending to lock into place whatever regulations happened to be in effect at the time that the redesignation decision was made. Furthermore, the other prerequisites for redesignation are that the area have approved implementation and maintenance plans and have met the statutory requirements for nonattainment areas. 42 U.S.C. § 7407(d)(3)(E)(ii),(iv),(v). Thus, the other conditions for redesignation address the need for an area to have regulations in effect to control emissions in the future, and the requirement that past emission reductions have resulted from permanent and enforceable reductions is not addressed to that issue.

Rather, a reasonable reading of the statute is that Congress simply meant to ensure that areas were not redesignated to attainment if the improvements in air quality were due to temporary or variable circumstances such us unusual weather, rather than to ongoing regulatory actions that had resulted in emission reductions

that were not likely to be reversed. EPA's determination that emission reductions resulting from CAIR meet this criterion is reasonable. While CAIR was remanded by the Court in *North Carolina*, the Court both there and in *EME Homer City* specifically required EPA to continue implementing CAIR in recognition both of the environmental benefits from implementation of CAIR and the reliance interests that had accumulated during the time CAIR has been in place. *EME Homer City*, 696 F.3d at 38. CAIR will remain in place until a replacement program is implemented. Furthermore, it will take some time for any replacement to be developed, promulgated, and implemented. In the meantime, the reliance interests identified by the Court in *EME Homer City* will continue to require the implementation of CAIR. Thus, EPA reasonably concluded that the emission reductions attributable to control of interstate pollution are due to permanent and enforceable controls. 78 Fed. Reg. 48,103, 48,120 (Aug. 7, 2012) (proposed redesignation for Chicago area).

It is not the case that the McCarthy Memorandum constitutes a "change of position," as alleged by Petitioners at pages 43-45 of their brief. Rather, the Memorandum simply represents the recognition by the Agency of the changed factual circumstances created by the *EME Homer City* decision. The Agency statements relied on by Petitioners as the basis for their argument all date from the period between publication of the Transport Rule on August 8, 2011, and issuance

of the decision in *EME Homer City* on August 21, 2012. (While the Transport Rule was stayed on December 31, 2011, the litigation was ongoing on an accelerated schedule.) Thus, during that period CAIR had already been replaced, and it was therefore reasonable for the Agency to rely on the Transport Rule rather than CAIR for projecting future emissions. Once the Transport Rule was vacated with the accompanying instruction to continue to implement CAIR until a valid replacement rule is promulgated, EPA could no longer rely on the Transport Rule for that purpose. Given that CAIR will remain in place until another rule addressing interstate transport is in place, it is reasonable for the Agency to rely on emission reductions from CAIR in carrying out its ongoing responsibilities under the Act.

Finally, given the Court's explicit instructions that EPA continue to implement CAIR, Petitioners' argument (at 45-47) that the McCarthy Memorandum is inconsistent with *North Carolina* and *EME Homer City* is meritless. In *EME Homer City*, the Court recognized that CAIR should remain in effect not only to preserve the environmental benefits, but also "in light of the reliance interests accumulated over the intervening four years." 696 F.3d at 38. The Court could not have intended to protect the reliance interests that had accumulated due to CAIR by requiring EPA to ignore the effect of CAIR in implementing the Act, with the result of requiring the States or EPA to impose

additional regulatory requirements on regulated sources to achieve the same emission reductions.

CONCLUSION

The petitions for review should be dismissed or denied.

Respectfully submitted,
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December 11, 2013

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing Brief of Respondent EPA contains 7,169 words as counted by the Microsoft Office Word 2007 word processing system, and thus complies with the applicable word limitation.

/S/ Norman L. Rave, Jr.
Norman L. Rave, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2013, the foregoing Brief of Respondent was served electronically through the Court's CM/ECF system on all registered counsel.

/S/ Norman L. Rave, Jr.
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