ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1172
Consolidated with No. 18-1174

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

NATURAL RESOURCES DEFENSE COUNCIL,

Petitioner,

v.

ANDREW WHEELER, Acting Administrator,
U.S. Environmental Protection Agency, and
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

ARKEMA, INC., et al.,

Intervenors.

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

INITIAL OPENING BRIEF OF PETITIONER NRDC

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Dated: November 7, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioner Natural Resources Defense Council certifies as follows:

(A) Parties

The parties in No. 18-1172 are petitioner Natural Resources Defense Council; respondents Andrew Wheeler, in his official capacity as Acting Administrator of the U.S. Environmental Protection Agency, and the U.S. Environmental Protection Agency; and intervenors Mexichem Fluor, Inc., Arkema Inc., and National Environmental Development Association's Clean Air Project. The parties in No. 18-1174 are petitioners State of New York, State of California, State of Delaware, State of Illinois, Commonwealth of Massachusetts, State of Minnesota (by and through its Minnesota Pollution Control Agency), State of New Jersey, State of Oregon, Commonwealth of Pennsylvania Department of Environmental Protection, State of Vermont, State of Washington, and the District of Columbia; respondents Andrew Wheeler, in his official capacity, and the U.S. Environmental Protection Agency; and intervenors Mexichem Fluor, Inc., Arkema Inc., and National Environmental Development Association's Clean Air Project.

(B) Rulings Under Review

The petitions for review challenge the Environmental Protection Agency's final action titled "Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP)

Program," which appears in the Federal Register at 83 Fed. Reg. 18,431 (Apr. 27, 2018).

(C) Related Cases

Mexichem Fluor, Inc. v. EPA (*Mexichem II*), D.C. Cir. Nos. 17-1024, 17-1030. NRDC is a Respondent-Intervenor in *Mexichem II*, which is currently pending before this Court and involves a challenge to a 2016 EPA rule restricting the use of hydrofluorocarbons.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, petitioner Natural Resources Defense Council certifies that it is a non-governmental corporation with no parent corporation and no publicly held company holding 10% or more of its stock. NRDC, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization dedicated to improving the quality of the human environment and protecting the nation's endangered natural resources.

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GLOSSARY OF ABBREVIATIONS

CFC	Chlorofluorocarbon
EPA	Environmental Protection Agency
HFC	Hydrofluorocarbon
SNAP	Significant New Alternatives Policy

INTRODUCTION

Hydrofluorocarbons (HFCs) are potent greenhouse gases developed as substitutes for chemicals that deplete the stratospheric ozone layer. In 2015, the U.S. Environmental Protection Agency (EPA) determined that other alternatives for ozone-depleting substances were safer than HFCs—"reduc[ing] overall risk to human health and the environment"—and issued a final rule under Clean Air Act Section 612(c) placing HFCs on the list of prohibited substitutes for ozone-depleting substances. 42 U.S.C. § 7671k(c); 80 Fed. Reg. 42,870 (July 20, 2015) (JA __).

In *Mexichem Fluor, Inc. v. EPA (Mexichem)*, 866 F.3d 451 (D.C. Cir. 2017), this Court unanimously upheld EPA authority to place HFCs on the "prohibited" list and rejected all claims that the listing decision was arbitrary and capricious. The Court also agreed that EPA could prevent any current user of ozone-depleting substances from adopting HFCs for prohibited uses. The Court, however, held that EPA could not require manufacturers currently using HFCs to stop doing so. Consequently, it partially vacated and remanded the rule.

In April 2018, EPA issued a decision—styled as "guidance" and issued without notice or opportunity for comment—announcing that the agency will no longer apply *any* of the HFC use restrictions established by the rule, even the restrictions that were upheld by *Mexichem*. 83 Fed. Reg. 18,431 (Apr. 27, 2018) (JA __). The suspension will last indefinitely, pending a future rulemaking that EPA has not even commenced, let alone set a deadline to conclude.

EPA's "guidance" turned *Mexichem*'s partial vacatur into a complete vacatur. It indefinitely suspended portions of a duly promulgated final rule that were expressly affirmed by this Court, without any proposal, opportunity for comment, or observance of the other rulemaking requirements specified in Section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d). The guidance has the immediate effect of authorizing significant emissions of HFCs that were previously prohibited. Yet the agency failed to acknowledge or analyze the harms to human health and the environment from lifting these restrictions.

EPA thus violated the Clean Air Act by unlawfully suspending a final rule without notice-and-comment rulemaking and without providing a reasoned explanation for its action. The Court should vacate the so-called "guidance" and restore restrictions on HFC use that protect public health and the environment and that were upheld in *Mexichem*.

STATEMENT OF JURISDICTION

NRDC has petitioned for review of EPA's final action published at 83 Fed. Reg. 18,431 (Apr. 27, 2018) and titled "Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program" (Guidance). EPA issued the Guidance purportedly under the authority of Clean Air Act Section 612, 42 U.S.C. § 7671k. This Court has jurisdiction to review the challenged final action pursuant to 42 U.S.C.

§ 7607(b). NRDC timely filed the petition on June 26, 2018, within 60 days of the date of publication. *Id.*

STATEMENT OF THE ISSUES PRESENTED

Whether the Guidance:

1. was issued without observance of procedure required by law because EPA indefinitely suspended a duly promulgated final rule without notice and comment, 42 U.S.C. § 7607(d)(9)(D)?
2. is arbitrary, capricious, or otherwise unlawful because the agency gave no reasoned explanation for indefinitely suspending portions of a final rule upheld in *Mexichem*, 42 U.S.C. § 7607(d)(9)(A)?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are included as an addendum to this brief.

STATEMENT OF THE CASE

NRDC asks this Court to vacate EPA's Guidance. The Guidance indefinitely suspended portions of a final rule that prohibited current users of ozone-depleting substances from replacing those substances with HFCs in specified uses. 83 Fed. Reg. at 18,435.

I. Clean Air Act Title VI and the Safe Alternatives Program

In the 1970s, scientists discovered that certain chemicals were degrading the stratospheric ozone layer. Depletion of the ozone layer at all latitudes, and especially in an "ozone hole" over Antarctica and reaching southern South America and

Australia, was (and still is) allowing more ultraviolet radiation to reach Earth's surface and increasing risk of skin cancer, among other harms. *See NRDC v. EPA*, 464 F.3d 1, 3 (D.C. Cir. 2006). In 1987, the United States joined other nations in adopting the Montreal Protocol, a treaty that requires reductions in the production and use of ozone-depleting substances. *See* Montreal Protocol on Substances that Deplete the Ozone Layer, *opened for signature* Sept. 16, 1987, S. Treaty Doc. No. 100–10, 1522 U.N.T.S. 29. Every nation on Earth eventually ratified the Protocol.

In 1990, Congress enacted Title VI of the Clean Air Act to fulfill and go beyond the country's commitments under the Montreal Protocol. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 601-18, 104 Stat. 2399, 2649-72. Title VI sets schedules for ending the production of most ozone-depleting substances, in some cases more rapidly than required by the Protocol. 42 U.S.C. §§ 7671a, 7671c, 7671d. In addition, Title VI contains provisions to assure the safety of the substitutes that replace ozone-depleting substances. Section 612, the "Safe Alternatives Policy," provides that "it shall be unlawful to replace any [ozone-depleting] substance with any substitute substance which [EPA's] Administrator determines may present adverse effects to human health or the environment" if another substitute that "reduces the overall risk to human health and the environment" is "currently or potentially available." *Id.* § 7671k(c). Section 612 instructs EPA to "publish a list of (A) the substitutes prohibited under this subsection for specific uses and (B) the safe alternatives identified under this subsection for specific uses." *Id.*

In 1994, EPA established a framework for administering Section 612, the Significant New Alternatives Policy Program (Safe Alternatives Program, or SNAP). 59 Fed. Reg. 13,044 (Mar. 18, 1994) (JA __), *codified at* 40 C.F.R. pt. 82, subpt. G. At the core of the Safe Alternatives Program are EPA's lists of acceptable (safe) and unacceptable (prohibited) substitutes for ozone-depleting substances. *See* 40 C.F.R. pt. 82, subpt. G, Apps. A-V (unacceptable substitutes);[1] EPA, *SNAP Substitutes By Sector*, https://www.epa.gov/snap/snap-substitutes-sector (acceptable substitutes). The lists are organized according to end uses, such as retail food refrigeration and motor vehicle air conditioning; for each end use, the lists indicate whether particular chemicals are acceptable or unacceptable substitutes for ozone-depleting substances, as well as the effective date of the listing. *See, e.g.*, 40 C.F.R. pt. 82, subpt. G., App. U.

"EPA uses notice-and-comment rulemaking to place any alternative on the list of prohibited substitutes . . . or to remove a substitute from either the list of prohibited or acceptable substitutes." 80 Fed. Reg. at 42,876 (JA __); *see also* 40 C.F.R. § 82.180(a)(8)(ii) (providing that "a rulemaking process will ensue" when EPA proposes to add a substance to the unacceptable list and "for removal from either list"). "No person may use a substitute" once EPA adds it the unacceptable list. 40 C.F.R. § 82.174(d); *see also* 42 U.S.C. § 7671k(c). The prohibition extends to "use in a

[1] The unacceptable substitutes list also includes substances that EPA designates as "acceptable subject to use conditions" or "acceptable subject to narrowed use limitations." *See* 40 C.F.R. § 82.180(b)(2), (3). Both designations limit, but do not ban, use of the chemical. *Id.*

manufacturing process or product, in consumption by the end-user, or in intermediate uses, such as formulation or packaging for other subsequent uses." 40 C.F.R. § 82.172.

When determining whether to list substitutes as acceptable or unacceptable, EPA "compares risks of substitutes to risks from continued use of ozone-depleting compounds as well as to risks associated with other substitutes." 59 Fed. Reg. at 13,046 (JA __); *see also* 40 C.F.R. § 82.170(a). Among the risks considered are substances' "[a]tmospheric effects," including their contribution to climate change. 40 C.F.R. § 82.180(a)(7)(i); 80 Fed. Reg. at 42,877, 42,938 (JA __). EPA adds a substance to the unacceptable list if it "poses risk of adverse effects to human health and the environment" and "other alternatives exist that reduce overall risk." 40 C.F.R. § 82.180(b)(4). EPA lists a substance as acceptable if its risks are not significantly greater than available substitutes. 80 Fed. Reg. at 42,876 (JA __); *see also* 40 C.F.R. § 82.180(b)(1).

Any person may petition the agency to add or remove a substance from either list. 42 U.S.C. § 7671k(d). Acting through rulemaking, EPA may change the designation of a substance from acceptable to unacceptable, and vice versa, based on new information about the substance's health or environmental effects or the availability of alternatives. *Mexichem*, 866 F.3d at 457; 80 Fed. Reg. at 42,878, 42,935-36 (JA __); 40 C.F.R. § 82.180(a)(8)(ii).

II. Regulation of HFCs under the Safe Alternatives Program

Hydrofluorocarbons (HFCs) are a class of chemicals developed as substitutes for chlorofluorocarbons (CFCs) in a variety of end uses, including commercial and residential air conditioners, refrigeration systems, and aerosol products. Declaration of Alexander Hillbrand ¶ 5. CFCs are both powerful ozone-depleting substances and greenhouse gases. *Id.* EPA initially listed HFCs as acceptable "near-term" substitutes on the grounds that "HFCs as a class offer lower overall risk than continued use of CFCs" because they do not deplete ozone and have less climate impact than CFCs. *See* 59 Fed. Reg. at 13,071-72. At the time, EPA noted its concern that "rapid expansion of the use of some HFCs could contribute to global warming." *Id.* at 13,071. EPA also signaled that the initial acceptable listings—including HFCs—could be rescinded in the future if safer alternatives later became available. *Id.* at 13,047.

In fact, relative to carbon dioxide, HFCs remain extremely potent greenhouse gases. For example, the most common HFC, HFC-134a, "is 1,430 times more damaging to the climate system than carbon dioxide" over a 100-year period. 80 Fed. Reg. at 42,879; *see also* Declaration of Kim Knowlton ¶ 13. HFC emissions are rising rapidly domestically and globally.[2] 80 Fed. Reg. at 42,879. Curtailing HFC emissions is essential to mitigating the extent and impact of climate change. Knowlton Decl. ¶ 15.

[2] Recognizing the threat of rapidly growing HFC use, in 2016 the parties to the Montreal Protocol agreed by consensus to adopt the Kigali Amendment, which establishes a schedule for phasing down HFC production and consumption. Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer,

EPA acknowledged the risks from HFC emissions in 2009, when it found that emissions of HFCs endanger the health of current and future generations by contributing to climate change. 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009). This Court upheld that endangerment determination in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *rev'd in part on other grounds*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

Between 2010 and 2012, environmental advocacy organizations, including NRDC, filed three petitions asking EPA to list HFCs as unacceptable substitutes for ozone-depleting substances in a number of end uses. 80 Fed. Reg. at 42,879-80 (JA __). EPA did so in 2015, prohibiting or restricting the use of various HFCs in commercial refrigerators, motor vehicle air conditioners, foams, and aerosols.[3] 80 Fed. Reg. at 42,872-73 (2015 Rule) (JA __), *codified at* 40 C.F.R. pt. 82, subpt. G., App. U. EPA found that alternative substitutes were available and that the harm from HFCs' contribution to climate change significantly outweighed the overall risks from other substitutes. 80 Fed. Reg. at 42,880 (JA __); *see also* 79 Fed. Reg. 46,126, 46,135 (Aug. 6, 2014) (stating that EPA considered approximately 400 HFC alternatives in its

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Oct. 15, 2016, U.N.T.C. XXVII.2.f. The United States has not ratified the Kigali Amendment and does not have a federal regulatory strategy to implement the phasedown. Knowlton Decl. ¶ 15.

[3] For each end use, the 2015 Rule designated individual HFCs as either "unacceptable" (and thus prohibited), "acceptable subject to use conditions," or "acceptable subject to narrowed use limits." 40 C.F.R. pt. 82, subpt. G., App. U; *see also id.* § 82.180(b).

comparative risk analysis). EPA made this finding based on extensive, peer-reviewed research into HFCs' climate risks, research that had accumulated in the two decades since the agency first listed the chemicals as acceptable substitutes. 80 Fed. Reg. at 42,879, 42,936 (JA __).

For each end use, the 2015 Rule established effective dates for the HFC listing, ranging from September 18, 2015 to January 1, 2025, after which Section 612's use restrictions would apply. 40 C.F.R. pt. 82, subpt. G., App. U. The restrictions applied to two groups: 1) manufacturers that have switched to using HFCs; and 2) entities using equipment or products (such as commercial refrigeration systems) containing ozone-depleting substances. As explained below, there are hundreds of thousands of these systems containing ozone-depleting substances in operation today—such systems are the subject of this case. After the effective dates, manufacturers making products with HFCs would have to shift to safer alternatives. *Mexichem*, 866 F.3d at 457. Also after the effective dates, entities using equipment or products containing ozone-depleting substances could no longer replace them with equipment or products containing HFCs. *Id.* After that point, such entities may replace systems using ozone-depleting substances only with equipment or products containing safer alternatives. As described further below, *infra* p. 17, these restrictions on current users of ozone-depleting substances were poised to prevent significant amounts of HFC emissions.

III. The *Mexichem* Decision

HFC manufacturers Mexichem Fluor, Inc. and Arkema Inc. petitioned for review of the 2015 Rule, alleging that EPA exceeded its statutory authority and acted arbitrarily in changing the listing status of HFCs. *Mexichem*, 866 F.3d at 456. NRDC and two manufacturers of HFC alternatives, Honeywell International Inc. (Honeywell) and The Chemours Company FC, LLC (Chemours), intervened in support of EPA. *Id.* at 453.

The panel held unanimously that Title VI authorized EPA to move a substitute from the acceptable list to the unacceptable list and that EPA acted reasonably when it added uses of HFCs to the unacceptable list in the 2015 Rule. *Id.* at 457, 463-64. The Court also confirmed EPA's authority to "bar any manufacturers that still make products that contain ozone-depleting substances from replacing those ozone-depleting substances with HFCs." *Id.* at 457 (emphasis omitted).

The *Mexichem* majority, however, determined that Title VI did not allow EPA to "prohibit manufacturers from making products that contain HFCs if those manufacturers already replaced ozone-depleting substances with HFCs at a time when HFCs were listed as safe substitutes."[4] *Id.* at 458 (emphasis omitted). Accordingly, the Court granted the petitions in part and "vacate[d] the 2015 Rule to the extent it requires manufacturers to replace HFCs with a substitute substance." *Id.* at 464.

[4] Dissenting in part, Judge Wilkins would have upheld the 2015 Rule in its entirety. 866 F.3d at 466-73.

Although the opinion focuses on product manufacturers, its "interpretation of Section 612(c) applies to any regulated parties that must replace ozone-depleting substances within the timelines specified by Title VI." *Id.* at 457 n.1.

On October 9, 2018, the Supreme Court denied NRDC's and Honeywell and Chemours' petitions for a writ of certiorari challenging the holding that EPA lacks authority to regulate current users of HFCs. *Honeywell Int'l Inc. v. Mexichem Fluor Inc.*, No. 17-1703, 2018 WL 3127416 (U.S. Oct. 9, 2018); *NRDC v. Mexichem Fluor, Inc.*, No. 18-2, 2018 WL 3210813 (U.S. Oct. 9, 2018). Nothing in the Court's disposition affects *Mexichem*'s holding that EPA properly prohibited entities from replacing ozone-depleting substances with HFCs—the subject of this case.

IV. Guidance Suspending the 2015 Rule's HFC Listings

In early 2018, after the mandate issued in *Mexichem*, NRDC, Honeywell, and Chemours learned that EPA was considering taking action that would affect the future of the 2015 Rule. They urged EPA to limit any action or guidance to the narrow scope of *Mexichem*'s partial vacatur. They explained that any broader action would constitute an amendment to the 2015 Rule and require notice-and-comment rulemaking. Letter from David D. Doniger et al., NRDC, to Matt Leopold, EPA General Counsel, and William Wehrum, Ass. Admin. of EPA Office of Air & Radiation 1-2 (Mar. 6, 2018) (JA __) [hereinafter NRDC Letter]; Letter from Jonathan S. Martel, Counsel for Honeywell, and Thomas A. Lorenzen, Counsel for Chemours, to Matt Leopold, EPA General Counsel, and William Wehrum, Ass. Admin. of EPA

Office of Air & Radiation 2-3 (Feb. 7, 2018) (JA __) [hereinafter Honeywell & Chemours Letter].

EPA did not heed that advice. On April 27, 2018, EPA published the "guidance" at issue in this case, indefinitely suspending the application of all of the HFC prohibitions in the 2015 Rule to any entity, including businesses still operating equipment using ozone-depleting chemicals. 83 Fed. Reg. at 18,431, 18,434-35 (JA __). EPA acknowledged that *Mexichem* "rejected the arbitrary and capricious challenges" to the 2015 Rule and that the Court's vacatur was "partial." *Id.* at 18,434-35 (JA __). Nevertheless, EPA declared that it "will implement the court's vacatur by treating it as striking the HFC listing changes in the 2015 Rule *in their entirety*." *Id.* at 18,435 (emphasis added) (JA __). EPA thereby converted the partial vacatur into a complete vacatur, and it did so without notice and comment.

Had EPA provided opportunity for public comment, NRDC would have called the agency's attention to its own data showing that more than 300,000 commercial refrigeration systems used in supermarkets, convenience stores, and other food retail, storage, and processing facilities across the country still use ozone-depleting chemicals. Hillbrand Decl. ¶¶ 11-14. *Mexichem* affirmed the 2015 Rule's prohibition barring these users from switching to equipment that uses HFCs. 866 F.3d at 457, 460. EPA's suspension of that prohibition will cause a substantial additional amount of destructive HFC emissions, with significant adverse consequences for human health and the environment. Hillbrand Decl. ¶ 7, 18-19; Knowlton Decl. ¶¶ 15, 30.

When it suspended the HFC listings, EPA did not even mention, let alone analyze, the harms from these additional emissions.

EPA stated only that the blanket suspension was needed to "dispel confusion" created by *Mexichem* and to "provide regulatory certainty." 83 Fed. Reg. at 18,432 (JA __). According to EPA, *Mexichem* created confusion by drawing distinctions that the 2015 Rule did not. *Id.* at 18,434-35 (JA __). For instance, unlike the 2015 Rule, *Mexichem* distinguished between users of ozone-depleting substances and users of HFCs. *Id.* at 18,435 (JA __); 866 F.3d at 460. Additionally, the 2015 Rule does not specify at what moment a manufacturer or an end-user has "replaced" ozone-depleting substances with a substitute and thus, under *Mexichem*, is no longer subject to EPA's Title VI authority. 83 Fed. Reg. at 18,435 (JA __); 866 F.3d at 458-59.

Despite the fact that *Mexichem* upheld the 2015 Rule's HFC prohibitions with respect to users of ozone-depleting substances, EPA concluded that it could not apply the partially vacated 2015 Rule without rewriting it. 83 Fed. Reg. at 18,435 (JA __). Such revisions, EPA acknowledged, would require notice-and-comment rulemaking. *Id.* Nonetheless, EPA suspended the Rule's HFC listings in their entirety, asserting without evidence that regulated businesses simply could not wait for normal notice and comment procedures to run their course. *Id.*

EPA did not consider any more tailored measures it could have taken without notice-and-comment rulemaking to clarify the application of the 2015 Rule in light of *Mexichem*. *See* Honeywell & Chemours Letter at 3 (JA __) ("[A]ny near term guidance

EPA issues should be limited to advising the regulated community, consistent with the court's order, that manufacturers currently making products with non-ozone-depleting chemicals are relieved of the prohibition against using HFCs listed as unacceptable in the July 2015 SNAP rule."). For example, the Guidance does not discuss the option of implementing the partial vacatur by issuing an interpretive rule or dealing with questions of applicability on a case-by-case basis in response to inquiries from regulated entities.

The Guidance states that the suspension will remain in place indefinitely, pending a future rulemaking on no specific schedule. 83 Fed. Reg. at 18,435. EPA has yet to issue even a proposal.

SUMMARY OF THE ARGUMENT

In issuing the Guidance, EPA violated the Clean Air Act in two ways, either of which is grounds for vacatur.

First, EPA indefinitely suspended valid portions of the 2015 Rule without providing notice or an opportunity for comment. "[D]elaying [a] rule's effective date" is "tantamount to amending or revoking [the] rule." *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017). An agency cannot amend or revoke a rule without first going through notice and comment. 5 U.S.C. §§ 551(5), 553(b). Therefore, EPA was required to engage in notice-and-comment rulemaking before suspending portions of the 2015 Rule upheld by this Court. *See* 42 U.S.C. § 7607(d)(1)(I), (d)(2)-(6).

Second, the Guidance is arbitrary and capricious because EPA did not give a "reasoned explanation" for indefinitely suspending the 2015 Rule's HFC listings. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). The Guidance will cause significant additional emissions of HFCs, potent greenhouse gases that EPA has determined present risks to health and the environment. EPA did not even mention, let alone weigh, these negative consequences of its action. The agency's failure to explain why the suspension's purported benefits to industry outweigh its health and environmental harms renders the Guidance arbitrary and capricious. 42 U.S.C. § 7607(d)(9)(A).

The Court should vacate the Guidance and thereby restore duly promulgated restrictions affirmed by this Court on replacing ozone-depleting substances with HFCs.

STANDING

An organization has standing to sue on behalf of its members when: (1) the interests at stake are germane to the organization's purpose; (2) the lawsuit does not require participation of individual members; and (3) the organization's members would have standing to sue in their own right. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

NRDC satisfies this test. NRDC is committed to reducing emissions of greenhouse gases to protect the health of its members and prevent the most devastating effects of climate change on humans and the environment. Hillbrand

Decl. ¶ 6; Declaration of Gina Trujillo ¶¶ 5-7. NRDC has long been engaged in the administration and defense of multiple aspects of Title VI of the Clean Air Act, including the Safe Alternatives Program. Hillbrand Decl. ¶ 6. NRDC has also worked on multiple fronts to reduce HFC pollution, including by intervening in *Mexichem* and a related case, *Mexichem Fluor, Inc. v. EPA*, D.C. Cir. Nos. 17-1024, 17-1030. *See id.* Neither the claims asserted, nor the relief requested in this case, require the participation of individual members, and NRDC does not seek individualized relief. *See Laidlaw*, 528 U.S. at 181. Finally, many of NRDC's members would have standing to sue in their own right because they are suffering an "injury in fact" that is "fairly traceable" to the Guidance and would "likely be redressed by a favorable decision." *Id.* at 180-81.

Injury in fact. NRDC has standing to oppose the weakening of pollution-reduction programs when the regulatory change harms its members. *See, e.g., NRDC v. EPA*, 755 F.3d 1010, 1016-17 (D.C. Cir. 2014); *NRDC v. EPA*, 643 F.3d 311, 317-19 (D.C. Cir. 2011); *NRDC v. EPA*, 489 F.3d 1364, 1370-71 (D.C. Cir. 2007). By suspending valid portions of the 2015 Rule, the Guidance harms NRDC's members by significantly increasing HFC emissions that contribute to more severe impacts of climate change. *Cf. NRDC v. EPA*, 464 F.3d 1, 7 (D.C. Cir. 2006) (finding that additional emissions of ozone-depleting substances, which mix throughout Earth's atmosphere, injured NRDC members by increasing health risks). By indefinitely suspending portions of the 2015 Rule affirmed in *Mexichem*, the Guidance allows

current users of hundreds of thousands of commercial refrigeration systems that use ozone-depleting chemicals to replace that equipment with new equipment using HFCs. Hillbrand Decl. ¶¶ 11-14. In the absence of the 2015 Rule's restrictions, users will likely elect to replace these aging units with HFC-containing equipment because HFCs are typically the lowest-cost refrigerant option. *Id.* ¶ 15.

Because this HFC-containing equipment will leak HFCs during ordinary operations, servicing, and eventual disposal, HFC emissions will rise predictably and certainly in proportion to the additional adoption of such equipment. *Id.* ¶ 16. Based on EPA data, NRDC estimates that, for each year that the valid portions of the 2015 Rule remain suspended, HFC emissions will increase by the equivalent of 83 million metric tons of carbon dioxide—more than the annual carbon dioxide emissions of 20 average U.S. coal-fired power plants. *Id.* ¶¶ 7, 18-19.

EPA has found that HFC emissions exacerbate climate change and thus endanger human health and the environment. 74 Fed. Reg. at 66,497; *see also* 80 Fed. Reg. at 42,879 (JA __) (describing rapidly rising rates of HFC emissions and their extreme potency as greenhouse gases). EPA also determined that, for the end uses addressed by the 2015 Rule, the climate risks from HFCs significantly outweigh the overall risks from available alternatives. 80 Fed. Reg. at 42,880 (JA __). The Court upheld this finding in *Mexichem*. 866 F.3d at 462-64.

The additional HFC emissions caused by the suspension of the 2015 Rule are worsening injuries to NRDC's members' health, finances, families, and communities

in a variety of ways, including strengthening hurricanes and other storms (such as Hurricanes Harvey and Sandy), increasing the rate of sea level rise and thus the frequency and extent of coastal flooding, and exacerbating heatwaves, droughts, and wildfires. Knowlton Decl. ¶¶ 16-28; Trujillo Decl. ¶ 4; *see also* Declaration of Robert Kopp ¶¶ 17-23.

For instance, NRDC member Paul Jeffrey resides on a barrier island in New Jersey vulnerable to sea level rise and hurricanes. Declaration of Paul Jeffrey ¶¶ 2-4. Hurricane Sandy devastated his community; flooding damaged his property and its value remains well below its pre-storm assessment. *Id.* ¶¶ 3-9; *see also* Kopp Decl. ¶¶ 16-18. By increasing HFC emissions, the suspension exacerbates the ongoing risk to Mr. Jeffrey's property and safety from flooding and extreme storms. Knowlton Decl. ¶¶ 15, 19-21, 28, 30; Kopp Decl. ¶¶ 20-23; *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1316-17 (D.C. Cir. 2015) (recognizing that depressed property values and heightened safety risks constitute injury in fact); *see also Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007) (finding that future sea level rise caused by climate change would damage coastal property and so caused a particularized injury to the Commonwealth of Massachusetts).

Causation and Redressability. NRDC's members' injuries are fairly traceable to the suspension of the 2015 Rule. The increased HFC emissions authorized by the Guidance will exacerbate harms from climate change, including stronger hurricanes and more frequent and extensive coastal flooding. *See* Knowlton Decl. ¶¶ 15, 19-21,

28, 30; Kopp Decl. ¶¶ 20-23. EPA issued the 2015 Rule to help avoid and reduce such climate harms.

A favorable decision will "relieve a discrete injury" to NRDC's members. *See Energy Future Coal. v. EPA*, 793 F.3d 141, 145 (D.C. Cir. 2015) (quoting *Massachusetts v. EPA*, 549 U.S. at 525). Vacating the suspension of the 2015 Rule would reinstate the HFC prohibitions as to users of hundreds of thousands of commercial refrigeration systems and prevent HFC emissions equivalent to tens of millions of tons of carbon dioxide. *See* Hillbrand Decl. ¶¶ 7, 11-14, 18-19. Reducing HFC emissions will mitigate the adverse effects of climate change on NRDC members by, for instance, slowing the rate and extent of sea level rise. *See* Kopp Decl. ¶¶ 19-20; Knowlton Decl. ¶¶ 13, 30. A favorable decision will not redress every injury NRDC members suffer from climate change, but it will relieve the discrete injury inflicted by the suspension. *See Energy Future Coal.*, 793 F.3d at 145; *see also Massachusetts v. EPA*, 549 at 525-26 (holding that Massachusetts had standing to challenge EPA's refusal to take an action that would "slow or reduce," but not "reverse," global warming); *NRDC v. EPA*, 464 F.3d at 7 (holding that a court order requiring EPA to restrict production of an ozone-depleting substance would redress the injury to NRDC members from emissions of the chemical).

STANDARDS OF REVIEW

When EPA promulgates or revises regulations issued under Title VI, it must go through notice-and-comment rulemaking. 42 U.S.C. § 7607(d)(1)(I), (d)(2)-(6). A

"court may reverse" an EPA action taken "without observance of procedure required by law." *Id.* § 7607(d)(9)(D). Amending or rescinding a final rule without notice and comment is reversible error. *See, e.g.*, *NRDC v. EPA*, 643 F.3d at 320-21; *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000); *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 523 (D.C. Cir. 1983) ("At a minimum, failure to observe the basic [Administrative Procedure Act] procedures, if reversible error under the APA, is reversible error under the Clean Air Act as well.").

This Court may also reverse final action under the Clean Air Act if it is "arbitrary, capricious, or otherwise contrary to law." 42 U.S.C. § 7607(d)(9)(A). The standard of review for arbitrary and capricious claims under the Clean Air Act is the same as under the APA. *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 891 F.3d 1041, 1047 (D.C. Cir. 2018).

ARGUMENT

I. The Guidance is final agency action

This Court has jurisdiction over petitions for review of any "final action taken" by EPA under the Clean Air Act. 42 U.S.C. § 7607(b)(1). The term "final action" in the Clean Air Act "is synonymous with the term 'final agency action' as used in Section 704 of the APA." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004). To be "final," agency action must "mark the consummation of the agency's decisionmaking process" and "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520

U.S. 154, 177-78 (1997) (citations and internal quotation marks omitted). Suspending a rule's effective date, as EPA did here, is reviewable final agency action. *Clean Air Council*, 862 F.3d at 6-8; *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 108 n.5 (2d Cir. 2018).

A. The Guidance marks the consummation of EPA's decisionmaking

Final action communicates an agency determination that is "definitive," not "merely tentative or interlocutory." *U.S. Army Corps of Engrs. v. Hawkes Co.*, 136 S. Ct. 1807, 1813-14 (2016). The Guidance conveys EPA's decision that it "will not apply the HFC use restrictions or unacceptability listings in the 2015 Rule for any purpose prior to completion of rulemaking." 83 Fed. Reg. at 18,435 (JA __). There is nothing tentative or interlocutory about this decision. Indeed, EPA's professed reason for issuing the guidance was to provide businesses with "regulatory certainty" about their obligations under Section 612. *Id.* at 18,432 (JA __).

The Guidance states that EPA may undertake a future rulemaking to address "the larger implications of the court's opinion" in *Mexichem*. *Id.* at 18,435 (JA __). But "[i]f the possibility (indeed, the probability) of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule . . . would ever be final as a matter of law." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002). In *Clean Air Council v. Pruitt*, this Court held that EPA's stay of a rule's effective date was "tantamount to amending or revoking a rule" and thus marked the consummation of the agency's decisionmaking process, even though EPA

was reconsidering the rule. 862 F.3d at 5-7. Similarly, the Guidance extends *Mexichem*'s partial vacatur to "strik[e] the HFC listing changes in the 2015 Rule in their entirety." 83 Fed. Reg. at 18,435. EPA might revisit this decision at some later date, but that possibility does not affect the finality of the Guidance. *Appalachian Power Co.*, 208 F.3d at 1022 ("The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.").

B. The Guidance creates new legal rights

The Guidance satisfies *Bennett*'s second prong because it rolls back restrictions on HFC use established by the 2015 Rule and thus determines the legal rights of regulated entities. The 2015 Rule prohibited certain manufacturers and users of ozone-depleting substances from switching to HFCs. *Mexichem* affirmed that prohibition. 866 F.3d at 457. Before EPA issued the Guidance, a business that replaced ozone-depleting substances with HFCs in violation of the 2015 Rule ran the risk of an EPA enforcement action. *See* 42 U.S.C. § 7413(a)(3) (authorizing EPA to enforce violations of "a requirement or prohibition of any rule" issued under Title VI). The guidance eliminated that risk, offering "regulatory certainty" that EPA "will not apply" the HFC listings under any circumstance. 83 Fed. Reg. at 18,433 (JA __); *see Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1007 (D.C. Cir. 2014) (holding that an EPA directive was final because it "provide[d] firm guidance to enforcement officials" regarding how to apply a regulation following a judicial interpretation of that regulation).

Supermarkets offer an example of the legal consequences of the Guidance. Approximately 124,000 supermarket refrigeration systems now use ozone-depleting substances, about one-third of the nationwide total. Hillbrand Decl. ¶ 12. The 2015 Rule barred supermarkets from replacing those refrigeration systems with systems that use HFCs after January 1, 2017. 80 Fed. Reg. at 42,903-04 (JA __). That restriction remained in place after *Mexichem*. *See* 866 F.3d at 457, 460. But the suspension strikes the listing of HFCs as unacceptable substitutes for commercial refrigeration systems. *See* 83 Fed. Reg. at 18,435 (JA __). It thereby endows supermarkets with a new legal right to replace their systems containing ozone-depleting chemicals with HFC systems with no regard to the deadline specified in the Rule.

The suspension thus altered the legal regime applicable to users and manufacturers of products containing ozone-depleting substances. *See Bennet*, 520 U.S. at 177-78 (holding that a Biological Opinion authorizing agency action that would harm endangered species—action otherwise prohibited by the Endangered Species Act—was final, in part, because it "alter[ed] the legal regime to which the action agency is subject"). This authorization of previously unlawful conduct and the corresponding release from potential liability for violations of the 2015 Rule are legal consequences flowing from the Guidance. *See Hawkes*, 136 S. Ct. at 1814 (noting that an agency determination has legal consequences when it creates a safe harbor from enforcement); *Clean Air Council*, 862 F.3d at 7 (holding that EPA's stay of a rule's

effective date was final action, in part, because it eliminated compliance requirements and the threat of liability).

The suspension is final action over which this Court has jurisdiction.

II. EPA violated the Clean Air Act by issuing the Guidance without notice and comment

When EPA promulgates or revises Title VI regulations, it must give public notice, an explanation of its proposal, and all pertinent data supporting that proposal. 42 U.S.C. § 7607(d)(1)(I), (d)(2)-(4). It then must accept and respond to comments. *Id.* § 7607(d)(5)-(6). Notice and comment "serve the need for public participation in agency decisionmaking" and "ensure the agency has all pertinent information before it when making a decision." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011).

The Guidance indefinitely suspended portions of the 2015 Rule upheld by this Court in *Mexichem* without notice and comment. "[D]elaying [a] rule's effective date" is "tantamount to amending or revoking [the] rule." *Clean Air Council*, 862 F.3d at 6; *see also Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (describing the indefinite suspension of a rule "until the agency completes a full notice and comment rulemaking" as a "paradigm of revocation"). An agency must go through notice and comment before it can amend or repeal a rule issued through notice and comment. 5 U.S.C. §§ 551(5), 553(b); *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 752-54 (D.C. Cir. 2001); *see also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015)

(stating that agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance"). Thus, EPA could not suspend portions of the 2015 Rule that remained in effect after *Mexichem* without giving the public notice and opportunity for comment required by Clean Air Act Section 307(d)(2)-(6). *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983) ("[A]n agency action which has the effect of suspending a duly promulgated regulation is normally subject to APA rulemaking requirements."); *see also NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d at 113 (holding that the agency violated the APA by suspending a final rule without notice and comment); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d at 523 ("failure to observe the basic APA procedures, if reversible error under the APA, is reversible error under the Clean Air Act as well").

Labeling the suspension "guidance" does not exempt EPA from notice and comment. *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003). The Guidance itself concedes that revisions to the 2015 Rule would necessitate notice-and-comment rulemaking. 83 Fed. Reg. at 18,434 (JA __). If revising the 2015 Rule requires notice and comment, then so too does striking the Rule's listings in their entirety.

EPA makes no effort to argue that the suspension falls within the exceptions to notice-and-comment rulemaking for "interpretive rules" or "general statements of policy." 42 U.S.C. § 7607(d)(1); 5 U.S.C. § 553(b)(A). Nor can it. The suspension is a legislative rule subject to notice-and-comment requirements.

"A rule is legislative if it . . . adopts a new position inconsistent with existing regulations," *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014), "creates new rights or imposes new obligations on regulated parties[,] or narrowly limits administrative discretion," *Ass'n of Flight Attendants v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015). By contrast, an interpretive rule "describes the agency's view of the meaning of an existing statute or regulation" without changing the law's substance. *Mendoza*, 754 F.3d at 1021 (quoting *Batterton v. Marshall*, 648 F.2d 694, 702 n.34 (D.C. Cir. 1980)). Similarly, general statements of policy explain the agency's intentions, but "are binding on neither the public nor the agency;" the agency "retains the discretion and the authority to change its position . . . in any specific case." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (citation omitted).

The suspension is not an interpretive rule because it does not clarify the meaning of the 2015 Rule. Instead, it turns *Mexichem*'s partial vacatur into a complete vacatur, discarding portions of the Rule affirmed by the Court. "[W]hen an agency changes the rules of the game . . . more than a clarification has occurred." *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003).

The Guidance is not a general statement of policy because it is legally binding. It carries the force of law, suspending a duly promulgated final rule and creating new rights for regulated entities.[5] Here, EPA issued the Guidance to create "regulatory

[5] The conclusion that the Guidance is legally binding, and thus a legislative rule, necessarily follows from the conclusion that it satisfies the second *Bennett* factor of

certainty" for businesses, informing them that EPA had terminated the 2015 Rule's prohibition on their replacing ozone-depleting substances with HFCs. 83 Fed. Reg. at 18,432 (JA __). EPA did not reserve discretion to change its position in specific cases. *See Syncor Int'l Corp.*, 127 F.3d at 94. Instead, the Guidance frees all regulated entities from the 2015 Rule's HFC restrictions without qualification. *Gen. Elec. Co.*, 290 F.3d at 383 ("[I]f the language of the [guidance] document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions, it can be binding as a practical matter." (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1328-29 (1992))). The Guidance is a legislative rule, legally binding on the agency and regulated entities.

Finally, EPA did not find that it had "good cause" to forego notice and comment. 42 U.S.C. § 7607(d)(1); 5 U.S.C. § 553(b)(B). To qualify for the good cause exception, a rule must include that finding as well as a "brief statement of reasons" explaining why notice and comment are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). Because the suspension does not include such a finding or statement of reasons, EPA cannot meet the "meticulous and

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determining rights or obligations or having legal consequences. *See NRDC v. EPA*, 643 F.3d at 320 ("Given that the Guidance document changed the law, the first merits question—whether the Guidance is a legislative rule that required notice and comment—is easy."); *see also Ass'n of Flight Attendants*, 785 F.3d at 716 (noting that, in litigation over guidance documents, the finality inquiry overlaps with the question of whether the guidance is a legislative rule).

demanding" standard of an exception that is "narrowly construed" and "reluctantly countenanced." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) (quoting *N.J. Dep't of Envt'l Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980)); *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012).

The Guidance suspends the operation of a final rule issued under Title VI, effectively revoking the listing of HFCs as unacceptable substitutes for various end uses. EPA violated the Clean Air Act by failing to provide the public with notice and opportunity for comment.

III. The Guidance is arbitrary and capricious

Even if EPA had followed the required rulemaking procedures, the Guidance should still be vacated because EPA failed to provide a reasoned explanation for its decision to indefinitely suspend the 2015 Rule's HFC restrictions, allowing users of hundreds of thousands of systems still using ozone-depleting substances to replace them with systems that use HFCs. EPA eliminated these restrictions on HFC use without any consideration of the health, environmental, or economic harms that will result from significant additional emissions.

"One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. at 2125. The "agency must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins.,* 463 U.S. 29, 43 (1983). Agency action is arbitrary and capricious

when the agency "entirely failed to consider an important aspect of the problem." *Id.* "[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). An agency must at least "face the trade-off[s]" presented by its decision and explain why "the trade-off" it selected "was worth it." *Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 323-24 (D.C. Cir. 1992) (emphasis omitted).

After *Mexichem*, EPA had to decide how to implement the decision's partial vacatur. Suspending the prohibition on using HFCs for *all regulated entities* would, as EPA noted, reduce uncertainty about present regulatory requirements. 83 Fed. Reg. at 18,434 (JA __). But EPA never examined the other side of the ledger. The portions of the Rule untouched by the vacatur barred users of hundreds of thousands of commercial refrigeration systems currently using ozone-depleting substances from switching to HFCs. Hillbrand Decl. ¶¶ 11-14; *see Mexichem*, 866 F.3d at 457. By refusing to "apply the HFC use restrictions or unacceptability listings in the 2015 Rule for any purpose," 83 Fed. Reg. at 18,435 (JA __), the Guidance allows those systems to be replaced with HFC-containing equipment. It will lead to HFC emissions equivalent to tens of millions of tons of carbon dioxide for every year it remains in place—a climate-change impact greater than the annual carbon dioxide emissions of 20 coal-fired power plants. Hillbrand Decl. ¶¶ 7, 18-19. Those emissions will exact a toll on health, the environment, and the economy. Knowlton Decl. ¶¶ 15-26. EPA never even acknowledged that the suspension permits additional emissions, and EPA

never considered the harm from those emissions. This is the antithesis of reasoned decision-making.

EPA's failure to acknowledge the harms from HFC emissions is particularly egregious because these are precisely the harms Congress directed the agency to consider when administering the Safe Alternatives Program. Under Section 612, EPA adds a substitute for ozone-depleting substances to the list of unacceptable substitutes when it finds that safer alternatives are available. 42 U.S.C. § 7671k(c). EPA made that finding for HFCs in the 2015 Rule, 80 Fed. Reg. at 42,880, and the Guidance does not reverse or revise it. Yet, EPA suspended the HFC listings, needlessly increasing risks to public health, and ignoring its obligation under Section 612 to ensure "[t]o the maximum extent practicable" that substitutes for ozone-depleting chemicals "reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a). Because it never assessed the advantages of leaving the HFC listings in effect to the extent they were upheld by *Mexichem*, EPA could not weigh those advantages against the reduction in regulatory uncertainty purportedly motivating the suspension. *See Michigan*, 135 S. Ct. at 2707; *Competitive Enter. Inst.*, 956 F.2d at 323-24.

EPA also overstated the benefits of the Guidance for regulated entities. Although suspending the HFC listings eliminates the short-term threat of liability, the Guidance does not reduce industry's long-term uncertainty regarding how EPA will restructure the Safe Alternatives Program to comply with *Mexichem*. 83 Fed. Reg. at 18,435 (JA __) (noting that EPA has yet to address the "larger implications" of

Mexichem); Br. of Carrier Corp. et al. as Amici Curiae in Support of Petitioners at 21-24, *Honeywell Int'l Inc. v. Mexichem Fluor Inc.*, Nos. 17-1703 & 18-2 (U.S. July 26, 2018) (describing the uncertainty experienced by leading manufacturers of commercial refrigerators and air conditioners in the wake of *Mexichem* and persisting after the Guidance). Companies need to make investment and product planning decisions that will govern their conduct many years into the future. Rather than providing certainty, the suspension extends regulatory uncertainty further into the future.

Finally, EPA did not consider any options for clarifying its interpretation of the 2015 Rule post-*Mexichem*. An interpretive rule or announcement that EPA would consider questions regarding the Rule's applicability on a case-by-case basis could have reduced regulatory uncertainty and would not have required notice and comment.

By focusing only on vaguely defined benefits to industry and neglecting to consider health and environmental harms, EPA ignored an "important aspect of the problem." *State Farm*, 463 U.S. at 43. The Guidance is arbitrary and should be vacated. *See* 42 U.S.C. § 7607(d)(9)(A).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for review and vacate the Guidance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the Court's order of October 18, 2018 because it contains 7,757 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the count of Microsoft Word.

I further certify that this brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

November 7, 2018

/s/ Peter J. DeMarco
Peter J. DeMarco

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2018, the foregoing Initial Opening Brief of Petitioner Natural Resources Defense Council has been served on all registered counsel through the Court's electronic filing system.

/s/ Peter J. DeMarco
Peter J. DeMarco