NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 18-1172 and consolidated case 18-1174

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

NATURAL RESOURCES DEFENSE COUNCIL,

Petitioner

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

Respondents.

ON PETITION FOR REVIEW OF AN ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

INITIAL RESPONSE BRIEF FOR RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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RESPONDENT'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Respondent United States Environmental Protection Agency submits this certificate as to parties, rulings, and related cases.

A. Parties and Amici

The parties in these consolidated cases are:

Petitioners: Natural Resources Defense Council; 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: The United States Environmental Protection Agency; E. Scott Pruitt; and Andrew Wheeler.

Intervenors for Respondent: Arkema, Inc. and Mexichem Fluor, Inc.;

B. Rulings Under Review

The agency action under review is EPA's guidance contained in a Federal Register document entitled "Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives

Policy (SNAP) Program," published in the Federal Register at 83 Fed. Reg. 18,431 (April 27, 2018).

C. Related Cases

NRDC is a Respondent-Intervenor in *Mexichem Fluor, Inc. v. EPA* (*Mexichem II*), D.C. Cir. Nos. 17-1024, 17-1030, which challenges an EPA rule titled "Protection of Stratospheric Ozone: New Listings of Substitutes; Changes of Listing Status; and Reinterpretation of Unacceptability for Closed Cell Foam Products Under the Significant New Alternatives Policy Program; and Revision of Clean Air Act Section 608 Venting Prohibition for Propane," published at 81 Fed. Reg. 86,778 (Dec. 1, 2016).

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GLOSSARY

1994 Framework Rule	"Protection of Stratospheric Ozone," 59 Fed. Reg. 13,044 (Mar. 18, 1994)
2015 Rule	"Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program," 80 Fed. Reg. 42,870 (July 20, 2015)
2016 Rule	Protection of Stratospheric Ozone: New Listings of Substitutes; Changes of Listing Status; and Reinterpretation of Unacceptability for Closed Cell Foam Products Under the Significant New Alternatives Policy Program; and Revision of Clean Air Act Section 608 Venting Prohibition for Propane," 81 Fed. Reg. 86,778 (Dec. 1, 2016)
CAA	Clean Air Act
EPA	United States Environmental Protection Agency
HFC	Hydrofluorocarbon
SNAP Guidance	EPA's guidance contained in the document entitled "Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program," published in the Federal Register at 83 Fed. Reg. 18,431 (April 27, 2018).

INTRODUCTION

In 2015, EPA promulgated a rule entitled "Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program," published at 80 Fed. Reg. 42,870 (July 20, 2015) (the "2015 Rule"). In the 2015 Rule, EPA changed the status of certain hydrofluorocarbons (also known as "HFCs") and hydrofluorocarbon blends under its framework for identifying safe alternatives for ozone-depleting substances. In the end-uses[1] that the 2015 Rule addressed, EPA had previously listed these substances as acceptable alternatives for substances that deplete the ozone layer.[2] The 2015 Rule changed those listings. It designated the substances addressed by the rule as unacceptable alternatives (*i.e.*, prohibited) in those end-uses. The 2015 Rule made these changes on a unitary basis, for each listed alternative, without drawing distinctions between various kinds of users of those now "unacceptable" alternatives. As particularly important to this case, the 2015 Rule did not distinguish between users who had already switched to using HFCs and those who had not. Relatedly, the 2015 Rule did not contemplate that, in the event of a partial vacatur, its listings of

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[1] "End-uses" are subsectors such as retail food refrigeration, vending machines, motor vehicle air conditioning systems, and rigid polyurethane appliance foam.

[2] EPA imposed restrictions on use as to certain of these substances. This distinction is not relevant for purposes of this litigation.

individual chemicals could be severed to draw such a distinction between different categories of users.

Mexichem Fluor, Inc., and Arkema Inc. sought review of the 2015 Rule on several grounds. As relevant here, these grounds included that EPA exceeded its statutory authority because "Section 612 unambiguously covers only replacements of ozone-depleting substances and does not authorize 'replacements of replacements.'" Pet. Br. at 29, *Mexichem Fluor, Inc. v. EPA*, No. 15-1328, Dkt. 1605947 (D.C. Cir. Mar. 28, 2016) (JA__).

This Court agreed, holding that EPA had exceeded its statutory authority. EPA only had the authority to regulate the initial replacement of an ozone-depleting substance with a non-ozone-depleting substance. *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 458-59 (D.C. Cir. 2017) ("*Mexichem I*") ("After that transition has occurred, the replacement has been effectuated, and the manufacturer no longer makes a product that uses an ozone-depleting substance."). Finding that EPA's approach in the 2015 Rule represented a "new interpretation" not authorized by 42 U.S.C. § 7671k(c), the Court partially vacated the 2015 Rule, "to the extent it requires manufacturers to replace HFCs with a substitute substance." 866 F.3d at 457 n.1, 464. Footnote 1 of *Mexichem I* provided that "[a]lthough we focus primarily on product manufacturers in this case, our interpretation of Section 612(c) applies to any regulated parties that must replace ozone-depleting substances within the timelines specified by Title VI." 866 F.3d 451, 457 n.1. As explained in more detail below,

these aspects of the Court's opinion cannot be implemented in a literal sense without drawing distinctions between different kinds of users—in particular, between those users who had already replaced ozone-depleting substances with HFCs versus those that had not—that neither the 2015 Rule nor the underlying regulatory program contemplated.

Mexichem I prompted significant confusion and uncertainty in the regulated community. *See* "Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program," 83 Fed. Reg. 18,431, 18,434 (April 27, 2018) ("SNAP Guidance") (JA__). Among other things, EPA issued the SNAP Guidance to "[p]rovid[e] guidance to stakeholders on how EPA will implement the court's partial vacatur of the 2015 Rule in the near term, pending a rulemaking." *Id.* at 18,432 (JA__).

The SNAP Guidance is not, as Petitioners would have it, final agency action with actual legal consequences on regulated parties and is, at most, an "interpretative rule" within the meaning of the Administrative Procedure Act.[3] Regardless, it is entirely correct.

EPA has begun the process of notice-and-comment rulemaking to address the distinction between those who have already replaced ozone-depleting substances and those who have not. Pending completion of that process, EPA correctly concluded

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[3] In the remainder of the brief EPA uses the phrasing "interpretive rule" rather than "interpretative rule."

that *Mexichem I* vacated the unitary, non-severable HFC listings in the 2015 Rule in their entirety and that any changes to separate out those who had already replaced ozone-depleting substances would require rulemaking. Each of the listings in the 2015 Rule is one, integral action with respect to the users it regulates. Each listing therefore necessarily stands or falls as a whole because there are no components to the regulatory text that can be treated independently and severed. Indeed, even NRDC (one of the petitioners in this case) has argued—at least, until now—that *Mexichem I* "*cannot be reconciled* with the 2015 Rule that was under review or with EPA's longstanding SNAP regulations, *and cannot be implemented as written*." Respondent-Intervenors' Reply Br. in Support of Motion to Continue to Hold Case in Abeyance, *Mexichem Fluor v. EPA*, No. 17-1024, Dkt. 1729788 at 5 (D.C. Cir. May 7, 2018) (emphasis added) (JA__).

JURISDICTION

As explained below, this Court lacks jurisdiction to review the SNAP Guidance, because it is not final agency action. *See* 42 U.S.C. § 7607(b)(1); *Sierra Club v. EPA*, 873 F.3d 946, 953 (D.C. Cir. 2017); *infra* Argument I.

STATEMENT OF ISSUES

1. Is the SNAP Guidance judicially reviewable final agency action where it has no legal consequences because it simply explains that the necessary legal consequence of *Mexichem I* was to vacate, in their entirety, the 2015 Rule's listings as to HFCs?

2. Did the SNAP Guidance require notice-and-comment procedures where it is an interpretive rule that simply articulates the existing state of the law following *Mexichem I*?

3. In issuing the SNAP Guidance, was EPA required to consider the possibility of increased HFC emissions even though the necessary legal consequence of *Mexichem I* was that the 2015 Rule's HFC listings were vacated in their entirety?

4. If the SNAP Guidance is in some respect defective, should the Court remand the guidance without vacatur given the absence of clarity for users of HFCs following *Mexichem I*, the disruption that vacatur would cause, and the possibility that EPA could cure any such defect?

PERTINENT STATUTES AND REGULATIONS

All of the applicable statutes, etc., are contained in Petitioner NRDC's brief and statutory addendum.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background.

A. Title VI of the Clean Air Act.

Title VI of the CAA, 42 U.S.C. §§ 7671-7671q, implements the United States' obligations to phase out production and consumption[4] of ozone-depleting substances as a party to the Montreal Protocol on Substances that Deplete the Ozone Layer, and

[4] As defined at 42 U.S.C. § 7671.

contains numerous complementary measures. Of particular relevance here, Section 7671k(c) addresses alternatives to ozone-depleting substances. It directs EPA to promulgate regulations governing the replacement of ozone-depleting substances with alternatives.[5] 42 U.S.C. § 7671k(c). Specifically, Section 7671k(c) requires that EPA issue regulations providing that "it shall be unlawful to replace any [ozone-depleting] substance with any substitute substance which the Administrator determines may present adverse effects to human health or the environment" where other substitutes that "reduce[] the overall risk to human health and the environment" are "currently or potentially available." *Id.* EPA must publish lists of substitutes prohibited for specific uses and substitutes that are safe alternatives for specific uses. *Id.* Any person may petition EPA to amend the lists, and producers of a substitute must notify EPA before introducing that substitute into interstate commerce. *Id.* § 7671k(d), (e).

B. EPA's Significant New Alternatives Policy Program.

In 1994, EPA promulgated regulations establishing the "Significant New Alternatives Policy" program ("Alternatives Program"),[6] a framework for carrying out EPA's statutory obligation to identify safe alternatives under Section 7671k. 40 C.F.R. pt. 82, subpt. G; Protection of Stratospheric Ozone, 59 Fed. Reg. 13,044 (Mar. 18,

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[5] "Substitute" and "alternative" mean the same thing in the Alternatives Program and are used interchangeably. *See* 40 C.F.R. § 82.172.

[6] While EPA refers to this program as "SNAP," this brief uses "Alternatives Program" in an effort to minimize the use of acronyms.

1994) (the "1994 Framework Rule"). The objective of the Alternatives Program has always been to promote the use of alternatives that have lower overall risks relative to other substitutes for the same end-use. *See* 40 C.F.R. § 82.170(a).

EPA's implementation of the Alternatives Program is based on a "comparative risk framework." This framework evaluates alternatives by end-use. For each end-use, it restricts the use of alternatives that present relatively higher overall risks to human health or the environment as compared with other available alternatives for that same use. 1994 Framework Rule, 59 Fed. Reg. at 13,046 (JA__). EPA's comparative risk framework includes seven specific criteria for evaluating alternatives: "(i) Atmospheric effects and related health and environmental impacts; (ii) General population risks from ambient exposure to compounds with direct toxicity and to increased ground-level ozone; (iii) Ecosystem risks; (iv) Occupational risks; (v) Consumer risks; (vi) Flammability; and (vii) Cost and availability of the substitute." 40 C.F.R. § 82.180(a)(7). Consistent with Section 7671k(c)'s requirement to publish lists of acceptable and unacceptable alternatives, EPA uses these criteria to classify alternatives as (i) acceptable, (ii) acceptable subject to use conditions, (iii) acceptable subject to narrowed use limits, (iv) unacceptable, or (v) pending. 40 C.F.R. § 82.180(b). EPA further explained in the 1994 Framework Rule that it viewed its authority under Section 7671k as including the ability to change the acceptability status of alternatives without receiving a petition or notification from an individual or

manufacturer, based on new data regarding other alternatives or alternatives already reviewed. 59 Fed. Reg. at 13,047 (JA__).

II. Background to this Litigation.

A. Hydrofluorocarbons.

HFCs have a variety of applications, including aerosols, refrigeration, automotive air conditioners, and foams. They do not deplete the ozone layer, but they are greenhouse gases. *Mexichem I*, 866 F.3d at 455. Global warming potential is one of the "atmospheric effects," 40 C.F.R. § 82.180(a)(7), that EPA considers in assessing alternatives to ozone-depleting substances. Because of their global warming effects, EPA stated that the Agency considered HFCs to be "near-term" alternatives for ozone-depleting substances. 1994 Framework Rule, 59 Fed. Reg. at 13,071-72 (JA__).

B. The 2015 Rule.

On July 20, 2015, EPA published the 2015 Rule in the Federal Register. 80 Fed. Reg. 42,870 (JA__). As pertinent here, the 2015 Rule limited the use of certain HFCs and blends thereof in certain specific end-uses by changing their listing from acceptable to unacceptable under the Alternatives Program. *Id.* The sole regulatory text that EPA promulgated in issuing the 2015 Rule was a set of regulatory tables, which are comprised of individual listings. SNAP Guidance at 18,434 (JA__); *see* 2015 Rule at 42,953-56, 42,958-59 (JA__). For each regulated end-use, EPA identifies the substitute or substitutes to which the listing decision applies; EPA's decision (in this case that the HFCs were "unacceptable" as of a specified applicability date); and

certain further information. SNAP Guidance at 18,434 (JA__); *see* 2015 Rule at 42,953-56, 42,958-59 (JA__).

Importantly, for each substitute that EPA identifies as "unacceptable" in a particular end-use, the regulatory text promulgated by the 2015 Rule does not distinguish between regulated parties based on whether they are currently using HFCs or an ozone-depleting substance. SNAP Guidance at 18,433-34 (JA__); 2015 Rule at 42,953-56, 42,958-59 (JA__). Nor does it draw distinctions based on whether they are a "product manufacturer" or some other "user" of HFCs. SNAP Guidance at 18,433-34 (JA__); 2015 Rule at 42,953-56, 42,958-59 (JA__). In other words, the listings were unitary in their application to all regulated parties. *See* SNAP Guidance at 18,435 ("Each HFC listing, *as a unit* . . . .") (JA__). Furthermore, the Alternatives Program's framework regulations draw no distinctions between regulated parties using ozone-depleting substances and those using HFCs, or between "manufacturers" and other users. *See* 40 C.F.R. § 82.174 ("No person may use a substitute after the effective date of any rulemaking adding such substitute to the list of unacceptable substitutes."); *see also* 42 U.S.C. § 7671k(c). Thus, *no* person could newly use or continue to use those HFCs in the relevant end-uses after the applicability date of the 2015 Rule.

C. *Mexichem I.*

In *Mexichem I*, Petitioners challenged EPA's decision in the 2015 Rule to change the status of certain HFCs for specified end-uses from acceptable to

unacceptable. *See Mexichem I*, 866 F.3d at 464. The Court in *Mexichem I* concluded that EPA had reasonably removed the HFCs in question from the list of acceptable substitutes in those end-uses. *See id.* at 462-64.

As noted above, however, HFCs are not, themselves, ozone-depleting substances. *Id.* at 453. And, as just explained, once the relevant HFCs were listed as unacceptable, no regulated party could continue to use those HFCs in the relevant end-uses after the applicability date—including those product manufacturers who had already switched from an ozone-depleting substance to the relevant HFCs. *See id.* at 457. The Court found that EPA had taken an excessively broad view of its authority in this respect. It "vacate[d] the 2015 Rule to the extent the Rule requires manufacturers to replace HFCs with a substitute substance," and remanded the 2015 Rule to EPA for further proceedings consistent with the Court's decision. *Id.* at 462. The Court further provided that although its opinion "focus[ed] primarily on product manufacturers in this case, our interpretation of Section 612(c) applies to any regulated parties that must replace ozone-depleting substances within the timelines specified by Title VI." *Mexichem I*, 866 F.3d at 457 n.1.

The Court's analysis of this issue focused on the meaning of the word "replace." A portion of the statute directs EPA to make it "unlawful to replace" any ozone-depleting substance with a substitute that has been prohibited by EPA for that use. 42 U.S.C. § 7671k(c). The Court concluded that the Agency only had the authority to regulate the initial replacement of an ozone-depleting substance with a

non-ozone-depleting substance. *Mexichem I*, 866 F.3d at 458-59. "After that transition has occurred, the replacement has been effectuated, and the manufacturer no longer makes a product that uses an ozone-depleting substance." *Id.* at 459. The Court therefore held that EPA's broader understanding of its regulatory authority under Section 7671k(c)—which would have allowed the Agency to further prohibit continued use of a substitute that does not directly deplete the ozone layer—"contravenes the statute and thus fails at *Chevron* step 1," but "even if we reach *Chevron* step 2, EPA's interpretation is unreasonable." *Id.*[7]

D. *Mexichem II.*

EPA also promulgated another rule, the "2016 Rule." The 2016 Rule, *inter alia*, changed the listing of certain HFCs in different end-uses from acceptable to unacceptable. 81 Fed. Reg. 86,778 (Dec. 1, 2016). The 2016 Rule is subject to a pending petition for review in this Court. *Mexichem Fluor, Inc. v. EPA*, No. 17-1024 (D.C. Cir., filed Jan. 24, 2017) ("*Mexichem II*"). That litigation was held in abeyance pending resolution of *Mexichem I* because the petitioners' claims were identical to those raised in *Mexichem I*. At this time, the sole dispute in *Mexichem II* is whether and to what extent the disposition of that case is controlled by *Mexichem I*.

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[7] After *Mexichem I*, EPA revisited the issue. The Agency now believes that the interpretation in *Mexichem I* reflects the better understanding of the term "replace" in Section 612(c). Br. for Fed. Resp. in Opp. at 9-13, *Honeywell Int'l Inc. v. Mexichem Fluor, Inc.*, Nos. 17-1703 & 18-2, 2018 WL 4106461 at *12 (U.S., Aug. 27, 2018) (JA__).

E. The SNAP Guidance.

After *Mexichem I*, a number of regulated entities contacted EPA expressing confusion and uncertainty regarding how the Court's decision would impact a variety of situations. SNAP Guidance at 18,434 (JA__); *see infra* at 38 (citing such contacts). In response to these inquiries, EPA issued the SNAP Guidance, explaining its "implementation of the court's vacatur pending rulemaking." *Id.* at 18,433.

EPA noted that the literal terms of the Court's vacatur ("to the extent it requires manufacturers to replace HFCs with a substitute substance") were incompatible with the regulatory text promulgated by the 2015 Rule and the structure of the underlying regulatory program. *See* SNAP Guidance at 18,434 (explaining that neither the 2015 Rule nor the framework regulations differentiates between "product manufacturers" and other "users" of HFCs, or differentiates between current users of HFCs and current users of ozone-depleting substances) (JA__); *supra* at 9. "Thus, for each listing decision there is no language that could be understood as being removed or struck out by the court so that some portion of the listing decision would remain in effect pending EPA's action on remand." SNAP Guidance at 18,434 (JA__).

Moreover, EPA observed a number of practical obstacles to narrowly implementing the literal terms of the Court's opinion in *Mexichem I*. First, although in footnote 1 the Court plainly signaled that it intended that its interpretation "applies to any regulated parties," not just to "manufacturers," *Mexichem I*, 866 F.3d 451, 457 n.1, NRDC argued that the Court intended to limit *Mexichem I*'s applicability to only

"manufacturers." *See* NRDC Mar. 6, 2018, Ltr. at 2 (JA__). As EPA explained, the question of what "constitutes a product manufacturer" is complicated and has never been addressed by the Alternatives Program. SNAP Guidance at 18,434 (JA__). In the specific instances in which EPA has drawn this distinction in implementing other provisions of Title VI of the Clean Air Act, it has engaged in full notice-and-comment rulemaking. *Id.*

Second, neither the 2015 Rule nor the implementing regulations "addresses the date by which a manufacturer must have switched to an HFC in order to avoid being subject to the 2015 Rule listing decisions." *Id.* (noting a variety of dates that could apply). Selecting this date would require a notice-and-comment rulemaking. And because "there are currently no requirements for manufacturers to document the date of a change to an HFC," it is not clear that EPA could even reliably ascertain "on what date manufacturers had made the switch." *Id.* at 18,434-35 (JA__).

Third, distinguishing between users of HFCs and users of ozone-depleting substitutes is itself complex. There are situations in which *both* types of substances may be in use. *Id.* at 18,435 (JA__). For example, "many manufacturers own multiple facilities, have multiple production lines at a single facility, make multiple different products or product models, or make products that can operate with either an ODS or a substitute." *Id.*; *see also infra* at 25. Again, neither the regulatory text in the Framework Rule nor in the 2015 Rule addresses these distinctions.

As EPA explained, unlike a situation where a court decision "affects specific regulatory language, striking some of that language while leaving the remainder untouched," restructuring the SNAP program to reasonably draw and apply the distinctions made by the Court in *Mexichem I* would require notice-and-comment rulemaking. *Id.* at 18,434; *see also id.* at 18,435 (JA__). But, at the same time, simply waiting to address the Court's vacatur until the completion of a formal rulemaking was also not a satisfactory solution. The mandate had issued and regulated entities were requesting guidance on what the vacatur meant for the listings in the 2015 Rule. *Id.* at 18,434 (JA__).

EPA concluded that the Court's vacatur "affect[ed] each HFC listing change in its entirety," such that EPA would not "apply the HFC use restrictions or unacceptability listings in the 2015 Rule for any purpose prior to completion of rulemaking." *Id.* at 18,435 (JA__). It reached this conclusion because "the *listing* of HFC's as unacceptable, or acceptable subject to use restrictions, *is* the means by which the 2015 Rule 'require[d] manufacturers to replace HFCs with a substitute substance.'" *Id.* (quoting *Mexichem*, 866 F.3d at 462). In other words, the 2015 Rule imposed legal requirements that exceeded EPA's statutory authority, but these were made in unitary, non-severable listings that do not reflect the distinctions underlying the Court's decision. *See id.* (explaining that "each of the HFC listings is a distinct unit" and noting the "*non*-severability of the particular effects of the rule on manufacturers singled out by the court in the narrower phrasing of its holding").

Thus, the Court's decision "[v]acating the 2015 Rule 'to the extent' that it imposed th[ose] requirement[s] *means* vacating the listings." *Id.* Following the publication of the SNAP Guidance, EPA held a stakeholder meeting on May 4, 2018. EPA also held seven workshops between June 1 and July 31, 2018, that focused on particular sectors or end-uses for ODS and ODS substitutes.[8]

SUMMARY OF ARGUMENT

The SNAP Guidance expresses EPA's view of the necessary legal consequence of *Mexichem I* in light of the unitary, nonseverable nature of each of the HFC listings promulgated by the 2015 Rule. Because the aspect of the 2015 Rule that exceeded EPA's authority stemmed from the HFC listings, these listings were the only relevant regulatory text that EPA could treat as affected (*i.e.*, struck by) the Court's decision. Consistent with this Court's precedent that when an unlawful aspect of a rule or regulation cannot function independently of a lawful aspect, the rule or regulation must fall in its entirety, EPA correctly concluded that the effect of *Mexichem I* was to vacate the 2015 Rule's HFC listings as a whole.

As a result, the SNAP Guidance is not final agency action because it has no legal effect in itself—it simply explains to the public the consequences of *Mexichem I*. For similar reasons, the guidance is interpretive in nature—addressing the meaning of

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[8] EPA's intent to conduct rulemaking to address *Mexichem* is reflected in the *Fall 2018 Unified Agenda of Regulatory and Deregulatory Actions*. *See* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=2060-AU11

EPA's regulations given *Mexichem I*'s vacatur—and it is well justified in concluding that the HFC listings in the 2015 Rule have been vacated pending further action by EPA. Because this conclusion was effectively dictated by *Mexichem I* itself, the emissions consequences related to the vacatur of the HFC listings could not have affected the guidance.

Petitioners do not meaningfully engage with the SNAP Guidance. EPA explained in detail that the approach taken in the SNAP Guidance was the only meaningful way to implement *Mexichem I*, given the non-severable nature of the HFC listings. Petitioners have no response. They do not identify any regulatory text EPA could treat as vacated *other* than the listings as a whole. Rather, they contend that EPA should have issued some unspecified guidance or adopted a case-by-case approach governed by no articulated standard. In doing so, they studiously ignore the fact that treating the invalid portion of the HFC listings as severable would require EPA to draw lines found nowhere in the regulatory scheme. This would result in a dramatically different regulatory landscape than any EPA has previously considered, presented for public comment, and promulgated. As EPA noted (and Petitioners do not contest), appropriately drawing these lines would separately require its own notice-and-comment rulemaking. The SNAP Guidance correctly concluded that the vacatur in *Mexichem I* encompassed the non-severable HFC listings in their entirety and that, as a result, the vacatur struck those listings from the EPA's list of prohibited substitutes.

STANDARD OF REVIEW

Petitioner has the burden of establishing this Court's jurisdiction. *See Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (2007). This Court may reverse EPA's action if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2). This standard is narrow, and the Court does not substitute its judgment for EPA's. *Bluewater Network v. EPA*, 370 F.3d 1, 11 (D.C. Cir. 2004). This standard presumes the validity of agency actions, and a reviewing court is to uphold an agency action if it satisfies minimum standards of rationality. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520-21 (D.C. Cir. 1983); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its actions must be upheld. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Mississippi v. EPA*, 744 F.3d 1334, 1348 (D.C. Cir. 2013).

ARGUMENT

I. The SNAP Guidance Is Not Final Agency Action.

A. The SNAP Guidance Implements the Necessary Legal Consequences of *Mexichem I*, Without Independent Effect.

The Court's jurisdiction under Clean Air Act section 307(b)(1), 42 U.S.C. § 7607(b)(1), is limited to review of "final" agency action. *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 193 (D.C. Cir. 2011). 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 consequences flow. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

An agency that has simply expressed its view of what the law requires has not engaged in judicially reviewable final agency action. *See Indep. Equip. Dealers Ass'n v. EPA,* 372 F.3d 420, 427 (D.C. Cir. 2004); *Ctr. for Auto Safety & Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 807-08 (D.C. Cir. 2006) (policy guidelines were not final agency action but rather just "a privileged viewpoint in the legal debate"); *Massachusetts v. EPA*, 415 F.3d 50, 54 (D.C. Cir. 2005), *rev'd on other grounds*, 549 U.S. 497 (2007). Likewise, where an agency simply interprets an existing obligation, such actions are typically non-final and not subject to judicial review. *See Am. Tort Reform Ass'n v. Occupational Safety & Health Admin. & Dep't of Labor*, 738 F.3d 387, 395 (D.C. Cir. 2013); *AT&T Co. v. EEOC*, 270 F.3d 973, 975–76 (D.C. Cir. 2001). And the mere fact that an agency pronouncement may prompt the parties to whom it is addressed to change their behavior does not establish that it has legal consequences. *See Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1040-41 (D.C. Cir. 2008) (there is "no merit" to the assumption that "guidance documents have the force of law because [parties] followed the advice contained in the documents"); *Ctr. for Auto Safety*, 452 F.3d at 811.

The SNAP Guidance is not final agency action because it simply applies and implements the Court's vacatur in *Mexichem I*. It therefore has no independent legal

consequences. As EPA recognized in the SNAP Guidance, the Court vacated the 2015 Rule "to the extent that it requires manufacturers to replace HFCs." SNAP Guidance at 18,435 (JA__). However, the brief statements in *Mexichem I* do not explain what it *means*, as a legal matter, to vacate the 2015 Rule "to th[at] extent." In particular, neither the Court nor the parties, at the time of that decision, focused on or addressed whether the lawful aspects of the 2015 Rule were severable from the unlawful aspects. The Court also did not identify in any way what particular regulatory sections or text would or would not survive its judgment. Petitioners' argument that the Court "squarely upheld the 2015 Rule insofar as it 'prohibit[s] any manufacturers that still use ozone-depleting substances . . . covered under Title VI from deciding in the future to replace those substances with HFCs," State Pet. Br., No. 18-1174, Dkt. 1759114 at 11 (D.C. Cir. Nov. 7, 2018), is inaccurate. In fact, the Court said only that EPA "has statutory *authority*" to prohibit users of ozone-depleting substances from switching to HFCs. *Mexichem I*, 866 F.3d at 460 (emphasis added). The Court did *not* say that any aspect of the *2015 Rule* would remain in force.

Petitioners do not meaningfully dispute EPA's explanation of how *Mexichem I*'s vacatur necessarily affected the HFC listings in their entirety. For example, it is uncontested that the only regulatory text addressing HFCs that the 2015 Rule promulgated were the tables specifying the listing status for the relevant HFCs in each end-use. SNAP Guidance at 18,434 (JA__); *see* 2015 Rule at 42,953-56, 42,958-59 (JA__). Likewise, Petitioners do not dispute that this regulatory text draws no

distinction between users of HFCs and users of ozone-depleting substances. SNAP Guidance at 18,433-34 (JA__); 2015 Rule at 42,953-56, 42,958-59 (JA__). Nor do they dispute that the framework regulations for the Alternatives Program lack such distinctions. *See* 40 C.F.R. § 82.174. Rather, per the relevant regulatory text, *all* users—without distinction—are prohibited from using, or continuing to use, the relevant HFCs in the applicable end-uses.

Indeed, in moving to hold *Mexichem II* in abeyance, Petitioner NRDC affirmatively relied on the SNAP Guidance to argue that *Mexichem I* "*cannot be reconciled* with the 2015 Rule that was under review or with EPA's longstanding SNAP regulations, *and cannot be implemented as written*." Respondent-Intervenors' Reply Br. in Support of Motion to Continue to Hold Case in Abeyance, *Mexichem Fluor v. EPA*, No. 17-1024, Dkt. 1729788 at 5 (D.C. Cir. May 7, 2018) (emphasis added) (urging the Court not to apply the holding of *Mexichem I* to the materially identical facts of *Mexichem II*) (JA__). According to NRDC, *Mexichem I* was a "murky" decision, *id.* at 6 (JA__), that has "sown turmoil and confusion in the industries that produce and use substitutes," *id.* at 4-5 (arguing that extending *Mexichem I* would "exacerbate the problems that opinion continues to cause") (JA__). NRDC took similar positions in its petition for certiorari in *Mexichem I*. *See* NRDC Petition for Certiorari, No. 18-2 at 16 (arguing that *Mexichem I* "leaves the safe alternatives program in total disarray") (JA__); *id.* at 18-19 (discussing the "complex distinctions" that *Mexichem I* requires EPA to make) (JA__). Indeed, NRDC went so far as to argue that *Mexichem I* "guts

not only the HFC rule; it rewrites the fundamentals of Section 612 so that it will never again be effective at protecting the public." *Id.* at 4-5 (JA__); *see also id.* at 4 (*Mexichem I* opens up a "gaping loophole" and "deprived Section 612 of almost all force and effect") (JA__).

EPA correctly concluded that implementing the Court's vacatur in *Mexichem I* necessarily "*means* vacating the listings." SNAP Guidance at 18,435 (JA__).[9] Because there is no regulatory text that EPA could treat as stricken other than the changes to the listing tables, which are unitary and do not distinguish between users of HFCs and users of ozone-depleting substances, taking a different approach would "drastically rewrite the 2015 Rule" without notice and comment. *Id.* As a result, the SNAP Guidance does not have any legal consequence—it simply explains the legal effect of the Court's decision in *Mexichem I* on EPA's regulations.

EPA's conclusion as to the effect of *Mexichem I* is consistent with this Court's precedent. "Whether the offending portion of a regulation is severable depends upon the intent of the agency *and* upon whether the remainder of the regulation could

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[9] Petitioners imply that EPA's conclusion that *Mexichem I* struck the HFC listings in their entirety is inconsistent with its statement that *Mexichem I* was a "partial vacatur" of the 2015 Rule. *See, e.g.*, NRDC Br. at 12. However, the 2015 Rule also changed the listing status of alternatives *other than* HFCs, and these listings were unaffected by *Mexichem I*. *See* 2015 Rule at 42,872 (JA__); SNAP Guidance at 18,435 ("The 2015 Rule also contains HCFC listings that were not challenged by the Petitioners and that were not addressed by the court in *Mexichem*.") (JA__). Thus, the SNAP Guidance correctly referred to *Mexichem I* as a "partial vacatur," notwithstanding that the only coherent reading of *Mexichem I* is that it struck *the HFC listings* in their entirety.

function sensibly without the stricken provision." *MD/DC/DE Broads. Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988)); *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 1000 (D.C. Cir. 2013) (vacating agency orders in their entirety because they imposed encoding rules that exceeded FCC's authority and, absent those rules, the orders could not operate); *cf. also Davis Cty. Solid Waste Mgmt. v. United States EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (holding that severance is improper if there is "substantial doubt" that the agency would have adopted the severed portion on its own, and considering whether the parts of the regulation at issue were "intertwined" or "operate entirely independently of one another" (quotation marks omitted)).

For instance, in *MD/DC/DE Broads. Ass'n*, the Court addressed whether "the balance of the [challenged] rule [addressing Equal Employment Opportunity programs for women and minorities] can function independently if shorn of its unconstitutional aspects." *MD/DC/DE Broads. Ass'n*, 236 F.3d at 22. The Court determined that it could not simply excise the offending portions of the regulatory text referring to minorities, while leaving the regulation intact with respect to women. *Id.* at 22-23. Doing so would "distort the Commission's program" and produce a strikingly different rule than any promulgated by the FCC. *Id.*; *see also MD/DC/DE Broads. Ass'n v. FCC*, 253 F.3d 732, 735-36 (D.C. Cir. 2001) (denying rehearing on this issue because severance would not "leave a sensible regulation in place" given that the severed portion played an "integral part in the Commission's evaluation of the rule as

a whole"). Similarly, in *North Carolina v. EPA*, the Court held that it "could not pick and choose portions" of the regulation to preserve, noting that it was "one, integral action," "a single, regional program . . . and all its components must stand or fall together." 531 F.3d 896, 929-30 (D.C. Cir. 2008). It further described the extensive line-drawing that EPA would have to conduct in order to fix the defects in the regulatory program, such that little of the program would survive in recognizable form if the Court attempted severance. *Id.*[10]

These cases underscore that a court's vacatur must be squared with the regulatory text. Although this issue was not briefed in *Mexichem I* and the Court did not consider this question—instead discussing EPA's statutory authority without addressing how its opinion interacted with the applicable regulatory text—the result is clear. Where an invalid portion of a regulation does not operate independently of a valid portion, the regulation is typically struck in its entirety. Here, the aspect of the 2015 Rule that exceeded EPA's authority does not "operate entirely independently" of the aspect that did not. *Davis County*, 108 F.3d at 1459. Indeed, the two aspects flow from the exact same regulatory text. The listings in the 2015 Rule are thus each "one, integral action" that necessarily "stand or fall" as a whole because there are no "components" to the regulatory text that can be treated independently and severed.

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[10] On rehearing, the Court ultimately decided to remand to EPA without vacatur but did not repudiate its previous analysis on severability. *See North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008).

North Carolina, 531 F.3d at 929-30; *see also* SNAP Guidance at 18,435 (contrasting each listing, which is a distinct unit that is severable from other discrete listings, with the "non-severability of the particular effects of the rule on manufacturers singled out by the court in the narrower phrasing of its holding") (JA__).

B. Petitioners Fail to Engage With EPA's Explanation or the Regulatory Text, and Their Arguments Confirm that *Mexichem I* Had the Effect of Entirely Vacating the HFC Listings.

Petitioners offer no coherent alternative approach. They suggest no regulatory text that *Mexichem I* could conceivably have vacated or struck to accomplish the approach they support, nor any aspect of the regulations that would support their view of the law in effect following the Court's decision. *Cf. supra* at 20 (noting NRDC arguments, relying on the SNAP Guidance, that *Mexichem I* cannot be implemented as written). Moreover, although baldly asserting that EPA could have "straightforwardly implement[ed] *Mexichem* by issuing guidance that the 2015 Rule's prohibition on HFC use does not apply to users that have *already* switched away from ozone-depleting substances," State Pet. Br at 38, Petitioners decline to elaborate on *how* EPA could fairly and reasonably do so under the Alternatives Program's existing regulatory regime. In fact, because of the non-severable nature of the listings, it is all but impossible to apply *Mexichem I* literally in the manner suggested by Petitioners. Instead, any attempt to do so would raise as many questions as it would resolve. The result would be a confusing hodgepodge of regulation and represent "a rule strikingly

different from any [EPA] has ever considered or promulgated." *MD/DC/DE Broadcasters*, 236 F.3d at 23.

EPA correctly observed (and Petitioners do not dispute) that "because neither the 1994 Framework Rule nor the 2015 Rule creates a distinction between users using ODS and those using substitutes, neither rule addresses more complex situations in which both types of substances may be in use." SNAP Guidance at 18,435 (JA__). This provides a host of examples of the problems with Petitioners' argument. Has a manufacturer who switched to HFC blends in its new refrigeration systems, but still assists its customers in retrofitting existing supermarket systems that use ozone-depleting substances, "switched" to HFCs? *Id.* What if a manufacturer produces refrigeration systems in a factory, but those systems are not filled with HFCs until they are assembled at the site where they will be used? *Id.* Could a manufacturer who currently uses *only* HFCs in its existing products design a new product line that uses HFCs? What if that manufacturer uses HFCs in some product lines and ozone-depleting substances in others? *Id.* If a manufacturer makes a product that uses HFCs, which downstream users can buy that product? *See id.* at 18,436; *cf.* 40 C.F.R. § 82.172.

The existing regulatory regime resolves none of these questions. Indeed, by its fundamental structure, it cannot do so. And, as EPA explained, revising the 2015 Rule (or the framework regulations) to fairly and reasonably draw such lines would

require notice-and-comment rulemaking. SNAP Guidance at 18,434 (JA__).[11] Similarly difficult questions are raised—but not answered—as to what "constitutes product manufacture" and the "date by which a manufacturer must have switched to an HFC in order to avoid being subject to the 2015 Rule listing decisions." *Id.*

In fact, these examples illustrate a foundational flaw in Petitioners' approach. The premise of Petitioners' claim that the SNAP Guidance is final agency action is that it suspends the 2015 Rule. According to Petitioners, it therefore endows certain parties (users of ozone-depleting substances who the 2015 Rule barred from switching to HFCs) with new legal rights (the ability to switch to HFCs). *See* State Pet. Br. at 23; NRDC Br., No. 18-1172, Dkt. 1759032 at 29-30 (D.C. Cir. Nov. 7, 2018). But any steps that EPA took to apply *Mexichem I* in the manner Petitioners suggest would, as discussed above, require EPA to resolve a host of *other* line-drawing problems that were neither presented to nor resolved by the Court in *Mexichem I*. Because these new lines would be without any basis in any regulatory text EPA had ever promulgated, any EPA guidance on these issues would be "drastically rewrit[ing]" the 2015 Rule,

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[11] Another example is State Petitioners' argument that "a *new* supermarket cannot reasonably be said to have already replaced ozone-depleting refrigerants with an approved substitute." State Pet. Br. at 20. If a supermarket *chain* uses HFCs in all of its existing facilities, why *hasn't* it "replaced" ozone-depleting substances with HFCs such that it can choose to use HFCs at new facilities? What if it has an existing inventory of refrigeration systems that use HFCs, and wants to install one at its new location? Even the example that State Petitioners cherry-pick to support their case is fraught with complex questions that are not resolvable within the structure of the existing regulations.

SNAP Guidance at 18,435 (JA__), and subject to the same criticism Petitioners raise here.[12] Because the necessary effect of *Mexichem I* was to vacate the non-severable HFC listings, EPA cannot issue contrary guidance that would amount to conjuring a new, complex regulatory regime out of thin air. *See id.* at 18,434 (JA__); *cf.* State Pet. Br. at 38 (conceding that drawing these lines would require notice and comment); NRDC Br. at 25 (similar). Petitioners cannot have it both ways—and their preferred approach would be much more vulnerable to the very arguments they raise now. Rather, the effect of *Mexichem I* was to entirely vacate the HFC listings in the 2015 Rule, even though the Court acknowledged EPA's authority to prohibit users of ozone-depleting substances from switching to HFCs.

The cases that Petitioners cite are inapposite. For example, the suggestion that the SNAP Guidance is akin to suspending the effective date of the 2015 Rule, *see, e.g.*, NRDC Br. at 23-25, is mistaken because the legal consequences at issue here flow strictly, and solely, from the scope of the *Mexichem I* decision. Their comparison of this case to *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1814 (2016), is unavailing for similar reasons—it is the vacatur in *Mexichem I*, not EPA's SNAP Guidance, that has relieved the regulated community of its compliance obligations with the HFC listings.

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[12] Any party aggrieved by the lines EPA drew (including Petitioners here) would no doubt have immediately filed a petition for review accusing EPA of unlawful rulemaking.

NRDC's reliance on *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1007 (D.C. Cir. 2014) ("*NEDACAP*") is similarly off-base. *NEDACAP* involved judicial review of an EPA directive in response to *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012). In *Summit*, the Sixth Circuit reversed an EPA determination that a particular natural gas plant and associated wells were "adjacent," and therefore one "source" for CAA permitting purposes, based on their functional relatedness. 690 F.3d at 739-40, 751; *see also NEDACAP*, 752 F.3d at 1002-04. In response, EPA issued a directive that stated that EPA would not consider facilities' interrelatedness in making such decisions within the Sixth Circuit, but would continue its previous approach elsewhere. *NEDACAP*, 752 F.3d at 1002-03. The Court vacated the *Summit* directive, explaining that it "violate[d] EPA's 'Regional Consistency' regulations without purporting to amend those regulations." *Id.* at 1009, 1011. In doing so, the Court held that the *Summit* directive had the legal consequences associated with final agency action because it gave "firm guidance to enforcement officials about how to handle permitting decisions" and EPA applied it in at least one permitting decision rendered outside the Sixth Circuit. *Id.* at 1007.

Summit involved a discrete permitting decision applicable to a particular facility. It did not purport to vacate any aspect of a rule or regulation of general applicability. Moreover, the Court found that the *Summit* directive required EPA regional offices to apply the Agency's functional-relatedness interpretation of "adjacent" outside of the jurisdiction of the Sixth Circuit. This "*compel[led]* agency officials to apply different

permitting standards in different regions of the country." *Id.* at 1007 (noting also that the legal effect of the *Summit* directive was made clear when it was applied outside the Sixth Circuit). This bifurcated approach was not required by the *Summit* decision and, therefore, was an independent legal consequence of the *Summit* directive. *See NEDACAP*, 752 F.3d at 1010 (noting that EPA might have "revise[d] its regulations for aggregating emissions" to account for functional interrelatedness in response to *Summit*).

Here, by contrast, all of the legal consequences in this case flow directly from this Court's decision to "vacate" and "remand" any portion of the Rule in *Mexichem I*. When viewed in relation to the actual structure of the Alternatives Program regulations, the only way to effectuate that decision is to treat the HFC listings as vacated in their entirety. Indeed, *NEDACAP* supports EPA's position because it illustrates why Petitioners' alternative approaches to *Mexichem I* are infeasible. The type of line-drawing Petitioners propose would conflict with either the 2015 Rule or implementing regulations in the same way *NEDACAP* held was both final agency action and impermissible.

In sum, because neither the 2015 Rule nor the implementing regulations for the Alternatives Program accommodate the distinctions *Mexichem I* drew, the listings in the 2015 Rule are simply not severable as Petitioners contemplate. The necessary result of *Mexichem I*, therefore, is that the HFC listings in the 2015 Rule were vacated

as a whole.[13] The vacatur thus struck those listings from the EPA's list of prohibited substitutes. *See CropLife Am. v. EPA*, 329 F.3d 876, 884-85 (D.C. Cir. 2003); *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987), *aff'd*, 488 U.S. 204 (1988). The SNAP Guidance thus has no legal consequences because it simply articulates the existing state of the law following the *Mexichem I* decision, and it is, therefore, not final agency action.

II. The SNAP Guidance Is Not Subject to Notice and Comment Procedures.

If the SNAP Guidance is judicially reviewable final agency action—which it is not—it is at most an interpretive (rather than legislative) rule and therefore is not subject to notice-and-comment procedures. *See Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1564-66 (D.C. Cir. 1984). "[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203-04 (2015) (quoting *Guernsey Memorial Hospital*, 514 U.S. at 99); *see also Gen. Motors Corp.*, 742 F.2d at 1564-66 ("An interpretative rule simply states what the administrative agency thinks

[13] The SNAP Guidance is consistent with *Mexichem I*'s rejection of the petitioners' arguments in that case challenging EPA's removal of the relevant HFCs from the list of safe substitutes based on the statutory term "replace." *Mexichem I*, 866 F.3d at 462-63. Nowhere does the SNAP Guidance repudiate EPA's analysis of the comparative risks of HFCs or the basis of EPA's decision to change the listing status of those substitutes.

the statute means, and only reminds affected parties of existing duties." (quotation marks omitted)). "[A]n interpretive rule does not have to parrot statutory or regulatory language but may have 'the *effect* of creating new duties'" and may "alter[ ] primary conduct." *Cent. Tex. Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005) (rejecting the argument that an agency action was a legislative rule, explaining that the obligations petitioners identified flowed from another agency action).

If the SNAP Guidance is a rule at all, it at most is an interpretive rule: it informs the regulated community how, following *Mexichem I*, EPA understands its regulations. Specifically, the SNAP Guidance concludes that the only regulatory text that *Mexichem I*'s vacatur could affect is the HFC listings in the 2015 Rule found in the appendices to 40 C.F.R. pt. 82. *See* 2015 Rule at 42,952-59 (setting forth the alterations to the regulatory text resulting from the 2015 Rule) (JA__). The SNAP Guidance interprets these tables in light of *Mexichem I*'s vacatur. As discussed, *Mexichem I* can only be implemented by treating the listings as entirely vacated. Thus, EPA has interpreted those listings as struck altogether by *Mexichem I*. It is not—as Petitioners would have it—a result of the SNAP Guidance itself or an exercise of EPA's authority under Section 612. *See Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 716, 718 (D.C. Cir. 2015) (legislative rules are those that "modif[y] or add to a legal norm based on the agency's *own authority* flowing from a congressional delegation to engage in supplementary lawmaking." (quotation marks omitted;

emphasis in original)).[14] Indeed, the SNAP Guidance does not purport to invoke EPA's regulatory authority.

That the SNAP Guidance is interpretive in nature supports a finding that it is not judicially reviewable final agency action. *See Am. Tort Reform Ass'n*, 738 F.3d at 395. NRDC's argument that "the conclusion that the Guidance is legally binding, and thus a legislative rule, necessarily follows from the conclusion that is satisfies the second *Bennett* factor," NRDC Br. at 26 n.5, is incorrect. *See, e.g.*, *Ass'n of Am. R.R. v. FRA*, 612 F. App'x 1, 2-3 (D.C. Cir. 2015) (agency action was final, but interpretive). Indeed, if every action with some indicia of finality had legal consequences sufficient to render the action "legislative," this would render the exceptions in 42 U.S.C. § 7607(d) and 5 U.S.C. § 553(b)(A) a dead letter.

The SNAP Guidance is the "quintessential example of an interpretive rule." *Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993); *see also Guernsey Mem'l Hosp.*, 514 U.S. at 97; *Gen. Motors Corp.*, 742 F.2d at 1564-66. "If the rule is based on specific statutory [or regulatory] provisions, and its validity stands or falls on the correctness of the agency's interpretation of those provisions, it is an interpretative rule." *United Technologies Corp. v. EPA*, 821 F.2d 714, 719-20 (D.C. Cir. 1987). That is the case here. The SNAP Guidance explains the meaning of the specific regulatory provisions that

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[14] That the SNAP Guidance was published in the Federal Register is of little moment, since the Federal Register includes both general statements of policy and regulations having the force of law. *See* 5 U.S.C. § 552(a)(1)(D); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986).

EPA administers, given *Mexichem I*'s impact on those provisions. As already explained, *see supra* Argument I, the SNAP Guidance does not create a new legal norm or affect the rights or obligations of any entity. *See Clarian Health W., LLC v. Hargan*, 878 F.3d 346, 357 (D.C. Cir. 2017) (explaining that whether the action has binding legal effect is "the most important" factor in determining if a rule is legislative). Concluding that the SNAP Guidance is interpretive, rather than legislative, is also consistent with EPA's characterization of the document. *See, e.g.*, *id.* (considering how the agency characterized its action); SNAP Guidance at 18,435 ("Based on its expertise in administering the SNAP regulations, and its understanding of the 2015 Rule, EPA concludes . . . .") (JA__); *id.* at 18,432 (EPA is providing "guidance to dispel confusion" and provide "a clear statement of EPA's understanding of the court's vacatur in *Mexichem*" but the guidance "is not intended to represent a definitive or final statement on the court's decision as a whole") (JA__).

For these reasons, the Court should hold that the SNAP Guidance was not a legislative rule that required notice and comment.[15]

III. The SNAP Guidance Is Not Arbitrary and Capricious.

Petitioners argue that the SNAP Guidance was arbitrary and capricious because it did not consider the HFC emissions that may result until such time as EPA finalizes

[15] If the Court holds that notice and comment was required, it should remand to EPA without reaching Petitioners' arbitrary-and-capricious challenge. *See, e.g.*, *Sierra Club v. EPA*, 699 F.3d 530, 534 (D.C. Cir. 2012).

a new approach. This argument is misplaced. It does not engage with the reasons EPA found it necessary to issue the SNAP Guidance. Contrary to Petitioners' suggestions, EPA has not repudiated the "detailed comparative risk analysis set forth in the 2015 Rule." State Pet. Br. at 40. Nor was it engaging in a balancing analysis in which it would be relevant to weigh the "advantages of leaving the HFC listings in effect . . . against the reduction in regulatory uncertainty" from the SNAP Guidance. NRDC Br. at 30.

Rather, the impossibility of applying *Mexichem I* literally due to that decision's incompatibility with the existing regulatory regime prompted EPA to consider what that vacatur actually *did*, as a legal matter. EPA did not justify the SNAP Guidance as the best option of several after weighing the pros and cons, as the result of a policy preference, or as a reassessment of the comparative risks of HFCs. Rather, EPA issued the SNAP Guidance because it concluded that when *Mexichem I* vacated the 2015 Rule *at least* "to the extent" that manufacturers had to replace HFCs, the lack of severability meant this had the effect of fully vacating that rule's HFC listings. *See supra* at Argument I; SNAP Guidance at 18,535 ("Vacating the 2015 Rule 'to the extent' that it imposed th[ose] requirement[s] *means* vacating the listings.") (JA__). In other words, the SNAP Guidance's conclusion that implementing *Mexichem I* meant

treating the HFC listings in the 2015 Rule as vacated in their entirety followed directly from *Mexichem I* itself.[16]

This conclusion is true regardless of any purported environmental benefits that might be associated with maintaining the HFCs listings. Put differently, there was no "other side of the ledger" for EPA to examine. NRDC Br. at 29. EPA was assessing the legal effect that *Mexichem I* had on the 2015 Rule given the unitary, non-severable nature of the HFC listings. The factors that Petitioners claim EPA overlooked are irrelevant to EPA's legal analysis.

State Petitioners' alternative argument that EPA should have issued some unspecified intermediate guidance also fails. *See* State Pet. Br. at 37-38; *cf.* NRDC Br. at 31 (arguing that EPA should have adopted a case-by-case approach). Tellingly, Petitioners do not offer any suggestion as to what standards the "guidance" or case-by-case approach they propose would apply.[17] This is unsurprising. Neither the 2015

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[16] Petitioners fault EPA because it has not yet issued a proposed rule, but as the discussion above illustrates, there are numerous complicated questions that EPA would need to consider in formulating such a proposed rule. This process takes time, including "seek[ing] input from interested stakeholders prior to developing a proposed rule." SNAP Guidance at 18,435 (JA__).

[17] State Petitioners mischaracterize the 1994 Framework Rule and the 2015 Rule as "guidance" on what EPA "believed was the application of its listing decisions to current and former users of ozone-depleting substances." State Pet. Br. at 37-38. Those actions were *rules* (not "guidance"), and were issued after notice and comment. Moreover, the whole point of this case is sorting out what to make of the regulatory scheme as applied to HFCs now that *Mexichem I* has concluded that EPA exceeded its authority in the 2015 Rule, given that the regulations do *not* distinguish between different categories of users.

Rule nor the implementing regulations for the Alternatives Program draw any distinctions based on what substances (ozone-depleting substances or alternatives thereto) regulated parties are using. As a result, any line-drawing through which EPA attempted to parse who may use HFCs and who may not would be unsupported by any duly promulgated rule or regulation. *See supra* at 24-27 (explaining in detail the flaws in Petitioners' approach). And, as discussed above, drawing such distinctions is anything but "straightforward." *Id.*

The "case-by-case" approach that NRDC suggests in passing, *see* NRDC Br. at 31, is no different, and it is squarely within EPA's discretion to decline to adopt a case-by-case adjudicatory approach. *See, e.g.*, *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974) (agencies have discretion to choose their procedural mode). NRDC's proposed approach merely kicks the can down the road. It defers the task of addressing these complex questions and specifying who may use HFCs until a later, individualized inquiry governed by no reasoned or previously articulated standard. Addressing these issues *ad hoc* would still require EPA to determine who, in its view, may or may not use HFCs. But it would keep the regulated community in the dark, robbing them of predictability and certainty. Waiting until later to implement *Mexichem I* is also not an acceptable solution. This Court's mandate has issued, regulated parties have requested guidance, and EPA must implement the vacatur, as best it can, *now*. Indeed, NRDC acknowledges that "[a]fter *Mexichem*, EPA had to decide how to implement the decision's partial vacatur." NRDC Br. at 29.

By incorrectly treating the SNAP Guidance as a decision by EPA to repudiate the agency's previous decision to change the listing status of HFCs, or as the result of a balancing of factors, Petitioners have missed the point. Because the SNAP Guidance rationally—indeed, entirely correctly—reflects that the vacatur in *Mexichem I* requires treating the HFC listings as struck in their entirety, it is not arbitrary and capricious.

Finally, even if the Court concludes that the SNAP Guidance is judicially reviewable and suffers some defect (which it should not), it should at most partially remand the SNAP Guidance without vacatur.[18] "The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal v. United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (declining to vacate rule because it was "conceivable" that the agency could provide a reasoned explanation for its decision on remand and "the consequences of vacating may be quite disruptive").[19]

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[18] The following discussion corresponds to Issue IV, identified *supra* at 5.

[19] Any remand of the SNAP Guidance should be partial because—at a minimum—EPA correctly identified that the Court intended that *Mexichem I*'s vacatur apply to not just "manufacturers" but rather "any user subject to the HFC listing changes, and not simply manufacturers." SNAP Guidance at 18,434.

Here, crediting—for the sake of argument—Petitioners' claims that the SNAP Guidance is deficient, the purported errors they identify would not warrant vacatur. *See, e.g.*, *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97-98 (D.C. Cir. 2002) (noting cases in which remand without vacatur was ordered to address a failure to provide notice-and-comment procedures). Indeed, even if the Court concludes that EPA should have considered interim HFC emissions, as Petitioners contend, EPA might still rationally conclude that the approach in the SNAP Guidance is appropriate. For instance, *Mexichem I*'s inconsistency with the existing regulatory structure and the interest in not enforcing a standardless compliance regime could outweigh the incremental emissions benefit of an interim reduction to HFC emissions.

Vacatur would also leave regulated parties rudderless as they attempt to navigate a "murky" regulatory regime that has "sown turmoil and confusion," NRDC Pet. at 4-6, regarding whether they are required to comply with the HFC listings. *See, e.g.*, SNAP Guidance at 18,434; Apr. 10, 2018 Memorandum; March 9, 2018, Email from Kelly Witman; February 7, 2018, Email from Ivan Rydkin (JA__). This uncertainty could easily deprive *Mexichem I* of much of its force. Lacking guidance on their compliance obligations, members of the regulated community may make effectively irrevocable decisions—for example, which equipment to invest in, how to design their products, whether they can supply certain products—on an assumption that they are subject to the 2015 Rule's prohibition on the use of HFCs. The

regulated community should not be *de facto* compelled to comply with a portion of an EPA rule that exceeded EPA's authority.

Moreover, EPA has adopted a cautious approach to addressing the implications of *Mexichem I* until it completes its rulemaking. The SNAP Guidance addresses only the effect of the vacatur on the HFC listings at issue in *Mexichem I* itself, and does not address any questions that the decision may pose for the program more broadly. The SNAP Guidance is, by its terms, merely an interim measure of limited duration that will apply as EPA "move[s] forward with a notice-and-comment rulemaking." SNAP Guidance at 18,435. And, of course, the dispute here concerns only a limited category of users—those entities who had not already replaced ozone-depleting substances with HFCs. For all of these reasons, even if the Court finds the SNAP Guidance is in some way deficient, equity favors remand without vacatur.

CONCLUSION

For the foregoing reasons, the Court should find it lacks jurisdiction over the petitions. In the event the Court has jurisdiction, the Court should deny the petitions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,904 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed this 15th day of February 2019, through the ECF filing system and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

s/ Benjamin R. Carlisle
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