NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 18-1172 and consolidated case No. 18-1174

United States Court of Appeals for the D.C. Circuit

NATURAL RESOURCES DEFENSE COUNCIL, et al.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Petition for Review of an Action of the
Environmental Protection Agency

PROOF BRIEF OF INTERVENORS MEXICHEM FLUOR, INC. AND ARKEMA INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Mexichem Fluor, Inc. and Arkema Inc. hereby certify:

1. Parties and *Amici*

All parties, intervenors and *amici* appearing in this Court are listed in Petitioner Natural Resource Defense Council's Opening Brief, except that National Environmental Development Association's Clean Air Project has withdrawn as intervenor.

2. Agency Action Under Review

Reference to the agency action at issue appears in Petitioner Natural Resource Defense Council's Opening Brief.

3. Related Cases

A list of related cases appears in Petitioner Natural Resource Defense Council's Opening Brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Mexichem Fluor, Inc. and Arkema Inc. make the following disclosures:

Mexichem, S.A.B. de C.V., a Mexican publicly held company, directly or indirectly owns the entirety of Mexichem Fluor, Inc. No publicly held corporation other than Mexichem, S.A.B. de C.V., owns 10% or more of Mexichem Fluor, Inc.

Arkema Inc. is a wholly owned subsidiary of Arkema Delaware, Inc. There are no publicly held companies that own 10% or more of the stock of Arkema Inc. However, Arkema Inc. is indirectly owned by Arkema, S.A., a French public company.

Mexichem Fluor, Inc. and Arkema Inc. produce industrial chemicals that are subject to regulation under the Clean Air Act, 42 U.S.C. § 7671k. Petitioners contend that the action under review unlawfully revised an EPA rule that affects some of the chemicals they manufacture; Mexichem Fluor, Inc. and Arkema Inc. have intervened in support of respondent Environmental Protection Agency.

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GLOSSARY

Abbreviation	Definition
CFC	Chlorofluorocarbon
EPA	Environmental Protection Agency
GWP	Global Warming Potential
Guidance	Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program, 83 Fed. Reg. 18,431 (Apr. 27, 2018)
HFC	Hydrofluorocarbon
HCFC	Hydrochlorofluorocarbon
Listing Rule	80 Fed. Reg. 42,870 (July 20, 2015)
Mexichem	*Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017)
NRDC	Natural Resources Defense Council
SNAP	Significant New Alternatives Policy
Title VI	Title VI of the Clean Air Act (42 U.S.C. §§ 7671 *et seq.*)

INTRODUCTION

Twenty-five years after the United States first agreed to phase out ozone-depleting substances, the Environmental Protection Agency ("EPA") issued a rule in 2015 that prohibited or restricted many uses of hydrofluorocarbons ("HFCs")—not because they affect ozone, but because of their potential contribution to global warming. In *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017) ("*Mexichem*"), this Court held that EPA had acted outside its authority under the applicable statute, and the Court vacated EPA's rule. The focus of the Court's reasoning was EPA's novel interpretation that it could ban certain applications of HFCs on the ground that ozone-depleting substances were, at one time, common in those applications. The Court did not hold that it would be improper for EPA to bar entities from switching to HFCs as substitutes for current users of ozone-depleting substances. Petitioners mistakenly believe that means the Court preserved some portion of EPA's rule.

Several months after the Court decided *Mexichem*, EPA issued a guidance document in which it announced that it would not be implementing its 2015 prohibitions and restrictions on HFCs. EPA explained that it had not, when it adopted the rule, given any consideration to distinguishing current users of ozone-depleting substances from users of HFCs. The guidance identified a number of practical and policy questions that would have to be answered in order to regulate

the first category but not the second. The 2015 rule had not addressed any of those questions, and EPA recognized that it would need to engage in a notice-and-comment rulemaking to make those decisions. Consequently, the guidance document concluded the only way to fulfill the *Mexichem* judgment was simply to cease implementing the 2015 rule entirely with respect to HFCs. In other words, given the nature of the 2015 rule, the Court's *vacatur* necessarily had the effect of vacating the HFC restrictions in their entirety.

Petitioners, concerned about the potential environmental consequences of EPA's guidance, have asked this Court to vacate the guidance document. They contend that EPA actually amended or suspended the 2015 rule. Because (as all parties recognize) EPA did not engage in notice and comment to develop the guidance document, Petitioners claim the guidance violated the Administrative Procedure Act. They also contend the guidance was arbitrary and capricious because EPA did not take full account of additional global warming that allegedly will result from continued use of HFCs in the applications that the 2015 rule regulated.

To the contrary, EPA took account of the only factors that mattered to the guidance—namely, whether it was lawfully able to carry out the 2015 rule after *Mexichem*. EPA's conclusion that it could not—that *Mexichem* barred it from implementing the rule—was correct. Informing the public of that fact was not a rule,

much less a legislative rule, or even an action that Petitioners have standing to challenge.

JURISDICTION

The Court lacks jurisdiction over this case, because, for reasons explained below, *see infra* at 26-29, Petitioners lack standing and the Guidance under review was not a "final action," *see* 42 U.S.C. § 7607(b)(1).

STATUTES AND REGULATIONS

Pertinent statutes appear in the addendum to the brief of Petitioner Natural Resources Defense Council ("NRDC").

STATEMENT OF THE CASE

A. Statutory Background.

In the mid-1970s, scientists discovered that certain man-made chemicals were contributing to the depletion of stratospheric ozone. Responding to that problem, the United States joined with other countries in the Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 29. The Montreal Protocol required developed countries to end production and consumption of chlorofluorocarbons ("CFCs"), the chief ozone-depleting substances at the time, by 1996, and to phase out hydrochlorofluorocarbons ("HCFCs"), a related class of ozone-depleting substances. *Id*. arts. 2A, 2F.

Congress implemented the Montreal Protocol through the Clean Air Act Amendments of 1990. Pub. L. 101-549, tit. VI, 104 Stat. 2649 (1990) (codified at 42 U.S.C. §§ 7671 *et seq.*). Title VI of the Clean Air Act, as amended, is titled "Stratospheric Ozone Protection," and it sets forth timetables for eliminating CFCs and HCFCs. The statute instructs EPA to implement various regulatory and supplemental measures for controlling the manufacture, distribution, and use of CFCs and HCFCs, such as cap-and-trade systems during the phase-out period, reporting requirements, and restrictions on disposal. *See, e.g.*, 42 U.S.C. §§ 7671b, 7671g, 7671k.

Among those supplemental measures, EPA was to restrict the range of permissible substitutes for the ozone-depleting substances, to ensure that they were "replaced by chemicals, product substitutes, or alternative manufacturing processes that reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a). To that end, EPA was required to develop recommendations for such substances. Producers of substitutes for CFCs were to notify EPA before introducing them for "significant new uses," and share with EPA their "unpublished health and safety studies" on the materials. Then, EPA was required to publish a list of substitutes that are "safe alternatives . . . for specific uses" and of substitutes prohibited for particular uses. *Id.* § 7671k(b), (c), (e). The statute also required EPA to issue regulations "providing that it shall be unlawful to replace any [CFC or

HCFC] with any substitute substance which the Administrator determines may present adverse effects to human health or the environment," if EPA had identified an acceptable alternative to the banned substance. *Id.* § 7671k(c).

B. The SNAP Program.

EPA implemented this "safe alternatives" authority in a 1994 rule that established what EPA called the "Significant New Alternatives Policy" (or "SNAP") program. JA __ (Protection of Stratospheric Ozone, 59 Fed. Reg. 13,044 (Mar. 18, 1994)). The SNAP regulations set forth lists of substances and particular end-uses—such as aerosol cans, automobile air conditioners, or commercial-scale refrigeration—for which each substance was deemed an acceptable or an unacceptable substitute for the ozone-depleting substances. For some substitutes and end-uses, the lists permitted continued use subject to certain restrictions. The regulations then prohibited any person from "introduc[ing] a new substitute into interstate commerce" without providing EPA appropriate notice; "us[ing] a substitute which a person knows or has reason to know was manufactured, processed or imported" in violation of the SNAP regulations; "us[ing] a substitute without adhering to any use restrictions" in the regulations; or "us[ing] a substitute after the effective date" of a rule disapproving the substitute. 40 C.F.R. § 82.174. "Use," for these purposes, "means any use of a substitute for a Class I or Class II ozone-depleting compound, including but not limited to use in a manufacturing process or

product, in consumption by the end-user, or in intermediate uses, such as formulation or packaging for other subsequent uses." *Id.* § 82.172.

The 1994 rule defined a "substitute" as a substance "intended for use as a replacement for a class I or II compound." *Id.* EPA explained that further substitution, after a substance had replaced an ozone-depleting substance, would not be subject to the SNAP regulations. For example, HFCs were a common class of substitutes for the ozone-depleting substances. EPA noted that if a producer introduced an HFC as a "first-generation substitute," and then later introduced another product to replace that HFC, the new product would not be subject to the notice and other requirements. JA __ (59 Fed. Reg. at 13,052).

C. The 2015 Listing Rule.

Since 1994, EPA has issued myriad amendments listing various substances as acceptable substitutes or, much less frequently, removing others from the acceptable substitutes list after learning of health or safety risks. *See* JA __ (Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program, 80 Fed. Reg. 42,870, 42,878 (July 20, 2015) (final rule) (summarizing past actions)). Those amendments all adhered to the principle that once a non-ozone-depleting substance is in use as a substitute, further replacements of it are not subject to the SNAP regulations. Meanwhile,

certain HFCs became common in important sectors where ozone-depleting substances had been prevalent.

In 2015, for the first time, EPA imposed fresh restrictions on substances that had long ago been used to replace ozone-depleting substances. The 2015 rule, JA __ (80 Fed. Reg. 42,870) ("Listing Rule"), prohibited or restricted use of a number of HFCs in aerosol sprays; automotive refrigeration (chiefly air conditioners in cars); retail refrigeration and vending machines; and foam blowing (such as preparation of polystyrene foam insulation). The affected HFCs included, among others, chemicals with shorthand names HFC-125, HFC-134a, and HFC-227ea. EPA imposed the restrictions because it determined that these substances present unacceptable environmental hazards due to their potential contribution to the greenhouse gas effect. JA __ (*id.* at 42,880). The Listing Rule also imposed fresh restrictions on several HCFCs. JA __ (*id.* at 42,873).

Unlike the situation in previous SNAP listing decisions, the HFCs that EPA restricted in the Listing Rule were already widely in use, including in applications where manufacturers had stopped using ozone-depleting substances years before. *See* JA __ (Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program, 79 Fed. Reg. 46,125, 46,136-55 (Aug. 6, 2014) (proposed rule) (describing prevalent usage of HFCs)). The effect of the Listing Rule, apparent from EPA's proposed rule, would

be to prohibit "use" of those materials in the covered sectors even though the purpose of the Title VI programs, protection of stratospheric ozone, had long ceased to be relevant for those applications. EPA made no attempt in the Listing Rule to distinguish between entities that might still be using ozone-depleting substances and those that had stopped entirely and were now using HFCs. Mexichem Fluor, Inc. and Arkema Inc., intervenors here (collectively "Intervenors"), along with others, commented on the proposed rule that EPA lacked authority to prohibit continued use of HFCs in applications where use of ozone-depleting substances was long in the past. JA __ (80 Fed. Reg. at 42,936). EPA rejected those comments, because it interpreted 42 U.S.C. § 7671k(c) to authorize it to regulate substances in any application where ozone-depleting substances had at one time been common. JA __ (*id.* at 42,937).

Thus, the Listing Rule simply stated that certain uses of the affected HFCs are prohibited, or restricted in ways described in the Rule. By operation of the existing SNAP regulations, it would be unlawful for any covered person to "use" those materials after the requirements took effect.

D. The *Mexichem* Decision.

Intervenors petitioned this Court for review of the Listing Rule. They contended that EPA does not have the authority under 42 U.S.C. § 7671k to regulate current uses of HFCs, because current manufacturers and end-users of HFCs are not

"replacing" ozone-depleting substances with the HFCs. Furthermore, HFCs themselves are not ozone-depleting, so the phase-out of ozone-depleting substances does not, itself, require users to stop using HFCs. In addition, Intervenors argued that EPA's decision to restrict HFCs was arbitrary and capricious, because EPA's reasoning, based on the potential contribution of HFCs to climate change, was deficient in various ways.

The Court agreed that EPA had misinterpreted the word "replace" in § 7671k(c). *Mexichem*, 866 F.3d at 456-61. The Court acknowledged that EPA can, if it reasonably chooses, prohibit regulated entities that are still using ozone-depleting substances from replacing them with HFCs. *Id.* at 460. But "manufacturers 'replace' an ozone-depleting substance when they transition to making the same product with a substitute substance." *Id.* at 459. Therefore, the panel held, EPA cannot use its Title VI authority to require current uses of HFCs to stop. *Id.* The panel stated 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." *Id.* at 457 n.1. The panel did not rule decisively on a theory that EPA raised in its briefing, that EPA can "retroactively" disapprove a replacement, because the Listing Rule made no mention of that theory. *Id.* at 461.

The *Mexichem* decision also "reject[ed] all of Mexichem and Arkema's arbitrary and capricious challenges" to the Listing Rule. *Id.* at 462-63.

With respect to remedy, Intervenors asked the Court to vacate the Listing Rule. EPA made no suggestion about remedy, but two intervenors in the case argued the Court should remand the Listing Rule without vacating it. JA __ (Final Resp. Br. by Industry Intervenor-Resp'ts, *Mexichem Fluor, Inc. v. EPA*, No. 15-1328, Dkt. 1629758, p.6 (D.C. Cir. Aug. 11, 2016)). The Court stated that

> we grant the petitions and vacate the 2015 Rule to the extent it requires manufacturers to replace HFCs with a substitute substance. We remand to EPA for further proceedings consistent with this opinion. We reject all of Mexichem and Arkema's other challenges to the 2015 Rule. The petitions are therefore granted in part and denied in part.

866 F.3d at 464. No party—including NRDC (a petitioner here), which intervened in the case—discussed whether any portion of the Listing Rule was severable.

NRDC, as intervenor in the *Mexichem* case, petitioned for *en banc* rehearing of the panel's decision. In that filing as well, NRDC did not argue that any portion of the Listing Rule was severable. Nor did any of the *amici curiae* briefs regarding the petition for rehearing—including from a number of States that are petitioners here—raise or discuss severability. The Court denied petitions for rehearing, and the Supreme Court denied petitions for *certiorari*. *Honeywell Int'l, Inc. v. Mexichem Fluor, Inc.*, 139 S. Ct. 322 (2018); *Natural Res. Def. Council v. Mexichem Fluor, Inc.*, 139 S. Ct. 322 (2018).

E. The 2018 Guidance.

In April 2018, EPA published a document titled "Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program." JA __ (83 Fed. Reg. 18,431 (Apr. 27, 2018)) (the "Guidance"). The Guidance explained that EPA had assessed the impact of the Court's decision in *Mexichem* and concluded that it had the effect of entirely vacating the HFC restrictions in the Listing Rule. EPA reviewed the structure and function of the Listing Rule, and it identified a host of difficult questions that would arise if *Mexichem* had actually vacated the Listing Rule only with respect to HFC users that had fully ceased using ozone-depleting substances. Among other problems, EPA noted that it is not clear at what point in time a user or manufacturer would have had to switch to HFCs to benefit from a limited *vacatur*. EPA had not considered those issues when it adopted the Listing Rule, because it simply prohibited certain uses of HFCs absolutely, without distinguishing between entities that are already using HFCs in those ways and those that would switch to them in the future. EPA "recognize[d] that the court vacated the 2015 Rule 'to the extent that' it requires manufacturers to replace HFCs." JA __ (*id.* at 18,435). But EPA concluded that the only way to apply that *vacatur*, given the Listing Rule as it was adopted, was to strike the HFC restrictions completely. "[T]he *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,'" and therefore "[v]acating the 2015 Rule 'to the extent' that it imposed that requirement *means* vacating the listings." JA __ (*id.*) (emphasis and second set of brackets in original).

Petitioners now ask this Court to vacate the Guidance.

SUMMARY OF ARGUMENT

In *Mexichem*, this Court vacated the Listing Rule. The Court said so explicitly for "manufacturers" of products that were already using HFCs. The Court's *vacatur* also necessarily undid the rest of the Rule with respect to its restrictions on HFCs. No part of those restrictions was severable. EPA did not draft separate sections for users of products already containing HFCs and for users of ozone-depleting substances. EPA did not, in the Listing Rule, analyze the operation of its rule separately for those groups. And EPA did not develop any standards or mechanisms for distinguishing different groups of users.

Petitioners argue only that EPA could establish such mechanisms, and that EPA could justify implementing something like the Listing Rule only for current users of ozone-depleting substances. They do not address the fact that EPA has not yet made those policy choices, and, critically, did not consider them in the Listing Rule. That issue is fatal to their contention that the Guidance is improper. Petitioners rely on an assumption that the *vacatur* in *Mexichem* was only partial. But

a *vacatur* of only part of an agency's rule is proper only if the court has concluded the rule is severable. *Mexichem* drew no such conclusion and did not even discuss whether the Listing Rule was severable. And Petitioners—most of whom participated in *Mexichem* at some point—never asked the Court to consider severability in that case.

Because *Mexichem* vacated the Listing Rule with respect to restrictions on HFCs, EPA was obligated not to implement or enforce that part of the Rule. The Guidance, far from suspending or repealing the Listing Rule, simply informed the public about the actual consequences of *Mexichem*. The Court therefore lacks jurisdiction to entertain Petitioners' arguments. Petitioners lack standing to challenge a document that merely informs the regulated public about existing law, and the document itself lacks the legal consequences that are prerequisite to a reviewable final action.

Even if the Court has jurisdiction, the petitions should still be denied. The Guidance did not need notice and comment, because it only communicated EPA's interpretations of *Mexichem* and the Listing Rule. And the Guidance was not arbitrary or capricious, because the factors that Petitioners say EPA ignored were actually irrelevant to EPA's task of understanding and complying with *Mexichem*.

STANDING

Intervenors have standing to participate in this case in support of Respondent EPA, because EPA issued the Guidance in implementation of the mandate of this Court in Intervenors' favor in *Mexichem*, and because Intervenors, as manufacturers of the HFCs at issue in the Guidance, are directly impacted by the announcements in the Guidance.

STANDARD OF REVIEW

The Court has jurisdiction only if the Guidance was a "final action." 42 U.S.C. § 7607(b)(1). The Court sets aside a final action under the Clean Air Act "if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" *Util. Air Regulatory Grp. v. EPA*, 744 F.3d 741, 747 (D.C. Cir. 2014) (quoting 42 U.S.C. § 7607(d)(9)(A)); and "[t]o determine whether a rule is arbitrary or capricious," the Court "appl[ies] the same standard of review . . . [as] under the Administrative Procedure Act." *Id.* The Court may also set aside a rule "if it was promulgated 'without observance of procedure required by law.'" *Id.* (quoting 42 U.S.C. § 7607(d)(9)(D)). However, "'the court may invalidate the rule only if . . . there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.'" *Id.* (quoting 42 U.S.C. § 7607(d)(8)).

To the extent the Guidance is based on EPA's interpretation of the Court's opinion in *Mexichem*, this Court's review is *de novo*. *See Univ. of Great Falls v.*

NLRB, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (refusing to defer to agency's interpretation of Supreme Court precedent). However, the Court gives some deference to EPA's characterization of its own actions. *See British Caledonian Airways, Ltd. v. Civil Aeronautics Bd.*, 584 F.2d 982, 992 (D.C. Cir. 1978) ("In the analogous situation of trying to determine whether a rule promulgated by an agency is legislative or interpretative, the agency's views are generally given deference . . . ."); *see also Mendoza v. Perez*, 754 F.3d 1002, 1020 (D.C. Cir. 2014) (severability of a regulation depends, in part, "upon the intent of the agency").

ARGUMENT

I. THE GUIDANCE HAS NO LEGAL CONSEQUENCES.

Petitioners' challenge to the Guidance depends on their assertion that the Court's decision in *Mexichem* left some aspects of the Listing Rule intact. *See, e.g.*, NRDC Br. 24 ("The Guidance indefinitely suspended portions of the 2015 Rule upheld by this Court in *Mexichem* . . . ."); State Br. 32 ("[T]he Guidance exceeds the scope of the *Mexichem* partial vacatur . . . .").[1] In fact, however, with respect to the HFCs at issue, nothing of the Listing Rule survived *Mexichem*.

[1] Throughout this brief, the two opening briefs are referred to as "NRDC Br." and "State Br."; and EPA's response brief is referred to as "EPA Br."

A. The *Mexichem* Decision Broadly Invalidated The Listing Rule.

The Court's decision in *Mexichem* was broad and reached applications of the Listing Rule far beyond just the manufacturers of products containing HFCs.

The Rule had restricted manufacture and use of certain HFCs in particular sectors,[2] on the theory that those substances remain, for the indefinite future, replacements for the ozone-depleting substances that were phased out in the early 1990s. The Court, agreeing with Intervenors, held that once a manufacturer has begun using a substance such as an HFC, "the manufacturer no longer makes a product that uses an ozone-depleting substance"; "there is no ozone-depleting substance to 'replace'"; and therefore EPA has no authority to regulate the product under 42 U.S.C. § 7671k(c). *Mexichem*, 866 F.3d at 459. Consistent with that understanding, the Court vacated the Listing Rule "to the extent it requires manufacturers to replace HFCs with a substitute substance." *Id.* at 464.[3]

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[2] The Listing Rule did not require compliance at a single time across all the affected applications of HFCs; EPA specified different compliance dates for certain applications. *See, e.g.*, JA __ (80 Fed. Reg. at 42,903-04).

[3] In the SNAP regulations, the term "manufacturer" has a narrower defined meaning, namely the person that makes the actual chemical. 40 C.F.R. § 82.172. But the word "manufacturer" in the Court's opinion must be "read in context." *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). Nothing in *Mexichem* suggests the panel meant to use "manufacturer" in the way the SNAP regulations define the term. Indeed, the discussion quoted above demonstrates that the panel was contemplating all manufacture of products that contain HFCs, not just products that *are* HFCs. This

Thus, contrary to Petitioners' characterizations of it as a "narrow vacatur," the explicit ruling in *Mexichem* was sweeping. The Court clearly held that a producer of HFCs—such as Intervenors—can continue producing and selling them (unless at some point EPA validly prohibits these substances on some other ground, *cf.* 866 F.3d at 461-62), and also that a manufacturer of products that contain HFCs can continue manufacturing and selling such products. For example, a car manufacturer can continue to make and sell cars with HFCs in the air conditioning systems; an aerosol can manufacturer can continue to make and sell aerosol products with HFC propellants; and a manufacturer of refrigerating equipment can continue to make and sell products using HFC refrigerants.

Furthermore, in light of *Mexichem*, the Listing Rule can no longer restrict *end-users* who were already using HFCs. This conclusion follows inescapably from the Court's *vacatur* of EPA's restriction on *manufacturers* already using HFCs in their products. Banning these products from the hands of users would be effectively the same as prohibiting their manufacture and sale. "The manufacturer's right to sell [products] . . . is meaningless in the absence of a purchaser's right to buy them." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004)

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brief also uses the word "manufacturer" in the ordinary sense rather than the defined term from the SNAP regulations.

(holding that the Clean Air Act, by regulating what vehicles can be manufactured, preempts state rules restricting what vehicles a fleet operator can purchase or use); *see also SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 n.* (2018) (doubting "an agency's 'power to do indirectly what it cannot do directly'") (citation omitted). Petitioners appear to concede this point. Each of them focuses on users who are still using ozone-depleting substances, and none of them suggests that the Listing Rule could validly bar current users of HFCs from continuing to buy and use refrigerant supplies, repair parts, or equipment containing HFCs. *See* NRDC Br. 22 ("The 2015 Rule prohibited certain manufacturers and users of ozone-depleting substances from switching to HFCs. . . . Before EPA issued the Guidance, a business that replaced ozone-depleting substances with HFCs . . . ran the risk of an EPA enforcement action."); State Br. 29 ("Affected users of ozone-depleting substances thus were barred . . . .").

Relatively little manufacturing remains that the Listing Rule could affect. In principle, a manufacturer still making a product with ozone-depleting substances could be prohibited from replacing those substances with HFCs. But, as two intervenors told the Court in *Mexichem*, in the uses for which the Rule restricted HFCs, the ozone-depleting substances have generally been replaced already. JA__ (Final Resp. Br. by Industry Intervenor-Resp'ts, *Mexichem Fluor, Inc. v. EPA*, No. 15-1328, Dkt. 1629758, pp. 17-18 (D.C. Cir. Aug. 11, 2016)). NRDC suggests the

Guidance "altered the legal regime applicable to . . . manufacturers of products containing ozone-depleting substances," NRDC Br. 23, but NRDC does not identify a single manufacturer of products for which that assertion would apply.[4]

B. The Listing Rule's Restrictions On Users Of Ozone-Depleting Substances Were Not Severable From Its Restrictions On Users And Manufacturers Of HFCs.

The sole legal consequence that Petitioners can attribute to the Guidance is that, they say, it allows current users of ozone-depleting substances to switch to products containing HFCs. That consequence, too, is illusory. The *Mexichem* decision effectively invalidated the Listing Rule with respect to those users, because the listing of HFCs was a single, integrated decision, without a separate section for such users that could survive independently.

As this Court has repeatedly explained, "[s]everance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own." *Nat'l Ass'n of Mfrs.*

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[4] The States appear to recognize that these manufacturers are not a significant factor; the States say the Guidance changed the law applicable for "users of ozone-depleting substances." State Br. 29. Similarly, EPA's brief in *Mexichem* asserted that there are still users of ozone-depleting substances, but it did not identify any remaining manufacturers of new products containing such materials. JA__ (Resp't Final Br., *Mexichem Fluor, Inc. v. EPA*, No. 15-1328, Dkt. 1628626, pp. 31-32 (D.C. Cir. Aug. 4, 2016)).

v. NLRB, 717 F.3d 947, 963 (D.C. Cir. 2013) (citation omitted). The "intent of the agency" is the primary indication of whether a portion of a rule is severable. *See MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001), *reh'g denied*, 253 F.3d 732 (2001). EPA could not have been clearer about its intent regarding the Listing Rule. In its brief in this case EPA says explicitly that it believes the Listing Rule was not severable. EPA Br. 21-24; *see EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 1000 (D.C. Cir. 2013) (vacating entirety of orders on basis of FCC's "deni[al] that the challenged orders could operate absent the encoding rules"). In *Mexichem* too, EPA never asserted that any aspect of the Listing Rule was severable. *See* JA__ (Resp't Final Br., *Mexichem Fluor, Inc. v. EPA*, No. 15-1328, Dkt. 1628626 (D.C. Cir. Aug. 4, 2016)). The Listing Rule itself does not contain a severability clause or otherwise assert that user restrictions are severable from manufacturer restrictions. *Cf. Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 493 (D.C. Cir. 2007) (vacating entirety of rule because "[t]he final rule does not contain a severability clause; nor does the SEC suggest it is severable").

Indeed, the Listing Rule actually rejected exactly the sort of severability that would be necessary for Petitioners' preferred user restrictions to have survived. During the rulemaking, commenters (including Intervenors) urged EPA not to prohibit use of HFCs in products that have already transitioned away from ozone-depleting substances. Rejecting that suggestion, EPA explained that 42 U.S.C.

§ 7671k(c) instructs it to "list substances as acceptable or unacceptable 'for specific uses,'" and that EPA "list[s] substitutes on an end-use or sector basis." JA __ (80 Fed. Reg. at 42,937). Similarly, EPA asserted that "transition . . . occur[s] on an end-use by end-use or sector-by-sector basis." JA __ (*id.*) This explanation confirms that EPA conceived of its rule as comprising prohibitions on particular "end-uses" of HFCs, not as separate—and separable—restrictions for manufacturers, for users who are already using HFCs, and for users who are still using ozone-depleting substances in a given end-use but may switch to HFCs.

Similarly, in the Listing Rule EPA based its analysis of the environmental consequences of various refrigerants largely on a single value: global warming potential, or "GWP." Commenters pointed out that GWP is a simple physical characteristic that does not account for the actual significance of reductions depending on market reaction to regulation. EPA's response was essentially that using the single value was appropriate because it was restricting HFCs across the entirety of each end-use. "[I]f comparable amounts of two substitutes are used," EPA said, "then the relative climate effects of resultant emissions will be higher for the substitute with higher GWP." JA __ (80 Fed. Reg. at 42,938). Preserving the Listing Rule solely for current users of ozone-depleting substances would mean differences in regulation across a given end-use, and the assumption of "comparable amounts" would no longer hold. To be sure, EPA presumably *could* analyze and

forecast the resulting emissions and their climate effects. The point, though, is that it did not. A key premise of EPA's analysis, underlying the whole Listing Rule, was that the prohibitions would apply uniformly to all manufacturers and users.

Even if EPA had intended the Listing Rule to be severable in the relevant respects, it would actually be severable only if "the balance of the rule can function independently." *MD/DC/DE Broadcaster Ass'n*, 236 F.3d at 22. For EPA's listing of unacceptable substitutes, there is no "balance of the rule." Petitioners suppose that after *Mexichem* the regulations prohibit an end-user who is still using an ozone-depleting substance from switching to an HFC. But there is no regulatory text that could be excised to produce that state of affairs. The relevant regulation simply says that "[n]o person may use a substitute without adhering to any use restrictions . . . after the effective date of any rulemaking imposing such restrictions," and that "[n]o person may use a substitute after the effective date of any rulemaking adding such substitute to the list of unacceptable substitutes." 40 C.F.R. § 82.174(c), (d). *Cf. MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 22-23 (analyzing regulatory text and concluding that excising a portion would "produce a rule strikingly different from any the Commission . . . ever considered"). To restrict only certain users, the regulation would need to have additional content—which neither the *Mexichem* panel was nor the Court in this case is empowered to create. *See* JA __ (83 Fed. Reg. at 18,434); EPA Br. at 21-24 (describing line-drawing decisions that EPA

would need to make in a rulemaking to restrict HFC use solely for current users of ozone-depleting substances).

Petitioners offer only one example of an end-use that they believe the Guidance affects, namely, supermarket refrigeration systems—roughly one-third of which, they say, still contain ozone-depleting substances. NRDC Br. 23; State Br. 19-21. Far from showing that a portion of the Listing Rule survived *Mexichem*, this example illustrates how the Listing Rule is not severable. The Listing Rule treated manufacturers and users the same regardless of whether a given refrigeration system contained ozone-depleting substances or HFCs. In particular, a user was allowed to service existing equipment, including by refilling the refrigerant with the same substance, whether ozone-depleting or HFC. JA __ (80 Fed. Reg. at 42,903). However, if a user installs a new system or "changes the intended purpose of the original equipment, for instance by adding additional cases," then the user would be bound by the Listing Rule's use restrictions. JA __ (*id.*) If *Mexichem* effectively eliminated these restrictions solely for entities already using HFCs, the resulting difference in treatment would undermine the goals of the program. A user with ozone-depleting refrigerants would be incentivized to keep the system in service as long as possible—with the attendant risk of ozone damage—to avoid being forced to transition. There must be, at a minimum, "substantial doubt" that EPA intended that perverse result. *See Nat'l Ass'n of Mfrs.*, 717 F.3d at 963.

C. The *Mexichem* Decision Effectively Vacated The Portions Of The Listing Rule That Were Not Severable.

Petitioners assert that before the Guidance, "a business that replaced ozone-depleting substances with HFCs . . . ran the risk of an EPA enforcement action," and that the Guidance "eliminated that risk, offering 'regulatory certainty.'" NRDC Br. 22. To the contrary, *Mexichem* inherently barred such an enforcement action, because the Court effectively vacated the Listing Rule in all its applications to the HFCs in question.

Because the *Mexichem* opinion's concluding sentences stated that the Court "vacate[d] the 2015 Rule to the extent it requires manufacturers to replace HFCs," 866 F.3d at 464, Petitioners assume the Court preserved restrictions on some users. However, "[t]o determine the effect of the judgment in [*Mexichem*], . . . we must look . . . to the nature of the flaw in the agency decision there under review, to circuit law governing the proper remedy for such a flaw, and to the remanding court's analysis of that flaw, viewed in the context of 'the decision as a whole.'" *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 197 (D.C. Cir. 2009) (citing examples in which courts held that previous judgments had actually vacated rules, though they had not made that relief explicit). Given the "nature of the flaw" here—EPA rulemaking beyond the scope of its statutory authority—*vacatur* was plainly the right remedy, as the panel recognized. And, as EPA observed in the Guidance, a *vacatur* "to the extent" the Listing Rule restricted manufacturers was a complete

vacatur with respect to the HFC portion of the Rule, precisely because there is no severable "manufacturer" portion of the regulations. JA __ (83 Fed. Reg. at 18,435).

More fundamentally, *Mexichem* could not have vacated anything less than the complete restrictions on HFCs, because the panel made no assessment of severability. Indeed, no party—including NRDC, an intervenor in that case—even raised the issue. Vacating only a portion of a rule, without determining that it is severable, is not within a court's power. *See Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 618 (1944) (once a portion of a rule is invalid, "the entire [rule] of which that limitation was a part *must* fall") (emphasis added); *Fed. Power Comm'n v. Ida. Power Co.*, 344 U.S. 17, 21 (1952) (holding that courts lack "power to exercise an essentially administrative function" of revising an invalid rule); *S. Prairie Constr. Co. v. Int'l Union of Operating Eng'rs*, 425 U.S. 800, 805-06 (1976) ("[T]he function of the Court of Appeals ended when the Board's error on [a particular] . . . issue was 'laid bare.'") (citation omitted); *North Carolina v. Fed. Energy Regulatory Comm'n*, 730 F.2d 790, 799 (D.C. Cir. 1984) ("Because the Commission's disposition of *Transco I* is unseverable from its disposition of *Transco II* and *III*, we *cannot* afford petitioners the relief requested [of partial *vacatur*] . . . .") (emphasis added).

The panel's rejection of arbitrary-or-capricious challenges to the Listing Rule is not to the contrary. The Court did not, as Petitioners assert, "affirm[]" the

application of the Listing Rule for current users of ozone-depleting substances. NRDC Br. 22 (citing 866 F.3d at 457); *accord* State Br. 29 ("[T]his Court . . . upheld the Rule's HFC use restrictions insofar as they apply to current users of ozone-depleting substances in the relevant end-uses."). The panel acknowledged—as Intervenors and EPA agreed—that EPA would have the authority to prohibit manufacturers and end-users from switching from ozone-depleting substances to HFCs. 866 F.3d at 457. The panel also "reject[ed]" all arguments that EPA's assessment of HFCs was arbitrary and capricious. *Id.* at 462-64. The panel nowhere said that it "affirmed" the Listing Rule in any respect. Nor could it. Given that the Court held the bulk of the Listing Rule to be contrary to law, and vacated it for that reason, the Court had no authority to perpetuate the remnants of the Rule simply because they were not arbitrary and capricious on their own terms. The sole basis for preserving any aspect of the Listing Rule would have been a conclusion that it was severable from the unlawful portion, and *Mexichem* made no such finding.

II. THE COURT DOES NOT HAVE JURISDICTION OVER THE PETITIONS FOR REVIEW.

The reality is that after *Mexichem*, EPA could not have enforced the Listing Rule against any party—manufacturer or user—that produced, obtained, or used the HFCs that EPA had unsuccessfully tried to prohibit. The Guidance did not change the law on this point. That being so, the Court has multiple reasons to dismiss or

deny the petitions for review. For starters, the Court should dismiss the petitions for lack of jurisdiction.

A. Petitioners Lack Standing.

Standing is, of course, an absolute requirement, and Petitioners have the burden to establish their standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Although Petitioners present copious evidence intended to show that end-users such as supermarkets will continue to use HFCs, and will thereby allegedly contribute to global warming, their arguments for standing rest unavoidably on the faulty premise that the Guidance changed the law. Petitioners contend that the Guidance "authoriz[es] a significant increase in HFC emissions," State Br. 18, and will lead to increased HFC emissions because it "suspend[s] valid portions of the 2015 Rule," NRDC Br. 16-17.

In fact, however, the HFC usage and emissions that Petitioners complain of would be permissible with or without the Guidance, because *Mexichem* effectively undid the Rule. Petitioners therefore fail to satisfy the "causation" criterion for standing. Petitioners are not themselves users or potential users of HFCs. The harms they describe would result solely from the actions of third parties, the end-users that switch to or continue to use HFCs. Unless a rule "permits or authorizes third-party conduct that would otherwise be illegal," *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004)—which, as explained above, the

Guidance does not—a petitioner must provide "formidable evidence" that "leav[es] little doubt as to" the causal relationship between the government action and the third-party conduct, *id.* at 941-42. Petitioners, relying on a change in law that the Guidance supposedly makes, have produced no evidence of any other causal relationship. Understood properly, the Guidance simply informs the regulated public about legal consequences that already existed. Whether receiving that information from EPA would motivate more end-users to keep using HFCs is purely speculative.

B. The Guidance Is Not Final Action.

As Petitioners acknowledge, the Court has jurisdiction under the Clean Air Act only if the Guidance was a "final action." State Br. 3. That phrase means the same as "final agency action" under the Administrative Procedure Act. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). "[T]he term is not so all-encompassing as to authorize us to exercise 'judicial review [over] everything done by an administrative agency.'" *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (alteration in original) (citation omitted).

"The most important factor" distinguishing a final action from a mere statement of policy "concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014). Nothing in the Guidance has actual legal effect.

Although Petitioners characterize the Guidance as "suspending" the Listing Rule, NRDC Br. 16, in fact it simply informed the public that EPA thinks *Mexichem* vacated the Listing Rule's restrictions on HFCs in their entirety. JA __ (83 Fed. Reg. at 18,435) ("Vacating the 2015 Rule 'to the extent' that it imposed that requirement *means* vacating the listings.") (emphasis in original). That policy has no legal consequence, because it neither imposes a new legal obligation nor lifts an existing one; it only described the state of the law as EPA sees it following *Mexichem*. *See Indep. Equip. Dealers*, 372 F.3d at 428 (guidance not final action because it "left the world just as it found it"). EPA also notified the public that EPA "will not apply the HFC use restrictions" pending a rulemaking to revise them in light of *Mexichem*. JA __ (83 Fed. Reg. at 18,435). That, too, has no legal consequence. Petitioners do not assert that EPA's announcement would "change the legal burden placed on the government (or on a private party in a citizen suit)." *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 16 (D.C. Cir. 2005).

Indeed, the availability of citizen suits throws a stark light on Petitioners' contention that EPA "suspended" the Listing Rule. If EPA had truly "altered the legal regime applicable to users and manufacturers" subject to the Listing Rule, as Petitioners say, NRDC Br. 23, the Guidance would foreclose the enforcement suits that private plaintiffs can bring based on the Rule's HFC restrictions, 42 U.S.C.

§ 7604(a).[5] Surely, though, in a citizen suit EPA's statement that *Mexichem* vacated the restrictions would "'ha[ve] force only to the extent the agency [or defendant] can persuade a court to the same conclusion.'" *Nat'l Ass'n of Home Builders*, 415 F.3d at 15 (quoting *AT&T v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001)).

These features mark the Guidance as quite different from the jurisdictional determinations that the Supreme Court held are final agency actions. *See* NRDC Br. 23 (citing *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016)). The Court in *Hawkes* stressed that the determination established or denied a safe harbor that was binding on the only bodies that can enforce the Clean Water Act to impose civil liability. 136 S. Ct. at 1814. By contrast, nothing in the Guidance purports to bind any government body; and the Clean Air Act authorizes private plaintiffs to seek civil penalties, 42 U.S.C. § 7604(a), (g).

To be sure, the Guidance provided "regulatory certainty," NRDC Br. 22 (citing JA __ (83 Fed. Reg. at 18,433)), and was "intended to dispel confusion" about the impact of *Mexichem*, JA __ (83 Fed. Reg. at 18,433). But providing "certainty," by itself, does not give a guidance document legal effect. A regulated entity

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[5] Section 7604(a) refers to "emission standard[s] or limitation[s] under this chapter"; subsection (f)(3) defines that term to encompass the SNAP regulations. 42 U.S.C. § 7604(f)(3).

assessing its response to *Mexichem* would want to know whether EPA shares the view that *Mexichem* vacated the HFC use restrictions. Otherwise, EPA might try to undercut the *Mexichem* decision, such as through investigations that make operations more difficult for HFC users. Had it done so, EPA would not have been the first agency to resist the full consequences of judicial authority. *Cf., e.g.*, *Bayshore Cmty. Hosp. v. Hargan*, 285 F. Supp. 3d 9, 17 (D.D.C. 2017) ("[T]he court is left with the unsettling sense that Defendant is schizophrenically applying [a prior court decision], resulting in Plaintiffs having to expend considerable time and resources to challenge the [agency's] decision in this court."). EPA's acknowledgment that it was important to share its views with the regulated community—to provide "regulatory certainty"—does not make the Guidance the *source* of the legal consequences that flowed from the Court's decision. *Cf. Nat'l Ass'n of Home Builders*, 415 F.3d at 15 ("[P]ractical consequences . . . are insufficient to bring an agency's conduct under our purview.").

National Environmental Development Association's Clean Air Project v. EPA, 752 F.3d 999 (D.C. Cir. 2014), is not to the contrary, for the reasons EPA ably explains. EPA Br. 28-29. Although the Court held there that EPA's response to a particular court case was a rulemaking that needed notice and comment, the circumstances were quite different. A court had granted relief in a single adjudication—without vacating the rule underlying EPA's decision in the

adjudication. *See* 725 F.3d at 1002-03. EPA responded by instructing its personnel to treat that court's holding as invalidating the underlying rule for cases in the same circuit, and to continue enforcing the rule in the rest of the country. *Id.* at 1003. That outcome was different from the underlying rule and different from what the court ordered. Here, by contrast, the Court itself, in *Mexichem*, decided to *vacate* the Listing Rule. The Guidance simply explained the necessary, inherent consequences of that decision.

III. PETITIONERS FAIL TO SHOW A MATERIAL DEFICIENCY IN THE GUIDANCE.

If the Court has jurisdiction, it should deny the petitions anyway. EPA was simply implementing the Court's mandate—and did so correctly.

A. The Guidance Is, At Most, An Interpretive Rule.

Even if there were some possibility (1) that the Listing Rule was severable, (2) that *Mexichem* therefore left the severable portion intact, and (3) that EPA therefore had a choice about how to respond to *Mexichem*, that choice would be fundamentally an interpretive rather than a legislative rule—and thus did not need notice and comment, *see* 5 U.S.C. § 553(b). On its face, the Guidance engages in an interpretation of the Listing Rule and of the Court's decision. EPA explained that the HFC use restrictions are "non-severab[le]" because, in part, of the "structure of the regulations." JA __ (83 Fed. Reg. at 18,435) (emphasis omitted). EPA then explained that "[v]acating the 2015 Rule 'to the extent' . . ."—the language in the

concluding paragraph of *Mexichem*—"*means* vacating the listings." JA __ (*Id.*) (emphasis in original). Thus, the Guidance "derive[d] a proposition," that the Listing Rule is unenforceable, "from an existing document," the Court's opinion in *Mexichem*, "whose meaning compels or logically justifies the proposition." *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010). That is the hallmark of an interpretive rule. *See Am. Inst. of Certified Pub. Accountants v. IRS*, 746 F. App'x 1, 12 (D.C. Cir. 2018) (a rule is interpretive "where 'it explains more specifically what is meant' in another authority") (citation omitted).

The States argue that the Guidance must be a legislative rule because it "meaningfully changes the legal landscape," and because—they say—the Guidance "affects the rights and obligations of regulated entities." State Br. 31-32. The Court long ago explained that simply having legal consequences does not make a rule legislative. For example, as a result of deference, a genuine interpretation *does* "change . . . the legal norm." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997). What distinguishes a legislative from an interpretive rule is, rather, "whether the interpretation *itself* carries the force and effect of law, . . . or rather whether it spells out a duty fairly encompassed within the [source] that the interpretation purports to construe." *Air Transp. Ass'n of Am. v. FAA*, 291 F.3d 49, 55-56 (D.C. Cir. 2002) (emphasis added and omitted).

NRDC contends that the Guidance does not fairly derive from the Listing Rule itself. *See* NRDC Br. 26 ("The suspension . . . does not clarify the meaning of the 2015 Rule."). That is beside the point. The Guidance purported to and did interpret the Court's opinion in *Mexichem*. JA __ (83 Fed. Reg. at 18,435). EPA did not assert any independent authority to treat the Listing Rule as unenforceable; the Guidance rests solely and directly on EPA's understanding of the Court's mandate.[6] Petitioners do not, and cannot, make any argument that a rule fails to be "interpretive" simply because the source it interprets is a court opinion rather than a statute or rule.

B. The Lack Of Notice And Comment Is Harmless At Worst.

Of course, as explained above, EPA did not really have a choice, because *Mexichem* did, indeed, render the Listing Rule's HFC use restrictions unenforceable. That users and manufacturers can continue to switch to and use HFCs is unavoidable unless and until EPA completes a rulemaking to revise the Listing Rule in light of

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[6] The States suggest that the Guidance is legislative because it "exceeds the scope of the *Mexichem* partial vacatur." State Br. 32. They cannot dispute that the Guidance is based on an attempt to explicate the *Mexichem* judgment. "[P]etitioners' argument 'confuses the question whether the agency is interpreting [the opinion] with the question whether the agency is thoroughly, or properly, interpreting the [opinion].'" *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1113 (D.C. Cir. 1993) (citation omitted).

Mexichem. That reality forecloses any argument that EPA should be forced to engage in notice and comment on the subject of the Guidance.

Even in cases under the Administrative Procedure Act, the Court has recognized, under the rule of harmless error, that a complete absence of notice and comment is excusable if the agency had no choice. *See, e.g.*, *Sheppard v. Sullivan*, 906 F.2d 756, 762 (D.C. Cir. 1990) ("[A]s we believe the agency's approach to have been the only reasonable one, Sheppard could not have been harmed by the absence of public participation."). To be sure, "utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002). But in this case, there is no uncertainty. For EPA to have implemented or enforced the Listing Rule with respect to users who switch to HFCs would have violated the Court's judgment in *Mexichem*, and the Guidance simply acknowledged that fact.

It bears emphasis, too, that because this case arises under the Clean Air Act, Petitioners bear the burden of showing that "there is a 'substantial likelihood' that the rule would have been 'significantly changed' in the absence of the procedural error.'" *West Virginia v. EPA*, 362 F.3d, 861, 869 (D.C. Cir. 2004) (citing 42 U.S.C. § 7607(d)(8)). Petitioners do not come close to meeting that burden. They say that given an opportunity to comment, they would have pointed out that *Mexichem*

rejected arbitrary-or-capricious challenges to EPA's decision to list HFCs, and they would have suggested ways EPA could enforce the HFC use restrictions for users but not manufacturers. State Br. 34-35. Those proposals might be valuable input in the rulemaking EPA intends to undertake to redo the Listing Rule;[7] but none of them addresses the fundamental issue that EPA faced, that as a matter of law *Mexichem* had eliminated the HFC use restrictions. Petitioners make no argument that their comments could have led to a different conclusion on that point.

C. The Guidance Is Not Arbitrary Or Capricious.

Similarly, because Petitioners fail to grapple with the issue that EPA actually faced, they fail to show the Guidance was arbitrary or capricious. They identify issues that they say EPA ignored or overlooked, such as the additional HFC emissions there might be; the health and safety concerns that factor into a SNAP listing decision; and the possibility that EPA could have clarified the applicability of the Listing Rule on a case-by-case basis. NRDC Br. 28-31; State Br. 36-41. But these issues could only come into play if EPA had discretion to implement the HFC use restrictions from the Listing Rule. *Cf. Nat'l Shooting Sports Found., Inc. v.*

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[7] The Guidance made clear that EPA does intend to engage in notice and comment rulemaking to redo the Listing Rule in response to *Mexichem*. JA __ (83 Fed. Reg. at 18,435-36). Petitioners will have ample opportunity to offer EPA their suggestions in that proceeding.

Jones, 716 F.3d 200, 215 (D.C. Cir. 2013) (agency need only consider "significant and viable" alternatives); *see also Ashton v. U.S. Copyright Office*, 310 F. Supp. 3d 149, 158 (D.D.C. 2018) (agency has "no obligation to consider all non-dispositive or tangential aspects of the issue before it").

EPA thoroughly discussed its reasons for concluding that the *Mexichem* judgment rendered the HFC use restrictions unenforceable. JA __ (83 Fed. Reg. at 18,433-54). That conclusion—which, indeed, follows inexorably from the structure of the Listing Rule and the Court's decision to grant *vacatur*—made it irrelevant whether alternative approaches would be preferable. Petitioners make no real attempt to refute EPA's conclusion. Their concerns about emissions and global warming, serious though they are, should be raised when EPA revisits the Listing Rule in its forthcoming rulemaking.

CONCLUSION

The Court should dismiss the petitions for review, or in the alternative deny them.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit set forth in this Court's October 18, 2018 order because the brief contains 8,779 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Cir. R. 32(e)(1).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

March 1, 2019

/s/ Keith Bradley
Keith Bradley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, PURSUANT TO Fed. R. App. P. 25(d)(1)(B) and D.C. Cir. R. 25(f), that, on March 1, 2019, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

March 1, 2019

/s/ Keith Bradley
Keith Bradley