ORAL ARGUMENT SCHEDULED FOR MAY 3, 2019

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

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

NATURAL RESOURCES DEFENSE COUNCIL,

Petitioner,

v.

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

Respondents,

ARKEMA, INC., et al.,

Intervenors.

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

REPLY BRIEF OF PETITIONER NRDC

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GLOSSARY OF ABBREVIATIONS

EPA	Environmental Protection Agency
HFC	Hydrofluorocarbon

SUMMARY OF ARGUMENT

EPA and Intervenors build all their arguments in defense of EPA's so-called "Guidance" on the same faulty foundation: their assertion that *Mexichem Fluor, Inc. v. EPA* fully vacated the 2015 Rule's HFC listings. Even a cursory review of the opinion reveals that this position is untenable.

After finding that the Clean Air Act authorized EPA to apply the HFC listings to one category of manufacturers (those still using ozone-depleting substances), *Mexichem* held that EPA lacked statutory authority to regulate a different category of manufacturers (those that had already switched to HFCs). 866 F.3d 451, 457, 462 (D.C. Cir. 2017). *Mexichem* vacated the listings "to the extent" they applied to the second category. *Id.* at 462. The Court then held that EPA acted reasonably in listing HFCs as unacceptable substitutes for ozone-depleting substances. *Id.* at 462-64. *Mexichem* thus affirmed the listings and their application to entities currently using ozone-depleting substances. The Guidance does not offer an alternative interpretation of *Mexichem*; it just ignores the Court's second holding affirming the listings and mislabels *Mexichem*'s partial vacatur as a full vacatur.

Since *Mexichem* does not support the Guidance, EPA and Intervenors invoke severability doctrine to attack and revise *Mexichem*'s relief. The *Mexichem* panel, however, properly exercised its remedial discretion by vacating the 2015 Rule only partially and upholding the HFC listings as applied to some manufacturers but not others. Neither EPA nor Intervenors argued during *Mexichem* that the HFC listings

were not severable. The Agency cannot now use the Guidance to rewrite the Court's judgment.

The Guidance cloaks its suspension of the HFC listings in the guise of interpretation, but *Mexichem* unambiguously upheld part of the 2015 Rule while striking down another. This partial vacatur cannot be reinterpreted as a full vacatur. The Guidance also erroneously presumes that EPA's only option following *Mexichem* was to scrap the HFC listings altogether. Not so. EPA could have continued to apply the listings to current users of ozone-depleting substances as authorized by *Mexichem* and thereby prevented significant emissions of a potent greenhouse gas. EPA could not, however, suspend the HFC listings without notice-and-comment rulemaking and without considering the drawbacks of suspension, including harms to health and the environment. The Guidance does just that.

ARGUMENT

I. *Mexichem* did not vacate the 2015 Rule's HFC listings in their entirety

This Court owes no deference to EPA's interpretation of a judicial opinion. *See Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002); *accord* Intervenors Br. 14-15. EPA and Intervenors implausibly argue that, when *Mexichem* "vacate[d] the 2015 Rule to the extent the Rule requires manufacturers to replace HFCs with a substitute substance," 866 F.3d at 462, the Court vacated the HFC listings in their entirety. EPA Br. 15, 19; Intervenors Br. 24-25. This reading of *Mexichem* contradicts key portions of the decision.

First, the plain meaning of vacating the 2015 Rule only "to the extent" it applied to certain manufacturers is to leave the Rule in effect *to the extent* it applied to other manufacturers and end users. *Compare Mexichem*, 866 F.3d at 454, 462, 464, *with Honeywell Int'l Inc. v. EPA*, 374 F.3d 1363, 1373 (D.C. Cir. 2004), *as amended* (Jan. 7, 2005) (vacating, without qualification, Safe Alternatives Program listings for end uses of two chemicals), *opinion withdrawn in part on reconsideration*, 393 F.3d 1315 (D.C. Cir. 2005).

Mexichem identifies some entities properly subject to the Rule's HFC use limitations: "any manufacturers that *still make products that contain ozone-depleting substances*." 866 F.3d. at 457 (emphasis in original); *see also id.* at 460. EPA construes this statement as merely the Court's observation of EPA's statutory authority. EPA Br. 19. But this was authority EPA had already exercised through the 2015 Rule, and the Court noted that all parties agreed "that aspect of the 2015 Rule" was not in dispute. 866 F.3d at 457-58. *Mexichem* did not disturb that aspect of the Rule.

EPA asserts that "[t]he Court did *not* say that any aspect of the *2015 Rule* would remain in force." EPA Br. 19. EPA is flat wrong. The Court rejected all of Mexichem and Arkema's arbitrary and capricious arguments, affirmed the HFC listings as reasonably promulgated, and did so *after* partially vacating those listings. 866 F.3d at 462-64. If *Mexichem* had vacated the listings in their entirety as EPA claims, petitioners' challenges to the reasonableness of the listing decision would have been moot. Instead, the Court explained that its "conclusion that the 2015 Rule must be

vacated to the extent it requires manufacturers to replace HFCs does not answer the question whether EPA reasonably removed HFCs from the list of safe substitutes in the first place." *Id.* at 462. And, because the Court upheld the listing of HFCs as unacceptable substitutes, the Rule's prohibitions continued to apply without interruption to current users of ozone-depleting substances.

EPA asserts that the Guidance is "consistent" with *Mexichem*'s arbitrary and capricious holding because the Guidance does not "repudiate" the factual basis for the listing decision. EPA Br. 30 n.13. But the Guidance is *not* consistent with *Mexichem*'s decision to uphold the listings as to users of ozone-depleting substances. Instead, the Guidance insists that *Mexichem* fully vacated those listings. 83 Fed. Reg. 18,431, 18,435 (Apr. 27, 2018) (JA__). To save the Guidance, EPA would convert *Mexichem*'s second holding into an advisory opinion and transform the partial vacatur into a full vacatur. Such remedial alchemy is beyond the Agency's power.

Each of EPA's and Intervenors' arguments depend on misconstruing *Mexichem*'s partial vacatur as a full vacatur. As a result:

- Petitioners have standing. *Contra* Intervenors Br. 27-28. The Guidance suspends valid applications of the HFC listings, causing increased emissions of a potent greenhouse gas. NRDC Br. 15-19; States Br. 18-25.
- The Guidance is final agency action. *Contra* EPA Br. 17-30; Intervenors Br. 28-32. It directs EPA officials not to enforce the listings and creates a new legal

right for users of ozone-depleting substances to switch to HFCs. NRDC Br. 20-24.

- The Guidance is a legislative rule that needed to go through notice and comment. *Contra* EPA Br. 30-33; Intervenors Br. 32-34. It suspends HFC listings promulgated through a legislative rule. NRDC Br. 24-28.
- EPA's failure to submit the Guidance for notice and comment was not harmless. *Contra* Intervenors Br. 34-36. It denied the public an opportunity to highlight the harms that would result from suspending the listings and to suggest alternatives. *Infra* p. 12, 14; NRDC Br. 29-31.
- The Guidance is arbitrary. *Contra* EPA Br. 33-39; Intervenors Br. 36-37. It lacks a reasoned explanation of the disadvantages of and alternatives to suspending the listings. *Infra* p. 14; NRDC Br. 28-31.

The Guidance is at odds with *Mexichem*, and it is the Guidance, not *Mexichem*, that must yield.

II. EPA's and Intervenors' severability arguments are meritless

A. To partially vacate the HFC listings, *Mexichem* was not required to strike regulatory text

EPA observes that the HFC listings do not distinguish, as *Mexichem* did, between manufacturers who have replaced ozone-depleting substances with HFCs

and those who have not. EPA Br. at 9. NRDC agrees.[1] EPA goes astray, however, in concluding that, because "there is no [regulatory] language that could be understood as being removed or struck out by [*Mexichem*]," EPA was free to "treat[] it as striking the HFC listing changes in the 2015 Rule in their entirety." 83 Fed. Reg. at 18,434-35 (JA __); *see* EPA Br. 15, 19-21.

When a court finds a statute "invalid as applied to one state of facts[,] . . . the normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (internal quotation marks and citations omitted). The same is true for regulations. *See ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 954-56, 959 (D.C. Cir. 1995). *Mexichem* followed this "normal rule" by vacating the HFC listings only *to the extent* they applied to manufacturers that had already replaced ozone-depleting substances with HFCs.

[1] EPA misrepresents NRDC's statements on this point. In a related case, NRDC observed that *Mexichem* "could not be implemented as written" because the decision partially vacated the 2015 Rule, even though the legal consequences of the HFC listings derive from a regulation issued in 1994. Resp't-Intervenors' Reply Supp. Mot. to Continue to Hold Case in Abeyance, *Mexichem Fluor, Inc. v. EPA*, No. 17-1024, Dkt. 1729788 at 5 (D.C. Cir. May 7, 2018). NRDC was arguing that the *Mexichem* petitions were untimely. *Id.* at 10-11. It was not conceding that EPA could not enforce applications of the HFC listings upheld by *Mexichem*. *Contra* EPA Br. 20-21. NRDC has consistently advocated for enforcement of the listings post-vacatur. *See* Letter from David D. Doniger et al., NRDC, to Matt Leopold, EPA General Counsel, and William Wehrum, Assistant Admin. of EPA Office of Air & Radiation 1-2 (Mar. 6, 2018) (JA __).

Nor is there anything unusual about *Mexichem*'s partial vacatur limiting the reach of the 2015 Rule without striking regulatory text. The Supreme Court "has on several occasions declared a statute invalid as to a particular application without striking the entire provision that appears to encompass it." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 487 (1995) (O'Connor, J., concurring in part and dissenting in part); *see, e.g.*, *United States v. Grace*, 461 U.S. 171, 175, 179 n.8, 183 (1983) (holding that a statute barring the display of flags and banners on Supreme Court grounds was unconstitutional as applied to public sidewalks bordering the Court); *Tennessee v. Garner*, 471 U.S. 1, 5, 11 (1985) (holding that a statute authorizing deadly force against fleeing suspects was unconstitutional as applied to "unarmed, nondangerous suspects"); *see also ISKCON*, 61 F.3d at 954-56, 959 (holding that a regulation barring solicitation of charitable donations on the National Mall was unconstitutional as applied to solicitations within restricted permit areas).

Davis County Solid Waste Management v. EPA, 108 F.3d 1454 (D.C. Cir. 1997), cited by EPA, makes this point explicitly. EPA Br. 22, 23. In a prior opinion, the Court vacated emissions standards for municipal waste combustors. 108 F.3d at 1455. EPA's regulations categorized combustor units according to the size of the plant where they were housed, but the Court held that the Clean Air Act required categorization according to the size of the individual unit. *Id.* On petition for rehearing, EPA asked the Court to reinstate standards applicable to large units since those standards would be nearly unchanged by the recategorization. *Id.* A petitioner

objected that EPA could not apply the standards to large "units" because EPA had promulgated standards only for large "plants." *Id.* at 1459. The Court found that this argument "exalt[s] form over substance." *Id.* Partial vacatur was permissible even if it did not map neatly onto the text of the regulation. *See id.*

Grace, *Garner, ISKON*, and *Davis County* all imposed relief similar to *Mexichem*: to sort between valid and invalid applications, they recognized distinctions not set out in the statutory or regulatory text, invalidated the law or rule to extent it applied to some entities, and left it in place to the extent it applied to others. Thus, there is no merit to EPA's contention that *Mexichem* must have vacated the HFC listings in their entirety just because it did not strike any words from the regulatory text of the 2015 Rule.

Nevertheless, EPA asserts that its position is "consistent with this Court's precedent" on severability. EPA Br. 21. Severability is a "question of remedy." *United States v. Booker*, 543 U.S. 220, 245 (2005). It is a doctrine courts can apply when deciding how to structure relief. As EPA concedes, *Mexichem* did not find that the HFC listings were not severable. EPA Br. 19. Severability doctrine does not empower EPA to revise *Mexichem*'s final judgment. EPA cannot *sua sponte* alter the scope of *Mexichem*'s relief any more than it can modify an injunction or a consent decree without leave of the court.

If EPA or Intervenors wished to argue that the HFC listings were not severable and should be vacated in their entirety, they could have done so during *Mexichem* in their merits briefing or in a petition for rehearing. *See* Fed. R. App. P. 40; D.C. Cir.

Rule 35. This Court often entertains severability arguments raised on petitions for rehearing. *See, e.g.*, *MD/DC/DE Broads. Ass'n v. FCC*, 253 F.3d 732, 733-34 (D.C. Cir. 2001); *Davis Cty.*, 108 F.3d at 1455, 1460; *Virginia v. EPA*, 116 F.3d 499, 501 (D.C. Cir. 1997) (per curiam). EPA and Intervenors failed to argue severability during *Mexichem*, and they cannot now seek to modify *Mexichem*'s relief.

Heartland Regional Medical Center v. Sebelius, 566 F.3d 193 (D.C. Cir. 2009), is not to the contrary. *Contra* Intervenors Br. 24. That case interpreted a district court ruling, which had "invalid[ated]" and remanded a regulation without specifying whether the regulation was vacated. 566 F.3d at 195, 197. This Court concluded based on "the decision as a whole" that the district court had not vacated the regulation. *Id.* at 197-99. By contrast, *Mexichem* did not leave its remedy in doubt. It ordered partial vacatur. The decision as a whole—particularly its affirmation of EPA's authority to regulate current users of ozone-depleting substances and its rejection of arbitrary and capricious challenges—confirms the Court intended to vacate the HFC listings only in part.

B. To partially vacate the HFC listings, *Mexichem* was not required to analyze severability

According to Intervenors, "[v]acating only a portion of a rule, without determining that it is severable, is not within a court's power." Intervenors Br. 25. Therefore, Intervenors assert, "*Mexichem* could not have vacated anything less than the complete restrictions on HFCs, because the panel made no assessment of

severability." *Id.* at 25; *see also id.* at 26. The cases they cite, however, stand only for the uncontroversial proposition that a court cannot partially vacate a rule when it determines that the rule is not severable. *See id.* at 25. Myriad opinions demonstrate that an express severability analysis is not a prerequisite for partial vacatur. *See, e.g.*, *Nat'l Corn Growers Ass'n v. EPA*, 613 F.3d 266, 275 (D.C. Cir. 2010); *S. Coast Air Quality Mgmt. Dist. v. EPA*, 489 F.3d 1245, 1248-49 (D.C. Cir. 2007); *NRDC v. EPA*, 489 F.3d 1364, 1367-68, 1375 (D.C. Cir. 2007). *Mexichem* could and did partially vacate the HFC listings without discussing severability.

III. The Guidance does not interpret *Mexichem* or the 2015 Rule

EPA insists that the Guidance does not suspend the HFC listings; it merely interprets them in light of *Mexichem*. EPA Br. 30-33; Intervenors Br. 32-34. However, "[t]o be interpretative, a rule 'must derive a proposition from an existing document whose meaning compels or logically justifies the proposition.'" *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (quoting *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010)). As described above, *Mexichem* does not compel or logically justify the Guidance's assertion that the HFC listings were vacated in their entirety. EPA cannot escape notice-and-comment requirements "by calling a substantive regulatory change an interpretative rule." *See U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005).

Intervenors contend that citizen suits to enforce the HFC listings are still available and are evidence that the Guidance interprets, rather than changes, the law.

Intervenors Br. 29-30. The Clean Air Act directs that challenges to "final action" by EPA, such as the Guidance, be brought through petitions for review in this Court, not citizen suits. *See* 42 U.S.C. §§ 7607(b)(1), 7604(a); *NRDC v. EPA*, 643 F.3d 311, 317 (D.C. Cir. 2011). Whether or not citizen suits are available against regulated entities, the Guidance is final agency action because it "narrows the field of potential plaintiffs" by withdrawing government enforcement, "a legal consequence satisfying the second *Bennett* prong." *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016) (internal quotation marks and alteration omitted).

IV. EPA could have enforced valid applications of the HFC listings

EPA argues that continuing to enforce the HFC listings after *Mexichem* was "all but impossible." EPA Br. 24. But there are thousands of refrigeration systems and other products containing ozone-depleting substances still in use today. NRDC Br. 16-17. The HFC listings bar users from replacing such systems with equipment that uses HFCs, and *Mexichem* left that prohibition in place. 866 F.3d at 457, 460. EPA can and should enforce the HFC listings in these clear cases.

NRDC acknowledges that there are "murky" cases where implementing *Mexichem*'s partial vacatur raises policy questions regarding how to distinguish between users that have replaced ozone-depleting substances with HFCs and those that have not. EPA Br. 20. EPA does not claim that these line-drawing questions are intractable. Instead, it contends that any effort to answer them would "drastically rewrite the 2015 Rule" and require notice and comment. *Id.* at 21.

Revisions to the HFC listings or other Safe Alternatives Program regulations would have to go through notice and comment. *See* 40 C.F.R. § 82.180(a)(8)(ii). But EPA is wrong that *any* interpretation or clarification of the user categories described by *Mexichem* would require notice and comment. *Contra* EPA Br. 25-26. A rule is not legislative "merely because it supplies crisper and more detailed lines than the authority being interpreted." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Courts have upheld agency guidance that engaged in such line drawing, even when it addressed complex or technical subjects. *See, e.g.*, *id.* at 1107-08, 1112-13 (rejecting notice-and-comment challenge to agency letters describing which x-rays "diagnose" lung disease within the meaning of regulations); *Catawba Cty. v. EPA*, 571 F.3d 20, 27-28, 33-35 (D.C. Cir. 2009) (per curiam) (rejecting notice-and-comment challenge to agency memo establishing rebuttable presumption regarding the geographic boundaries of certain Clean Air Act non-attainment areas and identifying nine factors EPA would consider when deciding whether to deviate from that presumption); *Molycorp, Inc. v. EPA*, 197 F.3d 543, 544-46 (D.C. Cir. 1999) (rejecting notice-and-comment challenge to technical document identifying which wastes at petitioner's mine the agency considered unregulated "beneficiation" wastes and which it considered regulated "processing" wastes). Alternatively, EPA could have resolved implementation questions through case-by-case adjudication. *See Blanca Tel. Co. v. FCC*, 743 F.3d 860, 867 (D.C. Cir. 2014). Even if EPA were correct that no aspect of *Mexichem*'s partial vacatur could be implemented without rulemaking, that

would not license EPA to suspend the HFC listings without notice and comment, nor would it constitute a reasoned explanation for such a suspension.

EPA faults Petitioners for not offering details on alternative guidance that EPA could have issued lawfully. EPA Br. 24. Petitioners have demonstrated that more tailored guidance and case-by-case adjudication were viable options EPA ignored. Petitioners do not need to draft an interpretive rule implementing the partial vacatur to prove that the Guidance is arbitrary.

Intervenors describe two purported obstacles to enforcement of the HFC listings post-*Mexichem*. Intervenors contend that *Mexichem* undermined the 2015 Rule's finding that HFCs present a greater climate risk than alternatives with lower global warming potentials. Intervenors Br. 21-22. But *Mexichem upheld* EPA's use of global warming potentials in the Agency's comparative risk assessment. 866 F.3d at 463. EPA's assessment of HFCs' climate risks remains sound even if the listings apply only to current users of ozone-depleting substances. *See* 80 Fed. Reg. 42,870, 42,937-38 (July 20, 2015) (JA __).

Intervenors also claim that continuing to apply the HFC listings to users of ozone-depleting substances will incentivize users to keep their equipment "in service as long as possible." Intervenors Br. 23. Whatever incentive entities may have to keep using such equipment remains the same after *Mexichem* as before. *See* 80 Fed. Reg. at 42,903 (JA __). *Mexichem* did not change the requirements applicable to these users and thus did not alter their incentives to stick with or abandon ozone-depleting

substances. The Guidance, however, did remove the requirement that, when replacing equipment containing ozone-depleting substances, entities begin using substances that pose less climate risk than HFCs.

V. EPA ignored HFC emissions caused by the Guidance

EPA listed HFCs as unacceptable substitutes for ozone-depleting substances because it determined that HFCs pose greater risks than other available substitutes. NRDC Br. 8-9. EPA and Intervenors do not dispute that allowing current users of ozone-depleting substances to switch to HFCs, which the listings prohibited, will cause a significant increase in HFC emissions. *See* NRDC Br. 16-18; Intervenors Br. 27-28; EPA Br. 38. Nor do they dispute that these additional emissions will exacerbate climate change and its harms to the health, safety, and property of NRDC members. *See* NRDC Br. at 16-19. EPA concedes that it did not consider these harms before issuing the Guidance. EPA Br. 35.

Yet, EPA claims that the drawbacks of suspending the HFC listings were "irrelevant" because *Mexichem*, not the Guidance, eliminated the listings' restrictions on current users of ozone-depleting substances. EPA Br. 35; Intervenors Br. 36-37. As described above, this conclusion is plainly wrong. *Supra* p. 2-4. EPA cannot disguise its policy choice, and the resulting costs, as the inevitable outcome of *Mexichem*. EPA arbitrarily failed to consider the excess emissions and harm caused by indefinite suspension of valid portions of the 2015 Rule. *See* NRDC Br. 28-31; *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

VI. The Guidance should be vacated

The Guidance served no function other than to suspend valid portions of the 2015 Rule, with immediate harmful consequences for public health and the environment. Given the seriousness of EPA's errors, the minimal disruption to regulated entities from vacating this interim suspension, and the health and environmental benefits from preventing significant HFC emissions, the Court should vacate the Guidance in its entirety.[2] *See* 42 U.S.C. § 7607(d)(9)(A), (D); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

"[D]eficient notice is a 'fundamental flaw' that almost always requires vacatur." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (quoting *Heartland Reg'l Med. Ctr.*, 566 F.3d at 199). EPA's complete failure to provide any notice or opportunity for comment before suspending the HFC listings merits vacatur. *See Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 103 (D.C. Cir. 2013). Vacatur is also the proper remedy for EPA's arbitrary refusal to consider the increased emissions caused by the Guidance. *See Humane Soc'y of U.S. v. Zinke*, 865 F.3d 585, 614-15 (D.C. Cir. 2017); *AEP Tex. N. Co. v. Surface Transp. Bd.*, 609 F.3d 432, 444 (D.C. Cir. 2010).

By contrast, vacating the Guidance would not be particularly disruptive. Vacatur would simply reinstate the HFC listings for those still using ozone-depleting

[2] EPA does not dispute that the requirements of 42 U.S.C. § 7607(d)(9)(D) are satisfied. Intervenors assert that no comments could have "significantly changed" the Guidance, Intervenors Br. 35-36, but this argument rests on their misreading of *Mexichem*.

substances, an exercise of the Agency's authority that has already gone through notice and comment and been upheld by this Court. For those that have already switched to HFCs, vacatur would cause no disruption at all.

EPA also overstates the regulatory certainty provided by the Guidance. *See* EPA Br. 38-39. The Guidance is "merely an interim measure of limited duration." EPA Br. 39. With or without the Guidance, businesses face uncertainty regarding when and how they will be affected by eventual regulation. *See* NRDC Br. 30-31.

Vacating the Guidance will restore the HFC listings and prevent significant HFC emissions, "resulting in greater protection to public health and the environment." *See NRDC v. EPA*, 489 F.3d at 1375. Any minimal disruption to regulated entities does not outweigh these substantial health and environmental benefits.

CONCLUSION

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

Respectfully submitted,

Dated: March 15, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the Court's order of October 18, 2018 because it contains 3,971 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the count of Microsoft Word. The combined number of words in this brief and the Reply Brief for State Petitioners do not exceed 8,000 words.

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

March 15, 2019

/s/ Peter J. DeMarco
Peter J. DeMarco

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2019, the foregoing Reply Brief of Petitioner Natural Resources Defense Council has been served on all registered counsel through the Court's electronic filing system.

/s/ Peter J. DeMarco
Peter J. DeMarco