TO BE ARGUED MAY 3, 2019
Case No. 18-1172 (consolidated with Case No. 18-1174)

United States Court of Appeals
for the District of Columbia Circuit

NATURAL RESOURCES DEFENSE COUNCIL,

Petitioner,

v.

ANDREW WHEELER, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

PETITION FOR REVIEW OF FINAL ACTION BY THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REPLY BRIEF FOR STATE PETITIONERS

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
DAVID S. FRANKEL
Assistant Solicitor General
Attorneys for State Petitioners
Albany, New York 12224-0341
(518) 776-2456

MICHAEL J. MYERS
Senior Counsel
MORGAN A. COSTELLO
Chief, Affirmative Litigation
JOSHUA M. TALLENT
Assistant Attorney General
Environmental Protection Bureau

(additional counsel listed in
signature blocks)

Dated: March 15, 2019

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GLOSSARY

Act	Clean Air Act
EPA	U.S. Environmental Protection Agency
HCFCs	Hydrochlorofluorocarbons
HFCs	Hydrofluorocarbons
Guidance	Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program, 83 Fed. Reg. 18431 (Apr. 27, 2018)
State Petitioners	The State of New York, the State of California, the State of Delaware, the State of Illinois, the Commonwealth of Massachusetts, the State of Minnesota by and through its Minnesota Pollution Control Agency, the State of New Jersey, the State of Oregon, the Pennsylvania Department of Environmental Protection, the State of Vermont, the State of Washington, and the District of Columbia
2015 Rule	Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program, 80 Fed. Reg. 82870 (July 20, 2015)

PRELIMINARY STATEMENT

In a 2015 rulemaking, EPA moved certain hydrofluorocarbons ("HFCs") from a list of substances approved for use as replacements for ozone-depleting substances to a list of substances prohibited for such use. In 2017, this Court held that EPA had rationally exercised its statutory authority when it prohibited current users of ozone-depleting substances from replacing those substances with prohibited HFCs. The Court also held that EPA could not bar *former* users of ozone-depleting substances from using HFCs. On the basis of that distinction, the Court largely upheld EPA's rule ("2015 Rule") reclassifying certain HFCs and HFC blends as unacceptable substitutes for ozone-depleting substances in certain end-uses, partially vacating the Rule only insofar as it would have required regulated entities currently using *non*-ozone-depleting HFCs to replace them with another substitute. *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017).

In this litigation, EPA continues to insist, wrongly, that the Court's explicitly partial vacatur of the 2015 Rule somehow supports the agency's post-decision Guidance striking the 2015 Rule's HFC restrictions "in their entirety." 83 Fed. Reg. 18431, 18435 (Apr. 27, 2018). Because that

position relies on an incorrect reading of *Mexichem*, this Court should vacate EPA's Guidance.

SUMMARY OF ARGUMENT

Point I. EPA asserts that its Guidance is not reviewable because it merely implements *Mexichem*. But the Guidance goes well beyond what *Mexichem* required. Because it changes regulated entities' legal rights and obligations in ways the *Mexichem* decision neither contemplated nor compelled, the Guidance is both a reviewable final agency action and a legislative rule unlawfully promulgated without notice or comment.

EPA argues that it could not implement *Mexichem*'s partial vacatur by striking any particular regulatory text and, thus, that it was obligated to vacate all HFC listings in the 2015 Rule. But *Mexichem* did not require the alteration of regulatory text; to the contrary, the application of the 2015 Rule vacated in *Mexichem* was set forth in the Rule's *preamble*. To comply with *Mexichem*, EPA needed only limit the Rule's scope to the applications this Court explicitly upheld.

EPA's claim that it could not issue such straightforward guidance because it faced insurmountable practical difficulties in distinguishing between valid and invalid applications is both incorrect and beside the

point. Indeed, this Court in *Mexichem*—and industry intervenors in their briefing—had little trouble drawing exactly this distinction. In any event, EPA's argument underscores that it has declined to implement what "the literal terms of the Court's opinion" required. EPA Br. at 12. Whether EPA had practical reasons to abandon *Mexichem* is irrelevant to the question whether it has meaningfully affected the rights and obligations of regulated entities.

Point II. Had EPA issued tailored guidance faithful to *Mexichem*, it would have preserved some of the health and environmental benefits flowing from the 2015 Rule. Instead, EPA arbitrarily and capriciously obliterated the Rule's HFC use restrictions part and parcel—repudiating the approach articulated in *Mexichem*—without meaningful justification.

Point III. Because EPA's Guidance unlawfully expands the Court's partial vacatur and is otherwise merely duplicative of *Mexichem*, this Court should vacate the Guidance.

ARGUMENT

POINT I

THE GUIDANCE IS A REVIEWABLE LEGISLATIVE RULE UNLAWFULLY ISSUED WITHOUT NOTICE OR PUBLIC COMMENT

EPA's basic contention is that it had no obligation to follow notice-

and-comment procedures under section 307(d) of the Clean Air Act ("Act") because the Guidance simply restates this Court's holdings in *Mexichem* and "has no legal consequence" on its own. EPA Br. at 30. That argument relies on a mischaracterization of *Mexichem*. When Mexichem Fluor and Arkema asked the Court to invalidate the 2015 Rule, the Court agreed *in part*, expressly limiting its partial vacatur to a particular application of the 2015 Rule's HFC listings—specifically, as applied to replacements of *non*-ozone-depleting substances—but otherwise upholding the Rule. *See Mexichem*, 866 F.3d at 455, 462, 464. In abrogating *all* HFC listing changes in the 2015 Rule, EPA went well beyond what *Mexichem* required and so issued a final, legislative rule substantively altering regulated entities' legal rights and obligations. Because EPA issued the Guidance without notice or public comment, the Guidance violates section 307(d).

A. The Guidance Is a Final Agency Action.

1. The Guidance Establishes New Rights and Obligations that Are Inconsistent with *Mexichem*.

In arguing that a wholesale vacatur of the 2015 Rule is consistent with *Mexichem*, EPA profoundly misconstrues the Court's decision. *See, e.g.*, EPA Br. at 18–19. Not only did the Court reaffirm EPA's statutory

authority to regulate the replacement of ozone-depleting substances, it *expressly upheld* the 2015 Rule's HFC listing changes as a rational exercise of that authority. EPA's subsequent decision to rescind the 2015 Rule's HFC listing changes for all remaining applications immediately and concretely determined the legal rights and obligations of regulated entities in a manner not contemplated, let alone mandated, by this Court. The Guidance is thus a reviewable final rule, *see* 42 U.S.C. § 7607(b)(1); *Natural Res. Def. Council v. EPA*, 643 F.3d 311, 319–20 (D.C. Cir. 2011), unlawfully issued without notice or public comment.

What EPA's Guidance improperly ignores is that *Mexichem* upheld the 2015 Rule in substantial part. The Court expressly held that "EPA may move a substitute from the list of safe substitutes to the list of prohibited substitutes, as it did in the 2015 Rule," *see id.* at 457; that EPA had statutory authority to enact the "aspect of the 2015 Rule" that bars using prohibited substitutes as *direct* replacements for ozone-depleting substances, *see id.*; and that placing HFCs on the prohibited substitutes list was not arbitrary and capricious, *see id.* at 462–64. In deciding to reach that last category of claims—and in examining the HFC listings at length—the Court plainly understood that limiting the breadth of the

2015 Rule's application would not affect the validity of the HFC listing changes as applied to current users of ozone-depleting substances.[1] When EPA asserts that "[t]he Court did not say . . . any aspect of the 2015 Rule would remain in force," EPA Br. at 19 (emphasis omitted), it ignores not only the Court's reasoning to the contrary, but also the fact that the Court only *partially* granted the petitions for review and *partially* vacated the 2015 Rule. *See Mexichem*, 866 F.3d at 464.

The upshot of *Mexichem* is that the universe of regulated entities subject to the 2015 Rule is now somewhat smaller than EPA had initially envisioned. But while *Mexichem* "vacate[d] the 2015 Rule to the extent [it] require[d] [users] to replace HFCs with a substitute substance," *id.* at 462, 464, there is no question but that the Court understood the 2015 Rule as continuing to bar the use of certain HFCs as substitutes for *ozone-*

[1] EPA's counsel now surmises that the Court issued a partial vacatur not to uphold the HFC listing changes as applied to current users of ozone-depleting substances, as the text of *Mexichem* plainly indicates, but to leave intact the 2015 Rule's listings for hydrochlorofluorocarbons ("HCFCs"). *See* EPA Br. at 21 n.9. Not only does the opinion fail to provide any support for that position, but because the *Mexichem* petitioners never objected to the HCFC listings, that issue was not before the Court. *See Virginia v. EPA*, 116 F.3d 499, 500 (D.C. Cir. 1997).

depleting substances in covered end-uses.[2]

2. The Court's Partial Vacatur Does Not Logically Compel a Complete Vacatur of the 2015 Rule's HFC listings.

EPA is likewise wrong to argue that the structure of the 2015 Rule requires total abrogation to comply with *Mexichem*. *See* EPA Br. at 21. The 2015 Rule remains enforceable as this Court intended—that is, as applied to direct substitutions of ozone-depleting substances.

EPA mistakenly assumes that it must identify specific "regulatory text [it] could treat as stricken." EPA Br. at 21. But *Mexichem* itself was not based on particular "regulatory text." Rather, the Court rejected EPA's determination, contained in the *preamble* to the 2015 Rule, that it would apply the Rule's HFC listing changes to entities that had already replaced ozone-depleting substances with non-ozone-depleting HFCs. *See* 80 Fed. Reg. 42870, 42936–37 (July 20, 2015) (explaining interpretation of "replacement"); *Mexichem*, 866 F.3d at 462 ("EPA may not *apply* the

[2] Even if "[r]elatively little manufacturing remains" that the 2015 Rule would affect, *see* Intervenors' Br. at 28, it remains undisputed that significant amounts of ozone-depleting substances are currently in use and, therefore, subject to replacement. In fact, ninety-five percent of all commercial refrigeration equipment retiring in 2018 used an ozone-depleting refrigerant. *See* Gallagher Decl., No. 18-1174, Dkt. 1759130 at ¶18 (D.C. Cir. Nov. 8, 2018).

2015 Rule to require [regulated entities] to replace one non-ozone-depleting substitute with another substitute" (emphasis added)). A preamble is a part of a rule, and legally binding statements in a preamble are independently reviewable. *Kennecott Utah Copper Corp. v. United States DOI*, 88 F.3d 1191, 1223 (D.C. Cir. 1996); *see also* 5 U.S.C. § 551(4) (defining "rule"). To apply the 2015 Rule in a manner consistent with *Mexichem,* EPA's task was thus to enforce the Rule as a bar against the direct replacement of ozone-depleting substances with prohibited HFCs in relevant end-uses.

EPA's focus on the 2015 Rule's HFC listing changes thus misses the point. A key part of the Rule undisputedly was EPA's codification of regulatory language reassigning certain HFCs from the safe alternatives list to the prohibited list. *See* 40 C.F.R. pt. 82, subpt. G, app. U. But this Court *upheld* the listing changes in *Mexichem* as a rational exercise of EPA's authority under section 612 of the Act. *See Mexichem*, 866 F.3d at 457, 462–63. EPA's assertion that it was required to abrogate all of the 2015 Rule's HFC listing changes to comply with the Court's directive makes no sense in light of the Court's express approval of those listing changes. Rather, the target of the Court's partial vacatur was EPA's

application of the Rule to particular uses—an application articulated in the Rule's preamble, not in any regulatory text. *See* 80 Fed. Reg. at 42936–37. Because the Court did not identify errors in the regulatory text, implementing *Mexichem* simply does not require striking that text, much less vacating the HFC listings as to all users.

EPA's claims notwithstanding, *see* EPA Br. at 24–26, implementing what *Mexichem* actually said is far from an impossible task. As discussed in Point II, *infra*, EPA could simply issue guidance informing interested parties that, as *Mexichem* squarely held, the 2015 Rule's HFC listing changes continue to apply to current users of ozone-depleting substances. This forthright approach would implement *Mexichem* without annulling the applications of the 2015 Rule this Court found valid.

EPA is also wrong that the Court's severance caselaw demands total abrogation of the HFC listings. *See* EPA Br. at 21–24. *Mexichem* neither required a revision of the 2015 Rule's text nor inhibited the Rule's proper functioning as applied to the subset of entities this Court held were properly subject to the Rule.[3] Any question of severance was thus

[3] EPA wrongly asserts that the Framework Rule is incompatible with *Mexichem* as written. EPA Br. at 20. That rule bars the use of a

fully resolved when this Court rejected—severed—the invalid application of the Rule identified in the preamble while expressly upholding other applications of the Rule. The Court should not tolerate EPA's attempt to relitigate this issue.

But even if the severance question remained open after *Mexichem*, the cases EPA cites do not support its position. None involves an agency, on its own initiative, administratively implementing a total vacatur after a court expressly upheld portions of a rule.[4] And here, unlike in those cases, the "remainder of the regulation could function sensibly without the stricken provision": the only difference now is that the listing changes will not affect users that have already transitioned to HFCs or other non-ozone-depleting chemicals. *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001); *see K Mart Corp. v. Cartier, Inc.*, 486 U.S.

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substitute after it is added to EPA's list of prohibited substitutes, *see* 40 C.F.R. § 82.174(d), and defines "substitute" to mean "any chemical . . . intended for use as a replacement" for an ozone-depleting substance, 40 C.F.R. § 82.172. After *Mexichem*, the 2015 Rule's HFC listings therefore bar the use of unacceptable HFCs and HFC blends only as direct replacements for ozone-depleting substances.

[4] If EPA believed this Court had neglected in *Mexichem* to conduct a necessary severance analysis, EPA should have sought clarification from the Court as to the scope of the partial vacatur. *See, e.g.*, *Illinois Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693 (D.C. Cir. 1997) (granting agency's motion to clarify scope of partial vacatur).

281, 294 (1988); *Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1460 (D.C. Cir. 1997). This more limited application hardly "undercut[s] the whole structure of the rule." *MD/DC/DE Broadcasters*, 236 F.3d at 22. To the contrary, the 2015 Rule's environmental and human health objectives would be advanced, not undermined, by applying the Rule to current users of ozone-depleting substances.

Industry intervenors argue that EPA would have made a different policy decision—and elected not to regulate at all—had it been able to prevent only some entities from using HFCs as substitutes. Intervenors' Br. at 19-23. This argument, based on speculation about EPA's past intent, fails not only because it is foreclosed by *Mexichem*, but because EPA never asserted that no regulation is preferable to partial regulation as a policy matter—not when issuing the 2015 Rule, not during the *Mexichem* litigation, not in the Guidance, and not now. EPA asserts only that it faces purportedly insurmountable mechanical obstacles in implementing *Mexichem* other than by wholly vacating the HFC listings. This Court should disregard intervenors' attempt to defend the Guidance

through post hoc policy justifications EPA itself has never adopted.[5] *See SEC v. Chenery*, 318 U.S. 80, 87–88 (1943).

B. The Guidance Is a Legislative Rule

EPA also defends its failure to follow required notice-and-comment procedures by claiming the Guidance is an interpretive rule. *See* EPA Br. at 30. But because the Guidance exceeds the scope of *Mexichem*'s partial vacatur and meaningfully determines regulated entities' legal rights and obligations, this argument too must fail.

An agency may use interpretive rules "to advise the public of the agency's construction of the statutes and rules . . . it administers" so long as it does not alter or amend those underlying laws or rules. *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1204, 1207–08 (2015) (quotation marks and citation omitted); *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015). Conversely, legislative rules "modif[y] or add[] to a legal norm." *Ass'n of Flight Attendants*, 785 F.3d at 716 (internal quotation marks and citations omitted). "Agency

[5] Even if EPA under the current administration has embraced the policy concerns industry intervenors articulate, EPA's recourse—given the plain holdings of *Mexichem*—would be to implement its policy choices through notice-and-comment rulemaking.

action that creates new rights or imposes new obligations on regulated parties . . . constitutes a legislative rule." *Id.*

In response to *Mexichem*, EPA could have issued guidance limiting the 2015 Rule's application to users of ozone-depleting substances. Instead, EPA elected to abrogate the Rule's HFC listing changes as to *all* users. The former approach would have left the underlying legal obligation in place. The latter plainly does not: Now, current users of ozone-depleting substances are free to switch from those substances to formerly prohibited HFCs.[6] EPA's Guidance does not "flow fairly from the substance" of *Mexichem*, but in fact "repudiates" key aspects of the decision EPA claims to be interpreting; the Guidance is thus a legislative rule unlawfully promulgated without notice or public comment.[7] *Central Tex. Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 211–12 (D.C. Cir. 2005) (quotation marks and citation omitted).

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[6] Unsurprisingly, interested parties have viewed the Guidance as having legal effect. At least one entity that petitioned for review of the 2015 Rule withdrew its petition after EPA issued the Guidance. *See Compsys, Inc. v. EPA*, No. 15-1334, Dkt. 1763045 (D.C. Cir. Dec. 5, 2018) (Compsys "no longer ha[d] a need to challenge" 2015 Rule because Guidance "effectively repealed [it]").

[7] For the same reasons, industry intervenors' standing argument—that State Petitioners cannot show causation because the Guidance did not itself change the law—is meritless. *See* Intervenors' Br. at 27.

EPA's claimed difficulty in implementing *Mexichem* is not only inaccurate, see Point II, *infra*, it is simply irrelevant to this analysis. Even in circumstances—not present here—where an agency faces truly insurmountable obstacles in attempting to comply with a court's decision, the agency is far from optionless. It can move for reconsideration or clarification, or utilize emergency rulemaking procedures. But what the agency cannot do is insulate its action from judicial review and from the Act's procedural requirements by purporting to interpret a judicial ruling it has in fact elected to flout.

POINT II

THE GUIDANCE IS ARBITRARY AND CAPRICIOUS

State Petitioners' opening brief explained that the Guidance is arbitrary and capricious for two reasons: First, EPA failed to reasonably explain why it did not issue or could not have issued narrowly tailored guidance implementing *Mexichem*. Second, EPA failed to justify its total abrogation of the 2015 Rule's HFC listings in light of its prior finding that increased HFC use represents a human health and environmental risk.

On the first point, EPA again contends it was forced to completely abrogate the 2015 Rule's HFC listings because it could not otherwise

implement what the Court repeatedly described as a *partial* vacatur. As explained above, EPA is wrong. *See* Point I.A.2, *supra*.

EPA claims such narrowly tailored guidance might have entailed "line-drawing" to restrict or prohibit the use of HFCs by different actors, and argues that such line-drawing would require formal rulemaking. *See* EPA Br. at 36. But there is no reason EPA could not have articulated basic principles in guidance that remained true to *Mexichem*. And by electing an alternate course, EPA did far more than draw lines: it entirely crossed out the HFC listing changes this Court expressly upheld as a rational exercise of the agency's authority. EPA thus altered regulated entities' legal obligations with no real explanation—other than a flawed interpretation of *Mexichem*—why it could not retain the 2015 Rule's HFC listings in *any* of their applications.

EPA's claim that it faced insurmountable practical challenges in issuing such tailored guidance is further refuted by industry intervenors' ability to distinguish valid applications of the 2015 Rule from invalid applications. In their briefs in *Mexichem*, Mexichem Fluor and Arkema drew precisely the distinction between users of HFCs and users of ozone-depleting substances EPA now claims is too unclear to administer. *See*

Joint Pets.' Br., No. 15-1328, Dkt. 1628538 at 29–30 (D.C. Cir. Aug. 3, 2016) (arguing that EPA "unambiguously" lacked authority to regulate users of non-ozone-depleting substances). And in their intervenors' brief here, they provide a concrete example, involving users of refrigeration systems, to show how the 2015 Rule could operate to regulate current users of ozone-depleting substances in accord with a literal reading of *Mexichem*.[8]

Thus, even if the Court credits EPA's unsupported speculation that some industry actors were so confused by the *Mexichem* decision as to be unable to apply it in certain circumstances, EPA has still failed to explain why it could not have maintained at least the Rule's applications for which there is no serious assertion of regulatory confusion. Indeed, given that the 2015 Rule's straightforward application to users of refrigerator systems accounts for the lion's share of the Rule's emissions benefits,[9]

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[8] Although they do express (unwarranted) policy concerns about such an outcome, intervenors explain that users of ozone-depleting-substance-based refrigeration systems "would be bound by the [2015] Rule's use restrictions" when such users "install[] a new system or change[] the intended purpose of the original equipment." Intervenors' Br. at 23.

[9] Thirty to forty percent of all supermarkets and grocery stores still use ozone-depleting HCFCs as a refrigerant. *See* Gallagher Decl. at ¶ 23.

EPA's complete vacatur was an arbitrarily disproportionate response lacking any record justification.

At bottom, the agency conflates issues that can be fully addressed in its upcoming rulemaking with guidance it can lawfully issue in the interim to reduce regulatory uncertainty after *Mexichem*. Regarding the latter, EPA could simply have said that the 2015 Rule continued to prohibit the replacement of ozone-depleting substances with HFCs. Such guidance would have served EPA's goal of decreasing uncertainty. Alternatively, while staying within the bounds of *Mexichem*, EPA could have offered additional clarity. EPA might, for example, have followed the model it used in the New Source Review permitting program. There, EPA issued guidance on the meaning of the "routine maintenance, repair, and replacement" regulatory exemption, including the scope of activities likely to render a plant modification ineligible. *See, e.g.*, *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 907–10 (7th Cir. 1990) (upholding EPA's applicability determination on the replacement of power plant

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When these stores replace or retrofit their systems, they would be unambiguously prohibited from switching to HFCs under *Mexichem*, as industry intervenors explicitly acknowledge. The Guidance removes that prohibition.

components as consistent with the Act). Consistent with *Mexichem*, EPA could similarly have issued guidance clarifying when HFCs replace ozone-depleting substances for purposes of the 2015 Rule.

Contrary to EPA's argument, interim guidance need not resolve all issues for which *Mexichem* created some degree of uncertainty. *See* EPA Br. at 25. The agency's list of purportedly unresolved issues simply does not preclude the issuance of guidance faithfully implementing the Court's decision. Indeed, in arguing that the Court should (at most) partially remand the Guidance instead of vacating it, EPA appears to concede that it could have issued narrower guidance leaving the HFC listing changes intact. *See* EPA Br. at 37, n.19 (arguing that the Court should uphold "at a minimum" so much of the Guidance as indicates that *Mexichem* applies to users subject to the HFC listing changes, not just to manufacturers).

As to State Petitioners' second arbitrary-and-capricious challenge, EPA defends its failure to account for the statute's aims by arguing that, in light of its reading of *Mexichem*, "there was no 'other side of the ledger' for EPA to examine." EPA Br. at 35. But EPA conducted no analysis, as it suggests it could upon remand, *see* EPA Br. at 38, showing the cost savings to industry from the Guidance outweighs the foregone public

health and environmental benefits of reducing HFC emissions. State Petitioners' argument that EPA failed to explain its departure from previous findings thus remains unrebutted. *See* State Pets.' Br. at 39–40.

POINT III

VACATUR IS THE APPROPRIATE REMEDY

Total vacatur of the Guidance is the only appropriate remedy. EPA's claim that the Guidance is necessary to prevent the regulated community from being "compelled to comply with a portion of an EPA rule that exceeded EPA's authority," EPA Br. at 38–39, is unfounded. As discussed above, the Court expressly held that EPA had statutory authority to prohibit the replacement of ozone-depleting substances with HFCs, and that the 2015 Rule's HFC listing changes were a rational exercise of that authority. *See* Point I.A.1, *supra.* Beyond its unlawful expansion of the Court's partial vacatur, the remainder of the Guidance adds nothing worth preserving. EPA points to text in the Guidance indicating that the Court's vacatur applies to regulated entities beyond manufacturers, EPA Br. at 37, n.19, but that observation is entirely duplicative of the *Mexichem* opinion. *See* 83 Fed. Reg. at 18433 (citing *Mexichem*, 866 F.3d at 457, n.1).

EPA's remaining arguments for partial remand fare no better. The agency's contention that it took a "cautious approach" in deciding not to extend the reach of the Guidance rests on its flawed interpretation of *Mexichem*. Finally, there is no reason to spare the Guidance because it is "an interim measure of limited duration," EPA Br. at 39; EPA could instead issue interim guidance faithfully reflecting the Court's holding.

CONCLUSION

For the reasons set forth above, the Petitions should be granted and the Guidance vacated.

Dated: March 15, 2019
Albany, New York

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for State Petitioners

s/Joshua M. Tallent

By: _____
Joshua M. Tallent[10]
Assistant Attorney General
Environmental Protection Bureau
The Capitol

[10] Counsel for the State of New York represents that all parties listed in the signature block below consent to this filing.

Albany, NY 12224
(518) 776-2456
Joshua.Tallent@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
DAVID S. FRANKEL
Assistant Solicitor General
MICHAEL J. MYERS
Senior Counsel
MORGAN A. COSTELLO
Chief, Affirmative Litigation

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General

s/Megan K. Hey

DAVID A. ZONANA
Supervising Deputy Attorney General
MEGAN K. HEY
Deputy Attorney General
California Department of Justice
300 S. Spring Street
Los Angeles, CA 90013
(213) 269-6000

FOR THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General

s/Daniel I. Rottenberg

MATTHEW J. DUNN
Chief, Environmental Enforcement/
Asbestos Litigation Division
DANIEL I. ROTTENBERG
Assistant Attorney General
Illinois Attorney General's Office
69 W. Washington St., 18th Fl.
Chicago, IL 60602
(312) 814-3816

FOR THE STATE OF DELAWARE

KATHLEEN JENNINGS
Attorney General

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
Attorney General

s/Valerie S. Edge

VALERIE S. EDGE
Deputy Attorney General
Delaware Department of Justice
102 W. Water Street
Dover, DE 19904

s/Megan M. Herzog

CHRISTOPHE COURCHESNE
Assistant Attorney General and Chief
MEGAN M. HERZOG
Special Assistant Attorney General
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Fl.
Boston, MA 02108
(617) 727-2200

FOR THE STATE OF MINNESOTA, BY AND THROUGH ITS MINNESOTA POLLUTION CONTROL AGENCY

KEITH ELLISON
Attorney General
State of Minnesota

s/Max Kieley

MAX KIELEY
CHRISTINA BROWN
Assistant Attorneys General
445 Minnesota Street, Suite 900
St. Paul, MN 55101
(651) 757-1244

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General

s/Paul Garrahan

PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301
(503) 947-4593

FOR THE STATE OF NEW JERSEY

GURBIR S. GREWAL
Attorney General

FOR THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

s/Lisa J. Morelli

LISA J. MORELLI
Deputy Attorney General
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 093
Trenton, NJ 08625
(609) 376-2708

ALEXANDRA C. CHIARUTTINI
Chief Counsel
Pennsylvania Department of Environmental Protection

s/Robert A. Reiley

ROBERT A. REILEY
Department of Environmental Protection
Office of Chief Counsel
400 Market Street, 9th Fl.
P.O. Box 8464
Harrisburg, PA 17105
(717) 787-7060

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General

s/Nicholas F. Persampieri

NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-3186

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General

s/Loren L. AliKhan

LOREN L. ALIKHAN
Solicitor General
Office of the Attorney General for the District of Columbia
441 4th Street, NW, Suite 600 South
Washington, D.C. 20001
(202) 727-6287

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

s/Katharine G. Shirey

KATHARINE G. SHIREY
Assistant Attorney General
Ecology Division
P.O. Box 40117
Olympia, WA 98504
(360) 586-6769

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITS

I certify:

1. This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's briefing schedule order dated October 18, 2018. According to the word processing system used in this office, this document, exclusive of the sections excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), contains 4,010 words. Because NRDC filed an opening brief of less than 3,990 words, the combined word count for all petitioners' briefs is less than 8,000 words.

2. Because this document has been prepared in a proportionally spaced, 14-point typeface, it complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6).

s/Joshua M. Tallent

Joshua M. Tallent
Assistant Attorney General
The Capitol
Albany, NY 12224
(518) 776-2456

CERTIFICATE OF SERVICE

I certify that on March 15, 2019, the foregoing Reply Brief of State Petitioners was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, which filing effected service upon counsel of record.

s/Joshua M. Tallent

Joshua M. Tallent
Assistant Attorney General
The Capitol
Albany, NY 12224
(518) 776-2456