ORAL ARGUMENT NOT YET SCHEDULED

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

RMS OF GEORGIA, LLC d/b/a CHOICE REFRIGERANTS, Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL., Respondents.	No. 22-1025 (consolidated No. 23-1104)

PETITIONER'S MOTION TO GOVERN FURTHER PROCEEDINGS

Pursuant to this Court's order of April 14, 2023 (ECF#1994785), Petitioner RMS of Georgia, LLC d/b/a Choice Refrigerants ("***RMS***" or "***Choice***") hereby files this motion to govern further proceedings. For the reasons set forth below, Petitioner respectfully requests that the Court: (*1*) sever unrelated case *Williams v. EPA*, No. 22-1314 from *RMS of Georgia v. EPA*, No. 22-1313 (or alternatively, require separate briefing); (*2*) consolidate *RMS of Georgia v. EPA,* No. 22-1025 with *RMS of Georgia v. EPA*, No. 22-1313 (maintaining case No. 22-1025 as the lead case); (*3*) after consolidation, order the parties in *RMS of Georgia v. EPA*, No.

22-1025, and *RMS of Georgia v. EPA*, No. 22-1313 to refile the briefs in a transferred Eleventh Circuit proceeding (No. 21-14213) as the briefing for No. 22-1025 and No. 22-1313 and schedule oral argument as soon as the Court's docket will allow; (*4*) if ordering parties to file new briefs, set a briefing schedule for No. 22-1025 and No. 22-1313 that requires RMS' opening brief within 30 days of the order, EPA's response brief within 30 days thereafter, and a reply brief within 20 days thereafter, and schedule oral argument in early Fall 2023; and (*5*) direct EPA to file a certified administrative record index in No. 22-1025, and to restrict the administrative record in No. 22-1025 and No. 22-1313 to those documents upon which the agency actually relied in taking final agency action with respect to the determination of RMS's eligible imports, which is the subject of RMS' challenge in No. 22-1025 and No. 22-1313.

BACKGROUND

These cases (No. 22-1025 and No. 22-1313) involve a challenge by RMS of Georgia, an importer of refrigerants, to EPA's decision regarding which of RMS' refrigerant imports qualify for allocation of import allowances for the first two years of a cap-and-trade program under the American Innovation and Manufacturing Act of 2020 ("***AIM Act***"), 42 U.S.C. §7675, and EPA's implementing regulations at 40 C.F.R. § 84. EPA's allowance trading program allocates import allowances to eligible market participants based on each

company's past imports of HFCs over the calendar years 2011-2019 using an averaging formula set out at 40 C.F.R. § 84.11. The determination of the eligibility of each company's past imports is an individualized agency decision, although the same allocation formula is applied to all companies to determine each company's "share of the pie" for each calendar year relative to the aggregate imports of all market participants. AIM Act, 42 U.S.C. §7675(e)(2)(C); 40 C.F.R. § 84.5. It is critical to the business survival of each company that it be allocated the correct number of allowances corresponding to its historic import levels.

EPA issued allowances to some 40 companies for the first two calendar years of the AIM Act allowance program. *See Phasedown of Hydrofluorocarbons: Notice of 2022 Allowance Allocations for Production and Consumption of Regulated Substances Under the American Innovation and Manufacturing Act of 2020*, 86 Fed. Reg. 55,841 (Oct. 7, 2021) ("***2022 Allocation Notice***"), and *Phasedown of Hydrofluorocarbons: Notice of 2023 Allowance Allocations for Production and Consumption of Regulated Substances Under the American Innovation and Manufacturing Act of 2020*, 87 Fed. Reg. 61,314 (Oct. 11, 2022) ("***2023 Allocation Notice***").

RMS of Georgia is challenging EPA's allocations for each year on the basis that EPA issued fewer allowances to RMS than it should have received under the AIM Act and EPA's regulations. Importantly, RMS is not challenging EPA's

application of its generally applicable allowance allocation formula at 40 C.F.R. § 84.11 for either allowance allocation year. Rather, RMS is challenging EPA's underlying company-specific regulatory decision (which the agency made without any reported factual finding or written record) to attribute certain HFC imports to RMS's shipping agent (Company A) or to another company that pirated RMS's patented HFC product (Company B) rather than to RMS. EPA's decision is the "inputs" into the general AIM Act formula with respect to the 40 other companies. Because EPA failed to issue any letter, memorandum or other notice explaining its decision with respect to the RMS imports, RMS became aware of EPA's decision only when it saw that the ultimate number of allowances allocated to it in the 2022 Allocation Notice and 2023 Allocation Notice did not match the number of allowances that it had expected to receive based on its company-specific import data.

PROCEDURAL POSTURE

On December 6, 2021, RMS of Georgia filed a petition for review in this Court (No. 21-1253) of two EPA final actions: (1) EPA's *Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act of 2020*, 86 Fed. Reg. 55,116 (Oct. 5, 2021) ("***Framework Rule***"), and (2) EPA's unpublished decision regarding RMS's historic imports as reflected in EPA's 2022 Allocation Notice.

RMS filed a parallel petition for review in the Eleventh Circuit (11th Cir. No. 21-14213) challenging only EPA's agency action reflected in the 2022 Allocation Notice, on the basis that jurisdiction/venue was mandated in the Eleventh Circuit as a locally applicable agency action. *See* RMS Pet. for Review, No. 21-1253, n.1 (ECF#1926118).

Respondent EPA sought to sever RMS's 2022 Allocation Notice challenge from RMS's challenge to the Framework Rule in No. 21-1253, taking the position that these were separate agency actions. EPA Mot. to Sever Challenge to Separate Agency Action, *Heating, Air-Conditioning, & Refrigeration Distributors v. EPA*, No. 21-1251 (D.C. Jan. 18, 2022) (ECF#1931100). This Court accepted EPA's argument that the Framework Rule and the 2022 Allocation Notice were separate agency actions, and severed the case by order dated February 2, 2022 (ECF#1936059), assigning the 2022 Allocation Notice challenge new No. 22-1025. By order dated March 14, 2022 (ECF#1939003), newly created No. 22-1025 was placed in abeyance pending resolution of the venue question in the Eleventh Circuit. The non-severed aspects of RMS's challenge to EPA's Framework Rule in No. 21-1253 (consolidated with No. 21-1251) proceeded on a separate track and oral argument was heard on November 18, 2022.

EPA subsequently published its announcement of allowances for calendar year 2023 based on the same Framework Rule in the 2023 Allocation Notice.

Because the government took the position that any judicial decision on 2022 Allocation Notice would not bind it with respect to the 2023 Allocation Notice, RMS was forced to file yet another petition for review on December 9, 2023 (ECF#1977181), which was assigned No. 22-1313. At about the same time, another HFC importer, Peter Williams filed a challenge to EPA's decision that Mr. Williams was not eligible for AIM Act allowances – but on entirely different facts and legal principles from those that RMS challenges (as discussed below). The Williams case was assigned No. 22-1314 and was consolidated by the clerk of court with RMS's challenge in No. 22-1313.

Thereafter, the Eleventh Circuit decided that jurisdiction in No. 21-14213 was proper in the D.C. Circuit and transferred the case to this Court (11th Cir. Doc. 73-1; D.C. Cir. ECF#1994785), where it was assigned No. 23-1104 and consolidated with this case, No. 22-1025, by order dated April 14, 2023 (ECF#1994785). In that same order, the Court directed parties to file motions to govern future proceedings by April 28, 2023.

SUGGESTIONS FOR GOVERNANCE

Petitioner RMS of Georgia respectfully suggests that the Court order the following with respect to briefing and argument of No. 22-1313 (currently consolidated with No. 22-1314 but which should be severed) and No. 22-1025 (consolidated with No. 23-1104):

A. Sever Williams No. 22-1314 from RMS of Georgia No. 22-1313

The Court should sever *RMS of Georgia v. EPA*, No. 22-1313, from *Williams v. EPA*, No. 22-1314, because they arise from different agency actions, are based on different administrative records, raise entirely different legal issues, and RMS and Mr. Williams are commercially adverse. Thus, there no judicial efficiency in consolidation, but rather a high risk of confusion of the issues and positional conflict if the cases remain consolidated.

EPA takes the position that the Williams challenge in No. 22-1314 is related to (and should continue to be consolidated with) the RMS challenge in No. 22-1313, but EPA is incorrectly framing these two petitions as challenges to the same 2023 Allowance Notice. As noted, EPA's 2023 Allocation Notice is merely an announcement of the final tally of allowances issued to 40 different companies under the AIM Act, which is presented in tabular form with no explanation of any company-specific decisions. Neither RMS nor Williams is challenging the notice itself; rather, each petitioner is challenging EPA's underlying agency decision, each unique to the respective company, regarding the qualification of that company under the AIM Act regulations, which EPA then used as an input into the AIM Act formula. In the Williams case, EPA issued a decision letter, which is the agency action that Williams is challenging, not the allocation notice per se. Williams Pet., Ex. A, No. 22-1314 (ECF#1977379). In the case of RMS, EPA never issued a

decision letter and EPA's allocation notice is merely an indication that the agency made some unpublished decision with respect to RMS's imports. That these two separate agency actions were reflected in the same *Federal Register* notice does not make them related actions or challenges to the same agency action.

Specifically, Choice Refrigerant's petition in No. 22-1313 is a challenge to the number of HFC imports that EPA credited to RMS as a market participant in EPA's cap-and-trade program under the AIM Act. RMS's petition involves factual and legal determinations made by EPA with respect to RMS's use of a shipping agent (Company A) to import refrigerants as well as imports made by a second company (Company B) in violation of Choice's patent rights. The agency made these determinations on an administrative record that was specific to RMS's import of refrigerants. Although the agency reflected the ultimate number of AIM Act allowances allocated to Choice in the 2022 Allocation Notice and 2023 Allocation Notice, along with 40 other companies, EPA's decision with respect to the imports attributed to Choice was (presumably) made in other agency documents, although EPA has not disclosed any decisional document in the administrative record (*see* Part E, below). The RMS petition in No. 22-1313 does not involve or implicate Mr. Williams in any way.

In contrast, Mr. Williams' petition in No. 22-1314 appears to challenge EPA's refusal to include Mr. Williams (an individual) as a qualified recipient of

"new entrant" allowances for the 2022 and 2023 allowance allocations. *See* Williams Pet., No. 22-1314 (ECF#1977379); Williams Stmt. of Issues, No. 22-1314 (ECF#1985801).[1] EPA's decision with respect to Mr. Williams' qualification for new entrant allowances was initially announced by EPA in a letter to Mr. Williams dated March 31, 2022. *See* Williams Pet., Ex. A, No. 22-1314 (ECF#1977379). EPA's decision to not allocate allowances to Mr. Williams for the calendar year 2022 was several days later reflected in a *Federal Register* notice entitled *Phasedown of Hydrofluorocarbons: Notice of 2022 Set-Aside Allowance Allocations for Production and Consumption of Regulated Substances under the American Innovation and Manufacturing Act of 2020*, 87 Fed. Reg. 19,683 (Apr. 5, 2022) ("***2022 Set-Aside Allocation Notice***"), which is different than the 2022 Allocation Notice for general pool allowances that RMS has challenged. Although Mr. Williams' papers also reference EPA's subsequent year 2023 Allocation Notice (which announced allowances issued to the general allowance pool as well as the new entrant pool), EPA had already made (in March 2022) the decision that Mr. Williams was not qualified for allowances in any year, such that the 2023 Allocation Notice simply reflects an absence of any allowance for Mr. Williams

[1] As background, EPA's Framework Rule provides for a special allowance pool for "new entrants" which is separate and distinct from the general allowance pool for which RMS was qualified. *See* 40 C.F.R. §§ 84.9(a)(3) and 84.15(c)(2).

based on the agency action make the prior year. Thus, RMS and Mr. Williams are not even referring to the same *Federal Register* notice announcing the underlying agency actions, much less challenging the same agency action. In sum, EPA's decision with respect to Mr. Williams' lack of qualification for new-entrant allowances shares no underlying facts, agency actions, or material documents with RMS's petition in No. 22-1313, and is based on an entirely different record, an entirely separate decisional process, and separate *Federal Register* notices.

Moreover, RMS and Williams are positionally in conflict. Choice is a direct competitor to Mr. Williams in EPA's "zero-sum" cap-and-trade program, and thus RMS is positionally opposed to the relief sought by Mr. Williams in No. 22-1314, due to the fact that if Mr. Williams is allocated allowances, Choice would receive fewer allowances. Given this positional conflict, even if the cases were not severed, it would be impossible for Choice and Mr. Williams to share a brief. In addition, separate administrative records would have to be filed and referenced in the briefs for the distinct agency actions being challenged by the respective petitions, *i.e.*, RMS's challenge to EPA's decision to attribute certain imports to Company A and Company B rather than RMS, on the one hand, and Mr. Williams' challenge to EPA's decision as to his qualification for special new-entrant allowances, on the other. Thus, there is no efficiency to consolidation, and indeed

consolidation would cause considerable logistical complication and likely confusion as to the factual and legal issues.

EPA asserts without any basis that severance of the Williams claims from the RMS claims would "result in contradictory rulings on the same action." EPA Motion to Govern at 5, filed Apr. 28, 2023 (ECF#1997137). But EPA fails to explain how contradictory rulings could be possible. Given that petitioners have raised entirely different issues relating to different companies, it is inconceivable that any ruling by this Court on the RMS claims and Williams claims could be contradictory. Moreover, as noted, Williams is not substantively challenging the 2023 Allocation Notice, as his claims are directed at EPA's March 31, 2022 eligibility letter that related to the 2022 Set-Aside Allowance Notice. The 2023 Allocation Notice only reflected the reality that Williams had been deemed ineligible in the prior 2022 calendar year by EPA's prior final agency action, such that he was not listed as an allowance holder in 2023.[2]

In short, these cases are complicated because the agency did not follow regular order by publishing separate notices of agency action. Severing the two

[2] Part of the confusion in these cases might be attributable to the fact that EPA has increasingly made decisions under the AIM Act without issuing a written decision or publishing its action in the *Federal Register*, such that parties are unsure when they can challenge EPA's action, and out of caution have brought challenges within 60 days of EPA's *Federal Register* allocation notices.

unrelated challenges will help reduce the confusion. In light of the foregoing, Choice Refrigerants respectfully requests that this Court sever No. 22-1313 from No. 22-1314.

B. Consolidate RMS' 2022 and 2023 Cases, No. 22-1025 and No. 22-1313

The Court should consolidate RMS's challenge to EPA's 2022 allowance allocation in *RMS of Georgia v. EPA*, No. 22-1025 (consolidated with No. 23-1104 which was recently transferred from the Eleventh Circuit) with RMS's challenge to the 2023 Allocation Notice in *RMS of Georgia v. EPA*, No. 22-1313. RMS suggests that the Court designate first filed No. 22-1025 as the lead case.

Consolidation is appropriate because these cases raise the same claims. EPA's decision with respect to RMS's historic imports, which in turn determined the allocation of allowances to RMS for each respective calendar year 2022 and 2023, are based on identical factual determinations with respect to RMS's historic imports and application of the AIM Act and EPA's Framework Rule implementing regulations. There is no need for separate, duplicative proceedings to determine the same factual and legal issues, notwithstanding the government's expressed position that resolution of the 2022 agency action would not bind it with respect to the 2023 agency action (a position that has no legal support).

Consolidation would also help avoid confusion in merits briefing. For example, the certified administrative record index that EPA has filed in No. 22-

1313 (ECF#1995155) includes language that suggests it was filed in No. 22-1025 rather than in No. 22-1313. EPA's certified index filed in No. 22-1313 states that "[t]he Index reflects that the administrative record for this case includes the previously filed indices for the [2022 Allocation Notice]," *see RMS of Georgia v. EPA*, No. 22-1313, at 23 (ECF#1995155), when in fact there are no prior filed indices in the administrative record in No. 22-1313. However, No. 22-1025 does include prior filed indices for the 2022 Allocation Notice resulting from its recent consolidation with No. 23-1104 (the new docket assigned to No. 21-14213 upon transfer from the Eleventh Circuit).

Because both proceedings involve identical factual issues, and to avoid further confusion, RMS's petitions relating to 2022 allowances, No. 22-1025, and relating to 2023 allowances, No. 22-1313, should be consolidated and briefed together.

C. Direct the Parties to Re-file Eleventh Circuit Briefs as Merits Briefing of No. 22-1025 and No. 22-1313

The Court should order that the briefs previously filed in Eleventh Circuit No. 21-14213 (transferred from the Eleventh Circuit to the D.C. Circuit on jurisdictional grounds and designated No. 23-1104 and consolidated with No. 22-1025) should be refiled as the briefing for consolidated No. 22-1025 (including No. 23-1104 and No. 22-1313). The issues have been fully briefed in the Eleventh Circuit with respect to EPA's 2022 allowance allocation, which are exactly the

same issues that will be briefed in No. 22-1025 (relating to EPA's 2022 allowance allocation) and No. 22-1313 (relating to EPA's 2023 allowance allocation). There is no need for new briefing. RMS, as a small business, should be spared the expense of filing and responding to entirely new briefs on the same issues. Moreover, re-filing the Eleventh Circuit briefs would be in the interest of judicial economy and a savings of taxpayer funds from the government side. It has been over sixteen months since RMS filed its petition on December 6, 2021, and the company desperately needs these allowances to continue its business. Re-filing the Eleventh Circuit briefs will expedite a decision in this Court, and will expedite a badly needed remedy for RMS should it prevail on the merits.

D. Consolidate Merits Briefing of No. 22-1025 and No. 22-1313

Alternatively, if the parties are directed to submit new briefs, the Court should order that briefing be on a consolidated basis in No. 22-1025 (including No. 23-1104) and No. 22-1313 as these cases involve the same issues relating to RMS's entitlement to allowances for calendar year 2022 and 2023, respectively. With respect to RMS' imports, EPA made the same agency decision for each calendar year 2022 and 2023 and the agency action is based on the same operative facts, same regulations, and same administrative record. EPA has not identified any material difference in the agency action or administrative record in No. 22-1025 and No. 22-1313 that would necessitate separate briefing. Indeed, RMS is

challenging the same agency action in each case, *to wit*, EPA's decision to not credit RMS with certain imports.

EPA suggests that the RMS challenges should be further delayed while EPA and Williams engage in dispositive motions over the Williams claims. This is an additional reason to sever the cases, but if the cases are consolidated, the Court should set a briefing schedule. Further delay of briefing of RMS's challenges, which are separate and unrelated to Williams, would further prejudice RMS and delay a remedy. Currently, RMS is without the allowances that it needs to operate its business, and any further delay will compound the injury that it is suffering. At the very least, for the reasons supporting severance, if the Williams case, No. 22-1313, remains consolidated with the RMS cases, the petitioners should be given separate briefs and the issues considered separately as they share no commonality or overlap.

In terms of briefing schedule, RMS suggests that the Court direct (after severance of the Williams claims): (*1*) Petitioner to submit an opening brief within 30 days of the Court's briefing order, (*2*) Respondents to submit a response brief within 30 days after the deadline of the opening brief, and (*3*) Petitioner to submit a reply brief 20 days after the deadline for the response brief. Any intervenor briefs should be submitted 1 week after the principal brief that it supports. Oral argument should be scheduled for early Fall 2023.

E. Direct EPA to File a Proper Certified Administrative Record Index in No. 22-1025 and 22-1313

The Court should direct EPA to file an administrative record index which reflects the actual records on which it based its final agency action with respect to allowances allocated to RMS of Georgia (*i.e.*, EPA's determination of which HFC refrigerant imports are attributable to RMS). The administrative record should exclude agency documents that appeared in separate agency action proceedings and were not part of the challenged agency action.

1. EPA Should File a Certified Index in No. 22-1025

The Court should order that EPA file a certified administrative record index in *RMS of Georgia v. EPA*, No. 22-1025. EPA has thus far filed an index only in *RMS of Georgia v. EPA*, No. 22-1313. As discussed above, these cases challenge the same underlying agency action, and the administrative records should be identical. If EPA files separate administrative records for these two cases, the Court should at least order EPA to identify any material differences between the thousands of pages in the records, as it will be unduly laborious, burdensome and expensive for RMS to undertake a document-by-document comparison of two different records. RMS is particularly concerned with this burden because the certified index filed by EPA in No. 22-1313 uses a different numbering and indexing system than the record filed in the Eleventh Circuit, which indicates that a comparison of the record will be difficult.

2. EPA's Administrative Record Index is Over-inclusive and Under-inclusive

The administrative record for judicial review under the AIM Act should include all records that the agency considered when deciding on it agency action.[3] *Accord* APA, 5 U.S.C. § 706 (reviewing court must examine the "whole record"); *Kiakombua v. McAleenan*, 2019 WL 4051021, *3 (D.D.C. Aug. 27, 2019) (Jackson, J.) (not reported) (administrative record is "what was before the agency at the time it made its decision") (quoting *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010)). The scope of the record must be determined by the reviewing court and is not merely documents that the government has "unilaterally selected." *Cf. In re United States*, 138 S. Ct. 371 (2017) (Breyer, J., dissenting from grant of stay).

In this case, EPA's certified record index contains absolutely no record indicating how EPA made its decision with respect to the HFC imports by RMS, Company A, and Company B, which is the subject of RMS's challenges. Instead, EPA has swamped the record with some 6,000 pages of documents, *see* No. 22-1313 (ECF#1995155), relating to EPA's allocation calculations for all 40

[3] The AIM Act borrows its judicial review provisions from the Clean Air Act, see 42 U.S.C. § 7675(k)(1)(C), which in turn draws from the Administrative Procedure Act, see 42 U.S.C. § 7607(d)(1) (implying that APA review applies where special rulemaking procedures do not displace the APA). See Maryland v. EPA, 958 F.3d 1185, 1196 (D.C. Cir. 2020) ("we apply the same standard of review under the Clean Air Act as we do under the Administrative Procedure Act").

companies that received allowances. Almost all of these documents are irrelevant to the agency action challenged by RMS, except for the handful of documents submitted by RMS that relate specifically to RMS's imports, Company A's imports (which RMS asserts were improperly credited to a shipping agent) and Company B's imports (which RMS asserts were improperly credited to an infringer of RMS's patent rights). There is no need for the Court and parties to have to sift through these thousands of pages to identify the few documents which EPA actually considered in making the specific decisions at issue in these cases. EPA's overly broad conception of the record also unnecessarily discloses highly sensitive commercial business information of the 37 other companies that receive allowances – information that the Court does not need to decide the issues, and which RMS neither needs nor wants to be responsible for under the Court's protective order.

Conversely, EPA has produced no documents indicating how it decided that Company A or Company B, rather than RMS, should be credited with the particular HFC imports at issue. It defies credibility that the agency made a definitive factual and legal determination regarding RMS's imports, which was of critical importance to how many allowances RMS would receive, yet prepared no decision memorandum or other document reflecting that the decision had been made or the rationale for that decision. *In re U.S.*, 138 S.Ct. 371, 372 (2017)

("Effective review depends upon the administrative record containing all *relevant* materials presented to the agency, including not only materials supportive of the government's decision but also materials contrary to the government's decision.") (emphasis added). However, having taken the position that no such documents exist, the government should be foreclosed from referencing any additional documents or attempting to supply a post-hoc explanation of the decision in the merits briefing. *Id.* at 371 (Breyer, J., dissenting) ("a reviewing court's sole task under the APA is to 'determine whether the agency's action may be upheld on the basis of the reasons the agency provides and 'the record the agency presents to the reviewing court'"); *see also Kiakombua*, 2019 WL 4051021, *3 (Jackson, J.) (an "agency will have a steep hill to climb if at some later date it seeks to expand the record . . . agencies have a solemn duty to search for, collect, and compile all relevant and non-privileged records when an administrative record is presented"); *see generally* Gavoor et al., *Administrative Records and the Courts*, Kansas Law Review 2018: Vol. 67(1) (discussing duty of the court to review the whole record in administrative cases).

3. The Administrative Record In No. 22-1025 and No. 22-1313 Should Not Include a Response-to-Comments Document from the Framework Rulemaking

The administrative record in this proceeding does not (and should not) include the Response-to-Comments (RTC) document that EPA has included in the

administrative record index filed in No. 22-1313.[4] The RTC document is a rulemaking document from September 2021 entitled "Establishing the Allowance Allocation and Trading Program under the American Innovation and Manufacturing Act: Response to Comments," which was prepared in relation to EPA's Framework Rule rulemaking in EPA-HQ-OAR-2021-044 and appears in the rulemaking docket for that agency action.[5] As noted, EPA apparently did not create an administrative docket for its agency action relating to RMS's imports. As noted, the government has previously taken the position that the Framework Rule proceeding is distinct from the allocation decision being challenged by RMS in No. 22-1025 and No. 22-1313. *See* EPA Motion to Sever Challenge to Separate Agency Action, *HARDI v. U.S. EPA*, No. 21-1251 (D.C. Cir. filed Jan. 18, 2022) (ECF#193100) (seeking to sever RMS's challenge to EPA's 2022 Allocation Notice in No. 21-1253 (now No. 22-1025) from challenge to EPA's Framework Rule cap-and-trade regulations in No. 21-1251 and No. 21-1252). Indeed, EPA's insistence that the Framework Rule and company-specific allocations are separate

[4] The RTC document is referenced as EPA-HQ-OAR-2021-0227-03, at page 31, third-to-last entry, of the certified administrative record index filed in No. 22-1313 (ECF#1995155).

[5] Available at the following link: https://www.regulations.gov/document/EPA-HQ-OAR-2021-0044-0227.

agency actions resulted in severance of RMS's challenge implicating EPA's 2022 Allocation Notice and creation of *RMS of Georgia v. EPA*, No. 22-1025.

Thus, the RTC document is a decision document from another proceeding, and not part of the administrative record for EPA's 2022 and 2023 allowance allocation decisions challenged by RMS in No. 22-1025 and No. 22-1313. The RTC document is not mentioned in the agency's 2022 Allowance Notice (at 86 Fed. Reg. 55,841), or in the 2023 Allowance Notice (at 87 Fed. Reg. 61,314) and was never presented by EPA as a basis for, or articulation of, the agency's action prior to this litigation.

In any event, the RTC document is not information that EPA would have relied on to make its decision relevant to this proceeding, as distinguished from information submitted by RMS or other parties or legal sources such as EPA's implementing regulations that EPA would have (or should have) considered in making its allocation decisions. Rather, the RTC is the agency's response to certain policy comments submitted by stakeholders in the Framework Rule rulemaking, which, again, EPA has asserted is an entirely separate proceeding not related to its 2022 and 2023 allocation decisions.

Even if the Court were tempted to consider the "explanations" in the RTC document associated with the Framework Rule, EPA has not included anything in the record in this case shedding light on what agency decision(s) the RTC was

responding to. In other words, the RTC is what it says – a response to comments explaining why EPA made certain decisions with respect to the Framework Rule. But the decisions challenged here were not made in the Framework Rule, but rather in a separate decisional process that was reflected in (but not explained by) the 2022 and 2023 Allocation Notices. We don't have any written record of that agency action because it appears that EPA never prepared a decision memorandum, letter or other decisional document reflecting its final decision about what RMS imports qualify for the allowance formula for 2022 and 2023 allowances. Without knowing the underlying agency action, EPA's response to policy comments in another proceeding are of no value, and simply confuse the record in this proceeding by conflating two separate agency actions.

Moreover, there is no document in the record corroborating that EPA actually considered the RTC document when making its decision about RMS's imports. The more likely timeline is that the RTC document was prepared after EPA had already decided that RMS's imports should be given to other companies, and therefore EPA could not have "considered" the RTC since it did not exist at the time of the decision. At most, the RTC document is a rationalization of an EPA decision that the agency had already made in the shadows, but never announced or disclosed. Again, the lack of any real agency record showing the timing or rationale of EPA's decision-making process highly prejudices RMS's

ability to demonstrate that the agency decision was unlawful. The Court should not compound this prejudice by allowing EPA to include documents in the record that were not actually a basis for the decision.

Accordingly, the Court should direct EPA to either remove the RTC document from the record index, or provide clarification of how the agency considered the RTC in making the substantive decisions challenged by RMS in No. 22-1025 and No. 22-1313.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court issue a scheduling order consistent with these suggestions.

Dated: April 28, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 27(d)(2), I hereby certify that the foregoing filing complies with the type-volume limitations. According to the word processing system used in this office, this document, exclusive of the caption, signature block, proposed order, and any certificates of counsel, contains **5,142** words.

2. Pursuant to Fed. R. App. P. 32(a)(5)-(6), I hereby certify that the foregoing filing complies with the typeface requirements and the type-style requirements because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

Dated: April 28, 2023

/s/ David M. Williamson
David M. Williamson

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 25(c) of the Federal Rules of Appellate Procedure and Circuit Rule 25, that on April 28, 2023, I filed the foregoing document using the Court's CM/EFC system, which will electronically serve all counsel of record registered to use the CM/ECF system.

/s/ Santiago M. Canton
Santiago M. Canton