ORAL ARGUMENT SCHEDULED FOR APRIL 1, 2019

Case No. 18-1085 (and consolidated cases)

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

California Communities Against Toxics, et al.

Petitioners,

v.

United States Environmental Protection Agency, et al.

Respondents.

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

Final Reply Brief for Petitioner State of California, by and through the California Air Resources Board and Xavier Becerra, Attorney General

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Environmental Petitioners	California Communities Against Toxics, Environmental Defense Fund, Environmental Integrity Project, Louisiana Bucket Brigade, Natural Resources Defense Council, Ohio Citizen Action, Sierra Club, Downwinders at Risk, Hoosier Environmental Council, and Texas Environmental Justice Advocacy Services
EPA	Environmental Protection Agency
JA	Joint Appendix
Section 112	42 U.S.C. § 7412
Seitz Memo	Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, Environmental Protection Agency, "Potential to Emit for MACT Standards – Guidance on Timing Issues" (May 16, 1995).
Wehrum Memo	Memorandum from William L. Wehrum, Assistant Administrator for Air and Radiation, Environmental Protection Agency, "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act" (January 25, 2018).

SUMMARY OF ARGUMENT

With the stroke of a pen, the Wehrum Memo effected a binding final action that is ripe for review. The Memo bears the hallmarks of a final agency action: it is "effective immediately" and binds the agency, in this instance, to a definitive reversal of a legal determination it applied for twenty-three years. The possibility of a future formal rulemaking does not alter the finality of EPA's action. Review of EPA's action is ripe because it presents a presumptively reviewable legal question under the Clean Air Act. Leaving review of this uniform national change to hypothetical permit-by-permit litigation in state courts is neither compelled by statute, nor practical or just.

The Wehrum Memo must be vacated in its entirety because: (1) it effects a substantive regulatory change to the legal regime and should have been subject to notice and comment under the Administrative Procedure Act; (2) it conflicts with the structure and purpose of section 112 of the Clean Air Act, 42 U.S.C. § 7412 ("Section 112"); and (3) it is an arbitrary and capricious reversal of EPA's prior policy without reasoned explanation.

ARGUMENT

I. THE COURT HAS JURISDICTION TO HEAR THE CHALLENGE.

A. The Wehrum Memo is a "Final Action" Under the Clean Air Act.

Contrary to EPA's assertions, the Wehrum Memo satisfies the two-pronged finality test outlined in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) because it marks the "consummation of the agency's decisionmaking process" and is an action "by which rights or obligations have been determined, or from which legal consequences will flow." Thus, even if the Court determines that the Wehrum Memo is not a legislative rule, it is still a reviewable final agency action. *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1006-07 (D.C. Cir. 2014) (EPA directive to regional offices regarding its interpretation of a "single stationary source" under the Clean Air Act was final agency action subject to judicial review); *accord Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 479-80 (2001).

1. The Wehrum Memo Marks the End of EPA's Decisionmaking Process.

The Wehrum Memo is unequivocal about the legal question presented here and states that the "plain language" of Section 112 "compels the conclusion that a major source becomes an area source at such time" that the source limits its potential to emit below the major source threshold.

Wehrum Memo 1 (emphasis added), JA0001; see also Opening Brief of Petitioner California ("Cal.") 18-19. EPA argues that the Wehrum Memo is not a final agency action because "the Agency is undertaking a notice-and-comment rulemaking process." Resp. 30. The argument is a red herring. The Wehrum Memo expressly states that it is "effective immediately," Wehrum Memo 1, JA0001, not that its legal effect is contingent on a future rulemaking.

Furthermore, EPA does not claim that it will be taking notice and comment regarding the definitive legal conclusions — that a source can reclassify from "major" to "area" — articulated in the Wehrum Memo. Wehrum Memo 2, JA0002; Resp. 30. Rather, the proposed regulatory text will merely implement that position. Thus, EPA has "concluded its consideration" of the issue, and the purpose of the potential future rulemaking would merely be to formalize EPA's legal position. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 479-80 (2001) (judicial review would not inappropriately interfere where EPA had "concluded its consideration of the implementation issue"). Even if EPA may possibly change its position in a future rulemaking, "[t]he fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000)

(holding EPA guidance final even though it was "subject to change"). Indeed, "[i]f the possibility . . . of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule . . . would ever be final as a matter of law." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002). The Wehrum Memo thus marks the consummation of EPA's decision-making process on the legal issue presented here for review.

2. The Wehrum Memo Announces a Binding Change in the Law.

The Wehrum Memo also satisfies the second prong of *Bennett*: It is an action by which "rights and obligations have been determined, or from which legal consequences will flow." *Bennett*, *supra,* 520 U.S. at 178. It expressly states, "EPA has now determined that a major source" can obtain area source status and "will not be subject thereafter to" major source requirements. Wehrum Memo 4, JA0004 (emphasis added). The Wehrum Memo also directs EPA regional offices to "send this memorandum to states within their jurisdiction." *Id.* It thus "provides firm guidance to enforcement officials about how to handle permitting decisions" and is, in itself, an agency action with binding legal consequences. *Nat'l Envtl. Dev. Ass'n's Clean Air Project*, *supra,* 752 F.3d at 1006-07.

The Wehrum Memo also revises the legal obligations previously imposed on major sources of hazardous air pollutants. Under the Seitz Memo, major sources seeking to reclassify as an area source after the compliance date of a maximum achievable standard were told "no" by EPA. *See* Cal. 19. By withdrawing and superseding the Seitz Memo, the Wehrum memo allows major sources to obtain area-source status, relieving those sources from compliance with maximum achievable standards and Title V permitting requirements *at any time*. *See U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016) (observing that, if a decision in one direction has legal consequences, a decision in the opposite direction also has legal consequences).

EPA suggests that the Title V permitting process will provide an opportunity for the public to challenge "EPA's reading of the major and area source definitions." Resp. 27. But Title V permitting cannot add requirements that the Wehrum Memo has eliminated. *See* 42 U.S.C. §§ 7661, *et seq*. Title V does not permit states (or EPA) to change the Wehrum Memo's substantive determination that major sources can reclassify to area sources and "will not be subject" to major-source requirements. Wehrum Memo 4, JA0004. "Title V does no more than consolidate 'existing air pollution requirements into a single document'"; it does not authorize

imposition of "any new substantive requirements." *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 597 (D.C. Cir. 2016). Thus, the Wehrum Memo meets the second prong of the *Bennet* finality test and constitutes a reviewable final agency action.

B. The Wehrum Memo is Ripe for Review.

Intervenors' ripeness argument is premised on similar arguments as EPA's finality claim and thus fails for the same reasons. See Respondent-Intervenors' Brief ("Intvn.") 23-28.[1] To determine ripeness, this Court evaluates "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003). The "fitness" factor asks "whether the issue presented is a purely legal one, whether consideration of that issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) (citations omitted). A purely legal claim is "presumptively reviewable." *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007). And because "Congress has emphatically declared a preference for immediate review" under the

[1] EPA only refers to ripeness in passing, equating it with the issue of finality. Resp. 16, 30, 32.

Clean Air Act, courts need not consider the hardship of withholding review. *Id.*

Here, Petitioners' challenge presents "purely legal" claims under the Clean Air Act and is thus presumptively fit for review. Intervenors and EPA rely on *Louisiana Environmental Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996) ("*LEAN*") to argue ripeness requires application of the Wehrum Memo by state permitting authorities. *See* Intvn. 23-26; Resp. 31. In *LEAN*, petitioners' challenge to an EPA delegation rule was premised on federal enforcement of yet-to-be-approved state regulatory programs. *See LEAN*, 87 F.3d at 1385. Here, EPA does not need to take any further action before states can implement the Wehrum Memo, and it is undisputed that some states have already done so. *See* Opening Brief of Environmental Petitioners ("Envtl.") 15-16. Further, facilities may petition EPA directly if state permitting authorities decline to follow the Wehrum Memo, and EPA admits that it could issue a revised permit itself. Resp. 30. Thus, subsequent permitting decisions will not provide a more final and concrete setting for deciding the legal issues presented here. *See Appalachian Power*, *supra*, 208 F.3d at 1023 n.18 (finding the challenge ripe because "[w]hether EPA properly instructed State authorities . . . will not turn on the specifics of any particular permit.")

Finally, challenges on a case-by-case basis in different state courts only promise to complicate the legal terrain by inviting different opinions from different courts. Congress intended this Court to be responsible for resolving such issues of national applicability. *Id.* A patchwork of state decisions also runs counter to the statutory structure of Section 112, which was amended by Congress to centralize the federal role in regulating hazardous air pollutants. *See* Cal. 27; Envtl. 2-7. For these reasons, Petitioners' challenge to the Wehrum Memo is fit for judicial review.

II. THE WEHRUM MEMO WAS RULEMAKING IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT.

A. The Wehrum Memo's Legal Effects Render It Legislative.

EPA argues that the Wehrum Memo was not subject to the notice and comment rulemaking requirements of the Administrative Procedure Act because it is merely an interpretive rule that "informs EPA's regional offices of the Agency's reading of the [Clean Air Act] Section 112." Resp. 21. Noting that the tests for whether a rule is final and whether it is legislative are closely related, Resp. 19, EPA asserts that the Wehrum Memo is not legally binding and that states and applicants are free to ignore it. Resp. 21, 23.

The court's inquiry in distinguishing legislative rules from interpretative rules "is whether the new rule effects a substantive regulatory change to the statutory or regulatory regime." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6-7 (D.C. Cir. 2011); *see also Sierra Club v. EPA*, 699 F.3d 530, 535 (D.C. Cir. 2012) (holding EPA determination a legislative rule because it "tread new ground."). As stated, the Wehrum Memo effectuated a substantive change to the regulatory regime applicable to major sources of hazardous air pollutants. *See supra* pp. 4-6; Cal. 23.

EPA's claim that states are free to ignore the Wehrum Memo falls flat. EPA readily admits that "[i]f state regulators disagree with EPA's view of the statutory language . . . a source may ask EPA to issue it a revised permit." Resp. 25 n.9; Resp. 30 ("Of course, a source could ask EPA to object to a permit that continues to include major source requirements . . . if a state permitting agency declines to reclassify a source from 'major' to 'area.'"). The Wehrum Memo offers no indication that states or EPA have discretion to disregard it,[2] and EPA admits it will follow the Wehrum Memo

[2] Indeed, certain states are prohibited from enacting regulations that are more stringent than federal law. *See, e.g.*, Mo. Ann. Stat. § 643.055 (West 2018) (Standards "shall not be any stricter than those required under the

in individual permitting decisions. That state permitting authorities, as opposed to EPA, will be applying the Wehrum Memo in individual permitting actions is irrelevant. The Wehrum Memo is EPA's "settled position" that it "plans to follow in reviewing State-issued permits[,] . . . a position EPA officials in the field are bound to apply." *Appalachian Power*, *supra*, 208 F.3d at 1022.

EPA further argues the Wehrum Memo constitutes an interpretive rule because EPA retains the discretion and the authority to change its position in upcoming rulemakings and individual permitting actions. Resp. 23-24. EPA's argument is inconsistent with its position that Congress clearly defined major and area sources and "nothing in [Section 112] . . . gives EPA the discretion" to establish more requirements. Resp. 33 n.15; Resp. 35 ("It is beyond EPA's power to devise a requirement out of thin air where Congress chose not to impose one."); *see also* Wehrum Memo 3 ("EPA had no authority to do so under the plain language of the statute"), JA0003. EPA cannot on the one hand state that its rule is compelled, and on the other hand that it is likely to change that rule. As in *Sierra Club v. EPA*, it appears that

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provisions of the federal Clean Air Act."); Ky. Rev. Stat. Ann. § 13A.120 (West 2018) (Regulations "shall be no more stringent than the federal law or regulations.").

"EPA's vow to remain flexible" may in fact be "just talk." 873 F.3d 946, 952 (D.C. Cir. 2017).

Thus, the Court should find that EPA violated Administrative Procedure Act, 5 U.S.C. § 553(b)-(d). The complex hypotheticals and scenarios presented by Intervenors and Amici merely highlight the problems caused by EPA's failure to provide notice and comment before issuing the Wehrum Memo.

B. The Seitz Memo Was a Legislative Rule, Rendering the Wehrum Memo's Revocation of it a Legislative Rule.

Even if its legislative character is not conclusively established by its own terms, the Wehrum Memo is also legislative because it expressly repudiates the Seitz Memo. "If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative." *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (citations omitted); *accord Sierra Club v. EPA, supra,* 873 F.3d at 952.

The Seitz Memo was a legislative rule with the force and effect of law. It reflected EPA's exercise of its authority to determine which constraints exist on a major source's ability to escape its obligations under Section 112.

Indeed it states, on its face, that its result – selecting one "result" among those it believed consistent with section 112 – required a "rule-making." *See* Seitz Memo 3-5, JA0233-35 (Section 112 "strongly suggests outer limits for when a source may avoid" a standard by changing status, but "is flexible enough to allow EPA to reach different results through rule-making.") The Seitz Memo thus supplemented the previous regulatory regime by stating, unequivocally, "that a major source must either comply" with a major source standard or limit its potential to emit below major source thresholds by the first compliance date "to avoid being in violation." Seitz Memo 5, JA0235.

EPA also applied the Seitz Memo with "unyielding rigidity," *Sierra Club, supra,* 873 F.3d at 952, in communications with EPA regional offices, states, and regulated entities regarding the applicability of maximum achievable standards and Title V permit requirements. *See, e.g.*, Memorandum from William T. Harnett, Acting Director for Information Transfer and Program Integration Division, EPA, "Applicability of [Seitz Memo]" (March 23, 2000) ("An existing major source . . . that takes limitations on its PTE after the first compliance date cannot be deferred from title V permitting."), JA0254; s*ee also* Cal. 19. And, in its previous efforts to reverse the Seitz Memo, EPA chose to proceed through notice-and-comment rulemaking – a level of process that would be unnecessary for an

interpretive rule. Resp. 9-11 (citing 68 Fed. Reg. 26,249 (May 15, 2003), 72 Fed. Reg. 69-01 (Jan. 3, 2007).

Contrary to their current assertions, Intervenors also viewed the Seitz Memo as a legislative rule. In 2007, the National Environmental Development Association's Clean Air Project "objected to the manner in which the [Seitz Memo] became law without notice to the public." EPA-HQ-OAR-2004-0094-0143 at 1-2 & n.3, JA0059-60. The Utility Air Regulatory Group described the Seitz Memo as "another example where a guidance memorandum has been used to expand the requirements of EPA's existing § 112 regulations without following appropriate notice and comment procedures." EPA-HQ-2004-0094-136 at 2, JA0055. And, the Air Permitting Forum recently complained that the Seitz Memo "imposes costly monitoring requirements." EPA-HQ-OA-2017-0190-35020 at 30, JA0148.

Backtracking from those previous positions, Intervenors now argue the Seitz Memo was not legislative because EPA applied it inconsistently and relied on "transition policies." Intvn. 31. Those transition policies do not purport to alter the timing requirement at issue here, that any such limitations be in place by "the first compliance date." Seitz Memo 9, JA0239. Similarly, the two examples offered by Intervenors do not

demonstrate inconsistent application of the Seitz Memo.[3] And even if EPA made some exceptions – which neither EPA nor Intervenors have demonstrated – those exceptions do not alter the legal requirements that EPA imposed via the Seitz Memo on major sources of hazardous air pollutants. Indeed, absent that rule, there would be no need for exceptions.

For these reasons, the Seitz Memo was a legislative rule, and EPA and Intervenors' reliance on *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) ("*Perez*") is misplaced. Under *Perez*, the Supreme Court held that an agency may reverse a prior interpretive rule without notice and comment. But given that neither the Seitz Memo nor the Wehrum Memo was an interpretive rule, *Perez* does not apply. Further, *Perez* examined the procedural requirements applicable to an agency issuing a rule interpreting one of its own regulations. Here, EPA seeks to exempt from notice and comment its legislative application of a statute that is both binding and inconsistent with the statutory structure. This is not the "concession to

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[3] In one, a source stopped using the solvents that would trigger applicability of the hazardous air pollutant standard at issue. Letter from Kenyon to McMannus of July 24, 2001, JA0258. In the other, the pollutant emitted by the source was delisted. Letter from Bannister to Luckett of August 26, 2008, JA0259-60. EPA did not suggest that this affected the Seitz Memo's required focus on the first compliance date; rather EPA "look[ed] back" to that date to determine whether the source "would have" been major then, absent emissions of the delisted pollutant. *Id.* at 2, JA0260.

agencies" recognized by the Supreme Court in *Perez*. *Id.* at 1211 (Scalia, J., concurring in the judgment). Accordingly, EPA acted unlawfully by failing to comply with the notice and comment rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. §§ 553(b)-(d).

III. THE WEHRUM MEMO IS INCONSISTENT WITH SECTION 112.

California adopts Environmental Petitioners' argument on reply that the Wehrum Memo must be set aside because it is in conflict with, not compelled by, the statutory structure of Section 112. *See* Reply Brief of Environmental Petitioners pp. 2-17.

Here, EPA fails to reconcile its interpretation of one isolated provision with the statutory structure of Section 112. *See Graham Cty. Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) ("Our duty, after all, is 'to construe statutes, not isolated provisions.'") For example, EPA provides no meaningful response to Petitioners' argument that the Wehrum Memo undermines Congress' specific command that EPA "require the maximum degree of reduction in emissions" of hazardous air pollutants, including the "prohibition on such emissions, where achievable." 42 U.S.C. § 7412(d)(2). Nor is it an answer that EPA "could" prohibit emissions from a category of area sources. Intvn. 38. That decision is both entirely discretionary and implausible — EPA is not required to demand the

maximum achievable emissions reductions for area sources. *See* 42 U.S.C. § 7412(d)(5). And in the vast majority of its rules, EPA has not subjected area sources to maximum achievable standards.

EPA also fails to grapple with the manner in which the Wehrum memo conflicts with Section 112's core purpose of establishing a federal regulatory regime for reducing emissions of hazardous air pollutants. As EPA previously acknowledged in the Seitz Memo, and as EPA regional offices and State pollution-control agencies pointed out when EPA proposed this interpretation in a 2007 rulemaking, major sources may take less stringent standards if allowed, thereby resulting in an increase in emissions of hazardous air pollutants. Seitz Memo 9, JA0239; EPA-HQ-OAR-2004-0094-0151, EPA Regional Comments 4, Att. 3 ("The costs of the increased HAP emissions [from major sources reclassifying to area sources] would be borne by the communities surrounding the source."), JA0089; EPA-HQ-OAR-2004-0094-0128, JA0051; EPA-HQ-OAR-2004-0094-0144, JA0077; EPA-HQ-OAR-2004-0094-0074, JA0006; EPA-HQ-OAR-2004-0094-0142, JA0057; EPA-HQ-OAR-2004-0094-0130, JA0053; Cal. 27-28.

Rather than confront this conflict with the statutory purpose, the Wehrum Memo ignores it, on the grounds that the statute is silent on the particular point. EPA's brief selectively points to comments from past

rulemakings and speculates that the Seitz Memo "may have" discouraged sources from "innovating technologically to reduce pollution." Resp. 43-33, 11-12. But this *post hoc* rationalization is unaccompanied by any attempt to analyze the validity of the cited claims and provides no basis for finding that the Wehrum Memo's statutory interpretation is compelled by Section 112.

Because the Wehrum Memo conflicts with the statutory structure and Congressional intent of Section 112, the Court should vacate the Wehrum Memo in its entirety.

IV. THE WEHRUM MEMO IS ARBITRARY AND CAPRICIOUS BECAUSE EPA FAILS TO PROVIDE A REASONED ANALYSIS FOR REVERSING ITS POLICY.

The Wehrum Memo represents a reversal of EPA's former views on whether a major source may reclassify as an area source under Section 112. Under the Administrative Procedure Act, an agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016). An agency cannot ignore "an important aspect of the

problem," *id.*, nor "serious reliance interests" engendered by its prior policy, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-516 (2009).

Here, as stated, EPA has not offered any explanation for rejecting and ignoring an important aspect of the Seitz Memo: to prevent major sources from "backsliding" and increasing their emissions. Seitz Memo 9, JA0239; *supra* pp. 16-17. EPA has also ignored "serious reliance interests" engendered by the Seitz Memo. As detailed in Petitioners' opening briefs, Congress amended Section 112 to centralize the federal role in regulating hazardous air pollutants through an aggressive, technology-forcing regime. *See* Cal. 27; Envtl. 2-7. Now, because EPA has created a loophole for major sources of hazardous air pollutants to escape that regime, states like California can no longer rely on that federal framework to protect their residents from hazardous air pollutants. *See* Cal. 4-5; 13-16, 27-28.

By departing from the Seitz Memo without any reasoned explanation and failing to consider key aspects of Seitz Memo, including the reliance interests of the states and their residents, EPA acted arbitrarily and capriciously. *Motor Vehicle Mfrs. Ass'n, supra,* 463 U.S. at 43.

CONCLUSION

For all of the foregoing reasons, California respectfully requests the Court to vacate the Wehrum Memo in its entirety.

Dated: February 22, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Final Reply Brief, dated February 22, 2019, complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure, this Court's Circuit Rules, and this Court's briefing order issued on August 17, 2018, which limited the briefs for Petitioners to a total of 8,250 words in no more than two briefs. I certify that this brief contains 3,839 words, as counted by the Microsoft Word software used to produce this brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), and that when combined with the word count of the Environmental Petitioners' brief, the total does not exceed 8,250 words.

/s/ Kavita P. Lesser
KAVITA P. LESSER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Final Reply Brief was filed on February 22, 2019, using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Kavita P. Lesser
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