To: Rao, Raj[Rao.Raj@epa.gov]; Keller, Peter[keller.peter@epa.gov]
Cc: Argentieri, Sabrina[argentieri.sabrina@epa.gov]; Doster, Brian[Doster.Brian@epa.gov]
From: Williams, Melina
Sent: Wed 11/15/2017 5:08:20 PM
Subject: DTE's Reply Brief
Final_DTEcertReply_111517-c.pdf
No. 17-170 Hunton Williams Signed Filing Docs.pdf

Just fyi, here's the reply brief that DTE filed in the Supreme Court today. I haven't had a chance to read it yet, but wanted to let you know we'd received it.

Melina Williams | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code 2344A | phone: (202) 564-3406 | fax: (202) 564-5603

The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. Do not distribute outside of EPA or DOJ.

From: Customer Service [mailto:briefs@wilsonepes.com]
Sent: Wednesday, November 15, 2017 10:51 AM
To: SupremeCtBriefs@usdoj.gov; robert.lundman@usdoj.gov; Tom Benson <thomas.benson@usdoj.gov>; kristin.furrie@usdoj.gov; elias.quinn@usdoj.gov; Williams, Melina <Williams.Melina@epa.gov>; Argentieri, Sabrina <argentieri.sabrina@epa.gov>; Chatfield, Ethan <chatfield.ethan@epa.gov>; sfisk@earthjustice.org; msoules@earthjustice.org; solom@dteenergy.com; andrea.hayden@dteenergy.com; lundm@pepperlaw.com; bbrownell@hunton.com; mbierbower@hunton.com; pjohnson@hunton.com; mjaber@hunton.com; gsibley@hunton.com; brosser@hunton.com
Cc: Customer Service <briefs@wilsonepes.com>; Chris Dorsey <chrisdorsey@wilsonepes.com>
Subject: No. 17-170 Reply Brief

The attached Reply Brief No. 17-170 has been HAND FILED today at the Supreme Court on November 15, 2017. Service parties will receive hard copy service per rule 29.5.

No. 17-170

IN THE

Supreme Court of the United States

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on November 15, 2017, three (3) copies of the REPLY B
PETITIONERS in the above-captioned case were served, as required by U.S. Supreme
29.5(c), on the following:

NOEL J. FRANCISCO
Solicitor General of the United States
JEFFREY H. WOOD
Acting Assistant Attorney General
ROBERT J. LUNDMAN
THOMAS A. BENSON
KRISTIN M. FURRIE
ELIAS L. QUINN
Attorneys
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Room 5614
Washington, D.C. 20530-0001
(202) 514-2203

Of Counsel:
MELINA WILLIAMS
SABRINA ARGENTIERI
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
(202) 564-8040

ETHAN CHATFIELD
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION V
77 West Jackson Boulevard
Chicago, IL 60604

MICHAEL SOULES
EARTHJUSTICE
1625 Massachusetts Avenue, N.W.
Suite 702
Washington, D.C. 20036
(202) 797-5237

SHANNON W. FISK
EARTHJUSTICE
1617 John F. Kennedy Boulevard
Suite 1130
Philadelphia, PA 19103
(215) 717-4522

Counsel for Sierra Club

ED_001598_00010744

The following email addresses have also been served electronically:

SupremeCtBriefs@usdoj.gov
robert.lundman@usdoj.gov
thomas.benson@usdoj.gov
kristin.furrie@usdoj.gov
elias.quinn@usdoj.gov
williams.melina@epa.gov
argentieri.sabrina@epa.gov
chatfield.ethan@epa.gov
sfisk@earthjustice.org
msoules@earthjustice.org
solom@dteenergy.com
andrea.hayden@dteenergy.com
lundm@pepperlaw.com
bbrownell@hunton.com
mbierbower@hunton.com
pjohnson@hunton.com
mjaber@hunton.com
gsibley@hunton.com
brosser@hunton.com

Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties required to have been served.

CASEY HOGAN
WILSON-EPES PRINTING COMPANY, INC
775 H Street, N.E.
Washington, D.C. 20002
(202) 789-0096

Sworn to and subscribed before me this 15th day of November 2017.

CHRISTOPHER R. DORSEY
NOTARY PUBLIC
District of Columbia

My commission expires July 31, 2018.

ExchangeDefender Message Security: Check Authenticity

No. 17-170

In the
Supreme Court of the United States

DTE Energy Company and
Detroit Edison Company,
Petitioners,

v.

United States of America,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

Michael J. Solo
Andrea E. Hayden
Of Counsel
DTE Energy Company
One Energy Plaza
Detroit, MI 48226

F. William Brownell
Counsel of Record
Hunton & Williams LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
bbrownell@hunton.com
(202) 955-1500

Counsel for Petitioners
(additional counsel listed on signature page)

November 15, 2017

ED_001598_00010745

CORPORATE DISCLOSURE STATEMENT

Petitioner DTE Energy Company has no parent corporation and no corporation owns 10% or more of its stock. Petitioner Detroit Edison Company, now known as DTE Electric Company, is a wholly owned subsidiary of DTE Energy Company.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES..... iii

INTRODUCTION..... 1

ARGUMENT 3

I. The NSR Rules Measure the Accuracy of Pre-construction Projections Through Actual Post-construction Data. 3

II. The Rules Allow EPA to Enforce Compliance With Its Projection Regulations, But That Is Not the Claim the Government Raised Here. 8

III. The Court Should Grant Certiorari to Clarify That a Federal Agency Cannot, Through the Guise of "Interpretation," Change the Plain Meaning of Its Regulations. 10

CONCLUSION 12

ED_001598_00010745

TABLE OF AUTHORITIES

Page

Federal Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997) 2

Christopher v. *SmithKline Beecham Corp.*, 567 U.S. 142 (2012) 10

Decker v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) 12

Envtl. Def. v. *Duke Energy Corp.*, 549 U.S. 561 (2007) 3

New York v. *EPA*, 413 F.3d 3 (D.C. Cir. 2005) 3

Perez v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) 12

Talk Am., Inc. v. *Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) 12

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 12

United Student Aid Funds, Inc. v. *Bible*, 136 S. Ct. 1607 (2016) 2

U.S. Army Corps of Eng'rs v. *Hawkes Co.*, 136 S. Ct. 1807 (2016) 2

Federal Statutes:

Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*

42 U.S.C. § 7411(a)(4) 3

ED_001598_00010745

Federal Regulations:

40 C.F.R. § 52.21(a)(2)(iv)(*a*) 1, 3, 8

40 C.F.R. § 52.21(a)(2)(iv)(*b*) 6, 8, 11

40 C.F.R. § 52.21(b)(41)..... 3

40 C.F.R. § 52.21(b)(41)(ii)(*a*)..... 4

40 C.F.R. § 52.21(b)(41)(ii)(*c*) 5

40 C.F.R. § 52.21(r)(6) 5, 7

Federal Register:

63 Fed. Reg. 39,857 (July 24 1998)..... 5

67 Fed. Reg. 80,186 (Dec. 31, 2002)..... 5

72 Fed. Reg. 72,607 (Dec. 21, 2007)..... 6

INTRODUCTION

The Environmental Protection Agency's (EPA) regulations implementing the statutory New Source Review (NSR) program state that a construction project "is not a major modification if it does not cause a significant emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*a*). The challenged projects performed by Petitioners DTE Energy Company and Detroit Edison Company (DTE) did not cause a significant increase in emissions; in fact, emissions decreased substantially. Can the Government nonetheless persist in its claim that Petitioners constructed a "major modification" without a permit? That is the stark question this case presents.

The Government seeks to avoid the question by answering a different one: whether it is "categorically barred" from enforcing its NSR regulations until emissions increase. U.S. Opp'n (I). But Petitioners accept that NSR is a pre-construction program with the possibility of pre-construction enforcement. The Government could have pursued a permissible action to enforce its projection regulations, which can proceed regardless of any emissions increase. Instead, the Government claimed that DTE constructed a major modification without a permit, which, under the plain text of the regulations, indisputably requires a showing that the challenged project caused an increase in emissions.

At bottom, the Government wants to punish DTE for accurately predicting that its 2010 projects at Monroe 2 would not cause a significant increase in emissions and thus would not require an NSR permit. The Government's proof? Demonstrably incorrect post hoc preconstruction projections based on methodologies that are not specified, let alone man-

dated by, the NSR rules. The Government's legal justification that this "proof" can suffice? A tortured reading of the regulations to create ambiguity where none exists, coupled with the hardy perennial of deference based on *Auer* v. *Robbins*, 519 U.S. 452 (1997).

This fundamental misapplication of the Clean Air Act (CAA) and the nationally-significant NSR program—not to mention the insults to due process and separation of powers that attend any application of *Auer* deference—cries out for correction. The plain text of the NSR rules incentivizes operators of industrial facilities across the nation to ensure the core objective of NSR—preventing emissions increases—is satisfied. The Sixth Circuit's mandate, in contrast, raises the prospect of retroactive application of projection methodologies not specified in the regulations and that produce results that defy reality. The applicability of major environmental programs such as NSR should not be shrouded in such uncertainty. Cf. *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring). Nor should the Government be permitted to "interpret" regulations to mean exactly the opposite of what they say. See *United Student Aid Funds, Inc.* v. *Bible*, 136 S. Ct. 1607, 1608-09 (2016) (Thomas, J., dissenting from denial of certiorari) (summarizing critiques against deference based on *Auer*).

The Court should grant certiorari and address the important issues presented by this case.

ARGUMENT

I. The NSR Rules Measure the Accuracy of Pre-construction Projections Through Actual Post-construction Data.

Under the CAA, "new" sources of air pollution must obtain NSR permits before commencing construction. Construction projects at existing plants qualify as new sources only if they cause an increase in emissions. So says the statute, which defines an NSR-triggering "modification" as a "physical change" that "increases the amount" of air pollution. 42 U.S.C. § 7411(a)(4). And so says EPA's implementing regulations, which state that a change causing a significant emissions increase is a "major modification," and one that does not cause such an increase is not a "major modification." 40 C.F.R. § 52.21(a)(2)(iv)(*a*); see also *Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 569 (2007); *New York* v. *EPA*, 413 F.3d 3, 38-40 (D.C. Cir. 2005) (*per curiam*).[1]

Because NSR is a pre-construction program—meaning that, if required, the operator must obtain its permit before commencing construction—EPA's rules specify that operators must predict whether the project in question will cause "actual emissions" at the plant to go up. 40 C.F.R. § 52.21(b)(41) (defining "projected actual emissions"). In the easy case, such as the construction of a completely new plant, where it is relatively easy to isolate new emissions and determine whether those emissions exceed the signifi-

[1] While the Government attempts to distinguish these cases, U.S. Opp'n 15-16, it cannot dispute that, as the D.C. explained, "'Congress directed the agency to measure emissions increases in terms of changes in actual emissions.'" *Id.* at 16, *quoting New York,* 413 F. 3d at 10.

ED_001598_00010745

cance threshold, these projections are not controversial. But with respect to construction projects at existing plants, the task is significantly more complex.[2] A comparison between operations in the past to operations in a five-year window in the future requires assessment of anticipated demand, which depends on a host of factors, including weather, economic activity, fuel prices, and regulatory climate. These variables can only be defined prospectively based on business and engineering judgment and thus are inherently subjective. Compounding the difficulty of the task, even small changes can affect the amount of projected actual emissions, especially for a large plant like Monroe 2.

In light of the inherent variability of preconstruction emission projections, EPA in the 2002 NSR rules gave operators certain basic instructions (*e.g.*, requiring selection of a two-year emission baseline in the prior five years, and specifying "significant" emission thresholds), but otherwise left to the operator's judgment how to apply the "projected actual emissions" test for determining NSR applicability. "[T]he owner or operator … [s]hall consider all relevant information," including "the company's own representations," its "expected business activity," and its "filings with the State or Federal regulatory authorities." *Id.* § 52.21(b)(41)(ii)(*a*). And operators shall "exclude, in calculating any increase in emissions that results from [t]he particular project, that portion of the unit's emissions following the project" that the unit "could have accommodated during the

[2] As Yogi Berra reportedly quipped, "It is tough to make predictions, especially about the future." Famous Quotes & Quotations, http://www.famous-quotes-and-quotations.com/yogi-berra-quotes.html (last visited Nov. 14, 2017).

ED_001598_00010745

consecutive 24-month period used to establish the baseline actual emissions ... and that are also unrelated to the particular project, including any increased utilization due to product demand growth." *Id.* § 52.21(b)(41)(ii)(c). That is all—the regulations do not specify what weight should be given to a particular piece of "relevant information", they do not impose a specific methodology for excluding emissions unrelated to the project, and they do not require the operator to obtain prior approval of its pre-construction analysis.

EPA recognized that this system—in particular the absence of specific methodologies governing how to project or exclude emissions—would allow companies to employ differing projection approaches and assumptions, with differing results when predicting what might happen in the future. "Because there is no specific test available for determining whether an emissions increase indeed results from an independent factor such as demand growth, versus factors relating to the change at the unit, ... [i]nterpretations may vary from source to source, as well as from what a permitting agency would accept as appropriate." 63 Fed. Reg. 39,857, 39,861 (July 24, 1998). So even a reasonable pre-construction projection that actual emissions would not increase due to a project could leave open the "reasonable possibility" that post-project emissions could nonetheless increase. 40 C.F.R. § 52.21(r)(6). But EPA did not use the "reasonable possibility" that a project might cause an emissions increase to eliminate the projected actual emissions test, or to provide greater specificity in how it should be applied, or to require prior approval of projections. Rather, EPA confirmed the availability of that test, 67 Fed. Reg. 80,186, 80,204 (Dec. 31,

2002), and provided that, where there is a "reasonable possibility" that emissions could increase despite a "no increase" projection, operators would not need to get a permit but rather would be required to monitor and to report emissions for five or ten years after the project in order to police their application of the demand growth exclusion using actual, measured emissions. 72 Fed. Reg. 72,607, 72,610-11 (Dec. 21, 2007).

It is thus unsurprising that EPA's 2002 NSR rules make actual post-construction data the touchstone for assessing, after the fact, the validity of preconstruction projections of actual emissions that might be caused by a project. "Regardless of *any such* preconstruction projections, a major modification results if the project *causes a significant emissions increase*...." 40 C.F.R. § 52.21(a)(2)(iv)(*b*) (emphases added). "Any such" preconstruction projection can be wrong—what matters is whether the project significantly increased the amount of air pollution.

By answering a different question—i.e., whether it is "categorically barred" from enforcing its regulations before construction, U.S. Opp'n 8, 12—the Government avoids any meaningful response to this straightforward language of EPA's rules. Instead, the Government relies on the pre-2002 NSR rules and cases addressing those rules for the unremarkable proposition that NSR is a pre-construction review program. See, *e.g., id.* at 4, 11. And Sierra Club, for its part, concedes that "an increase in emissions is a necessary element of a modification." Sierra Club Opp'n 24.

EPA's conscious decision to use actual emissions to test the validity of NSR applicability decisions has

ED_001598_00010745

legal consequences. To begin, the rules delineate the scope of EPA's ability to "enforce" NSR before construction of projects at existing plants commences. For example, EPA could have made the preconstruction notifications submitted where there is a "reasonable possibility" of an emissions increase, 40 C.F.R. § 52.21(r)(6), due months before commencement of construction to allow more thorough regulatory review of the operator's projection. EPA likewise might have imposed additional specific requirements for projections, including specific methodologies for, *inter alia*, applying the demand-growth exclusion. That way, EPA could more closely monitor the projection methodologies employed by operators before the project took place. And EPA could have required prior approval of projections, a fundamentally different system that would allow State or federal regulators the opportunity to prevent construction if they disagreed with the operator's judgment.

But EPA did not promulgate this type of scheme. Thus, Sierra Club's suggestion that DTE somehow failed to provide enough information in its preconstruction notice, Sierra Club Opp'n 2, is wholly misplaced.[3] So, too, is its complaint that DTE erroneously predicted that demand would grow and with it Monroe 2's emissions. *Id.* at 10-11. That is exactly

[3] Indeed, Sierra Club's suggestion is contradicted by the lower courts finding that DTE's notice was adequate, Pet. App. 97a-99a, and by EPA's own concession to the lower court that DTE's projections were based on a "'sophisticated computer model'" that considered "'exhaustive inputs.'" *Id.* at 38a (Rogers, J., dissenting) (quoting U.S. Br. at 13, *United States* v. *DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017) (Nos. 14-2274/2275). (*DTE II*)).

ED_001598_00010745

the point. Under EPA's all-encompassing yet non-specific methodology, projections can be highly variable and sometimes even entail the "reasonable possibility" of being incorrect.

Most fundamentally, when an agency (i) defines a "major modification" as a change that causes an increase in emissions, 40 C.F.R. § 52.21(a)(2)(iv)(*a*), (ii) clarifies that changes not producing such an increase are *not* major modifications, *id.*, and (iii) emphasizes that the validity of projections is tested using actual post-construction data, *id.* § 52.21(a)(2)(iv)(*b*), it cannot later prove that a project that did not cause an emissions increase was nonetheless a major modification based on an alternative—and demonstrably incorrect—projection. See U.S. Opp'n 5 (Arguing for NSR applicability determined based on the counter-factual judgment of the Government's "expert witness" provided "[d]uring discovery."). The rule of law does not work that way.

This Court should grant certiorari to restore clarity to this important gateway federal program.[4]

II. The Rules Allow EPA to Enforce Compliance With Its Projection Regulations, But That Is Not the Claim the Government Raised Here.

Contrary to the Government's suggestion, U.S. Opp'n (I), DTE does not ask the Court to hold that the Government is categorically precluded from pursuing an enforcement action before construction commences. As DTE has acknowledged, under the "project-and-report system" adopted in the 2002 NSR rules, see Sierra Club Opp'n 22, the Government re-

[4] See DTE Pet. 26-30 (demonstrating the importance of the issue).

tains authority to pursue preconstruction enforcement in a range of circumstances. For example, in cases where NSR applicability is not in dispute, such as the construction of a brand-new plant, the Government can seek an injunction mandating that the operator obtain a permit. And in cases where the operator has misapplied the unambiguous requirements of the regulations, for example by using an incorrect baseline period or simply failing to perform a pre-construction projection, the Government can pursue an injunction to require the operator to perform its pre-construction projection and to use the correct baseline.

But that is not the enforcement action the Government pursued here. Instead of challenging DTE's compliance with the specific requirements of the projection regulations, the Government sought to prove that the 2010 projects were "major modifications," notwithstanding that DTE's projections complied with the objective, unambiguous requirements of the projection rules, and that, in fact, actual post-project emissions *decreased*. That difference is of paramount importance, because it is why Judge Batchelder, the deciding vote in *DTE II*, concluded that the *DTE I* majority's limited mandate could be disregarded. "If the question had been whether or not [the Government] could challenge DTE's failure to comply with the regulations, then *DTE I* would have affirmed the summary judgment because [the Government] had raised no such claim." Pet. App. 21a (Batchelder, J., concurring). On Judge Batchelder's conclusion, the mandate of the Court below depends entirely.

The Government therefore goes too far when it suggests that DTE asks the Court to "categorically bar[ ]" enforcement actions where emissions have not

increased. U.S. Opp'n (I). Such actions are permissible, albeit in a much narrower category of circumstances than would have been available had EPA opted for a prior approval scheme in the 2002 NSR Rules. More precisely framed, the question is whether the Government can prove that a project was an NSR-permit-triggering major modification, when it did not, in fact, cause an increase in emissions. Under both the statute and the regulations, the answer must be "no."

III. The Court Should Grant Certiorari to Clarify That a Federal Agency Cannot, Through the Guise of "Interpretation," Change the Plain Meaning of Its Regulations.

The Government's non-textual enforcement-by-projection reading of the rules is deeply offensive to due process. DTE Pet. 24-26. When an agency leaves a governing regulation vague, it cannot, consistent with due process, exploit that vagueness to establish a hitherto unpublished standard of liability. *Id.* (citing, *inter alia*, *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 158-59 (2012)). The Government's attempt to prove that the 2010 Monroe 2 projects were major modifications based on application of a made-for-litigation and never-before-published projection methodology violates this principle. *Id.*

The Government claims that this argument was not raised in the Court below, but that is incorrect. DTE raised precisely this point in response to the Government's invocation of *Auer* deference in the Court of Appeals. DTE Br. at 69, *DTE II*. As DTE explained there, "The Government could not lawfully substitute a system that affords that measure of judgment for one that requires strict adherence to an unwritten methodology announced for the first time

in an enforcement proceeding." *Id.* That is the same argument we raise here. DTE Pet. 24-26.

In its Opposition, the Government carefully avoids mention of *Auer* but still invokes that very dubious deference doctrine. For example, the Government contends that 40 C.F.R. § 52.21(a)(2)(iv)(*b*)'s provision subordinating projections to actual post-construction data when deciding whether a project was a "major modification" is actually a one-way street that "simply expands the regulatory definition of 'major modification' to include projects that unexpectedly increase emissions." U.S. Opp'n 14. Under this view, if emissions go up unexpectedly, projections do not matter, but if post-project data confirm the operator's projection, an inaccurate enforcement-generated projection can trump. The regulations say no such thing. Nor can they fairly be read to allow for so absurd a result. The Government nonetheless justifies this gloss on the rules as "EPA's interpretation of its regulations as applied in this enforcement action." *Id.*

Even worse, the Government asks for deference for "the agency's interpretations of those [NSR] regulations at the time that it brought this enforcement action" *id.* at 10, while observing that "[t]he issues underlying this enforcement action" are currently "under consideration," *id.* at 9 n.2, and holding open the possibility that "[t]hat review may result in changes to the agency's regulatory approach." *Id.* at 17. So while the Government seeks deference to its counter-textual interpretation of the 2002 NSR rules in this case, it holds open the possibility that the meaning of this nationally significant regulatory program could change further, potentially confirming that (as the statute says) a "modification" requires

ED_001598_00010745

an emissions increase. Only in a world of *Auer* deference could an agency give a regulation different—and perhaps diametrically opposed—meanings depending on the timing of enforcement.

This case thus presents the Court with the opportunity to address whether *Auer* remains valid, and if so, whether it can be applied in the way the Government would seek to apply it here. As members of this Court have observed, *Auer* deference rests on an unstable foundation. Among other infirmities, *Auer* gives agencies the incentive to "issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process" *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting). Such vagueness "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring). See also *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment); *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 615-16 (2013) (Roberts, C.J., concurring).

CONCLUSION

For these reasons and those set forth in DTE's opening brief, the petition should be granted.

Respectfully submitted,

F. WILLIAM BROWNELL
Counsel of Record
MARK B. BIERBOWER
MAKRAM B. JABER
HUNTON & WILLIAMS LLP
2200 Pennsylvania Ave. NW
Washington, DC 20037
bbrownell@hunton.com
(202) 955-1500

HARRY M. JOHNSON III
GEORGE P. SIBLEY III
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200

BRENT A. ROSSER
HUNTON & WILLIAMS LLP
101 South Tryon Street,
Suite 3500
Charlotte, NC 28280
(704) 378-4707

MICHAEL J. SOLO
ANDREA E. HAYDEN
Of Counsel
DTE ENERGY COMPANY
One Energy Plaza
Detroit, MI 48226

Counsel for Petitioners

November 15, 2017

ED_001598_00010745

Est. 1941
WILSON-EPES PRINTING CO., INC.

E-Mail Address:
briefs@wilsonepes.com

Web Site:
www.wilsonepes.com

775 H Street, N.E.
Washington, D.C. 20002

Tel (202) 789-0096
Fax (202) 842-4896

No. 17-170

IN THE

Supreme Court of the United States

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on November 15, 2017, three (3) copies of the REPLY BRIEF FOR PETITIONERS in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

NOEL J. FRANCISCO
Solicitor General of the United States
JEFFREY H. WOOD
Acting Assistant Attorney General
ROBERT J. LUNDMAN
THOMAS A. BENSON
KRISTIN M. FURRIE
ELIAS L. QUINN
Attorneys
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Room 5614
Washington, D.C. 20530-0001
(202) 514-2203

Of Counsel:
MELINA WILLIAMS
SABRINA ARGENTIERI
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
(202) 564-8040

ETHAN CHATFIELD
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION V
77 West Jackson Boulevard
Chicago, IL 60604
(312) 886-5112

Counsel for Respondent United States of America

MICHAEL SOULES
EARTHJUSTICE
1625 Massachusetts Avenue, N.W.
Suite 702
Washington, D.C. 20036
(202) 797-5237

SHANNON W. FISK
EARTHJUSTICE
1617 John F. Kennedy Boulevard
Suite 1130
Philadelphia, PA 19103
(215) 717-4522

Counsel for Sierra Club

The following email addresses have also been served electronically:

SupremeCtBriefs@usdoj.gov
robert.lundman@usdoj.gov
thomas.benson@usdoj.gov
kristin.furrie@usdoj.gov
elias.quinn@usdoj.gov
williams.melina@epa.gov
argentieri.sabrina@epa.gov
chatfield.ethan@epa.gov
sfisk@earthjustice.org
msoules@earthjustice.org
solom@dteenergy.com
andrea.hayden@dteenergy.com
lundm@pepperlaw.com
bbrownell@hunton.com
mbierbower@hunton.com
pjohnson@hunton.com
mjaber@hunton.com
gsibley@hunton.com
brosser@hunton.com

Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties required to be served have been served.

CASEY HOGAN
WILSON-EPES PRINTING COMPANY, INC.
775 H Street, N.E.
Washington, D.C. 20002
(202) 789-0096

Sworn to and subscribed before me this 15th day of November 2017.

CHRISTOPHER R. DORSEY
NOTARY PUBLIC
District of Columbia

My commission expires July 31, 2018.

No. 17-170

IN THE

Supreme Court of the United States

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,977 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 15, 2017.

Christopher R. Dorsey
Wilson-Epes Printing Co., Inc.