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

No. 05-1097 (and consolidated cases) COMPLEX

STATE OF NEW JERSEY, *et al.*

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Final Rules of The United States Environmental Protection Agency

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EPA'S PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

Respondent United States Environmental Protection Agency ("EPA") seeks rehearing *en banc* of the Panel's ruling in *New Jersey v. EPA*, No. 05-1097, 2008 WL 341338 (D.C. Cir. Feb. 8, 2008). *En banc* review is merited under Federal Rule Appellate Procedure 35 because the proceeding involves a question of exceptional importance and because such consideration is necessary to secure or maintain uniformity of the Court's decisions.

In section 112(n)(1)(A) of the Clean Air Act ("the CAA" or "the Act"), 42 U.S.C. § 7412(n)(1)(A), Congress distinguished electric utility steam generating units ("power plants") from all other sources of hazardous air pollutants. Recognizing that it had already subjected power plants to extensive regulation elsewhere in the Act, Congress directed EPA *not* to regulate power plants under the stringent regulatory program set forth in CAA section 112 unless EPA determined that such regulation was both "appropriate and necessary," after considering hazards to public health from power plant emissions remaining after imposition of other Act requirements.

In December 2000, EPA made an initial determination that it was "appropriate and necessary" to regulate power plants under section 112. 65 Fed. Reg. 79,825 (Dec. 20, 2000). Based on this finding, EPA added power plants to a list of source categories to be regulated under section 112. Prior to availability of judicial review of the initial December 2000 determination, EPA reevaluated the determination. On reevaluation, EPA concluded, following extensive analysis, that it is *neither* "appropriate" nor "necessary" to regulate power plants under section 112. 70 Fed. Reg. 15,994 (Mar. 29, 2005) ("the Section 112(n) Rule"). EPA concluded, among other things, that regulating hazardous air pollutant emissions from power plants under section 112 is unnecessary because such emissions can be regulated more efficiently under other existing statutory programs. 70 Fed. Reg. at 16,005/1. As a consequence of EPA's revised "appropriate and necessary" determination, EPA removed power plants from the list of source

categories to be regulated under section 112.

The Panel vacated EPA's Section 112(n) Rule on grounds that, even if EPA were correct that it is not appropriate or necessary to regulate power plants under section 112, EPA lacked the ability to remove power plants from the list of source categories to be regulated under section 112 without making certain findings under CAA section 112(c)(9), 42 U.S.C. § 7412(c)(9). *New Jersey v. EPA*, slip op. at 12-18.

THE PROCEEDING INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE

The proceeding involves a question of exceptional importance: whether Congress' explicit direction in section 112(n)(1)(A) that EPA should not regulate power plants under section 112, unless such regulation is "appropriate and necessary," governs an EPA decision to remove power plants from the list of source categories to be regulated under section 112, when EPA determines that its initial decision was in error. In section 112(n)(1)(A), Congress specifically addressed power plants and directed that power plants should not be regulated under section 112 unless such regulation is both "appropriate and necessary." EPA has concluded that regulation of power plants under section 112 is neither appropriate nor necessary. The Panel's construction of the Act thwarts Congress' express direction, set forth in section 112(n)(1)(A), by requiring EPA to engage in inappropriate and unnecessary regulation of power plants.

The Panel concluded that EPA cannot remove power plants from the list of source categories to be regulated under section 112 without making certain findings under CAA section 112(c)(9). The Panel erred, however, by failing to consider section 112(c)(9) in context with Congress' specific direction concerning power plants set forth in section 112(n)(1)(A). *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (holding that "in determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation"). Section 112(n)(1)(A) – not section 112(c)(9) -- contains Congress' specific direction concerning the circumstances under

which power plants should be regulated under section 112.

The Panel's interpretation of the statute leads to an absurd result. EPA's initial erroneous appropriate-and-necessary determination under section 112(n)(1)(A) – which the Panel has refused to allow EPA to correct – has never been subject to judicial review. Under the applicable judicial review provision at section 112(e)(4) of the Clean Air Act, 42 U.S.C. § 7412(e)(4), EPA's December 2000 appropriate-and-necessary determination will become judicially reviewable when EPA promulgates section 112 emission standards for power plants, and not before then. The Panel recognized in its statutory analysis that when the December 2000 determination becomes subject to judicial review, the Court may vacate that determination (along with emission standards premised on such a determination), if it concludes the determination was erroneous. Slip op. at 16-17. Accordingly, the Panel's construction of the statute leads to the following absurd result: (1) EPA is powerless to correct its initial December 2000 section 112(n)(1)(A) determination prior to judicial review; (2) EPA must instead proceed to engage in a rulemaking to establish concededly inappropriate and unnecessary emission standards for power plants under section 112; (3) following such a rulemaking, regulated entities subject to concededly inappropriate and unnecessary standards must then file a new lawsuit challenging EPA's initial December 2000 determination; (4) the Court can then vacate the December 2000 determination and the associated emission standards based on the conceded listing error under section 112(n)(1)(A). Thus, the Panel's opinion compels EPA to expend significant resources promulgating, and the regulated entities and others to expend significant resources to provide data for and comment on, standards that EPA itself believes are unsupportable because of EPA's initial listing error.

Moreover, CAA Section 112(g)(2), 42 U.S.C. § 7412(g)(2), prohibits the construction or reconstruction of major sources in listed source categories unless the Administrator or the State establishes case-by-case emission limitations for the source, where no national emission

limitations have been established by the Administrator under section 112. Thus, regulated entities will also be unnecessarily compelled to expend significant resources complying with case-by-case emission limitations prior to promulgation of national standards and judicial review of the concededly erroneous listing decision. Moreover, regulated entities could not challenge that listing decision until the Administrator issued national emission standards for the source category. 42 U.S.C. § 7412(e)(4).

Furthermore, the Panel's ruling has unnecessarily frustrated implementation of an important program for controlling power plant mercury emissions that was promulgated by EPA under CAA section 111. *See* "The Clean Air Mercury Rule" ("CAMR"), 70 Fed. Reg. 28,606 (May 18, 2005). EPA's section 111 standards marked the first-ever national regulations controlling mercury emissions from power plants and would have achieved cost-efficient, 70-percent reductions of mercury emissions from power plants. The Panel's misconstruction of EPA's authority under Section 112 resulted in CAMR being vacated along with the Section 112(n) Rule, because EPA's authority to regulate hazardous air pollutant emissions from power plants under section 111 turns on EPA's not having included power plants in the section 112 regulatory program.

EN BANC REVIEW IS NECESSARY TO SECURE UNIFORMITY OF DECISIONS

En banc review is also necessary to secure uniformity of this Court's decisions. The Panel's decision undermines an important principle of administrative law long-recognized by this Court – namely, the principle that an agency has inherent authority to correct its own errors prior to judicial review. *See Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950) (holding that the power to reconsider agency decision within period allowed for an appeal is inherent in an agency's power to decide). *See also American Methyl Corp. v. EPA*, 749 F.2d 826, 835, n.55 (D.C. Cir. 1984) (citing cases). The Panel's decision is additionally contrary to the basic principles of statutory interpretation set forth in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837,

842-43 (1984) (holding that if Congress has not directly spoken to precise question at issue, agency interpretation must be upheld as long as it is a reasonable reading of the statute).

STATUTORY AND REGULATORY BACKGROUND

Section 112 of the Act, 42 U.S.C. § 7412, creates a regulatory program for one-hundred and eighty-eight "hazardous air pollutants."[1] Congress substantially modified CAA section 112 in the 1990 CAA amendments. Pursuant to CAA section 112(c)(1), EPA must publish a list of all categories and subcategories of major sources of hazardous air pollutants.[2] 42 U.S.C. § 7412(c)(1). EPA must then establish emission standards for listed major source categories and subcategories that "require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section" that the Administrator determines is achievable, taking into account certain factors such as cost, energy requirements, and other impacts. *Id.* § 7412(c)(2) and (d)(2).

EPA's listing of a source category under section 112(c) is not a final agency action subject to judicial review until EPA issues emission standards for the source category. CAA § 112(e)(4), 42 U.S.C. § 7412(e)(4). CAA Section 112(c)(9) relates to the removal by EPA of categories from the list of source categories to be regulated under section 112 and provides, in part, that:

> The Administrator may delete any source category from the [section 112(c)(1) list] . . . whenever the Administrator . . . [determines] . . . that emissions from no source in the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no

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[1] Hazardous air pollutants are "pollutants which present, or may present, . . . a threat of adverse human health effects . . . or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise." 42 U.S.C. § 7412(b)(2).

[2] A "major source" is any stationary source or group of stationary sources at a single location and under common control that emits or has the potential to emit ten tons per year of any single hazardous air pollutant or 25 tons or more per year of any combination of hazardous air pollutants. 42 U.S.C. § 7412(a)(1).

> adverse environmental effect will result from emissions from any source . . . .

42 U.S.C. § 7412(c)(9)(B).

Congress enacted a special provision in the 1990 Amendments addressing hazardous air pollutant emissions from power plants – CAA section 112(n)(1), 42 U.S.C. § 7412(n)(1). Unlike section 112(c)(1), which requires that a major source category be listed and regulated under section 112 based on nothing more than the emissions of hazardous air pollutants by sources in that category, section 112(n)(1)(A) directs EPA to conduct a study to determine what hazards to public health associated with emissions of hazardous air pollutants from power plants would reasonably be anticipated to occur following imposition of other requirements of the Act. Section 112(n)(1)(A) further provides that EPA "shall regulate [power plants] under [section 112] if [EPA] finds such regulation is *appropriate* and *necessary* after considering the results of the study." 42 U.S.C. § 7412(n)(1)(A) (emphasis added). Thus, unlike other major sources of hazardous air pollutants, the regulation under section 112 of power plants that emit such pollutants is not automatic. Rather, power plants are to be regulated under section 112 only if EPA finds it is both "appropriate" and "necessary" to do so.

Following passage of the 1990 Amendments, EPA conducted a study, pursuant to section 112(n)(1)(A), 42 U.S.C. § 7412(n)(1)(A), to evaluate what hazards to public health, if any, would reasonably be anticipated to occur as a result of emissions of hazardous air pollutants from power plants after imposition of the requirements of the CAA. EPA completed this study in 1998. After some additional information collection, EPA made an initial finding on December 20, 2000, under section 112(n)(1)(A) that regulation of power plants under section 112 was "appropriate and necessary." 65 Fed. Reg. 79,825, 79,829 (Dec. 20, 2000). Based on this initial finding, EPA added power plants to the CAA section 112(c) list of source categories to be regulated under section 112. *Id.* at 79,831. Petitioner Utility Air Regulatory Group ("UARG") challenged the finding. Applying CAA section 112(e)(4), 42 U.S.C. § 7412(e)(4), this Court

held that it lacked jurisdiction to review EPA's listing decision until EPA promulgated emission standards, and dismissed UARG's challenge. *UARG v. EPA*, No. 01-1074, 2001 WL 936363 (D.C. Cir. July 26, 2001).

On January 30, 2004, EPA issued a proposed rule that included two primary alternative regulatory approaches to address mercury emissions from power plants. 69 Fed. Reg. 4652. Under the first approach, EPA proposed retaining its December 2000 Finding and the associated section 112(c) listing of power plants and issuing final emission standards for power plants under section 112(d). Under the second approach, EPA proposed revising the December 2000 Finding, removing power plants from the section 112(c) list, and issuing standards of performance under section 111.[3]

On March 15, 2005, the EPA Administrator signed a final rule ("the Section 112(n) Rule") revising and reversing the December 2000 Finding based on his determination that it was, in fact, neither appropriate nor necessary to regulate power plants under CAA section 112. 70 Fed. Reg. 15,994 (Mar. 29, 2005). Before taking this final action, EPA received and responded to thousands of public comments and documents, and conducted additional robust air quality modeling and analyses. EPA concluded that it was not "appropriate" to regulate power plants under section 112 because (1) the level of emissions of hazardous air pollutants from power plants remaining after imposition of other requirements of the Act are not reasonably anticipated to cause hazards to public health, and (2) if EPA were to regulate mercury emissions from power plants under section 112, the costs would be extreme and the health benefits would be nominal. 70 Fed. Reg. at 16,022/3, 70 Fed. Reg. 16,029/1. EPA concluded it was not "necessary" to

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[3] Section 111 creates a program for the establishment of "standards of performance." 42 U.S.C. § 7411. A "standard of performance" is "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction, which (taking into account the cost of achieving such reduction and any non air quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." *Id.* § 7411(a)(1).

regulate power plants under section 112 because there are other available authorities under the Act that, if implemented, would cost-effectively address hazardous air pollutant emissions from power plants. 70 Fed. Reg. at 16,005. Based on its revised section 112(n)(1)(A) finding, EPA in the Section 112(n) Rule removed power plants from the section 112(c) list. 70 Fed. Reg. at 15,994/2.

On the same date that he signed the Section 112(n) Rule, the EPA Administrator signed CAMR. 70 Fed. Reg. 28,606, 28,649 (May 18, 2005). CAMR establishes "standards of performance" pursuant to CAA sections 111(b) and (d) limiting mercury emissions from new and existing power plants. CAMR creates a standard of performance for existing sources that, when fully implemented, will reduce nationwide annual power plant emissions of mercury from a 1999 baseline of 48 tons to 15 tons. 70 Fed. Reg. at 28,619.

Environmental groups, States, tribes, and industry groups filed petitions for judicial review of both the Section 112(n) Rule and CAMR. The petitions, which were consolidated, raised a number of challenges to both rules.

SUMMARY OF THE PANEL DECISION

On February 8, 2008, the Panel issued a decision granting the petitions and vacating both the Section 112(n) Rule and CAMR. The Panel concluded that the "appropriate and necessary" criteria in section 112(n)(1) govern EPA's decision regarding whether to *add* power plants to the list of source categories to be regulated, but do not govern an EPA decision to *remove* power plants from the list of source categories to be regulated. The Panel reasoned that the language of section 112(c)(9) requires EPA to make section 112(c)(9) findings before removing "any" source category from the section 112(c) list of categories to be regulated. Slip op. at 14-15. The Panel further reasoned that because power plants are a source category, section 112(c)(9) limits EPA's discretion to correct any mistake it may have made in determining under section 112(n)(1)(A) that it is appropriate and necessary to regulate power plants. Slip op. at 16. The Panel asserted

that EPA's contrary position would "nullify section 112(c)(9) altogether." *Id.*

Having found that EPA erred in removing power plants from the list of source categories to be regulated under Section 112, the Panel also vacated CAMR. Slip op. at 17. The Panel noted that EPA itself believes that it cannot establish standards of performance for existing sources under CAA Section 111 for source categories that are listed under section 112. *Id.* The Panel did not reach other challenges to the rules raised by petitioners.

The mandate was issued on March 14, 2008.

STANDARD FOR EN BANC REVIEW

The Federal Rules of Appellate Procedure provide that rehearing *en banc* may be ordered where: "(1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). *En banc* review is warranted here on both grounds.

ARGUMENT

The Panel Erred in Finding That the Plain Language of Section 112(c)(9) Governs Delisting of Power Plants

Under *Chevron*, in reviewing an agency's construction of a statute it administers, the court must decide as a first step "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842-43. Importantly, under the first step of *Chevron*, the statute must be construed in its entirety, and the Court cannot confine itself to reading a particular statutory provision in isolation. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 132. In the event "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. If it is, the reviewing court *must* defer to the agency's construction, *id.* at 843-44, even if the court might have reached a different conclusion. *Id.* at 843, n.11.

I. The Panel Erred in Concluding That the Plain Language of Section 112(n)(1)(A) Governs Listing of Power Plants, But Not Delisting

The Panel erred in applying *Chevron* step one because it failed to consider appropriately the text of section 112(c)(9) in context with the remainder of the statute, and, in particular, in context with section 112(n)(1)(A). Section 112(n)(1)(A) clarifies that an affirmative determination that it is both "appropriate and necessary" to regulate power plants under section 112 is a prerequisite to any regulation of power plants under that section. However, it does not distinguish between listing and delisting of power plants.

The Panel agreed that section 112(n)(1)(A) governs the *addition* of power plants to the list of source categories to be regulated under section 112, but concluded that section 112(n)(1)(A) does not govern the *removal* of power plants from that list. *See* slip op. at 14 ("Section 112(n)(1) governs how the Administrator decides whether to list [power plants]; it says nothing about delisting [power plants] . . . ."). The plain text of the statute does not support the purported distinction identified by the Panel between listing and delisting decisions. Section 112(n)(1)(A) broadly directs EPA not to ***"regulate"*** power plants under section 112 unless it is both appropriate and necessary to do so. 42 U.S.C. § 7412(n)(1)(A) (emphasis added). There is nothing in section 112 that distinguishes between listing and delisting decisions. Indeed, there is no reference to either "listing" or "delisting" at all in section 112(n)(1)(A). The clear implication of the plain language of section 112(n)(1)(A) is that an existing and valid affirmative appropriate-and-necessary determination under section 112(n)(1)(A) is a prerequisite to *any* regulation of power plants under section 112, regardless of whether power plants have been previously listed.

If Congress had intended for the criteria in section 112(n)(1)(A) to apply *solely* to a listing decision, as found by the Panel, it could have said so. It did not. The Panel's construction ignores the plain text of Section 112(n)(1)(A) and thereby nullifies Congress' express direction.

II. The Panel Erred in Concluding That An Implied Limitation Trumps An Express Grant of Textual Authority

The Panel further erred in concluding that an implied limitation on the Agency's delisting authority precludes EPA from reconsidering its exercise of authority specifically granted in section 112(n)(1)(A) relating to the regulation of power plants. Section 112(n)(1)(A) provides the Agency with specific authority to determine whether it is "appropriate and necessary" to regulate power plants under section 112 and to decline to regulate power plants where it is not "appropriate and necessary" to do so. In contrast, section 112(c)(9) provides that the Administrator "*may*" (emphasis added) remove any source category from the list of source categories to be regulated where the Administrator makes certain findings. Section 112(c)(9) does not say that the Agency "shall not delete" any source category unless requisite findings are made, and the word "may" customarily connotes discretion. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005). Nonetheless, the Panel *sub silentio* construed section 112(c)(9) as imposing a limitation on the Administrator's discretion to delist source categories without making the factual findings set forth in 112(c)(9). The Panel erred in concluding that such an implied limitation in section 112(c)(9) precludes the Administrator from reconsidering the exercise of express textual authority relating to power plants under section 112(n)(1)(A).

III. The Panel Ignored Section 112(c)(1) in Finding That Where Congress Wished to Exempt Power Plants From Specific Requirements of Section 112, It Said So Explicitly

The Panel further erred in relying on a finding that "where Congress wished to exempt [power plants] from specific requirements of section 112," such as the requirements set forth in section 112(c)(9), "it said so explicitly." *See* slip op. at 15. The Panel's premise is demonstrably erroneous.

Most notably, Congress did not explicitly exempt power plants from subsection 112(c)(1). Section 112(c)(1) provides that the Administrator shall list "***all*** categories and subcategories of major sources" (emphasis added), and it does not itself explicitly exempt power

plants. The word "all," like the word "any" in subsection 112(c)(9), has an expansive meaning. Because section 112(c)(1) does not itself explicitly exempt power plants, the Panel's logic would dictate that section 112(c)(1) requires listing of power plants, because power plants are a major source.

Despite this, the Panel conceded that section 112(c)(1) does *not* govern the listing of power plants. Slip op. at 14. In fact, the Panel found that "[*s*]*ection 112(n)(1)* governs how the Administrator decides whether to list [power plants,]" notwithstanding the presence of the expansive word "all" in section 112(c)(1). *Id.* (emphasis added). *Per force*, section 112(n)(1)(A) must also govern decisions whether to *delist* power plants as a source category, notwithstanding the presence of the expansive word "any" in section 112(c)(9). There is no linguistic distinction between the word "all" in subsection 112(c)(1) and the word "any" in subsection 112(c)(9) that compels the Panel's conclusion that the "appropriate and necessary" criteria in section 112(n)(1)(A) displace the *listing* criteria in subsection 112(c)(1), but do not displace the *delisting* criteria in subsection 112(c)(9).[4]

IV. The Panel Erred in Finding That EPA's Interpretation of the Statute Would Completely Nullify Section 112(c)(9)

The Panel further erred in finding that EPA's proposed construction would completely nullify section 112(c)(9). *See* slip op. at 16. This finding was plainly wrong. Under EPA's reasonable construction of the statute, section 112(n)(1)(A) governs regulation of power plants,

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[4] *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006), cited by the Panel (*see* Slip op. at 14-15) to support the proposition that the word "any" in section 112(c)(9) must be given an expansive meaning, is distinguishable. In *New York*, the court was interpreting section 111(a)(4) of the Act in isolation, and there was no reason not to give an expansive literal reading to the word "any" as it appeared in that subsection. 443 F.3d at 886. In the instant case, the plain language of section 112(n)(1)(A) does provide a reason to give a narrower meaning to the word "any" as it appears in section 112(c)(9), because section 112(n)(1)(A) demonstrates Congress' intent to treat power plants separately and differently from other source categories under section 112. Thus, the Court in *New York* was not faced with an analogous statutory setting when it construed the word "any" expansively.

but section 112(n)(1)(A) has no application to any other source category. Accordingly, under EPA's construction, section 112(c)(9) retains vitality because section 112(n)(1)(A) is limited to power plants. Such an interpretation hardly nullifies section 112(c)(9) altogether, as the Panel found.

V. The Panel Departs From Longstanding Principles of Administrative Law

This Court has long recognized that administrative agencies have inherent authority to correct mistakes prior to judicial review. *See Albertson v. FCC*, 182 F.2d at 399. *See also American Methyl,* 749 F.2d at 835, n.55 (citing cases). Here, Congress expressly precluded judicial review of section 112(c) listing decisions until after EPA issues emission standards for the listed source category. Thus, the time period for judicial review of EPA's admittedly defective December 2000 listing decision has not yet even begun.

The Panel erred in finding that, through section 112(c)(9), Congress "provided a mechanism capable of rectifying mistaken actions . . . [such that] it is not reasonable to infer authority to reconsider agency action." *See* slip op. at 16 (quoting 749 F.2d at 835). The health-risk delisting criteria in section 112(c)(9) differ from the criteria in section 112(n)(1)(A) which govern the regulation of power plants. For example, a delisting decision for a major source category under section 112(c)(9)(B)(ii) requires a determination that emissions from no source in the category or subcategory exceed a level that is adequate to protect public health with an ample margin of safety and that there will be no adverse environmental effect from emissions from any source in the category. By contrast, section 112(n)(1)(A) focuses solely on public health and requires the Administrator to evaluate whether power plant emissions remaining after imposition of other requirements of the Act are reasonably anticipated to pose a hazard to public health. Thus, EPA cannot necessarily utilize the criteria under section 112(c)(9) to fix a mistake under section 112(n)(1)(A).

The Court's decision in *American Methyl*, cited by the Panel, is easily distinguishable.

First, in *American Methyl,* the period for taking an appeal had "long expired." 749 F.2d at 835 (emphasis added). In this case, the time for appealing EPA's December 2000 decision to list power plants under section 112(c) has not even begun. *See UARG v. EPA*, No. 01-1074, 2001 WL 936363 (D.C. Cir. July 26, 2001). Second, in *American Methyl*, the two provisions at issue addressed precisely the same subject – fuel additives. In contrast, section 112(n)(1) alone specifically addressees power plants.

Moreover, to the extent that the Panel relied on the legislative history cited in *National Lime Ass'n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000), the Panel erred in doing so. As the panel noted, the legislative history for section 112 cited in *National Lime* reflected a congressional preoccupation with the fact that EPA had failed to regulate hazardous air pollutants sufficiently. *See* slip op. at 17. The legislative history quoted in *National Lime*, however, did not address power plants specifically or address Congress' intent with respect to power plants as plainly set forth in section 112(n)(1)(A). Congress elected to treat power plants differently than other sources, and by enacting section 112(n)(1)(A), clearly signaled a reluctance to automatically subject power plants to the section 112 regulatory program. Thus, legislative history related to the enactment of section 112 generally should not have been utilized to contravene the plain meaning of section 112(n)(1)(A).[5]

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[5] Legislative history specifically related to section 112(n)(1)(A) supports EPA's statutory construction. For example, one member of the conference committee stated:

> The conferees agreed to the House provisions [containing Section 112(n)] because of the logic of basing any decision to regulate on the results of scientific study and because of the emission reductions that will be achieved and the extremely high costs that electric utilities will face under other provisions of the new Clean Air Act amendments.
>
> As we all know, the utility industry has been singled out for regulation under the acid rain provisions. The utility industry may

(continued...)

CONCLUSION

The absurd consequence of the Panels' decision is that EPA would have to expend significant resources promulgating inappropriate and unnecessary standards, which would then be unsupportable upon judicial review because of EPA's flawed listing decision. Further, regulated entities would be subject to emission limits prior to construction or reconstruction based on that flawed decision. Nothing in the Act compels such a nonsensical result.

For the reasons stated above, rehearing *en banc* should be granted.

Respectfully submitted,

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[5](...continued)

> also face additional controls for NOx emissions for ozone control, and revised PM-10 controls. All of these programs will result in substantial reductions in emissions of conventional and potentially hazardous air pollutants. Even without all of these reductions in air pollution, the health risks from emissions of hazardous air pollutants from power plants are vanishingly small, as EPA has repeatedly recognized.

136 Cong. Rec. H12911, 12,934 (daily ed. Oct. 26, 1990), *reprinted in Legislative History of the Clean Air Act Amendments of 1990*, at 1177, 1416 (Comm. Print 1993).