TODD KIM
Assistant Attorney General
LESLIE M. HILL (D.C. Bar No. 476008)
Leslie.Hill@usdoj.gov
United States Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
4 Constitution Square
150 M Street, N.E.
Suite 4.149
Washington, D.C. 20002
Telephone (202) 514-0375
Facsimile (202) 514-8865

Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LIBERTY PACKING COMPANY, LLC, NUCKLES OIL CO., INC. D/B/A MERIT OIL COMPANY, NORMAN R. "SKIP" BROWN, DALTON TRUCKING COMPANY, INC., CONSTRUCTION INDUSTRY AIR QUALITY COALITION, and ROBINSON INDUSTRIES, INC.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and MICHAEL S. REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency,

Defendants.

Case No. 2:21-cv-00724-MCE-DB

EPA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

Hearing Vacated (Dkt. No. 12)
Judge: Hon. Morrison C. England, Jr.

Plaintiffs seek to compel a response to their *Petition To Reconsider Endangerment and Cause Or Contribute Findings For Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15. 2009) ("Endangerment Finding"). Dkt. No. 1-1 ("Petition"). Plaintiffs ask EPA to reconsider its prior finding made pursuant to Clean Air Act ("CAA") section 202(a), 42 U.S.C. § 7521(a), that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare." Compl. ¶ 26; *see* Pls.' Opp'n at 1 (Dkt. No. 13, "Opp'n"). Plaintiffs claim EPA has unreasonably delayed taking action on their administrative petition for rulemaking under the CAA and ask the Court to compel EPA to "issue a definitive ruling" on the Petition by a date certain. Compl. at 13 (prayer for relief); *see also* ¶ 37.

Plaintiffs oppose EPA's motion by arguing that not responding to their Petition is not "a failure of the Administrator to perform any act or duty under this [Act] which is not discretionary" under the CAA's citizen suit provision, 42 U.S.C. § 7604(a)(2), and thus, it does not provide a waiver of sovereign immunity for Plaintiffs' claim. Opp'n at 1, 3. Plaintiffs therefore argue that their claims arise under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*., and that the APA provides the requisite waiver of sovereign immunity. *Id*.

Though an issue of first impression in this court, two opinions from the D.C. District Court thoroughly analyze the issue and conclude that although the duty to respond to a rulemaking petition is found in APA, 5 U.S.C. § 555, the CAA provides an adequate remedy at law to compel a petition response via its citizen suit provision, 42 U.S.C. § 7604(a). Thus, the APA cannot provide a waiver of sovereign immunity or serve as the basis for such a claim. Plaintiffs do not explain why they believe the analysis in those cases is incorrect. Instead, they state that the cases were wrongly decided and offer an alternative and unsustainable interpretation of the citizen suit provision, ignoring changes Congress made in 1990 that address this specific issue. As explained below, Plaintiffs' alternative analysis is without merit.

Plaintiffs also oddly suggest that even if EPA is correct that this suit must be brought pursuant to the CAA, which requires 180-day pre-suit notice, their Petition provided notice. But language in the Petition cannot provide the requisite notice, as it was submitted before EPA had

an opportunity to respond, prior to any delay.

Thus, for the reasons stated in EPA's motion to dismiss (Dkt. No. 9) and below, the Complaint must be dismissed.

I. ARGUMENT

A. Plaintiffs Have Not Established a Waiver of Sovereign Immunity.

As explained in EPA's motion, the D.C. District Court has fully analyzed and rejected similar claims in two cases. In those cases, as in this one, plaintiffs filed a petition seeking EPA action under the CAA, and then filed a complaint alleging that EPA's response was unreasonably delayed, without providing pre-suit notice to EPA. The court dismissed both complaints, holding that the CAA's citizen suit provision provides an adequate remedy. Dkt. No. 9-1 at 8-10 ("Memo.") (citing *Env't Integrity Project v. EPA*, 160 F. Supp. 3d 50 (D.D.C. 2015), and *Humane Soc'y v. McCarthy*, 209 F. Supp. 3d 280 (D.D.C. 2016)). Plaintiffs' attempt to distinguish or brush those decisions aside falls flat. This Court should reach the same result.

In both cases, the plaintiffs sought to have the district court declare that EPA's failure to respond to a petition asking EPA to take action under the CAA was actionable under the APA. Both decisions conclude that the CAA citizen suit provision, 42 U.S.C. § 7604(a), provides an adequate remedy for such a claim. Both thoroughly analyzed the CAA's text and its legislative history and rejected Plaintiffs' argument that the district court jurisdiction cannot come from the CAA's citizen suit provision because the duty to respond to the petition lies in the APA, not the CAA. And both held that although the duty to respond to a petition is found in section 555 of the APA, 5 U.S.C. § 555, allegations of unreasonable delay in responding to a petition fall within the district court's jurisdiction under the CAA. This Court should do the same. Tellingly, Plaintiffs cite no contrary decisions directly addressing this issue to support their alternative conclusion.

First, the CAA divides subject matter jurisdiction between the federal district courts and the courts of appeal. 160 F. Supp. 3d at 52. The D.C. Circuit "has exclusive jurisdiction to review an action of the EPA Administrator in promulgating certain national standards and rules, as well as 'any other nationally applicable regulations promulgated, or final action taken, by the Administrator.'" *Id*. at 52 (quoting 42 U.S.C. § 7607(b)(1)). Under the citizen suit provision, any

person may "bring a civil action on his own behalf against the EPA Administrator in the district court 'where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator,' *id*. § 7604(a)(2), and it also permits the district courts 'to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed.' *Id*. § 7604(a)." *Env't Integrity Project*, 160 F. Supp. 3d at 53.

Much like Plaintiffs here, the plaintiffs in *Environmental Integrity Project* petitioned EPA to make a finding regarding endangerment. *Id*. at 53 (seeking finding that "ammonia gas pollution endangers the public health and welfare"); *see also Humane Soc'y*, 209 F. Supp. 3d at 281 (plaintiffs petitioned EPA to conduct a rulemaking to regulate certain sources of air pollution under the CAA). When EPA did not respond to their petition, the plaintiffs sued EPA under the APA alleging unreasonable delay and seeking a court order requiring EPA to respond in 90 days. *Envtl. Integrity Project*, 160 F. Supp. 3d at 53.

The district court in *Environmental Integrity Project* explained the question as:

> whether it has subject matter jurisdiction to review plaintiffs' claim that the EPA has unreasonably delayed in responding to their 2011 petition . . . This turns on whether the government has waived its sovereign immunity as to plaintiffs' claim, and if so, under which statute the waiver was effectuated—the [APA] or the [CAA], which includes the 180-day notice provision.

Id. at 54. As in that case, EPA agrees here "that the APA is the source of an agency's duty to respond to a petition for rulemaking—including a petition seeking action under the CAA — within a reasonable time." *Id*. Similarly, in that case, as here, the plaintiffs argued that:

> CAA's citizen-suit provision is not the source of jurisdiction in this case, because it "waives sovereign immunity only for suits alleging the Administrator failed to perform a nondiscretionary duty." Because nothing in the CAA requires the EPA to respond to a rulemaking petition, plaintiffs contend that the APA is both the source of the duty and the avenue for relief when that duty is not performed.

Id. at 55 (internal citations omitted); Opp'n at 1-3, 7-8 (same); *see also Humane Soc'y*, 209 F. Supp. 3d at 282.

In concluding that the CAA provides an adequate remedy, both district courts looked first to the text of the citizen suit provision, 42 U.S.C. § 7604(a) *before* the 1990 CAA Amendments:

> Except as provided in subsection (b) of this section, any person may commence a

> civil action on his own behalf—
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> * * *
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> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary[.]
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> * * *
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> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties . . . to order the Administrator to perform such act or duty, as the case may be.

42 U.S.C. § 7604(a) (1990). In *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987), the D.C. Circuit interpreted the term "not discretionary" in the pre-1990 text to refer to a duty for which the statute specifies "a date-certain deadline" for agency action. *Id*. at 791; *see also id*. at 788-90. Thus, before 1990, 42 U.S.C. § 7604 gave district courts jurisdiction over claims that EPA failed to perform a "non-discretionary" duty (i.e., a duty with a date-certain deadline) under the CAA.

Because the citizen suit provision did not expressly address claims seeking to compel EPA to perform a statutory duty without a specific deadline, the D.C. Circuit then had to determine which court Congress intended to exercise jurisdiction over such unreasonable delay claims. Previously, in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"), the D.C. Circuit held that, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), it possessed exclusive jurisdiction over claims of unreasonable delay in taking an agency action that would, once taken, be subject to the exclusive review of the D.C. Circuit. *Id*. at 78. In *Thomas*, the D.C. Circuit applied *TRAC* to interpret the CAA's judicial review provisions. Based on the then-current versions of 42 U.S.C. §§ 7604 and 7607(b) the D.C. Circuit concluded that it possessed jurisdiction over unreasonable delay claims against EPA where "Congress has established no date-certain deadline—explicitly or implicitly—but EPA must nevertheless avoid unreasonable delay . . . ." 828 F. 2d at 792.

Thus, before the 1990 Amendments, 42 U.S.C. § 7604(a) only provided district court jurisdiction over claims that EPA had failed to comply with a non-discretionary, or mandatory, duty with a date-certain deadline. "In such circumstances, the only question for the district court to answer is whether the agency failed to comply with that deadline." *Id*. at 792. Conversely, pursuant to *TRAC*, for "discretionary" duties (i.e., those where Congress has established no date-certain deadline), the D.C. Circuit reviewed unreasonable delay claims "in order that [it may

protect its] eventual jurisdiction under section 307 to review the final EPA action." *Id*. at 791-92.

Shortly after the *Thomas* decision, in the 1990 Amendments, Congress amended the citizen suit provision to clarify that claims of unreasonable delay of agency action should be brought in the district court. Pub. L. No. 101-549, § 707(f), 104 Stat. 2399, 2683 (1990); *see also* S. Rep. No. 101-228 at 374 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3757 ("The amendment will clarify that such review is available, and will assign it to the Federal district courts, in keeping with the general principle that those courts are better suited to address claims of agency inaction . . . "); 136 Cong. Rec. 35,377 (1990) ("The bill changes the judicial review scheme under the act by giving the district courts jurisdiction to compel Agency action that has been unreasonably delayed."). In pertinent part, the 1990 Amendments added the following text:

> The district courts of the United States shall have jurisdiction . . . to compel . . . agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) [of this section] shall be provided 180 days before commencing such action.

42 U.S.C. § 7604(a). Thus, the 1990 Amendments redirected the category of unreasonable delay claims to the district courts that, under *TRAC* and *Thomas*, would have belonged in the courts of appeals. *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 n.6 (D.C. Cir. 2015). However, Congress conditioned this jurisdictional grant, providing that "[i]n any such action for unreasonable delay," the prospective plaintiff must give EPA notice 180 days "before commencing such action." 42 U.S.C. § 7604(a); *see also id*. § 7604(b) (specifying who must receive such notice and requiring that it "shall be given in such manner as the Administrator shall prescribe by regulation"); *see* 40 C.F.R. pt. 54. Under the 1990 Amendments, such actions may only be brought in a district court "within the circuit in which such action would be reviewable under section 7607(b) of this title." 42 U.S.C. § 7604(a). Nationally applicable final actions taken under the CAA are only reviewable in the D.C. Circuit. 42 U.S.C. § 7607(b). Thus, a complaint alleging unreasonable delay in taking a nationally applicable action must be brought in the D.C. District Court.

It is against this backdrop that in both *Environmental Integrity Project* and *Humane Society* the court considered "whether the citizen-suit provision of the CAA provides a basis to challenge the EPA's failure to satisfy its general duty under the APA to 'conclude a matter presented to it' 'within a reasonable time.'" *Envtl. Integrity Project*, 160 F. Supp. 3d at 55 (quoting 5 U.S.C. § 555(b)); *see Humane Soc'y*, 209 F. Supp. 3d at 286 (same). Relevant to the court's consideration, 42 U.S.C. § 7604(a) currently provides:

> Except as provided in subsection (b) . . . any person may commence a civil action on his own behalf—
>
> * * *
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or
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> * * *
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, . . . to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). *The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed*, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) . . . shall be provided 180 days before commencing such action.

42 U.S.C. § 7604(a) (emphasis added).

As in *Environmental Integrity Project*, Plaintiffs here seek to proceed as if nothing had changed since *Thomas*, arguing that "the revised citizen-suit provision must be construed as narrowly as it was in 1987, and that it does not provide an avenue for bringing claims to review what the *Thomas* court called 'discretionary' actions of the Administrator, including claims that the Administrator has engaged in unreasonable delay." 160 F. Supp. 3d at 57; Opp'n at 3 ("The CAA does not authorize claims against EPA for unreasonable delay in performing discretionary acts."); *id*. at 7 (citing two pre-1990 cases).

In *Environmental Integrity Project*, the court concluded that while there must be "a duty to act" before there can be an unreasonable delay, such duties may arise under the APA, explaining that EPA was "obligated to act, because the APA requires that the EPA 'conclude a

matter presented to it'—including responding to a rulemaking petition—'within a reasonable time.'" 160 F. Supp. 3d at 57-58 (quoting 5 U.S.C. § 555(b)).The district court considered the argument, also made by Plaintiffs here, that the parenthetical "consistent with paragraph (2) of this subsection" could be construed to "limit[ ] unreasonable delay claims to those arising out of delay in the performance of a nondiscretionary act required by the [CAA] itself, and not an act required by the APA." *Id.*; *see* Opp'n at 8-9. The court noted two issues with that interpretation: (1) "unreasonable delay in performing a duty can be indistinguishable from the failure to perform the duty"; and (2) "prior to 1990, the district courts already had jurisdiction over claims to compel the EPA to perform the duties specifically imposed by the [CAA] that were not discretionary." 160 F. Supp. 3d at 58 (internal citations omitted). Thus, the court concluded:

> For the amendment to make any sense, then, there must be something different included within the scope of the new section 304(a) claims to compel the performance of agency action unreasonably delayed that was not already covered by the pre-existing section 304(a)(2) cause of action to compel the performance of a nondiscretionary duty. To read the statute otherwise would run counter to the well-settled principle . . . that all words in a statute are to be assigned meaning and not to be construed as duplicative or surplusage.

Id. (internal quotations omitted). The district court then considered a subset of cases Congress intended to add with the 1990 Amendments, noting that the new provision used broader language than that used in the pre-1990 version of 42 U.S.C. § 7604(a)(2) by referring to compelling "agency *action*" and omitting the limitation "under this chapter." 160 F. Supp. 3d at 60.

Here, Plaintiffs argue that this court should interpret the parenthetical to graft a limitation in 42 U.S.C. § 7604(a)(2) into § 7604(a) more generally. Opp'n at 8-9. But for that view to prevail, the court "would have to find that Congress utilized a vague parenthetical aside—'consistent with paragraph (2) of this subsection'—to impose a limitation on the new jurisdictional provision it went to the trouble to create when it did not do so explicitly, and it would have been easy to mirror the language of the existing provision." 160 F. Supp. 3d at 60.

Next the district court looked to the legislative history, which "confirms that the language at issue was specifically added to create a remedy in the district court for the full scope of potential unreasonable delay by the agency, including delay in responding to a rulemaking petition that was previously addressed only by the APA." 160 F. Supp. 3d at 60. The court

highlighted passages it found compelling, such as "[u]nder this amendment, the citizen suit provision of the Act will encompass the full range of inaction covered by the [APA]." 160 F. Supp. 3d at 60 (quoting S. Rep. No. 101-228 at 374 (1989)). Likewise, the text Congress added:

> has a broad effect because Agency action referred to in section 307(b) includes any final action taken by the Administrator under the act. Thus, for example, final Agency action in the form of a response to a petition for rulemaking would fall within this category. A suit alleging unreasonable delay by the Administrator in responding to such a petition could therefore be heard only by a district court within the circuit of the court of appeals that could review the Administrator's response to the petition for rulemaking.
>
> This unreasonable delay jurisdiction … authorizes the appropriate courts to enforce the provision of the [APA] that requires an agency, "within a reasonable time," to "proceed to conclude a matter presented to it." *Thus, unreasonable delay jurisdiction is designed to allow the courts to compel the Agency to respond to a petition for rulemaking or other request for Agency action if the Agency has made no response within a reasonable time after the request has been presented to it.* … If the Agency does not do so, the jurisdiction of the appropriate district court could be invoked.

160 F. Supp. 3d at 61-62 (quoting 136 Cong. Rec. 35377 (1990)) (emphasis in original).

The court concluded the "scenario contemplated by [this passage] is precisely the one presented by plaintiffs' claim in this case." *Id.* at 62. As here, plaintiffs sought to compel the Agency to respond to a petition, claiming it had not responded in a reasonable time. The court found that 42 U.S.C. § 7604(a) "affords plaintiffs a remedy in court for their claim that the EPA engaged in unreasonable delay in responding to the . . . petition calling for action" under the CAA. *Id.* Because plaintiffs failed to "satisfy a mandatory condition precedent to bringing this suit and securing the government's waiver of its sovereign immunity under the CAA," i.e., 180-day pre-suit notice, the court lacked jurisdiction. *Id*. That deficiency could not be solved by invoking the APA, because the APA's waiver of sovereign immunity is limited to agency actions for which there is no other adequate remedy in a court. *Id*. As neither the APA nor the CAA waived sovereign immunity for the claims, the district court found that it lacked subject matter jurisdiction and dismissed the complaint. *Id*.[1]

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[1] In *Humane Society*, the court similarly analyzed the text of the citizen suit provision, applicable D.C. Circuit precedent, and the 1990 CAA Amendments, to reach the same conclusion. 209 F.

This is the same scenario in the present litigation. Plaintiffs filed an administrative petition seeking EPA action under the CAA and allege that EPA's delay in responding is unreasonable. As in *Environmental Integrity Project* and *Humane Society*, Plaintiffs failed to provide pre-suit notice to EPA. For the same reasons as in *Environmental Integrity Project* and *Humane Society*, this court should dismiss the Complaint.

B. Plaintiffs Cannot Bring a Citizen Suit at This Time.

Because Plaintiffs have an adequate remedy under the CAA citizen suit provision, they must proceed under that provision to assert an unreasonable delay claim here. Thus, they must provide 180-days' notice before commencing such an action. 42 U.S.C. § 7604(a). The Court should reject Plaintiffs' assertion they somehow gave notice in the Petition itself. Opp'n at 14. Plaintiffs' suit alleges that EPA unreasonably delayed responding to the Petition. When Plaintiffs submitted the Petition, EPA's response could not have been unreasonably delayed. No cause of action under 42 U.S.C. § 7604(a) had yet accrued because some period of time must pass after receiving the Petition before EPA's response can be unreasonably delayed. Pre-suit notice is intended to provide an opportunity for the agency "to bring itself into complete compliance" and thus "render unnecessary a citizen suit." *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989). As explained in *Friends of Animals v. Ashe*, "[t]o state the obvious, the Service cannot violate the duty to make a final determination before that duty has come into existence." 808 F.3d 900, 904 (D.C. Cir. 2015). Submissions before the duty accrues do "not give notice of an *existing* violation of a nondiscretionary duty," but rather provide "notice only of a possible future violation of a duty that may never arise." *Id.* Thus, Plaintiffs failed to provide the required notice.

C. This Action is Not Properly in This Court.

Plaintiffs have failed to rebut EPA's argument that the waiver of sovereign immunity for its claims lies within 42 U.S.C. § 7604(a). As EPA explained in its motion, 42 U.S.C. § 7604(a) provides that claims of unreasonable delay in taking an action that would be reviewable in the

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Supp. 3d at 287-88. Likewise, because the plaintiffs failed to effectuate a waiver of sovereign immunity, the court held that it lacked subject matter jurisdiction and dismissed the matter. *Id*.

D.C. Circuit under 42 U.S.C. § 7607(b) can only be heard in the D.C. District Court. Here, the Petition "requested that the EPA reconsider its finding under the Clean Air Act [made in the Endangerment Finding] that greenhouse gases pose a danger to human health and welfare." Compl. ¶ 26; *see also* Petition at 2. The Endangerment Finding is nationally applicable, *see* 74 Fed. Reg. at 66,496, and was previously reviewed by the D.C. Circuit. *See Coal. for Responsible Regul., Inc. v. EPA*, 684 F.3d 102, 114 (D.C. Cir. 2012) (subsequent history omitted). Similarly, final action regarding the Endangerment Finding taken in response to the Petition would be reviewable only in the D.C. Circuit. *See Nat. Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1249 (D.C. Cir. 1988).[2] Thus, Plaintiffs may only file their unreasonable delay claim in the D.C. District Court. 42 U.S.C. § 7604(a). Even if Plaintiffs had given pre-suit notice, and alleged a citizen suit claim under the CAA, they are in the wrong district court.

Lastly, Plaintiffs misunderstand EPA's argument that even if the forum provision in 42 U.S.C. § 7604(a) was not part of the requisite waiver of sovereign immunity and a bar to this Court's jurisdiction (and it is), 42 U.S.C. § 7604(a) still specifies the only permissible forum for Plaintiffs' challenge. Contrary to Plaintiffs' suggestion that EPA is hedging its bets on whether 42 U.S.C. § 7604(a) constitutes the applicable waiver of sovereign immunity for Plaintiffs' complaint, EPA's argument applies only to the appropriate forum for Plaintiffs' complaint if all other aspects of the waiver of sovereign immunity were met. Thus, under Federal Rule of Civil Procedure 12(b)(3), this Court could also dismiss the complaint for improper venue.

II. CONCLUSION

For the foregoing reasons and reasons stated in EPA's motion to dismiss, Plaintiffs' complaint should be dismissed for lack of jurisdiction, failure to state a claim upon which relief can be granted, and improper venue.

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[2] Plaintiffs argue that *Thomas* is inapposite, but they misapprehend EPA's point. EPA cited *Thomas* for its conclusion that the "clause governing 'nationally applicable regulations' provides jurisdiction over both the direct challenge to the regulations and the petition for reconsideration." 838 F.2d at 1249. Petitioners do not challenge that interpretation, nor do they explain why the asserted uniqueness of the petitions in *Thomas* would limit the interpretation to its facts.

Date: August 26, 2021

TODD KIM
Assistant Attorney General

/s Leslie M. Hill
LESLIE M. HILL (D.C. Bar No. 476008)
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
4 Constitution Square
150 M Street, N.E.
Suite 4.149
Washington, D.C. 20002
Tel: (202) 514-0375
Email: Leslie.Hill@usdoj.gov

Attorneys for Federal Defendants

Of counsel:

Melina Williams
Office of General Counsel
U.S. Environmental Protection Agency