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UNITED STATES DISTRICT COURT

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.

No. 2:21-CV-00724-MCE-DB

PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS

Judge: Hon. Morrison C. England, Jr.

Hearing on Motion to Dismiss Vacated

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INTRODUCTION

In three fundamental ways, the Motion to Dismiss filed by the United States Environmental Protection Agency ("EPA") misconstrues the Clean Air Act (the "Act" of the "CAA"), the Petitioners' Administrative Petition submitted to EPA (the "Administrative Petition" or "P's' Admin. Pet."), and the Petition for Writ of Mandamus (the "Writ Petition").

First, as explained in Section I, below, the citizen suit provision of the CAA does not provide a waiver of sovereign immunity for the instant action because the action does not allege "a failure of the Administrator to perform any act or duty under this Act which is *not discretionary*." 42 U.S.C. § 7604(a)(2) (emphasis added). The Administrative Petition did not ask EPA to perform any nondiscretionary act or duty covered by 42 U.S.C. § 7604(a)(2). Rather, it asked EPA to "reconsider EPA's Endangerment Finding," P's' Admin. Pet. at 2,6, 13, 28, 29, 32, and nothing in the Clean Air Act suggests that a reconsideration of a prior EPA action is mandatory. Because reconsideration of past agency actions is not a mandatory duty of the Administrator under the Clean Air Act, that Act imposed no duty on EPA to respond to the Administrative Petition.

In fact, the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, (the "APA") is the sole federal statute requiring any response from EPA to the Administrative Petition at issue here. And it is the only federal statute that authorizes actions for EPA's "unreasonable delay" in responding to the Administrative Petition. Accordingly, the instant action for unreasonable delay was properly filed under the APA and not under the citizen suit provision of the Clean Air Act. Had the Petitioners brought this action under the citizen suit provision of the Clean Air Act and not under the APA, EPA rightly would have challenged jurisdiction *because* the alleged unreasonable delay was not in connection with a nondiscretionary act required by the CAA. Accordingly, the Writ Petition properly asserted the waiver of sovereign immunity under the Administrative Procedure Act because there was "no other adequate remedy" under the Clean Air Act or any other federal

statute.

Second, contrary to EPA's assertion, the Writ Petition states valid claims upon which relief can be granted under the APA because, as explained in Section II, below, it presented well-pleaded facts demonstrating the Petitioners' entitlement to relief.

Third, venue is proper in this Court because, as explained in Section III, below, the citizens suit provision of the Clean Air Act does not govern venue in this case and at least one Petitioner resides in this judicial district and no real property is involved in this action. *See* 28 U.S.C. § 1391(e)(1).

LEGAL BACKGROUND

The Administrative Procedure Act provides, in relevant part: "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). This requirement applies to all agencies governed by the APA. 5 U.S.C. § 551(1), including EPA. *See id*. ("'[A]gency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency[.]"). The plain text of the APA requires an agency that receives a petition for rulemaking to consider it and respond to it within a reasonable time. *See* 5 U.S.C. § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.").

The APA also governs judicial review of federal agency action. 5 U.S.C. § 701 *et seq.* It provides that a person suffering legal wrong because of federal agency inaction or the inaction of an agency officer or employee in an official capacity may petition for judicial review thereof. 5 U.S.C. § 702. The APA requires a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Courts have interpreted 5 U.S.C. § 555(b) to apply to administrative petitions and have held that the district courts have jurisdiction and venue in

connection with lawsuits seeking to "compel agency action unlawfully withheld or unreasonably delayed" in connection with administrative petitions. 5 U.S.C. § 706(1). *See In re Natural Resources Defense Council*, 645 F.3d 400, 406 (D.C. Cir. 2011); *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099-1100 (D.C. Cir. 2003). And the APA requires that a federal agency must provide a definitive decision on an administrative petition. *See In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004).

The Mandamus and Venue Act, 28 U.S.C. § 1361, provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." When evaluating a claim of unreasonable delay under the APA, the Ninth Circuit adheres to the standard set forth in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). *See, e.g., NRDC, Inc. v. U.S. Envtl. Prot. Agency (In re Pesticide Action Network N. Am.)*, 798 F.3d 809, 813 (9th Cir. 2015); *Pac. Gas & Elec. v. FERC (In re Cal. Power Exch. Corp.)*, 245 F.3d 1110, 1124 (9th Cir. 2001); *Brower v. Evans*, 257 F.3d 1058, 1068-69 (9th Cir. 2001); *Indep. Mining Co. v. Babbitt*, 105 F.3d 502 (9th Cir. 1997).

The Clean Air Act has a citizen suit provision authorizing claims against EPA for unreasonable delay in connection with a "failure of the Administrator to perform any act or duty which is *not discretionary*" under the CAA. 42 U.S.C. § 4604(a)(2) (emphasis added). The CAA does not authorize claims against EPA for unreasonable delay in performing discretionary acts. The Administrative Petition filed with EPA in the instant case does not seek the Administrator to perform a nondiscretionary act mandated by the CAA. Accordingly, the CAA imposes no duty on EPA to respond (in a timely manner or otherwise) to the Administrative Petition. Any duty to respond to the Administrative Petition in a timely manner stems only from the Administrative Procedure Act, 5 U.S.C. § 555(b) ("With due regard for the convenience and necessity of the parties

or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.").

STATEMENT OF FACTS

On May 1, 2017, Petitioners' filed the Administrative Petition with EPA, asking EPA to reconsider its finding made on December 15, 2009, that greenhouse gases endanger human health and welfare (the "Endangerment Finding"). *See* 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), Docket No. EPA-HQ-OAR-2009-0171; FRL-9091-8; RIN 2060-ZA14. Copies of the Administrative Petition were presented to the EPA Administrator, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, the Acting Director of the President's Council on Environmental Quality, and the Acting Assistant Administrator of the Office of Air and Radiation. The Administrative Petition is attached as Exhibit A. The cover letter that accompanied the copy of the Administrative Petition presented to the EPA Administrator is attached as Exhibit B. In their Administrative Petition, Petitioners requested that EPA reconsider the Endangerment Finding because, before making the finding, the EPA Administrator failed to submit the proposed finding to the Science Advisory Board for peer review, as required by 42 U.S.C. § 4365(c)(1).

On September 21, 2017, EPA acknowledged receipt of the Administrative Petition with two letters from the Director of the Climate Change Division of the Office of Air and Radiation. The letters are attached as Exhibit C. On January 19, 2021, almost four years after Petitioners submitted their Administrative Petition, EPA denied the Administrative Petition, as well as several other administrative petitions filed by other parties regarding the Endangerment Finding. A copy of the denial is attached as Exhibit D. On March 23, 2021, EPA withdrew the denial dated January 19, 2021, stating that the denial "does not provide an adequate justification for denial." The withdrawal

of the denial also states that "EPA . . . intends to reassess the petitions and to issue a new decision in due course." A copy of the withdrawal of the denial is attached as Exhibit E.

It has been over four years since the Petitioners submitted the Administrative Petition to EPA. EPA has not yet provided a definitive response to the Administrative Petition.

STANDARD OF REVIEW

Pursuant to Rule 12(b)(1), "jurisdictional attacks can be either facial or factual." *White v. Lee,* 227 F.3d 1214, 1242 (9th Cir. 2000). In evaluating "a facial challenge to subject matter jurisdiction . . . the court accepts the factual allegations in the complaint as true." *See Miranda v. Reno*, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001); *Blackman-Baham v. Kelly,* 2017 U.S. Dist. LEXIS 24175 at *25 (N.D. Cal. February 21, 2017) (same); *see also Cervantez v. Sullivan*, 719 F.Supp. 899, 903 (E.D. Cal. 1989) (citing 2A J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice, 12.07 at 12.46-47 (2d ed. 1987) (opining that, where there is a facial attack on jurisdiction, the factual allegations are presumed to be true and a motion to dismiss will not be granted unless the plaintiff fails to allege an element necessary for jurisdiction."). Moreover, "[t]he court will not dismiss a claim under 12(b)(1) unless it appears without *any* merit." *Chugach Alaska Corp. v. United States Forest Serv.,* 1999 Y.S. Dist. LEXIS 24083 at *5 (D. Alaska, December 13, 1999) (emphasis added). Other jurisdictions agree. *See, e.g., Home Builders Ass'n v. City of Madison,* 143 F.3d 1006, 1010 (5th Cir. 1998) ("A motion under 12(b)(1) should be granted *only* if it appears *certain* that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief."). (Emphasis added).

A Rule 12(b)(6) motion may be granted for failure to state a claim only when the complaint does not include enough facts to "raise a right to relief above a speculative level," and a mere formulaic recitation of the elements of a cause of action is insufficient. *See Whitaker v. Tesla Motors, Inc.* 985 F.3d 1173, 1176 (9th Cir. 2021) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544

(2007)). There are "[t]wo working principles underl[ying]" *Twombly:* (1) "[t]hreadbare recitals of the elements of a [claim]" are not sufficient but (2) "well-pleaded facts demonstrating the pleader's entitlement to relief" are sufficient to survive a Rule 12(b)(6) motion. *Whitaker*, 985 F.3d at 1176 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). The Rules essentially require that the claim give the defendant "fair notice" of the nature of the claim and the grounds on which it rests. *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). Moreover, jurisdiction is "not defeated by the *possibility* that the complaint might fail to state a claim upon which recovery can be had." *Avila v. Sheet Metal Workers Local Union No. 293*, 400 F.Supp.3d 1044 (D. Hawaii 2019) (emphasis in original) (citing *Brock v. Writers Guild of Am., W., Inc.*, 762 F.2d 1349, 1352 n. 3 (9th Cir. 1985).

Under Rule 12(b)(3), plaintiffs generally bear the burden to show that venue is proper in the chosen district. *See Hope v. Otis Elevator Co.,* 389 F.Supp.2d 1235, 1243 (E.D. Cal. 2005) (holding that venue chosen by plaintiff was "proper.").

ARGUMENT

I. THE COURT HAS JURISDICTION TO HEAR THIS CASE UNDER THE ADMINISTRATIVE PROCEDURE ACT.

Contrary to EPA's assertions, the citizen suit provision of the Clean Air Act does not provide a waiver of sovereign immunity for the instant action because the action has not "alleged a failure of the Administrator to perform any act or duty under this Act which is *not discretionary*." 42 U.S.C. § 7604(a)(2) (emphasis added). Nondiscretionary acts under the Clean Air Act include a failure to establish national ambient air quality standards for criteria pollutants under Section 109, a failure to designate uniform national emission standards for hazardous air pollutants under Section 112, and a host of other nondiscretionary acts requiring EPA to take certain regulatory steps within statutorily mandated deadlines. *See e.g.,* 42 U.S.C. § 7409 (national ambient air quality standards), § 7411 (new source performance standards), § 7412 (hazardous air pollutants).

Plaintiff's Administrative Petition did not ask EPA to perform any nondiscretionary act covered by 42 U.S.C. § 7604(a)(2). Rather, the Administrative Petition asks EPA to "reconsider EPA's Endangerment Finding." P's' Pet. at 2,6, 13, 28, 29, 32. *See* Exhibit A. By its own terms the Administrative Petition asks the Administrator to engage in the *discretionary* act of reconsidering a prior agency action, and nothing in the Clean Air Act suggests that a reconsideration of a prior agency action is a nondiscretionary duty of EPA.

EPA's Motion to Dismiss conveniently skirts the fact that 42 U.S.C. § 7604(a)(2)'s provision waiving sovereign immunity is unambiguously limited to cases challenging EPA's failure to perform an act that is "*not discretionary*." (Emphasis added). But every word in a statute must be given effect, and the term "not discretionary" cannot be discarded as surplusage. "The starting point for resolving a dispute over the meaning of a statute begins with the language of the statute itself." *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 872 (9th Cir. 2008). Courts must give effect to every clause and word of a statute. *Moskal v. United States*, 498 U.S. 103, 109 (1990). "[Statutes] should not be construed to make surplusage of any provision." *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996). Accordingly, each word of 42 U.S.C. § 7604(a)(2) must be given effect, and the statutory provision limiting the waiver of sovereign immunity under the citizen suit provision to acts of the Administrator that are "not discretionary" under the Clean Air Act inexorably leads to the conclusion that the provision does *not* waive sovereign immunity with regard to acts that *are discretionary* under the Clean Air Act.

Because 42 U.S.C. § 7604(a)(2) unambiguously waives sovereign immunity only with regard to acts that are "not discretionary," and because providing a response within any given period of time to the Administrative Petition at issue here is not a mandatory duty "under the [Clean Air] Act," it is abundantly clear that 42 U.S.C. § 7604(a)(2) does not waive sovereign immunity with regard to the Writ Petition filed by the Petitioners. *See Chevron, U.S.A., Inc., v. NRDC, Inc.,* 467

U.S. 837, 842 (1984) (unambiguous statutory language must be given effect in accordance with its plain meaning). Accordingly, the Petitioners rightly did not file their Writ Petition pursuant to the Clean Air Act's citizen suit provision waiving sovereign immunity but, rather, filed the Writ Petition under the separate and independent waiver provision of the Administrative Procedure Act. EPA's disregard of the pivotal term "not discretionary" is fatal to its Motion to Dismiss.

Had the Plaintiffs brought this action under the citizen suit provision of the Clean Air Act and not under the Administrative Procedure Act, EPA rightly would have challenged jurisdiction because the alleged unreasonable delay was not in connection with a nondiscretionary act. Accordingly, contrary to EPA's Motion to Dismiss, the Writ Petition properly asserted the waiver of sovereign immunity under the Administrative Procedure Act because there was "no other adequate remedy" under the Clean Air Act, or any other statute.

Although this Court has not directly dealt with the specific issue presented in the Motion to Dismiss, the Ninth Circuit has addressed the citizen suit provision of the CAA by observing that it was intended to "provide relief *only* in a narrowly-defined class of situations in which the Administrator failed to perform a mandatory function." *See Kennecott Copper Corp., Nevada Mines Div. v. Costle*, 572 F.2d 1349, 1355 (9th Cir. 1978) (emphasis added); *see also Environmental Defense Fund v. Thomas*, 870 F.2d 892, 899 (2d Cir. 1989) ("[T]he district court has jurisdiction, under [section 7604(a)], to compel the Administrator to perform *purely* ministerial acts.) (emphasis added).

Notably, the citizen suit provision itself states that "[t]he district courts of the United States shall have jurisdiction to compel (*consistent with paragraph (2) of this subsection*) agency action unreasonably delayed." 42 U.S.C. § 7604(a) (emphasis added). The citation to "paragraph 2 of this subsection" refers to the second paragraph of subsection 7604(a), which limits the ability of parties to file lawsuits against the Administrator to situations in which the Administrator fails to

perform an act that is "not discretionary." Thus, the subsection of the CAA's citizen suit provision *giving* district courts jurisdiction to hear unreasonable delay cases is the same subsection *limiting* their jurisdiction to unreasonable delay cases brought in connection with EPA acts that are "not discretionary." That specific limitation on district courts' jurisdiction to hear unreasonable delay cases cannot be ignored. *See Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997) (limiting language cannot be ignored); *United States v. Lacy,* 119 F.3d 742, 748 (9th Cir. 1997) (statutory terms are understood by their associated statutory terms); *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 833-34 (9th Cir. 1996) ("[A] statute must be interpreted to give significance to all of its parts . . . [and] statutes should not be construed to make surplusage of any provision."); *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975) (qualifying words, phrases, and clauses necessarily apply to language in close proximity to the qualifying terms).

Here, the limiting language "consistent with paragraph 2 of this subsection" not only appears "in close proximity" to the term "not discretionary," but it appears in the very same subsection of the statute. Accordingly, the authorization to initiate lawsuits for "unreasonable delay" set forth in subsection 7604(a) is limited to acts of the Administrator that are "not discretionary" under that subsection.

As shown above, whether or not the Administrator chooses to reconsider the Endangerment Finding *is* discretionary under the CAA. Likewise, whether or not the Administrator delays for any period of time in responding to the Administrative Petition, or simply chooses not to respond, is also discretionary under the CAA. Accordingly, the authorization in the CAA's citizen suit provision to bring a lawsuit for unreasonable delay does not apply to the unreasonable delay claim brought by the Petitioners in the instant case because the Administrative Petition did not ask the Administrator to perform any nondiscretionary act.

Importantly, there is no other provision in the Clean Air Act that requires the Administrator

to reconsider the Endangerment Finding or respond to the Administrative Petition. Rather it is the APA that authorizes district courts generally to "compel agency action . . . unreasonably delayed," without reference to whether the agency action is discretionary or nondiscretionary. *See* 5 U.S.C. § 706(1). *See Rodriguez v. United States,* 480 U.S. 522, 525 (1987) (observing that where Congress includes particular language in one place but omits it in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). Accordingly, the APA, and not the CAA, provides both the waiver of sovereign immunity and the jurisdictional foundation for the instant lawsuit.

EPA's other assertions in the Motion to Dismiss, such as failure to state a claim upon which relief can be granted and improper venue, hinge on whether the instant action was based on "a failure of the Administrator to perform any act or duty under [the Clean Air Act] which is not discretionary." Because the Administrator's failure to act in connection with the Administrative Petition was not a failure to perform a nondiscretionary act under the Clean Air Act, the other arguments raised in the Motion to Dismiss are irrelevant, since they are based upon the false premise that the citizen suit provision of that Act applies here. Accordingly, the Motion to Dismiss should be denied.

If anything further is needed on the issue of sovereign immunity, Petitioners note that EPA's citations to cases from other jurisdictions are either wrongly decided or are, quite frankly, mischaracterized by EPA. For example, *Humane Soc'y of the United States v. McCarthy,* 209 F.Supp.3d 280 (D.D.C. 2016) was a case in which the plaintiff sought relief against EPA under the Administrative Procedure Act for EPA's failure to timely respond to a petition for rulemaking seeking EPA to regulate Concentrated Animal Feeding Operations ("CAFOs") as a source of air pollution under the Clean Air Act. Minimizing the significance of the plain language of 42 U.S.C. § 7604(a)(2)'s limitation of waiver of sovereign immunity to acts of the Administrator that are "not

discretionary," the district court relied on a strained analysis of disparate pieces of legislative history by cobbling together older cases construing prior versions of the Clean Air Act, Congress's response to those cases, and the court's own inventive (and incorrect) views of the purported relationship between the APA's waiver of sovereign immunity provisions and those of the Clean Air Act. *See Humane Soc'y*, 209 F.Supp.3d at 284-88. In so doing, the district court ignored the Supreme Court's instructions to give effect to "every clause and word" of the Clean Air Act. *Moskal* 498 U.S. at 109. It also ignored the Ninth Circuit's direction that "[statutes] should not be construed to make surplusage of any provision." *Glickman*, 82 F.3d at 834.

Next, *Envtl. Integrity Project v. United States EPA*, 160 F.Supp.3d 50 (D.D.C. 2015) presented the question of whether an unreasonable delay claim based on an administrative petition filed under the Clean Air Act seeking discretionary rulemaking for ammonia is governed by the sovereign immunity waiver provision of the APA or the CAA. Noting that "[t]his is not an easy question," *id.* at 55, the district court impermissibly relied heavily on a tortured analysis of the legislative history of the CAA and discounted the actual statutory language, concluding erroneously that the CAA's citizen suit provision provides an adequate remedy. *Id.* at 56-62. But the *Envtl. Integrity Project* court failed to adhere to the Supreme Court's instruction that "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron,* 467 U.S. at 842-43. As shown above, the statutory language is unambiguous: unreasonable delay claims are not authorized by the CAA's citizen suit provision where the requested action is discretionary. Accordingly, *Envtl. Integrity Project* was wrongly decided. Here, the Administrative Petition at issue requested the Administrator to conduct a discretionary act for which the citizen suit provision of the Clean Air Act does not provide an adequate remedy. Accordingly, it was appropriate for the Petitioners to

have filed their claim under the APA.

EPA also cites *Royster-Clark Agribusiness, Inc. v. Johnson*, 391 F.Supp.2d 21 (D.D.C. 2005). But that case had nothing to do with an administrative petition seeking action by EPA, be that action discretionary or nondiscretionary. Rather, it dealt solely with a plaintiff seeking a declaratory judgement that EPA acted in excess of its statutory authority by issuing a Notice of Violation under the Clean Air Act. The district court held that it was without jurisdiction because the plaintiffs failed to satisfy any of the three potentially applicable waivers of statutory immunity: the Larson Act, the APA, or the CAA. There was no analysis of the meaning of the CAA term "not discretionary," which in any event was irrelevant to the issues in the case. *Id.* at 25-26. The actual holding of the case was that a mere notice of violation does not constitute final agency action and, therefore, is unactionable. *Id.* at 27- 30. Accordingly, *Royster-Clark Agribusiness* is inapposite.

EPA also cites *Monongahela Power Co. v. Reilly*, 980 F.2d 272 (4th Cir. 1992), but that case dealt solely with the issue of whether "the Administrator had a nondiscretionary duty to process extension applications before he promulgated final regulations [under] the statutory program." *Id.* at 276. The issue had nothing to do with the issues under consideration here.

Thus, the out-of-circuit cases cited by EPA in support of its Motion to Dismiss are either wrongly decided, inapposite, or simply mischaracterized, and they do not support the Motion to Dismiss with regard to the waiver of sovereign immunity issue. Moreover, as indicated, the fatal flaw of EPA's sovereign immunity argument is that it is inconsistent with the plain language of the Clean Air Act's citizen suit provision. Accordingly, Petitioners have shown that the citizen suit provision of the Clean Air Act does not provide an adequate remedy for the unreasonable delay they have alleged and that, consequently, the Writ Petition was properly filed under the APA.

Because the sovereign immunity issue is the very heart of the Motion to Dismiss, and all other issues raised by the Motion hinge upon EPA's sovereign immunity argument, the Motion

should be rejected in its entirety. Nevertheless, in the interests of thoroughness, the remaining portions of this Opposition to EPA's Motion to Dismiss address the other, subordinate issues raised by EPA.

II. THE COMPLAINT PROPERLY STATES VALID CLAIMS UPON WHICH RELIEF CAN BE GRANTED.

EPA offers several arguments in its Motion to Dismiss under Rule 12(b)(6). They are without merit. First, EPA argues that the Mandamus Act, 28 U.S.C. § 1361, does not provide a basis for subject matter jurisdiction or sovereign immunity because "an order pursuant to section 1361 is available only if . . . 'no other adequate remedy is available,'" and then argues that the citizen suit provision of the Clean Air Act provides such a remedy. Def's MTD at 10-11. But, as shown in Section I, above, the citizen suit provision of the Clean Air Act does not provide a remedy because it applies only to enforcement of acts of the Administrator that are nondiscretionary under the Clean Air Act. Here, Petitioners do not seek to require the Administrator to perform any nondiscretionary act required by the Clean Air Act.

Second, EPA asserts that the federal question statute cited by the Petitioners in their Petition for Writ of Mandamus, 28 U.S.C. § 1331, does not provide subject matter jurisdiction or a waiver sovereign immunity. But Petitioners do not allege that sovereign immunity is waived under the federal question statute. The very first sentence in the Writ Petition states "This is a civil action seeking a writ of mandamus, arising under the Administrative Procedure Act, 5 U.S.C. § 551, *et. seq.*" Even a cursory reading of the Writ Petition shows that Petitioners use the APA as the basis for the waiver of sovereign immunity. And EPA admits as much in its Motion to Dismiss. *See* Def's MTD at 8-9. Petitioners *do* cite the federal question statute to establish that the court has subject matter jurisdiction, and reliance on that statute is appropriate because, as shown, among other things, "no other remedy is available." *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1997).

EPA then asserts that the case must be dismissed because Petitioners did not provide EPA

with notice under the Clean Air Act's citizen suit provision 180 days before commencing the action. *See* Defs' MTD at 11-13. But, as indicated in Section I above, the Clean Air Act's citizen suit provision does not apply in this case because the Plaintiffs do not seek the Administrator to perform any nondiscretionary act mandated by the CAA. Accordingly, the portion of the citizen suit provision requiring a 180-day notice does not apply here.

In any event, EPA curiously neglects to mention that the Administrative Petition itself provides a nonadversarial opportunity during which EPA was given a period of 180 days to take the action necessary to obviate the need for litigation. Specifically, the Administrative Petition states, in relevant part:

> Petitioners respectfully request that the Administrator . . . [w]ithin *180 days* of receipt of this Administrative Petition, provide a substantive response to the Petitioners informing them and the public of the commencement of an administrative proceeding to reconsider the Endangerment Finding, *see* 42 U.S.C. § 7604.

Administrative Petition at 32 (emphasis added). Contrary to EPA's assertion, a 180 day notice was provided to EPA. In fact, Petitioners have provided EPA with well over 180 days (four years to be precise) during which to act on the Administrative Petition in a nonadversarial manner.

Accordingly, this Court has subject matter jurisdiction to hear this case, and EPA's Rule 12(b)(6) argument should be rejected.

III. VENUE IS APPROPRIATE IN THIS COURT.

EPA asserts in its Motion to Dismiss that this action can only be brought in the District Court for the District of Columbia. The assertion is false. First, EPA's assertion is premised on its argument that the Clean Air Act's citizen suit provision applies to this lawsuit. As set forth in Sections I and II, above, that premise is incorrect because the lawsuit does not seek to compel the Administrator to perform a nondiscretionary act mandated by the Clean Air Act.

Second, EPA notes that the citizen suit provision references 42 U.S.C. § 7607(b), which provides for judicial review of "nationally applicable regulations *promulgated*, or *final* action taken,

by the Administrator . . . only in the United States Court of Appeals for the District of Columbia." (Emphasis added). EPA argues that this language necessarily means that this case can only be heard by the District Court in the District of Columbia because the D.C. Circuit would need to hear any appeal of the district court's decision under 42 U.S.C. § 7607(b). But the Petitioners are not seeking the Court to review any "promulgated" regulations or any other "final" action taken by the Administrator. They are asking the Court to review the Administrator's failure to provide a timely response to their request to commence an administrative proceeding to reconsider the Endangerment Finding. EPA wishes this Court to believe that this lawsuit is akin to a lawsuit challenging a final action in which the Administrator has actually completed the reconsideration requested by the Petitioners. *See* Defs' MTD at 14-15. This case is not that hypothetical case posited by EPA in its Motion to Dismiss. Accordingly, EPA's argument is meritless.

EPA's citation to *Nat. Res. Def. Council, Inc. v. Thomas,* 838 F.2d 1224, 1249 (D.C. Cir. 1988) is not on point. *Thomas* involved a unique circumstance under 42 U.S.C. § 7607(b) in which the Petitioners were required to file an administrative petition for reconsideration of a promulgated rule within 60 days of promulgation based upon new evidence not available to EPA during the rulemaking proceeding. Again, this case is not that case, and *Thomas* is inapposite.

EPA hedges its bets and concludes that even if the citizen suit provision of the Clean Air Act "was not part of the requisite waiver of sovereign immunity for Plaintiffs' claim," that provision "still specifies the only permissible forum for Plaintiffs' challenge." Def's MTD at 15. That is untrue. As explained in Section I and Section II, above, the citizen suit provision establishes venue by stating that "[t]he district courts of the United States shall have jurisdiction to compel (*consistent with paragraph (2) of this subsection*) agency action unreasonably delayed." 42 U.S.C. § 7604(a) (emphasis added). The citation to "paragraph 2 of this subsection" refers to the second paragraph of subsection 7604(a), which limits the ability of persons to file lawsuits against the Administrator

to situations in which the Administrator fails to perform an act that is "not discretionary." *Northwest Forest Resource Council v. Glickman*, 82 F.3d at 833-34. ("[A] statute must be interpreted to give significance to all of its parts . . . [and] statutes should not be construed to make surplusage of any provision."); *Azure v. Morton*, 514 F.2d at 900 (9th Cir. 1975) (qualifying words, phrases, and clauses necessarily apply to language in close proximity to the qualifying terms).

As indicated, there is no other provision in the Clean Air Act that required the Administrator to respond to the Administrative Petition. Rather it is the APA that authorizes district courts generally to "compel agency action . . . unreasonably delayed," without reference to whether the agency action is discretionary or nondiscretionary. *See* 5 U.S.C. § 706(1). *See Rodriguez v. United States,* 480 U.S. 522, 525 (1987) (observing that where Congress includes particular language in one place but omits it in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). Accordingly, the APA, and not the CAA, provides the waiver of sovereign immunity, the jurisdictional foundation for the instant lawsuit, *and* the appropriate venue. Consequently, EPA's argument that venue rests exclusively in the district court of the District of Columbia is without merit.

Venue is proper in this judicial district under 28 U.S.C. § 1391(e)(1) because at least one Petitioner resides in this judicial district and no real property is involved in this action. If EPA wishes to ask for a change of venue, it should file a motion seeking such relief, providing appropriate reasons for such a request, rather than asking this Court to dismiss this case based upon a false assertion of improper venue *ab initio*. Because venue is proper in this Court, EPA's Motion to Dismiss on venue grounds should be denied.

CONCLUSION

For the foregoing reasons, EPA's Motion to Dismiss should be denied in its totality.

Respectfully submitted,

Dated: July 12, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2021, Plaintiffs' Opposition to Federal Defendants' Motion to Dismiss was filed and served through the Court's CM/ECF system and upon all counsel of record.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

EXHIBIT A

BEFORE THE ADMINISTRATOR OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Liberty Packing Company LLC,
Nuckles Oil Co., Inc. dba Merit Oil Company,
Norman R. "Skip" Brown,
Dalton Trucking Company, Inc.,
Loggers Association of Northern California,
Construction Industry Air Quality Coalition, and
Robinson Industries, Inc.

PETITIONERS

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) DOCKET NO. EPA-HQ-OAR-2009-0171; FRL-9091-8; RIN 2060-ZA14 ("ENDANGERMENT FINDING")

INTRODUCTION

Pursuant to the Right to Petition Government Clause of the First Amendment of the United Sates Constitution,[1] the Administrative Procedure Act,[2] the Clean Air Act,[3] and the United States Environmental Protection Agency's ("EPA's") implementing regulations, Petitioners file this petition with EPA's Administrator and, for the reasons set forth herein, respectfully request the Administrator to reconsider EPA's Endangerment Finding, 74 Fed. Reg. 66,496 (Dec. 15, 2009), made pursuant to Section 202(a) of the Clean Air Act.

INTEREST OF PETITIONERS

Petitioner Liberty Packing Company LLC ("Liberty") is a bulk processor of tomato products. Located in California, Liberty relies on natural gas boilers for production of its tomato products. Burning natural gas creates carbon dioxide as a byproduct. Carbon dioxide is a greenhouse gas that is subject to the Endangerment Finding.

Petitioner Nuckles Oil Co., Inc. dba Merit Oil Company ("Merit Oil") is a family business that has operated in California for three generations. Merit Oil stores, transports, and wholesales a variety of petroleum products, including gasoline, diesel fuels, solvents, and kerosene, and

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1 "Congress shall make no law . . . abridging . . . the right of the people . . . to petition Government for a redress of grievances." U.S. Const. amend. I. The right to petition for redress of grievances is among the most precious of liberties safeguarded by the Bill of Rights. *United Mine Workers of America, Dist. 12 v. Illinois State Bar Association,* 389 U.S. 217, 222 (1967). It shares the "preferred place" accorded in our system of government to the First Amendment freedoms and has a sanctity and sanction not permitting dubious intrusions. *Thomas v. Collins,* 323 U.S. 516, 530 (1945). "Any attempt to restrict those First Amendment liberties must be justified by clear public interest, threatened not doubtful or remotely, but by clear and present danger." *Id.* The Supreme Court has recognized that the right to petition is logically implicit in, and fundamental to, the very idea of a republican form of government. *United States v. Cruikshank,* 92 U.S. (2 Otto) 542, 552 (1875).

2 5 U.S.C. Section 553(e).

3 42 U.S.C. Section 7401, *et seq.* (sometimes referred to here as the "CAA").

operates a number of delivery trucks. Merit Oil's operations emit greenhouse gases subject to the Endangerment Finding.

Petitioner Norman R. "Skip" Brown is an individual residing in California who has been the owner of a family roadbuilding business, Delta Construction Company, which will be required to go out of business in part because of regulations governing carbon dioxide emissions, which are the subjects of the Endangerment Finding.

Petitioner Dalton Trucking Company, Inc. is a California corporation that provides specialized transportation and off-loading services in connection with which it operates numerous heavy-duty trucks that emit greenhouse gases, which are the subjects of the Endangerment Finding.

Petitioner Loggers Association of Northern California ("LANC") is a nonprofit California trade association representing the interests of its members involved in the logging industry in Northern California.

Petitioner Construction Industry Air Quality Coalition ("CIAQC") is a nonprofit California trade association representing the interests of other California nonprofit trade associations and their members whose air emissions are regulated by California state, regional, and local regulations, as well as federal regulations.

Petitioner Robinson Enterprises, Inc. ("Robinson") is a third-generation family-owned California corporation engaged in harvesting and transportation of forest products, petroleum products, and transportation of various commodities. It has suffered unnecessary financial hardship as a result of various burdensome regulatory requirements.

EXECUTIVE SUMMARY

EPA's Greenhouse Gas Endangerment Finding is the cornerstone of EPA's effort to regulate greenhouse gases under the Clean Air Act. Carbon dioxide is the most prevalent

greenhouse gas. Because carbon dioxide is everywhere and in everything, the Endangerment Finding provides EPA with a springboard for regulating virtually every aspect of our nation's economic life. At the same time, it is the product of serious legal, scientific, evidentiary, and procedural errors. Those errors reflect the past Administration's rush to judgment, which was spurred by political expediency.

This Petition focuses on a glaring statutory violation, namely, EPA made the Endangerment Finding without seeking peer review from the Science Advisory Board, a blue-ribbon panel of experts established by Congress to ensure that EPA regulations are based on accurate data and credible scientific analyses. In enacting the peer review requirement, Congress was concerned that EPA not impose unnecessary restrictions on economic and personal freedom by unintelligently pursuing its regulatory goals. By ignoring the peer review requirement, EPA violated 42 U.S.C. § 4365(c)(1). That fundamental error stemmed from a desire to impress the community of nations by being among the first to regulate greenhouse gas emissions timed to coincide with the 2009 Copenhagen international climate conference.

In making the Endangerment Finding, EPA made no showing that the finding or any of its related greenhouse gas rules will remove any dangers to human health or welfare. Indeed, EPA disclaimed any obligation to define its ultimate regulatory objectives or its chosen means of achieving them and even refused to articulate how the Endangerment Finding could lead to successfully combating the climate change problems that EPA postulated. Furthermore, EPA claimed it was 90-99% certain that human-caused climate change threatened public health and welfare, *see* 74 Fed. Reg. at 66,518 & n.22, while failing to state what constitutes a safe climate, acceptable global temperature ranges, how levels of greenhouse gases in the atmosphere (whether natural or man-made) may affect those ranges, or even whether its regulatory actions would

ameliorate any risk. Because of these substantial gaps in its analysis, no one could accurately judge whether EPA achieved any discernable public benefit or congressionally authorized goal when it made the Endangerment Finding. As set forth in the attached declaration by a long-standing member of the Science Advisory Board, these analytical gaps would have been identified and communicated by the Board to EPA had EPA submitted the Endangerment Finding for statutorily-mandated peer review.

Moreover, Section 202(a)(1) of the Clean Air Act, under which the Endangerment Finding was made, requires the Administrator to exercise independent judgment to determine how a regulatory response to a perceived risk will reduce or eliminate that risk. The prior Administration left the gathering, sifting, and analyzing of the evidence, as well as the risk assessment, almost entirely to international non-governmental organizations, which have no authority under the Clean Air Act. The conclusions borrowed from those organizations rest primarily on theoretical computer modeling projections, which themselves are based on untested assumptions. Indeed, EPA acknowledged that the assumptions upon which it relied are subject to substantial uncertainty. Accordingly, the Agency's professed high confidence in its Endangerment Finding is unsupported, and its almost complete reliance on the work of non-governmental organizations was, put plainly, an abdication of its responsibilities under the Clean Air Act. As set forth in the attached expert declaration, these problems also would have been addressed by the Science Advisory Board had EPA submitted the proposed Endangerment Finding to the Board, as required by law.

The adverse economic impacts of the Endangerment Finding and the cascade of greenhouse gas regulations that it continues to generate are well documented. Virtually all sectors of the nation's economy are affected, including but not limited to mining, manufacturing, transportation, construction, and agriculture, as well as energy production, transmission, and use,

resulting in lost jobs affecting millions of American workers and their families.

Now, the new EPA Administration has the opportunity to correct the illegal process that culminated in the Endangerment Finding. Indeed, EPA has both the authority and the responsibility to reconsider the Endangerment Finding in light of the previous Administration's errors. Foremost among those errors is EPA's utter failure to submit the relevant documentation to the Science Advisory Board for peer review. It matters not that a court has reviewed the Endangerment Finding, because EPA is fully empowered to reconsider the finding at any time, as long as it articulates sufficient reasons for so doing. This Petition provides a surfeit of such reasons.

As set forth in more detail below, the Endangerment Finding should be reconsidered, and the Administrator should reopen the regulatory process so that the Science Advisory Board may be given the opportunity to conduct peer review, as required by 42 U.S.C. § 4365(c)(1).

STATEMENT OF LAW

Congress directed the EPA Administrator to establish the Science Advisory Board (sometimes referred to here as "SAB" or the "Board") to function as a peer review panel of experts to ensure that EPA's actions are scientifically and technically sound and defensible, 42 U.S.C. § 4365(a). The operative language of the SAB statute provides that EPA "shall" make its regulatory proposals available to the Science Advisory Board for peer review. 42 U.S.C. § 4365(c)(1). The SAB submittal requirement applies to all regulatory proposals made by EPA under the statutes it administers, including the Clean Air Act, and the submittal requirement is nondiscretionary. *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1188 (D.C. Cir. 1981) ("*API*") ("The language of the statute indicates that making a [regulatory proposal] available to the SAB for comment is mandatory."). Upon receipt of the material, the SAB may provide "advice and comments on the

adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation, together with any pertinent information in the Board's possession." 42 U.S.C. § 4365(c)(2).

The plain meaning of the mandatory SAB submittal requirement is confirmed by its purpose, which is to provide the Science Advisory Board an opportunity to make available "its advice and comments [to EPA] on the adequacy of the scientific and technical basis of the [regulatory proposals]." 42 U.S.C. § 4365(c)(2). SAB's mission is to provide "expert and independent advice to the [EPA] on the scientific and technical issues facing the Agency" and to assist EPA "in identifying emerging environmental problems." 40 C.F.R. § 1.25(c). *See* Joe G. Conley, *Conflict of Interest and the EPA's Science Advisory Board*, 86 Tex. L. Rev. 165, 168 (2007) ("Congress established the EPA's Science Advisory Board in 1978 to provide independent scientific and technical advice to the EPA."). A key element of the SAB's mission is to render advice to EPA "on a wide range of environmental issues and the integrity of the EPA's research." *Meyerhoff v. United States EPA*, 958 F.2d 1498, 1499 (9th Cir. 1992).

Because the SAB submittal requirement is nondiscretionary, an EPA regulatory action subject to the submittal requirement that has not been submitted to the Board for peer review is "not in accordance with law." *See* 5 U.S.C. § 706(2)(A); *API*, 665 F.2d at 1184. *See also, e.g., Sprint Corp. v. Fed. Commc'n Comm'n*, 315 F.3d 369 (D.C. Cir. 2003); *Sugar Cane Growers Co-op of Florida v. Veneman*, 289 F.3d 89 (D.C. Cir. 2002); *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976).

STATEMENT OF FACTS

The prior EPA Administration commenced its activities in 2009 with a firm conviction that human greenhouse gas emissions are causing significant and harmful global climate change. In

one of her first official acts, then-EPA Administrator Lisa Jackson issued a memorandum to all EPA staff announcing the top five priorities that would receive her "personal attention." The first of those priorities was "[r]educing greenhouse gas emissions." *See Memorandum from Lisa P. Jackson to "All EPA Employees,"* dated January 23, 2009, reproduced as **Exhibit A**.

Just three months later, EPA released the proposed Endangerment Finding, which was based upon two premises. First, EPA stated that air emissions of six substances — CO2, CH4, N2O, HFCs, PFCs, and SF6 — endanger public health and welfare. Second, EPA asserted that those six substances together constitute a single "air pollutant" emitted by new automobiles that contributes to harmful "air pollution," even though automobiles actually do not emit two of the six (PFCs and SF6) and emit two others (CH4 and N2O) only in minute amounts. In fact, carbon dioxide (CO2), a ubiquitous natural substance essential to life on Earth, was the primary target of the Endangerment Finding. *See* 74 Fed. Reg. 18,886-88 (Apr. 24, 2009). EPA provided only a 60-day comment period for the proposed Endangerment Finding, even though it was apparent the finding would create one of the most far-reaching regulatory programs in history, spurring numerous requests to extend the comment period, all of which EPA denied. *See* 74 Fed. Reg. at 66,503. Notably, the SAB submittal requirement was raised during the public comment period on the proposed Endangerment Finding, but ignored by EPA. *See Coalition Comments on EPA's Proposed Finding of Endangerment from Anthropogenic Greenhouse Gases to Public Health and Welfare*, reproduced in relevant part in **Exhibit B**, p.10 n 4. ("EPA also failed to make available to the Science Advisory Board for review and comment the Endangerment Finding").

On May 19, 2009, less than one month after publishing the proposed rule and well before the comment period closed, the Obama Administration announced that, "for the first time in history," the United States "set in motion a new national policy aimed at both increasing fuel

economy and reducing greenhouse gas pollution from all new cars and trucks." This "groundbreaking policy" was based on an "unprecedented collaboration" among federal agencies, automakers, environmental advocacy groups, organized labor, and the State of California to issue motor vehicle greenhouse gas regulations. *See President Obama Announces National Fuel Efficiency Policy*, reproduced as **Exhibit C**. EPA knew and understood that such an arrangement could not be implemented unless EPA were to promulgate the Endangerment Finding in the form in which it was proposed, and which would function as the springboard for the implementation of the "groundbreaking policy." *See Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Fuel Economy Standards*, 74 Fed. Reg. 49454, 49464 (Sept. 28, 2009) ("If EPA makes the . . . endangerment finding . . . then section 202 authorizes EPA to issue [greenhouse gas] standards applicable to [cars and trucks].").

EPA announced its final Endangerment Finding on December 7, 2009. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009), just nine months after the publication of the proposed finding. Conveniently, that was the opening day of a highly publicized international conference on climate change held in Copenhagen, Denmark, attended by EPA's Administrator. *See Copenhagen Climate Change Conference – December 2009, United Nations Framework Convention on Climate Change*, http://unfccc.int/meetings/cop_15/items/5257.php. EPA's final rule was substantially unchanged from EPA's proposal. 74 Fed. Reg. at 66,497-99, 66,516-17, 66,540-41.

This irregular and illegal process had consequences. In EPA's own words, the Endangerment Finding causes "costs to sources and administrative burdens to permitting authorities . . . so severe that they [create] 'absurd results.'" 75 Fed. Reg. at 31,516-17. EPA also stated that whether the Endangerment Finding, or any foreseeable regulatory actions based on the finding, might or even could mitigate any projected climate effects was irrelevant. 74 Fed. Reg.

at 66,507-08.

Importantly, EPA acknowledged in a prior technical document published in connection with its Advance Notice of Proposed Rulemaking for light duty vehicles (the "Car Rule") that greenhouse gas emissions applicable to such vehicles would produce a reduction of, at most, approximately 0.01 degree Celsius in mean global temperature. *See Light Vehicle Technical Support Document*, Docket U.S. EPA-HQ-OAR-2008-0318-0084. When asked about this statement during the comment period on the Endangerment Finding, EPA declined to reevaluate its technical conclusion regarding temperature but simply "disagree[d]" that temperature effects were relevant to the Endangerment Finding, even though the Car Rule was the immediate impetus for the Endangerment Finding. *See EPA's Response to Public Comments: Volume 10: Cause or Contribute Finding, Response to Comment 10-14*, reproduced as **Exhibit D** at 11-13.

EPA made the Endangerment Finding without benefit of input from the Science Advisory Board. Instead, EPA relied almost exclusively on "assessment literature" generated by third parties that had summarized their own views of global climate change science. According to EPA, the Administrator "relied heavily" on the assessments of the United States Global Change Research Program ("USGCRP"), the Intergovernmental Panel on Climate Change, ("IPCC,") and the National Research Council ("NRC") as the "*primary* scientific and technical basis of her endangerment decision." 74 Fed. Reg. at 66,510 (emphasis added). In response to comments calling on EPA to make "its own assessment of all of the underlying studies and information," EPA refused, on the ground that it "ha[d] no reason to believe" the reports of the three non-governmental organizations were inaccurate. *Id*. at 66,511.

Significantly, the prior EPA Administrator was apparently comfortable relying substantially on the work of *one* of the non-governmental groups, IPCC, to answer what is perhaps

the most critical issue in regulating greenhouse gas emissions — the extent to which climate change arises from anthropogenic greenhouse gas emissions, as opposed to natural forces. *See Principles Governing IPCC Work at ¶ 1-9*, reproduced as **Exhibit E** (discussing the purposes, missions, and goals of the IPCC). In so doing, EPA acknowledged that, despite republishing and relying on IPCC's claim of 90-99% certainty, there are "varying degrees of uncertainty across many of these scientific issues." *See* 74 Fed. Reg. 66,506.

Notwithstanding these uncertainties, EPA issued the Endangerment Finding based on computer model predictions of man-made, severe climate change impacts, and concluded that, because of its Endangerment Finding, it was legally obligated to promulgate a separate rule to restrict greenhouse gas emissions from certain new motor vehicles. Car Rule, 75 Fed. Reg. 25,324, 35,398 (May 7, 2010).

EPA further concluded that its regulation of motor vehicle greenhouse gas emissions automatically triggered, beginning on January 2, 2011, regulation of stationary-source greenhouse gas emissions under the Clean Air Act's Prevention of Significant Deterioration ("PSD") program and Title V programs. *See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,519-22 (Jun. 3, 2010) (rule rewriting, or "tailoring," the Clean Air Act's emissions thresholds for stationary sources of greenhouse gases subject to the PSD and Title V programs; s*ee also Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*,75 Fed. Reg. 17,004 (Apr. 2, 2010) (EPA rule reversing long-standing interpretation of Clean Air Act's applicability provisions to account for new greenhouse gas regulations).

EPA also found that its new statutory construction of the Clean Air Act would create "absurd results" never intended by Congress. *See* 75 Fed. Reg. at 31,516. To avoid those expected

absurd consequences, EPA elected to rewrite the statutory thresholds by creating new thresholds, not authorized by the Clean Air Act, unique to greenhouse gases. *Id.*

In short, the Endangerment Finding immediately triggered a flood of regulations governing emissions of greenhouse gases from numerous stationary and mobile sources.

Soon after the Endangerment Finding was made, affected parties filed petitions for review in the D.C. Circuit; *Coalition for Responsible Regulation v. EPA* (Case No. 09-1322). Several petitioners also filed administrative petitions for reconsideration with EPA. *See Reconsideration Denial*, 75 Fed. Reg. 49,556, 49,557 (Aug. 13, 2010). Some of the administrative petitions urged EPA to reconsider its Endangerment Rule in light of the extensive electronic files from the University of East Anglia's Climate Research Unit released to the public after the comment period closed. *See, e.g.,* 74 Fed. Reg. at 18886-18910 (April 24, 2009); *see also Addendum and Supplementation of Record to Coalition Comments*, dated December 4, 2009, reproduced as **Exhibit F**. Those documents raised important questions regarding the impartiality and data quality of the climate science on which the IPCC and thus EPA relied. Refusing to receive any public comment on the administrative petitions for reconsideration, EPA denied them all. *See* 75 Fed. Reg. at 49,556.

Some of the issues arising out of the massive Endangerment Finding litigation in the D.C. Circuit and related lawsuits are still being contested. One of the most recent lawsuits arises from EPA's promulgation of the Clean Power Plan, *State of West Virginia v. EPA*, (D.C. Circuit Case No. 15-1363), where EPA defended that lawsuit in part because of its Endangerment Finding. The Clean Power Plan has since been stayed by the United States Supreme Court. *See West Virginia v. EPA*, 136 S. Ct. 1000 (Mem.), 194 L.Ed.2d 17 (2016). In a recent executive order issued by President Trump, the EPA has been instructed to reconsider the Clean Power Plan, which deals

with existing fossil fuel electric generation facilities, and certain associated regulations dealing with new facilities. *See Executive Order on Clean Power Plan*: https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1.

Because the ubiquitous natural substance carbon dioxide is one of the six greenhouse gases subject to EPA's 2009 Endangerment Finding, the effects of the finding are affecting and will continue to affect virtually all parts of the nation's economy, giving EPA potentially unprecedented power to regulate life in the United States. It is uncontroverted that EPA did not submit the Endangerment Finding to the Science Advisory Board for peer review. *See EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, Volume 3: Process Issues Raised by Petitioners*, pp 17-18, Response to Comment 3-7, reproduced as **Exhibit G**.

ARGUMENT

THE ENDANGERMENT FINDING SHOULD BE RECONSIDERED BECAUSE EPA VIOLATED A STATUTORY MANDATE WHEN IT FAILED TO SUBMIT THE FINDING TO THE SCIENCE ADVISORY BOARD FOR PEER REVIEW

I. The Text and Legislative History of the SAB Statute Required EPA to Submit the Endangerment Finding to the Science Advisory Board for Peer Review

In relevant part, the SAB statute provides that

> "[for] *any* proposed criteria document, standard, limitation, or regulation . . . . . provided to *any* other Federal agency for formal review and comment" [the Administrator] "*shall* make available to the Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based."

42 U.S.C. § 4365(c)(1) (emphasis added). The duty to submit proposed rules and regulations to the SAB is a mandatory requirement. *See API*, 665 F. 2d at 1188 ("The language of the statute

indicates that making a [regulatory proposal] available to the SAB for comment is mandatory.").

In an analogous context, the United States Supreme Court determined that Congress's use of the word "shall" in the Clean Water Act imposed a mandatory and discretionless obligation. *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007) (citing *Lopez v. Davis*, 531 U.S. 230, 241 (2001)). In *Lopez*, the Supreme Court noted the significance of the fact that Congress, in the same statute, used "may" and "shall" to denote different obligations, such that "may" creates discretionary obligations, while "shall" creates discretionless obligations.

The same is true in the SAB statute. 42 U.S.C. § 4365(c)(1) mandates that the Administrator "shall" submit the material to SAB for review, but then in the very next paragraph, 42 U.S.C. § 4365(c)(2) provides that the SAB "may" provide advice and comments on the material submitted to it. Accordingly, the mandatory nature of EPA's submittal duty is clear. *See Lopez*, 531 U.S. at 241. *See also Moskal v. United States*, 498 U.S. 103, 109 (1990) (courts must give effect to every clause and word of a statute); *Bennett v. Spear*, 520 U.S. 154, 172 (1997) (describing the "rudimentary" principle of administrative law that regulatory action must comply with statutory requirements). *Chevron v. NRDC*, 467 U.S. 837, 843 (1984) (courts and agencies "must give effect to the unambiguously expressed intent of Congress").

The legislative history of the SAB submittal requirement further illustrates Congress's intent. *See Joint Explanatory Statement*, H.R. Conf. Rep. 96-722, 3296 (1977) ("The first paragraph of this section *requires* the Administrator of EPA to make available to the [Science Advisory] Board any proposed criteria document, standard, limitation, or regulation together with scientific background information in the possession of the Agency on which the proposed action is based.") (emphasis added). Accordingly, an interpretation that the submittal requirement is discretionary runs afoul of Congressional intent. *See Chevron*, 467 U.S. at 845 (agency

interpretation of a statute is impermissible if it "is not one that Congress would have sanctioned.").

A. The Endangerment Finding Is a "Regulation"

Among other regulatory actions, proposed EPA "regulations" must be submitted to the Science Advisory Board for peer review. 42 U.S.C. § 4365(c)(2); *see API*, 665 F.2d at 1188. A regulation, also known as a legislative rule, is "an agency statement of general *or* particular applicability and future effect designed to . . . prescribe law or policy." 5 U.S.C. § 551(4) (emphasis added). The Endangerment Finding is a "regulation" because it has the force of law, *Thomas v. New York*, 802 F.2d 1443, 1445-47 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987), and because it is also of "particular applicability," in that the Endangerment Finding required EPA to promulgate greenhouse gas emissions standards under Section 202 of the Clean Air Act, 42 U.S.C. § 7521(a). "If EPA makes a finding of endangerment, the [a]gency [is required] to regulate emissions of [greenhouse gases] from motor vehicles." *Coalition for Responsible Reg., Inc. v. E.P.A.*, 684 F.3d 102, 126 (D.C. Cir. 2012), *aff'd in part, rev'd in part sub nom. Util. Air Reg. Group v. E.P.A.*, 134 S. Ct. 2427 (2014), and *amended sub nom.*, quoting *Massachusetts v. EPA*, 127 S. Ct. 1462 (2007). EPA itself acknowledged the Endangerment Finding obligated it to regulate motor vehicle emissions of greenhouse gases. *See* 76 Fed. Reg. at 57,129 ("With EPA's December 2009 final findings that certain greenhouse gases may reasonably be anticipated to endanger public health and welfare and that emissions of [greenhouse gases] from section 202 (a) sources cause or contribute to that endangerment, section 202(a) *requires* EPA to issue standards applicable to emissions of those pollutants from new motor vehicles.") (emphasis added). Accordingly, the Endangerment Finding is a regulation subject to the SAB submittal requirement.

B. EPA Provided the Endangerment Finding to the Office of Management and Budget "For Formal Review and Comment"

The SAB statutory language requires EPA to submit any proposed regulation to the Science

Advisory Board for peer review whenever it provides the proposal to "any other Agency for formal review and comment." 42 U.S.C. 4365. EPA acknowledged that it submitted the Endangerment Finding to the Office of Management and Budget (OMB") as a "significant regulatory action" pursuant to an overarching executive order:

> Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to Office of Management and Budget (OMB) recommendations have been documented in the docket for this action.

74 Fed. Reg. 66545 (Dec. 15, 2009). This was a "formal" review mandated by EO 12866, and any notion that the OMB submission was "informal" is belied by the text of the executive order cited by EPA. Specifically, EO 12866 declares:

> Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function.

58 Fed. Reg. 51735 (Sept. 30, 1993). EO 12866 goes on to specify in painstaking detail exactly what must be submitted to OMB, and prescribes a "regulatory plan" that must consist "at a minimum" of a statement of the agency's regulatory objectives, a summary of each planned significant regulatory action including anticipated costs and benefits, a summary of the legal basis for each such action, a statement of the need for each action, the agency's schedule for action, and other data. 58 Fed. Reg. 51735 (Sept. 30, 1993). The level of detail required indicates that the review is the epitome of formality. Indeed, the submission requirements are taken so seriously that within 10 days of receiving the submission from EPA, OMB is required to circulate it among other federal agencies to check for possible conflicts. *Id.*

Accordingly, EPA made available the proposed Endangerment Finding to another federal agency, namely, OMB, pursuant to Executive Order 12866, and through OMB, to other federal agencies, for formal review, bringing the review of the Endangerment Finding squarely within the ambit of "formal" federal agency review under 42 U.S.C. § 4365(c)(1), thereby triggering the SAB submittal requirement.

C. The Endangerment Finding Was Never "Made Available" by EPA to the Science Advisory Board for Peer Review

The D.C. Circuit has ruled that the mandate to "make available" a regulatory proposal to the SAB for peer review requires that EPA 'submit" the proposed regulation to the SAB. *API,* 665 F.2d at 1189 ('the statute *explicitly mandates* that standards be *submitted* to the Board for review.") (emphasis added). "EPA did not submit the Endangerment Finding for review by its Science Advisory Board." *Coalition for Responsible Reg., Inc. v. E.P.A.*, 684 F.3d at 124. In addition, EPA admitted in its statements to the public that it never submitted the Endangerment Finding to the SAB for peer review. *See EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, Volume 3: Process Issues Raised by Petitioners, pp 17-18, Response to Comment 3-7,* reproduced as **Exhibit G**.

EPA's statement that the Endangerment Finding was generated as a result of the "far reaching and multidimensional" problem addressed by the finding, *see* 74 Fed. Reg. at 66497, does not excuse its violation of the SAB submittal requirement, because the seriousness of any particular issue facing an administrative agency does not permit it to violate the statute under which it takes administrative action. *See Food and Drug Admin. v. Brown & Williamson*, 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure

that Congress enacted into law.'") (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). Put plainly, Congress placed the burden on EPA to make regulatory proposals available to the Science Advisory Board for peer review, and EPA failed to meet that burden when it made the Endangerment Finding without seeking review from the Board. *See U.S. v. Kirby*, 74 U.S. 482, 486 (1868) ("[a]ll laws should receive a sensible construction."). Regardless of the extent to which the prior Administration's substantive determination regarding the Endangerment Finding merits any discretion from the courts, this Administration should correct the palpable procedural violation of the mandatory SAB submittal requirement. *See Bennett*, 520 U.S. at 172 ("It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.").

II. The D.C. Circuit's Decision in *Coalition for Responsible Regulation v. EPA* Does Not Constrain EPA from Reconsidering the Endangerment Finding

The Petitioners are mindful of the D.C. Circuit's decision in *Coalition for Responsible Regulation v. Environmental Protection Agency*, 684 F.3d 102 (D.C. Cir. 2012), where dozens of petitioners challenged EPA's Endangerment Finding. One of the challenges was based on EPA's failure to submit the Endangerment Finding to the SAB for peer review. The panel in the case concluded that (1) it was "not clear" whether the Endangerment Finding was submitted "to any other Federal agency for formal review and comment," thereby triggering the SAB submittal duty, 684 F.3d at 124, and (2) "even if EPA violated its mandate by failing to submit the Endangerment Finding to the SAB, Industry Petitioners have not shown that this error was 'of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.'" 684 F.3d at 124.

Although it may not have been "clear" to the panel in *Coalition for Responsible Regulation* whether EPA sought "formal review and comment" of the Endangerment Finding from another

federal agency, it is abundantly clear from the foregoing discussion in Section I. B. that EPA did in fact seek formal review and comment on the Endangerment Finding from the Office of Management and Budget pursuant to Executive Order 12866. By stating that it was "not clear" whether EPA sought formal review from another federal agency, the D.C. Circuit panel acknowledged that it could not determine whether EPA sought "formal review and comment." Accordingly, the record is open on that issue. *See Cooper Industries, Inc. v. Aviall Services, Inc*., 543 U.S. 157, 170 (2004) (a court's failure to make a specific ruling on an issue does not constitute binding precedent for that issue).

For three additional reasons set forth in more detail in Subsections II A., B., and C. below, the decision in *Coalition for Responsible Regulation* regarding the Endangerment Finding does not constrain EPA from reconsidering the finding. First, the SAB submittal requirement, which is set forth in a statute separate and independent of the Clean Air Act, is categorically not subject to the "central relevance" and "substantial likelihood" constraints applicable to procedural violations of the Clean Air Act itself. Second, assuming *arguendo* that the Clean Air Act's "central relevance" and "substantial likelihood" tests apply to the SAB submittal requirement, a "substantial likelihood" that EPA's regulatory proposals would undergo significant change as a result of SAB review is built into the fabric of the SAB statute and is, therefore, centrally relevant to the issue of whether a proposed regulation, including the Endangerment Finding, would have a substantial likelihood of undergoing significant change as a result of review by the Board. *See* 42 U.S.C. § 4365(c)(1). Third, in any event, EPA has the inherent authority to reconsider a prior rulemaking.

A. The "Central Relevance" and "Substantial Likelihood" Tests Do Not Apply to EPA's Duty to Submit the Endangerment Finding to the Science Advisory Board for Peer Review

In the D.C. Circuit panel's view, "Industry Petitioners *have not shown* that [the SAB] error was 'of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.'" *Coalition for Responsible Regulation*, 684 F.3d at 124 (emphasis added). The panel's summary conclusion that a specific showing was not made does not address the threshold issue of whether the procedural requirements of the Clean Air Act trump those of the distinct SAB statute. *See Cooper Industries, Inc.*, 543 U.S. at 170 (a court's silence regarding issues is not precedent for future decisions).

EPA's duty to submit regulatory proposals to the Science Advisory Board for peer review applies not only to EPA's regulatory proposals under the Clean Air Act but also to regulatory proposals made under *every* "authority of the Administrator." *See* 42 U.S.C. § 4365(c)(1). Under longstanding principles of statutory construction, the statutory authorities administered by EPA must be construed in a way that makes them consistent with each other, if at all possible. *See Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524 (1986) (differing statutes should be interpreted so as to be consistent); *United States v. Freeman*, 44 U.S. 556 (1845) ("Statutes *in pari materia* should be taken into consideration in construing a law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute"); *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 363 (D.C. Cir. 1985) ("All parties to the appeal agree, however, that the two statutes before us cannot be construed to reach different results. Because the NHA shares with the FDIA the common purpose of insuring funds placed in depository institutions; and because its legislative history shows that Congress intended it to create the same insurance protection for investors in savings and loan associations as the Banking Act of 1933 had created for bank depositors, these two statutes are *in pari materia* and must be construed together.") (internal citations omitted); *Motion Picture Ass'n of Am., Inc. v. F.C.C.*, 309 F.3d 796,

801 (D.C. Cir. 2002) ("Statutory provisions *in pari materia* normally are construed together to discern their meaning.").

The SAB statute contains no "central relevance" or substantial likelihood" test. At the same time, the Clean Air Act places those two limitations only on judicial review of rulemaking procedures mandated by the Clean Air Act itself. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 522 (D.C. Cir 1983) (in amending the CAA in 1977, Congress "wanted to add new procedural protections" in the CAA while "[minimizing] disputes over EPA's compliance with the new procedures" in the 1977 Amendments to the Clean Air Act, and Congress "did not intend to cut back" on statutory procedural requirements and protections set forth in statutes other than the Clean Air Act). Thus, the "central relevance" and "substantial likelihood" standards set forth in the CAA for procedural violations of that Act, 42 U.S.C. § 7607(d)(8), do not apply to violations of rulemaking procedures mandated by statutes other than the CAA, such as the SAB statute. *See Small Refiner*, 705 F.2d at 522-24.

Under the longstanding interpretive principle of harmonizing statutes that an agency administers, EPA must comply with the SAB submittal requirement consistently for all of its regulatory proposals, regardless of the specific law under which a particular regulation is proposed. This result is required because the SAB submittal requirement does not distinguish among EPA's substantive regulatory authorities but applies equally to all of them, including the Clean Air Act.

Citing *API*, the D.C. Circuit's panel decision in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), incorrectly applied the "central relevance" and "substantial likelihood" tests to the SAB submittal requirement in the context the Endangerment Finding. In so doing, the panel did not recognize that *API* did not analyze nor even address the crucial relationship between EPA's singular, independent duty to comply with the SAB submittal

requirement and EPA's diverse duties under each of the programmatic statutes it administers. Thus, the panel mistakenly applied the Clean Air Act's unique "critical relevance" and "substantial likelihood" tests to EPA's overarching obligation to submit regulatory proposals, including the Endangerment Finding, to the Science Advisory Board for peer review.[4]

The report of the Standing House Committee on Interstate and Foreign Commerce (the "Committee"), which investigated the need for and crafted the language of the Clean Air Act's 1977 amendments, is particularly instructive. *See* Norman J. Singer, 2A Sutherland Statutes and Statutory Construction § 48:6 (7th ed. 2007) ("The report of the standing committee in each house of the legislature which investigated the desirability of the statute under consideration is often used as a source for determining the intent of the legislature."). The Committee noted that the pre-1977 Clean Air Act lacked sufficient "procedural safeguards" and that broad administrative discretion to promulgate regulations to protect health or the environment must be restrained by thorough and careful procedural safeguards that insure an effective opportunity for public participation in the rulemaking process. *See* H. Rep. 95-294 at 319 (May 12, 1977). Among other things, the Committee concluded that there was a need for "clearly defined procedures applicable to establishing a publicly available record as a basis for decisionmaking" under the Clean Air Act. *Id.* at 320. Of special concern to the Committee were the "new" procedural requirements for cross-examination of witnesses on disputed factual issues, which were added by the 1977 Clean Air Act

[4] In addition, as discussed in more detail below in Section III, *Coalition for Responsible Regulation* erred in its rote citation of *API* because in that case there was harmless error in that EPA had previously submitted two drafts of the relevant documentation to the Science Advisory Board and had made substantial changes to the regulation at issue there pursuant to the Board's recommendations. In connection with the Endangerment Finding at issue here, however, EPA never submitted anything to the Board.

Amendments in connection with hearings held on rulemaking proposals. To prevent the new procedures from getting bogged down in fine points such as "[whether] a given question involves 'facts' or 'policy' or whether a given fact is 'legislative' or 'adjudicative,'. . . the committee has limited the extent to which the Administrator's decisions on *such* procedural matters [arising under the language of the 1977 Amendments] may be reversed during judicial review." *Id*. at 322 (emphasis added).

The Committee went on to state that courts may overturn EPA rulemaking under the 1977 Clean Air Act Amendments with regard to

> *such* procedural matters [only if] if the procedural errors 'were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.'

Id. (emphasis added). Thus, the only procedural violations subject to the high bar set by Congress were the then-new rulemaking procedures established by Congress in the 1977 Clean Air Act Amendments. *See Small Refiner*, 705 F.2d at 522. The independent duty to submit regulatory proposals to the SAB, which is found entirely outside of the Clean Air Act, is independent of, and is not constrained by, the 1977 Clean Air Act Amendments.

The prior Administration failed to comply with the nondiscretionary requirement to submit the Endangerment Finding to the Science Advisory Board for peer review before it was promulgated. That failure is a violation of the SAB statute and not the Clean Air Act. Accordingly, contrary to the summary conclusion of the panel in *Coalition for Responsible Regulation*, EPA's failure was not subject to the "central relevance" or "substantial likelihood" standard for procedural violations of the Clean Air Act.

It is true that the earlier D.C. Circuit's decision in *API* summarily applied the Clean Air Act's "central relevance" and "substantial likelihood" tests to the SAB submittal requirement. But

a "court's prior judicial construction of a statute trumps a [subsequent] agency construction . . . *only* if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 548–49 (2009) (citing *Brand X*, 545 U.S. at 982) (emphasis added). Neither *API* nor *Coalition for Responsible Regulation* ever held or even asserted that their construction of the applicability of the "central relevance" and "substantial likelihood" tests to SAB review was mandated by the unambiguous terms of either the Clean Air Act or the SAB statute, or, indeed, both of them when viewed in tandem.

Accordingly, as set forth in more detail in Section II. C, *infra*, this Administration is free to revisit the issue based upon its own legal, policy, and scientific evaluations. Significantly, the Clean Air Act's "central relevance" and "substantial likelihood" standards *cannot* apply to violations of the SAB submittal requirement in connection with rules promulgated by EPA under any statutory authority *other than* the Clean Air Act because no other EPA administered statute authorizes those tests under any circumstance. Accordingly, consistent with the long-honored principle that different statutes administered by the same agency must be construed harmoniously, EPA should now determine that regulations promulgated by EPA under the Clean Air Act are subject to the same SAB peer review requirements as regulations under "any other authority of the Administrator." *See* 42 U.S.C. § 4365(c)(1); *see also Parsons*, 474 U.S. at 524.

B. By Enacting the SAB Statute, Congress Itself Implicitly Determined That Peer Review by The Board Is *Always* Centrally Relevant and Carries a Substantial Likelihood of Significant Change in Connection with EPA's Regulatory Proposals

Assuming *arguendo* that the "central relevance" and "substantial likelihood" tests apply, congressional contemplation of a "substantial likelihood" that EPA's regulatory proposals would undergo "significant change" as a result of SAB review, and the "central relevance" of such review

for proposed regulations, is built into the very fabric of the SAB statute. *See* 42 U.S.C. § 4365(c)(1). The legislative history makes clear that the SAB's role in EPA's rulemaking process is to "be able to preview conflicting claims and advise the [EPA] on the adequacy and reliability of the technical basis for rules and regulations." *See Joint Explanatory Statement*, H.R. Conf. Rep. 96-722, 3295-96. Congress' *Joint Explanatory Statement* goes on to state:

> Much of the criticism of the Environmental Protection Agency might be avoided if the decisions of the Administrator were fully supported by technical information which had been reviewed by independent, competent scientific authorities.
>
> . . . [T]he intent of [the SAB submittal requirement] is to ensure that the [SAB] is able to comment in a well-informed manner on any regulation that it so desire.

Id. at 3296. That is why SAB submittal is "mandatory." *API*, 665 F.2d at 1188. "[We] must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9. Accordingly, even under the CAA's "significant likelihood" standard, the uncertainty created by EPA's failure to submit the Endangerment Finding to the SAB for peer review indicates a "significant likelihood" that the rule would have been "substantially changed" if such errors had not been made and, therefore, is of "central relevance." 42 U.S.C. § 7607(d)(8).

Such a result is compelled by *Kennecott Corp. v. EPA*, 684 F.2d 1007 (D.C. Cir. 1982). In *Kennecott*, EPA denied an administrative petition for reconsideration by asserting that its failure to include certain documents in the rulemaking record was not significant because, even if the documents had been included, EPA would have come to the same regulatory conclusion. The D.C. Circuit disagreed, stating that the "absence of those documents . . . makes impossible any meaningful comment on the merits of EPA's assertions." *Id*. at 1018. "EPA's failure to include such documents constitutes reversible error, for the uncertainty that might be clarified by those documents . . . indicates a 'substantial likelihood' that the regulations would 'have been

significantly changed.'" *Id.* at 1018-19. Here too, EPA's failure to make the proposed Endangerment Finding available to the SAB for peer review is improper because the uncertainty regarding the outcome of SAB's review and EPA's response indicates a "substantial likelihood" that the regulation would have been "significantly changed" had SAB been consulted.

This conclusion is supported by the attached declaration of Roger O. McClellan, who served as a member of the Science Advisory Board for over three decades, including years of service as a member of the Board's Executive Committee and its Clean Air Scientific Advisory Committee. The declaration, attached as **Exhibit H**, was filed in the D.C. Circuit in support of one of the Petitioners in the consolidated cases of *Coalition for Responsible Regulation v. EPA* (Case No. 09-1322, Document # 1388587).

Among other things, McClellan's declaration states that the Endangerment Finding "can have a profound impact on society." Declaration of Roger O. McClellan ¶ 8. EPA never contested the fact that the Endangerment Finding can have a profound societal impact.

The McClellan Declaration goes on to state that "SAB essentially serves a critical gatekeeper role whose mission is to ensure that EPA's regulatory proposals are based upon sound scientific and technical principles." McClellan Decl. ¶ 11. "On many occasions during the long history of SAB, EPA changed its regulatory proposals and schedules based on review and comment by SAB. This has been the rule rather than the exception, which stands to reason, as SAB was created to provide an expert reality check for EPA scientific and technical determinations that inform policy judgments." McClellan Decl. ¶ 10.

McClellan further states:

> I am familiar with EPA's finding made in December of 2009 that greenhouse gases pose a threat to human health and welfare (the "Endangerment Finding"). The Endangerment Finding is certainly the type of regulatory action that SAB was created to review. It deals with novel,

> cutting edge scientific and technical issues that can have a profound impact on society. Those issues require the type of detailed expert scrutiny that SAB review was intended to provide.

McClellan Decl. ¶ 8. Moreover, the declaration states that EPA's long-standing custom and standard operating procedure was to submit regulatory proposals to SAB for review during public comment periods:

> I have always understood that EPA's proposed regulations under the Clean Air Act would be made available to the SAB for review at the earliest possible time and no later than the date the regulations are first published in the Federal Register for comment by other federal agencies and the general public.

McClellan Decl. ¶ 7.

Because the purpose of the SAB submittal requirement is to provide SAB an opportunity to make available "its advice and comments [to EPA] on the adequacy of the scientific and technical basis of [regulatory proposals]," 42 U.S.C. § 4365(c)(2), Congress could not have intended that SAB review would be no more than a mere formality or a superfluous gesture. *Moskal v. United States*, 498 U.S. 103 (1990) (courts should give effect to every clause and word of a statute). In fact, Congress intended that EPA's proposed Clean Air Act regulations would significantly evolve, mature, and otherwise change as a result of SAB's scientific and technical advice. Lynn E. Dwyer, *Good Science in the Public Interest: A Neutral Source of Friendly Facts?* 7 Hastings W-N.W. J. Envtl. L. & Pol'y 3, 6-7 (2000) (SAB was created to function as a scientific and technical peer review panel to provide EPA with guidance, so that the Agency's rulemaking is not based on erroneous or untrustworthy data or conclusions); *see also* McClellan Decl. ¶¶ 10-11.

McClellan goes on to state:

> Based upon my more than two decades of experience as a member of SAB, after it was established legislatively, my more than 15 years of service as a

> member of the SAB Executive Committee and my knowledge of how SAB interacts with EPA, I believe there is substantial likelihood that the Endangerment Finding would have been substantially changed in response to advice from the SAB had the Endangerment Finding been made available for review prior to its promulgation.

McClellan Decl. ¶ 12.

Accordingly, even if the "substantial likelihood" standards apply to SAB submittals of regulatory proposals made by EPA under the Clean Air Act, those standards are met in the case of the Endangerment Finding.

C. EPA Has Inherent Authority to Reconsider the Endangerment Finding

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. When an agency changes its existing position, it need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. But the agency must at least display awareness that it is changing position and show that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (internal citations and quotation marks omitted). Furthermore, "[a]n initial agency interpretation is not instantly carved in stone [although] reasoned decision-making ordinarily demands that an agency acknowledge and explain the reasons for a changed interpretation. But so long as an agency adequately explains the reasons for a reversal of policy, its new interpretation of a statute cannot be rejected simply because it is new." *Verizon v. FCC*, 740 F.3d 623, 636 (D.C. Cir. 2014). Accordingly, EPA is free to reconsider the Endangerment Finding.

It matters not that the D.C. Circuit in *Coalition for Responsible Regulation* summarily discounted on extremely narrow grounds, without analysis, a claim that EPA violated the SAB statute when it made the Endangerment Finding without seeking peer review. As indicated in the foregoing discussion, the court did not rule that EPA in fact had no duty to submit the

Endangerment Finding to the Science Advisory Board, merely that there was no clear evidence before the court that the triggers for that duty had been activated. *Coalition for Responsible Regulation*, 684 F. 3d at 124-25. As the Supreme Court observed, "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. . . . [I]n *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy."). *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981-82 (2005) (citing *Chevron v. NRDC*, 467 U.S. 837, 857-58 (1984).

Accordingly, EPA may determine as a matter of policy that the Endangerment Finding should have been submitted to the Science Advisory Board for peer review and that EPA's failure to do so triggers reconsideration of the finding, coupled with submittal to the Board. *See Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742 (1996) ("[regulatory] change is not invalidating. . . ."); *Van Hollen, Jr. v. Fed. Election Comm'n*, 811 F.3d 486, 496 (D.C. Cir. 2016) ("An agency 'must consider varying interpretations and the wisdom of its policy on a continuing basis.'") (quoting *Brand X*, 545 U.S. at 981). Indeed, as set forth in Section II. B., above, EPA may adopt such an interpretation even if a court had previously construed the statutory requirement differently. *See Cuomo* 557 U.S. at 548–49. Therefore, EPA is free to revisit the Endangerment Finding based upon the instant Administrative Petition.

III. EPA'S FAILURE TO SUBMIT THE ENDANGERMENT FINDING TO THE SCIENCE ADVISORY BOARD WAS NOT HARMLESS ERROR

A careful review of EPA's statements about the regulations reveals how critical and necessary it was to have the SAB perform a thorough evaluation of the scientific basis of the proposed rule.

The EPA began its overview of the rule by declaring that "[t]he Administrator has determined that the body of scientific evidence compellingly supports this finding." 74 Fed. Reg.

66497 (Dec.15, 2009). However, the EPA admitted that it relied almost exclusively on data gathered, sifted, and analyzed by others. *Id* at 66510-12. The input of the Science Advisory Board would have been of major influence on the evaluation of the body of scientific evidence. *See* McClellan Declaration ¶¶ 2-12. EPA acknowledges that "[p]ublic review and comment has always been a major component of EPA's process." 74 Fed. Reg. at 66500. EPA is silent, however, as to why, during that period, it failed to comply with the mandatory obligation to let the experts at the Science Advisory Board opine on the data and science underlying the rule, especially in light of the fact that the public noted the error during the public comment period, as described above in the Statement of Facts. EPA even claimed that "the science is sufficiently certain." 74 Fed. Reg. 66501 (Dec.15, 2009). Such an assertion would seem to require, at a minimum, that EPA comply with the mandatory duty to submit the science for review by the statutorily established expert organization charged with providing EPA with advice in connection with scientific determinations.

The utter failure of EPA to submit the proposed Endangerment Finding and supporting material to SAB at any stage distinguishes this case from another one where failure had been found to be harmless. In *API*, procedural challenges were raised against the ozone standards established by EPA. There, EPA had submitted two drafts of the criteria document to the Science Advisory Board and had made changes to the criteria based on SAB's recommendations. 665 F. 2d at 1187-88. The proposed ozone standard, which was based entirely upon the previously submitted criteria, as revised, was itself not submitted to the SAB. In rejecting the challenge, the court found that because the Science Advisory Board had *twice* reviewed the criteria documents, which contained the detailed scientific and technical basis for the standard, it was harmless error that EPA did not submit the documentation for a third review. *Id*. at 1189. In the case of the Endangerment Finding, however, SAB never had the opportunity to review anything. Accordingly, there is no basis to

conclude that the failure of EPA to submit the Endangerment Finding to the Science Advisory Board for peer review could under these circumstances be considered harmless error.

As discussed above in the Statement of Facts section of this Petition, the Endangerment Finding has enormous impact on the power generation and distribution industry, as illustrated by the Clean Power Plan, and on diverse other stationary sources, as illustrated by the PSD and Title V requirements triggered by the finding. In addition, the Endangerment Finding has profound consequences for the transportation industry, especially owners and operators of trucks.

In 2011, the EPA finalized its Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy Duty Engines and Vehicles rule. 76 Fed. Reg. 57106 (Sept. 15, 2011). That rule was expressly based on the earlier Endangerment Finding. *See* 76 Fed. Reg. 57109 (Sept. 15, 2011). The rule covers all new heavy-duty trucks starting with the 2014 model year and imposes stringent new fuel consumption standards on such vehicles. 76 Fed. Reg. 57106 (Sept. 15, 2011). In order to reduce greenhouse gas emissions, EPA determined it could not simply impose requirements for the truck engine; the rule requires fundamental changes to the entirety of the truck. *See* 76 Fed. Reg. 57114 (Sept. 15, 2011). The result of imposing new mandates on both truck engines and truck bodies crates an enormous increase in the cost of trucks. *See* 76 Fed. Reg. 57321 (Sept. 15, 2011). Nevertheless, EPA elected to "make no attempt at determining what the impact of increased costs would be on new truck prices." *Id*. EPA did, however, recognize that there would be research and development costs of at least $6.8 million per manufacturer per year for five years. *Id*. These costs will necessarily be passed on to the purchasers of the new trucks.

The economic impacts on stationary and mobile sources throughout the nation have had, and will continue to have, repercussions in the job market, resulting in job losses in the mining, manufacturing, construction, and transportation sectors, among others.

These adverse nationwide economic impacts are directly traceable to the Endangerment Finding, and that is yet another reason why it would be untenable to claim that the failure to submit the finding to the Science Advisory Board for peer review was "harmless error." Accordingly, EPA should reconsider the Endangerment Finding and, in the process, submit the finding to the Science Advisory Board for peer review.

CONCLUSION

For these reasons, Petitioners respectfully request that the Administrator:

1. Within 180 days of receipt of this Administrative Petition, provide a substantive response to the Petitioners informing them and the public of the commencement of an administrative proceeding to reconsider the Endangerment Finding, *see* 42 U.S.C. Section 7604;

2. During the administrative proceeding:

    a. provide the public with notice and opportunity for comment, as required by the Administrative Procedure Act and 42 U.S.C. § 7607(d);
    b. provide interested persons an opportunity for the oral presentation of data, views, or arguments, in accordance with 42 U.S.C. § 7607(d)(5);
    c. submit the current Endangerment Finding and any appropriate alternatives thereto, as well as all underlying documentation, to the Science Advisory Board for peer review, as required by 42 U.S.C. § 4365(c)(1); and
    d. based upon the totality of evidence, including input from the Science Advisory Board and public comment, make an independent scientific, technical, policy, and legal evaluation of whether it is appropriate to revise or rescind the Endangerment Finding;

3. Pending completion of the administrative proceeding, suspend the Endangerment Finding and refrain from any rulemaking or enforcement activity based in whole or in part on the Endangerment Finding; and

4. Upon completion of the administrative proceeding, take appropriate final action to revise or rescind the Endangerment Finding.

DATED: May 1, 2017

Respectfully submitted,

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EXHIBIT B

Texas Public Policy FOUNDATION

May 1, 2017

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RE: Administrative Petition to Reconsider the Greenhouse Gas Endangerment Finding

Dear Administrator Pruitt:

Enclosed please find our Administrative Petition respectfully requesting EPA to reconsider its finding under the Clean Air Act that greenhouse gases pose a danger to human health and welfare. When making the Endangerment Finding in 2009, the prior EPA Administrator failed to submit the finding to the Science Advisory Board ("SAB") for peer review, as required by 42 U.S.C. § 4365(c)(1). The SAB submittal requirement is a nondiscretionary statutory mandate.

Thank you in advance of your careful consideration of the enclosed Administrative Petition.

Respectfully submitted,

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Enclosure

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Washington, DC 20460

EXHIBIT C

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

September 21, 2017

Mr. Theodore Hadzi-Antich

General Counsel & Director
Center for the American Future
Texas Public Policy Foundation
901 Congress Avenue
Austin, Texas 78701

Dear Mr. Hadzi-Antich:

Thank you for your letter dated May 1, 2017, to the U.S. Environmental Protection Agency Administrator. Your letter and the enclosure(s) concerning the *Administrative Petition to Reconsider the Greenhouse Gas Endangerment Finding* have been received.

We appreciate your comments and concerns, and invite you to please visit our website at https://www.epa.gov/.

Thank you again for your letter.

Sincerely,

Paul M. Gunning, Director
Climate Change Division

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

September 21, 2017

Mr. Robert Henneke
General Counsel & Director
Center for the American Future
Texas Public Policy Foundation
901 Congress Avenue
Austin, Texas 78701

Dear Mr. Henneke:

Thank you for your letter dated May 1, 2017, to the U.S. Environmental Protection Agency Administrator. Your letter and the enclosure(s) concerning the *Administrative Petition to Reconsider the Greenhouse Gas Endangerment Finding* have been received.

We appreciate your comments and concerns, and invite you to please visit our website at https://www.epa.gov/.

Thank you again for your letter.

Sincerely,

Paul M. Gunning, Director
Climate Change Division

EXHIBIT D

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

January 19, 2021

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Dave Wallace, President
FAIR Energy Foundation
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Dear Messrs. Kazman, Hadzi-Antich, Wallace, Menton, and MacDougald:

I am responding to your petitions to the U.S. Environmental Protection Agency to reconsider our 2009 Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act.

The EPA has reviewed your petitions and the information available on the issues you raised. For the reasons discussed in the enclosed response, the EPA denies your petitions.

I would like to thank you for your interest in these issues. The EPA looks forward to working with you and other stakeholders as we continue to protect human health and the environment in accordance with law.

Sincerely,

Andrew R. Wheeler

Enclosure

Denial of Petitions to Reconsider the EPA's Greenhouse Gas Endangerment Finding

This document is in response to four petitions requesting that the EPA reconsider its 2009 Endangerment Finding for Greenhouse Gas (GHG). The petitions were submitted by the Concerned Household Electricity Consumers Council (CHECC) on January 20, 2017, the Competitive Enterprise Institute and the Science and Environmental Policy Project (CEI & SEPP) on February 23, 2017,[1] Liberty Packing Company LLC and several other entities represented by the Texas Public Policy Foundation on May 1, 2017, and the FAIR Energy Foundation (received by the Agency in 2019).

As you know, we issued our Endangerment Finding in 2009 in response to the U.S. Supreme Court's holding in *Massachusetts v. EPA*, that under section 202(a)(1) of the Clean Air Act, the EPA must either decide whether greenhouse gases cause or contribute to climate change or provide a reasoned justification for declining to form a scientific judgment. 549 U.S. 497, 533–35 (2007).

Our Endangerment Finding concluded on the basis of scientific evidence from the U.S. Global Climate Research Program, the Intergovernmental Panel on Climate Change, and the National Research Council that certain long-lived and directly emitted greenhouse gases in the atmosphere—the six well-mixed greenhouse gases--may reasonably be anticipated both to endanger public health and to endanger public welfare.

The Endangerment Finding was the subject of ten separate petitions for reconsideration that the EPA denied in 2010. We incorporate by reference our Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, *available at* https://www.epa.gov/ghgemissions/epas-response-petitions-reconsider-endangerment-and-cause-or-contribute-findings.

The petitioners brought a judicial challenge following EPA's denial of their reconsideration petitions, and the D.C. Circuit upheld the 2009 Endangerment Finding in 2012. *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 120-26 (D.C. Cir. 2012).

In the intervening years, we have issued several new rules that rely on the Endangerment Finding as a predicate. These include the *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2*, 81 Fed. Reg. 73,478, 73,486 (Oct. 25, 2016); the Affordable Clean Energy Rule, *Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units*, 84 Fed. Reg. 32,520 (July 8, 2019); and *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, 85 Fed. Reg. 24,174 (Apr. 30, 2020). In 2016, EPA issued an endangerment finding as the predicate for the airplane greenhouse gas standards. *See Control of Air Pollution From Airplanes and Airplane Engines: GHG Emission Standards and Test*

[1] The Competitive Enterprise Institute and the Science and Environmental Policy Project characterize theirs as a petition "to initiate a rulemaking proceeding on the subject of greenhouse gases and their impact on public health and welfare" or, in the alternative, "as a petition for reconsideration of its Endangerment Finding." CEI & SEPP Petition at 1.

Procedures, 86 Fed. Reg. 2136, 2143 (Jan. 11, 2021). (The 2016 airplane endangerment finding was based on "[t]he Administrator's view is that the body of scientific evidence amassed in the record for the 2009 Endangerment Finding also compellingly supports an endangerment finding under CAA section 231(a)(2)(A)." 81 Fed. Reg. at 54,424.)

To the extent we have considered new assessments of the danger posted by greenhouse gases, we have concluded that they "further strengthen[] the case that GHG emissions endanger public health and welfare." *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2*, 81 Fed. Reg. 73,478, 73,486 (Oct. 25, 2016). We incorporate this discussion by reference.

And we have sometimes responded to comments that question the scientific basis for our Endangerment Finding. *See, e.g.*, Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles - Phase 2, EPA-420-R-16-901, at 1435-36 (Aug. 2016). We incorporate those responses here by reference.

The three petitions from CHECC, CEI & SEPP, and the FAIR Energy Foundation each challenge the 2009 Endangerment Finding's reliance on three lines of evidence that the petitioners allege have been called into question by new scientific research.

Liberty Packing Company and its co-petitioners challenge the EPA's 2009 Endangerment Finding for not having gone through peer review with Science Advisory Board, for relying on information from international organizations, and for causing adverse economic impacts.

Upon consideration of the four petitions, the EPA concludes that they present insufficient information to warrant revisiting the 2009 Endangerment Finding. EPA therefore denies the petitions.

EXHIBIT E

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

March 23, 2021

THE ADMINISTRATOR

Mr. Theodore Hadzi-Antich
Texas Public Policy Foundation
901 Congress Avenue
Austin, Texas 78701

Dear Mr. Hadzi-Antich:

As you know, on January 19, 2021, the U.S. Environmental Protection Agency sent you a denial of your then-pending petitions to reconsider the EPA's 2009 Endangerment and Cause or Contribute Findings for Greenhouse Gases under section 202(a) of the *Clean Air Act*.[3]

I am withdrawing the denial of your petitions as the response does not provide an adequate justification for the denial. The EPA therefore intends to reassess the petitions and to issue a new decision in due course.

Thank you for your interest in these issues, and please contact me if you have further questions about the status of the EPA's response to your petition.

Sincerely yours,

Michael S. Regan

Michael S. Regan

[3] The denial references petitions submitted by the Concerned Household Electricity Consumers Council on January 20, 2017, the Competitive Enterprise Institute and the Science and Environmental Policy Project on February 23, 2017, Liberty Packing Company LLC and several other entities represented by the Texas Public Policy Foundation on May 1, 2017 and the FAIR Energy Foundation (received by the Agency in 2019).

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LIBERTY PACKING COMPANY, LLC, ET AL., Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	No. 2:21-CV-00724-MCE-DB **[PROPOSED] ORDER**

The Court, having considered Defendants' motion to dismiss and memorandum in support, Plaintiffs' memoranda in opposition and replies thereto, and otherwise being sufficiently advised, hereby **DENIES** the motion.

IT IS SO ORDERED.

Dated:

MORRISON C. ENGLAND, JR.
SENIOR U.S. DISTRICT JUDGE