NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 23-1119

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HOOSIER ENVIRONMENTAL COUNCIL, ET AL.,
Petitioners,
v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

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

RESPONDENT'S UNOPPOSED MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR

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So that it can reconsider the narrow topic of fenceline monitoring for lead acid battery manufacturing area sources, Respondent EPA respectfully moves to remand without vacatur the Final Rule titled "New Source Performance Standards Review for Lead Acid Battery Manufacturing Plants and National Emission Standards for Hazardous Air Pollutants for Lead Acid Battery Manufacturing Area Sources Technology Review," 88 Fed. Reg. 11,556 (February 23, 2023) ("Final Rule"). EPA's reconsideration process and remand request is limited to the subject of fenceline monitoring, and no other aspect of the Final Rule should be disturbed.

Counsel for EPA conferred with counsel for Petitioners Hoosier Environmental Council, et al., and Intervenor Battery Council International ("BCI"). Petitioners do not oppose this motion. Intervenor BCI states that while it does not oppose this motion, it believes reconsideration of fenceline monitoring is unnecessary because EPA's prior resolution of that issue is the correct one.

INTRODUCTION

Petitioners challenge a narrow aspect of EPA's Final Rule promulgated under the Clean Air Act revising hazardous air pollutant

emission standards for lead acid battery manufacturing sources. Specifically, they challenge EPA's decision to not require "fenceline" monitoring for area sources subject to the rule (i.e., monitoring along the property boundaries of regulated sources).[1]

Without conceding any error, EPA intends to reconsider the narrow issue of fenceline monitoring. As set forth in the appended declaration of Penny Lassiter, EPA's reconsideration process will include a new proposed rule on the issue of fenceline monitoring, an opportunity to comment on that proposal, and a new final rule on fenceline monitoring for lead acid battery manufacturing area sources.

Granting this request to remand the rule for lead acid battery manufacturing sources will conserve the Court's and the parties' resources because it will allow EPA to further consider the issues raised by Petitioners and such reconsideration may avoid the need for litigation, or at least narrow the issues for future potential litigation, on this aspect of the Final Rule.

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[1] As part of their challenge to EPA's decision to not require fenceline monitoring, Petitioners also challenge EPA's failure to require "corrective action" tied to that monitoring. For simplicity's sake, references to "fenceline monitoring" in this motion include the concept of corrective action.

In the interest of judicial economy, EPA requests that the Court keep this case in abeyance pending the Court's disposition of this motion.

BACKGROUND

I. Statutory and Regulatory Background

Section 112(d) of the Clean Air Act requires EPA to establish standards that reduce emissions of "hazardous air pollutants." 42 U.S.C. § 7412(d). In the 1990 amendments to the Act, Congress listed 189 hazardous air pollutants, including "lead compounds." *Id.* § 7412(b)(1). Congress established a multi-step process for regulating hazardous air pollutants from major sources, which are "sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." *Id.* § 7412(a)(1).

EPA was first required to list categories of major sources of hazardous air pollutants, and then to establish national emission standards for hazardous air pollutants or ("NESHAPs," generally

referred to as "emission standards") for source categories under Section 112(d) of the Act. *Id.* § 7412(c)(1), (d).

Area sources, which are at issue here, are those sources of hazardous air pollutants that do not qualify as major sources. For area sources, Congress allowed EPA to set alternative standards that provide for the use of "generally available control technologies or management practices," ("generally available control technologies") 42 U.S.C. § 7412(d)(5).

Section 112(d)(6) requires EPA to "review" and "revise as necessary (taking into account developments in practices, processes, and control technologies)" emission standards promulgated under Section 112 "no less often than every 8 years." *Id.* § 7412(d)(6). This is often called a "technology review" and is required for all standards established under Clean Air Act section 112(d), including generally available control technologies that apply to area sources.

When conducting its periodic technology review under Section 112(d)(6), EPA identifies and evaluates developments in practices, processes, and control technologies that have occurred since the emission standards for the source category under review were

promulgated or since the last review. Final Rule, 88 Fed. Reg. 11556, 11559 (Feb. 23, 2023). Where EPA identifies such a development, EPA analyzes the development's technical feasibility, estimated costs, energy implications, and non-air environmental impacts. *Id*. EPA also considers the emission reductions associated with applying each development. This analysis informs EPA's decision of whether it is "necessary" to revise the emissions standards. *Id*.

II. Procedural Background

EPA first regulated lead acid battery manufacturing area sources under Section 112 in July 2007. 72 Fed. Reg. 38864 (July 16, 2007). In the Final Rule, EPA completed the technology review required by 42 U.S.C. § 7412(d)(6) and revised the emission standards for lead acid battery manufacturing area sources. Those revisions included stricter emission limits, more stringent work practices, increased inspection requirements, and other measures to control and reduce emissions. 88 Fed. Reg. at 11556.

In comments submitted on EPA's proposal, Petitioners asked EPA to consider fenceline monitoring a "development" under 42 U.S.C. § 7412(d)(6) and to determine that it is "necessary" to add to the

emission standards for lead acid battery manufacturing facilities. In the Final Rule, EPA did consider fenceline monitoring and concluded that it is not "an appropriate work practice standard for this source category." 88 Fed. Reg. at 11566.

On February 23, 2023, the Final Rule was published in the Federal Register. On April 24, 2023, Petitioners petitioned for review challenging the Final Rule. Petitioners claim that EPA acted arbitrarily and capriciously by allegedly not considering fenceline monitoring a "development" under 42 U.S.C. § 7412(d)(6) and not analyzing whether it was necessary to include fenceline monitoring in EPA's revised emission standards. Pet'rs' Br. 26-50.

STANDARD OF REVIEW

Agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Courts have broad discretion to grant or deny an agency's motion to remand. *See Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 381, 386 (D.C. Cir. 2017). This Circuit "generally grant[s] an agency's motion to remand so long as the agency

intends to take further action with respect to the original agency decision on review." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018) (internal quotations omitted); *see also Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) (this Court "commonly grant[s]" voluntary remand requests). An agency does not need to "confess error or impropriety in order to obtain a voluntary remand" but "the agency ordinarily does at least need to profess intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge." *Limnia*, 857 F.3d at 387.

In deciding a motion for remand, this Court "considers whether remand would unduly prejudice the non-moving party." *Id.* In considering whether to vacate an agency's action, courts generally consider "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences" of vacatur. *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (citation and quotation marks omitted).

ARGUMENT

I. This Court Should Grant EPA's Motion for Voluntary Remand Without Vacatur.

Remanding the Final Rule without vacatur to EPA is appropriate and will promote judicial economy. Remand will allow EPA to expeditiously proceed with its plan to reconsider the issue of fenceline monitoring and to more fully address how it considered fenceline monitoring a "development" under Clean Air Act section 112(d)(6), 42 U.S.C. § 7412(d)(6). *See* Decl. of Penny Lassiter, Ex. 1 ¶ 10. As part of EPA's reconsideration process, it will propose a new rule on this issue, which will allow the public to comment on EPA's proposed decision. *See* Decl. of Penny Lassiter, Ex. 1 ¶ 9.

Fenceline monitoring is the only aspect of the Final Rule that Petitioners challenge. *See, e.g.*, Pet'rs' Br. 38-50. Petitioners argue that, under 42 U.S.C. § 7412(d)(6), EPA should have considered fenceline monitoring a new "development" and analyzed whether fenceline monitoring is a "necessary" revision to the emission standard for this source category. *Id*. In fact, EPA did consider fenceline monitoring a "development" and whether fenceline monitoring was "necessary" under Section 7412(d)(6), but EPA acknowledges its explanation of its

assessment could have been clearer and better developed. EPA's decision to reconsider the issue of fenceline monitoring was informed, in part, by Petitioners' challenges. EPA's reconsideration of the issue on remand could fully address and resolve Petitioners' concerns or at least narrow the issues in dispute.

EPA's request for remand without vacatur to reconsider the issue of fenceline monitoring will not prejudice any of the parties because neither oppose this motion. Further, granting this motion will benefit the parties and the Court because any challenge to the subsequent final rule that results from EPA's reconsideration rulemaking process will be based on a more thorough administrative record on the topic of fenceline monitoring.

II. Remand Without Vacatur Is Appropriate.

Here, remand without vacatur is appropriate because EPA is not confessing any error, and no party opposes to EPA's request to remand without vacatur. Under *Allied–Signal*, "[t]he decision whether to vacate depends on the 'seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." 988

F.2d at 150–51. Where there has been no adjudication of the merits or confession of error, the first *Allied Signal* factor is not met. *See Friends of Animals v. Williams*, 628 F.Supp. 2d 71, 81-82 (D.D.C. 2022) (expressing doubt that courts have authority to vacate a rule without first having found it invalid on the merits independently and holding that regardless that the first *Allied Signal* factor cannot be met absent a merits determination). The second *Allied Signal* factor is also not met as the remand will leave the existing rule in place and not have any disruptive consequences.

CONCLUSION

For all these reasons, the Court should grant EPA's request for remand without vacatur.

Dated: February 16, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of D.C. Circuit Rule 27(c) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) this document contains 1,571 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ *Jeffrey Hammons*
JEFFREY HAMMONS

Counsel for Respondents

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Hoosier Environmental Council, et al., *Petitioners*, v. United States Environmental Protection Agency, et al., *Respondents*.	No. 23-1119

DECLARATION OF PENNY LASSITER

1. I, Penny E. Lassiter, under penalty of perjury, affirm and declare that the following statements are true and correct to the best of my knowledge and belief, and are based on my personal knowledge or on information contained in the records of the United States Environmental Protection Agency ("EPA"), or supplied to me by EPA employees under my supervision.

2. I am the Director of the Sector Policies and Programs Division ("SPPD") within the Office of Air Quality Planning and Standards ("OAQPS"), Office of Air and Radiation ("OAR") at EPA. I have held this position in a permanent capacity since May 26, 2019.

3. SPPD is the division within OAQPS that has responsibility for developing, reviewing, and revising, as required and appropriate, regulations under Section 112 of the Clean Air Act ("CAA"), 42 U.S.C. § 7412, the National Emission Standards for Hazardous Air Pollutants ("NESHAP") program.

4. This declaration is filed in support of EPA's Motion for Voluntary Remand Without Vacatur.

5. On February 23, 2022, the Federal Register published EPA's proposed rule, "Review of Standards of Performance for Lead Acid Battery Manufacturing Plants and National Emission Standards for Hazardous Air Pollutants for Lead Acid Battery Manufacturing Area Sources Technology Review," at 87 Fed. Reg. 10,134.

6. On April 25, 2022, Petitioners and other environmental groups submitted comments on the proposed rule, including comments urging EPA to adopt fenceline monitoring and a corrective action level in the final rule. EPA provided a response to those comments in its Response to Comments document that accompanied the final rule.

7. On February 23, 2023, the Federal Register published EPA's rule, "New Source Performance Standards Review for Lead Acid Battery Manufacturing Plants and National Emission Standards for Hazardous Air

Pollutants for Lead Acid Battery Manufacturing Area Sources Technology Review," ("Final Rule") at 88 Fed. Reg. 11,556.

8. On April 24, 2023, Petitioners filed their petition for review challenging the Final Rule.

9. After reviewing Petitioners' opening brief, EPA determined that it wants to reconsider its decision on fenceline monitoring for this source category. EPA anticipates that it will propose a new rule on the issue of fenceline monitoring, solicit public comment, and finalize action on fenceline monitoring, including a response to comments. The reconsideration process will be limited in scope to the issue of fenceline monitoring for lead acid battery manufacturing area sources only.

10. While EPA did consider revising the standards to require fenceline monitoring under Clean Air Act section 112(d)(6), 42 U.S.C. § 7412(d)(6), the Agency concluded that fenceline monitoring was not appropriate. EPA wants to reconsider the issue and provide another opportunity for comment on this subject. EPA can then provide a full explanation of its final decision on this issue.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 13th day of February, 2024.

PENNY LASSITER

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Date: 2024.02.13 18:16:53 -05'00'

Penny Lassiter