California Communities Against Toxics v. Environmental Protection Agency: Declining to Review and the Impact of Source Reclassification for Hazardous Air Pollutants

I. OVERVIEW

For decades, federal courts have been puzzled by the legality of guidance documents from administrative agencies, which have profound effects on industry and the general public, and varying court decisions often leave interested parties with more questions than answers. Here, the court is tackling the enforceability of an Environmental Protection Agency (EPA) statutory interpretation that preempts an earlier interpretation of the Clean Air Act (CAA) and takes a drastically different approach in the regulation of hazardous air pollutants (HAPs). The new interpretation would allow certain regulated polluters to avoid stricter emission standards and other requirements.[1]

A group of environmental organizations, along with the state of California, filed suit against the EPA seeking judicial review of the new interpretation, known as the Wehrum Memo.[2] They argued that (1) the memo is a final agency action and thus ripe for judicial review; (2) the memo is a legislative rule that violates the Administrative Procedure Act (APA) because it failed to provide notice and comment; and (3) the

1. William L. Wehrum, Assistant Adm'r, U.S. Envtl. Prot. Agency, Memorandum on Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act (Jan. 25, 2018) [hereinafter Wehrun Memo], https://www.epa.gov/sites/production/files/2018-02/documents/reclassification_of_major_sources_as_area_sources_under_section_112_of_the_clean_air_act.pdf.

2. *See* Cal. Cmtys. Against Toxics v. EPA, 934 F.3d 627, 631 (D.C. Cir. 2019).

interpretation of section 112 was incorrect regardless of whether it was an interpretative or legislative rule.[3]

The U.S. Court of Appeals for the D.C. Circuit *held* that the petitions lacked subject matter jurisdiction under the CAA because the Wehrum Memo was not a final agency action subject to judicial review.[4] The court declined to determine whether the Wehrum Memo was a legislative or interpretative rule, or whether it was a correct interpretation of section 112 of the CAA.[5] As a result, the Wehrum Memo remains the interpretation used by the EPA and will not be reviewed by a court until it has been enforced on an affected party.[6]

II. BACKGROUND

Since the passage of the Administrative Procedure Act (APA) in 1946 and the expansion of the administrative state, challenges to agency action are numerous and jurisprudence continues to evolve. As Judge Wilkins stated in the noted case, the area of law surrounding the nature of agency action is an "important continuing project" and courts are continually attempting to define aspects of this "gnarled field of jurisprudence."[7]

At issue in the noted case, under a new presidential administration in 2018, the EPA took an opposite approach to the reclassification of major sources as area sources under the CAA. EPA Assistant Administrator William Wehrum issued a memorandum (Wehrum Memo) to all regional air division directors that stated the plain language of the CAA compelled the conclusion that major sources could be reclassified as an area source as soon as the source implemented enforceable emission limits below the statutory threshold.[8] According to the Wehrum Memo, once a major source had been reclassified, it would no longer be subject to the Maximum Achievable Control Technology (MACT) standards or any other major source requirements.[9] The EPA officially withdrew the 1995

3. *Id.* (citing 5 U.S.C. § 553 (West through P.L. 116-112)) (stating that interested parties have the right to comment on proposed legislative rulemaking after notice is published in the Federal Register, but the requirements do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

4. *Id.*

5. *Id.*

6. *Id.* at 640.

7. *Id.* at 641 (quoting Nat'l Mineral Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014)).

8. Wehrun Memo, *supra* note 1.

9. *Id.*

interpretation, and the Wehrum Memo stated that the EPA would publish the new interpretation in the Federal Register for public comments.[10]

Two months after the Wehrum Memo was issued, the petitioners filed an action challenging the legality of the guidance document in the D.C. Circuit.[11] Subsequently, the case was argued before the court on April 1, 2019.[12] After oral arguments, the EPA officially published the "proposed rule" in the Federal Register on July 26, 2019, where it would receive public comments until September 24, 2019, and planned to hold at least one public hearing based on the responses.[13] In the meantime, the D.C. Circuit issued its opinion in favor of the EPA on August 20, 2019.[14] After the court ruling was issued and the public comment period on the proposed rule ended, the EPA reopened the comment period until November 1, 2019, so interested parties would have additional time to review and comment on the proposal.[15]

A. The Finality Analysis for Review of Agency Actions

Under the provisions of the APA, judicial review of an agency action is not available to an interested party until the agency action is final.[16] Judicial review is not available for any "preliminary, procedural, or intermediate agency action."[17] However, the process of determining what is a final agency action is not simple and contains many caveats. The U.S. Supreme Court attempted to clarify the conundrum in *Bennett v. Spear*, stating an agency action is final when it (1) marks the "'consummation' of the agency's decision[-]making process" and (2) determines the rights or obligations of an interested party "from which 'legal consequences will

10. *Id.* at 1-2.

11. Petition for Review at 1-2, *Cal. Cmtys. Against Toxics*, 934 F.3d 627 (No. 18-1085); *see also* Issuance of Guidance Memorandum, Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 83 Fed. Reg. 5543 (Feb. 8, 2018). The EPA published the interpretation outlined in the Wehrum Memo in the Federal Register but did not open the publication to comments, rather stated the guidance document would become effective on February 8, 2018. 83 Fed. Reg. 5543.

12. *Cal. Cmtys. Against Toxics*, 934 F.3d at 627.

13. Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 84 Fed. Reg. 36,304 (proposed on July 26, 2019).

14. *Cal. Cmtys. Against Toxics*, 934 F.3d at 627.

15. Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act (Oct. 2, 2019), https://www.regulations.gov/document?D=EPA-HQ-OAR-2019-0282-0355.

16. S*ee* Nat'l Mineral Ass'n v. McCarthy, 758 F.3d 243, 250 (D.C. Cir. 2014)) (citing 5 U.S.C. § 704 (2012).

17. 5 U.S.C. § 704.

flow.'"[18] The agency action must have direct consequences to be considered final and cannot be a mere tentative recommendation from the agency.[19]

At issue in *Bennett* was a biological opinion issued by the Fish and Wildlife Service under the authority of the Endangered Species Act (ESA), which stated that an irrigation project's impact would threaten two species of endangered fish.[20] The Bureau of Reclamation was in charge of the project and agreed to comply with the biological order that identified safe alternatives, including the maintenance of minimum water levels in certain reservoirs where the endangered fish were located.[21] Two irrigation districts in Oregon that received water from the project challenged the biological order for failing to provide sufficient evidence for the order and claimed the agency action to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" because they had a competing interest for the use of the water.[22] After the Court determined that the districts had standing to sue and the ESA authorized the suit, Justice Antonin Scalia turned to whether the biological opinion was subject to judicial review under the APA.[23] The biological opinion, and the subsequent action by the Bureau, satisfied both prongs of the test mentioned above because it altered the legal regime by supplying prescribed conditions.[24] The agency actions were not advisory but had "direct and appreciable legal consequences" on the petitioners.[25]

In *U.S. Army Corps of Engineers v. Hawkes*, the Court affirmed the two-prong test of *Bennett* and concluded that the Corps' determination that certain wetlands were considered "waters of the United States" and subject to the Clean Water Act was a final agency action that was subject to judicial review.[26] In the review, the Court found that the jurisdictional determination marked the consummation of agency decision making

18. 520 U.S. 154, 177-78 (1997) (citing Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatl., 400 U.S. 62, 71 (1970); Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)); *see also* Franklin v. Massachusetts, 505 U.S. 788, 798 (1992) ("The core question is whether the agency has completed its decision-making process, and whether the result of the process is one that will directly affect the parties.").

19. *See Franklin*, 505 U.S. at 798 (citing Abbott Labs. v. Gardner, 387 U.S. 136, 151 (1967)).

20. *Bennett*, 520 U.S. at 157 (citing 16 U.S.C. § 1531 (West through P.L. 116-112)).

21. *Id.* at 158-89.

22. *Id.* at 159-60 (quoting 5 U.S.C. § 706(2)(A) (West through P.L. 116-112)).

23. *Id.* at 177.

24. *Id.* at 178.

25. *Id.*

26. U.S. Army Corps of Eng'rs v. Hawkes Co., Inc., 136 S. Ct. 1807, 1813 (2016).

because it was made after extensive fact finding and rarely challenged once the permitting process moved forward.[27] Furthermore, the Corps' determination also gave rise to "direct and appreciable legal consequences" because it bound the Corps in future enforcement proceedings and denied the property owner the safe harbor that would arise if the Corps found that the property was not subject to their jurisdiction.[28] Although the jurisdictional determination would not give rise to administrative or criminal proceedings, it warned the property owner that certain penalties could arise if they failed to obtain a permit before undertaking certain actions.[29]

Cases surrounding the finality of guidance documents from administrative agencies often hinge on the substance and enforceability of the document involved. In *Appalachian Power Company v. EPA*, the D.C. Circuit held that an EPA guidance document on requirements imposed on states for operating permit programs under the CAA was a final agency action subject to judicial review.[30] The EPA argued that the guidance document was subject to change, and therefore not final, but the court countered that all laws are subject to change and the potential for a future change would not remove the availability of immediate judicial review.[31] The EPA guidance also satisfied the second prong of the *Bennett* test because it had legal consequences for state agencies administering the CAA programs by imposing an obligation that "commands, it requires, it orders, it dictates."[32] A disclaimer at the end of the guidance document, stating that it was not a final agency action, did not impact the analysis because it was merely boilerplate and has been attached to all EPA guidance documents since 1991.[33] The court also expressed concern that administrative agencies might use guidance and memorandum to interpret broad statutes to shield themselves from judicial review.[34]

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27. *Id.* at 1813-14.

28. *Id.* at 1814 (quoting *Bennett*, 520 U.S. at 178).

29. *Id.* at 1815.

30. 208 F.3d 1015, 1023 (D.C. Cir. 2000); *see also* Nat. Res. Def. Council, Inc. v. EPA, 22 F.3d 1125, 1132-33 (D.C. Cir. 1994) (holding EPA guidance memorandums on governance of state plans for automobile emissions were final agency actions subject to judicial review).

31. *Appalachian Power Co.*, 208 F.3d at 1022.

32. *Id.* at 1023.

33. *Id.* at 1022-23; *see also* Barrick Goldstrike Mines Inc. v. Browner, 215 F.3d 45, 48-49 (D.C. Cir. 2000) (holding that an EPA guidance document on a de minimis exception for chemicals in metal mining was a final agency action subject to judicial review because it imposed obligations on regulated industry).

34. *Appalachian Power Co.*, 208 F.3d at 1020.

In *Natural Resources Defense Council v. EPA*, the D.C. Circuit held that an EPA guidance document qualified as a final agency action, which made it a legislative rule and was, thus, required to undergo the APA notice and comment process.[35] The document was a memorandum from the Director of the Office of Air Quality Planning & Standards that allowed regions not in attainment under the National Ambient Air Quality Standards (NAAQS) ozone standards to choose alternative programs to those required by the statute or avoid fees if the region was in attainment for one substandard and not another after a case-by-case basis determination made by the EPA.[36] The court found that the guidance document was a final agency action because it bound regional directors to an interpretation that changed the legal regime by interpreting a gap left by Congress in the CAA.[37] The finality analysis and the analysis into whether an agency action is a rule are essentially the same, and the court concluded that the guidance was not a policy statement because it had a binding effect on the agency and was a legislative rule, subject to notice and comment, because it was an interpretation not previously authorized by the CAA or prior regulations.[38]

On the other hand, in a holding similar to that of the noted case, the D.C. Circuit in *Sierra Club v. EPA* concluded that a guidance document that pertained to a modification in the agency's understanding on measurements for proposed transportation projects was not final because it was not binding on the EPA or any interested parties.[39] The finality analysis turned on three questions that considered "(1) 'the actual legal effect (or lack thereof) of the agency action in question on regulated entities'; (2) 'the agency's characterization of the guidance'; and (3) 'whether the agency has applied the guidance as if it were binding on regulated parties.'"[40] One of the court's key determinations was that the guidance was merely a recommendation for methodology and the agency

35. 643 F.3d 311, 313 (D.C. Cir. 2011).

36. *Id.* at 317.

37. *Id.* at 320.

38. *Id.* at 321 (quoting Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 226 n.14 (D.C. Cir. 2007)) (first citing Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997); and then citing Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993)).

39. 873 F.3d 946, 948 (D.C. Cir. 2017) (citing 42 U.S.C. § 7607(b)(1) (2019)) (outlining the D.C. Circuit's jurisdiction to review agency actions under the CAA for national ambient air quality standards, hazardous air pollutant emission standards, standards of performance for stationary sources, automobile emission standards, aircraft emission standards, national regulations promulgated, and any final agency action by the EPA).

40. *Id.* at 951 (quoting Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 243 (D.C. Cir. 2014)).

was entitled to consider alternatives, which differentiated it from the guidance in *Appalachian Power Co.*, which was a final agency action because it commanded action.[41] Any consequences of the methodology guidance would arise from its implementation, and not from the substance of the guidance itself.[42]

B. History of Source Classification Under the Clean Air Act

Congress declared in 1970 that the purpose of the CAA was "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[43] Under the CAA, the EPA has the obligation to regulate the emission of HAPs.[44] The regulation of pollution sources under section 112 of the CAA are divided amongst major sources, which include any stationary source that emits more than ten tons per year of any HAP or twenty-five tons per year of any combination of HAPs and area sources, which includes any stationary source that emits HAPs that are not classified as a major source.[45] Major sources are subject to much more stringent emission standards and requirements than area sources.[46]

Since 1995, the EPA had interpreted the provisions of the CAA to imply a "once in, always in" requirement for sources that are designated as major sources, which means they cannot be reclassified as area sources

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41. *Id.* at 952; Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000); *see also* Valero Energy Corp. v. EPA, 927 F.3d 532, 536 (D.C. Cir. 2019) (holding that EPA guidance document on the interpretation of the CAA Renewable Fuel Standards program was not a final agency action because it only presented EPA's position on the law and did not require any action from any party or the agency). *But see* Gen. Elec. Co. v. EPA, 290 F.3d 377, 385 (D.C. Cir. 2002) (holding that EPA guidance document was final agency action because it imposed binding obligations on regulated entities and the agency's administration of statute).

42. *Sierra Club*, 873 F.3d at 952-53. The court also concluded that the fact that the guidance was issued with notice and comment did not make it a legislative rule because the EPA publishes a numerous guidance documents online and if all guidance documents that were published for comment were deemed legislative rules, it would discourage the EPA from seeking public input. *Id.*

43. 42 U.S.C. § 7401(b)(1) (2018); *see also id.* § 7401(b)(4) (stating that an additional purpose was "to encourage and assist the development and operation of regional air pollution prevention and control programs").

44. *Id.* § 7412.

45. *Id.* § 7412(a)(1-2); *see also id.* § 7411(a)(3) (defining "stationary source" as any building, structure, facility, or installation that emits or may emit any air pollutant).

46. *See* Cal. Cmtys. Against Toxics v. EPA, 934 F.3d 627, 632 (D.C. Cir. 2019) (citing 42 U.S.C. § 7412(d)); *see also* 42 U.S.C. § 7412(d)(3) (stating major sources are required to implement MACT for emission limitations and cannot be less stringent than the emission control achieved by the best controlled similar source); U.S. Sugar Corp. v. EPA, 830 F.3d 579, 595 (D.C. Cir. 2016) (stating area sources are only required to implement General Available Control Technology (GACT), which has no standards and no duty to consider a more stringent standard).

after the initial designation.[47] The EPA believed that this interpretation was the most logical conclusion from the "language and structure of the statute."[48] As stated above, the EPA reversed course in 2018 and stated in the Wehrum Memo that the plain language of the CAA compelled a different conclusion: that major sources could be reclassified as area sources once enforceable emission limits beyond the threshold were implemented.[49]

III. COURT'S DECISION

A considerable amount of the majority opinion in *California Communities Against Toxics v. EPA* is devoted to the Title V permitting process and how it works in conjunction with section 112, noting that the HAPs emissions set forth in section 112 "are of little use if the sources do not comply with them."[50] The majority proceeds to ground their decision that the Wehrum Memo is not subject to review under the judicial review provisions of the Title V permitting process, which impose more stringent standards to when review is available than the general judicial review provisions of the CAA.[51]

First, Judge Wilkins applied the finality test and criticized previous D.C. Circuit opinions that combined the test with the "separate analysis of whether an agency action is a legislative rule."[52] The court outlined the two-prong finality test put forth by the U.S. Supreme Court in *Bennett* and stated that the most important factor is whether the action has an actual legal effect and whether it would give rise to "direct and appreciable legal consequences."[53] The purpose of the finality test, as distinct from the legislative rule test, is critical because it may be the only form of judicial review available to some parties who are not involved in the enforcement

47. John S. Seitz, Director, U.S. Envtl. Prot. Agency, Memorandum on "Potential to Emit for MACT Standards—Guidance on Timing Issues," (May 16, 1995), https://www.epa.gov/sites/production/files/2015-08/documents/pteguid.pdf ("EPA is today clarifying that facilities that are major sources for HAPs on the 'first compliance date' are required to comply *permanently* with the MACT standard to ensure that maximum achievable reductions in toxic emissions are achieved and maintained." (emphasis added)).

48. *Id.*

49. Wehrum Memo, *supra* note 1.

50. *Cal. Cmtys. Against Toxics*, 934 F.3d at 633-35 (citing 42 U.S.C. § 7661 (2018)).

51. *Id.* at 633-34; 42 U.S.C. §§ 7607(b)(1), 7661d(c).

52. *Cal. Cmtys. Against Toxics*, 934 F.3d at 634-35 ("[I]f a rule is final it is not necessarily legislative, and therefore the finality analysis is distinct from the test for whether an agency action is a legislative rule.").

53. *Id.* at 635 (first citing U.S. Army Corps of Eng'rs v. Hawkes Co., Inc., 136 S. Ct. 1807, 1813 (2016)); then citing Bennett v. Spear, 520 U.S. 154, 177-78 (1997); and then citing Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 252 (D.C. Cir. 2014)).

actions or to obtain review of an interpretative rule that has final binding effects.[54]

The court unequivocally concluded that the Wehrum Memo satisfied the first prong of the *Bennett* test because, based on the plain language of the guidance document, it was the EPA's final legal conclusion, and it was further supported by the EPA's publication of the interpretation in the Federal Register a month after the Wehrum Memo was issued.[55]

As for the second prong of the *Bennett* test, the court held "that the Wehrum Memo does not have a single direct and appreciable legal consequence" and was therefore not a final action.[56] The court relied on the Supreme Court's instruction in *Hawkes* to determine whether the Wehrum Memo had any legal consequences, and that determination must be based on the specific congressional statutes that govern the action.[57] As a result, the majority specifically viewed the Wehrum Memo through the lens of the Title V permitting process and determined that it had no legal authority because state agencies face no penalty if they do not comply and regulated sources cannot rely on it.[58] Therefore, when viewed exclusively through the Title V process, the Wehrum Memo was not subject to judicial review under 40 U.S.C. § 7661d because it had not been applied to a particular scenario, where a state or interested party could petition its validity.[59]

The majority attempted to distinguish its holding from that of *Appalachian Power* where the EPA guidance document related to the Title V permitting process was deemed a final agency action subject to judicial review.[60] Unlike in the noted case, the D.C. Circuit established subject matter jurisdiction in *Appalachian Power* under the general provisions of 42 U.S.C. § 7607, which applies to all national applicable agency actions, rather than the judicial review provision of permitting decision outlined in Title V.[61] The court created the disparity between the cases by stating that

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54. *Cal. Cmtys. Against Toxics*, 934 F.3d at 635-36.
55. *Id.* at 636.
56. *Id.* at 637.
57. *Id.* (quoting *Hawkes Co., Inc.*, 136 S. Ct. at 1813).
58. *Id.* at 637-38.
59. *Id.* at 638 (citing 42 U.S.C. §§ 7661d(b)(2), 7661d(c) (2018)).
60. *Id.*; Nat'l Envtl Dev. Ass'n Clean Air Project v. EPA, 752 F.3d 999 (D.C. Cir. 2014) (holding EPA guidance document that stated agency would continue to use its interpretation of a single stationary source in the permitting process was a final agency action subject to judicial review because it provided binding guidance to agency officials on their handling of the permitting process); Appalachian Power Co. v. EPA, 208 F.3d 1015, 1021 (D.C. Cir. 2000).
61. *Cal. Cmtys. Against Toxics*, 934 F.3d at 639; *Appalachian Power Co.*, 208 F.3d at 1019-20 (citing 42 U.S.C. § 7607(b)(1)).

the Wehrum Memo does not require action from any party, whereas the guidance in *Appalachian Power* commanded action, and that the Wehrum Memo would be subject to judicial review through the permitting process, whereas that option would not have been available in *Appalachian Power*.[62]

The dissent, written by Circuit Judge Rogers, stated that the Wehrum Memo was a final agency action because "[i]t commands, orders, and dictates without caveats or disclaimers about the binding nature of its statutory interpretation."[63] The dissent argued the Wehrum Memo granted mandatory authority over state permitting agencies because it provided strict details to follow, and states that do not follow the EPA's "unequivocal interpretation" would be subject to penalties, which is opposite of the voluntary nature described by the majority.[64] The Wehrum Memo changed the legal and regulatory regime concerning major sources under the CAA, which the dissent argued was a clear legal consequence, satisfying the second prong of the *Bennett* finality test.[65] The dissent pointed out that the finality test is not that narrow, and legal consequences have already followed because two major sources have been reclassified in Indiana and numerous others are eligible to reclassify under the new interpretation.[66]

IV. ANALYSIS

While the majority opinion grounded its holding in a particular section of the CAA, it failed to adequately represent the overall purpose of the statute and added another chapter to the confusion surrounding the availability of judicial review for guidance documents. The basic mandate of the CAA is to protect the nation's air quality and resources. Therefore, a nationwide change in interpretation that allows certain sources to forego certain emission limitations and requirements should have been subject to

62. *Cal. Cmtys. Against Toxics*, 934 F.3d at 640.

63. *Id.* at 643 (Rogers, J., dissenting) The dissent used the phrase "reads like a ukase," from the *Appalachian Power Co. v. EPA* opinion, to describe the mandate of the Wehrum memo to agency officials. *Id.*

64. *Id.* at 643-44.

65. *Id.* at 644 (first citing U.S. Army Corps of Eng'rs v. Hawkes Co., Inc., 136 S. Ct. 1807, 1814-15 (2016)); then citing Nat. Res. Def. Council v. EPA, 643 F.3d 311, 319-20 (D.C. Cir. 2011); then citing Indep. Equip. Dealers Ass'n v. EPA, 372 F.3d 420, 427 (D.C. Cir. 2004)); and then citing *Appalachian Power Co.,* 208 F.3d at 1020-21).

66. *Cal. Cmtys. Against Toxics*, 934 F.3d at 645 (Rogers, J., dissenting) ("Judicial review of national standards at the start of the regulatory process can ensure that Congress's intent is being carried out before States and the regulated community must take costly implementing actions, while later enforcement review can ensure the compliance with terms and conditions in individual permits.").

pre-enforcement judicial review to determine if it fit within the framework of the CAA. Postponing judicial review until a decision has been made in the permitting process forces all interested parties—including regulated industry and the environmental community—to undertake considerable resources with the uncertainty that the new interpretation might later be overruled. Dismissing the case for lack of subject-matter jurisdiction only kicks the proverbial can down the road to a future date.

First and foremost, the majority misinterpreted the overall purpose of judicial review under the structure of the CAA. The majority pigeonholed their jurisdiction to the judicial review provisions of the Title V permitting process, rather than asserting jurisdiction under the general judicial review provision of the CAA.[67] Section 7607(b) states that judicial review is available for any final agency action taken by the EPA, any national applicable regulation that was promulgated by the EPA, and many other agency actions.[68] Whereas section 7661d allows judicial review to a permitting decision only after the EPA has either issued or denied the permit.[69] On its face, and by its plain language, the Wehrum Memo is a national applicable regulation because it impacts major sources of HAPs across the country and was a mandate issued to all EPA regional directors to follow in future permitting decisions. The Wehrum Memo not only superseded prior guidance to regional directors but compelled directors to send the new interpretation to states in their jurisdiction to follow in permitting decisions. While the Wehrum Memo was not officially categorized as a regulation, it had the effect of regulation as it has already been followed with two major source reclassifications in Indiana.[70]

In prior D.C. Circuit jurisprudence, pre-enforcement judicial review has been used on EPA guidance documents that mark the end of the agency decision-making process and alter the legal regime of the CAA, as both the majority and the dissent noted.[71] The majority attempted to distinguish the Wehrum Memo from prior cases by stating that the prior guidance documents were used to force action on interested parties, and the Wehrum Memo does not require any action. However, the majority failed to recognize that the Wehrum Memo will be used in permitting decisions

67. *Id.* at 640.
68. 42 U.S.C. § 7607(b) (2018).
69. *Id.* § 7661d(c).
70. Wehrun Memo, *supra* note 1; Issuance of Guidance Memorandum, "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act," 83 Fed. Reg. 5543 (Feb. 8, 2018) (to be codified at 40 C.F.R. pt. 63); *Cal. Cmtys. Against Toxics*, 934 F.3d at 645 (Rogers, J., dissenting).
71. *Cal. Cmtys. Against Toxics*, 934 F.3d at 639-40, 642.

before and throughout the process.[72] The dissent correctly pointed out that the Wehrum Memo binds enforcement officials on both the federal and state levels to take a certain action in their permitting decisions.[73] It represents a settled agency position that alters the legal regime with potential consequences on state permitting agencies.[74] It binds agency officials to an interpretation that is legal in nature and not fact-specific, unlike the review of permitting decisions under section 7661d that would be based on individualized facts.[75] A review of individualized facts on monitoring methodology and periodic reviews was the basis for the holdings in *Valero Energy Co.* and *Sierra Club*, which is quite different than a guidance document that will impact permitting decisions of major sources of HAPs nationwide.[76]

Furthermore, the D.C. Circuit stated in *Natural Resource Defense Council* that Congress "emphatically declared a preference for immediate review" of EPA rulemaking under the CAA.[77] As discussed, the Wehrum Memo alters the legal regime with a new interpretation of the CAA and challenges to the interpretation that are legal in nature are presumptively reviewable.[78]

Looking beyond the confusion of guidance documents and judicial review, the Wehrum Memo could possibly have the result of increasing emissions of HAPs because major sources that were previously required to obtain MACT and undergo more stringent oversight requirements than area sources could increase emissions by removing certain limitations after being reclassified. Once reclassified as an area source, they would only be subject to General Available Control Technology (GACT), which impose only loose standards that vary based on the source's economic condition.[79]

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72. *Id.* at 640; *see* also National Environmental Developmental Ass'n's Clean Air Project v. EPA, 752 F.3d 999, 1007 (D.C. Cir. 2014) ("[T]he finality and legal consequences of the *Summit* Directive were made plain when the EPA relied on the directive in a permit decision . . . .").

73. *Cal. Cmtys. Against Toxics*, 934 F.3d at 643 (Rogers, J., dissenting).

74. Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

75. Nat. Res. Def. Council v. EPA, 643 F.3d 311, 320 (D.C. Cir. 2011).

76. Valero Energy Corp. v. EPA, 927 F.3d 532, 536 (D.C. Cir. 2019); Sierra Club v. EPA, 873 F.3d 946, 948 (D.C. Cir. 2017).

77. *See Nat. Res. Def. Council,* 643 F.3d at 320 (quoting Cement Kiln Recycling Coal., 493 F.3d 207 215 (D.C. Cir. 2007)).

78. *See Cement Kiln Recycling Coal*., 493 F.3d at 215 ("[A] purely legal claim in the context of a facial challenge is 'presumptively reviewable.'").

79. *See* Cal. Cmtys. Against Toxics v. EPA, 934 F.3d 627, 633 n.1 (D.C. Cir. 2019). As we have observed, the Act does not provide any parameters for setting GACT standards, but its legislative history describes GACT as "'methods . . . [that] are commercially available and appropriate for application . . . considering economic impacts and the technical capabilities of firms

On the other hand, some legal commentators believe that the Wehrum Memo will be more beneficial to the environment because the previous interpretation stalled innovation. They argue that it was a disincentive to create new emission control technologies, because there was no chance that a major source could ever be exempt from regulatory burdens.[80] Additionally, commenters and the EPA believe that the new interpretation will encourage major sources to reduce emissions of HAPs so that they can be reclassified and forego the regulatory burdens, which would be beneficial for the environment.[81]

The Wehrum Memo presents a question purely legal in nature because it is a gap left open by Congress in the CAA, and the EPA's statutory interpretation is subject to a reasonableness determination by the court.[82] Based on the legality of the question and the nationwide applicability of the Wehrum Memo, the D.C. Circuit had jurisdiction to review the guidance document under the general judicial review provisions of the CAA, rather than confining their review to Title V.

V. CONCLUSION

The D.C. Circuit declined to review an EPA guidance document altering the agency's interpretation of the reclassification of sources for hazardous air pollutants under the CAA.[83] However, the majority misinterpreted the structure of the CAA to judicial review jurisdiction by confining their review of a nationwide guidance document to the individualized permitting process. Under the general provisions of the CAA, judicial review is available to any final agency action and any nationally applicable regulation. Here, the Wehrum Memo alters the legal regime and binds agency officials to an interpretation that must be applied in permitting decisions nationwide.[84] To delay judicial review until a permitting decision has been made goes against the CAA's emphasis on

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to operate and maintain the emissions control systems.'" *Id.* (citing U.S. Sugar Corps v. EPA, 830 F.3d 579, 595 (D.C. Cir. 2016)).

80. Ed Roggenkamp, *EPA Revises Guidance Allowing Reclassification of Major Sources of Hazardous Air Pollutants as Area Sources Under the Clean Air Act*, SCHIFF HARDIN—ENERGY & ENVT'L L. ADVISOR (Jan. 29, 2018), https://www.energyenvironmentallawadviser.com/2018/01/epa-revises-guidance-allowing-reclassification-of-major-sources-of-hazardous-air-pollutants-as-area-sources-under-the-clean-air-act/.

81. *Id.*

82. *See* Chevron, U.S.A. v. NRDC, Inc., 467 U.S. 837, 842-44 (1984).

83. *Cal. Cmtys. Against Toxics*, 934 F.3d at 640.

84. *See* 42 U.S.C. § 7607(b)(1) (2018).

pre-enforcement review[85] and has the potential to have negative consequences on the regulated industry, and on agency officials who make determinations based on the new interpretation. Also, the EPA's interpretation in the guidance document was a gap left open in the CAA, which is subject to a reasonableness determination.[86]

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85. *See* Nat. Res. Def. Council v. EPA, 643 F.3d 311, 320 (D.C. Cir. 2011) (quoting Cement Kiln Recycling Coal., 493 F.3d 207, 215 (D.C. Cir. 2007)).

86. *Chevron, U.S.A.*, 467 U.S. at 843-44.

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