No. 09-495

In the Supreme Court of the United States

AMERICAN CHEMISTRY COUNCIL, ET AL.,
PETITIONERS

v.

SIERRA CLUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record

IGNACIA S. MORENO
Assistant Attorney General

DANIEL R. DERTKE
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

SCOTT FULTON
General Counsel

SHEILA IGOE
Attorney
Environmental Protection Agency
Washington, D.C. 20460

QUESTION PRESENTED

Whether a petitioner may challenge a Clean Air Act regulation after expiration of the Act's 60-day time period for judicial review, 42 U.S.C. 7607(b)(1) (Supp. I 2007), on the ground that the regulatory context of the regulation has changed sufficiently to alter the stakes for judicial review.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statute and regulations:

Regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 09-495

AMERICAN CHEMISTRY COUNCIL, ET AL.,
PETITIONERS

v.

SIERRA CLUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 551 F.3d 1019.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2008. Petitions for rehearing were denied on July 30, 2009 (Pet. App. 22a-23a, 24a-25a). The petition for a writ of certiorari was filed on October 22, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Environmental Protection Agency (EPA) regulates the emission of hazardous pollutants into the air

through National Emission Standards for Hazardous Air Pollutants (NESHAPs), which are promulgated under Section 112 of the Clean Air Act (CAA), 42 U.S.C. 7412. Section 112 lists numerous "hazardous air pollutants," 42 U.S.C. 7412(b)(1), and it authorizes EPA to add to the list other pollutants that "present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects," 42 U.S.C. 7412(b)(2). The CAA requires EPA to enumerate "all categories and subcategories" of sources of the listed pollutants and then to revise that list periodically. 42 U.S.C. 7412(c)(1).

Based on the list of pollutants and the list of categories and subcategories of sources that emit them, EPA must "establish[] emission standards" for each source category and subcategory. 42 U.S.C. 7412(d)(1). For major sources, those technology-based standards, known as maximum achievable control technology (MACT) standards, must

> require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section * * * that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures, processes, methods, systems or techniques.

42 U.S.C. 7412(d)(2). Under the CAA, MACT standards for new major sources may permit no greater emissions than those released "in practice by the best controlled similar source," while MACT standards for existing major sources in large categories and subcategories must

allow for release of no greater emissions than the average of the "best performing 12 percent of the existing sources." 42 U.S.C. 7412(d)(3). This provision is commonly called the "MACT floor."

The CAA provides a mechanism for judicial review of emissions standards and other actions taken by EPA to implement the statute. 42 U.S.C. 7607(b) (Supp. I 2007). The CAA states that a "petition for review of action of the [EPA] in promulgating * * * any emission standard or requirement under [Section 112] * * * may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. 7607(b)(1) (Supp. I 2007). A petition for review

> shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

Ibid.

2. In March 1994, EPA adopted a set of "General Provisions" that, under the terms of the regulation, need not be repeated in every separate emission standard. See 59 Fed. Reg. 12,408 (1994 Rule). Instead, EPA specifies in its category- and subcategory-specific emissions standards which of these General Provisions "is or is not included in such relevant standard." 40 C.F.R. 63.1(a)(4).

This case involves one of these General Provisions. The relevant General Provision states that, during periods of startup, shutdown, and malfunction (SSM), covered sources (*i.e.*, sources subject to emissions standards in which EPA has incorporated this General Provision)

are exempt from the category-specific emissions limitations that apply during normal operating conditions. 40 C.F.R. 63.6(f)(1) and (h)(1). No party challenged the SSM exemption within 60 days after it was published in the *Federal Register*.

A separate, but related, General Provision also established in 1994 requires sources at all times to operate "in a manner consistent with safety and good air pollution control practices for minimizing emissions." 40 C.F.R. 63.6(e)(1)(i). This duty to minimize emissions applies during normal operating conditions as well as during SSM events, and it requires the source to reduce its emissions "to the greatest extent which is consistent with safety and good air pollution control practices." *Ibid.* However, this "general duty to minimize emissions during a period of startup, shutdown, or malfunction does not require the owner or operator to achieve emission levels that would be required by the applicable standard at other times." *Ibid.*

The General Provisions also require each source to develop a plan that "describes, in detail, procedures for operating and maintaining the source during periods of startup, shutdown, and malfunction; and a program of corrective action for malfunctioning process, air pollution control, and monitoring equipment used to comply with the relevant standard." 40 C.F.R. 63.6(e)(3)(i). Sources must maintain current SSM plans and make them available for inspection by the permitting authority, and the permitting authority may request a copy of the SSM plan at any time. 40 C.F.R. 63.6(e)(3)(v). Sources may periodically revise their SSM plans, and the permitting authority may order revisions. 40 C.F.R. 63.6(e)(3)(vii). Sources must also report any malfunction and keep records of actions taken to mini-

mize emissions when malfunctions occur. Sources must also report any actions taken to minimize emissions during startup and shutdown if the source's emissions exceed the standard that would apply during normal operations. 40 C.F.R. 63.6(e)(3)(iii) and (iv); see 40 C.F.R. 63.10(b)(2)(iv) and (v), 63.10(d)(5)(i) and (ii).

3. EPA subsequently amended some of the SSM-related rules, but it did not amend the SSM exemption itself.

Title V of the Clean Air Act requires sources to have permits embodying the relevant emissions limitations. 42 U.S.C. 7661a(a). As originally promulgated in 1994, the General Provisions required that a source's SSM plan be "incorporated by reference into the source's title V permit." 40 C.F.R. 63.6(e)(3)(i) (1994). At the time of promulgation, industry groups (but not environmental groups) challenged this provision of the 1994 rules, arguing, *inter alia*, that the requirement to incorporate the SSM plan into the source's Title V permit could require a permit revision any time the SSM plan was revised. Because EPA agreed that such a result would be unduly burdensome, EPA amended the General Provisions in 2002 to remove the requirement that the SSM plan be incorporated into the source's Title V permit. 67 Fed. Reg. 16,587. Nonetheless, sources remained obligated to develop an SSM plan and then operate in accordance with it. *Ibid.* At the same time, EPA also removed the requirement that sources routinely submit their SSM plans to the permitting authority, and it required permitting authorities to obtain an SSM plan and make it publicly available only if asked to do so by a member of the public. *Id.* at 16,600; see 66 Fed. Reg. 16,326 (2001) (proposing rule change). In 2003, EPA further modified the rules to specify that any request by a member of the pub-

lic that EPA or a permitting authority obtain a copy of a source's SSM plan (in order to make it publicly available) must be "specific and reasonable." 68 Fed. Reg. 32,591.

In 2006, EPA rescinded the requirement that sources follow their SSM plans during SSM events on the ground that this would "allow sources flexibility to address emissions during periods of SSM." 71 Fed. Reg. 20,447. The agency also rescinded the requirement that EPA or the permitting authority obtain a copy of the SSM plan after a request from the public, although it stated its expectation that most permitting authorities would continue to do so voluntarily upon "reasonable" request. *Id.* at 20,451. In the same rulemaking action, EPA noted that some commenters had suggested eliminating the SSM exemption altogether, but it explained that this exemption had been in place since 1994 and that these comments were "outside of the scope of this rulemaking." *Id.* at 20,449.

Petitions for review challenging these various post-1994 rule changes (and an additional denial of reconsideration in 2007, 72 Fed. Reg. 19,385) were filed by various environmental groups (collectively Sierra Club). Those groups are the private respondents in this Court. Those petitions for review were consolidated by the court of appeals.

4. Although Sierra Club raised subsidiary challenges to the changes EPA made between 2002 and 2006 to the SSM plan rules, its principal challenge in the court of appeals was to the SSM exemption itself. Sierra Club argued that the text of Section 112 does not permit such an exemption. The court of appeals granted the petitions for review and vacated the SSM exemption. Pet. App. 1a-21a.

a. Although the petitions for review were filed more than 60 days after the SSM exemption was promulgated in 1994, the court of appeals held that the petitions were timely. Pet. App. 8a-13a. The court noted that under D.C. Circuit precedent, an agency can "reopen" an unchanged rule—and thus create a new window for judicial review of it—if the agency puts the rule out for comment, offers a renewed justification for it, and then responds to comments when "promulgating the regulation in its final form." *Id.* at 8a (quoting *American Iron & Steel Inst.* v. *EPA*, 886 F.2d 390, 397 (1989), cert. denied, 497 U.S. 1003 (1990)). The court acknowledged, however, that those circumstances were not present in this case because EPA had stated during the 2006 rulemaking that comments on the propriety of the SSM exemption were beyond the scope of the proceeding. *Id.* at 9a (citing 71 Fed. Reg. at 20,449). "Such agency conduct," the court of appeals recognized, "is not tantamount to an *actual* reopening." *Ibid.*

The court of appeals held, however, that EPA had "constructively reopen[ed]" the SSM exemption to judicial review when the agency altered "the regulatory context for its SSM exemption by stripping out virtually all of the SSM plan requirements that it created to contain that exemption." Pet. App. 9a (internal quotation marks omitted). The court saw these actions as effectively leaving only the "general duty" to minimize emissions, 40 C.F.R. 63.6(e)(1)(i), in place during SSM events. Pet. App. 10a-11a. The court explained that from "the perspective of environmental petitioners' interests and allocation of resources the general duty 'may not have been worth challenging in [1994], but the [revised] regulations gave [that duty] a new significance.'" *Id.* at 11a (quoting *Kennecott Utah Copper Corp.* v. *Department of the Inte-*

rior, 88 F.3d 1191, 1227 (D.C. Cir. 1996). The court of appeals concluded that the post-1994 modifications to the regulatory framework "changed the calculus for petitioners in seeking judicial review, and thereby constructively reopened consideration of the exemption from section 112 emission standards during SSM events." *Id.* at 12a-13a (citation omitted).

b. On the merits, the court of appeals found that CAA Sections 112 and 302(k) require not only continuous emission standards, but emission standards that are continuously in compliance with CAA Section 112(d)'s minimum levels of stringency. Pet. App. 15a. The court concluded that because the general duty to minimize emissions is the only standard that applies during SSM events, and the general duty standing alone does not comply with Section 112(d), "the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously." *Ibid*. The court therefore vacated the exemption and did not reach Sierra Club's other arguments. *Id*. at 17a.

c. Judge Randolph dissented. Pet. App. 18a-21a. He agreed with the panel majority that an agency can reopen a prior regulation, thereby giving interested parties a new 60-day window for seeking judicial review, if the agency "give[s] its regulation new significance by altering other regulations incorporating it by reference." *Id*. at 18a. In the dissenting judge's view, however, "nothing of the sort occurred here." *Ibid*. Judge Randolph concluded that even if EPA's amendments to the regulatory regime had made it more difficult to enforce the general duty to minimize emissions, "that could hardly have amounted to agency 'action' re-promulgating the 1994 regulations." *Id*. at 18a-19a.

ARGUMENT

Although the court of appeals erred in invoking the "constructive reopening" doctrine to find Sierra Club's attack on a 1994 regulation timely, the petition should be denied. This little-used D.C. Circuit doctrine has not posed a significant problem in agency review cases, and there is no division among the circuits concerning its proper application. Moreover, EPA is already taking significant steps—with input from industry and other interested parties—to minimize any disruption that might flow from the court of appeals' decision.

1. Although agency regulations often are not ripe for judicial review until they are applied to specific factual settings, some federal statutes authorize review of particular categories of regulations immediately upon their promulgation. See *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). The CAA provides for review in the D.C. Circuit of various categories of EPA actions, including the promulgation of "any emission standard or requirement." 42 U.S.C. 7607(b)(1) (Supp. I 2007). "Any petition for review under [the CAA] shall be filed within sixty days from the date notice of such promulgation, approval, or action appears" in the *Federal Register*. *Ibid.* In applying the 60-day filing requirement, the D.C. Circuit has held that, even when an agency leaves a preexisting rule in place, the agency may actually reopen the rule to judicial review by seeking comment on the rule, responding to comments, and offering a renewed explanation of the rule. See, *e.g.*, *National Mining Ass'n* v. *Department of the Interior*, 70 F.3d 1345, 1352 (1995) (agency reopens rule when it "undertake[s] a serious, substantive reconsideration" of it). In such situations, the court has concluded that the agency's course of con-

duct should be treated as an effective repromulgation of the rule that triggers a new 60-day review period.

This case involves what the D.C. Circuit has described as "one extension of that rule" of actual reopening. *Kennecott Utah Copper Corp.* v. *Department of the Interior*, 88 F.3d 1191, 1214 (1996) (*Kennecott Copper*). This "extension" "covers a possible circumstance in which an issue might be deemed to have been constructively reopened even though it was not actually reopened." *Ibid.* When an agency does not actually reopen a settled rule, but makes changes to related rules that the court believes "changed the calculus for petitioners in seeking judicial review," the court may deem the agency to have "constructively reopened" the settled rule to judicial review. Pet. App. 12a.

To this point, the D.C. Circuit's rarely-used constructive reopening rule has not posed a substantial problem for the government in agency review cases. We are aware of only two decisions (other than the one at issue here) in which that court found constructive reopening. See *National Ass'n of Mfrs.* v. *Department of the Interior*, 134 F.3d 1095, 1104 (1998); *Kennecott Copper,* 88 F.3d at 1214.[1] In *Kennecott Copper*, the first D.C. Circuit case to discuss "constructive reopening," the court found the doctrine applicable to only one of the several claims at issue. See *id.* at 1214-1215. The court in *Kennecott Copper* also stressed that "the appropriate

[1] In a handful of other cases, the D.C. Circuit considered and rejected, or found it unnecessary to reach, a party's claim that an agency had constructively reopened a rule. See, *e.g.*, *PanAmSat Corp.* v. *FCC,* 198 F.3d 890, 894 (1999) (finding it unnecessary to decide whether constructive reopening had occurred because agency had expressly held question open in earlier order); *Environmental Def.* v. *EPA*, 467 F.3d 1329, 1333-1334 (2006) (finding no constructive reopening).

way in which to challenge a longstanding regulation on the ground that it is 'violative of statute' is ordinarily 'by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition.'" *Id.* at 1214 (quoting *Public Citizen* v. *Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir. 1990), cert. denied, 498 U.S. 992 (1990)).

There is no reason to suppose that the decision below heralds a dramatic expansion of the "constructive reopening" doctrine within the D.C. Circuit. The court of appeals' decision in *NRDC* v. *EPA*, 571 F.3d 1245 (2009), issued after the court's ruling in this case, confirms the limited contours of the D.C. Circuit's "constructive reopening" doctrine. In *NRDC*, the D.C. Circuit interpreted *Kennecott Copper* and the decision at issue here to permit a finding of constructive reopening only when the agency "work[s] * * * a sea change" in the regulatory landscape surrounding an unchanged rule. *Id.* at 1266. Applying that stringent standard, the court found no reopening. See *ibid.*[2]

As we explain below (see pp. 16-18, *infra*), we agree with petitioners that the court of appeals erred in treating as timely Sierra Club's request for review of the SSM exemption that was promulgated in 1994. In endorsing the concept of "constructive reopening," however, the court of appeals invoked a doctrine that has been part of D.C. Circuit case law for nearly 15 years and that has had an insubstantial impact on agency practice during that period. Given the infrequency with which the D.C.

---

[2] Judge Rogers, the author of the court of appeals' opinion in this case, dissented in *NRDC*. 571 F.3d at 1277. She would have found constructive reopening on the facts presented in *NRDC*, and she criticized the majority's approach for being so strict as to "render the constructive reopening precedents nugatory." *Id.* at 1278.

Circuit has found constructive reopening, and its recent decision in *NRDC* confirming that the doctrine applies only in limited circumstances, the Court's intervention is not warranted at this time.[3]

2. Contrary to petitioners' contention (Pet. 17-22), the circuits are not divided on the question presented by this case. No other court of appeals has addressed the question whether the time for seeking review of an agency regulation may be constructively reopened.

In the cases that petitioners cite, the courts of appeals have held that a party may obtain judicial review of even a long-established rule by petitioning the agency to amend or rescind it and then seeking judicial review if that petition is denied. See, *e.g.*, *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997); *Wind River Mining Corp.* v. *United States*, 946 F.2d 710, 716 (9th Cir. 1991); *Legal Envtl. Assistance Found.* v. *EPA*, 118 F.3d 1467, 1472-1473 (11th Cir. 1997). Denial of a petition opens a new period within which "to challenge * * * the agency's constitutional or statutory authority." *Dunn*, 112 F.3d at 1287. The D.C. Circuit likewise recognizes that such a procedure provides the normal route to judicial review of a rule for which the statutory deadline has expired. See

---

[3] In their briefs to the panel, both petitioners and the government contended that no constructive reopening had occurred in this case under the standards set forth in prior D.C. Circuit decisions. After the panel issued its opinion, petitioners (but not the government) filed a petition for rehearing en banc. In that filing, petitioners contended that the panel's application of the "constructive reopening" doctrine conflicted with prior D.C. Circuit decisions. Petitioners did not argue that the court of appeals should reject the concept of constructive reopening altogether. Petitioners have advanced that argument for the first time in this Court.

Kennecott Copper, 88 F.3d at 1214 (describing this as the "ordinar[y]" way of obtaining review).[4]

In holding that constructive reopening provides an additional (though infrequently available) means of securing judicial review of an agency rule, the D.C. Circuit has not departed from the decisions of other courts of appeals, but has simply resolved a question that no other circuit has decided. No other court of appeals has specifically rejected the concept of constructive reopening or held that seeking review of the denial of a petition to rescind is the exclusive means of securing review of an old rule. There is no circuit split.[5]

---

[4] In a decision released after the one at issue here, the D.C. Circuit reiterated that "agency denial of a petition for a new rulemaking which complains of *substantive* infirmities in existing rules *is*, for the most part, judicially reviewable irrespective of time limits dating from the rules' enactment." *American Road & Transp. Builders Ass'n* v. *EPA*, 588 F.3d 1109, 1112 (2009). The court went on to hold, however, that in a CAA case, this procedure could not be used to "raise points that could have been brought to [the court's] attention" when the rule was first promulgated. *Id.* at 1113. That is because the CAA's judicial-review provision specifically addresses challenges filed after the initial 60-day deadline expires, authorizing the court to entertain such challenges only when they are "'based solely on grounds arising after'" the deadline. *Id.* at 1112 (quoting 42 U.S.C. 7607(b)(1) (Supp. I 2007)).

[5] Petitioners' claim (Pet. 21) of an "intra-circuit conflict" is likewise incorrect. In *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654, 666 (1975), the D.C. Circuit recognized that, in cases where new information is alleged to cast doubt on the reasonableness of an existing EPA regulation, allowing judicial review of EPA's "refusal to revise" the agency rule in light of the new information is "considerably more desirable" than permitting "direct review of a new information challenge." The court in that case had no occasion, however, to decide whether and under what circumstances EPA's amendment of related aspects of a regulatory regime might constitute constructive reopening of unchanged portions of a pre-existing rule.

3. Although the question presented in the petition for a writ of certiorari does not encompass any challenge to the court of appeals' holding on the merits (see Pet. i), petitioners contend that the court's vacatur of the challenged SSM exemption will lead to "practical consequences so stark that they warrant review." Pet. 23; see Pet. 22-25. Petitioners greatly overstate the likely impact of the court of appeals' holding.

First, the court of appeals' decision directly applies only to a minority of EPA's Section 112(d) standards. Most of those standards do not simply rely on cross-references to the general rules that were vacated by the court below, but rather include "specific regulatory text that exempts or excuses compliance during SSM events." See Letter from Adam M. Kushner, Director, Office of Civil Enforcement, to counsel, 2, Tbl. 1 and 2 (July 22, 2009) (explaining EPA's view that the decision below applies directly to only 35 of 99 standards) <http://www.epa.gov/compliance/civil/caa/ssm-memo080409.pdf> (Kushner Letter); 74 Fed. Reg. 43,124 (2009) (notifying public of availability of Kushner letter, which "addresses concerns that have been raised regarding the impact of the decision in [this case]"). Those standard-specific SSM exemptions were not before the court below and therefore remain in force. To the extent the court's decision may raise questions about the validity of those standards, "EPA intends to evaluate each of them in light of the court's decision." Kushner Letter 2-3.

Second, with respect to most of the standards that relied on only cross-references to the general SSM exemption, EPA's initial analysis indicates that for "various reasons" the decision below should raise no significant "compliance issues." Kushner Letter 3. For example, some sources use "pollution control equipment [that] is

not affected by SSM events," and some standards impose work practice requirements that can be met during SSM events. In addition, some standards are expressed over such long periods of time (such as an annual rolling average) that deviation from normal emissions levels during SSM events is unlikely to have a material impact on regulated entities' ability to achieve compliance. *Ibid.*

That leaves the minority of the minority of EPA's Section 112(d) standards—*i.e.*, those that rely solely on a cross-reference to the general SSM exemptions and that cover sources for which the lack of such an exemption is likely to have a material impact on regulated parties' ability to satisfy the standards. EPA announced in July 2009 that, in light of the decision below, the agency was "evaluating * * * which Section 112(d) source category standards should be revised, and of these, which should be revised on an expedited basis." Kushner Letter 4. As part of that process, EPA explained that it "intend[ed] to give highest priority to reviewing and revising those Section 112(d) source category standards that may be difficult for sources to meet during an SSM period given the technological limitations of the process involved." *Ibid.*

After receiving comments from industry and other interested parties, EPA recently promulgated Section 112 rules that treat SSM events in a manner consistent with the court of appeals' holding. For example, in issuing a new Section 112(d) standard for chemical manufacturing area sources, EPA "established different standards for [startup and shutdown] periods where appropriate." National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources, 74 Fed. Reg. 56,033 (2009); see also National Emission Standards for Hazardous Air Pollutants for Area Sourc-

es: Asphalt Processing and Asphalt Roofing Manufacturing, 74 Fed. Reg. 63,250-63,251 (2009) (measuring compliance over 24 hours "during periods of startup and shutdown" and over three hours at other times); Pet. App. 14a (court of appeals holds that EPA must apply a Section 112(d) standard at all times "without necessarily continuously applying a single standard").

Finally, EPA has spoken directly to its use of enforcement discretion during the period before it updates remaining emissions standards to address SSM events. EPA has explained that where "a source * * * fails to comply with the applicable Section 112(d) standards during SSM events, EPA will determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during SSM periods." Kushner Letter 3. EPA has also encouraged "sources that anticipate compliance difficulties to contact EPA or the appropriate state regulatory authority" since "EPA or the state may be able to take action to resolve a source's compliance concerns by, for example, issuing an Administrative Order on Consent." *Id.* at 4. To facilitate that process, EPA sought and obtained from the court of appeals a 60-day stay of the issuance of the court's mandate. See EPA Mot. to Stay Mandate, *Sierra Club* v. *EPA*, No. 02-1135 (D.C. Cir. filed Aug. 5, 2009); Order (Sept. 23, 2009) (No. 02-1135) (granting motion). Given that the court of appeals' decision impacts only a minority of EPA's Section 112 standards, and in light of the steps EPA is taking to address these impacts, review by this Court is not warranted.

4. Although this Court's review is unwarranted for the reasons discussed above, the government believes that the court of appeals erred in treating as timely Sierra Club's challenge to the 1994 SSM exemption. Un-

der the CAA's judicial-review provision, a petition for review challenging an "emission standard or requirement" promulgated under Section 112 of the CAA must be filed within 60 days after "the date notice of such * * * action appears" in the *Federal Register*. 42 U.S.C. 7607(b)(1) (Supp. I 2007). In this case, however, the court of appeals reviewed an "action" from 1994 in response to petitions for review filed within 60 days of *Federal Register* notices of separate regulatory "action[s]" taken by EPA between 2002 and 2006.

The CAA's requirement that a petition for review of an EPA regulation must be filed within 60 days after promulgation of *that* regulation is easy to administer and promotes certainty about which agency rules are and are not subject to challenge. Allowing judicial review after that initial 60-day window under the "actual reopening" rule—*i.e.*, when EPA has expressly reconsidered and then effectively readopted a regulation—is unlikely to reduce that certainty to an appreciable degree.

The "constructive reopening" doctrine as applied in this case has some hypothetical potential to cause confusion because the mode of analysis used by the court below is less determinate than the standard for determining whether actual reopening has occurred. Both in a conventional challenge to an EPA rule filed immediately upon its promulgation and in a later challenge filed after an "actual reopening" of the rule, the timeliness of a petition for review turns exclusively on the agency's actions. The constructive reopening rule, by contrast, allows or disallows judicial review depending on the court's assessment of an outside party's reaction to the agency's actions. Thus, in theory, the D.C. Circuit's adoption of the "constructive reopening" doctrine in *Kennecott Copper* might have resulted in litigation and uncertainty as to

the timeliness of various challenges to agency regulations made reviewable by statute.

As we explain, however, those consequences have never in fact occurred. Since the 1996 decision in *Kennecott Copper*, plaintiffs have rarely invoked the "constructive reopening" doctrine, and the D.C. Circuit has even more rarely found that a constructive reopening has been established. Petitioners offer no sound reason to believe that the court will apply the doctrine more expansively in the future, and the D.C. Circuit's subsequent decision in *NRDC* indicates that the court will continue to exercise restraint. See p. 11, *supra*. Because the practical significance of the question presented in the petition for certiorari is slight, and because EPA is taking appropriate steps to minimize any disruption that might be caused by the court of appeals' merits decision, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SCOTT FULTON
General Counsel
SHEILA IGOE
Attorney
Environmental Protection Agency

ELENA KAGAN
Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
DANIEL R. DERTKE
Attorney

JANUARY 2010