No. 17-170

In the Supreme Court of the United States

DTE ENERGY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an enforcement action alleging that projections of emissions increases required the operator of a pollution source to obtain a permit under the Clean Air Act, 42 U.S.C. 7401 *et seq.*, is categorically barred when the operator has completed construction without a permit and emissions have not increased thereafter.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 845 F.3d 735. The opinion of the district court (Pet. App. 57a-61a) is not reported but is available at 2014 WL 12601008. A prior opinion of the court of appeals (Pet. App. 62a-85a) is reported at 711 F.3d 643. A prior opinion of the district court (Pet. App. 86a-99a) is not reported but is available at 2011 WL 3706585.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2017. A petition for rehearing was denied on May 1, 2017 (Pet. App. 48a-49a). The petition for a writ of certiorari was filed on July 31, 2017 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Clean Air Act (CAA or Act), 42 U.S.C. 7401 *et seq.*, was enacted "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." 42 U.S.C. 7401(b)(1). The Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, amended the Act to require, *inter alia*, that a permit must be obtained "before a 'major emitting facility' could be 'constructed'" in particular areas. *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 568 (2007) (quoting 42 U.S.C. 7475(a)).[1] As currently codified, a section entitled "Preconstruction requirements" prescribes a permitting process wherein a source must, *inter alia*, (i) undergo a review (including a public hearing) that addresses factors such as "the air quality impact of such source" and "alternatives thereto," 42 U.S.C. 7475(a)(2); (ii) demonstrate that its emissions "will not cause, or contribute to, air pollution in excess of" various standards, 42 U.S.C. 7475(a)(3); (iii) apply the "best available control technology" to limit air pollutants from the "proposed facility," 42 U.S.C. 7475(a)(4); and (iv) un-

[1] The program described in *Duke Energy* is one of two "generally parallel" programs—"Nonattainment New Source Review" and "Prevention of Significant Deterioration"—that apply to particular areas by pollutant, based on whether those areas are designated as not attaining national ambient air quality standards established by the EPA for the pollutant. Pet. App. 64a n.1. The facilities at issue here are located in an area that is subject to one program for some pollutants and the other program for other pollutants. *Ibid.* Because the differences between the programs "do not affect this case," *ibid.*, this brief will focus on the program described in *Duke Energy.*

dertake "an analysis of any air quality impacts projected for the area as a result of growth associated with such facility," 42 U.S.C. 7475(a)(6).

Shortly after the 1977 amendments were adopted, Congress enacted a technical amendment providing that "[t]he term 'construction' when used in connection with any source or facility, includes the modification (as defined in [42 U.S.C. 7411(a)(4)]) of any source or facility." *Duke Energy Corp.*, 549 U.S. at 568 (citation omitted); see 42 U.S.C. 7479(2)(C). As a result of that provision, "the 'construction' requiring a * * * permit under the statute was made to include (though it was not limited to) a 'modification,' as defined in [the relevant] provisions." *Duke Energy Corp.*, 549 U.S. at 568. Those provisions define "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. 7411(a)(4).

b. Regulations promulgated by the Environmental Protection Agency (EPA) provide that "[n]o new major stationary source or major modification * * * shall begin actual construction without a permit." 40 C.F.R. 52.21(a)(2)(iii). The regulations define the term "[m]ajor modification" to include "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase * * * of a [relevant] regulated * * * pollutant * * * ; and a significant net emissions increase of that pollutant from the major stationary source." 40 C.F.R. 52.21(b)(2)(i) (emphasis omitted).

As the court of appeals explained in its initial opinion in this case, "to determine whether a proposed change

would cause a significant emissions increase, and thus require a permit, an operator must project post-change emissions." Pet. App. 66a. The regulations state that "[a] significant emissions increase * * * is projected to occur if the sum of the difference between the projected actual emissions" and past or "baseline actual emissions" exceeds a regulatory threshold. 40 C.F.R. 52.21(a)(2)(iv)(*c*); see 40 C.F.R. 52.21(b)(3)(i) (defining "[n]et emissions increase" in part by reference to 40 C.F.R. 52.21(a)(2)(iv)) (emphasis omitted). To isolate the increases attributable to the new construction (*i.e.*, to distinguish those increases from increases attributable to other factors), certain projected emissions increases may be excluded from the calculation under what is known as the "demand growth" exclusion. 40 C.F.R. 52.21(b)(41)(ii)(*c*); see Pet. App. 66a-67a, 69a.

Although the regulations include certain reporting and recordkeeping requirements, they do not require a source that concludes that its projected emissions will fall below the regulatory threshold for a permit to seek verification of that conclusion from the EPA before commencing construction. See Pet. App. 67a. The EPA has historically interpreted its program to mean that an operator is subject to an enforcement action if it proceeds based on a deficient analysis. See 45 Fed. Reg. 52,676, 52,725 (Aug. 7, 1980) ("Any source which improperly avoids review and commences construction will be considered in violation of the applicable" regulatory scheme "and will be retroactively reviewed under the applicable * * * regulation."); see also 68 Fed. Reg. 61,248, 61,250 (Oct. 27, 2003) (noting that a source may seek an official determination of whether a particular permit exception applies, and cautioning that "if

the owner or operator proceeds without a reviewing authority determination and if we later find that he or she made an incorrect determination on its own, the owner or operator faces potentially serious enforcement consequences").

2. Petitioners are the owners and operators of the Monroe Power Plant in Monroe, Michigan. Pet. App. 71a. In 2010, petitioners planned a $65 million overhaul of one of the emission units at that facility. *Ibid.* Before beginning work, petitioners "projected a post-project emissions increase of 3,701 tons per year of sulfur dioxide and 4,096 tons per year of nitrogen oxides," both of which are regulated air pollutants. *Ibid.* The roughly 4000-ton increase in the emissions of each of those pollutants was approximately 100 times greater than the 40-ton-per-year threshold that triggers the permitting requirement under the regulations. *Ibid.*; see 40 C.F.R. 52.21(b)(23). Petitioners, however, took the view "that the entire emissions increase fell under the demand growth exclusion," and they commenced construction without seeking a permit. Pet. App. 71a.

The EPA learned of the project two months after construction began. Pet. App. 72a. Shortly thereafter, the EPA issued a notice of violation, contending that the project should have been classified as a "major modification" for which a permit was required. *Ibid.* In August 2010, following unsuccessful efforts to resolve the dispute without litigation, and shortly after petitioners had finished their unpermitted construction, the United States filed an enforcement action against them in district court. *Id.* at 72a-73a. During discovery, an expert witness for the government explained that petitioners' reliance on the demand growth exclusion was unwarranted because, based on petitioners' own computer

modeling, the project would directly lead to increased pollution by enhancing the availability of the refurbished unit, causing it to run more and pollute more. See Gov't C.A. Br. 36-37. The district court granted summary judgment to petitioners, however, on the theory that the determination whether the project was a "major modification" under the preconstruction program regulations could be made only on the basis of postconstruction emissions data. Pet. App. 96a-97a.

3. The court of appeals reversed, holding that a "preconstruction projection is subject to an enforcement action by EPA to ensure that the projection is made pursuant to the requirements of the regulations." Pet. App. 80a; see *id.* at 62a-80a. The court held that the EPA is not "categorically prevented from challenging even blatant violations of its regulations until long after modifications are made." *Id.* at 64a. It reasoned that if such a bar existed, the scheme "would cease to be a preconstruction review program." *Id.* at 74a-75a. The court explained that, under the regulatory scheme, the operator "has to make projections according to the requirements for such projections contained in the regulations." *Id.* at 75a. "If the operator does not do so," the court continued, "it is subject to an enforcement proceeding." *Ibid.*

The court of appeals observed that petitioners had "conceded at oral argument that EPA could use its enforcement powers to force operators to make the projection." Pet. App. 76a. The court concluded that the agency's "powers must also extend to ensuring that operators follow the requirements in making those projections." *Ibid.* The court noted in particular petitioners' statement at oral argument that, "'if the operator had misread the rules and used 400 tons per year instead of

40 tons per year as the significance threshold, they would have filed an improper notification, an improper projection, and the agency could then make them do the projection right.'" *Id.* at 76a-77a (brackets and citation omitted).

Judge Batchelder, while "agree[ing] with much of the majority opinion," dissented on the ground that any dispute about preconstruction projections had been mooted by postconstruction data showing no increase in emissions. Pet. App. 81a; see *id.* at 81a-85a.

4. On remand, the district court again granted summary judgment, and partial final judgment under Federal Rule of Civil Procedure 54(b), for petitioners on the relevant claims. Pet. App. 57a-61a; see *id.* at 52a-54a. The court construed an admonishment by the court of appeals against "'second-guess[ing]'" the operator's calculations as a directive that the district court's scrutiny be limited to a "surface review" or a "cursory examination" of a source's projections. *Id.* at 59a (citation omitted). The district court accordingly believed that it was required to accept the validity of petitioners' assertion that the demand growth exclusion entirely canceled out its projected 8000-ton emissions increases. *Id.* at 59a-60a. The court also concluded in the alternative that the absence of measured postconstruction emissions increases entitled petitioners to prevail. *Id.* at 60a.

The court of appeals again reversed and remanded for further proceedings. Pet. App. 1a-47a. Judge Daughtrey wrote the lead opinion, which Judge Batchelder joined as to the result. *Id.* at 1a-12a. Judge Daughtrey found "genuine disputes of material fact that preclude summary judgment for [petitioners] regarding [their] compliance with [the] statutory preconstruction requirements and with agency regulations implementing

those provisions." *Id.* at 11a. She expressed her own view that petitioners' preconstruction projections were flawed because, *inter alia*, petitioners had "fail[ed] to carry [their] burden to set out a factual basis for [their] demand-growth exclusion." *Id.* at 9a. She also emphasized that "the panel unanimously agree[d]," based on the precedential and law-of-the-case effects of the court of appeals' decision in the prior appeal, "that actual post-construction emissions have no bearing on the question of whether [petitioners'] preconstruction projections complied with the regulations." *Id.* at 11a-12a.

Judge Batchelder concurred in the judgment. Pet. App. 13a-23a. She stated that the panel's prior opinion "clearly requires that we reverse the district court's grant of summary judgment to [petitioners] and remand for reconsideration consistent with that prior opinion." *Id.* at 14a; see *id.* at 13a-23a. She observed that, after the first remand, the government had "reframed its claims" against petitioners to allege "non-compliance with particular regulations," including allegations that petitioners had failed to "base [their] predictions on 'all relevant information'" and had "ignored [their] own modeling when claiming that any increase was due to demand increases." *Id.* at 22a (quoting 40 C.F.R. 52.21(b)(41)(ii)(*a*)). She concluded that "this is a far more legitimate challenge." *Ibid.*

Judge Rogers dissented, expressing the view that "the undisputed facts establish that [petitioners] complied with the basic requirements of the regulations for making projections." Pet. App. 24a-25a; see *id.* at 24a-47a.

ARGUMENT

Petitioners contend (Pet. 20-30) that the EPA categorically cannot pursue an enforcement action for un-

lawfully commencing construction without a permit unless the EPA shows that emissions in fact increased after the unpermitted construction. The court of appeals correctly rejected that categorical contention, in recognition of the interpretation of the CAA and its implementing regulations under which the EPA proceeded when it brought this enforcement action. That interpretation is a reasonable construction of the regulations and the underlying statute, and as such is entitled to deference.[2] The court's decision does not conflict with any decision of this Court or any other court of appeals. Further review of this case, particularly in its current interlocutory posture, is not warranted.

1. "[T]he 'construction' requiring a * * * permit under" the relevant CAA provisions "include[s] * * * a 'modification'" of an existing pollution source. *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 568 (2007); see *Alaska Dep't of Envtl. Conservation* v. *EPA*,

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[2] On March 28, 2017, the President issued Executive Order No. 13,783, "Promoting Energy Independence and Economic Growth," which recognizes the "national interest" in ensuring "affordable, reliable, safe, secure, and clean" energy production from domestic sources, and which directs the EPA to consider the effect of its regulations pertaining to domestic energy production. 82 Fed. Reg. 16,093 (Mar. 31, 2017). Consistent with that directive, the agency is currently reviewing its New Source Review policies and regulations. See EPA, *Final Report on Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783*, at 1-2 (Oct. 25, 2017), https://www.epa.gov/sites/production/files/2017-10/documents/eo-13783-final-report-10-25-2017.pdf. The issues underlying this enforcement action are among those under consideration. The agency intends to address its prospective approach to New Source Review through a combination, as appropriate, of statements of enforcement policy, interpretation of existing regulations, and, potentially, proposals for regulatory reform.

540 U.S. 461, 472 (2004) (*ADEC*) ("No such facility may be constructed or modified unless a permit prescribing emission limitations has been issued for the facility."). Compliance with the Act accordingly requires a prospective determination, before construction commences, about whether a particular alteration to an existing pollution source should be considered a "modification" under the statute. If such a determination were wholly retrospective, neither the EPA nor a regulated entity would know ex ante whether a permit was required.

The structure and substance of the CAA, along with the EPA's current regulations and the agency's interpretations of those regulations at the time that it brought this enforcement action, reflect the prospective nature of the permit determination. The requirement to obtain a permit, and the procedural and substantive prerequisites for doing so, are set forth in a section entitled "[p]reconstruction requirements." 42 U.S.C. 7475(a). In addition, the EPA has broad authority under the Act to halt construction before it commences or is complete. "In notably capacious terms, Congress armed EPA with authority to issue orders stopping construction when 'a State is not acting in compliance with any CAA requirement or prohibition . . . relating to the construction of new sources or the modification of existing sources,' [42 U.S.C.] 7413(a)(5), or when 'construction or modification of a major emitting facility . . . does not conform to the requirements of [this part],' [42 U.S.C.] 7477." *ADEC*, 540 U.S. at 484 (brackets omitted). The courts of appeals have accordingly recognized that a violation of the Act can occur "when construction commences without a permit in hand." *United States* v. *Midwest Generation, LLC*, 720 F.3d 644, 647 (7th Cir.

2013); see *United States* v. *EME Homer City Generation, L.P.*, 727 F.3d 274, 285 (3d Cir. 2013); *Texas* v. *EPA*, 726 F.3d 180, 190 (D.C. Cir. 2013); *Sierra Club* v. *Otter Tail Power Co.*, 615 F.3d 1008, 1014 (8th Cir. 2010); *CleanCOALition* v. *TXU Power*, 536 F.3d 469, 478 (5th Cir.), cert. denied, 555 U.S. 1049 (2008); *National Parks & Conservation Ass'n, Inc.* v. *Tennessee Valley Auth.*, 502 F.3d 1316, 1322 (11th Cir. 2007), cert. denied, 554 U.S. 917 (2008).

EPA regulations implementing the statute similarly provide that no "major modification" can proceed "without a permit that states that the * * * major modification will meet" relevant requirements, 40 C.F.R. 52.21(a)(2)(iii), and that any source that "commences construction" of such a modification without approval "shall be subject to appropriate enforcement," 40 C.F.R. 52.21(r)(1). The regulations accordingly require that "an operator must project post-change emissions" in order to determine whether "a proposed change" would "require a permit." Pet. App. 66a; see 40 C.F.R. 52.21(a)(2)(iv)(*c*). In the context of the CAA's preconstruction permitting scheme, a determination of the lawfulness of particular unpermitted construction may include consideration of whether, "at the time of the projects," the operator "expected, or should have expected, that its modifications would result in" emissions increases. *United States* v. *Alabama Power Co.*, 730 F.3d 1278, 1282 (11th Cir. 2013); see *United States* v. *Cinergy Corp.*, 623 F.3d 455, 459 (7th Cir. 2010) (relevant analysis turns on whether modification "'[w]ould,' not 'did' [result in an increase], because the permit must be obtained before the modification is made, and so the effect on emissions is a prediction rather than an observation").

2. Petitioners acknowledged below, and do not dispute now, "that EPA could use its enforcement powers to force operators to make the projection." Pet. App. 76a. Petitioners likewise acknowledged below, and do not dispute now, that the EPA could, in at least some circumstances, also use its enforcement powers to ensure that operators "do the projection right"—*e.g.*, by requiring recalculation when an operator has "misread" the regulatory thresholds that trigger the permitting requirement. *Id.* at 76a-77a (citation omitted); see *New York* v. *U.S. EPA*, 413 F.3d 3, 35 (D.C. Cir. 2005) (per curiam) (recognizing that oversight is necessary to prevent source from "overstating the demand growth exclusion"); *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 917 (7th Cir. 1990) (recognizing "that the EPA cannot reasonably rely on a utility's own unenforceable estimates of its annual emissions"). Petitioners' current contention—that the statute forecloses a reading under which the outcome of an enforcement action that challenges unpermitted construction can turn on any factor other than a post hoc examination of the completed project—cannot be squared with those acknowledgments, or with the statutory or regulatory scheme as interpreted by the agency at the time it brought this enforcement action.

a. The statute and the current regulations, as interpreted by the EPA at the time that it brought this enforcement action, do not allow an operator to disregard the regulatory projection requirements, commence construction without the permit a valid projection would require, and then argue based solely on postconstruction emission rates that its earlier actions were lawful. Petitioners suggest (Pet. 21) that such a result is mandated by the use of the present tense in the statutory definition of

"modification," which refers to a change that "increases" emissions. That suggestion disregards the background rule under the Dictionary Act, 1 U.S.C. 1, that "unless the context indicates otherwise * * * words used in the present tense include the future as well as the present."

Here, the context allows an interpretation of "increases" that relies primarily on preconstruction projections, rather than focusing solely on postconstruction measurements. The CAA requires, for example, that the EPA must bring an action "to *prevent* the construction or modification of a major emitting facility which does not conform to the [statutory] requirements." 42 U.S.C. 7477 (emphasis added). A suit to "prevent" construction can only be brought before postconstruction data are available. See *ibid.* (similarly requiring action to prevent a "proposed" unlawful modification); 42 U.S.C. 7413 (authorizing additional civil and criminal enforcement).

Petitioners' reliance on certain phrases in the regulations is similarly unavailing. As petitioners note (*e.g.*, Pet. 5, 21), a project "is not a major modification if it does not cause a significant emissions increase," and even then "is a major modification only if it also results in a significant net emissions increase." 40 C.F.R. 52.21(a)(2)(iv)(*a*). But petitioners' focus on that language disregards the regulatory directive that, for purposes of the permit requirement, projections made "before beginning actual construction" must be used to determine whether such increases "will occur" for purposes of the permit requirement. 40 C.F.R. 52.21(a)(2)(iv)(*b*); see 40 C.F.R. 52.21(a)(2)(iv)(*c*) and (b)(3). Petitioners also focus (*e.g.*, Pet. 13) on regulatory language stating that, "[r]egardless of any such preconstruction projections, a major modification results if the project causes a significant

emissions increase and a significant net emissions increase." 40 C.F.R. 52.21(a)(2)(iv)(*b*). But pursuant to the EPA's interpretation of its regulations as applied in this enforcement action, that provision simply expands the regulatory definition of "major modification" to include projects that unexpectedly increase emissions. Under this reading, the regulatory provision would have no bearing on whether a project that is expected to increase emissions requires a preconstruction permit.

b. Contrary to petitioners' contention, the absence of an immediately measurable increase in emissions upon completion of a project does not necessarily validate an operator's prior unlawful decision to commence construction without a permit that would have been required by proper preconstruction projections. See, *e.g.*, 40 C.F.R. 52.21(r)(1) (requiring a permit before commencing construction projected to result in emissions increases). Neither the Act nor the regulations require such an approach. *Inter alia*, the absence of measurable increases within an arbitrarily limited time window does not prove that the EPA's projections were incorrect, or that no increases in emissions will in fact occur. It may instead reflect, for example, that the operator is not yet operating the source at its full future capacity during the pendency of the enforcement action. Here, for example, shortly after the EPA's enforcement action was filed, the district court ordered petitioners "not to use" the refurbished unit "'to any extent that is greater than it was utilized' prior to the completion of the projects." Pet. App. 31a.

Under the EPA's interpretation and application in this case of the permitting scheme in the statute and the present regulations, an operator's preconstruction projections do not preclude the agency's enforcement of the

preconstruction requirements that the scheme reasonably imposes. Contrary to petitioners' suggestion (Pet. 24-26), an enforcement action premised on allegations that an operator failed to comply with the projection regulations is consistent with due process. Petitioners had clear notice of the projection regulations. Cf. *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 418-419 (1993) (upholding agency interpretation even though rule could have had a "more exact mode of calculating" a particular cost factor). They also had clear notice of the data produced by their own computer models, which provide the basis for the government's claim that the regulations were disregarded. See pp. 5-6, *supra*. In any event, petitioners did not press any due process argument below; the court of appeals did not pass on such an argument; and review of that argument in the first instance by this Court would not be warranted. See, *e.g.*, *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

3. Petitioners do not identify any decision of this Court or another court of appeals that has directly addressed the question presented here and reached a different result than did the court below. See Pet. 23 (acknowledging that "the precise question presented differed among" the cases it cites).

The three decisions that petitioners cite as support for their reading of the statute and regulations in fact support the opposite interpretation. This Court's decision in *Environmental Defense* v. *Duke Energy Corp.*, *supra*, observed that the regulations define "major modification" in terms of the emissions that "would result" from a project's completion, 549 U.S. at 568, and it allowed the government to proceed on a claim that certain "projects would have been projected to result in"

emissions increases, *id.* at 571 (citation omitted). The Seventh Circuit's decision in *Wisconsin Electric Power Co.* v. *Reilly*, *supra*, similarly recognized that in determining whether a project is a major modification, "the question is whether [the] renovation project *will* result in 'a significant net emissions increase.'" 893 F.2d at 916 (emphasis added; citation omitted). The court simply determined that the agency had misapplied the then-existing regulations in finding that standard to have been met. See *id.* at 916-918. And in *New York* v. *U.S. EPA*, *supra*, the D.C. Circuit concluded that "Congress directed the agency to measure emissions increases in terms of changes in actual emissions," as opposed to "looking to whether 'emissions limitations' have changed," but it upheld the EPA's "use of * * * projected future actual emissions * * * in measuring emissions increases." 413 F.3d at 10; see *id.* at 38-40.

4. The current interlocutory posture of this case further counsels against granting a writ of certiorari at this time. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (observing that the interlocutory nature of a case "alone furnishe[s] sufficient ground for the denial" of the petition for a writ of certiorari); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). The court of appeals' decision returns the case to the district court to hear evidence on whether a permit was required. See Pet. App. 11a ("Viewing the facts in the light most favorable to the EPA, we conclude that there are genuine disputes of material fact that preclude summary judgment for

[petitioners] regarding [their] compliance with [the relevant] statutory preconstruction requirements and with agency regulations implementing those provisions."). If petitioners are ultimately found liable after those factual disputes are resolved, they can seek further review of the question presented following the entry of final judgment.

In addition, as noted above (see p. 9 n.2, *supra*), the EPA is currently reviewing its New Source Review policies and regulations. That review may result in changes to the agency's regulatory approach. The possibility of such changes provides a further reason to deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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