No. 10-1333

In the Supreme Court of the United States

SANDY CREEK ENERGY ASSOCIATES, L.P.,
Petitioner,

v.

SIERRA CLUB, INC., AND PUBLIC CITIZEN, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents Sierra Club, Inc. and Public Citizen, Inc. (collectively "Sierra Club") devote most of their brief in opposition to an argument that Petitioner Sandy Creek Energy Associates, L.P. ("Sandy Creek") never made: "[B]ecause section 7412(g)(2)(B) [of the Clean Air Act ("CAA" or "the Act")] imposes pre-construction requirements, it cannot be violated once construction starts." Br. in Opp. 15. But Sandy Creek's argument, clearly stated throughout its Petition, is simply that ongoing construction without a MACT determination cannot violate 42 U.S.C. § 7412(g)(2)(B) *if no MACT determination was required when construction began*. *See* Pet. i ("Question Presented . . . Whether, after construction of a power plant has begun in reliance on the issuance of a lawful preconstruction permit reflecting that there was no [MACT] requirement then in force, a new MACT determination requirement can be compelled during construction . . . ."); *see also id.* at 2, 29. Having mischaracterized the argument, Sierra Club then labors to establish the commonsense (and undisputed) proposition that a developer who violates the CAA's pre-construction MACT requirements will *continue* to violate those requirements when it continues to build in violation of its initial obligation.

Correcting for Sierra Club's mischaracterization of the Question Presented undermines its defenses of the Fifth Circuit's opinion, eliminates its arguments that the Fifth Circuit's opinion accords with those of other circuit courts and with EPA's rule

implementing § 7412(g)(2)(B), and underscores the significance and far-reaching implications of the Fifth Circuit's opinion. The Fifth Circuit's decision opens the way for courts to change in midstream the rules governing multi-billion dollar capital projects. As demonstrated in Sandy Creek's Petition, this Court's review is warranted.

I. THE FIFTH CIRCUIT ERRED IN HOLDING THAT CONSTRUCTION LAWFULLY BEGUN COULD VIOLATE SECTION 7412(G)(2)(B)

Sierra Club's argument that the Fifth Circuit's opinion was correct because ongoing construction *can* violate § 7412(g)(2)(B) misses the mark of Sandy Creek's criticism of that opinion: (1) The CAA contemplates only pre-construction and operating permits; (2) the CAA does not contemplate the issuance of a MACT determination mid-construction as a stand-alone process; and (3) Congress could not have intended that ongoing construction would violate § 7412(g) if no MACT determination is required at the time of pre-construction permitting because a MACT determination is inextricably intertwined with the pre-construction permit process. *See* Pet. 9-12. Sierra Club fails even to acknowledge this argument, much less rebut it.

Sierra Club does take issue with Sandy Creek's argument that because § 7412(g)(2)(B) requires the permitting authority to determine that MACT "will be met," MACT is an up-front determination made during the pre-construction permitting process. Pet. 12. Sierra Club asserts that this statutory language simply confirms that MACT limits, once set, apply to post-construction operations. *See* Br. in Opp. 16

("[T]he use of the future tense recognizes only that the required limits govern pollution-emitting operations after construction is both commenced and completed."). But Sierra Club's interpretation conflicts with EPA's long-standing and codified interpretation of this same language: According to EPA, its regulations "require[] the MACT determination *before* construction or reconstruction of the major source. The requirement is based upon the language in section [7412(g)(2)(B)] requiring that the Administrator (or the State) determine that MACT 'will be met.'" 61 Fed. Reg. 68,384, 68,393 (Dec. 27, 1996) (emphasis added).

Sierra Club's position conflicts not only with EPA's, but with Sierra Club's: In the paragraph just preceding its claim that the "will be met" language does not compel the conclusion that the MACT determination is a pre-construction obligation, Sierra Club admits that "Section 7412(g)(2)(B) demands procurement of MACT limits *prior to construction*." Br. in Opp. 15 (emphasis added).

Finally, Sierra Club's argument in response to Sandy Creek's discussion of the distinction Congress drew between "new" and "existing sources" misses the mark because it, too, is directed against the (unmade) argument that § 7412(g) has no application once construction has commenced. Br. in Opp. 16-18. Sandy Creek's discussion was meant to demonstrate only that Congress took great care not to require a source to apply changing emissions standards in the middle of construction—an intention frustrated by the Fifth Circuit's interpretation of § 7412(g)(2)(B). *See* Pet. 13-15, 26. Further, this discussion shows Congress's recognition that a source that was not

subject to case-by-case MACT requirements at the start of construction (like Sandy Creek) could not avoid compliance with MACT requirements indefinitely: Once EPA completes its rulemaking obligations, all sources will have to comply with MACT standards, rendering unnecessary the Fifth Circuit's harsh interpretation of § 7412(g). *See id.*

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER CIRCUITS

Sierra Club tries to show that the Fifth Circuit's decision is consistent with those of other circuits, arguing that no other circuit "holds (or implies) that a prohibition on construction is violated only at the moment construction commences, and not by the remainder of construction prior to the plant's completion." Br. in Opp. 19. That effort, however, is both unsuccessful and irrelevant.

It fails because *Sierra Club v. Franklin County Power of Illinois, LLC* plainly states that "the *last* possible moment at which a preconstruction violation occurs is when the actual construction *is commenced, and not at some later point in time*." 546 F.3d 918, 928 (7th Cir. 2008) (emphasis added) (internal quotations omitted); *see also Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1015 (8th Cir. 2010) ("'[T]he plain language of the [closely-related PSD] provisions demonstrates that any preconstruction violation occurs when the actual construction *is commenced, and not at some later point in time*.'") (quoting *United States v. Ill. Power Co.*, 245 F. Supp. 2d 951, 957 (S.D. Ill. 2003)) (emphasis added). While those cases involved 42 U.S.C. § 7475, the pre-construction requirements associated with the PSD

program, that provision contains the *very same* "unqualified proscription" on construction that Sierra Club contends is dispositive. Br. in Opp. 10. It is a "normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). In conflict with these Seventh and Eighth Circuit cases, the Fifth Circuit holds that a pre-construction violation can begin after construction does.

But even if no court has held or implied that a prohibition on construction is violated only at the moment construction begins, the Fifth Circuit's decision *still* is at odds with the decisions of other circuits. That conflict results from the Fifth Circuit's treatment of the obligation to obtain a MACT determination as an ongoing duty separate and apart from the pre-construction permitting process, whereas the Eighth and Eleventh Circuits refuse to treat the analogous requirement to obtain a BACT determination as such. Pet. 17-18. *See Otter Tail Power Co.*, 615 F.3d at 1017 (finding that the CAA and its implementing regulations did not "establish[] an ongoing duty to apply BACT independent of the permitting process"); *Nat'l Parks & Conservation Ass'n v. Tenn. Valley Auth.*, 502 F.3d 1316, 1325 (11th Cir. 2007) (holding that the obligation to apply BACT "was to be met at construction time . . . , and was not an ongoing duty" in part because the state permitting authority's regulations "did not provide a way for a party . . . to obtain [a BACT] determination outside the preconstruction permitting process").

As noted in Sandy Creek's Petition, the Sixth Circuit has adopted a position consistent with that of

the Fifth, but in conflict with that of the Eighth and Eleventh, holding that a party has "an ongoing obligation to apply BACT, regardless of what terms a preconstruction permit may or may not contain." *Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.*, 480 F.3d 410, 418 (6th Cir. 2007). In addition to clarifying the applicability of MACT standards, review in this case also would help to resolve the apparent conflict among the circuits about the applicability of parallel BACT provisions.[1]

III. THE DECISION BELOW CONTRADICTS EPA'S IMPLEMENTING RULES

Sierra Club contends (Br. in Opp. 22-23) that an internal memorandum from an EPA Assistant Administrator (the "Meyers Memorandum")

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[1] Sierra Club contends (Br. in Opp. 19 n.11) that 40 C.F.R. § 63.43(l)(2) provides a basis for distinguishing between cases construing the pre-construction provision of the PSD program, § 7475, and § 7412(g)(2)(B). But § 63.43(l)(2) does not resolve the question of whether the duty to apply MACT is ongoing when a source does not or need not obtain a MACT determination during the pre-construction permitting process. This provision indicates only that, when a source secures a MACT emission limit (because it was required when the source began construction), those MACT limits are enforceable. *See* 40 C.F.R. § 63.43(l)(2) (owner of a constructed major source "which has *obtained* a MACT determination shall be . . .") (emphasis added). EPA explained this provision by noting that "Congress clearly intended that the EPA should be able to enforce the requirement for sources to apply MACT *prior to* construction or reconstruction of a major source. If a facility obtains a MACT determination but does not adhere to its terms and conditions, then that facility should not be shielded from Federal enforcement." 61 Fed. Reg. at 68,393 (emphasis added). This rule, in short, reinforces Sandy Creek's argument.

demonstrates that the decision below is consistent with EPA's implementing rules. But that two-page memorandum simply states its unadorned conclusion without ever trying to square it with the governing rule. In fact, it does not even mention the governing rule, 40 C.F.R. § 63.42(c)(2), which states in unequivocal terms that "no person may *begin* actual construction" without a MACT determination, much less explain how its conclusion is consistent with that rule. Section 63.42(c)(2) unambiguously prohibits only the commencement of construction without a MACT determination and not ongoing construction (at least where none was required when construction commenced). An unreasoned memorandum does not trump an unambiguous regulation. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 882 (2011).

According to Sierra Club, simply because "*compliance* is required before construction begins does not prevent *violations* from occurring after construction begins." Br. in Opp. 23. Exactly so. But this case involves construction lawfully commenced: If the EPA rule establishes MACT as a pre-construction requirement (it does), and neither the statute nor the EPA rule contemplates the issuance of a MACT determination mid-construction (they do not), Sandy Creek cannot reasonably be held to have violated the law if it was not subject to MACT requirements until *after* completion of the pre-construction permitting process (and, indeed, until after lawfully starting construction). EPA's rule confirms that ongoing construction without a MACT determination is not prohibited if none was required when construction began. Neither Assistant Administrator Meyers, Sierra Club, nor the Fifth Circuit have presented any reasonable explanation of

how the result they seek can be reconciled with EPA's longstanding rule. That conflict between the rule and the Fifth Circuit's decision amounts to an impermissible invalidation of the EPA rule in an enforcement proceeding. *See* Pet. 19-21.

IV. THE FIFTH CIRCUIT'S DECISION HAS FAR-REACHING IMPLICATIONS

Sierra Club argues that it is really not such a big thing to force a midstream rules change on "roughly thirty" (Br. in Opp. 5) multibillion dollar power projects, asserting that the effects of the Fifth Circuit's decision are "limited almost entirely to this case, and this petitioner." Br. in Opp. 24. But while Sierra Club contends that all but four of the thirty plants have come into compliance with section 7412(g)(2)(B), Br. in Opp. 5-6, 12, 24—presumably because they have been forced to because of opinions like the one below—it only musters evidence that *seven* such plants have sought MACT determinations, R.543-44, 1161-70; Br. in Opp. 5 n.3, leaving approximately *twenty* plants potentially affected by the Fifth Circuit's decision.[2]

But that is just the beginning. While Sierra Club assures this Court that the Fifth Circuit's opinion has "few consequences beyond this case," Br. in Opp. 1,

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[2] Sierra Club suggests that Sandy Creek had no business relying on the Delisting Rule because it "was being challenged in the D.C. Circuit." Br. in Opp. 25. But virtually *every* new rule of any consequence is subject to challenge; if the public could not rely on facially valid rules promulgated after regular notice and comment rulemaking simply because someone had filed a petition for review, businesses could not function.

tucked away in a footnote is its concession that, just as Sandy Creek warned in its petition (Pet. 24), "[a] previously exempt plant could also become subject to section 7412(g)(2)(B)" whenever EPA "list[s] a new hazardous pollutant" that the plant is a major source of. Br. in Opp. 11 n.7. It would not matter if billions of dollars already had been invested in the plant and only a month of construction was left; under the Fifth Circuit's rationale, as Sierra Club concedes, the plant would be required "to come into timely compliance with section 7412(g)(2)(B)." *Id.* The Fifth Circuit's opinion would compel what EPA has studiously avoided, which is to make ongoing construction illegal overnight.

The Fifth Circuit's willingness to make new requirements immediately applicable casts doubt on the validity of *any* authorized construction activity across the Nation. Its opinion is now authority for the proposition that Clean Air Act requirements intended to be established pre-construction may be required to be determined mid-construction, or at any time before completion. Any capital project developer that has satisfied pre-construction permitting requirements must now fear that its construction could, without warning, become unlawful overnight due to newly adopted regulatory requirements.

The Fifth Circuit's opinion disrupts the Texas Commission on Environmental Quality ("TCEQ") and other state permitting agencies, whose systems for implementing § 7412(g) use their pre-construction permitting processes. *See* Pet. 27-28. Sierra Club cites no authority to support its blithe assertion that agencies have been addressing retroactive application of MACT "without any difficulty or complaint." Br. in

Opp. 24. This contention is belied, in fact, by this and other cases discussed in Sierra Club's Brief in Opposition. *Id.* 6, 12. Without Supreme Court intervention, states will be unable to convey with confidence the authorization provided and obligations expected of new economic activity.

V. NO OTHER ISSUES WOULD PREVENT THIS COURT FROM ADDRESSING THE QUESTION PRESENTED

Sierra Club asserts that, if this Court grants Sandy Creek's Petition, it will need to consider whether the decision in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), applies retroactively to govern Sandy Creek's commencement of construction—a question that, according to Sierra Club, was not decided by the Fifth Circuit. Br. in Opp. 26-28. But the Fifth Circuit *unquestionably did decide* whether *New Jersey* applied retroactively to make Sandy Creek's pre-*New Jersey* construction a violation of the Act, concluding that it did not: "[W]e find it important to note that any construction Sandy Creek undertook *prior to* March 14, 2008 [the date of *New Jersey*'s mandate], *should not be considered in violation of § [7412(g)(2)(B)]*." App. 14a (emphasis added) (footnote omitted).

The Fifth Circuit's statement that the retroactivity issue was "not determinative" does not mean that the Fifth Circuit failed to resolve this issue, as Sierra Club avers. Rather, the Fifth Circuit was explaining the district court's error in finding that Sandy Creek did not violate the CAA based solely on its conclusion that *New Jersey* did not apply retroactively. *See id.* 16a. Because the Fifth Circuit decided the retroactivity issue, and because Sierra

Club did not file a cross-petition for a writ of certiorari, the retroactivity issue is dead. In any event, even if the retroactivity issue still were live, it is not an issue presented for this Court's review; it would be decided on remand, and so is of no concern to this Court.

Finally, Sierra Club notes Sandy Creek's view that alterations of its TCEQ permit (which postdated the petition in this case) brings its plant into compliance with § 7412(g) going forward, and that Sandy Creek has suggested to the district court that this renders moot most of Sierra Club's claims for relief (although Sierra Club hastens to add that it disagrees). Br. in Opp. 10, 12. This state of affairs presents no obstacle to this Court's consideration. Even if the district court ultimately determines that Sandy Creek is now in compliance with § 7412(g)(2)(B), Sierra Club's claim for attorneys' fees would remain, and a decision by this Court favorable to Sandy Creek on the Question Presented would preclude that claim. As this Court has found, a claim for attorney's fees presents a live claim sufficient to support this Court's exercise of certiorari jurisdiction. *See Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers v. Crowley*, 467 U.S. 526, 535 n.11 (1984) (controversy not mooted in part because of pending claim for attorney's fees and costs "that are dependent upon the propriety of the District Court's [decision]"); *see also Cmty. Publishers, Inc. v. DR Partners*, 139 F.3d 1180, 1182 n.3 (8th Cir. 1998) (refusing to find the appeal moot because claim for attorney's fees still pending and court had to "decide the various [merit-based] arguments for reversal asserted by [Defendants] before we can say whether

the private plaintiffs are in fact, at the end of the day, prevailing parties").

CONCLUSION

This case presents an issue of critical importance with immediate and far-reaching consequences for capital projects throughout the United States. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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