No. 22-2287

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE CHEMOURS COMPANY FC, LLC,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency,
Respondents.

On Petition for Review of Agency Order

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Local Appellate Rule 26.1.1, *amicus curiae* hereby makes the following disclosure:

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.[2]

At issue here is EPA's HFPO Dimer Acid Drinking Water Health Advisory,[3] issued pursuant to the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300f *et seq*., which announced a purportedly safe level of HFPO Dimer Acid in drinking

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Pursuant to Fed. R. App. P. 29(a)(2), the Chamber represents that all parties to this case, including the various intervenors, have consented to the filing of this *amicus curiae* brief by the Chamber.

[3] Drinking Water Health Advisory: Hexafluoropropylene Oxide (HFPO) Dimer Acid (CASRN 13252-13-6) and HFPO Dimer Acid Ammonium Salt (CASRN 62037-80-3), Also Known as "GenX Chemicals", available at https://www.epa.gov/system/files/documents/2022-06/drinking-water-genx-2022.pdf. Notice of the availability of the Health Advisory was published in the Federal Register at 87 Fed. Reg. 36,848 (June 21, 2022).

water—that is, a level below which EPA has determined there are no adverse health consequences. The Chemours Company FC, LLC ("Chemours"), asks this Court to set aside the Health Advisory, because the Health Advisory: (1) is a final agency action subject to review by this Court, (2) is a substantive or legislative rule promulgated without the notice and opportunity for comment required by the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, (3) is arbitrary and capricious, and (4) is otherwise inconsistent with the law.

The Chamber supports Chemours's petition, focusing in this brief on two issues. First, the Health Advisory is a reviewable final agency action because it imposes new legal obligations under both federal and state law and has an immediate, practical impact on regulated parties. Second, the Health Advisory is also an invalid legislative rule, because it is treated by EPA and others as having binding legal effect but was issued without the protections (such as notice-and-comment procedures) required by the APA.

The manner in which EPA issues, and the manner in which EPA and the States treat, such health advisories impact far more than Chemours's interests; they impact all businesses, including many Chamber members, whose products have been or may be the subject of such SDWA health advisories. In sum, the Chamber has a vital interest in ensuring that such advisories are issued only in accordance with the APA's requirements, including the requirements of notice and an

opportunity to comment. To allow EPA to operate outside the bounds of the APA would deny the Chamber, its members, and other interested parties the opportunity to comment on proposed actions that carry significant consequences for them.

SUMMARY OF ARGUMENT

In the challenged Health Advisory, EPA tries to have it both ways. The Agency contends, on the one hand, that the Health Advisory is not "legally binding," that it "does not have the force and effect of law," and that it does not "constitute[] final agency action that affects the rights and obligations of any person."[4] As a result, EPA issued the Health Advisory without notice and the opportunity for meaningful comment guaranteed by the APA for substantive, or legislative, rules from which legal consequences will flow.

On the other hand, in announcing the Health Advisory, EPA Administrator Michael Regan stated openly that EPA intends to use this purportedly nonbinding document as the basis for "aggressive action … to prevent [HFPO Dimer Acid] from entering the environment."[5] How? According to EPA's Updated Guidance on

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[4] Health Advisory, at 1 n.2. *See also* 87 Fed. Reg. at 36,849 (health advisories "are not regulations and should not be construed as legally enforceable Federal standards").

[5] *See* Press Release, Env't Prot. Agency, "EPA Announces New Drinking Water Health Advisories for PFAS Chemicals, $1 Billion in Bipartisan Infrastructure Law Funding to Strengthen Health Protections" **(**June 15, 2022), https://www.epa.gov/newsreleases/epa-announces-new-drinking-water-health-advisories-pfas-chemicals-1-billion-bipartisan ("EPA's June 15, 2022 Press

Invoking Emergency Authority under Section 1431 of the Safe Drinking Water Act, at 9-10 (May 30, 2018) ("Emergency Authority Guidance")[6], EPA can treat "[a]n exposure, or threat of exposure, to chronic contaminants *at levels exceeding … health advisory levels*" (emphasis added) as establishing an "imminent endangerment" to public health. Such a finding of imminent endangerment triggers EPA's emergency authorities under Section 1431, 42 U.S.C. §300i, including the Agency's authority to order any person who causes or contributes to such contamination to provide alternative sources of drinking water, and the authority to subject such persons to civil penalties of up to $15,000 per day for failure to comply with such an order. Similarly, many States automatically incorporate EPA-issued health advisory levels into their drinking water regulations. These real-world impacts undercut EPA's claim that the Health Advisory "does not have the force and effect of law" and does not "affect[] the rights and obligations of any party."

These real-world impacts also demonstrate why the Health Advisory should have been issued through notice-and-comment rulemaking, which would have allowed the public to offer information and advice to the Agency to improve the

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Release").

[6] Available at https://www.epa.gov/sites/default/files/2018-09/documents/updatedguidanceonemergencyauthorityundersection1431sdwa.pdf.

quality of the Agency's decision-making. Unfortunately, in large part because EPA did not follow the notice-and-comment process here, it made several substantive and scientific errors that will have long-term, adverse consequences. *See* Petitioner's Proof Brief at 1-3 (identifying the Health Advisory's scientific and methodological errors, including the Advisory's reliance on animal studies showing effects that are not relevant to humans and the Agency's disregard of highly relevant data in issuing the Advisory). The Chamber focuses on these real-world, imminent impacts through the lens of two legal issues that are particularly important to the broader business community:

First, the Health Advisory at issue in this case is reviewable final agency action because it satisfies the two-part test set forth in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The Health Advisory both (1) consummates EPA's decision-making process to set a health advisory level of 10 parts per trillion for concentrations of HFPO Dimer Acid in drinking water, and (2) gives rise to legal consequences that impact regulated parties across the country.

In addition to meeting the *Bennett* test, the Health Advisory independently counts as "*any* … final action" under the SDWA's broad judicial-review provision, which allows for review not only of final regulations but of final non-regulatory actions such as health advisories. 42 U.S.C. § 300j-7(a)(2) (emphasis added).

Second, the Health Advisory is an invalid legislative rule, promulgated "without observance of procedure required by law," because it affects the rights and obligations of Chemours and others, and the Agency issued it without adhering to the APA's notice-and-comment requirements. 5 U.S.C. § 706(2)(D).

Consequently, the Court should set aside the Health Advisory.

BACKGROUND

Congress established the SDWA, 42 U.S.C. § 300f *et seq.*, to protect the Nation's drinking water against "contaminants," defined broadly as "any physical, chemical, [or] biological … matter in water." *Id.* § 300f(6). EPA meets this goal in several ways.

First, EPA can promulgate "national primary drinking water regulations," *id.* § 300g-1(b)(1)(A), directed at owners or operators of public water systems, *id.* §§ 300f(5), 300g. Because such regulations are binding and enforceable, EPA is required to issue them through notice-and-comment rulemaking. This applies both to the drinking water regulation itself and to setting an associated "maximum contaminant level goal." *Id.* § 300g-1(a)(3), (b)(1)(E). Each such drinking water regulation must specify a "maximum contaminant level," which must be "as close to the [maximum contaminant level goal] as is feasible." *Id.* § 300g-1(b)(4)(B). Owners and operators of public water systems must act to ensure that levels of a contaminant do not exceed the specified maximum contaminant level. *Id.*

Second, EPA can "publish health advisories (which are not regulations) or take other appropriate actions for contaminants not subject to any national primary drinking water regulation." *Id.* § 300g-1(b)(1)(F). For certain contaminants, health advisories identify the health advisory level — the concentration of that contaminant in drinking water "at which adverse health effects and/or aesthetic effects are not anticipated to occur over specific exposure durations." *See* Drinking Water Health Advisories (HAs), ENV'T PROT. AGENCY (last updated June 15, 2022).[7] EPA has stated repeatedly, including in the challenged Health Advisory, that such health advisories "are not regulations and should not be construed as legally enforceable Federal standards." *See, e.g.,* 87 FED. REG. at 36,849.

Third, under the SDWA, EPA may delegate primary implementation and enforcement authority of the SDWA's drinking water program to States that have met certain criteria. 42 U.S.C. § 300g-2; 40 C.F.R. Part 142. EPA has done so, having granted all States (except Wyoming and the District of Columbia) primacy to implement the SDWA. The statute requires EPA to supervise the States' programs continuously, and EPA must withdraw primacy approval if it determines that the State no longer meets all requirements. 40 C.F.R. § 142.17(a); ENV'T PROT. AGENCY "Safe Drinking Water Act (SDWA) Resources and FAQs."[8]

[7] Available at https://www.epa.gov/sdwa/drinking-water-health-advisories-has.
[8] Available at https://echo.epa.gov/help/sdwa-faqs. (last viewed April 19, 2023).

Fourth, health advisories can result in legally enforceable requirements, both under federal law and in many States. For example, (1) Section 1431 of the SDWA authorizes EPA to take emergency legal action to prevent "imminent endangerment," which EPA considers to include exposures to certain contaminants at levels exceeding their health advisory levels; (2) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq*., health advisories provide substantive standards for remedial action, in particular, via State-incorporated "applicable or relevant and appropriate requirements;" and (3) under numerous state laws, EPA health advisories have automatic legal effect through their incorporation into various state regulatory remediation requirements. *See* Chemours's Brief in Opposition To Respondents' Motion to Dismiss, p. 7 - 17 (October 16, 2022) (identifying several ways in which health advisories can result directly in the imposition of legally enforceable obligations on regulated parties).

ARGUMENT

I. EPA'S HEALTH ADVISORY IS A "FINAL AGENCY ACTION" SUBJECT TO JUDICIAL REVIEW UNDER THE APA AND THE SDWA.

A. APA Judicial Review: The Health Advisory Consummates EPA's Decision To Set A Health Advisory Level, Gives Rise To Legal Consequences, And Has An "Immediate And Practical Impact" On Regulated Parties.

Under the APA, courts take a "pragmatic approach" when determining whether agency action is final and reviewable. *See, e.g., U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599-600 (2016). Typically, they apply a two-pronged test to determine finality, examining: (1) whether the action marks the consummation of the agency's decision-making process, and (2) whether the action is one by which rights or obligations have been determined or from which "legal consequences" flow. *Bennett*, 520 U.S. at 177-78.

Courts can also conclude that agency action is final if it has an "immediate and practical impact" on regulated parties. *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956). In sum, the Supreme Court's pragmatic approach recognizes that either "legal consequences" or "immediate and practical impact" can render agency action final, no matter its label. *Hawkes*, 578 U.S. at 599-600 (relying on *Bennett* and *Frozen Food Express*).

1. The Health Advisory Satisfies *Bennett*'s Two-Pronged Finality Test.

Here, EPA does not dispute that the Health Advisory satisfies *Bennett*'s first prong—it marks the consummation of the Agency's decision-making process. *See* EPA's Motion to Dismiss (September 15, 2022) at 10 (acknowledging that Health Advisory "consummates EPA's decision" to issue the advisory).

The Health Advisory also satisfies *Bennett*'s second prong—it determines rights or obligations, and legal consequences flow from it. The Health Advisory directly generates a variety of legal consequences for regulated entities, in particular through (1) triggering EPA's emergency authority under Section 1431 of the SDWA, including its authority to order parties causing or contributing to contamination to provide alternative drinking water sources and face steep civil penalties if they fail to do so, (2) its status as a CERCLA "applicable or relevant and appropriate … requirement," and (3) the automatic incorporation of health advisories and their associated health advisory levels into the enforceable regulatory and remedial requirements of numerous States. We treat each of these in turn.

(1) *EPA takes the position that exceedance of a health advisory level triggers EPA's SDWA emergency authorities.* Section 1431 of the SDWA authorizes EPA to take aggressive emergency action to prevent "imminent endangerment" to public health whenever "a contaminant … is present in or is likely to enter a public water

system or an underground source of drinking water." 42 U.S.C. § 300i(a). The Agency may order any person who caused or contributed to the endangerment to provide alternative drinking water supplies and the authority to impose up to $15,000 per day in civil penalties for noncompliance with any such order. *Id.* § 300i(b). EPA considers health advisories and associated health advisory levels sufficient to trigger this authority. In other words, EPA takes the position that the "imminent endangerment" required to invoke its emergency authorities can be triggered by, among other things, "[a]n exposure, or threat of exposure, to chronic contaminants at levels exceeding their … health advisory levels." Emergency Authority Guidance, at 10. Thus, far from being nonbinding and without legal effect, EPA takes the position that the Health Advisory is sufficient to serve as the basis for EPA's exercise of some of its most aggressive emergency authorities, with potentially profound and costly impacts for those who might be a source of the contaminants.

To be clear, EPA is not obligated to act when contaminants exceed a health advisory level, or even a maximum contaminant level. What matters under *Bennett* is that EPA deems exposure to chronic contaminants in excess of a health advisory level as sufficient to demonstrate "imminent endangerment" and thus satisfy the statutory precondition for exercising its broad emergency powers under Section 1431, including its authority to order parties associated with that contaminant to provide alternate drinking water supplies or face steep civil penalties. *Cf. Valero*

Energy Corp. v. EPA, 927 F.3d 532, 536 (D.C. Cir. 2019) (finding that an EPA document was not final where it had no legal consequences for any regulated party and did not expose any regulated party to the possibility of an enforcement action or to enhanced fines or penalties).

(2) *A health advisory level can be a CERCLA applicable or relevant and appropriate requirement ("ARAR"), driving remedial requirements at a contaminated site*. Under CERCLA, remedial actions at contaminated sites must address all "applicable or relevant and appropriate … requirement[s]." 42 U.S.C. § 9621(d). At a CERCLA site, the lead agency must identify such requirements based upon an objective determination of whether the requirements specifically address a pollutant or contaminant found at the site. 40 C.F.R. § 300.400(g)(1). ARARs include "state standards" for relevant contaminants, so long as they are, among other things, "legally enforceable" and "more stringent than federal requirements." 40 C.F.R. § 300.400(g)(4).

Twenty-one States automatically incorporate SDWA health advisories issued by EPA into their substantive regulatory standards, thus rendering them capable of driving remediation levels at contaminated sites. *See, e.g.,* Chemours Opp. Brief, at 12, Appendix (identifying state laws that automatically incorporate EPA health advisories); IOWA ADMIN. CODE R. 567-137.5(4) (stating that "the statewide standard for chemicals will be the lifetime health advisory level (HAL)"

issued by "EPA's Office of Water" if no maximum contaminant level exists); ALA. ADMIN. CODE R. 335-6-15-.30(e) (setting "correction action limit" for "groundwater ingestion pathway" "equal to" applicable maximum contaminant level or "Health Advisory Level (HAL) established by EPA"). These are legally enforceable standards of general applicability and deemed by EPA to be more "stringent" than the federal requirements. 40 C.F.R. § 300.400(g)(4).

(3) *SDWA health advisory levels are automatically incorporated into environmental and health standards in many States.* EPA health advisories have automatic legal effect for other laws as well. For example, in New Hampshire, state ambient groundwater-quality standards must be "no less stringent" than levels set by "health advisories [that] have been promulgated under the Federal [SDWA]"). *See* N.H. REV. STAT. ANN. § 485-C:6(I) ("Where federal maximum contaminant level or health advisories have been promulgated under the Federal Safe Drinking Water Act or rules relevant to such act, ambient groundwater quality standards shall be no less stringent than such standards."). Pennsylvania law states that its Environmental Quality Board "shall promulgate Statewide health standards for regulated substances." 35 P.S. § 6026.303(a). The standards "shall include" any standards adopted by the State's Department of Environmental Protection "and by the Federal Government by regulation … and health advisory levels." *Id.* ("The standards shall include any existing numerical residential and nonresidential health-based standards

adopted by the department and by the Federal Government by regulation or statute, and health advisory levels."). And both New Hampshire and Pennsylvania allow their respective state agencies to seek enforcement actions or impose penalties—i.e., direct legal consequences—on parties for non-compliance with the statutes or regulations. N.H. REV. STAT. § 485-C:18, C:19 (identifying administrative fines and penalties); 35 P.S. § 6026.905 (stating the remediation statute's enforcement provision.

In sum, although EPA labels health advisory levels nonbinding and claims they create no legal obligations, quite the opposite is true. In EPA's view, a SDWA health advisory is sufficient alone to subject private parties to both federal and state remedial obligations and authorities, and to subject persons to substantial civil penalties if they caused or contributed to contamination exceeding the health advisory level.

2. The Health Advisory Has An "Immediate And Practical Impact" On Regulated Parties.

Just as it has direct legal consequences, the Health Advisory also has "an immediate and practical impact" on regulated parties. Take, for example, Alabama's law regarding "applicable or relevant and appropriate … requirement[s]" under CERCLA. Alabama law sets the "correction action limit" for a "groundwater ingestion pathway" "equal to" the applicable maximum contaminant level or "Health Advisory Level (HAL) established by EPA." ALA.

ADMIN. CODE R. 335-6-15-.30(e). As a result, an EPA health advisory that lowers the health advisory level for a particular contaminant causes Alabama state law to automatically match the health advisory level (absent a maximum contaminant level). This lower limit will have an immediate and practical impact not only on the responsible party's obligations to remediate a site, but also on how that responsible party hires consultants, pays for remediation equipment, and monitors the property's day-to-day activities to ensure compliance. *Frozen Food Express*, 351 U.S. at 43-44 (concluding that agency order, stating that commodity was not an exempt agricultural product, was a final agency action because it "ha[d] an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well"); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967) (explaining that agency action having "direct effect on [the company's] day-to-day business" is "sufficiently direct and immediate as to render the issue appropriate for judicial review").

In sum, this Health Advisory meets the two-pronged test of *Bennett v. Spear*. It represents the consummation of EPA's decision-making process (as EPA itself concedes) and it has direct legal consequences for regulated entities by subjecting them to EPA's emergency powers under Section 1431 of the SDWA, imposing new remedial obligations on them in many States that automatically adopt health advisory levels into their regulations and remedial requirements, and immediately

impacting parties responsible for CERCLA cleanup sites. It is a final and reviewable action subject to judicial review under the APA.

B. The Health Advisory Is A Final Action Under The SDWA's Broad Judicial Review Provision.

In addition to satisfying the *Bennett* test, the Health Advisory is independently reviewable under the SDWA's broad judicial review provision. This provision applies to two different kinds of final actions: "national primary drinking water *regulations*," 42 U.S.C. § 300j-7(a)(1) (emphasis added), and, separately, "any *other* final action of the [agency]." 42 U.S.C. § 300j-7(a)(2) (emphasis added). This broad statutory language shows that Congress intended for more than just standard drinking water regulations to be reviewable—it intended that *other* final actions taken under SDWA be reviewable as well. *See Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) ("[W]hen [a] statute's language is plain, the sole function of the courts … is to enforce it according to its terms.").

Here, EPA identified this Health Advisory as one of its "*final* health advisories for Gen X chemicals." 87 Fed. Reg. at 36849 (emphasis added). As such, it is a final action reviewable under § 300j-7(a)(2). Moreover, Section 300g-1(b)(1)(F), which provides that health advisories "are not regulations," also refers to health advisories as "*actions* for contaminants" (emphasis added). Given this statutory language, the health advisories are covered by the SDWA's judicial review provision. *See* 42 U.S.C. § 300g-1(b)(1)(F) ("Health advisories *and other*

actions") ("The Administrator may publish health advisories (which are not regulations) or take *other appropriate actions* for contaminants not subject to any national primary drinking water regulation.") (emphasis added).

Even if Congress had expressly provided for judicial review under the SDWA, the nature and practical consequences of health advisories, as explained above, would independently warrant categorizing health advisories as final actions subject to judicial review under the statute. Congress could have expressly exempted SDWA health advisories from judicial review, as it exempted them from compliance with statutory requirements applicable only to "regulations," such as national drinking water standards. But it did not. Thus, such advisories are reviewable under SDWA as "other final action of the agency."

II. EPA'S HEALTH ADVISORY IS AN INVALID "LEGISLATIVE RULE."

A. The Health Advisory Is A Legislative Rule, And EPA Should Have Complied With The APA's Notice-And-Comment Requirements.

Under the APA, rules that "work substantive changes in prior regulations" or "create new law, rights, or duties" are legislative or substantive rules. *SBC Inc. v. Fed. Commc'ns Comm'n*, 414 F.3d 486, 497 (3d Cir. 2005). Legislative rules also "modif[y] or add[] to a legal norm based on the agency's own authority." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95, 96 (D.C. Cir. 1997). In contrast,

nonlegislative or interpretative rules simply state or "remind" affected parties of already-existing duties. *SBC Inc.*, 414 F.3d at 497.

Legislative rules are subject to the APA's notice-and-comment requirements; nonlegislative rules, because they create no new law, rights, or duties, are exempt from these requirements. *SBC Inc.*, 414 F.3d at 497-98; 42 U.S.C. § 300g-1(b)(3)(C)(i); 5 U.S.C. § 553(b). Legislative rules that fail to satisfy notice-and-comment requirements can be set aside by courts. *See Jerri's Ceramic Arts*, *Inc.*, 874 F.2d 205, 207–08 (4th Cir. 1989). Similarly, if an agency incorrectly identifies a legislative rule as a nonlegislative rule and fails to provide the process required by the APA, courts can invalidate the action. *See, e.g.*, *Appalachian Power Co. v. EPA,* 208 F.3d 1015, 1028 (D.C. Cir. 2000) (concluding that EPA "guidance" was a legislative rule subject to notice-and-comment requirements, notwithstanding the agency's "boilerplate" disclaimer that the guidance "[did] not represent final Agency action.")

Here, the Health Advisory is a legislative rule. As discussed above, the Health Advisory imposes new duties on regulated parties under the SDWA, through its triggering of EPA's emergency powers under Section 1431, and *automatically* modifies or adds to numerous States' substantive legal requirements. EPA argues that the Health Advisory is "non-regulatory," 87 Fed. Reg. 36848, and thus it is a nonlegislative action exempt from the APA's notice-and-comment

requirements. But this is inapposite. Whether the Health Advisory is a "regulation" under the SDWA does not answer whether it is a legislative rule under the APA. The proper inquiry is whether the rule "effects a substantive change in the regulations," *Warder v. Shalala*, 149 F.3d 73, 80 (1st Cir. 1998), and the Health Advisory certainly does. Because the Health Advisory at issue in this case is a substantive, legislative rule, EPA should have complied with the APA's notice-and-comment requirements before promulgating it. 5 U.S.C. § 553(b). It did not.

Likewise, the Health Advisory is not simply a policy statement that announces EPA's tentative plans for the future. *See Pacific Gas and Elec. Co. v. Fed. Power Comm.*, 506 F.2d 33, 38 (D.C. Cir. 1974) (describing nonlegislative policy statements as providing agencies with the opportunity to announce their "tentative intentions for the future" in a non-binding manner). Because the Health Advisory at issue in this case is a substantive, legislative rule, EPA should have complied with the APA's notice-and-comment requirements before promulgating it. 5 U.S.C. § 553(b).

B. This Court Should Not Allow EPA To Make An End Run Around The APA's Notice-And-Comment Requirements.

EPA's decision to bypass notice and comment for this Health Advisory infringed on the regulated public's rights under the APA. Unfortunately, in recent years, such a move is all too common. As noted by courts and commentators, many federal agencies, including EPA, have made a habit of issuing self-styled

nonlegislative "guidance statements" or "letters"—but which are, in practice and substantive, legislative rules—to avoid cumbersome statutory rulemaking requirements. *See, e.g.*, *Appalachian Power Co.*, 208 F.3d at 1020 (criticizing EPA's use of guidance documents to avoid APA's notice-and-comment requirements); Comm. on Gov't Reform, Non-binding Legal Effect of Agency Guidance Documents, H.R. Rep. No. 106-1009, at 9 (2000) ("[The U.S. House's Committee on Government Reform] also finds that agencies have sometimes improperly used guidance documents as a backdoor way to bypass the statutory notice-and-comment requirements for agency rulemaking and establish new policy requirements.").

As a result, courts have not hesitated to invalidate previous EPA attempts to issue legislative rules in the guise of nonlegislative rules (e.g., guidance letters or documents). *See Iowa League of Cities v. EPA*, 711 F.3d 844, 874-76 (8th Cir. 2013) (vacating EPA's allegedly interpretative letters—regarding regulatory requirements for municipal wastewater-treatment processes—as legislative rules that EPA failed to promulgate through notice-and-comment procedures); *Appalachian Power Co.,* 208 F.3d at 1028 (setting aside EPA guidance document—concerning operation of permit programs under Clean Air Act—as legislative rule that EPA failed to promulgate through required notice-and-comment procedures).

This Court should follow these examples and invalidate this Health Advisory. It should not permit EPA to make an end run around the APA's notice-and-comment requirements by simply claiming to issue a "non-regulatory" health advisory, when, in reality, it has promulgated a legislative rule that will impose new and binding duties on regulated entities. *See generally* John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 893 (2004) ("Because [nonlegislative rules] often have the look and feel of rules promulgated through notice-and-comment procedures, they risk enabling agencies to make an end run around that more formal process. … If a purported nonlegislative rule has operative characteristics that only a legislative rule can legitimately possess, courts will not hesitate to invalidate that rule on the ground that the agency did not use proper procedures to adopt it.").

CONCLUSION

This Court should review this Health Advisory as a final agency action and, ultimately, set it aside as unlawful for, among other things, EPA's failure to comply with the APA's notice-and-comment requirements.

Dated: April 26, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because the brief contains 4,548 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

3. In accordance with Third Circuit Local Appellate Rule 31.1(c), the text of the Chamber's brief, as electronically filed on April 26, 2023, is identical to the text of the brief to be submitted in paper copy.

4. In accordance with Third Circuit Local Appellate Rule 31.1(c), the Chamber's brief, as electronically filed on April 26, 2023, was scanned with a virus detection program, namely Microsoft Defender (Version 1.387.2030.0), and no virus was detected.

Dated: April 26, 2023

/s/ Thomas A. Lorenzen
Thomas A. Lorenzen

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of this Court.

Dated: April 26, 2023

/s/ Thomas A. Lorenzen
Thomas A. Lorenzen

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2023, I electronically filed the foregoing brief with the United States Court of Appeals for the Third Circuit through the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 26, 2023

/s/ Thomas A. Lorenzen
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