[ORAL ARGUMENT NOT YET SCHEDULED]

No. 21-1140

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHEVRON U.S.A. INC.,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Review of an Order of the
Environmental Protection Agency

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER CHEVRON U.S.A. INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, amicus curiae the Chamber of Commerce of the United States of America hereby submits the following corporate disclosure statement:

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.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Except for *amicus curiae* Chamber of Commerce of the United States of America, all parties, rulings, and related cases are listed in the Brief for Petitioner Chevron U.S.A. Inc.

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INTERESTS OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic 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.[1]

At issue in this case is a reversal, within the space of three months, of a January 19, 2021 letter issued by the United States Environmental Protection Agency ("EPA" or "the Agency") that both: (1) set forth EPA's

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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.

Because both Petitioner Chevron U.S.A. Inc. ("Chevron" or "Petitioner") and Respondent U.S. Environmental Protection Agency ("EPA") consent to this filing, the Chamber filed a notice thereof on November 17, 2021 (Doc. 1922915). *See* Fed. R. App. P. 29(a).

interpretation of a critical provision of the Clean Air Act ("CAA" or "the Act"), and (2) determined that, under that definitive Agency interpretation, oil and gas platform decommissioning activities taking place aboard a vessel situated at the platform are not activities covered by that section of the Act. Doc. 1911136, Ex. 3 ("January Letter"). In reversing course without prior notice to the affected businesses, EPA abjured consideration of the reasonable reliance interests of the private business that requested EPA's determination and the uncertainty that such reversal would cause within the regulated community.

Such reversals are judicially reviewable. The legal principles requiring this conclusion reach far beyond the immediate interests of operators of oil and gas platforms on the Outer Continental Shelf ("OCS"). The availability of timely judicial review of agency reversal decisions of this kind is important to the regularity and certainty necessary for the conduct of business across the nation, as well as the government's interaction with private businesses generally.

SUMMARY OF ARGUMENT

Chevron explains persuasively in its Brief why this Court should grant its petition for review and vacate EPA's April 20, 2021 Letter (Doc.

1911136, Ex. 1 ("April Letter")). In that April Letter, EPA reversed statutory interpretations that it had definitively announced in a letter issued just three months before. The Chamber supports Chevron's request for relief for two critical reasons:

First, regulatory certainty and regulated industry's reasonable reliance on agency pronouncements about whether and how the nation's laws apply to their activities are fundamental components of the engine driving the nation's economy. Private businesses reasonably and in good faith rely on what purport to be definitive representations from the government when they proceed to engage in otherwise-regulated activity in the manner the government specifically considered and approved. Courts should not abide an agency's sudden about-face without ensuring that appropriate procedural and substantive requirements have been observed, including the overarching requirement of reasoned decisionmaking mandated by the Administrative Procedure Act (APA) and other statutes.

Second, agency actions that have immediate, practical impacts on regulated entities cannot escape judicial review. EPA cannot evade judicial review of a reversal of a definitive course it took only three

months before by cloaking a novel interpretation of settled law in the garb of a letter purporting to defer to a local authority to decide the issue at a later date. Rather, the April Letter must be viewed for what it is: (1) EPA's rescission of a safe harbor that it expressly identified in its January Letter—that is, once an offshore platform no longer has any potential to emit regulated air pollutants, it (and any vessel associated with it) is no longer an OCS "source" subject to regulation under Section 328 of the Act, 42 U.S.C. § 7627; and (2) the Agency's abrupt reinterpretation of that same Section 328 to introduce a novel and unsupported extra-statutory term—"the [OCS] *site*"—that it now intends to apply to OCS operations, including Chevron's. The OCS "site" is a term found nowhere in the statute, and it carries potentially far broader regulatory reach than the "sources" Congress expressly identified in Section 328. Viewed through the proper lens, neither aspect of EPA's April Letter can withstand this Court's scrutiny, and settled precedent requires the conclusion that this Court's review of the letter is warranted now.

This Court should find the April Letter to be reviewable final agency action. It should hold that the April Letter is contrary to law. And

accordingly, the Court should vacate it.

ARGUMENT

I. REGULATED U.S. BUSINESSES RELY ON AGENCY ACTIONS LIKE THE JANUARY LETTER TO PROVIDE THEM MUCH-NEEDED REGULATORY CERTAINTY.

Regulatory certainty is vital to the orderly conduct of business in the United States. This is particularly true for highly regulated industries, as in this case. Agency actions purporting to provide regulatory certainty—nationwide rulemakings, responses to requests for interpretations of statutory and regulatory provisions like that submitted here, and site-specific statutory and regulatory applicability determinations, among others—give rise to significant reliance interests. Undermining and undercutting these interests can have profound adverse consequences for all sorts of commercial activity.

Without regulatory certainty and predictability, businesses are left with little to help guide them between the Scylla and Charybdis of the expensive and time-consuming federal permit process (or other authorization process, depending on the nature of the regulatory scheme at issue), on the one hand, and the substantial civil and criminal penalties that can follow if a company proceeds without an authorization

or other appropriate assurance, on the other hand. The resulting uncertainty can have paradoxical effects. Here, for instance, EPA's unlawful new interpretation of the Act is impeding the safe and timely *de*commissioning and removal of obsolete offshore oil and gas facilities.

It is no surprise, then, that reliance interests play a significant role in the case law governing when agency actions—like the April Letter—will be considered final and reviewable by the courts.

A. Courts recognize reliance interests when evaluating the finality and merits of agency actions, and they scrutinize agencies' failures to consider them.

This Court has recently reiterated the need to evaluate reliance interests "[w]hen an agency changes policy." *MediNatura, Inc. v. Food & Drug Admin.*, 998 F.3d 931, 940 (D.C. Cir. 2021) (cleaned up). While jurisprudence often speaks of reliance interests as having developed over the course of "longstanding" agency policy, *id.*, the length of time that has passed since an agency's determination is not determinative of the level or the reasonableness of an entity's reliance on that decision. Sometimes time is of the essence, and where that is the case, reliance interests may arise immediately. Contracts may be let, permits may be obtained or foregone, and construction and other activities may commence on a time-

sensitive project, all based on a recent agency pronouncement of statutory or regulatory applicability or inapplicability. If the agency thereafter reverses course and revises its pronouncement, an entity could face legal liability for its actions, even if only a few weeks, or even a few days, had passed between the initial agency pronouncement and its reversal.

For example, in *Texas Oil and Gas Corp. v. Watt*, 683 F.2d 427 (D.C. Cir. 1982), this Court determined that the Secretary of the Interior's cancellation of oil and gas leases just a few months after the U.S. Bureau of Land Management awarded them, under the auspices of an "eleventh-hour interpretation" of the agency's statutory duty, exceeded statutory authority. *Id.* at 431; *see also id.* at 435 (rejecting lease cancellation where the "Secretary … engaged in a hasty attempt, based on politically suspect motives at worst and on a legally erroneous theory at best, to undo what had been done"); *Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958) ("[T]he power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies."). Notably, there the lessee had already relied on the agency

action, having submitted applications for permits to drill. 683 F.2d at 435; *see also Moncrief v. U.S. Dep't of Interior*, 339 F. Supp. 3d 1, 9-10 (D.D.C. 2018) (describing *Texas Oil and Gas* as having "emphasized the reliance interests at stake").

Indeed, courts consider whether an agency action induces reliance by regulated parties and others in evaluating whether that action is final and thus reviewable. For example, an "incidental take statement" that authorizes the "take" of an endangered or threatened species as long as certain conditions are met "constitutes a permit" on which regulated entities (even other federal agencies) may rely. *Bennett v. Spear*, 520 U.S. 154, 170 (1997). Because this statement "alters the legal regime" such that an agency disregards it "at its own peril," the Court readily concluded that the statement was final. *Id.* at 170, 178. And in *Frozen Food Express v. United States*, the Supreme Court explained that an agency's order interpreting the law, which provided "the basis for carriers in ordering and arranging their affairs," was final and reviewable. 351 U.S. 40, 44 (1956). The Court did not couch these decisions in terms of the word "reliance" *per se*. But in recognizing that the agency actions "permit[ted]" and were "the basis" for subsequent activities, respectively,

the Court illuminated the reliance interests at issue.

Moreover, the Court has explained that reliance interests are important *whenever* an agency changes course and is "not writing on a blank slate." *Dept. of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020). When that happens, the agency must at the very least "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* Failure to do so can result in unlawful agency action. *Id.*; *cf. Int'l Org. of Masters, Mates & Pilots v. Brown*, 698 F.2d 536, 552 (D.C. Cir. 1983) (explaining that detrimental reliance is a factor in considering estoppel against the government). Ignoring reasonable reliance interests can also implicate "due process considerations of fair notice and fundamental fairness." *Cemex Inc. v. Dep't of the Interior*, No. 1:19-cv-01265 (CJN), 2021 WL 4191959, at *10 (D.D.C. Sept. 15, 2021).

B. Applicability determinations of the kind at issue in this case engender particularly acute reliance, and thus are particularly detrimental when reversed.

When an agency sets forth its definitive interpretation of the law, as EPA did in its January Letter, and explains how that interpretation applies to a recurring factual scenario, it stands to reason that regulated

entities should be able to rely on that interpretation. *Nat'l Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 699 (D.C. Cir. 1971) (reviewing new agency interpretation where "members of the association had conducted their affairs in reliance on an outstanding ruling of the [Labor Department's Wage and Hour Division] Administrator, as they had a right to do"). While some statutes, such as those at issue in *National Automatic Laundry*, contain express safe-harbor provisions that protect entities that conform to previous agency interpretations, *id.*, such express provisions are not necessary for legitimate reliance interests to arise, *see Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 106 & n.5 (2015) (explaining that Congress has enacted safe harbor provisions in acknowledgement of reliance interests, but that they are not necessary to implicate retroactivity concerns).

A determination by EPA that certain Clean Air Act requirements do not apply to an activity creates a safe harbor for conforming activities. EPA recognizes as much when it issues applicability determinations under other programs in the Act. EPA's internal manual concerning these programs describes applicability determinations as "reviewable final agency actions that conclusively resolve questions of applicability

for a particular source," *i.e.*, letters that tell regulated entities how EPA interprets the law to apply (or not to apply) to the matter in question.[2] Indeed, EPA has promulgated regulations governing the process for application for and issuance of applicability determinations. *E.g.*, 40 C.F.R. § 60.5. That EPA has such a process evidences the importance of such determinations within and to highly regulated industries, and gives industry reason to believe they can rely on these determinations. Even where no formal process exists for the issuance of applicability determinations, reliance interests remain. And the same overarching principles of finality and reviewability ought to apply whenever EPA (or any other agency) issues such a determination.

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[2] EPA Process Manual for Responding to Requests Concerning Applicability and Compliance Requirements of Certain Clean Air Act Stationary Source Programs 13, B-2 (July 2020), https://www.epa.gov/sites/default/files/2020-07/documents/111-112-129_process_manual.pdf. While EPA may counter that this manual also provides that these applicability determinations are site-specific and thus not nationally or locally applicable, EPA itself acknowledges that applicability determinations "could potentially address multiple sources in different locations." *Id.* at 16 n.21. And, to be clear, while the principle of finality undergirding applicability determinations is analogous here, the manual does not govern the January or April Letter. For the reasons explained in Chevron's Opening Brief (Doc. 1923637 at 28-37), EPA's April Letter is indeed nationally applicable.

Here, EPA gave no hint in the April Letter that it considered the obvious possibility that OCS oil and gas operators have already acted in reliance on the definitive interpretations and other statements in its January Letter. EPA did not provide notice that it was considering issuing the April Letter and thereby gave the regulated entities no opportunity to raise such reliance interests with the agency. As in *Regents*, where the Court rejected the resulting agency action after the government declined to consider the parties' reliance interests before changing course, 140 S. Ct. at 1915, this Court should reject EPA's April Letter. The April Letter gives no reason for the Court to depart from that precedent.

II. THE APRIL LETTER IS A JUDICIALLY REVIEWABLE FINAL AGENCY ACTION WHICH, ON REVIEW, MUST FAIL.

The Supreme Court has recently reaffirmed that the courts are to take a "pragmatic" approach when determining whether agency action is final. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599-60 (2016). Under this pragmatic approach, courts apply a two-pronged test that examines whether the action marks the consummation of the agency's decisionmaking process and whether it determines legal rights

or imposes legal obligations. *Bennett v. Spear*, 520 U.S. at 177-78. Related to the second prong, courts have also asked whether the agency's action has an "immediate and practical impact." *Frozen Food Express v. United States*, 351 U.S. at 44.[3] Under all these cases, the April Letter is final agency action reviewable by this Court.

The April Letter has the legal effect of denying the safe harbor granted by the January Letter, and as a practical matter is complicating the process of decommissioning platforms. Moreover, the April Letter's articulation of a new (and contrary to statute) regulatory construct further supports the conclusion that the Letter is judicially reviewable final agency action.

A. Agency actions are final when they pose direct and appreciable legal consequences, *i.e.*, when they have immediate and practical impacts on regulated entities.

The "pragmatic" approach that the Supreme Court has long taken to determining finality of agency action is necessarily flexible. *Hawkes*,

[3] *See* William Funk, Final Agency Action After *Hawkes*, 111 N.Y.U. J.L & Liberty 285, 293 (2017) (discussing Supreme Court precedent as having found finality in different ways, but noting: "In the vast majority of cases, this is seemingly a nonissue because the agency action has a direct and immediate impact as a result of the action's legal consequences or its determination of a person's rights or obligations.").

578 U.S. at 599-600 (citing *Bennett* and *Frozen Food Express*); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-50 (1967). Over time, the Supreme Court has instructed lower courts on the many ways in which an agency action can be final and reviewable. *See Hawkes*, 578 U.S. at 599-600, 604; *Frozen Food Express*, 351 U.S. at 44; *Abbott Laboratories*, 387 U.S. at 149-52.

1. The most frequently employed method to determine finality is the two-pronged test set forth in *Bennett v. Spear*. Under *Bennett*, agency action is final if: (1) the action marks the consummation of the agency's decisionmaking process, rather than merely being tentative or interlocutory in nature, and (2) the action is one by which rights or obligations have been determined or from which legal consequences will flow. 520 U.S. at 177-78.

Applying the first prong in *Bennett*, the Supreme Court has held that an agency action is final if "[the agency] has rendered its last word on the matter in question." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (internal quotation marks omitted). An agency action satisfies *Bennett*'s second prong if it "gives rise to direct and appreciable legal consequences." *Hawkes*, 578 U.S. at 598 (internal quotation marks

omitted) (finding that an affirmative "waters of the United States" jurisdictional determination that denied a "safe harbor" from certain enforcement actions met the *Bennett* "legal consequences" requirement).

2. The *Bennett* test, however, is not a formula to be applied mechanically. The Court has also looked at whether the agency action in question has "an immediate and practical impact" on regulated parties. *Frozen Food Express*, 351 U.S. at 43-44 (concluding that an Interstate Commerce Commission order stating that a commodity was not an exempt agricultural product was final agency action because it "ha[d] an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well" and was not "abstract, theoretical, or academic"); *Abbott Laboratories*, 387 U.S. at 152 (explaining that agency action having a "direct effect on the day-to-day business" of a company "is sufficiently direct and immediate as to render the issue appropriate for judicial review"); *Hawkes*, 578 U.S. at 604 (Ginsburg, J., concurring) (agreeing that agency action was final because it was "definitive," not "informal" or "tentative," and had "an immediate and practical impact").

The Supreme Court's "pragmatic" approach to finality recognizes

that *both* "legal consequences" and "immediate and practical impacts" can render an agency action final. *See Hawkes*, 578 U.S. at 599-600 (relying on *Bennett*, *Frozen Food Express*, and *Abbott Laboratories*); *id.* at 604 n.* (Ginsburg, J., concurring) (explaining that *Bennett* "does not displace or alter the approach to finality established by *Abbott Laboratories* … and *Frozen Food Express*"); *Frozen Food Express*, 351 U.S. at 44 (holding as final an agency order that imposed no legal obligation because the order's statutory interpretation nevertheless had an immediate and practical impact on regulated entities); *see also Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 981 F.3d 1360, 1380 (Fed. Cir. 2020) (applying *Frozen Food Express* approach to finality).

3. One key indicator of finality that the Supreme Court has identified is whether the agency action provides—or removes—a safe harbor against the prospect of federal enforcement. The Court's recent decision in *Hawkes* illustrates the concept. In *Hawkes*, the Supreme Court ruled that a written finding that a particular parcel of land fell within the Clean Water Act's definition of "waters of the United States," subjected that parcel to federal regulatory jurisdiction and denied the

recipient a "safe harbor" from certain federal enforcement proceedings. 578 U.S. at 598-99. That denial, the Court concluded, "gives rise to direct and appreciable legal consequences." *Hawkes*, 578 U.S. at 598-99 (internal quotation marks omitted); *see also id.* at 604 (Ginsburg, J., concurring) (citing *Frozen Food Express* for the proposition that the "immediate and practical impact" of the jurisdictional determination *also* counseled in favor of finality).[4]

This flexible view of finality both makes eminent sense and best respects the courts' longstanding policy in favor of judicial review of agency action. *See Sackett v. EPA*, 566 U.S. 120, 128 (2012) ("The APA ... creates a presumption favoring judicial review of administrative action." (internal quotation marks omitted)). And, at the same time, it advances the twin goals of regulatory certainty and respecting reasonable reliance on prior determinations. Both are vital to establishing and maintaining a reliable, consistent, and safe regulatory environment that is much

[4] "[A] negative [jurisdictional determination] both narrows the field of potential plaintiffs and limits the potential liability a landowner faces for discharging pollutants without a permit. Each of those effects is a legal consequence satisfying the second *Bennett* prong. It follows that affirmative [jurisdictional determinations] have legal consequences as well: They represent the denial of the safe harbor that negative [jurisdictional determinations] afford." *Id.* at 599 (cleaned up).

needed by the nation's businesses.

B. EPA's April Letter is final agency action reviewable under *U.S. Army Corps of Engineers v. Hawkes* and other controlling precedent.

The April Letter bears all the hallmarks of EPA's final statement on the continued validity of EPA's earlier January Letter: it is signed by Joseph Goffman, the Acting Assistant Administrator for Air and Radiation; it rescinds and replaces the January Letter and withdraws the safe harbor that the January Letter had provided to Chevron; and there is no indication that it is tentative or interlocutory in this regard, or that it might be reconsidered by Mr. Goffman or by Administrator Regan or Deputy Administrator McCabe.[5]

The letter also has legal and practical consequences for Chevron and other OCS oil and gas operators that plan, conduct, and invest in business activities, including platform decommissioning activities, in reliance on EPA's pronouncements. Thus, it is final agency action within the meaning of the APA and, by extension, the Clean Air Act. *See* 5 U.S.C. § 704; *see also Whitman*, 531 U.S. at 478 (explaining that "final action"

[5] That the April Letter states that additional decisions may be made by the local air quality control authorities in Ventura County is of no import. The safe harbor provided by the January Letter is undeniably undone.

under CAA § 307, 42 U.S.C. 7607, "bears the same meaning" as its APA corollary).

The January Letter articulated a definitive interpretation of the Clean Air Act and applied it to the decommissioning of offshore oil platforms: platforms that "no longer emit or have the potential to emit any pollutant" after the pre-abandonment and abandonment phases will cease to be regulated OCS "sources"; "they will also no longer be subject to the relevant regulations of the corresponding onshore area (COA) … [and] the emissions from vessels associated with the OCS source and within 25 miles of the platforms will not be subject to OCS permitting requirements [pursuant to CAA Section 328]." January Letter at 1-2. The January Letter conclusively provided the certainty that OCS source permitting requirements would not apply to decommissioning activities carried out from aboard vessels at platforms that no longer emit or have the potential to emit air pollutants.

In a rapid about-face, EPA in the April Letter changes its mind, revokes January Letter's confirmation of non-regulation, and instead determines that: (1) to make an "OCS source" determination for a platform that ceases to emit any air pollutant, a regulatory agency has to

evaluate the emissions from "additional activity conducted *at the site* or equipment used to dismantle the Platforms after the Pre-Abandonment and Abandonment"; and (2) the delegated OCS permitting authority—the Ventura County Air Pollution Control District in this case—instead of EPA, is the appropriate agency to make a Section 328 applicability determination, though EPA encourages the local authority to consult with EPA prior to taking further action. April Letter at 1-3 (emphasis added).

The April Letter meets both *Bennett* prongs. First, as discussed above, the April Letter marks the consummation of EPA's decision to reverse the OCS non-applicability determination and deprive Chevron (and the regulated oil-and-gas community more generally) of the regulatory certainty provided by the January Letter. The denial is not of a "tentative or interlocutory nature." *See Bennett*, 520 U.S. at 177-78. The Agency "has rendered its last word on the matter" that the January Letter has been revised, and thus it satisfies the first *Bennett* prong. *See Whitman*, 531 U.S. at 478.

Second, the assurance of a safe harbor through the January Letter—and by extension, the removal of that assurance through the

April Letter—is undoubtedly a legal consequence, akin to the revocation of a permit. The January Letter confirmed to Chevron and other OCS oil and gas operators that platforms that cease to emit pollutants after pre-abandonment and abandonment, as well as vessels associated with the decommissioning of those platforms, are not OCS sources; they are not subject to relevant corresponding offshore area regulations and OCS permitting requirements; nor are they exposed to any legal liabilities associated with those statutes and regulations. January Letter at 1-2.[6] Withdrawal of this regulatory safe harbor is the "direct and appreciable" legal consequence of the April Letter, and thus the April Letter meets the second prong of *Bennett*. *See Hawkes*, 578 U.S. at 598-599.

Moreover, the April Letter has "immediate and practical impact." *See Frozen Food Express*, 351 U.S. at 43-44. EPA applicability determinations are agency actions upon which businesses expect to act. EPA was well aware of that here, given that Chevron explained that it was "in the process of developing decommissioning plans" for the oil and

[6] Of course, exclusion from regulation as an OCS source under Section 328 of the Clean Air Act does not speak to regulation under other statutory and regulatory provisions, which continue to apply to decommissioning activities.

gas platforms discussed in Chevron's request, and sought EPA's assistance in that effort. Doc. 1911136, Ex. 2 at 2. The "immediate and practical impact" of EPA's sudden change of mind is that the April Letter deprived Chevron and similarly-situated OCS operators of the regulatory assurance afforded by EPA's January Letter.

Businesses reasonably expect to be able to act in reliance on an agency's applicability determinations, especially those coming from a duly-appointed official, such as the EPA Deputy Assistant Administrator for Air and Radiation who issued the January Letter here. EPA should not be allowed to whipsaw businesses through such sudden reversals of position in ways that could render those businesses' investments and other activities worthless at the Agency's whim, or that could subject those businesses to liabilities that they understood not to exist, based on the definitive assurance afforded by a previous agency decision.

C. The April Letter altered the regulatory regime applicable to OCS sources, which reinforces its reviewability.

The April Letter also demands this Court's review because it effectively alters the regulatory regime applicable to OCS "sources" nationwide in a way that finds no basis in the statute. *See Bennett*, 520

U.S. at 178 (explaining that actions that "alter the legal regime" meet the second *Bennett* prong).

CAA Section 328(a)(4)(C) identifies "three criteria each of which must be met for 'any equipment, activity, or facility' to be considered an OCS source," January Letter at 4: (1) emitting or having the potential to emit any air pollutant, (2) regulation under the Outer Continental Shelf Lands Act, and (3) location on the Outer Continental shelf or waters above. The "activit[ies]" to which those criteria apply

> include, but are not limited to, platform and drill ship exploration, construction, development, production, processing, and transportation. For purposes of this subsection, emissions from any vessel servicing or associated with an OCS source, including emissions while at the OCS source or en route to or from the OCS source within 25 miles of the OCS source, shall be considered direct emissions from the OCS source.

42 U.S.C. § 7627(a)(4)(C).

The January Letter's interpretation of "OCS source" is straightforward. The letter found that vessels associated with a platform that is no longer an OCS source (because it no longer emits or has the potential to emit) are also not OCS sources. And, if there is no longer an OCS source present, the emissions from these vessels are not emissions from an OCS source. January Letter at 5. The nub of the letter is the

statute's regulation of a "source" on the OCS, which "include[s] any equipment, activity, or facility which … emits or has the potential to emit any air pollutant." *See* 42 U.S.C. § 7627(a)(4)(C). Significantly, once there is no longer any potential to emit, there is no longer an OCS "source" within the meaning of Section 328, leaving no basis for regulation under that provision of the former "source" or of anything associated with it.

The April Letter, however, abruptly backtracks. It introduces a new trigger for regulation under Section 328 that appears nowhere in the statute—"the [OCS] site." The letter implies that post-abandonment "equipment," "facilities," or "new activities" at "the site" can be an OCS source under Section 328 even if the equipment, facilities, or activities do not meet the statutory criteria for such a source. *See* April Letter at 2 (stating whether there is an OCS source in this case "depends on whether other equipment or facilities brought *to the site* (e.g., vessels or barges) or new activities conducted *at the site* qualify as an OCS source for some period after the completion of the pre-abandonment and abandonment phases" (emphasis added)). The April Letter also concludes that activities undertaken to decommission a platform could be viewed to be similar to the list of activities defining an OCS source, which could then render the

demolition of a platform a regulated OCS source activity. *See* April Letter at 3.

The new and revised interpretations in the April Letter are contrary to the text and purpose of Section 328.

First, the April Letter's new OCS "site" concept finds no support in the statute, which refers only to OCS "sources." The "site" concept, coined by EPA in the April Letter, is neither defined nor used in the context of OCS source determination in CAA Section 328 or of EPA's implementing regulations at 40 C.F.R. part 50. *See* 42 U.S.C. § 7627; 40 C.F.R. part 50.

Second, viewing the "dismantling" of a platform as similar to the "platform and drill ship exploration, construction, development, production, processing, and transportation" activities listed in the statutory definition of OCS source, 42 U.S.C. § 7627(a)(4)(C), runs counter to fundamental principles of statutory interpretation and disregards congressional intent.

Put simply, all the activities listed in the definition of OCS source in CAA Section 328(a)(4)(C) are *development or production* activities in the service of exploring for and extracting natural resources. Decommissioning activities, such as dismantling obsolete drilling

platforms, are the exact opposite of development or production activities. Adding decommissioning activities to the list of OCS source activities runs afoul of congressional intent to focus OCS source regulation on development and production of energy sources.

Moreover, to the extent EPA viewed the phrase "include, but are not limited to" as providing a "gap for the agency to fill," it took a wrong turn when it departed from the class of activities that Congress chose to cover in Section 328. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). To be sure, the phrase "including but not limited to" indicates a non-exclusive list; however, that expression, when combined with specific items as examples, includes additional terms of the same kind or nature, and is not an open-ended catchall provision allowing dissimilar activities to be swept in. *See United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1200 (D.C. Cir. 2005) ("The words 'including, but not limited to' introduce a non-exhaustive list that sets out specific examples of a general principle. Applying the canons of *noscitur a sociis* and *ejusdem generis*, we will expand on the remedies explicitly included in the statute only with remedies similar in nature to

those enumerated." (citation omitted)).[7] In this case, decommissioning activities are the polar opposite of the development activities listed in the statute, and thus are not similar to the OCS source activities on the list. Had Congress intended to include decommissioning in Section 328, Congress would have used more capacious language to do so.

In sum, that EPA in the April Letter reinterpreted the statute's applicability to decommissioning activities nationwide, in a novel way—and, notably, in a way that finds no support in the statute—reinforces that *this* Court should review it as final agency action and set it aside.

CONCLUSION

For the above reasons, the Court should vacate EPA's unlawful April Letter.

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Respectfully submitted,

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[7] Every term used by Congress in listing those activities regulated under Section 328 relates to the development or production of natural resources from the OCS. Decommissioning is the one that just doesn't belong. This conclusion—which arises straightforwardly from the statutory text—also makes eminent policy sense, as it avoids disincentivizing the timely decommissioning and removal of obsolete OCS infrastructure.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,447 words. This brief 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 the brief has been prepared in Century Schoolbook 14-point font using Microsoft Word 2010.

November 29, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2021 the foregoing was filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system, which sends a notice of filing to all registered CM/ECF users.

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