No. 21-71132

UNITED STATES COURT OF APPEALS
FOR THE NINTH 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, *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.

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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 approximately 300,000 direct members and indirectly represents the interests of more than three million companies 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.[1]

At issue in this case is the reversal, within the space of three months, of a January 2021 letter issued by the United States Environmental Protection Agency ("EPA") that had both: (1) set forth EPA's conclusive interpretation of a critical provision of the Clean Air Act

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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. Petitioner Chevron U.S.A. Inc. ("Chevron" or "Petitioner") and Respondent U.S. Environmental Protection Agency consent to this filing. *See* Fed. R. App. P. 29(a); Cir. R. 29-3; Cir. Advisory Cmte. Note to R. 29-3.

("CAA" or "the Act"), and (2) applied that interpretation to determine that offshore 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. ER-8. In reversing course without prior notice and broadening EPA's regulatory jurisdiction, EPA abjured consideration of the reasonable reliance interests of the private business that requested EPA's determination and disregarded 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 interests of operators of offshore oil and gas platforms; they apply to regulatory regimes governing a wide range of human activities and industries. Timely judicial review of agency reversals of conclusive interpretations affecting significant reliance interests is essential to the certainty needed for the conduct of business across the nation.

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 ER-4. In that April Letter, EPA reversed statutory interpretations that it had

definitively announced in a letter issued a mere three months earlier. The Chamber supports Chevron's request for relief for two principal reasons:

First, regulatory certainty and regulated industries' 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 authoritative representations from the government when they engage in activity that the government specifically considered and approved. Courts should not abide an agency's sudden about-face concerning such a representation without ensuring that appropriate procedural and substantive requirements have been observed, including the 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 should not be permitted to evade review of a reversal of a decisive course it took only three months before. It makes no difference that EPA's novel interpretation of settled law comes cloaked 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) the un-noticed rescission of a safe harbor that EPA had expressly announced in its January Letter—that, 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 Outer Continental Shelf ("OCS") "source" subject to regulation under CAA Section 328, 42 U.S.C. § 7627; and (2) the abrupt introduction of a novel, extra-statutory term—"the [OCS] *site*"—that EPA 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" that Congress expressly identified as the proper subject of regulation 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 judicial review of that interpretation *now*.

This Court should find the April Letter to be reviewable final agency action, hold that it is contrary to law, and therefore vacate it.

ARGUMENT

I. REGULATED BUSINESSES RELY ON AGENCY ACTIONS LIKE THE JANUARY LETTER FOR MUCH-NEEDED REGULATORY CERTAINTY.

Regulatory certainty is vital to the orderly conduct of business in the United States, providing a stable environment for private enterprise that fosters investment and innovation. This is particularly true for highly-regulated industries like Chevron's. Agency actions purporting to provide regulatory certainty—nationwide rulemakings, responses to requests for interpretations of statutory and regulatory provisions, and site-specific statutory and regulatory applicability determinations, among others—give rise to significant reliance interests. Undercutting these interests through sudden, unannounced reversals like that in the April Letter 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 permitting or authorization process, on the one hand, and the substantial civil and criminal penalties that can follow if a company proceeds without such permitting or

authorization, on the other. 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 give adequate weight and consideration to such interests.

This Court has recently reiterated the need to evaluate reliance interests "[w]hen an agency changes course[.]" *Nat'l Urban League v. Ross*, 977 F.3d 770, 778 (9th Cir. 2020) (quoting *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020)). 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 extent or the reasonableness of private parties' 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 pronouncement and its reversal.

For example, in *National Urban League*, this Court recognized the reliance interests arising from a plan for extending U.S. census deadlines in light of the COVID-19 pandemic ("COVID-19 Plan")—deadlines that the U.S. Census Bureau abruptly foreshortened mere months later. 977 F.3d at 778. The Court noted that the COVID-19 Plan had already been the subject of an intense advertising campaign, leading to public reliance on an extended deadline for self-reporting. *Id.* The district court articulated the seriousness of the reliance interests in no uncertain terms: "people who believe[d] they could submit their census responses [in accordance with the COVID-19 Plan] and try to do so *would not be counted*" due to being late under the new deadline. *Nat'l Urban League v. Ross*, 489 F. Supp. 3d 939, 1000 (N.D. Cal. 2020) (emphasis added); *see*

also id. at 999 (explaining reliance interests also arising "on the part of municipalities and organizations who encouraged people to be counted and publicized the COVID-19 Plan's October 31, 2020 deadline for data collection"). That the COVID-19 Plan was not "longstanding" did not undermine the significance of the agency's *volte-face*. *See also Tex. Oil & Gas Corp. v. Watt*, 683 F.2d 427, 431, 435 (D.C. Cir. 1982) (rejecting agency's cancellation of oil and gas leases, just a few months after leasing award, under auspices of "eleventh-hour interpretation" of agency's statutory duty).

Rather, courts consider whether an agency action *induces reliance by regulated parties and others* in evaluating whether it is final and thus reviewable. For example, in *Bennett v. Spear*, 520 U.S. 154, 170 (1997), the Supreme Court held that an "incidental take statement," authorizing 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) are *entitled* to rely. Because such a statement "alters the legal regime," an agency disregards it "at its own peril"; thus, the Court readily concluded that the statement was final and reviewable at the behest of the affected water users. *Id.* at 169-70, 178.

And in *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956), the 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. The Court did not couch these decisions in terms of the word "reliance" *per se*. But in recognizing that the agency action at issue, which determined whether the plaintiff carrier's activities were exempt from permitting and regulatory requirements, was "the basis" for subsequent activities, the Court clearly recognized 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." *Regents of Univ. of Cal.*, 140 S. Ct. at 1915 (internal quotation marks and citation omitted). 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.* Ignoring reasonable reliance interests can also implicate "due process considerations of fair notice and fundamental fairness[.]" *Cemex Inc. v. Dep't of the Interior*, 560 F. Supp. 3d 268, 281

(D.D.C. 2021); *cf. Regency Air, LLC v. Dickson*, 3 F.4th 1157, 1162 (9th Cir. 2021) (explaining how an agency's changing theories midstream without notice raises due process concerns).

B. Applicability determinations of the kind at issue here engender particularly acute reliance, and thus it is acutely detrimental when they are 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 will, and should be able to, rely on that interpretation. *Nat'l Automatic Laundry & 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"); *see also Cal. ex rel. Harris v. FERC*, 809 F.3d 491, 499 (9th Cir. 2015) (quoting *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 239 (D.C. Cir. 1980), for proposition that "reviewability of an order must [therefore] be determined by reference to

its practical function and consequences" in the relevant statutory scheme).[2]

A determination by EPA that certain Clean Air Act requirements do not apply to an otherwise-regulated activity creates a safe harbor for activities conforming to that determination. EPA recognizes as much when it issues applicability determinations under other CAA programs. 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.[3] Indeed, EPA has promulgated

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[2] Although 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, 443 F.2d at 699, such express provisions are not necessary for legitimate reliance interests to arise. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 106 & n.5 (2015) (explaining that Congress has enacted safe harbor provisions in acknowledgment of reliance interests, but that they are not necessary to implicate retroactivity concerns).

[3] 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) (emphasis added), *available at* https://www.epa.gov/sites/default/files/2020-07/documents/111-112-129_process_manual.pdf; *see also id.* at 12-13

regulations governing the processes of applying for and issuing applicability determinations. *E.g.*, 40 C.F.R. § 60.5. That EPA has created such a process evidences the importance of such determinations to highly-regulated industries and gives industry ample reason to understand that they can rely on these determinations. Even where no formal process exists for issuing applicability determinations, reasonable 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.

Here, EPA gave no indication in the April Letter that it had 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 provided no advance notice to Chevron or any other regulated entity that it was considering issuing the April Letter; it thus gave the regulated entities no opportunity whatsoever to raise such reliance interests with the agency. As in *Regents*, where the Court rejected the resulting agency action after the

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(articulating principle of finality undergirding applicability determinations in analogous circumstances).

government failed 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 THAT IS INVALID ON THE MERITS.

The Supreme Court recently reaffirmed that the courts are to take a "pragmatic" approach when determining whether agency action is final and reviewable. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599-600 (2016); *see also Gill v. U.S. Dep't of Just.*, 913 F.3d 1179, 1184 (9th Cir. 2019) (same). Under this pragmatic approach, courts apply a two-pronged test to determine whether the action marks the consummation of the agency's decisionmaking process and whether it settles legal rights or imposes legal obligations. *Bennett*, 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, 351 U.S. at 44.[4] Under all these cases, the April Letter is final agency action reviewable by this Court.

The April Letter has the legal effect of eviscerating the safe harbor expressly granted by the January Letter, and as a practical matter is delaying the ongoing 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*, 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

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[4] *See* William Funk, Final Agency Action After *Hawkes*, 11 N.Y.U. J. L. & Liberty 285, 293 (2017) (discussing Supreme Court precedent as having found finality in different ways, but noting: "[i]n 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").

an agency action can be final and reviewable. *See Hawkes*, 578 U.S. at 599-600; *id.* at 604 (Kagan, J., concurring); *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 and citation omitted). An agency action satisfies *Bennett*'s second prong if it "gives rise to direct and appreciable legal consequences." *Hawkes*, 578 U.S. at 597-98 (internal quotation marks omitted, citing *Bennett*, 520 U.S. at 178) (finding that affirmative "waters of the United States" jurisdictional

determination that denied "safe harbor" from certain enforcement actions met *Bennett*'s second prong).

This Court has applied *Bennett* in concluding correctly that an agency's decision that a particular statutory scheme applies to an issue or a set of facts *in itself* can be final agency action, even before the agency implements the scheme. In *Navajo Nation v. U.S. Department of the Interior*, 819 F.3d 1084 (9th Cir. 2016), this Court evaluated the National Park Service's decision—conveyed first in an email, and only after much prompting in a more-formal document—that the Native American Graves Protection and Repatriation Act applied to require an inventory of hundreds of sets of human remains and funerary objects taken from Canyon de Chelly National Monument without consent, and despite the Navajo Nation's request that they be returned without further disturbance. *Id.* at 1089-90. This Court rejected the notion that the Navajo Nation had to wait for the Park Service to complete its inventory, because the Nation asserted that the law should not apply *at all*, rendering the Park Service's retention of the remains unlawful. *Id.* at 1094. In sum, the agency's determination that the law applied satisfied both *Bennett* prongs because it was final and effectively "determined at

least some of the Navajo Nation's property rights[.]" *Id.* at 1093; *see also id.* at 1091-93.

2. The *Bennett* test, however, is not the exclusive basis for finding an agency action final and reviewable. The Court has also found finality by concluding that the agency action in question has "an immediate and practical impact" on regulated parties. *Frozen Food Express*, 351 U.S. at 43-44 (agency order, stating that 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 "direct effect on [company's] day-to-day business" "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 *either* "legal consequences" *or* "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); *see also S.F. Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 580 (9th Cir. 2019) (citing *Frozen Food Express* for conclusion that agency action advising as to risk of legal violation was final).

3. One key indicator of finality that the Supreme Court has identified is whether the agency action provides—or removes—a safe harbor against potential federal enforcement. The Court's decision in *Hawkes* illustrates the concept. In *Hawkes*, the Supreme Court ruled that an agency finding that a 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 enforcement proceedings. 578 U.S. at 597-99. That denial, the Court concluded, "gives rise to direct and appreciable legal consequences." *Id.* (internal quotation marks and citation omitted); *see also id.* at 604 (Ginsburg, J., concurring) (citing *Frozen Food Express*, 351

U.S. at 44, for proposition that "immediate and practical impact" of jurisdictional determination *also* counseled in favor of finality).[5]

This practical view of finality both makes eminent sense and best respects the longstanding presumption 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 and citation omitted)). 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 and consistent regulatory environment that benefits society.

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[5] "[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) (citations omitted).

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 expressly rescinds and replaces the January Letter and withdraws the safe harbor that EPA had provided to Chevron; and there is no indication that the April Letter is tentative or interlocutory, or that it might be reconsidered by Mr. Goffman or by the EPA Administrator or Deputy Administrator.[6]

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[6] That the April Letter states that additional decisions may be made by air quality control authorities in Ventura County is of no import. The safe harbor provided by the January Letter is undeniably undone by the April Letter. Moreover, "[a]n agency action can be final even if its legal or practical effects are contingent on a future event," such as future regulatory proceedings. *Gill*, 913 F.3d at 1185; *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003) (finding agency action final where it "attach[ed] legal consequences to … future … proceedings"). If EPA had deferred *entirely* to Ventura County (putting aside such deferral's questionable legality), EPA's case for no reviewability would have been significantly stronger. But, having weighed in, EPA cannot now plausibly disclaim the consequences of its determination or the fitness of that determination for judicial review.

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" 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]." ER-8-9. The January Letter conclusively provided the certainty that OCS source permitting requirements *would not apply* to decommissioning activities carried out

aboard vessels at platforms that no longer emit or have the potential to emit air pollutants.

In a rapid about-face, EPA changed its mind. In its April Letter, EPA revoked the January Letter's confirmation of non-regulation, and instead determined 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. ER-4-6 (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 earlier OCS non-applicability determination and deprives Chevron (and the regulated community more generally) of the regulatory certainty provided by the January Letter. The denial in the April Letter

is not of a "tentative or interlocutory nature." *See Bennett*, 520 U.S. at 177-78. EPA "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 (internal quotation marks and citation omitted).

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 regulated 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. ER-8-9.[7] Withdrawal of this regulatory safe harbor is the express, "direct[,] and

[7] Of course, that safe harbor does not mean that such platforms and vessels are exempt from regulation altogether. Other statutory and regulatory provisions continue to apply to decommissioning activities.

appreciable" legal consequence of the April Letter, and thus the April Letter meets the second prong of *Bennett*. *See Hawkes*, 578 U.S. at 598-99.

Moreover, the April Letter has "immediate and practical impact" on regulated parties. *See Frozen Food Express*, 351 U.S. at 43-44. 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 gas platforms discussed in Chevron's request, and sought EPA's assistance in that effort. ER-15. The "immediate and practical impact" of EPA's sudden change of mind is that Chevron and similarly-situated OCS operators no longer have the regulatory non-applicability assurance expressly afforded by EPA's January Letter. Chevron was not required "to call the [EPA's] bluff and engage in" potentially unsanctioned behavior, at the risk of enforcement action, to obtain review of EPA's about-face. *S.F. Herring*, 946 F.3d at 582.[8]

[8] Nor was Chevron required to seek more clarity from EPA, as no more clarity was needed. A "central rationale of the final agency action requirement is to prevent premature intrusion into the agency's deliberations; it is not to require regulated parties to keep knocking at the agency's door when the agency has already made its position clear." *Id.* at 579.

Businesses reasonably rely 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, at its unreviewable discretion, to whipsaw businesses through reversals of position in ways that could render those businesses' investments and other activities worthless, 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); *see also Navajo Nation*, 819 F.3d at 1092 (actions that determine legal rights of affected party are reviewable).

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," ER-11: (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 air pollutants) are not themselves OCS sources. And, if there is no longer an OCS source present, the emissions from these vessels are not emissions from an OCS source. ER-12. The nub of the letter is the statute's regulation of a "source" located 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 air pollutants,

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 reverses course. 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* ER-5 (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 as 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* ER-6.

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. Because EPA's introduction of this new construct lacks any grounding in the statutory text, it is unlawful, as Chevron explains in its brief (at 36-44). Further, EPA's meager attempt to portray the reversal as a reasonable construction of either the statute or the regulations deserves no deference (*see* Chevron Br. at 44-49; 51-52).

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. *See* Chevron Br. at 40-41 (explaining canons of construction applicable to lists of activities).

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," EPA 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'l 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 Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 833 F.3d 1136, 1144 (9th Cir. 2016) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as

well." (quoting *Beecham v. United States*, 511 U.S. 368, 371 (1994))).[9] 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, it could and would have used more capacious language. That it did not is telling.

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.

[9] 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. *De*commissioning 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.

CONCLUSION

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

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Respectfully submitted,

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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 5,938 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 2019.

November 9, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2022, the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth 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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