**ORAL ARGUMENT NOT YET SCHEDULED**

**United States Court of Appeals for the District of Columbia Circuit**

**No. 14-1290**

Troy Chemical Corporation, Inc.,
Petitioner

v.

Environmental Protection Agency, et al.,
Respondents

On Petition for Review of a Final Rule
of the U.S. Environmental Protection Agency

# BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS, CHEMISTRY COUNCIL OF NEW JERSEY, AND NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER TROY CHEMICAL CORPORATION, INC.

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### (A) Parties and Amici.

The parties in this case are listed in the Opening Brief for the Petitioner.

The National Association of Manufacturers ("NAM"), the Chemistry Council of New Jersey ("CCNJ"), and the New Jersey Business & Industry Association ("NJBIA") are amici curiae and are filing this brief in support of Petitioner.

Reference to the final rule under review, issued by the United States Environmental Protection Agency ("EPA" or "the Agency"), is provided in the Opening Brief for Petitioner.

This case has not previously been before this Court or any other court, and counsel for amici curiae are not aware of any related cases currently pending.

## STATEMENT REGARDING AUTHORITY TO FILE, AUTHORSHIP, AND FINANCIAL CONTRIBUTIONS

Amici represent that all parties have consented to the filing of this brief, as explained in the notices filed on October 23, 2019 and October 25, 2019.

Amici represent that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund the preparation or submittal of this brief, and no person/entity other than amici and their members contributed money intended to fund the preparation and submittal of this brief.

## CORPORATE DISCLOSURE STATEMENTS

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. The manufacturing sector employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM states that it is a "trade association" for purposes of Circuit Rule 26.1(b). The NAM has no parent corporation, and no publicly held company has ten percent or greater ownership in the NAM.

CCNJ states that it is a "trade association" for purposes of Circuit Rule 26.1(b). CCNJ has no parent corporation, and no publicly held company has ten percent or greater ownership in CCNJ.

NJBIA states that it is a "trade association" for purposes of Circuit Rule 26.1(b). NJBIA has no parent corporation, and no publicly held company has ten percent or greater ownership in NJBIA.

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## GLOSSARY OF ACRONYMS AND ABBREVIATIONS

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|---|---|
| APA | Administrative Procedure Act |
| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act |
| EPA | Environmental Protection Agency |
| HRS | Hazard Ranking System |
| NPL | National Priorities List |

## STATUTES AND REGULATIONS

Most pertinent statutes and regulations are contained in Petitioners' Addendum. Those not contained therein are set forth in the Addendum to this Brief.

## INTEREST OF AMICI CURIAE

The NAM and its members have a strong interest in the outcome of this case. As a general matter, the NAM has a substantial interest in ensuring that environmental rules and regulations promulgated by EPA are in accord with the Agency's statutory authority, properly promulgated, appropriately tailored to avoid unduly burdening the regulated community, and otherwise lawful. The NAM's advocacy is intended to ensure the continued efficacy of environmental protections without unnecessarily harming the NAM's members' ability to compete in the global market.

The NAM is specifically interested in Agency rules and decisions promulgated pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601, *et seq.*, and frequently participates in Agency rulemaking proceedings and petitions for judicial review of final agency actions under CERCLA. Agency regulations governing remediation sites and cleanup liability frequently involve manufacturers and can often result in damage to business reputation, loss of property value, and other economic costs. The NAM is vitally concerned with ensuring that EPA's

Superfund rules and regulations focus on real, significant, and non-arbitrary risks to human health and the environment, and that the relative risks associated with certain sites are properly analyzed and accurately portrayed.

CCNJ represents the manufacturing interests of companies involved in the business of chemistry, including chemical, pharmaceutical, flavors and fragrance manufacturers and petroleum refineries in New Jersey. This group of companies is the largest manufacturing industry in the state, representing a combined value of $25.5 Billion and employing over 43,000 direct jobs.

NJBIA provides information, services and advocacy to its member companies to build a more prosperous New Jersey. Its members represent every industry in the State, and employ over 1,000,000 people. This includes contractors, manufacturers, retail and wholesale businesses, and service providers of every kind.

In its Opening Brief, Petitioner Troy contends that EPA's listing of the Pierson's Creek Site ("Pierson Creek" or "the Site") on the Superfund's National Priorities List ("NPL") was based on an arbitrary and unlawful application of EPA's Hazard Ranking System ("HRS"). In this brief, amici explain how one particular aspect of EPA's HRS analysis (the "human food chain" component) violated CERCLA and the Administrative Procedure Act ("APA"), misapplied the Agency's own HRS regulations, and misconstrued the HRS regulations to deflect and ignore superior data and evidence in the administrative record. Indeed, the analytical

approach EPA applied here is so deficient that, if repeated, it could result in widespread inclusion on the NPL of present or former manufacturing sites without any meaningful consideration of the hazard posed by those sites. Inundating the NPL with sites irrespective of risk unnecessarily harms the economic and reputational interests of many businesses and individuals, undermining the prioritization scheme that Congress commanded in CERCLA.

## SUMMARY OF ARGUMENT

This case involves the listing of a site on the NPL under the Superfund program. Through CERCLA, Congress directed EPA to, *inter alia*, develop the NPL as a means of "determining priorities among releases or threatened releases throughout the United States . . . ." 42 U.S.C. § 9605(a)(8)(A). To determine the "relative risk or danger to public health or welfare or the environment," Congress instructed EPA to examine certain criteria including "the damage to natural resources which may affect the human food chain and which is associated with any release or threatened release . . . ." 42 U.S.C. § 9605(a)(8)(A). In furtherance of this mandate, Congress also directed EPA to develop a ranking system that "shall . . . to the maximum extent feasible . . . accurately assess the relative degree of risk to human health and the environment posed by sites and facilities subject to review." 42 U.S.C. § 9605(c).

In response to this congressional directive, EPA proposed and finalized the current HRS in 1990. 40 C.F.R. pt. 300, App. A. Under the Agency's HRS regulations, EPA analyzes contaminated sites by examining four potential migration pathways (groundwater, surface water, soil, and air), and for each viable pathway assesses: (1) the likelihood of a release from the site; (2) the quantity and toxicity of the pollutants; and (3) the potential for releases from the site to affect people or sensitive environments. 40 C.F.R. pt. 300, App. A §§ 2.1 – 2.5. Potential sites are given a score from 0 to 100 based on formulas provided in EPA's HRS algorithm. Any site scoring 28.50 or higher is deemed as meeting the threshold hazard level for inclusion on the NPL. 82 Fed. Reg. 2760, 2765 (Jan. 9, 2017).

EPA utilized the HRS in its decision to list Pierson's Creek on the NPL. As part of the analysis the Agency conducted under the HRS, EPA assigned the Site 20 points based on a supposition that potential releases from the Site may be damaging natural resources that affect the "human food chain." EPA based the "human food chain" value on the potential for contamination of fish caught 13 miles away at the 69th Street American Veterans Memorial Pier ("Veterans Memorial Pier" or "Fishing Pier") in New York Bay.

In response to EPA's proposed listing of the Site, Petitioner Troy submitted detailed comments and data, including expert analysis, showing that such contamination was implausible at best. The Agency largely ignored the relevant

data submitted by Troy, instead making repeated reference to EPA's own 1990 HRS regulations stating that the Agency's analysis of "human food chain" impacts requires EPA to assign a numerical value "if there is a fishery (or portion of a fishery) present anywhere within the target distance limit." 40 C.F.R. pt. 300, App. A, § 4.1.3.3.1.

The HRS elsewhere defined the "target distance limit" for surface waters to be 15 miles, a distance which EPA viewed in this case as applicable regardless of the direction, volume, frequency of, or obstructions to, water flow from the site to the "fishery" target. According to EPA, when it comes to assessing whether pollutants in a contaminated site are likely to enter the food chain, proximity trumps all.

EPA's singular reliance on a cursory examination of proximity to the preclusion of the superior data submitted by Troy impermissibly undermines Congress' sole objective in enacting the NPL – to identify *accurately* the most contaminated sites in the country. EPA's refusal to meaningfully consider any data that did not conform to the "target distance" formula therefore constitutes an impermissible failure to respond to "evidence that runs counter to the agency's decision." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 307 (D.C. Cir. 2018). EPA must examine relevant data and offer a reasonable explanation for its actions. *See id*. at 311. *See also Nat'l Gypsum Co. v. EPA*, 968 F.2d. 40, 43 (D.C. Cir. 1992).

Regardless whether EPA reads its HRS regulations as compelling or condoning the dismissal of Troy's data in favor of the target distance algorithm, the Agency's interpretation of CERCLA as applied here is not reasonable and is entitled to no deference.

In contrast to EPA's rigid application of the Agency's HRS regulations to deflect and ignore Troy's data, EPA opted in two other important instances to disregard entirely its HRS regulations in order to avoid scoring the Site in a way that would weigh against listing the Site on the NPL. This is the clearest hallmark of arbitrary and capricious decision-making.

First, EPA violated its own HRS regulations by failing to establish that there was an "observed release" from the Site. HRS Section 4.1.2.1.1 requires EPA to determine, based on direct observation or chemical analysis, that "the site has released" a hazardous substance to the surface water in the watershed. Yet, the entirety of EPA's discussion of directly observed releases consisted of releases *to* the Site – not *from* the Site. Final Support Doc. at Sec. 3.15, pp. 28-30. Similarly, EPA attempted to demonstrate "the observed release by chemical analysis" based on samples exclusively taken from sediments within the Site. Final Support Doc. at Sec. 3.15, pp. 28-30. Not one of the samples EPA identified as showing elevated mercury levels was taken from sediments or surface waters outside of the Site. Final Support Doc. at 9.

EPA's erroneous decision to analyze only releases *to* the Site rather than *from* the Site may be an artifact of the Agency's prior focus on Troy's property as the contaminated site, but that is of no moment. Troy's predecessor ceased using mercury decades ago, leading EPA to identify only the mercury-contaminated sediments in Pierson's Creek as the Site. And at no point in the listing process or in the administrative record did EPA identify an observed release from this Site. Due to this error alone, EPA's listing of Pierson's Creek should be vacated.

Second, the Agency also misapplied the HRS regulations' "target distance limit" on which EPA relied to conclude that the Site posed a "human food chain" hazard to a Fishing Pier 13 miles away. This too is cause for vacatur.

EPA's HRS regulations instruct: "If flow within the hazardous substance migration path is reversed by tides, evaluate upstream targets *only if there is documentation* that the tidal run could carry substances from the site as far as those upstream targets." 40 C.F.R. pt. 300, App. A, § 4.1.1.2 (emphasis added). Yet, after Troy submitted comments and multiple studies showing that the predominant flows in the Arthur Kill and the Kill Van Kull push water and suspended sediments from New York Harbor (where the Fishing is located) to Newark Bay (where any release from the Site would enter),[1] EPA responded that "the HRS *does not require documentation that contaminated sediments migrate at all*, as contaminated

[1] *See, e.g.*, Troy Comments at 13.

sediments are not required to be documented within a fishery to score targets subject to potential contamination at the site." Final Support Doc. at 37 (emphasis added).

EPA never provided "documentation that the tidal run could carry substances from the site as far as those upstream targets." Instead, the Agency baldly ignored its own HRS regulations. Wielding that ignorance, EPA attacked the sufficiency of Troy's data showing that tides in the areas were highly unlikely to pull pollutants from the Site to the Fishing Pier. This Court should decline to defer to an Agency determination based on an unexplained departure from its own regulations, failure to make a requisite determination, and unwillingness to meaningfully consider data provided by Troy.

Pierson's Creek's NPL listing was based on a counter-factual premise, contrary to both the text of the HRS and the intent of CERCLA, and without observance of the substantive and procedural safeguards of the APA. It should be vacated.

## ARGUMENT

### I. EPA'S INFLEXIBLE APPLICATION OF THE AGENCY'S HRS REGULATIONS IN LISTING PIERSON'S CREEK VIOLATES CERCLA

In enacting 42 U.S.C. § 9605, Congress required EPA to adopt and implement a ranking system through which the Agency could accurately discern the relative risk posed by contaminated sites throughout the country. While Congress allowed

EPA some efficiencies in approaching this task, it did not unburden EPA of its obligation to meaningfully discern the relative hazards among the nation's contaminated sites and to do so as accurately as possible. At a minimum, this means EPA cannot adopt regulations or interpret its mandate to preclude it from meaningfully considering relevant data or responding to comments. It also means that EPA's ranking system must be capable of reasonably discerning the relative risk presented by various sites, rather than scoring each site as an exigent priority.

As applied to Pierson's Creek, EPA's HRS Regulations fall short of CERCLA's mandate. In listing the Site, EPA sacrificed accuracy for expediency, failed to consider comments and relevant data, and analyzed risk in a way that wholly undermined the prioritization scheme that Congress commanded.

### A. CERCLA Requires EPA to Accurately Discern the Relative Risks Presented by Contaminated Sites

Congress enacted the NPL to incentivize private parties and the federal government to prioritize the cleanup of the most harmful pollutants in America. *See generally* S. Rep. No. 848, 96th Cong., 2d Sess. 60 (1980). As such, CERCLA mandates "that [EPA's] hazard ranking system accurately assess[] the relative degree of risk to human health and the environment posed by sites and facilities subject to review." 42 U.S.C. § 9605(c)(1). Through CERCLA, Congress provided EPA with a clear directive: To make the ranking of the most contaminated sites in America as "accurate" as possible.

While Congress was cognizant of the need to avoid saddling EPA with onerous data collection requirements, the accuracy of the NPL remained one of Congress's foremost concerns, and for good reason. Listing a site on the NPL is not an empty exercise of bureaucratic decision-making. The NPL was intended as a means of prioritizing sites for facilitating remedial action at those sites that present the highest hazard. *See* 42 U.S.C. § 9605(a)(8)(A). Congress also saw the NPL as a means of providing notice to states and the public about potential hazards presented by sites on the list. *See* Report of the Committee on Environment and Public Works, Senate Report No. 96-848, 96th Cong., 2d Sess. 60 (1980). As such, although the NPL itself does not assign or apportion liability to owners or operators, Congress understood the importance of providing the public accurate information about potentially hazardous sites in their neighborhoods.

The accuracy of the NPL is important to owners and operators of listed properties as well. NPL listings can and do have real and meaningful consequences on impacted owners and operators.

The need to ensure that the NPL accurately identifies the sites truly presenting the greatest hazards informed Congress's requirement that EPA develop a ranking system (the HRS) that "shall . . . to the maximum extent feasible . . . accurately assess the relative degree of risk to human health and the environment posed by sites and facilities subject to review." 42 U.S.C. § 9605(c). And EPA recognized Congress'

directive in characterizing the Agency's HRS regulations "as a screening tool to evaluate the relative potential of uncontrolled hazardous substances, pollutants or contaminants to pose a threat to human health or the environment." 84 Fed. Reg. 21708, 21709 (May 15, 2019). As such, the product of the HRS should be a score that reflects "the probability and magnitude of harm to the human population or sensitive environment from exposure to hazardous substances as a result of contamination of ground water, surface water, or air." *Eagle Picher Indus., Inc. v. EPA*, 759 F. 2d 905, 910-911 (D.C. Cir. 1985).

"Permitting the inclusion of low-risk sites on the NPL would thwart rather than advance Congress's purpose of creating a priority list based on evidence of high risk levels." *Mead Corp. v. Browner*, 100 F.3d 152, 156 (D.C. Cir. 1996). Indeed, absent a meaningful and reasonably accurate basis for ranking and prioritization, the NPL has no purpose. If every contaminated site is a priority, then none are.[2] As discussed below, the screening framework EPA employed in listing Pierson's Creek on the NPL did not, and could not, meaningfully discern the risk posed by the Site relative to all other contaminated sites.

[2] To paraphrase Pixar's *The Incredibles*: "When everyone's super[fund], no one will be." *See Everyone's Super,* YouTube (Oct. 28, 2008), https://www.youtube.com/watch?v=A8I9pYCl9AQ (last visited Oct. 24, 2019).

### B. EPA Failed to Accurately Discern Relative Risks, Thereby Violating CERCLA

In listing Pierson's Creek on the NPL, EPA pursued the strict and unyielding application of its HRS regulations to the detriment of the congressionally mandated purpose of those regulations – to "accurately assess the relative degree of risk to human health and the environment posed by sites and facilities subject to review." 42 U.S.C. §§ 9605(c). EPA chose to ignore scientific and factual evidence submitted by Troy showing that contaminants entrained in the sediments in Pierson's Creek could not plausibly migrate 13 miles against the prevailing currents and across two waterbodies to the nearest fishery – a pier in Brooklyn. That decision was arbitrary and capricious. It should be vacated.

As its primary purpose is a "screening tool," it necessarily follows that "[t]he HRS is not a tool for conducting a quantitative risk assessment." 82 Fed. Reg. at 2761. Accordingly, in a situation where EPA is not presented with an administrative record of scientific data and facts, the HRS may provide EPA a streamlined way of evaluating a site's relative risk without extensive data collection.

When relevant and credible evidence is presented to the Agency, however, the HRS does not provide EPA license to ignore that data or treat it as less significant than the formulaic numerical ranking system EPA is permitted to utilize in the absence of actual data. The HRS does not excuse uncritical thinking, or unburden EPA of its statutory obligation to "assure, to the maximum extent feasible" that the

Agency "accurately assesses the relative degree of risk to human health and the environment posed by sites and facilities subject to review." 42 U.S.C. § 9605(c). Nor does the HRS allow EPA to avoid the APA's mandates to meaningfully respond to comments, examine relevant data, or rationally explain its actions.

The HRS is a tool for assessing hazards in spite of data deficiencies, not a means to evade consideration of data. When EPA is provided with information showing that a threat to human health is implausible or non-existent, it cannot use the HRS to ignore that evidence. But that is precisely what EPA did in the underlying Pierson's Creek rulemaking. Despite the congressional directive that the Agency use the HRS to "accurately assess" risks to human health, EPA instead used its HRS as justification for ignoring the scientific and factual evidence brought before it.

Troy provided credible and relevant evidence that the target fishery in this rulemaking—Memorial Pier in Brooklyn, New York—was subject to neither actual nor potential food chain contamination from mercury stemming from Pierson's Creek. *See* Troy Comments at 12 (explaining that "mercury releases into Pierson's Creek cannot conceivably migrate into either Newark Bay or New York Harbor and are not a potential threat to the food chain."); *id.* at 13 (citing "[s]cientific studies"—including EPA's *own* study—"demonstrate that it is implausible that Mercury released into Pierson's Creek would threaten the food chain identified by EPA.").

Instead of meaningfully considering the rigorous scientific data provided by Troy, EPA tersely responded: "The human food chain threat is correctly evaluated and documented in the HRS documentation record at proposal and correctly assigns the food chain individual factor of 20, in accordance with the HRS requirements." Final Support Doc. at 35. EPA's reason for this? "[T]he EPA documented that a fishery is present within the 15-mile target distance limit (TDL) and therefore correctly assigned the Food Chain Individual Factor Value of 20." *Id*. Indeed, in each instance where EPA confronted detailed comments conclusively showing that contaminated sediments at the Site could not plausibly migrate to the nearest fishery, EPA shielded itself with the bureaucratic formulas of its own creation, thereby abandoning the commitment to accurate and informed decision-making commanded by both CERCLA and the APA.

According to EPA:

> the HRS does not require documentation that contaminated sediments migrate at all, as contaminated sediments are not required to be documented within a fishery to score targets subject to potential contamination at the site. The EPA correctly applied the HRS as explained in this section and documented an observed release of mercury and a fishery within the 15-mile TDL.

Final Support Doc. at 37. This position profoundly misconstrues the discretion EPA is afforded in order to efficiently rank the relative risks presented by sites. While one could argue that CERCLA does not compel EPA to gather all the data about Pierson Creek that Troy compiled, there is no question that CERCLA and the APA

prohibit EPA from ignoring that data once Troy presented it to the Agency. *See, e.g.*, *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1266 (D.C. Cir. 1994) (rejecting EPA rulemaking where EPA's "response [to comments providing factual information] added nothing to the agency's defense of its thesis except perhaps the implication that it was committed to its position regardless of any facts to the contrary.").

A 15-mile target distance may be a helpful rule of thumb, but it does not provide license to ignore real questions about whether the pollutants are actually capable of mobilizing and traversing that distance. This Court should not defer to an Agency decision that applied the HRS regulations so mechanically as to allow EPA to remain willfully blind to contrary facts and data.

> Generally, the court defers the determination of fit between the facts and the model to the EPA, so that the agency rather than the court may balance marginal losses in accuracy against marginal gains in administrative efficiency and timeliness of decision making. The more inflexibly the agency intends to apply the model, however, the more searchingly will the court review the agency's response when an affected party presents specific detailed evidence of a poor fit between the agency's model and that party's reality.

*Chem. Mfrs. Ass'n*, 28 F.3d at 1265. EPA cannot so easily unburden itself of its obligations to examine relevant data, meaningfully respond to comments, and offer reasonable explanations for its actions. *See Genuine Parts Co.*, 890 F.3d at 307 (listing "arbitrary and capricious" where EPA "fail[ed] to address evidence that runs

counter to the agency's decision."). *See also Nat'l Gypsum*, 968 F.2d. at 43 (vacating final rule where EPA "failed to adequately explain its position . . . .").

This Court's precedent does "not suggest that our reviews of listing decisions should be of the rubber-stamp variety, and they have not been." *Bd. of Regents of Univ. of Washington v. EPA*, 86 F.3d 1214, 1218 (D.C. Cir. 1996). Where, as here, EPA willfully chooses to disregard the facts, relying instead on nothing more than its "commit[ment] to its position regardless of any facts to the contrary," 28 F.3d at 1266, a rubber stamp should not be provided.

In many respects, this proceeding is akin to *Tex Tin Corp. v. U.S. E.P.A.*, 992 F.2d 353 (D.C. Cir. 1993) ("*Tex Tin*"). In *Tex Tin*, this Court was tasked with determining whether arsenic present in tin slag was "'reasonably likely' to emit dust, through erosion or other processes." *Id.* at 355. EPA supported its listing decision in *Tex Tin* on a record that was far more substantive than the one at present, but was nonetheless limited to, "cit[ing] a number of studies finding that particulate releases from slag piles commonly occur as a result of wind erosion, vehicular traffic, and site operations." *Id.* (quotation omitted). Tex Tin responded to that generalized data with site-specific facts, showing "that whatever the Agency's experience with other types of waste piles, the tin slag at the Tex Tin facility was unlikely to generate any entrainable dust." *Id.* In vacating the listing decision, this Court noted: "we ha[ve] only the Agency's conclusory statements to weigh against specific scientific

evidence Tex Tin provided. Despite the cursory nature of the NPL listing process, the Agency may not base a listing decision on unsupported assumptions." *Id.* (Quotations omitted).

The Court should reach the same conclusion here. Where, in *Tex Tin*, the NPL listing was based on EPA relying on its own inferior evidence rather than superior evidence submitted by Tex Tin, in the instant case, EPA simply invoked its HRS regulations to ignore data altogether. Indeed, "[t]he EPA seems unwilling to support its decisions with the necessary scientific findings." *Nat'l Gypsum*, 968 F.2d at 41. "[T]he necessarily cursory nature of the NPL listing process do not entitle the EPA to base a listing decision on unsupported assumptions." *Id.* at 43-44 (citations omitted). "EPA 'retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a non-arbitrary, noncapricious rule.'" *Columbia Falls Aluminum Co. v. E.P.A.*, 139 F.3d 914, 923 (D.C. Cir. 1998) (quoting *Small Refiner Lead Phase–Down Task Force v. EPA*, 705 F.2d 506, 534 (D.C.Cir.1983)).

EPA *knows* that "key assumptions" underlying the 20-point score given to Pierson's Creek for "actual or potential human food chain contamination" are inaccurate. Troy provided EPA credible and relevant data showing that there is no human food chain threat to the Fishing Pier 13 miles away. *See, e.g.*, Troy Comments at 12-15 (documenting the "implausib[ility] that Mercury released into

Pierson's Creek would threaten the food chain identified by EPA."). EPA has neither rebutted nor meaningfully responded to such evidence. *See* Final Support Doc. at 34-38 (acknowledging but failing to rebut or attempt to rebut Troy's evidence of the implausibility that mercury released into Pierson's Creek would threaten the food chain identified by EPA). CERCLA requires EPA to "take into account the potential migration of any hazardous substance." 42 U.S.C. § 9605(c)(2). But EPA cannot invoke its HRS regulations to assume such a link exists when the evidence before the Agency demonstrates that it does not. On these facts, the rule must be vacated. *See Columbia Falls*, 139 F.3d at 923 (vacating final rule where "EPA knows that 'key assumptions' underlying the [rule] are wrong and yet has offered no defense of its continued reliance on it.").

### C. EPA's Inflexible Application of the Agency's HRS Regulations, if Upheld, Will Have Widespread Adverse Impacts on the Manufacturing Community

EPA assigned Pierson's Creek 20 points, thereby pushing the Site's score above the NPL threshold, based purely on a crude and cursory examination of proximity. The Agency did so to the preclusion of superior data from Troy regarding the immobility of the pollutant, the discontinuity between Pierson's Creek and the Fishing Pier, and the utter improbability that effluent from Pierson's Creek could migrate to the Fishing Pier. Given the historic proximity of manufacturing sites to waterbodies, EPA's singular reliance on the Agency's 15-mile target distance to

evaluate "human food chain" hazards could result in listing on the NPL of many more manufacturing sites regardless of evidence showing that the pollutants could not migrate to the fishery. This is particularly problematic given EPA's determination here that the amount of mercury in the Site's sediments is immaterial to the Agency's hazard scoring. *See* Final Support Doc. at 17.

Unwarranted NPL listings harm site owners as well. "[A] decision to list a site may have severe consequences for affected parties. The agency must remain aware that placement on the NPL has serious consequences for a site's owner. While we do not require the EPA's decisions to be perfect, or even the best, we do require that they not be arbitrary or capricious." *Bd. of Regents of Univ. of Washington v. E.P.A.*, 86 F.3d 1214, 1217 (D.C. Cir. 1996) (quotation omitted). Indeed,

> [w]hile the primary purpose of the NPL is informative, once a site is listed on the NPL, the ramifications are significant and substantive. The effects of having a site listed typically include, but are not limited to, having the site involved in extensive and prolonged litigation (for example, contribution suits between PRPs, litigation between owners and insurers); reducing the ability to transfer the property because it is less desirable; possible loss in fair market value because of the extensive work, time and expense for removal or remedial action (often eight to 14 years); and it may become more difficult to refinance the property.

William Hardy, *Challenges to EPA's Listing of Hazardous Waste Sites; It Is Possible to Fight A Listing Successfully, but the Procedures and Data for So Doing Are Intricate and Technical, Requiring Careful Attention*, 61 Def. Couns. J. 270 (1994).

Adverse impacts such as these may be warranted when the data show that a site presents real risks to human health and the environment. However, where the listing is based on EPA's singular reliance on a cursory examination of proximity to the preclusion of the superior data, as here, those adverse impacts are unwarranted and impermissible.

Congress' sole objective in enacting the NPL was to identify *accurately* the most contaminated sites in the country. The only protections against unwarranted inclusion of a site on the NPL consist of EPA's obligations to examine relevant data, meaningfully respond to comment, and offer reasonable explanations for its actions. This Court should ensure the Agency meets those obligations.

## II. PIERSON'S CREEK'S NPL LISTING DOES NOT COMPORT WITH THE AGENCY'S OWN HRS REGULATIONS

As described above, EPA dismissed and ignored superior relevant data submitted by Troy based on the Agency's unbending application of its interpretation of the HRS regulations. But, even if this Court were to overlook EPA's rigid interpretation of the HRS, the Court should still vacate EPA's decision to list Pierson's Creek on the NPL, because its rigid interpretation of the regulations was also an incorrect one. In fact, EPA altogether ignored its HRS regulations in at least two aspects of its analysis. As explained below, if EPA had correctly followed its HRS regulations, it would have been precluded from listing the Site on the NPL.

### A. EPA Never Established an Observed Release from the Site

EPA violated its own HRS regulations by failing to establish that there was an "observed release" from the Site. HRS Section 4.1.2.1.1 requires EPA to determine, based on direct observation or chemical analysis, that "the site has released" a hazardous substance to the surface water in the watershed. EPA's HRS Guidance Manual explains that an observed release from a site within the 15-mile target distance can, on its own, lead to listing on the NPL.

> Even if actual contamination of a fishery is not established, the human food chain threat score is likely to be significant if there is an observed release to the watershed and the waste characteristics value is 100 or greater. [] If no observed release is established, the human food chain threat score is unlikely to be significant unless there is a fishery within a minimal or small to moderate stream and the waste characteristics value is greater than 320.

Hazard Ranking Guidance Manual, USEPA Publication No. 9345.1-07 at 38 (Nov. 1992). Notwithstanding the outsized import of this single criteria to the outcome of EPA's listing decision, the Agency failed to identify any "observed releases" from the Site. In fact, the entirety of EPA's discussion of observed releases consisted of releases *to* the Site – not *from* the Site. *See* Final Support Doc., Sec. 3.15, at 28-30.

When Troy and others questioned EPA's basis for determining that there was an observed release from the Site, the Agency replied that "the likelihood of release value of 550 is correctly assigned and documented based on an observed release of mercury *to Pierson's Creek from the operations at the former Troy*." Final Support

Doc. at 28 (emphasis added). EPA emphasized its point by quoting the Listing Proposal's determination that:

> Observed release by direct observation is supported by numerous reports of mercury-containing wastewater and stormwater discharging *from the Troy facility* directly *into Pierson's Creek* and its unnamed inventory.

Final Support Doc. at 29 (emphasis added). As an alternative to establishing an observed release through direct observation, EPA declared that the administrative record "documents an observed release of mercury by chemical analysis." Final Support Doc. at 30. According to EPA "the observed release by chemical analysis is documented by mercury contamination *in Pierson's Creek . . .*" *Id.* (emphasis added). Indeed, the Agency's "observed release by chemical analysis" is based entirely on sediment sampling conducted *within the Site*. *See* Final Support Doc. at Sec. 3.15, pp. 28-30. None of the samples EPA identified as showing elevated mercury levels were taken from sediments or surface waters outside of the Site. *Id*.

The foregoing represents a small subset of the Listing Support Document's supposed documentation of observed releases by direct observation or chemical analysis. The Listing Support Document contains dozens of additional examples of observed releases. Every one of those examples reflects a release *to the Site*. None reflect releases *from the Site*. Similarly, all the identified "observed releases" in the HRS Package that reflect the actual scoring of Pierson's Creek were releases *to the*

*Site*. HRS Package at 28-33. No releases were identified as originating *from the Site*. *See id*.

EPA's erroneous decision to analyze only releases *to* the Site rather than *from* the Site may be an artifact of the Agency's prior focus on Troy's property as the contaminated site, but that is of no moment.[3] EPA has since recognized that the mercury present in Pierson's Creek's sediment is the result of long-since discontinued discharges from Troy's predecessor and others,[4] and has clarified that EPA "did not state that the Troy facility itself is the site." Final Support Doc. at 9. Rather, "the site as scored consists of sediments in Pierson's Creek contaminated with mercury as a result of historical releases from the chemical manufacturing facility located at One Avenue L." *Id*.[5]

At no point in the listing process or in the administrative record did EPA identify an observed release from this Site. The Agency's entire "human food chain" analysis rests on the Agency's erroneous analysis of releases *to* the Site, rather than

[3] *See* Final Support Doc., Section 3.4, pp. 8-9 (changing the definition of the Site from the prior definition in the Proposed Rule).

[4] Final Support Doc. at 3.

[5] EPA has roughly identified the Site as the contaminated sediments in Pierson's Creek from just south of Troy's property and extending 1.5 miles south to an undefined point within Pierson's Creek prior to the creek's discharge into Newark Bay. *See* Final Listing Doc. at 9.

releases *from* the Site. On this error alone, EPA's listing of Pierson's Creek should be vacated.

### B. EPA Never Documented that Pollutants from the Site Would Migrate to the Fishing Pier

In choosing to list Pierson's Creek on the NPL, EPA relied on Section 4.1.3.3.1 of the HRS. That section states, in pertinent part: "if there is an observed release of a hazardous substance having a bioaccumulation potential factor value of 500 or greater to surface water in the watershed and there is a fishery (or portion of a fishery) present anywhere within the target distance limit, assign a value of 20." 40 C.F.R. Part 300, Appendix A § 4.1.3.3.1.

But section 4.1.3.3.1 of the HRS cannot be read in a vacuum. Instead, the subsection must be read in the context of the HRS as a whole. As explained below, HRS sections 4.1.1.2 and 4.1.3.3 both serve to undermine EPA's reading of the regulation. A proper interpretation of the HRS does not provide any points at all for human food chain threat. Because EPA missed the mark in interpreting its regulation in implementing the final rule listing Pierson's Creek on the NPL, the rule must be vacated.

In its Listing Support Document, EPA repeatedly states that the "target distance limit" referenced in HRS Section 4.1.3.3.1 is 15 miles, and it applied that target distance without exception. *See, e.g.*, Final Support Doc. at 37 ("the HRS does not require documentation that contaminated sediments migrate at all, as

contaminated sediments are not required to be documented within a fishery to score targets subject to potential contamination at the site."). EPA repeatedly relies on the assertion that it need not show that the contaminated materials at issue flowed to a fishery, because "the HRS does not consider the availability of contamination in sediments or the dynamics of sediment transport." *Id.* EPA is mistaken. Its interpretation of the HRS directly conflicts with the HRS' text.

The HRS clearly instructs that: "If flow within the hazardous substance migration path is reversed by tides, evaluate upstream targets *only if there is documentation that the tidal run could carry substances from the site as far as those upstream targets*." 40 C.F.R. pt. 300, App. A, § 4.1.1.2 (emphasis added). In its comments, Troy presented evidence that the hazardous substance migration path (to the extent it exists at all), is reversed by tidal factors. Troy explained, *inter alia*: "Tide gates at the mouth of Pierson's Creek prevent tidal intrusions and create stagnant conditions except under rare, high-flow events." Troy Comments at 13. Due, among other things, to the tide gates' blocking and thereby reversing the hazardous substance migration path, Troy explained in its comments that "it is implausible that mercury could be transported from Pierson's Creek, contrary to the predominant sediment transport direction, into Newark Bay and New York Harbor" and from there to the Veterans Memorial Pier in Brooklyn, New York.

In the face of this evidence that the flow of the mercury at issue would be reversed by tides, EPA was required to provide "documentation that the tidal run could carry substances from the site as far as" the Brooklyn Fishing Pier. *See* 40 C.F.R. pt. 300, App. A, § 4.1.1.2. EPA failed to do so and, in its failure, undercut its own position. EPA stated in its Listing Support Document: "The HRS does not require documentation that the released contaminant has migrated, or is continuing to migrate, to the location of the fishery." Final Support Doc. at 38.

EPA's position runs contrary to the HRS' text. EPA's willful ignorance of section 4.1.1.2 of the HRS mandates that its listing decision be vacated.

## CONCLUSION

In order for the NPL to retain its relevance, it must accurately include only those sites posing the greatest risk of contamination to the populace. Pierson's Creek is not one of those sites. EPA should not be allowed to ignore the clear and convincing evidence provided to it documenting this truth. EPA's Final Rule Listing Pierson's Creek on the NPL should be vacated and remanded.

Dated: October 25, 2019

*/s/ Bezalel A. Stern*

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Dated: October 25, 2019

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## CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2019, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: October 25, 2019 */s/ Bezalel A. Stern*
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