1. SunCoke will expend vast sums installing new controls to meet MACT floor limits.

EPA takes the position that "[r]equiring the consideration of costs in setting the MACT floor would conflict with the plain language of CAA."[118] Under *Loper Bright*, that interpretation is not entitled to deference. But even assuming EPA's interpretation of the statute is correct, it increases the need to ensure in the first instance that EPA (1) has considered all the data and (2) properly wields legal authority to set the MACT floors. That is especially true where, as here, EPA is establishing floors for multiple HAP emission limits for the first time. This drives SunCoke to develop first of a kind applications to control these HAP emissions. When the EPA does not or cannot consider the costs of the regulation it imposes on stakeholders, a regulate-now-and-determine-legality-later approach is certain to inflict irreparable harm. The D.C. Circuit has stayed one of EPA's new rules when it was based on bad data and industry would be irreparably harmed complying with "expensive" regulations before the error could be corrected.[119]

Installing additional controls to meet the requirements of the Final Rule will be exorbitantly "expensive."[120] As an initial matter, SunCoke must spend significant time and money evaluating how to comply with the new floor limits. This would require substantial testing to collect the data that EPA did not in its rulemaking regarding the sources and the emissions, as well as engineering, modifying additional equipment, and other efforts. Because of the agency's truncated timeline—and because EPA forgot to include new HAP surrogate limits and work practice standards in the Proposed Rule SunCoke has not yet been able to determine the total cost of installing the new controls. As SunCoke explained in its comments, the rule as proposed would severely impact SunCoke's Jewell coke plant, costing it at least $474.9 million in capital investments and $66 million (not $4.7 million) in annual costs, if it is feasible to install the necessary controls at all.[121]

SunCoke has a year of testing before it can know whether it can meet many of these limits. In the case of HH1 Hg, SunCoke will need a year of testing because of unknown issues it can have, based on its experience installing PAC at Granite City Operations and Middle Town Operations. Testing potentially impacts the SO_2/FGD operation requiring a second spray dry absorber and an expanded baghouse costing over an extra $15-20 million. Beyond the costs associated with identifying and developing these new controls, SunCoke will incur yet more costs by limiting production during installation SunCoke will inevitably suffer opportunity costs during this downtime. The D.C. Circuit has held that revenues forever lost because of unauthorized agency action amount to irreparable harm.[122]

All told, these errors will cost SunCoke many millions of dollars. SunCoke can never expect to recover these costs, no matter the outcome of the litigation pending before the D.C. Circuit.

[118] 89 Fed. Reg. at 55710.
[119] *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011).
[120] *Id.*
[121] SunCoke will submit detailed declarations explaining the financial impact of the new controls required to ensure compliance with SunCoke's motion for a judicial stay.
[122] *In re NTE Conn.*, 26 F.4th at 990–91.