ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1112 & No. 14-1151

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: MURRAY ENERGY CORPORATION,

Petitioner.

MURRAY ENERGY CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

Respondents.

On Petition for Writ of Prohibition & Petition for Review

BRIEF FOR RESPONDENT EPA

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February 12, 2015

Certificate as to Parties, Rulings, and Related Cases

Pursuant to Circuit Rules 28(a)(1)(A) and 21(d), Respondents the United States Environmental Protection Agency et al. states as follows:

Parties and Amici:

The parties in these consolidated cases are:

Petitioner: Murray Energy Corporation;

Intervenors for Petitioner: National Federation of Independent Business, Utility Air Regulatory Group, Peabody Energy Corporation, State of Alabama, State of Alaska, State of Indiana, State of Kansas, State of Kentucky, State of Louisiana, State of Nebraska, State of Ohio, State of Oklahoma, State of South Dakota, State of West Virginia, State of Wyoming;

Amici Curiae for Petitioner: American Coalition for Clean Coal Electricity, National Mining Association, American Chemistry Council, American Coatings Association, Inc., American Fuel & Petrochemical Manufacturers, American Iron and Steel Institute, State of South Carolina, United States Chamber of Commerce, Council for Industrial Boiler Owners, Independent Petroleum Association of America, Metals Service Center Institute, National Association of Manufacturers;

Respondents: The United States Environmental Protection Agency, and Regina A. McCarthy, Administrator;

Intervenors for Respondent: Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, Commonwealth of Massachusetts, District of

Colombia, State of California, State of Connecticut, State of Delaware, State of Maine, State of Maryland, State of New Mexico, State of New York, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, City of New York; and

Amici Curiae for Respondent: State of New Hampshire, Clean Wisconsin, Michigan Environmental Council, Ohio Environmental Council, Calpine Corporation, Jody Freeman, and Richard J. Lazarus.

Rulings under Review:

Petitioner challenges, and alternatively asks this Court to issue a writ prohibiting, this proposed rule: *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,380 (June 18, 2014).

Related Cases:

These consolidated cases are related to, and have been designated by the Court for argument on the same day as, State of West Virginia, et al., v. EPA, No. 14-1146, which purportedly challenges a 2010 settlement agreement between EPA, certain states, and non-governmental organizations, but asks the Court to stop the same ongoing rulemaking that Petitioner Murray Energy Corp. challenges in this case.

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GLOSSARY

Act	The Clean Air Act
CO_2	Carbon dioxide
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
MATS	Mercury and Air Toxics Standards
OLRC	Office of the Law Revision Counsel of the United States House of Representatives

Jurisdiction and Standing

As explained in Argument sections I through III, Petitioner lacks standing and the Court lacks jurisdiction over this challenge to an ongoing EPA rulemaking.

Issues Presented

1. Whether Petitioner has standing to seek relief from a proposed rule that – if finalized – would not regulate Petitioner;

2. Whether Petitioner can challenge a *proposed* rule despite the requirement that agency action be final prior to judicial review;

3. Whether this Court has jurisdiction to issue a writ of prohibition to stop an ongoing rulemaking; and

4. Whether, even if it has jurisdiction, the Court should take the truly extraordinary step of prohibiting an ongoing rulemaking based on Petitioner's interpretation of an ambiguous statutory provision.

Statutes and Regulations

All relevant statutes and regulations are set forth in Respondent's Addendum.

Statement of the Case

Greenhouse gas emissions continue to pose a real threat to Americans by causing "damaging and long-lasting changes in our climate that can have a range of severe negative effects on human health and the environment." 79 Fed. Reg. 34,830, 34,833 (June 18, 2014) ("Proposed Rule"). Fossil-fuel fired power plants are, "by far, the largest emitters" of greenhouse gases in the United States. Id.

At the President's direction, EPA has proposed regulatory measures to address U.S. greenhouse gas emissions. One key measure is its proposal that states submit plans for reducing existing power plants' carbon dioxide ("CO_2") emissions under 42 U.S.C. § 7411(d). 79 Fed. Reg. at 34,830-33. Murray Energy Corp. ("Murray"), a coal producer, objects to this proposal, and petitions the Court to "halt" the ongoing rulemaking, either by issuing a writ of prohibition or "set[ting] aside EPA's legal conclusion." Pet.Br. 1. It so requests even though Murray is not an entity that would be regulated under the Proposed Rule; the rule is not final; and the issue Murray raises concerns the interpretation of a patently-ambiguous statutory provision.

Murray argues that this is an "extraordinary case." Pet.Br. 1. Murray is right, but not for the reasons it believes. Rather, it is what Murray asks this Court to do – halt an ongoing rulemaking before EPA takes final action – that is extraordinary. There is no legal basis for such relief, and EPA should not be prevented from completing a rulemaking intended to address the serious threat of climate change.

Background

I. THE CLEAN AIR ACT

The Clean Air Act ("Act") was enacted in 1970 to "[r]espond[] to the growing perception of air pollution as a serious national problem." Ala. Power Co. v. Costle, 636 F.2d 323, 346 (D.C. Cir. 1979). It set out a comprehensive scheme for air pollution control, "address[ing] three general categories of pollutants emitted from stationary sources": (1) criteria pollutants; (2) hazardous pollutants; and (3) "pollutants that are (or may be) harmful to public health or welfare but are not" hazardous or criteria pollutants "or cannot be controlled under" those programs. 40 Fed. Reg. 53,340 (Nov. 17, 1975).

Six relatively ubiquitous "criteria" pollutants are regulated under 42 U.S.C. §§ 7408-7410. These are pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare"; "the presence of which in the ambient air results from numerous and diverse mobile or stationary sources"; and for which the Administrator has issued, or plans to issue, "air quality criteria." 42 U.S.C. § 7408(a)(1). Once EPA issues air quality criteria for such pollutants, the Administrator must propose primary National Ambient Air Quality Standards (NAAQS) for them at levels "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. § 7409(a)-(b).

"Hazardous air pollutants" are regulated under 42 U.S.C. § 7412, and include pollutants so designated by Congress in 1990 and other pollutants that EPA finds:

> may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise . . . .

42 U.S.C. § 7412(b)(2). Hazardous air pollutants tend to be less widespread than criteria pollutants but are considered more potent and are associated with more serious health impacts, such as cancer, neurological disorders, reproductive dysfunctions, and death, even in small quantities. H.R. Rep. 101-490, 315 (1990), reprinted in 2 Legislative History of the Clean Air Act Amendments of 1998, at 3339 (Comm. Print 1998). EPA must publish and revise a list of "major" and "area" source categories of hazardous pollutants, and then has a nondiscretionary obligation to establish achievable emission standards for all listed hazardous air pollutants emitted by sources within a listed category. 42 U.S.C. § 7412(c)(1) & (2).

Congress prescribed a unique listing requirement for power plants. EPA must first study the hazards posed by power plant emissions after imposition of the other requirements of the Act, and then determine if regulation is "appropriate and necessary" after considering the results of the study. See 42 U.S.C. § 7412(n)(1)(A). If EPA so determines, regulation of hazardous emissions from power plants proceeds under section 7412(d) just as with any other type of listed source category. See White Stallion Energy Ctr. LLC v. EPA, 748 F.3d 1222, 1243-44 (D.C. Cir. 2014), cert. granted, 135 S. Ct. 702 (Nov. 25, 2014).

The final major category of pollutants covered by the Act – harmful pollutants not regulated under the NAAQS or hazardous pollutant programs – are subject to regulation under 42 U.S.C. § 7411. Section 7411 has two main components. First, section 7411(b) requires EPA to promulgate federal "standards of performance" addressing *new* stationary sources that cause or contribute significantly to "air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Once EPA has set *new* source standards addressing emissions of a particular pollutant, section 7411(d) authorizes EPA to promulgate regulations requiring states to establish standards of performance for *existing* stationary sources of the same pollutant. 42 U.S.C. § 7411(d)(1). If a state fails to submit a satisfactory plan, EPA is authorized to prescribe a plan for the state, and also to enforce plans where states fail to do so. Id. § 7411(d)(2).

Together, the NAAQS, hazardous pollutant, and performance standard programs constitute a comprehensive scheme designed to achieve Congress' goal of "protect[ing] and enhance[ing] the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C. § 7401(b).

II. THE 1990 AMENDMENTS

The Act was amended extensively in 1990. Among other things, Congress sought to accelerate EPA's regulation of hazardous pollutants. White Stallion, 748 F.3d at 1230. To that end, Congress established a lengthy list of hazardous air pollutants; set criteria for listing "source categories" of such pollutants; and required

EPA to establish standards for each source category hazardous pollutant emissions. 42 U.S.C. § 7412(a), (b)(1) & (2), & (d)(1).

In the course of overhauling the regulation of hazardous pollutants under section 7412, Congress also edited section 7411(d), which cross-referenced a provision of old section 7412 that was to be eliminated. Specifically, the pre-1990 version of section 7411(d) obligated EPA to require standards of performance:

> for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section [7408(a)] or [7412(b)(1)(A)] . . . .

42 U.S.C. § 7411(d)(1)(A) (1988). To address the obsolete cross-reference to section 7412(b)(1)(A), Congress passed two amendments – one from the House and one from the Senate – that were never reconciled. The House amendment replaced the cross-reference with the phrase "emitted from a source category which is regulated under section [7412]." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990). The Senate amendment replaced the same text with a cross-reference to section 7412. Pub. L. No. 101-549, § 302(a), 104 Stat. at 2574. Both amendments were enacted into law in the Statutes at Large, which supersedes the U.S. Code if there is a conflict.[1]

[1] See 1 U.S.C. §§ 112 & 204(a).

III. THE MATS RULE

In 2000, EPA determined under 42 U.S.C. § 7412(n)(1)(A) "that regulation of [hazardous pollutant] emissions from coal- and oil-fired [power plants] under section 112 of the [Act] is appropriate and necessary," and added those power plants to the section 7412(c) list of source categories to be regulated. 65 Fed. Reg. 79,825, 79,826-30 (Dec. 20, 2000). EPA determined that it was not "appropriate and necessary" to regulate natural-gas fired power plants. Id. at 79,831. In 2012, EPA promulgated a final rule establishing hazardous pollutant emission standards for coal- and oil-fired plants. 77 Fed. Reg. 9304 (Feb. 16, 2012) (the "MATS Rule"). The MATS Rule does not regulate CO_2, which is not a listed hazardous air pollutant, and does not regulate natural gas-fired plants, which are not a listed source category. Unlike the MATS Rule, the Proposed Rule addresses CO_2, and covers natural gas-fired plants as well as coal- and oil-fired plants. Compare 77 Fed. Reg. 9304 with 79 Fed. Reg. at 34,855.

This Court upheld the MATS Rule. White Stallion, 748 F.3d at 1222. The Supreme Court granted certiorari. Michigan v. EPA, 135 S. Ct. 702 (Nov. 25, 2014). Murray has filed an amicus brief urging the Court to vacate the MATS Rule, arguing that hazardous pollution from power plants instead should be regulated under section 7411 because: "Section [74]11 offers the flexibility necessary for regulating a widely diverse source category like power plants without imposing unjustified costs" and "the ability to address all of the same public health and environmental concerns." Am. Curiae Br. of Murray Energy Corp. (No. 14-46) at 22, 27.

IV. THE PROPOSED RULE

In 2013, the President announced his "Climate Action Plan," and directed EPA to work expeditiously to promulgate CO_2 emission standards for fossil fuel-fired power plants. EPA has since proposed (1) performance standards for new power plants under section 7411(b), 79 Fed. Reg. 1430 (Jan. 8, 2014); (2) standards for modified and reconstructed power plants under section 7411(b), 79 Fed. Reg. 34,960, (June 18, 2014); and (3) and regulations under which states would submit plans to address CO_2 emissions from existing power plants under section 7411(d), 79 Fed. Reg. at 34,830-34 ("Proposed Rule"). Petitioner challenges the last of these proposals.

The Proposed Rule has two main elements: (1) state-specific emission rate-based CO_2 goals, to be achieved collectively by all of a state's regulated coal- and natural gas-fired sources; and (2) guidelines for the development, submission, and implementation of state plans. 79 Fed. Reg. at 34,833. While the proposal lays out individualized CO_2 goals for each state, it does not prescribe how a state should meet its goal. Id. Rather, each state would have the flexibility to design a program that reflects its circumstances and energy and environmental policy objectives. Id.

EPA solicited comments on all aspects of the Proposed Rule. 79 Fed. Reg. at 34,830. Over two million comments were submitted before the comment period closed on December 1, 2014. EPA is reviewing those comments, and plans to take final action this summer.

Summary of Argument

Neither Murray nor Intervenors in support of Petitioner can establish that they have Article III standing to seek review of the Proposed Rule. Speculation regarding the consequences of one *possible* future outcome of an ongoing notice-and-comment rulemaking proceeding is not enough to demonstrate the concrete, particularized, and actual or imminent injury required for Article III standing. The Court has dismissed such challenges on standing grounds in previous cases and should do likewise here.

The Court also lacks jurisdiction because the Proposed Rule is obviously not a "final" action. The Act prescribes the process by which EPA may establish standards or requirements under section 7411(d), and EPA indisputably has not completed that process. EPA has only published a proposal for notice and comment; it has not yet considered and responded to those comments as the Act requires, nor "promulgated" a regulation. Thus, it has taken no action that has binding legal effect or determines any entity's rights or obligations. Moreover, because EPA is in the midst of a notice-and-comment rulemaking process in which it will evaluate and respond to comments on the very legal question Murray would have this Court prematurely decide, this petition is not "fit" for a judicial decision and must be dismissed as unripe.

If this Court were to reach the merits despite the non-final nature of the challenged rulemaking, it should decline to issue a writ of prohibition or otherwise "halt" the rulemaking as Murray asks. Murray argues that section 7411(d) of the Act bars EPA from addressing power plants' emissions of carbon dioxide – or any other

pollutant – under that provision because power plants' emissions of certain *hazardous* pollutants, like mercury, have been regulated under section 7412. But section 7411(d) is far from unambiguous on this point. Given the convoluted, ungrammatical and ambiguous nature of the text as set forth in the U.S. Code, it could reasonably be interpreted as authorizing EPA to address *non-hazardous* emissions from power plants. Moreover, in interpreting section 7411(d), EPA could also appropriately consider the existence of two separate amendments to the relevant portion of that text in the Statutes at Large, one of which would plainly authorize the regulation of non-hazardous pollutants under that provision. Thus, there are a number of reasons why EPA might reasonably conclude it may address power plants' carbon dioxide emissions under section 7411(d), and the Court should not intervene in the rulemaking before EPA has the opportunity to reach a final conclusion and articulate its reasoning, based on its own ongoing analysis as well as the comments received.

Argument

I. MURRAY LACKS ARTICLE III STANDING.

A. Murray cannot show "actual or imminent" injury from a proposal.

"To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (internal quotation and citations omitted). A petitioner that asserts standing based on the expectation of future injury "confronts a significantly more rigorous burden to

establish standing." Chamber of Commerce of U.S. v. EPA, 642 F.3d 192, 200 (D.C. Cir. 2011) (internal quotation omitted); accord Clapper, 133 S. Ct. at 1147 ("allegations of *possible* future injury are not sufficient") (internal quotation omitted).

Additionally, "when the [petitioner] is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (internal quotation omitted). In such a case, standing "depends on the unfettered choices [of] independent actors . . . whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," and it thus becomes the petitioner's burden "to adduce facts showing that those choices have been or will be made in such manner as to produce causation and redressability of injury." Id. (internal quotations omitted); Chamber of Commerce, 642 F.3d at 201.

Murray cannot possibly meet this burden here, because the action it challenges is only a "proposed" rule. This Court long has held that an administrative agency's "*initiation* of a rulemaking" through a notice and comment process does not impair the rights of interested parties so as to give rise to Article III standing, even if such parties would be directly regulated by a final rule. Alternative Research & Dev. Found. v. Veneman, 262 F.3d. 406, 411 (D.C. Cir. 2001) (emphasis added). In Alternative Research, the Court held that an association of biomedical researchers lacked standing to challenge a settlement establishing a schedule for rulemaking to consider whether to regulate the treatment of birds, mice and rats used in such research. Id. As the

Court observed, parties potentially affected by such a rulemaking have the opportunity, first, to *participate* in the rulemaking – by making known any objections they may have and, if desired, attempting to persuade the agency not to finalize the proposal – and then to seek judicial review if the proposed rule is finalized in a manner that genuinely harms their interests. See id.

The Court recently reaffirmed this conclusion in Defenders of Wildlife v. Perciasepe, 714 F.3d 1317 (D.C. Cir. 2013), where it held that an association of energy companies lacked standing to intervene for the purpose of challenging a consent decree that set a rulemaking schedule to revise regulations governing wastewater discharges from power plants. See id. at 1323-26. There, as in Alternative Research, the claimants faced the potential of direct regulation by the rulemaking at issue, unlike Murray; yet the Court again made clear that merely commencing a notice-and-comment rulemaking that *may* result in a "new, stricter rule" does not create standing, because Article III "requires more than the *possibility* of potentially adverse regulation." Perciasepe, 714 F.3d at 1325 (emphasis added); see also Nat'l Ass'n of Home Builders v. EPA, 667 F.3d 6, 13 (D.C. Cir. 2011) (no standing to challenge Clean Water Act jurisdictional determination).

Because Murray's claim is based on predicting the substantive content of one possible final outcome of the rulemaking, it is too speculative to support standing. Murray relies on the predictive modeling EPA developed in connection with the Proposed Rule, which projects that if the proposal is promulgated as a final rule,

domestic power plants will use 25 to 27 percent less coal to generate electricity by 2020 (as compared with a hypothetical base case in which no final rule is ever promulgated), and 30 to 32 percent less coal by 2030. 79 Fed. Reg. at 34,934; Pet.Br. 13-14; Declaration of Robert E. Murray ("Murray Decl.") ¶¶ 15-16 (attached to Pet.Br.). This model necessarily assumes, however, not only that EPA will promulgate a final rule, but that the content of that final rule will not significantly change from the proposal. At this stage, when EPA is still evaluating and has not yet responded to the millions of comments it received, any predictions about what state-specific guidelines EPA might adopt in a final rule – let alone what requirements each state, in turn, independently may impose on power plants pursuant to such guidelines – are pure conjecture. See La. Envtl. Action Network v. Browner, 87 F.3d 1379, 1383 (D.C. Cir. 1996) (no standing based on "multi-tiered speculation" that states with delegated authority would adopt certain programs and that EPA would approve).

The Article III standing cases Murray relies on (Pet.Br. 12-14) involved challenges to final rules promulgated *after* notice and comment – not proposed rules published for the purpose of *soliciting* public comments[2] – or to agency directives that were not subject to notice-and-comment, e.g., National Envt'l Dev. Ass'n's Clean Air Project ("NEDA-CAP") v. EPA, 752 F.3d 999, 1005-06 (D.C. Cir. 2014) (EPA

[2] See, e.g., Ethyl Corp. v. EPA, 306 F.3d 1144, 1147-48 (D.C. Cir. 2002); Monroe Energy, LLC v. EPA, 750 F.3d 909, 914-15 (D.C. Cir. 2014).

directive established an immediately-effective new policy for permitting decisions).[3] Murray cites *no* authority holding that speculation about one possible outcome of an ongoing notice-and-comment rulemaking process can give rise to Article III standing.

B. Murray cannot show that the impacts it cites are traceable to the Proposed Rule and would be averted if the Court grants relief.

Even if EPA had promulgated a *final* section 7411(d) rule for power plants in January 2014, Murray's affidavit would still fail to establish Article III standing. As a coal producer, Murray would not be subject to any requirements if such a rule were promulgated. It therefore bears a heightened burden to establish that the downstream economic effects it complains of are genuinely traceable to EPA's action rather than to third parties' independent choices, and are redressable here. Lujan, 504 U.S. at 562. Specifically, Murray must demonstrate a "substantial probability" that these economic effects would not have occurred but for EPA's January 2014 publication, and that, "if the court affords the relief requested, the [alleged] injury will be removed." Ass'n of Battery Recyclers, Inc. v. EPA, 716 F.3d 667, 671 (D.C. Cir. 2013) (internal quotation omitted).[4] This Murray has not done.

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[3] Other cases are inapposite because they address "prudential standing" or the "zone of interests" test, not Article III standing. E.g., Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014); Pet.Br. 14 n.3.

[4] The claimants in most of the Article III cases Murray cites either were directly regulated by the rules in question or asserted injuries that Murray does not. See, e.g., Monroe, 750 F.3d at 915; Ethyl Corp., 306 F.3d at 1147-48 (asserting "informational" injuries). And in Motor & Equip Mfrs. Ass'n v. Nichols, 142 F.3d 449, 457 (D.C. Cir. 1998), EPA did not contest that the rule caused the third-party conduct at issue.

For example, Murray's standing affidavit states that several of its power plant customers anticipate converting coal-fired units to other fuel sources in the foreseeable future. These plans often are *not* characterized as a response specifically to the Proposed Rule, however, but rather to the cumulative regulatory burden under other, *final* regulations that EPA previously promulgated, such as the MATS Rule. See Murray Decl. ¶¶ 20, 25. Elsewhere, Murray simply states in conclusory fashion that certain customers' power plants have shut down or are slated for closure, without providing any reasons for these customers' decisions. Id. ¶ 24. Another power plant reportedly faces "uncertainty" about whether it will continue operating beyond 2020, but Murray does not identify that plant as a customer. Id. ¶ 22.

Murray also relies on reports identifying regional and national trends towards reduced coal production, and the industry-wide conversion of many coal-fired power plants to natural gas or other fuel sources. But these patterns of industry behavior emerged years before EPA published the Proposed Rule. See Murray Decl. ¶¶ 17-19[5]; see also 77 Fed. Reg. 22,392, 22,399 (April 13, 2012) (preamble to April 2012 proposal under section 7411(b)); 79 Fed. Reg. at 34,863. As discussed in EPA's preamble statements, there are numerous economic factors independent of EPA's air regulations that may explain these long-term trends towards increased use of natural

[5] Murray also cites one report predicting that the Proposed Rule will result in reduced coal generation capacity in Texas. Id. ¶ 21. Murray has no coal production operations in Texas, nor supplies any power plant customers there. Id. ¶¶ 9, 13.

gas and decreased use of coal in power generation, and Murray's standing affidavit makes no attempt to address such factors. Nor has Murray shown a "substantial likelihood" that power plants will reverse these trends if the Court sets aside the Proposed Rule. See Crete Carrier Corp. v. EPA, 363 F.3d 490, 494 (D.C. Cir. 2004) (trucking companies lacked standing to challenge rule regulating engine manufacturers because "'it is entirely conjectural whether the nonagency activity' (that is, the engine manufacturers' production decisions) affecting the prices of tractors . . . 'will be altered or affected' should the EPA rescind [it]") (quoting Lujan, 504 U.S. at 571). In short, Murray's affidavit would fail even if EPA had *completed* its rulemaking process.

C. The Intervenors also lack Article III standing.

If the Court finds that Murray lacks standing, then the Intervenors in support of Murray also are subject to Article III standing requirements. See Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997). None of the Intervenors can stand in Murray's shoes, however, because they did not file within sixty days after Federal Register publication of the Proposed Rule. 42 U.S.C. § 7607(b)(1); Okla. Dep't of Envtl. Quality ("ODEQ") v. EPA, 740 F.3d 185, 191 (D.C. Cir. 2014) (time limit is jurisdictional); see Doc Nos. 1520421 & 1523376 (motions to intervene in Case No. 14-1112 filed by National Federation of Independent Businesses and Utility Air Regulatory Group, respectively, on Nov. 3 & Nov. 19, 2014); 1523876 (joint notice of intention to intervene filed by State Intervenors on Nov. 21, 2014); 1529468

(motion to intervene filed by Peabody Energy Corp. on Dec. 29, 2014).[6] Even if not untimely, the Intervenors' standing assertions would fail for the reasons discussed above or in EPA's brief in the related petition brought by states. See Brief for EPA in Case No. 14-1146 at 11-22 (Doc No. 1533964).

II. THE COURT LACKS JURISDICTION OVER MURRAY'S DIRECT CHALLENGE TO THE PROPOSAL FOR ADDITIONAL REASONS.

Murray bears the burden of demonstrating that the Court has subject-matter jurisdiction. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). Its invocation of the All Writs Act does not change that requirement. See In re Tennant, 359 F.3d 523, 527 (D.C. Cir. 2004) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998)); infra Argument III. Murray cannot meet that burden here, because a "proposed" rule is neither "final action" nor ripe for judicial review.

A. Under the plain text of the Act, neither the Proposed Rule nor the supporting legal memorandum is a "final action."

Section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1), governs judicial review of EPA's nationally applicable air regulations and is an exclusive remedy. Id. § 7607(e); ODEQ, 740 F.3d at 191. It lists specific, nationally applicable actions that are subject to judicial review – including action "*promulgating* . . . any standard of

[6] Moreover, "investor perceptions of the short-term impacts of the Proposed Rule on Peabody's business" are not a cognizable injury under Article III. Peabody Br. at 8 (Doc. No. 1529726); see Perciasepe, 714 F.3d at 1323 (consent agreement did not cause injury despite claimant's belief that EPA "likely" would "promulgate a rule economically harmful to" energy companies); cf. Gen. Elec. Co. v. Jackson, 610 F.3d 110, 121-22 (D.C. Cir. 2010).

performance or requirement under [42 U.S.C. § 7411]" – along with "any other nationally applicable regulations *promulgated*, or *final action* taken, by the Administrator under this chapter." 42 U.S.C. § 7607(b)(1) (emphasis added).

Murray relies on a truncated reading of this last phrase to suggest that although Congress expressly made only "promulgated" standards or requirements under section 7411 reviewable, it also intended to make *proposed* requirements under this section subject to judicial review when it referred to review of "any other . . . final action." Pet.Br. 38. Murray further contends that because the Proposed Rule was signed by the Administrator, both the proposal and its supporting legal memorandum are "presumptively final." Pet.Br. 48. Murray errs on both counts.

With respect to Murray's first argument, the plain text of the Act's general rulemaking provision, 42 U.S.C. § 7607(d), unambiguously mandates the procedures by which EPA first "proposes" and then "promulgates" all notice-and-comment rules subject to that provision, which include all such rules under section 7411. See id. § 7607(d)(1)(C). Section 7607(d) makes clear that only a *promulgated* rule consummates the rulemaking process. Specifically, the Act states that "proposed rules" are to be made available for public comment in the Federal Register and must include a notice specifying the period available for public comment. Id. § 7607(d)(3). "Promulgated rules," in contrast, are only issued *after* the public comment period and must be accompanied, inter alia, by "an explanation of the reasons for any major changes in the promulgated rule from the proposed rule," and "a response to each of the

significant comments, criticisms, and new data submitted in written or oral presentations during the comment period." Id. § 7607(d)(6)(A)(ii), (B).

Because the Act is so precise in referring to "proposed" and to "promulgated" rules, giving each term a distinct meaning, the fact that the judicial review provision in 42 U.S.C. § 7607(b)(1) *only* refers to "promulgated," not proposed, rules when describing actions that are subject to this Court's review is dispositive. "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." So. Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882, 894 (D.C. Cir. 2006) (internal quotation omitted); see, e.g., City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 337-38 (1994). Had Congress intended that proposed rules be subject to immediate judicial review, it could readily have made that clear by including "action *proposing or* promulgating [requirements under section 7411 and other listed items]" on the list of specific actions subject to review. Congress chose, instead, specifically to authorize review only of final action "promulgating" such requirements.

The fact that 42 U.S.C. § 7607(d)(7)(B) limits judicial review to "[o]nly" those objections "raised with reasonable specificity during the period for public comment (including any public hearing)" further supports the conclusion that only "promulgated," not "proposed" rules governed by section 7607(d)'s procedures are subject to judicial review. If a claimant could petition for review of a proposed rule

without first submitting comments and awaiting EPA's final action in response to those comments, this limitation would make no sense.

Moreover, when the phrase "other . . . final action taken" is read in conjunction with the earlier list of *specific* "promulgated" actions – rather than reading the latter phrase in isolation as Murray does – it becomes clear that "other . . . final action" logically refers not to any of the specific "promulgated" regulations already listed as reviewable (such as requirements under section 7411), but to *other* types of final actions EPA may take that do not involve notice and comment.[7] Reading this phrase to *also* encompass judicial review of "proposed requirements under section 7411" would effectively nullify the Act's provisions mandating the procedures by which such requirements may be made final through "promulgation." See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 485 (2001) (Act may not be construed in a manner that "nullifies textually applicable provisions"). Congress' choice not to subject proposed rules to judicial review until they are "promulgated" must be given effect.

That the Act provides for judicial review of promulgated regulations even if they are the subject of administrative petitions for reconsideration (Pet.Br. 50) does not contradict this plain reading of the statutory text. Whether or not a petition for

[7] One example of a non-notice-and-comment "final" action of which this phrase authorizes judicial review is an action under 42 U.S.C. § 7410(c)(1)(A) ("find[ing] that a State has failed to make a [state implementation plan] submission . . .").

reconsideration has been filed, the relevant question for purposes of the judicial review provision is whether the regulation has been "promulgated" in the manner the Act requires. The Proposed Rule here has not.

Murray's second contention – that EPA's Proposed Rule and supporting legal memorandum may be "presumed" final because of the Administrator's signature on the preamble, Pet.Br. 48-49 – is not supported by the case Murray cites. In National Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971), the Court reviewed a Department of Labor advisory letter issued pursuant to the Fair Labor Standards Act. Id. at 689. Thus, not only was Schultz decided under a different statute than the CAA and prior to the Supreme Court's clarification of the test for determining "finality" in Bennett v. Spear, 520 U.S. 154 (1997), but the Court there did *not* suggest that a "presumption of finality" could apply to a "proposed rule" published as part of a notice-and-comment process, as no such proposal was at issue. Instead, the Court specifically limited the scope of its holding to "interpretative rulings." Shultz, 443 F.2d at 702.

However valid a presumption of finality may have been in the narrow set of circumstances addressed by Shultz, it makes *no* sense in the context of the CAA's notice-and-comment rulemaking process. The CAA mandates that *every* "proposed rule" subject to the rulemaking procedures in section 7607(d) be accompanied by a "statement of basis and purpose" that includes, inter alia, "the major legal interpretations . . . underlying the proposed rule." 42 U.S.C. § 7607(d)(3)(C). Thus,

by setting forth relevant legal interpretations in the preamble to the Proposed Rule and supporting legal memorandum (see Pet.Br. 45-47), EPA was merely taking a step that the Act requires for *any* proposed rule governed by section 7607(d).

Moreover, the Administrator routinely signs proposed rules that are nationwide in scope, such as this one, because the Administrator is the only agency official authorized to take such administrative action. Thus, were the Court to adopt Murray's "presumption," *every* proposed nationwide air rule could potentially be considered "final" and immediately reviewable in this Court without waiting for the conclusion of the rulemaking process. Were such a precedent established, claimants that disagree with EPA's legal interpretations in any future proposed rule under the CAA likely would be *forced* to sue within sixty days of publication of the proposal in order to avoid the risk that their challenge might otherwise be deemed untimely.[8]

In short, Murray's suggested approach for determining "finality" is wholly at odds with the text of the Act's rulemaking and judicial review provisions and would destroy the orderly scheme that Congress established. Dismissing Murray's petition, in contrast, would uphold the "prescribed order of decisionmaking" in which "the first decider under the Act is the expert administrative agency, the second, federal judges." Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2539 (2011).

[8] See 42 U.S.C. § 7607(b)(1).

B. Murray cannot satisfy either prong of the Bennett finality test.

1. The Proposed Rule did not consummate the rulemaking process.

Although it is clear that the Proposed Rule and supporting legal memorandum are not final actions for the reasons explained above, the familiar finality test articulated in Bennett reinforces this conclusion, as this Court held when dismissing premature challenges to EPA's 2012 proposed rule under section 7411(b). Las Brisas Energy Ctr., LLC v. EPA, No. 12-1248 & consolidated cases (Order dated Dec. 13, 2012) (Attach. A).

To be final, an action (1) "must mark the consummation of the agency's decisionmaking process" and "must not be [] merely tentative or interlocutory"; and (2) it "must be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett, 520 U.S. at 177-78. Murray cannot demonstrate that the first criterion is met here, because the Proposed Rule clearly does not represent "the consummation of [EPA's] decision-making process." The process by which the Administrator promulgates "standards of performance" and other "requirements" under section 7411 is prescribed by 42 U.S.C. § 7607(d) as shown above, and EPA indisputably has not completed that process. Therefore, the Proposed Rule is an "interlocutory" action. Bennett, 520 U.S. at 178.

The Proposed Rule is also "tentative," id., in that EPA has sought comments on all aspects of the proposal – including on the legal questions at the heart of Murray's challenge – and EPA may modify its final action in any number of ways in

response to those comments. See 79 Fed. Reg. at 34,853/2 (EPA "solicits comment on all aspects of its legal interpretations, *including the discussion in the Legal Memorandum*") (emphasis added); id. at 34,835/2 (EPA seeks "public comment on all aspects of this proposal"). Hypothetically, it would be well within EPA's administrative discretion to issue a supplemental proposal, issue a modification to the Proposed Rule, or even withdraw it entirely if the Administrator determined, after consideration of the comments, that such action was appropriate. See 79 Fed. Reg. 1352 and 79 Fed. Reg. 1430 (Jan. 8, 2014) (notices withdrawing April 2012 proposal and substituting a new, substantially different proposal under section 7411(b)).

Murray insists that the legal interpretations in the preamble and supporting legal memorandum are phrased in an "unequivocal" or conclusive manner, and argues that because EPA employed such phrasing, the Court may review the Proposed Rule despite the acknowledged possibility that EPA may not promulgate a rule or may modify the proposal. See generally Pet.Br. 45-55. But the absence of hedge-words does not render a "proposed" notice-and-comment rule definitive. While courts sometimes ascertain finality based on the agency's choice of language or other contextual clues in cases involving agency letters,[9] guidance statements,[10] or other

[9] E.g,. Harrison v. PPG Indus., Inc., 446 U.S. 578 (1980).

[10] E.g., Appalachian Power Co. v. EPA, 208 F.3d 1015, 1028 (D.C. Cir. 2000). Murray's reliance on Appalachian Power is especially ironic, since the Court held that it was error to adopt a guidance statement without going through notice and comment. 208 F.3d at 1028. Here, Murray seeks to *thwart* the notice-and-comment

actions *not* subject to statutory notice-and-comment rulemaking requirements,[11] here the decision-making process EPA must follow is spelled out in the Act itself.

Murray's reliance on Whitman v. American Trucking Associations, 531 U.S. 457 (2001), is also misplaced (Pet.Br. 49, 51, 57). There, the Supreme Court held that an interim policy for implementing NAAQS was reviewable, in part, because EPA had published the policy in conjunction with the proposed rule and *then* adopted the policy in the preamble to the *final* rule "in light of" the comments it received. Id. at 477-79. Here, in contrast, EPA's challenged preamble and supporting legal memorandum have only been published with the Proposed Rule for the purpose of *seeking* comments on EPA's legal interpretations, and EPA has not yet considered and responded to those comments as the Act requires.

2. Proposing a rule creates no binding legal consequence.

Murray asserts that the second prong of Bennett's test is satisfied (Pet.Br. 55-57), but never explains how EPA's mere publication of a rulemaking proposal could impose legal consequences or determine rights or obligations. Bennett, 520 U.S. at 177-78. No state or potentially regulated entity – let alone Murray – is "required" to

process by asking the Court to review the merits before EPA has the opportunity to consider and respond to the comments it received.

[11] E.g., Sackett v. EPA, 132 S. Ct. 1367, 1369 (2012) (administrative compliance order). Other cases are irrelevant because they did not address finality. E.g., Athlone Indus. v. Consumer Prod. Safety Comm'n, 707 F.2d 1485 (D.C. Cir. 1983).

do *anything* based on the Proposed Rule. Only a final regulation promulgated in conjunction with EPA's responses to comments would have such effect.

C. Murray's challenges are unripe.

In assessing ripeness, this Court "focus[es] on . . . the 'fitness of the issues for judicial decision' and the extent to which withholding a decision will cause 'hardship to the parties.'" Am. Petroleum Inst. ("API") v. EPA, 683 F.3d 382, 387 (D.C. Cir. 2012) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)). "[A] dispute is not ripe if it is not fit . . . and . . . it is not fit if it does not involve final agency action." Holistic Candlers & Consumers Ass'n v. Food & Drug Admin., 664 F.3d 940, 943 n.4 (D.C. Cir. 2012) (internal citations omitted).

Because fitness is so plainly lacking when a claimant seeks judicial review of a legal dispute that may be mooted by the outcome of a pending notice and comment rulemaking process, this Court historically has dismissed such claims as unripe. See, e.g., API, 683 F.3d at 386; Atlantic States Legal Found. v. EPA, 325 F.3d 281, 284 (D.C. Cir. 2003); Utility Air Regulatory Group v. EPA, 320 F.3d 272, 278-79 (D.C. Cir. 2003); Action on Smoking & Health v. Dep't of Labor, 28 F.3d 162, 165 (D.C. Cir. 1994); accord Las Brisas (Order dated Dec. 13, 2012) (Attach. A); see also Brief for EPA in Case No. 14-1146 at 28-31. This Court should likewise dismiss Murray's premature petition.

III. THE COURT LACKS JURISDICTION TO ISSUE A WRIT OF PROHIBITION TO STOP THE ONGOING RULEMAKING.

Murray cannot overcome the non-final nature of the action it challenges by invoking the All Writs Act. Murray attempts to convince the Court otherwise by mixing together disparate bits of All Writs Acts jurisprudence, with a dash of the collateral order doctrine and other inapposite case law thrown in for good measure. See Pet.Br. at 39-41. But Murray's writ request remains half-baked. The All Writs Act does not confer jurisdiction where it is otherwise lacking; a writ is unavailable where there is another legal remedy; and writ issuance is a rare occurrence that has been confined to limited categories of circumstances, none of which apply here.

A. A writ may issue to aid, but not enlarge, jurisdiction.

Murray ignores key constraints on the Court's authority under the All Writs Act. That act "is not itself a grant of jurisdiction." In re Tennant, 359 F.3d 523, 527 (D.C. Cir. 2004). Rather, it "confines the [court's] authority to the issuance of process 'in aid of' the issuing court's jurisdiction" and "does not enlarge that jurisdiction." Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999). It "can never provide jurisdiction to a court that does not and would not otherwise have jurisdiction." Ayuda, Inc. v. Thornburgh, 948 F.2d 742, 755 (D.C. Cir. 1991) (vacated on other grounds).

Here, entertaining a challenge to the ongoing section 7411(d) rulemaking would impermissibly enlarge the Court's jurisdiction. As discussed above, it is well-established that courts only have jurisdiction to review final agency action. Allowing

Murray to challenge the Proposed Rule would allow parties to bypass the limitations imposed by Congress in 42 U.S.C. § 7607(b)(1), thus enlarging the Court's jurisdiction. Ayuda, 948 F.2d at 755 ("Surely" a "court may not use the All Writs Act to exercise jurisdiction over an agency . . . *before* a case is ripe or the agency's action is final. Otherwise . . . courts could easily circumvent those jurisdictional bars.").

Moreover, premature review of the rulemaking would impede, not aid, the Court's exercise of its jurisdiction, as it places the Court in the position of having to review an agency position that is not fully developed. As this Court explained in Telecomms. Research & Action Ctr. v. FCC ("TRAC"), 750 F.2d 70, 79 (D.C. Cir. 1984) (quotation omitted), "[p]ostponing review until relevant agency proceedings have been concluded permits an administrative agency to develop a factual record, [and] to apply its expertise to that record." Murray suggests that those steps are unnecessary here because its challenge "focuses exclusively on the legal basis" for the rulemaking and "will never be clearer." Pet.Br. 43. But that ignores the value of comments received from Murray and others on the issue raised. Such comments – of which EPA has received many – may alter EPA's or the Court's analysis. Indeed, if an issue is *not* raised in comment with reasonable specificity, it cannot be raised on judicial review. See 42 U.S.C. § 7607(d). This further underscores that Murray's challenge is inconsistent with the review process Congress prescribed in the Act.

B. A writ is only available where there is no other legal remedy.

A writ is "an extraordinary remedy that is not available when review by other means is possible." TRAC, 750 F.2d at 78. Here, the Clean Air Act already provides a specific remedy for an allegedly "ultra vires" rule: review under its judicial review provision, 42 U.S.C. § 7607(b)(1), once the rule is final. Thus, "review by other means" is not only possible, but certain here.

Murray suggests, with much hyperbole, that review of the final rule is not an *adequate* remedy because states and industry will have to expend resources before the rule is finalized. Pet.Br. 42-43 (complaining that the "specter of the mandate" may force coal plants to shut down, and "States must immediately devote tremendous time and resources"). As discussed in Section I, that claim is factually unsubstantiated. But in any event, such concerns do not justify issuing a writ where the challenged action will be reviewable in the normal course. See Public Util. Comm'r of Or. v. Bonneville Power Admin., 767 F.2d 622, 630 (9th Cir. 1985) (rejecting argument that writ should issue because delay would cause irreparable harm).

C. An extraordinary writ may issue only in certain circumstances.

Because an extraordinary writ may only issue "in aid of" a court's jurisdiction, courts have entertained petitions for a writ only in certain narrow categories of circumstances, otherwise concluding that jurisdiction is lacking.

First, "[t]he traditional use of the writ in aid of appellate jurisdiction . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or

to compel it to exercise its authority when it is its duty to do so." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943); see also I.C.C. v. U.S. ex rel. Campbell, 289 U.S. 385, 394 (1933) ("Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal . . . ").

Second, appellate courts have issued writs to address non-jurisdictional lower court action where "resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice." Colonial Times, Inc. v. Gasch, 509 F.2d 517, 524 (D.C. Cir. 1975). Such cases have generally addressed discovery orders, see, e.g., Schlagenhauf v. Holder, 379 U.S. 104 (1964), which "are often collateral to the litigation and thus lost to appellate review . . . ." Gasch, 509 F.2d at 526.

Third, courts "have the authority, under the All Writs Act, 28 U.S.C. § 1651, to issue a writ of mandamus" in regard to agency action where an agency has "unreasonably delayed" taking action required of it by law. Sierra Club v. Thomas, 828 F.2d 783, 795-96 (D.C. Cir. 1987); TRAC, 750 F.2d at 76 (court had jurisdiction over petition for a writ of mandamus alleging unduly lengthy delay by the FCC in responding to complaint).[12] The delayed action must lie within the Court's future jurisdiction, see Tennant, 359 F.3d at 529, and issuance of the writ must be necessary

[12] After Thomas and TRAC, Congress amended the Clean Air Act so that unreasonable delay claims are now heard in district court. See 42 U.S.C. § 7604(a).

"to protect [that] future jurisdiction." TRAC, 750 F.2d at 76. In other words, the court may only assume jurisdiction if "the agency might forever evade our review and thus escape its duties [while] we awaited final action." Thomas, 828 F.2d at 793.

Murray's petition fits into none of these three categories. It does not address a lower court's exercise of jurisdiction it lacks or refusal to exercise jurisdiction, but rather the substance of administrative action. It also does not fit into the Gasch/Schlagenhauf category, not only because it does not address lower court action, but also because the goals of preventing similar errors and furthering the "efficient administration of justice" by addressing an issue that might otherwise evade review are not in play here. To the contrary, "[r]efusing intervention in current agency proceedings ensures against premature, possibly unnecessary, and piecemeal judicial review." Bonneville Power, 767 F.2d at 629. The issue Murray raises can be addressed when a final rule is before this Court. While that issue may be important and undecided, "[n]ot every issue of first impression or every 'basic, undecided' problem should be the basis for mandamus relief." Gasch, 509 F.2d at 525.

The third category – the only one addressing *agency* action as opposed to lower court action – is also inapposite because, unlike in TRAC and the other cases in this vein, Murray does not challenge agency *delay* that might frustrate the Court's review of final action. Rather, it is Murray that would deprive the Court of the opportunity to review a final rule by demanding that the agency take no action.

Murray attempts to overcome the traditional limitations on the availability of an extraordinary writ by cobbling together isolated aspects of some of the above cases, while ignoring the corresponding limitations. Murray relies heavily on Gasch and Schlagenhauf as authorizing review of "new and important problems" (Pet.Br. 39) – a label that could apply to any number of cases – but conveniently ignores that those cases were limited to addressing district court discovery orders that might have otherwise been "lost to appellate review." Gasch, 509 F.2d at 526. Petitioner points to Thomas and TRAC as holding that the Court can review non-final agency action (Pet. at 24), but glosses over the limitation of those holdings to undue delay claims where the court's opportunity to review the agency's action might be frustrated by a failure to take action. Thomas, 828 F.2d at 793; TRAC, 750 F.2d at 76. Petitioner also fails to mention that the Court declined to issue the writ in both cases. Id.

D. No authority supports the issuance of a writ here.

Apparently recognizing that the All Writs Act is insufficient to achieve its ends, Murray turns to several other inapposite doctrines and cases. Pet.Br. 40-41. Not one of them supports its arguments.

Murray cites McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963), as holding that a court can enjoin non-final action that involves "public questions particularly high in the scale of our national interest." Pet.Br. at 40. But no party challenged jurisdiction in that case, regarding whether the NLRB could hold an election on a Honduran ship. Addressing jurisdiction on its own initiative, the Court noted that the

NLRB's action "aroused vigorous protests from foreign governments," creating "a uniquely compelling justification for prompt judicial resolution of the controversy." 372 U.S. at 16-17. While the Proposed Rule has certainly drawn "vigorous protests" from Murray and others, such protests – which occur often in agency rulemakings – do not present the same type of "compelling justification" for bypassing normal jurisdictional rules as the international incident at issue in McCulloch.

Murray also relies on Leedom v. Kyne, 358 U.S. 184, 187-91 (1958). But there, the National Labor Relations Board conceded that the district court had jurisdiction under a general review provision, *unless* the National Labor Relations Act specifically deprived it of such jurisdiction. Id. Here, there is no such general grant of jurisdiction that allows review of non-final EPA action, and the All Writs Act cannot fill that void. As discussed above, it does not "enlarge" the Court's jurisdiction.

Finally, Murray relies on Meredith v. Federal Mine Safety and Health Review Commission, 177 F.3d 1042 (D.C. Cir. 1999), for the proposition that the Court may review non-final action under the collateral-order doctrine. Pet.Br. at 41. But Murray offers no support for its bare assertion that the prerequisites for application of that doctrine – conclusiveness and unreviewability – have been met, even though the challenged rulemaking has not concluded and the Court will have the opportunity to review the resulting final rule under 42 U.S.C. § 7607(b)(1) once it does.

Murray's argument for issuance of an extraordinary writ is, in essence, that the challenged rulemaking is really important. But even if true, that is not enough. There

is simply no authority for the remarkable proposition Murray advances: that the Court can halt an ongoing rulemaking under the auspices of the All Writs Act. As in other cases where a party has attempted to use that limited tool to achieve a novel end, the Court should reject this argument. See In re Bluewater Network, 234 F.3d 1305, 1312 (D.C. Cir. 2000) ("petitioners cannot use the present mandamus action to challenge the substance of" temporary regulations).

IV. THE COURT SHOULD NOT STOP THE RULEMAKING BASED ON ONE INTERPRETATION OF AN AMBIGUOUS PROVISION.

If it reaches the merits, the Court should decline to take the extreme step of ordering EPA to stop an ongoing rulemaking based on Murray's preferred interpretation of a patently ambiguous provision.

To prevail on the merits at this preliminary stage, Murray must show that its interpretation of section 7411(d) of the Act – under which EPA is barred from addressing *non-hazardous* pollutants emitted by a source category because it has regulated *hazardous* pollutants from that source category – is clearly and indisputably the only possible way to interpret that provision. See Chevron, U.S.A., Inc. v. Natural Resources Def. Council, 467 U.S. 837 (1984) (a court must accept an agency's reasonable construction of an ambiguous provision); In re United States, 925 F.2d 490, 1991 WL 17225, at *2 (D.C. Cir. Feb. 11, 1991) (a writ may issue only where the "right to issuance . . . is 'clear and indisputable'") (quoting Kerr v. U.S. Dist. Court for N. Dist. of Cal., 426 U.S. 394, 403 (1976)).

Murray cannot make that showing. The text of section 7411(d), even as amended by the House alone, does not require Murray's interpretation; the legislative history and statutory context do not favor it; and Murray improperly discounts the Senate's amendment to section 7411(d), which would plainly allow EPA to regulate power plants' emissions of carbon dioxide. Moreover, even under Murray's interpretation of section 7411(d), EPA would still have the authority to regulate *natural gas plants*; thus, in seeking to halt the rulemaking (which addresses both coal- and natural gas-fired plants) in its entirety, Murray is seeking relief that would preclude EPA from exercising authority that even Murray does not dispute EPA has.

EPA must have the opportunity to proffer its own interpretation of section 7411(d), addressing all of the above, after completing its analysis and considering the comments it has received from Murray, Intervenors, and thousands of others. Then, this Court can properly consider whether that interpretation is reasonable in light of the statute's text, context, and legislative history, as well as common sense.

A. Section 7411(d) need not be read as Murray insists.

Murray contends that there is only one way to read section 7411(d): as barring regulation thereunder of *all* emissions from a source category once that source category's *hazardous* emissions have been regulated under section 7412. Not so. As EPA has previously explained,[13] that provision – even as amended by the House only

[13] Because EPA discussed these alternative interpretations at length in both its Response to [Writ] Petition in this case (p.28-30) and in its brief in the companion

– is rife with ambiguity and subject to several other possible interpretations. All except Murray's proposed reading would authorize regulation of *non-hazardous pollutants*, such as carbon dioxide, emitted by power plants.

First, the literal text of the House-amended version of section 7411(d) (set forth in the U.S. Code) can be read as authorizing EPA to address power plant emissions under that provision so long as the pollutant in question (here, carbon dioxide) is not a criteria pollutant. This interpretation is apparent once one focuses on the way the three qualifying clauses in the text are joined:

> **The Administrator shall prescribe regulations** . . . under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source **for any air pollutant** [1] for which air quality criteria have not been issued **or** [2] which is not included on a list published under section 7408(a) of this title **or** [3] emitted from a source category which is regulated under section 7412 of this title . . . .

42 U.S.C. § 7411(d)(1) (emphasis and internal numbering added). Because Congress used the conjunction "or" rather than "and" between the three clauses, they would be more naturally read as alternatives, rather than requirements to be imposed simultaneously.[14] In other words, the literal language of section 7411(d) provides that the Administrator may require states to establish standards for an air pollutant so long

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case West Virginia v. EPA, No. 14-146 (Brief for Respondent pp.35-40), it will provide a more condensed treatment here.

[14] Merriam Webster defines "or" as "a function word [used] to indicate an alternative <coffee *or* tea> <sink *or* swim>." At http://www.merriam-webster.com/dictionary/or.

as *either* air quality criteria have not been established for that pollutant, *or* one of the remaining criteria is met. Air quality criteria have not been issued for CO_2; thus, whether power plants have been regulated under section 7412 is arguably irrelevant.

Section 7411(d) could also be literally read as requiring regulation of power plant carbon dioxide emissions because of the lack of a negative before the third clause. Petitioner presumes that the negative from the second clause was intended to carry over, implicitly inserting another "which is not" before "emitted from a source category." But the text (as amended by the House) says that EPA "shall" require standards for "any air pollutant . . . emitted from a source category which is regulated under section 7412." 42 U.S.C. § 7411(d)(1). Thus, section 7411(d) can also be literally read as requiring EPA to regulate emissions of a pollutant from a source category if that category *is* regulated under section 7412.

Next, the House chose to use the term "regulated," which is inherently ambiguous. As the Supreme Court has explained, when interpreting that term, an agency must consider *what* is being regulated. See Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 366 (2002) (It is necessary to "pars[e] . . . the 'what'" of the term "regulates."); UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 363 (1999) (the term "'regulates insurance' . . . require[s] interpretation, for [its] meaning is not 'plain.'") Here, the "what" being "regulated under section 7412" is a source category's emission of specific hazardous pollutants. Thus, EPA could reasonably conclude that it is only precluded from regulating sources in regard to a particular pollutant under

section 7411(d) if those sources are already "regulated under section 7412" *with respect to that same pollutant*. This is precisely the sort of "reasonable, context-appropriate meaning" that the Supreme Court has directed EPA to give such ambiguous terms. Utility Air Regulatory Group v. EPA (UARG), 134 S. Ct. 2427, 2440 (2014).

Moreover, the phrase "which is regulated under section 7412" is ambiguous in regard to the object(s) it modifies. Petitioner assumes it modifies "source category," but it may also or instead modify "air pollutant." "As enemies of the dangling participle well know, the English language does not always force a writer to specify [to what] . . . a modifying phrase relates." Young v. Cmty. Nutrition Inst., 476 U.S. 974, 980-81 (1986) (FDA's interpretation therefore gets Chevron deference). If Congress intended the phrase "which is regulated . . ." to modify "air pollutant," then regulation would be barred only if a source category was already regulated under section 7412 *for the same pollutant EPA sought to regulate under section 7411(d)*.

Finally, the clause "emitted from a source category which is regulated under section 7412" is ambiguous as a whole because it modifies the ambiguous phrase "any air pollutant." 42 U.S.C. § 7411(d). As the Supreme Court recently noted, "any air pollutant" is routinely given a "context-appropriate meaning." UARG, 134 S. Ct. at 2439. Here, context suggests that "any air pollutant" "emitted from a source category which is regulated under section 7412" should be understood as referring only to any *hazardous* air pollutants, since hazardous pollutants are what section 7412 addresses.

Murray addresses none of these textual ambiguities. Rather, it blithely asserts that "[t]he Supreme Court has . . . already confirmed . . . that the text of Section [74]11(d) as reflected in the United States Code prohibits EPA from mandating state-by-state standards . . . ." Pet.Br. 17.[15] The Supreme Court has done no such thing. In a footnote in American Electric Power v. Connecticut, the Court said:

> "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program §§ 7408-7410, or the 'hazardous air pollutants' program, § 7412."

131 S. Ct. 2527, 2537 n.7 (2011) ("AEP"). First, the issue presented here – whether section 7411(d) bars regulation of *all* emissions from a source category once *hazardous* emissions from that category have been regulated under section 7412 – was not raised or addressed in AEP. To the contrary, industry petitioners asserted in briefing that "EPA may . . . require States to submit plans to control" power plants' greenhouse

[15] Murray also claims that EPA has "acknowledged that the text of Section [74]11(d) . . . unambiguously prohibits doubly regulating existing source categories." Not true. As discussed in EPA's brief in West Virginia (pp.51-53), while, in the preamble to a 2005 rule that was overturned, EPA stated that the interpretation of 42 U.S.C. § 7411(d) advanced by Murray here was "*a* literal reading" of that text (emphasis added), it nevertheless concluded that the text was ambiguous, not only because of the Senate amendment, but also because of context and legislative history. See 70 Fed. Reg. 15,994, 16,031-32 (Mar. 29, 2005) ("Such a reading would be inconsistent with the general thrust of the 1990 amendments . . . . We do not believe that Congress sought to eliminate regulation for a large category of sources . . ."). No party disagreed. Rather, the question raised then was whether section 7411(d) authorized regulation thereunder of a *hazardous pollutant* where that pollutant was listed, but not actually regulated, under section 7412. In any event, EPA is not tied to statements in the preamble of a vacated rule, and it should not be criticized for failing to explore all possible meanings of the House amendment in that context, particularly given that the argument Murray now asserts was not raised in that rulemaking.

gas emissions under 42 U.S.C. § 7411(d),[16] and reiterated at argument – which took place *after* EPA proposed the MATS Rule – that EPA has "the authority to consider [greenhouse gas] standards under section [74]11."[17]

Furthermore, the phrase "of the pollutant in question" arguably indicates that the Supreme Court understood the prohibition to be pollutant-specific. The structure of the Court's statement also so suggests, as the Court's references to the NAAQS program and hazardous pollutant program are parallel, and it is indisputable that the NAAQS exclusion is criteria-pollutant specific.[18] Thus, if the Supreme Court's dicta in AEP means what Murray believes, then it is at least half wrong.

Finally, the holding of AEP – that section 7411 "speaks directly to emissions of [CO_2] from the defendants' [power] plants," 131 S. Ct. at 2537 – undercuts Murray's position, particularly since it post-dates the issuance of the final MATS Rule.

The Supreme Court has not yet grappled with the myriad ambiguities of section 7411(d), and its passing reference to the language of that provision in AEP does not inform the analysis here. What is evident, at this point, is that this is no "case of 'clear right'" concerning a "clear statutory provision," TRAC, 750 F.2d at 79, and so the Court should neither issue a writ of prohibition nor set aside the Proposed Rule.

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[16] Brief for Pet's, No. 10-174, 2011 WL 334707, at *6-7.

[17] Transcript, 2011 WL 1480855, at *16-17.

[18] See 42 U.S.C. § 7411(d)("The Administrator shall prescribe regulations . . . [requiring states to] establish[] standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued . . .).

B. The Act's structure, purpose, context, and legislative history do not favor Murray's authority-nullifying interpretation of § 7411(d).

Statutory interpretation begins with the text, but does not end there. As this Court has explained, "[t]he literal language of a provision taken out of context cannot provide conclusive proof of congressional intent." Bell Atlantic Telephone Cos. v. F.C.C., 131 F.3d 1044, 1047 (D.C. Cir. 1997). Rather, the Court "must employ all the tools of statutory interpretation, including . . . structure, purpose, and legislative history." Loving v. I.R.S., 742 F.3d 1013, 1016 (D.C. Cir. 2014) (internal quotation omitted). Fully employed here, those tools favor a reading of section 7411(d) that does not bar regulation thereunder of *all* emissions from a source simply because its *hazardous* emissions are already regulated under section 7412.

1. The Act's structure and purpose conflict with Murray's interpretation.

In assessing any interpretation of section 7411(d), the Court should consider how the three main programs set forth in the Act work together. See UARG, 134 S. Ct. at 2442 (a "reasonable statutory interpretation must account for . . . the broader context of the statute as a whole") (quotation omitted).

Congress designed section 7411(d) to work in tandem with the NAAQS and section 7412 programs such that, together, the three programs cover the full range of dangerous emissions from stationary sources. See supra pp. 3-5. Under Murray's reading, there would be a gaping hole in that coverage, leaving sources' emissions of

certain pollutants outside the Act's scope. Such a result is starkly at odds with the Act's purpose of protecting "public health and welfare." 42 U.S.C. § 7401(b)(1).

This Court should not rush to adopt an interpretation of section 7411 that is at odds with the Act's purpose and creates gaps in the otherwise-comprehensive scheme designed by Congress in 1970. Rather, it should give EPA an opportunity to interpret that provision so as to "make sense of the whole." Bell Atl., 131 F.3d at 1047.

2. The legislative history conflicts with Murray's interpretation.

The legislative history of the 1990 Amendments also "makes it plain" that Murray's theory of section 7411(d) "is not a reasonable statutory interpretation." United States v. Vogel Fertilizer Co., 455 U.S. 16, 26 (1982). That history is replete with language indicating that Congress sought to expand EPA's regulatory authority across the board, compelling the Agency to regulate more pollutants, under more programs, more quickly.[19] Conversely, no party has identified a single statement in the legislative history indicating that Congress simultaneously sought to restrict EPA's

[19] See S. Rep. No. 101-228 at 133 ("the program to regulate hazardous air pollutants . . . should be restructured to provide EPA with authority to regulate industrial and area source categories of air pollution . . . in the near term"), reprinted in 5 Legis. Hist. at 8473; S. Rep. No. 101-228 at 14 ("The bill gives significant authority to the Administrator in order to overcome the deficiencies in [the NAAQS program]"), reprinted in 5 Legis. Hist. at 8354; H.R. Rep. No. 101-952 at 336, 340, 345 & 347 (discussing enhancements to Act's motor vehicle provisions, EPA's new authority to promulgate chemical accident prevention regulations, the enactment of the Title V permit program, and enhancements to EPA's enforcement authority), reprinted in 1 Legis. Hist. at 1786, 1790, 1795, & 1797.

authority under the existing source performance standards program or to create gaps in the comprehensive structure of the statute. This strongly suggests that both houses simply intended to edit section 7411(d) to reflect the structural changes made to section 7412; i.e., EPA's new mandate to regulate the nearly 200 hazardous pollutants Congress identified on a source category-by source category basis, rather than regulating hazardous pollutants *one-by-one*. Indeed, that was the conclusion drawn by the Congressional Research Service shortly after enactment of the 1990 Amendments. 1 Legis. Hist. at 46 n.1 (characterizing House and Senate amendments as "duplicative" edits that "change the reference to section 112" using "different language").

Lacking any contemporaneous historical evidence supporting its interpretation of section 7411(d), Murray presents a theory as to why Congress might have wanted to exempt all source categories regulated under section 7412 from any regulation under section 7411(d): a supposed desire to prohibit "double regulation." Pet.Br. 20. Murray posits that "ban[ning] EPA from doubly regulating source categories under both Sections [74]11(d) and [74]12" was "sensibl[e]" because those provisions might impose "conflicting or unaffordable requirements." Pet.Br. 19-20. Beyond the lack of historical evidence supporting it, there are several things wrong with this theory.

First, sections 7412 and 7411 regulate different types of air pollutants – hazardous and non-hazardous respectively – although a lay reader of Murray's brief would have no idea this was the case. If the section 7411 and section 7412 programs addressed the same sets of pollutants, then Murray's theory might make some sense,

but there is obviously no "double regulation" when the two programs at issue address different pollutants. Moreover, Murray provides no factual support for its suggestion that the controls required under section 7412 to address hazardous emissions might "conflict," technologically, with the controls required under section 7411(d) to address the emissions of other pollutants.

Second, instead of legislating to avoid any regulatory overlap between state and federal programs as Murray theorizes (Pet.Br. 19), Congress in fact made it clear that sources may be simultaneously subject to multiple regulatory programs. See 42 U.S.C. § 7416 (authorizing states to require sources already regulated under section 7412 or other national standards to impose additional, *more stringent* state controls). Indeed, the Title V program, enacted in 1990 and providing for the collection of all regulatory requirements applicable to a source into one permit, would be largely unnecessary if a source can only be subject to one program at a time.

Finally, Murray's suggestion that Congress sought to bar all regulation under section 7411(d) once a source category has been regulated under section 7412 in order to avoid imposing "unaffordable requirements" is undercut by something Murray itself points out: the fact that the standards set under those programs both incorporate cost considerations. Pet.Br. 19; 42 U.S.C. §§ 7411(a)(1), 7412(d). Thus, Congress addressed the issue of affordability by incorporating cost considerations into the standard-setting process under both the section 7411(d) and 7412 programs, not by exempting a source category from one of those programs.

3. The statutory context is also at odds with Murray's interpretation.

"Context serves an especially important role in textual analysis of a statute when Congress has not expressed itself as unequivocally as might be wished." Bell, 131 F.3d at 1047. Where the Court is "charged with understanding the relationship between two different provisions within the same statute" – e.g., §§ 7411(d) and 7412 – it "must analyze the language of each to make sense of the whole." Id.

Here, the text of section 7412 states that regulation of hazardous pollutants under that section is not to "diminish or replace the requirements of" EPA's regulation of non-hazardous pollutants under section 7411. 42 U.S.C. § 7412(d)(7). Under Murray's reading, section 7412 standards for hazardous pollutants would entirely *eliminate* regulation of non-hazardous emissions from a source category. Given that current sections 7412(d)(7) and 7411(d) were both the result of the 1990 Amendments, one would have to ascribe contradictory intentions to the same Congress to interpret the latter as Murray suggests.

Ultimately, EPA may or may not conclude that section 7411(d) should be interpreted as Murray argues, and the reasoning supporting its conclusion may or may not be along the lines of the arguments addressed above. But EPA must be afforded the opportunity to complete the rulemaking process, and reach its own final conclusion regarding the issues raised here, before the arguments for and against any particular interpretation of the statute can properly be considered by this Court.

C. The Senate Amendment also conflicts with Murray's interpretation of section 7411(d), and cannot be ignored.

Murray's preferred interpretation of section 7411(d) is also at odds with Congress' enactment of a second amendment to that provision, drawn from the Senate's bill, which plainly authorizes EPA to regulate unless *the same pollutant* is already regulated under section 7412. This clear preservation of EPA's regulatory authority over the full range of dangerous pollutants emitted by a source, hazardous and non-hazardous, is properly considered when interpreting section 7411(d).

1. The Senate Amendment should not be ignored.

Unlike the ambiguous amendment to section 7411(d) drawn from the House bill, the amendment drawn from the Senate bill is straightforward. It simply substitutes "section 112(b)" for the prior cross-reference to "section 112(b)(1)(A)." Pub. L. No. 101-549, § 302(a), 104 Stat. at 2574. So amended, section 7411(d) would mandate that EPA require states to submit plans establishing standards "for any existing source for any air pollutant . . . which is not included on a list published under section 7408(a) or section 7412(b)."

Murray and Intervenors offer various arguments as to why this clear mandate, which all concede is at odds with the interpretation of section 7411(d) advanced by Murray (see Pet.Br. n8), should be ignored. All are unavailing. First, Murray asserts that the Court should "defer" to the Office of Law Revision Counsel's ("OLRC's") "decision" regarding "what the text of the Clean Air Act" is; i.e., that OLRC's non-

execution of the Senate Amendment in the U.S. Code is the authoritative word on the interpretation of section 7411(d). Pet.Br. 34. Murray goes so far as to claim that, because OLRC did not execute the Senate Amendment, "there is no ambiguity." Id.

But Murray misunderstands the role of OLRC. OLRC is not a "legislative agency" as Murray asserts (id.); it does not make law. Rather, its job is simply to "prepare[] and publish[] the United States Code."[20] OLRC may also *recommend* "such amendments and corrections as will remove ambiguities, contradictions, and other imperfections" in a law and submit a revised version of that title to the Committee of the Judiciary of the House of Representatives,[21] but until Congress enacts that version of the title into positive law, the text in the Statutes at Large controls. See Stephan v. United States, 319 U.S. 423, 426 (1943) ("the Code cannot prevail over the Statutes at Large when the two are inconsistent"); Five Flags Pipe Line Co. v. Dep't of Transp., 854 F.2d 1438, 1440 (D.C. Cir. 1988) ("[W]here the language of the Statutes at Large conflicts with the language in the United States Code that has not been enacted into positive law, the language of the Statutes at Large controls."). This Court accordingly concluded in Five Flags that it had to give effect to the version of a provision set forth in the Statutes at Large, as opposed to the version in the U.S. Code, where there was a substantive difference between the two. Id. In contrast, OLRC's mechanical

[20] At http://uscode.house.gov/about/info.shtml.

[21] Id.

non-execution of an amendment (for whatever reason[22]) is entitled to "no weight." United States v. Welden, 377 U.S. 95, 98 n.4 (1964).[23]

None of the cases cited by Murray (Pet.Br. 35-36) remotely support its argument to the contrary. NLRB v. Noel Canning, 134 S. Ct. 2550, 2577 (2014), concerned the President's authority under the Recess Appointment Clause of the Constitution. While the Court found "some linguistic ambiguity" in that Clause, which it interpreted in light of "the basic purpose of the Clause, and the historical practice," id. at 2573, there were obviously no issues of conflicting *statutory* language, or deference to the OLRC. The "undue judicial interference" language repeatedly quoted by Murray relates to the question of whether the Court should take the Senate's representations of its own actions at face value or instead inquire into the facts behind them. Thus, Noel Canning is irrelevant to the issues presented here. Ex parte Wren, 63 Miss. 512 (Miss. 1886), is also off point. That case addressed whether

[22] Murray states that the House Amendment had "execution priority" because it appears before the Senate Amendment in the bill. But "if there exists a conflict in the provisions of the same act, the last provision in point of arrangement must control." Lodge 1858, Am. Fed'n of Gov't Emps. v. Webb, 580 F.2d 496, 510 (D.C. Cir. 1978).

[23] EPA does not dispute that there are other instances in which statutory amendments have not been executed. See Pet.Br. n.9. Murray misses the point: in the rare instances where unexecuted text is found to matter, it must be considered and given effect, just as this Court did in Five Flags. This will not "embroil" courts in "the intricacies of the legislative process" as Murray hyperbolically suggests. Indeed, most of the unexecuted amendments cited by Murray are trivial and/or duplicative (e.g., 1990 Amendments to 42 U.S.C. § 1395*l*(a)(1)(K) (both amendments struck same word, "and"), or obviously in error (e.g., 2008 Amendments to 15 U.S.C. § 2081(b)(1) (section amended had been repealed)).

an amendment that did *not* make its way into the final bill signed by the governor, despite the legislature's intent to include it, has effect. If anything, the Mississippi Supreme Court's conclusion – that the text of the bill *as signed into law* governs – supports EPA's position here, not Murray's.

Murray also suggests that the Senate amendment should be discounted because it is "not substantive," but only "conforming." Pet.Br. 33. Murray is again wrong. First, the "conforming" label is irrelevant. A "conforming" amendment may be substantive or non-substantive. Burgess v. United States, 553 U.S. 124, 135 (2008). And while the House Amendment contains more words, it also qualifies as "conforming" under the definition in the Senate Legislative Drafting Manual, Section 126(b)(2) ("necessitated by the substantive amendments of provisions of the bill"). Here, both the House and Senate amendments were "necessitated by" Congress' revisions to section 7412, which included the deletion of old section 7412(b)(1)(A). Thus, the House's amendment is no less "conforming" than the Senate's, and the heading under which it was enacted – "Miscellaneous Guidance" – no more indicates substantive import. In any event, this Court gives full effect to conforming amendments, see Washington Hospital Center v. Bowen, 795 F.2d 139, 149 (D.C. Cir. 1986), and so the Senate amendment cannot be ignored.[24]

[24] Murray cites Am. Petroleum Inst. v. SEC as suggesting otherwise. Pet.Br. 33. It does not. There, the Court did not ignore a conforming amendment; rather, it

Intervenors NFIB and UARG seize on a line from the legislative history stating that the Senate "recedes to the House," arguing that this language indicates the Senate "defer[red] . . . to the . . . House amendment" and thereby "reconcile[ed] the alternate versions of the 1990 amendments." NFIB/UARG Br. 17 (citing S. 1631, 101st Cong., § 108 (Oct. 27, 1990), reprinted in 1 Leg. Hist. at 885) (JA XX)). Intervenors misuse this rather mundane legislative history snippet.

To begin with, the language quoted is not from the conference report as Intervenors state, but from a "Statement of Senate Managers" read into the record on the floor. See 1 Leg. Hist., at 880 (JA XX). As the reader noted, it was "not reviewed or approved by all of the conferees," id., and thus has limited value. Furthermore, "recedes" is a boilerplate term that signals that one chamber is withdrawing its prior objection to a provision of a bill, either because it has been amended, replaced, or otherwise. See Riddick's Senate Procedure S. Doc. 101-28 at pp. 1481-82 (JA XX-XX). It does not mean one house is deferring to another. Moreover, the statement at issue here is specific to section 108 of the bill, and thus says nothing about the Senate's intentions regarding section 302, containing the Senate amendment. Indeed, the Senate Managers expressly stated that they were not addressing Title III of the bill, which contained that amendment. 1 Leg. Hist., at 880 (JA XX). In any event, the key

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refused to act based on a non-existent conforming amendment that a party theorized Congress might have forgotten to enact. 714 F.3d 1329, 1336-37 (D.C. Cir. 2013).

point remains that both amendments to section 7411(d) were enacted into law, and must therefore be given effect. See Envtl. Def. Fund v. EPA, 82 F.3d 451, 460 n.10 (D.C. Cir. 1996) (Statement of Senate Managers "cannot undermine the statute's language"). Thus, both Murray and Intervenors fail to show that the Senate Amendment must be disregarded.

2. The Senate Amendment poses no non-delegation issue.

In a last-ditch attempt to excise the Senate Amendment from the Act, Intervenors point to the non-delegation doctrine. They argue that agencies may not "pick and choose between . . . conflicting legislative enactments" (NFIB Br. 22), and that EPA is unlawfully "attempt[ing] to exercise lawmaking power" (Peabody Br. 11). Intervenors' attempt to scare up a constitutional bogeyman fails.

First, it is not apparent that there is a "conflict" between the two amendments to section 7411(d), given that the House-amended text can be interpreted as not barring regulation of a source category under section 7411(d) unless that source category's emissions of *the pollutant in question* are already regulated under section 7412. Supra pp. 35-40. EPA should be permitted to at least consider that possibility.[25]

Second, if there is tension between the two amendments, EPA should have the opportunity to try to harmonize them, in light its expertise on this statutory scheme.

[25] See Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2228 (2014) (Sotomayor, J., dissenting) ("before concluding that Congress has legislated in conflicting and unintelligible terms," "traditional tools of statutory construction" should be used to "allow [the statute] to function as a coherent whole.").

Where "internal tension" in a statute "makes possible alternative reasonable constructions," "Chevron dictates that a court defer to the agency's . . . expert judgment about which interpretation fits best with, and makes the most sense of, the statutory scheme." Scialabba, 134 S. Ct. at 2203 (Kagan, J., plurality op.). This Court has similarly opined that where Congress "drew upon two bills originating in different Houses and containing provisions that, when combined, were inconsistent in respects never reconciled in conference . . . it was the greater wisdom for [EPA] to devise a middle course." Citizens to Save Spencer Cnty. v. EPA, 600 F.2d 844, 872 (D.C. Cir. 1979). Thus, if there is a conflict between the House and Senate amendments, EPA should be given the chance to find a reasonable "middle course." Id.[26]

Intervenors cite to Chief Justice Roberts' statement that "Chevron is not a license for an agency to repair a statute that doesn't make sense." NFIB Br. 25 (citing Scialabba, 134 S. Ct. at 2214 (concurring opinion)). But (in addition to being at odds with the plurality opinion), that statement doesn't apply here. The Act makes sense;

[26] Intervenors cite Whitman, 531 U.S. at 457, as suggesting that EPA may not choose "between competing versions of a statute." NFIB/UARG Br. 22. But that case concerned whether Congress' command that EPA set air quality standards "requisite to protect public health" and "allowing an adequate margin of safety" was too broad. It was in that different context that the Court suggested that, if a grant of authority was too broadly drawn, EPA could not cure it by declining to exercise some of that authority. Id. at 472. And the Court noted that "[i]n the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes," whereas it has routinely upheld agencies' authority to execute vaguely-drafted Congressional commands. 531 U.S. at 474.

Congress' intent in 1970 to establish a comprehensive regulatory scheme, covering the full range of dangerous pollutants, was clear and sensible, and its intent to strengthen that scheme in 1990 was equally clear and sensible. If EPA determines that there is a discrepancy between the two amendments at issue here, those "intelligible principles" can guide its application of the traditional tools of statutory interpretation to harmonize the two amendments. Indeed, the Chief Justice made clear that he favored reading a statute "as a symmetrical and coherent regulatory scheme," and "fit[ing], if possible, all parts into a harmonious whole." Id. at 2214.

Finally, even if the Court concluded that there was a "direct conflict" between the House and Senate amendments, which it did not think the agency could properly address through interpretation, 134 S. Ct. at 2203, the result would not be what Murray or Intervenors wish. Rather, the amended portion of section 7411(d) would revert to its pre-1990 text – which would either render it entirely null (because it cross-references section 4712(b)(1)(A), which no longer exists), or instead might be found to preserve the pre-1990 scope of the exclusion (if only the now-inapplicable subsection references ("(b)(1)(A)") are considered null).[27]

[27] See ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 189 (2012) ("[I]f a text contains truly irreconcilable provisions . . . and they have been simultaneously adopted, neither provision should be given effect.").

EPA has not yet determined what weight to give the Senate amendment; whether or how to reconcile it with the House amendment; or if reconciliation is even necessary. Intervenors suggest that, instead of having the opportunity to proffer its conclusions on these issues, EPA must throw its hands in the air and look to either Congress to clarify its intentions or the Court to divine them. But separation of powers principles instead require that the agency to which Congress has delegated the implementation of a statute, and which has extensive expertise in interpreting and applying that statute, gets the first crack at answering such questions.

Conclusion

The Court should dismiss or deny Murray's Petition for Review and its Petition for an Extraordinary Writ.

Respectfully submitted,

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February 12, 2015

Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because, as counted by the word count feature of Microsoft Office Word, it contains 13,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1); and

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) because it was prepared using Microsoft Office Word 2013 in a proportionally spaced typeface, Garamond, in 14 pt. font.

/s/ Amanda Shafer Berman
Amanda Shafer Berman
Counsel for Respondent EPA

Dated: February 12, 2015

Certificate of Service

I certify that the Brief of Respondent EPA was electronically filed today with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, and that, pursuant to Circuit Rule 31(b), five paper copies of the brief were delivered to the Court by hand.

I further certify that a copy of the foregoing Brief of Respondent EPA was today served electronically through the court's CM/ECF system on all registered counsel for Petitioners, Intervenors and Amici.

/s/ Amanda Shafer Berman
Counsel for Respondent

Dated: February 12, 2015

Attachment A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1248 **September Term, 2012**

EPA-77FR22392

Filed On: December 13, 2012

Las Brisas Energy Center, LLC,

Petitioner

v.

Environmental Protection Agency and Lisa Perez Jackson,

Respondents

Conservation Law Foundation, et al.,
Intervenors

Consolidated with 12-1251, 12-1252, 12-1253, 12-1254, 12-1257

BEFORE: Rogers, Garland, and Brown, Circuit Judges

O R D E R

Upon consideration of the motions to dismiss, the oppositions thereto, and the replies; and the motion for declaratory relief, the oppositions thereto, and the replies, it is

ORDERED that the motions to dismiss be granted. The challenged proposed rule is not final agency action subject to judicial review. See 42 U.S.C. § 7607(b)(1); Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (holding that final agency action "must mark the consummation of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow") (internal quotations omitted). It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1248 **September Term, 2012**

FURTHER ORDERED that the motion for declaratory relief be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1112 & No. 14-1151

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: MURRAY ENERGY CORPORATION,

Petitioner.

MURRAY ENERGY CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

Respondents.

On Petition for Writ of Prohibition & Petition for Review

RESPONDENTS' STATUTORY ADDENDUM

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February 12, 2015

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Public Law 101-549
101st Congress

An Act

To amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes.

Nov. 15, 1990
[S. 1630]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Air pollution control.

TITLE I—PROVISIONS FOR ATTAINMENT AND MAINTENANCE OF NATIONAL AMBIENT AIR QUALITY STANDARDS

SEC. 101. GENERAL PLANNING REQUIREMENTS.

Inter-governmental relations.

(a) AREA DESIGNATIONS.—Section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)) is amended to read as follows:

"(d) DESIGNATIONS.—

"(1) DESIGNATIONS GENERALLY.—

"(A) SUBMISSION BY GOVERNORS OF INITIAL DESIGNATIONS FOLLOWING PROMULGATION OF NEW OR REVISED STANDARDS.—By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 109, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

"(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

"(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

"(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not

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exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

"(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act and all applicable regulations.

"(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

"(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

"(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 105.".

SEC. 108. MISCELLANEOUS GUIDANCE.

(a) TRANSPORTATION PLANNING GUIDANCE.—Section 108(e) of the Clean Air Act is amended by deleting the first sentence and inserting in lieu thereof the following: "The Administrator shall, after consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, and with State and local officials, within nine months after enactment of the Clean Air Act Amendments of 1989 and periodically thereafter as necessary to maintain a continuous transportation-air quality planning process, update the June 1978 Transportation-Air Quality Planning Guidelines and publish guidance on the development and implementation of transportation and other measures necessary to demonstrate and maintain attainment of national ambient air quality standards.". 42 USC 7408.

(b) TRANSPORTATION CONTROL MEASURES.—Section 108(f)(1) of the Clean Air Act is amended by deleting all after "(f)" through the end of subparagraph (A) and inserting in lieu thereof the following:

"(1) The Administrator shall publish and make available to appropriate Federal, State, and local environmental and transportation agencies not later than one year after enactment of the Clean Air Act Amendments of 1990, and from time to time thereafter— Public information.

"(A) information prepared, as appropriate, in consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, regarding the formulation and emission reduction potential of transportation control measures related to criteria pollutants and their precursors, including, but not limited to—

"(i) programs for improved public transit;

"(ii) restriction of certain roads or lanes to, or construction of such roads or lanes for use by, passenger buses or high occupancy vehicles;

"(iii) employer-based transportation management plans, including incentives;

"(iv) trip-reduction ordinances;

"(v) traffic flow improvement programs that achieve emission reductions;

need for revision, or implementation of any plan or plan revision required under this Act.".

(e) NEW SOURCE STANDARDS OF PERFORMANCE.—(1) Section 111(b)(1)(B) of the Clean Air Act (42 U.S.C. 7411(b)(1)(B)) is amended as follows:

(A) Strike "120 days" and insert "one year".

(B) Strike "90 days" and insert "one year".

(C) Strike "four years" and insert "8 years".

(D) Immediately before the sentence beginning "Standards of performance or revisions thereof" insert "Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard.".

(E) Add the following at the end: "When implementation and enforcement of any requirement of this Act indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.".

(2) Section 111(f)(1) of the Clean Air Act (42 U.S.C. 7411(f)(1)) is amended to read as follows:

"(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) before the date of the enactment of the Clean Air Act Amendments of 1990 and for which regulations had not been proposed by the Administrator by such date, the Administrator shall— Regulations.

"(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after the date of the enactment of the Clean Air Act Amendments of 1990;

"(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after the date of the enactment of the Clean Air Act Amendments of 1990; and

"(C) propose regulations for the remaining categories of sources within 6 years after the date of the enactment of the Clean Air Act Amendments of 1990.".

(f) SAVINGS CLAUSE.—Section 111(a)(3) of the Clean Air Act (42 U.S.C. 7411(f)(1)) is amended by adding at the end: "Nothing in title II of this Act relating to nonroad engines shall be construed to apply to stationary internal combustion engines.".

(g) REGULATION OF EXISTING SOURCES.—Section 111(d)(1)(A)(i) of the Clean Air Act (42 U.S.C. 7411(d)(1)(A)(i)) is amended by striking "or 112(b)(1)(A)" and inserting "or emitted from a source category which is regulated under section 112".

(h) CONSULTATION.—The penultimate sentence of section 121 of the Clean Air Act (42 U.S.C. 7421) is amended to read as follows: "The Administrator shall update as necessary the original regulations required and promulgated under this section (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990) to ensure adequate consultation.". Regulations.

(i) DELEGATION.—The second sentence of section 301(a)(1) of the Clean Air Act (42 U.S.C. 7601(a)(1)) is amended by inserting "subject to section 307(d)" immediately following "regulations".

and sources subject to the provisions of this section and shall include aggregate information from the database in each annual report. The report shall include, but not be limited to—

"(1) a status report on standard-setting under subsections (d) and (f);

"(2) information with respect to compliance with such standards including the costs of compliance experienced by sources in various categories and subcategories;

"(3) development and implementation of the national urban air toxics program; and

"(4) recommendations of the Chemical Safety and Hazard Investigation Board with respect to the prevention and mitigation of accidental releases.".

SEC. 302. CONFORMING AMENDMENTS.

42 USC 7411.

(a) Section 111(d)(1) of the Clean Air Act is amended by striking "112(b)(1)(A)" and inserting in lieu thereof "112(b)".

(b) Section 111 of the Clean Air Act is amended by striking paragraphs (g)(5) and (g)(6) and redesignating the succeeding paragraphs accordingly. Such section is further amended by striking "or section 112" in paragraph (g)(5) as redesignated in the preceding sentence.

42 USC 7414.

(c) Section 114(a) of the Clean Air Act is amended by striking "or" after "section 111," and by inserting ", or any regulation of solid waste combustion under section 129," after "section 112".

42 USC 7418.

(d) Section 118(b) of the Clean Air Act is amended by striking "112(c)" and inserting in lieu thereof "112(i)(4)".

42 USC 7602.

(e) Section 302(k) of the Clean Air Act is amended by adding before the period at the end thereof ", and any design, equipment, work practice or operational standard promulgated under this Act.".

42 USC 7604.

(f) Section 304(b) of the Clean Air Act is amended by striking "112(c)(1)(B)" and inserting in lieu thereof "112(i)(3)(A) or (f)(4)".

42 USC 7607.

(g) Section 307(b)(1) is amended by striking "112(c)" and inserting in lieu thereof "112".

(h) Section 307(d)(1) is amended by inserting—

"(D) the promulgation of any requirement for solid waste combustion under section 129,"

after subparagraph (C) and redesignating the succeeding subparagraphs accordingly.

42 USC 7412 note.

SEC. 303. RISK ASSESSMENT AND MANAGEMENT COMMISSION.

(a) ESTABLISHMENT.—There is hereby established a Risk Assessment and Management Commission (hereafter referred to in this section as the "Commission"), which shall commence proceedings not later than 18 months after the date of enactment of the Clean Air Act Amendments of 1990 and which shall make a full investigation of the policy implications and appropriate uses of risk assessment and risk management in regulatory programs under various Federal laws to prevent cancer and other chronic human health effects which may result from exposure to hazardous substances.

(b) CHARGE.—The Commission shall consider—

(1) the report of the National Academy of Sciences authorized by section 112(o) of the Clean Air Act, the use and limitations of risk assessment in establishing emission or effluent standards, ambient standards, exposure standards, acceptable concentration levels, tolerances or other environmental criteria for hazardous substances that present a risk of carcinogenic effects

1 U.S.C. § 112. Statutes at Large; contents; admissibility in evidence

The Archivist of the United States shall cause to be compiled, edited, indexed, and published, the United States Statutes at Large, which shall contain all the laws and concurrent resolutions enacted during each regular session of Congress; all proclamations by the President in the numbered series issued since the date of the adjournment of the regular session of Congress next preceding; and also any amendments to the Constitution of the United States proposed or ratified pursuant to article V thereof since that date, together with the certificate of the Archivist of the United States issued in compliance with the provision contained in section 106b of this title. In the event of an extra session of Congress, the Archivist of the United States shall cause all the laws and concurrent resolutions enacted during said extra session to be consolidated with, and published as part of, the contents of the volume for the next regular session. The United States Statutes at Large shall be legal evidence of laws, concurrent resolutions, treaties, international agreements other than treaties, proclamations by the President, and proposed or ratified amendments to the Constitution of the United States therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

* * *

1 U.S.C. § 204. Codes and Supplements as evidence of the Laws of United States and District of Columbia; citation Codes and Supplements

(a) United States Code.--The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: *Provided, however*, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

* * *

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions nad agreeable to the usages and principles of law.

* * *

42 U.S.C. § 7401. Congressional findings and declaration of purpose

* * *

(b) Declaration. The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

* * *

42 U.S.C. § 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants.

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970] publish, and shall from time to time thereafter revise, a list which includes each air pollutant--

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970], but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on--

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant:

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

* * *

42 U.S.C. § 7409. National primary and secondary ambient air quality standards

(a) Promulgation.

(1) The Administrator--

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970], shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall be regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970], the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare.

(1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

* * *

42 U.S.C. § 7411. Standards of performance for new stationary sources

(a) Definitions. For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in title II of this Act [42 USCS §§ 7621 et seq.] relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means--

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 USCS § 792(a)] or any

amendment thereto, or any subsequent enactment which supersedes such Act, or (B) which qualifies under section 113(d)(5)(A)(ii) of this Act shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

* * *

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority--

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

* * *

42 U.S.C. § 7411 (1988). Statutes at Large; contents; admissibility in evidence

* * *

(d) Standards of performance for existing sources; remaining useful life of source.

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) or 7412(b)(1)(A) of this title but (ii) to which a standard of performance under this section would apply if such exiting source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

* * *

42 U.S.C. § 7412. Hazardous air pollutants

(a) Definitions
For purposes of this section, except subsection (r) of this section--

(1) Major source
The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. The Administrator may establish a lesser quantity, or in the case of radionuclides different criteria, for a major source than that specified in the previous sentence, on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors.

(2) Area source
The term "area source" means any stationary source of hazardous air pollutants that is not a major source. For purposes of this section, the term "area source" shall not include motor vehicles or nonroad vehicles subject to regulation under subchapter II of this chapter.

(3) Stationary source
The term "stationary source" shall have the same meaning as such term has under section 7411(a) of this title.

(4) New source
The term "new source" means a stationary source the construction or reconstruction of which is commenced after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source.

(5) Modification
The term "modification" means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results

in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.

(6) Hazardous air pollutant
The term "hazardous air pollutant" means any air pollutant listed pursuant to subsection (b) of this section.

(7) Adverse environmental effect
The term "adverse environmental effect" means any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

(8) Electric utility steam generating unit
The term "electric utility steam generating unit" means any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale shall be considered an electric utility steam generating unit.

(9) Owner or operator
The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(10) Existing source
The term "existing source" means any stationary source other than a new source.

(11) Carcinogenic effect
Unless revised, the term "carcinogenic effect" shall have the meaning provided by the Administrator under Guidelines for Carcinogenic Risk Assessment as of the date of enactment. Any revisions in the existing Guidelines shall be subject to notice and opportunity for comment.

(b) List of pollutants

(1) Initial list

The Congress establishes for purposes of this section a list of hazardous air pollutants as follows:

CAS number	Chemical name
75070	Acetaldehyde
60355	Acetamide
75058	Acetonitrile
98862	Acetophenone
53963	2-Acetylaminofluorene
107028	Acrolein
79061	Acrylamide
79107	Acrylic acid
107131	Acrylonitrile
107051	Allyl chloride
92671	4-Aminobiphenyl
62533	Aniline
90040	o-Anisidine
1332214	Asbestos
71432	Benzene (including benzene from gasoline)
92875	Benzidine
98077	Benzotrichloride
100447	Benzyl chloride
92524	Biphenyl
117817	Bis(2-ethylhexyl)phthalate (DEHP)
542881	Bis(chloromethyl)ether
75252	Bromoform
106990	1,3-Butadiene
156627	Calcium cyanamide
105602	Caprolactam
133062	Captan
63252	Carbaryl
75150	Carbon disulfide

56235	Carbon tetrachloride
463581	Carbonyl sulfide
120809	Catechol
133904	Chloramben
57749	Chlordane
7782505	Chlorine
79118	Chloroacetic acid
532274	2-Chloroacetophenone
108907	Chlorobenzene
510156	Chlorobenzilate
67663	Chloroform
107302	Chloromethyl methyl ether
126998	Chloroprene
1319773	Cresols/Cresylic acid (isomers and mixture)
95487	o-Cresol
108394	m-Cresol
106445	p-Cresol
98828	Cumene
94757	2,4-D, salts and esters
3547044	DDE
334883	Diazomethane
132649	Dibenzofurans
96128	1,2-Dibromo-3-chloropropane
84742	Dibutylphthalate
106467	1,4-Dichlorobenzene(p)
91941	3,3-Dichlorobenzidene
111444	Dichloroethyl ether (Bis(2-chloroethyl)ether)
542756	1,3-Dichloropropene
62737	Dichlorvos
111422	Diethanolamine
121697	N,N-Diethyl aniline (N,N-Dimethylaniline)
64675	Diethyl sulfate
119904	3,3-Dimethoxybenzidine
60117	Dimethyl aminoazobenzene

119937	3,3'-Dimethyl benzidine
79447	Dimethyl carbamoyl chloride
68122	Dimethyl formamide
57147	1,1-Dimethyl hydrazine
131113	Dimethyl phthalate
77781	Dimethyl sulfate
534521	4,6-Dinitro-o-cresol, and salts
51285	2,4-Dinitrophenol
121142	2,4-Dinitrotoluene
123911	1,4-Dioxane (1,4-Diethyleneoxide)
122667	1,2-Diphenylhydrazine
106898	Epichlorohydrin (1-Chloro-2,3-epoxypropane)
106887	1,2-Epoxybutane
140885	Ethyl acrylate
100414	Ethyl benzene
51796	Ethyl carbamate (Urethane)
75003	Ethyl chloride (Chloroethane)
106934	Ethylene dibromide (Dibromoethane)
107062	Ethylene dichloride (1,2-Dichloroethane)
107211	Ethylene glycol
151564	Ethylene imine (Aziridine)
75218	Ethylene oxide
96457	Ethylene thiourea
75343	Ethylidene dichloride (1,1-Dichloroethane)
50000	Formaldehyde
76448	Heptachlor
118741	Hexachlorobenzene
87683	Hexachlorobutadiene
77474	Hexachlorocyclopentadiene
67721	Hexachloroethane
822060	Hexamethylene-1,6-diisocyanate
680319	Hexamethylphosphoramide
110543	Hexane
302012	Hydrazine

7647010	Hydrochloric acid
7664393	Hydrogen fluoride (Hydrofluoric acid)
123319	Hydroquinone
78591	Isophorone
58899	Lindane (all isomers)
108316	Maleic anhydride
67561	Methanol
72435	Methoxychlor
74839	Methyl bromide (Bromomethane)
74873	Methyl chloride (Chloromethane)
71556	Methyl chloroform (1,1,1-Trichloroethane)
78933	Methyl ethyl ketone (2-Butanone)
60344	Methyl hydrazine
74884	Methyl iodide (Iodomethane)
108101	Methyl isobutyl ketone (Hexone)
624839	Methyl isocyanate
80626	Methyl methacrylate
1634044	Methyl tert butyl ether
101144	4,4-Methylene bis(2-chloroaniline)
75092	Methylene chloride (Dichloromethane)
101688	Methylene diphenyl diisocyanate (MDI)
101779	4,4'-Methylenedianiline
91203	Naphthalene
98953	Nitrobenzene
92933	4-Nitrobiphenyl
100027	4-Nitrophenol
79469	2-Nitropropane
684935	N-Nitroso-N-methylurea
62759	N-Nitrosodimethylamine
59892	N-Nitrosomorpholine
56382	Parathion
82688	Pentachloronitrobenzene (Quintobenzene)
87865	Pentachlorophenol
108952	Phenol

106503	p-Phenylenediamine
75445	Phosgene
7803512	Phosphine
7723140	Phosphorus
85449	Phthalic anhydride
1336363	Polychlorinated biphenyls (Aroclors)
1120714	1,3-Propane sultone
57578	beta-Propiolactone
123386	Propionaldehyde
114261	Propoxur (Baygon)
78875	Propylene dichloride (1,2-Dichloropropane)
75569	Propylene oxide
75558	1,2-Propylenimine (2-Methyl aziridine)
91225	Quinoline
106514	Quinone
100425	Styrene
96093	Styrene oxide
1746016	2,3,7,8-Tetrachlorodibenzo-p-dioxin
79345	1,1,2,2-Tetrachloroethane
127184	Tetrachloroethylene (Perchloroethylene)
7550450	Titanium tetrachloride
108883	Toluene
95807	2,4-Toluene diamine
584849	2,4-Toluene diisocyanate
95534	o-Toluidine
8001352	Toxaphene (chlorinated camphene)
120821	1,2,4-Trichlorobenzene
79005	1,1,2-Trichloroethane
79016	Trichloroethylene
95954	2,4,5-Trichlorophenol
88062	2,4,6-Trichlorophenol
121448	Triethylamine
1582098	Trifluralin
540841	2,2,4-Trimethylpentane

108054	Vinyl acetate
593602	Vinyl bromide
75014	Vinyl chloride
75354	Vinylidene chloride (1,1-Dichloroethylene)
1330207	Xylenes (isomers and mixture)
95476	o-Xylenes
108383	m-Xylenes
106423	p-Xylenes
0	Antimony Compounds
0	Arsenic Compounds (inorganic including arsine)
0	Beryllium Compounds
0	Cadmium Compounds
0	Chromium Compounds
0	Cobalt Compounds
0	Coke Oven Emissions
0	Cyanide Compounds[1]
0	Glycol ethers[2]
0	Lead Compounds
0	Manganese Compounds
0	Mercury Compounds
0	Fine mineral fibers[3]
0	Nickel Compounds
0	Polycylic Organic Matter[4]
0	Radionuclides (including radon)[5]
0	Selenium Compounds

NOTE: For all listings above which contain the word "compounds" and for glycol ethers, the following applies: Unless otherwise specified, these listings are defined as including any unique chemical substance that contains the named chemical (i.e., antimony, arsenic, etc.) as part of that chemical's infrastructure.

[1] X'CN where X = H' or any other group where a formal dissociation may occur. For example KCN or $Ca(CN)_2$

[2] Includes mono- and di- ethers of ethylene glycol, diethylene glycol, and triethylene glycol $R-(OCH_2CH_2)_n-OR'$ where

n = 1, 2, or 3

R = alkyl or aryl groups

R' = R, H, or groups which, when removed, yield glycol ethers with the structure: R-(OCH$_2$CH)$_n$-OH. Polymers are excluded from the glycol category.

[3] Includes mineral fiber emissions from facilities manufacturing or processing glass, rock, or slag fibers (or other mineral derived fibers) of average diameter 1 micrometer or less.

[4] Includes organic compounds with more than one benzene ring, and which have a boiling point greater than or equal to 100°C.

[5] A type of atom which spontaneously undergoes radioactive decay.

(2) Revision of the list

The Administrator shall periodically review the list established by this subsection and publish the results thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) of this section as a result of emissions to the air. No air pollutant which is listed under section 7408(a) of this title may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is listed under section 7408(a) of this title or to any pollutant which is in a class of pollutants listed under such section. No substance, practice, process or activity regulated under subchapter VI of this chapter shall be subject to regulation under this section solely due to its adverse effects on the environment.

(3) Petitions to modify the list

(A) Beginning at any time after 6 months after November 15, 1990, any person may petition the Administrator to modify the list of hazardous air pollutants under this subsection by adding or deleting a substance or, in case of listed pollutants without CAS numbers (other than coke oven emissions, mineral fibers, or polycyclic organic matter) removing certain unique substances. Within 18 months after receipt of a petition, the Administrator shall either grant or deny the petition by publishing a

written explanation of the reasons for the Administrator's decision. Any such petition shall include a showing by the petitioner that there is adequate data on the health or environmental defects[1] of the pollutant or other evidence adequate to support the petition. The Administrator may not deny a petition solely on the basis of inadequate resources or time for review.

(B) The Administrator shall add a substance to the list upon a showing by the petitioner or on the Administrator's own determination that the substance is an air pollutant and that emissions, ambient concentrations, bioaccumulation or deposition of the substance are known to cause or may reasonably be anticipated to cause adverse effects to human health or adverse environmental effects.

(C) The Administrator shall delete a substance from the list upon a showing by the petitioner or on the Administrator's own determination that there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects.

(D) The Administrator shall delete one or more unique chemical substances that contain a listed hazardous air pollutant not having a CAS number (other than coke oven emissions, mineral fibers, or polycyclic organic matter) upon a showing by the petitioner or on the Administrator's own determination that such unique chemical substances that contain the named chemical of such listed hazardous air pollutant meet the deletion requirements of subparagraph (C). The Administrator must grant or deny a deletion petition prior to promulgating any emission standards pursuant to subsection (d) of this section applicable to any source category or subcategory of a listed hazardous air pollutant without a CAS number listed under subsection (b) of this section for which a deletion petition has been filed within 12 months of November 15, 1990.

(4) Further information

If the Administrator determines that information on the health or environmental effects of a substance is not sufficient to make a determination required by this subsection, the Administrator may use any authority available to the Administrator to acquire such information.

(5) Test methods
The Administrator may establish, by rule, test measures and other analytic procedures for monitoring and measuring emissions, ambient concentrations, deposition, and bioaccumulation of hazardous air pollutants.

(6) Prevention of significant deterioration
The provisions of part C of this subchapter (prevention of significant deterioration) shall not apply to pollutants listed under this section.

(7) Lead
The Administrator may not list elemental lead as a hazardous air pollutant under this subsection.

(c) List of source categories

(1) In general
Not later than 12 months after November 15, 1990, the Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories and subcategories of major sources and area sources (listed under paragraph (3)) of the air pollutants listed pursuant to subsection (b) of this section. To the extent practicable, the categories and subcategories listed under this subsection shall be consistent with the list of source categories established pursuant to section 7411 of this title and part C of this subchapter. Nothing in the preceding sentence limits the Administrator's authority to establish subcategories under this section, as appropriate.

(2) Requirement for emissions standards
For the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section, according to the schedule in this subsection and subsection (e) of this section.

(3) Area sources
The Administrator shall list under this subsection each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate)

warranting regulation under this section. The Administrator shall, not later than 5 years after November 15, 1990, and pursuant to subsection (k)(3)(B) of this section, list, based on actual or estimated aggregate emissions of a listed pollutant or pollutants, sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section. Such regulations shall be promulgated not later than 10 years after November 15, 1990.

(4) Previously regulated categories
The Administrator may, in the Administrator's discretion, list any category or subcategory of sources previously regulated under this section as in effect before November 15, 1990.

(5) Additional categories
In addition to those categories and subcategories of sources listed for regulation pursuant to paragraphs (1) and (3), the Administrator may at any time list additional categories and subcategories of sources of hazardous air pollutants according to the same criteria for listing applicable under such paragraphs. In the case of source categories and subcategories listed after publication of the initial list required under paragraph (1) or (3), emission standards under subsection (d) of this section for the category or subcategory shall be promulgated within 10 years after November 15, 1990, or within 2 years after the date on which such category or subcategory is listed, whichever is later.

(6) Specific pollutants
With respect to alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the Administrator shall, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) of this section. Such standards shall be promulgated not later than 10 years after November 15, 1990. This paragraph shall not be construed to require the Administrator to promulgate standards for such pollutants emitted by electric utility steam generating units.

(7) Research facilities

The Administrator shall establish a separate category covering research or laboratory facilities, as necessary to assure the equitable treatment of such facilities. For purposes of this section, "research or laboratory facility" means any stationary source whose primary purpose is to conduct research and development into new processes and products, where such source is operated under the close supervision of technically trained personnel and is not engaged in the manufacture of products for commercial sale in commerce, except in a de minimis manner.

(8) Boat manufacturing

When establishing emissions standards for styrene, the Administrator shall list boat manufacturing as a separate subcategory unless the Administrator finds that such listing would be inconsistent with the goals and requirements of this chapter.

(9) Deletions from the list

(A) Where the sole reason for the inclusion of a source category on the list required under this subsection is the emission of a unique chemical substance, the Administrator shall delete the source category from the list if it is appropriate because of action taken under either subparagraphs (C) or (D) of subsection (b)(3) of this section.

(B) The Administrator may delete any source category from the list under this subsection, on petition of any person or on the Administrator's own motion, whenever the Administrator makes the following determination or determinations, as applicable:

(i) In the case of hazardous air pollutants emitted by sources in the category that may result in cancer in humans, a determination that no source in the category (or group of sources in the case of area sources) emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source (or group of sources in the case of area sources).

(ii) In the case of hazardous air pollutants that may result in adverse health effects in humans other than cancer or adverse environmental effects, a determination that emissions from no source in the category or subcategory concerned (or group of sources in the case of area sources) exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source (or from a group of sources in the case of area sources).

The Administrator shall grant or deny a petition under this paragraph within 1 year after the petition is filed.

(d) Emission standards

(1) In general
The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in accordance with the schedules provided in subsections (c) and (e) of this section. The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for any standard applicable to any source under subsection (i) of this section as the result of the authority provided by this sentence.

(2) Standards and methods
Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures, processes, methods, systems or techniques including, but not limited to, measures which--

(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications,

(B) enclose systems or processes to eliminate emissions,

(C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point,

(D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h) of this section, or

(E) are a combination of the above.

None of the measures described in subparagraphs (A) through (D) shall, consistent with the provisions of section 7414(c) of this title, in any way compromise any United States patent or United States trademark right, or any confidential business information, or any trade secret or any other intellectual property right.

(3) New and existing sources
The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or subcategory but shall not be less stringent, and may be more stringent than--

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined by section 7501 of this title) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources, or

(B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

(4) Health threshold
With respect to pollutants for which a health threshold has been established, the Administrator may consider such threshold level, with an ample margin of safety, when establishing emission standards under this subsection.

(5) Alternative standard for area sources
With respect only to categories and subcategories of area sources listed pursuant to subsection (c) of this section, the Administrator may, in lieu of the authorities provided in paragraph (2) and subsection (f) of this section, elect to promulgate standards or requirements applicable to sources in such categories or subcategories which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

(6) Review and revision
The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.

(7) Other requirements preserved
No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title, part C or D of this subchapter, or other authority of this chapter or a standard issued under State authority.

(8) Coke ovens

(A) Not later than December 31, 1992, the Administrator shall promulgate regulations establishing emission standards under paragraphs (2) and (3) of this subsection for coke oven batteries. In establishing such standards, the Administrator shall evaluate--

(i) the use of sodium silicate (or equivalent) luting compounds to prevent door leaks, and other operating practices and technologies for their effectiveness in reducing coke oven emissions, and their suitability for use on new and existing coke oven batteries, taking into account costs and reasonable commercial door warranties; and

(ii) as a basis for emission standards under this subsection for new coke oven batteries that begin construction after the date of proposal of such standards, the Jewell design Thompson non-recovery coke oven batteries and other non-recovery coke oven technologies, and other appropriate emission control and coke production technologies, as to their effectiveness in reducing coke oven emissions and their capability for production of steel quality coke.

Such regulations shall require at a minimum that coke oven batteries will not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing oven doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries shall be December 31, 1995.

(B) The Administrator shall promulgate work practice regulations under this subsection for coke oven batteries requiring, as appropriate--

(i) the use of sodium silicate (or equivalent) luting compounds, if the Administrator determines that use of sodium silicate is an effective means of emissions control and is achievable, taking into account costs and reasonable commercial warranties for doors and related equipment; and

(ii) door and jam cleaning practices.

Notwithstanding subsection (i) of this section, the compliance date for such work practice regulations for coke oven batteries shall be not later than the date 3 years after November 15, 1990.

(C) For coke oven batteries electing to qualify for an extension of the compliance date for standards promulgated under subsection (f) of this section in accordance with subsection (i)(8) of this section, the emission standards under this subsection for coke

oven batteries shall require that coke oven batteries not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries seeking an extension shall be not later than the date 3 years after November 15, 1990.

(9) Sources licensed by the Nuclear Regulatory Commission
No standard for radionuclide emissions from any category or subcategory of facilities licensed by the Nuclear Regulatory Commission (or an Agreement State) is required to be promulgated under this section if the Administrator determines, by rule, and after consultation with the Nuclear Regulatory Commission, that the regulatory program established by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act [42 U.S.C.A. § 2011 et seq.] for such category or subcategory provides an ample margin of safety to protect the public health. Nothing in this subsection shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce any standard or limitation respecting emissions of radionuclides which is more stringent than the standard or limitation in effect under section 7411 of this title or this section.

(10) Effective date
Emission standards or other regulations promulgated under this subsection shall be effective upon promulgation.

* * *

(n) Other provisions

(1) Electric utility steam generating units

(A) The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator's report to Congress

alternative control strategies for emissions which may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.

(B) The Administrator shall conduct, and transmit to the Congress not later than 4 years after November 15, 1990, a study of mercury emissions from electric utility steam generating units, municipal waste combustion units, and other sources, including area sources. Such study shall consider the rate and mass of such emissions, the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies.

(C) The National Institute of Environmental Health Sciences shall conduct, and transmit to the Congress not later than 3 years after November 15, 1990, a study to determine the threshold level of mercury exposure below which adverse human health effects are not expected to occur. Such study shall include a threshold for mercury concentrations in the tissue of fish which may be consumed (including consumption by sensitive populations) without adverse effects to public health.

(2) Coke oven production technology study

(A) The Secretary of the Department of Energy and the Administrator shall jointly undertake a 6-year study to assess coke oven production emission control technologies and to assist in the development and commercialization of technically practicable and economically viable control technologies which have the potential to significantly reduce emissions of hazardous air pollutants from coke oven production facilities. In identifying control technologies, the Secretary and the Administrator shall consider the range of existing coke oven operations and battery design and the availability of sources of materials for such coke ovens as well as alternatives to existing coke oven production design.

(B) The Secretary and the Administrator are authorized to enter into agreements with persons who propose to develop, install and operate coke production emission control technologies which have the potential for significant emissions reductions of hazardous air pollutants provided that Federal funds shall not exceed 50 per centum of the cost of any project assisted pursuant to this paragraph.

(C) On completion of the study, the Secretary shall submit to Congress a report on the results of the study and shall make recommendations to the Administrator identifying practicable and economically viable control technologies for coke oven production facilities to reduce residual risks remaining after implementation of the standard under subsection (d) of this section.

(D) There are authorized to be appropriated $5,000,000 for each of the fiscal years 1992 through 1997 to carry out the program authorized by this paragraph.

(3) Publicly owned treatment works

The Administrator may conduct, in cooperation with the owners and operators of publicly owned treatment works, studies to characterize emissions of hazardous air pollutants emitted by such facilities, to identify industrial, commercial and residential discharges that contribute to such emissions and to demonstrate control measures for such emissions. When promulgating any standard under this section applicable to publicly owned treatment works, the Administrator may provide for control measures that include pretreatment of discharges causing emissions of hazardous air pollutants and process or product substitutions or limitations that may be effective in reducing such emissions. The Administrator may prescribe uniform sampling, modeling and risk assessment methods for use in implementing this subsection.

(4) Oil and gas wells; pipeline facilities

(A) Notwithstanding the provisions of subsection (a) of this section, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources, and in the case of any oil or gas exploration or production well (with its associated equipment), such emissions shall not be aggregated for any purpose under this section.

(B) The Administrator shall not list oil and gas production wells (with its associated equipment) as an area source category under subsection (c) of this section, except that the Administrator may establish an area source category for oil and gas production

wells located in any metropolitan statistical area or consolidated metropolitan statistical area with a population in excess of 1 million, if the Administrator determines that emissions of hazardous air pollutants from such wells present more than a negligible risk of adverse effects to public health.

(5) Hydrogen sulfide

The Administrator is directed to assess the hazards to public health and the environment resulting from the emission of hydrogen sulfide associated with the extraction of oil and natural gas resources. To the extent practicable, the assessment shall build upon and not duplicate work conducted for an assessment pursuant to section 8002(m) of the Solid Waste Disposal Act [42 U.S.C.A. § 6982(m)] and shall reflect consultation with the States. The assessment shall include a review of existing State and industry control standards, techniques and enforcement. The Administrator shall report to the Congress within 24 months after November 15, 1990, with the findings of such assessment, together with any recommendations, and shall, as appropriate, develop and implement a control strategy for emissions of hydrogen sulfide to protect human health and the environment, based on the findings of such assessment, using authorities under this chapter including sections[3] 7411 of this title and this section.

(6) Hydrofluoric acid

Not later than 2 years after November 15, 1990, the Administrator shall, for those regions of the country which do not have comprehensive health and safety regulations with respect to hydrofluoric acid, complete a study of the potential hazards of hydrofluoric acid and the uses of hydrofluoric acid in industrial and commercial applications to public health and the environment considering a range of events including worst-case accidental releases and shall make recommendations to the Congress for the reduction of such hazards, if appropriate.

(7) RCRA facilities

In the case of any category or subcategory of sources the air emissions of which are regulated under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], the Administrator shall take into account any regulations of such emissions which are promulgated under such subtitle and shall, to the maximum extent practicable and consistent with the provisions of this section, ensure that the requirements of such subtitle and this section are consistent.

* * *

42 U.S.C. § 7416. Retention of State authority

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. § 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction. Except as provided in subsection (b), any person may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of title I [42 USCS §§ 7470 et seq.] (relating to significant deterioration of air quality) or part D of title I [42 USCS §§ 7501 et seq.] (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 307(b) [42 USCS § 7607(b)] which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 307(b) [42 USCS § 7607(b)]. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) shall be provided 180 days before commencing such action.

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42 U.S.C. § 7607. Administrative proceedings and judicial review

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(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,„[2] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for

reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

* * *

(d) Rulemaking

(1) This subsection applies to--

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of--

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon

by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or

if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized
Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

101ST CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPT. 101-490
Part 1

CLEAN AIR ACT AMENDMENTS OF 1990

REPORT

OF THE

COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES

ON

H.R. 3030

together with

ADDITIONAL, SUPPLEMENTAL, AND DISSENTING VIEWS

MAY 17, 1990.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
29-694 WASHINGTON : 1990

Also provided is injunctive authority to restrain violations of fuels regulations, as is already available for violations of vehicle and stationary source requirements.

Section 224. High altitude testing

This section requires that EPA promptly establish at least one new testing center at a site that represents high altitude conditions.

Section 225. Technical amendments

Section 225 revises various sections of the Act to delete outdated provisions and to improve the organization of Title II.

Title III: Provisions for Control of Hazardous Air Pollution

INTRODUCTION

Title III amends section 112 of the Clean Air Act to establish a new program for the control of hazardous air pollutants. Pollutants controlled under this section tend to be less widespread than those regulated under the NAAQS established under section 109 of the Act, but are often associated with more serious health impacts, such as cancer, neurological disorders, and reproductive dysfunctions. Because of their serious impacts, hazardous air pollutants are subject nationally to uniform, source category and subcategory specific controls.

BACKGROUND

Hazardous air pollutants are air pollutants that can cause serious illnesses, such as cancer, or death. In theory, they were to be stringently controlled under the existing Clean Air Act section 112. However, as already noted, only seven of the hundreds of potentially hazardous air pollutants have been regulated by EPA since section 112 was enacted in 1970.

SUMMARY OF TITLE III

"Hazardous air pollutants" versus "criteria air pollutants"

The Clean Air Act distinguishes between two categories of pollutants: hazardous air pollutants and criteria or conventional air pollutants. Criteria air pollutants, as noted earlier, are defined as pollutants that "endanger public health or welfare" and "result from numerous or diverse mobile or stationary sources." These pollutants tend to be more pervasive, but less potent, than hazardous air pollutants. Examples include ozone, CO, and PM–10. The Act requires EPA to set National Ambient Air Quality Standards (NAAQS) for these pollutants, which the States have responsibility for achieving through State Implementation Plans (SIPs).

Hazardous air pollutants are pollutants that pose especially serious health risks. Under existing law, they are pollutants that "cause or contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." They may reasonably be anticipated to cause cancer, neurological disorders, reproductive dysfunctions, other chronic health effects, or adverse acute human health effects.

101ST CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
101-952

CLEAN AIR ACT AMENDMENTS OF 1990

CONFERENCE REPORT

TO ACCOMPANY

S. 1630

OCTOBER 26, 1990.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1990

35-412

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, DC 20402

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1630) to amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a substitute for the Senate bill and the House amendment. Certain matters agreed to in conference are noted below.

The Conference agreement on S. 1630, the Clean Air Act Amendments of 1990, includes provisions addressing attainment and maintenance of ambient air quality standards, mobile sources of air pollution, toxic air pollution, acid rain, permits, enforcement, stratospheric ozone protection, miscellaneous provisions, and clean air research. A summary of the conference agreement follows.

TITLE I—NONATTAINMENT PROVISIONS

Title I of the conference agreement, which adopts the House Title I except with respect to transportation related issues and with a change concerning the regulation of oxides of nitrogen, divides areas that fail to meet any one of the pollution standards listed above into categories, depending on the severity of the problem, and sets out requirements of different levels of stringency for each category.

Depending on the severity of the pollution problem, nonattainment areas for any of the pollutants must attain the health standard for ozone within five, ten, fifteen, or seventeen years (twenty years for Los Angeles).

In the case of ozone, areas must reduce emissions of volatile organic compounds (VOCs), a precursor of ozone, by 3 percent per year (with waivers for certain specified conditions) until the standard is attained.

Vehicle inspection and maintenance programs must be upgraded in ozone and carbon monoxide areas that already have such programs and must be instituted in most other areas that do not already have them.

The Environmental Protection Agency (EPA) is required to impose one of the following sanctions in an area that fails to pre-

pare or implement a plan to attain an air quality standard: limited use of Federal highway funds or a requirement that new industry offset emissions at a 2 to 1 ratio.

Under the safety exemption to highway sanctions, the principal purpose of the project must be to improve highway safety, but the project may also have other important benefits.

The definition of major sources in current law is modified so that smaller sources of VOCs are required to control emissions (50 tons in moderate and serious areas; 25 tons in severe areas; 10 tons in extreme areas).

When a State fails to develop a plan that meets the requirements of the law, the EPA is required to promulgate a Federal Implementation Plan.

The EPA is required to issue control requirements for a number of sources of pollution, including commercial and consumer products.

A new program is established to address the interstate transport of ozone air pollution.

The conferees adopt the House language on rocket testing with the agreement that the appropriate Federal agency may find that testing required for a civilian or commercial launch program is essential to the national security.

TITLE II—MOTOR VEHICLE-RELATED PROVISIONS

Title II is based on the House bill with a number of significant modifications.

Reformulated gasoline

Cleaner, reformulated gasoline would be mandated in the nine cities with the most severe ozone pollution beginning in 1995. States could elect to have the requirements apply in other cities with ozone pollution problems. In comparison with conventional gasoline, reformulated gasoline would be required to have 15 percent lower emissions of VOCs and toxic chemicals by 1995, and greater reductions by 2000. The agreement also contains additional standards for oxygen, benzene, and aromatics.

Under section 211(k)(4), a petition for the certification of a fuel formulation or slate of fuel formulations is deemed certified if the Administrator fails to act on the petition within 180 days of its receipt. Such a petition is deemed certified until the Administrator completes action on the petition. In the event that the Administrator subsequently denies such a petition, the conferees intend that the Administrator will take appropriate steps to ensure orderly and prompt compliance.

Section 219 of the bill includes a credit program to provide flexibility in meeting the bill's requirements on the oxygen, aromatic hydrocarbon, and benzene content of reformulated gasoline. A credit program is the mechanism by which persons subject to these requirements will be allowed to pool gasoline sold in a given covered area for purposes of determining compliance with these requirements.

Under this credit program, a person may earn credit for gasoline with a higher oxygen content, lower aromatic hydrocarbon content,

Permits

It is the conferees' intent that EPA not use the permit hammer approach (case-by-case) to avoid or delay meeting MACT requirements.

Routine Emissions From "Area" Sources

Based on the list of pollutants mentioned above, EPA can also list an area source category just as the agency would list a major source category, and can require MACT. EPA must list sufficient source categories to assure that 90% of the emissions of the 30 most serious area source pollutants are regulated.

Five years after enactment, EPA is to propose a national urban air toxics strategy to reduce cancer risks associated with urban air toxics by 75%. EPA is to report on reductions achieved in 8 and 12 years intervals.

Accidental Releases

The agreement contains provisions that are designed to prevent chemical accidents.

EPA is to publish a list of at least 100 regulated substances, of which 16 are listed in the agreement.

EPA is authorized to promulgate accident prevention regulations.

The conferees do not intend the term "stationary source" to apply to transportation, including the storage incident to such transportation, of any regulated substance or other extremely hazardous substance under the provisions of this subsection.

The prohibition on listing substances for the accident prevention program which have been listed under this section 108(a) does not preclude the listing of anhydrous sulfur dioxide which is on the initial list.

The conference agreement establishes a Chemical Safety and Hazard Investigation Board, similar to the National Transportation Safety board, to investigate chemical accidents.

The Board is authorized to investigate accidental releases which cause substantial property damage. Substantial damage would include fires, explosions, and other events which cause damages that are very costly to repair or correct, and would not include incidental damage to equipment or controls.

Hazard assessments required under this section shall include:

(1) basic data on the source, units at the source facility which contain or process regulated substances (including the longitude and latitude of such units), operating procedures, population of nearby communities, and the meteorology of the area where the source is located;

(2) an identification of the potential points of accidental releases from the source of regulated substances;

(3) an identification of any previous accidental releases from the source including the amounts released, frequencies, and durations;

(4) an identification of a range (including worst case events) of potential releases from the source, including an estimate of

The conferees intend that termination of the seasonal or temporary use of a cleaner fuel shall not be considered a modification for purposes of section 111 or part C of Title I.

TITLE V—PERMIT PROVISIONS

The conference agreement includes provisions that require various sources of air pollution to obtain operating permits which would ensure compliance with all applicable requirements of the Clean Air Act.

Permit programs

EPA is required to issue permit program regulations within one year. States are required to develop programs consistent with those regulations. The programs would be in effect within four years, and the requirement to have a permit would be phased-in over the ensuing three years.

Consistent with the general provisions of section 116 of the Clean Air Act, the conferees understand that a State may establish additional, more stringent permitting requirements, but a State may not establish permit requirements that are inconsistent with the national permitting requirements of this Act, including this title.

EPA Oversight of Permit Programs

The conference agreement provides EPA with the authority to review permits proposed to be issued by a State and to object to permits that violate the Clean Air Act. EPA would also have the opportunity to waive review of permits for small sources.

State response to EPA objections

Under the conference agreement, States would be granted 90 days to revise permits to meet any EPA objection. If the State fails to revise the permit, EPA will issue or deny the permit.

Permit shield

The agreement provides that compliance with a permit is deemed compliance with the requirements of the permit program. Permit compliance also may be deemed compliance with other applicable provisions of the Clean Air Act if the permit has been issued in accordance with Title V and includes those provisions, or if the permitting authority includes in the permit a specific determination that such provisions are not applicable.

Operational flexibility

Facilities will be authorized to make changes in operations without the necessity for a permit revision so long as: (i) the changes are not "modifications" under Title I of the Act, (ii) the changes will not result in emissions that exceed emissions allowable under the permit, and (iii) the facility provides EPA and the permitting authority with seven days written notice in advance of the changes.

Processing permit applications

Except for applications submitted within the first year of the permit program (for which a 3-year phased review is allowed),

are subsequently destroyed is too broad and does not include adequate safeguards to preclude abuse. In the course of implementing this Act, however, EPA shall consider whether an exclusion will be allowed on a case-by-case basis for the manufacture of controlled substances that are (1) coincidental, unavoidable byproducts of a manufacturing process and (2) immediately contained and destroyed by the producer using maximum available control technologies.

TITLE VII—FEDERAL ENFORCEMENT

The conference agreement includes a number of provisions that enhance the enforcement authority of the Federal government under the Clean Air Act while at the same time providing substantive procedural safeguards. In general terms, the agreement increases the range of civil and criminal penalties for violations of the Clean Air Act.

SIP and permit violations

The conference agreement revises and strengthens EPA enforcement authority regarding violations of State Implementation Plans and permits, including authority to bring civil actions for injunctive relief and penalties, as well as new authority to issue administrative penalty orders in response to violations. These authorities can also be used by EPA when States fail to enforce SIPs or permit requirements.

Violations of other requirements

EPA is authorized to initiate a range of enforcement actions for a number of violations of specified sections and titles of the Act. Included is authority to issue administrative penalty orders, file civil actions, and initiate criminal proceedings via the Attorney General.

It is the conferees' intention to provide the Administrator with prosecutorial discretion to decide not to seek sanctions under Section 113 for de minimis or technical violations in civil and criminal matters.

Criminal penalties

Criminal fines and penalties are included for a range of violations of the Act, including negligent or knowing violations that result in the endangerment of others, knowing violations of SIPs that occur after the violator is on notice of the violation, knowing violations of certain sections in the permit title, and knowing violations of the acid rain title or the stratospheric ozone protection title. In addition, the agreement provides criminal fines and penalties for the knowing filing of false statements and other similar recordkeeping, monitoring, and reporting violations. Consistent with other recent environmental statutes, criminal violations of the Clean Air Act are upgraded from misdemeanors to felonies.

The amendments add new criminal sanctions for recordkeeping, filing and other omissions. These provisions are not meant to penalize inadvertent errors. For criminal sanctions to apply, a source

Calendar No. 427

101ST CONGRESS
1st Session

SENATE

REPORT
101-228

CLEAN AIR ACT AMENDMENTS OF 1989

REPORT

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

together with

ADDITIONAL AND MINORITY VIEWS

TO ACCOMPANY

S. 1630

DECEMBER 20, 1989.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
24-525 WASHINGTON : 1989

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, DC 20402

that does not meet the standard is to be designated nonattainment. An area that meets the standard and does not contribute to another area that exceeds the standard is to be designated attainment. An area that cannot be classified on the basis of available information as meeting the standard is to be designated unclassifiable.

Revised section 107(f)(3) of the Act designated any area that did not meet the primary ambient air quality standard for ozone or carbon monoxide as of the last calendar year before the date of enactment of the bill as nonattainment. Revised section 107(f)(4) designates each area that was identified by EPA as a Group I area in the August 7, 1987, promulgation of the revised particulate standard (PM–10) or which contains a site for which monitoring data shows a violation of the air quality standard for PM–10 before the date of enactment as nonattainment.

Revised section 107(d)(5) of the Act provides that areas may be redesignated by the Administrator upon the request of the Governor of a State or on the Administrator's own motion. The Administrator must act to redesignate an area not currently designated as nonattainment as a nonattainment area within one hundred eighty days of receiving evidence that the area exceeds the national ambient air quality standard for any pollutant. In order to redesignate an area from nonattainment to attainment, the Administrator must promulgate the redesignation by rule, must determine that the area has attained the air quality standard and that attainment is due to permanent reductions in emissions, must have approved a maintenance plan, and determine that the State containing the area has met requirements of the Act applicable to the area. The Administrator may not redesignate an area from nonattainment to unclassified.

New paragraphs (2) and (3) of section 107(d) of the Act provide that the boundaries of an area that is designated nonattainment for ozone and that is located within a metropolitan statistical area (MSA) or a consolidated metropolitan statistical area (CMSA) are the boundaries of the MSA or CMSA, unless the State demonstrates that some portion of the MSA or CMSA does not contribute to violations of the air quality standard and that there is a geographical basis for excluding the portion. With respect to a serious carbon monoxide area, the Administrator may, by rule, include the entire MSA or CMSA in the nonattainment area.

DISCUSSION

This section of the bill restructures and clarifies the process for designating and redesignating areas of the country depending on their emissions and ambient air quality. The bill gives significant authority to the Administrator in order to overcome the deficiencies in current law that have failed to allow the Administrator to respond to new information about pollution levels and control needs.

Existing law, as interpreted by EPA, precludes the Administrator from issuing new designations or revising existing ones when an ambient standard is revised, as occurred with the promulgation in 1987 of the ambient standard for PM–10. Current law is also

currently recognized within the structure of section 112 and have no other statutory authorization.

There is now a broad consensus that the program to regulate hazardous air pollutants under section 112 of the Clean Air Act should be restructured to provide EPA with authority to regulate industrial and area source categories of air pollution (rather than the pollutants) with technology-based standards in the near term.

In light of these conclusions, the reported legislation makes fundamental changes in the basic provisions of section 112 of the Clean Air Act. The bill establishes a list of 191 air pollutants and a mandatory schedule for issuing emissions standards for the major sources of these pollutants. The standards are to be based on the maximum reduction in emissions which can be achieved by application of best available control technology. These new, technology-based standards will become the principal focus of activity under section 112. Authority to issue health-based standards is preserved in modified form to be used for especially serious pollution problems.

This approach to regulation of toxic pollutants is not without precedent. It follows the general model which has been employed since the mid-1970's to control toxic effluents discharged to surface waters by major industrial point sources.

Under the 1972 amendments to the Clean Water Act, industrial dischargers were given two deadlines to control *conventional* pollutants (biological oxygen demand, suspended solids, and acidity): 1) by July 1, 1977 each facility was required to meet emissions limitations reflecting "best practicable control technology currently available" (so-called BPT limits); and 2) by July 1, 1983 each facility was to meet emissions limitations set according to "best available technology economically achievable" (BAT).

Toxic pollutants under the 1972 Act were to be treated differently. The Administrator was to publish a list of toxic pollutants within 90 days and within a year promulgate effluent standards that would provide an "ample margin of safety" to protect the most affected (aquatic) organisms. Thus, the structure of this authority to regulate toxic discharges to surface waters was very similar to the current structure of section 112 of the Clean Air Act.

During the five-year period following passage of the 1972 Clean Water Act, EPA promulgated standards for only six toxic pollutants. In 1975 the Environmental Defense Fund and the Natural Resources Defense Council brought suit against the Agency for failure to list more toxics and to promulgate standards as mandated by the Act. In June 1976, EPA and the plantiffs entered into a consent decree that established a new formula for the development of effluent standards for toxic water pollutants. This agreement created a list of 120 priority pollutants and required EPA to promulgate effluent guidelines based on best available control technology for each pollutant and each industrial category not later than December 31, 1980. Industrial dischargers were to be in compliance with these standards by July 1, 1983, the same deadline as established by the Act for BAT control of conventional pollutants. There were 14,000 dischargers divided into 21 industrial categories and 399 subcategories potentially subject to these new toxics standards.

103d Congress
1st Session

COMMITTEE PRINT

S. PRT. 103-38
Vol. I

A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990

TOGETHER WITH

A SECTION-BY-SECTION INDEX

PREPARED BY THE

ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION

OF THE

CONGRESSIONAL RESEARCH SERVICE

OF THE

LIBRARY OF CONGRESS

FOR THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS U.S. SENATE

VOLUME I

NOVEMBER 1993

Printed for the use of the Senate Committee on Environment and Public Works

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U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1993

48-657

S322-3

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-041786-4

CLEAN AIR ACT AMENDMENTS OF 1990
CHAFEE-BAUCUS STATEMENT OF SENATE MANAGERS

Mr. President, the conference report that is before us includes some 800 pages of legislative language and less than 40 pages--double spaced--of explanatory text. Due to time constraints, we do not have a particularly useful statement of managers.

To help rectify this problem, we have prepared a detailed explanation of five important titles. The explanation is in the form of a traditional statement of managers. It has not been reviewed or approved by all of the conferees but it is our best effort to provide the agency and the courts with the guidance that they will need in the course of implementing and interpreting this complex act.

The titles covered by the "Chafee-Baucus Statement of Senate Managers" are: title I on nonattainment; title II on mobile sources; title V on permits; title VI on stratospheric ozone; and title VII on enforcement.

Mr. President, I ask unanimous consent that this document be printed in the Record.

There being no objection, the material was ordered to be printed on the Record, as follows:

CHAFEE-BAUCUS STATEMENT OF SENATE MANAGERS, S. 1630, THE CLEAN AIR ACT AMENDMENTS OF 1990

Title I--Provisions for Attainment and Maintenance of National Ambient Air Quality Standards.
Title II--Mobile Sources.
Title V--Permits.
Title VI--Stratospheric Ozone Protection.
Title VII--Enforcement.

TITLE I--PROVISIONS FOR ATTAINMENT AND MAINTENANCE OF NATIONAL AMBIENT AIR QUALITY STANDARDS

SECTION 101--GENERAL PLANNING REQUIREMENTS

Senate bill. In sections 101 and 104 the Senate bill amends the Clean Air Act with respect to processes for designating areas of the country based on air quality and with respect to requirements for preparation, contents, submittal, and review of State implementation plans.

In section 106 the Senate bill amends section 176(c) of the Clean Air Act which requires conformity of Federal activities and federally funded activities with the State implementation plan.

House amendment. In section 101 the House bill amends the Clean Air Act to establish a somewhat different structure from existing law for State and EPA action following promulgation of new or revised national ambient air quality standards, including procedures for designating areas based on air quality and for preparation, submittal and review of State implementation plans.

Conference agreement. The Senate recedes to the House except that, by reference to the provisions in section 103 of the agreement, transportation control requirements applicable in severe ozone nonattainment areas--including the requirement applicable to employe[illegible] of 100 or more employees--are also applied in serious CO nonattainment areas.

SECTION 105--ADDITIONAL PROVISIONS FOR PARTICULAR MATTERS (PM-10) NONATTAINMENT AREAS

Senate bill. Section 109 of the Senate bill provides for classification of PM-10 areas based on the severity of pollution, deadlines for attaining the PM-10 primary standard, requirements applicable to PM-10 nonattainment areas depending on their classification, and consequences for failure to comply with requirements or meet deadlines.

House amendment. The House amendment is similar in structure and content to the Senate bill but differs in details.

Conference agreement. The Senate recedes to the House.

SECTION 107--PROVISIONS RELATED TO INDIAN TRIBES

Senate bill. Section 113 of the Senate bill authorizes the Administrator to treat Indian tribes as States under the Clean Air Act and requires the Administrator to issue regulations that specify which provisions of the Act may be administered by Indian tribes.

House amendment. The House amendment provides similar authority and directives to the Administrator regarding treatment of Indian tribes.

Conference agreement. The Senate recedes to the House.

SECTION 108--MISCELLANEOUS PROVISIONS

Senate bill. In section 103 the Senate bill revises sections 108 (e) and (f) of the Clean Air Act to require the Administrator and the Secretary of Transportation to update air quality/transportation planning guidance and to add to the transportation control measures to be evaluated by the Administrator after consultation, when appropriate, with the Secretary.

House amendment. The House amendment contains a similar provision to the one in the Senate bill regarding amendments to section 108 of the Clean Air Act. In addition, the House amendment contains provisions for a technology clearinghouse to be established by the Administrator, for amending section 111 of the Clean Air Act relating to new and existing stationary sources, for amending section 302 of the Clean Air Act which contains definitions, to provide a savings clause, to state that reports that are to be submitted to Congress are not subject to judicial review, and for other purposes.

Conference agreement. The Senate recedes to the House except that with respect to the requirement regarding judicial review of reports, the House recedes to the Senate and with respect to transportation planning, the House recedes to the Senate with certain modifications.

RIDDICK'S
SENATE PROCEDURE

A SENATOR, from the committee of conference, submitted the following:

CONFERENCE REPORT

(To accompany H.R. _____)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to an amendment of the Senate to the bill (H.R. _____), _____, having met,
(title of bill)

after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House of Representatives recede from its amendment to the amendment of the Senate and concur therein.

_____
_____
_____

Managers on the Part of the Senate.

_____
_____
_____
_____
_____

Managers on the Part of the House.

_____

[Form of a conference report when it is proposed that the Senate recede from its amendment to an amendment of the House to a Senate bill.]

A SENATOR, from the committee of conference, submitted the following:

CONFERENCE REPORT

(To accompany S. _____)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to an amendment of the House to the bill (S. _____), _____ having met,
(title of bill)

after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its amendment to the amendment of the House of Representatives and concur therein.

_____
_____
_____

Managers on the Part of the Senate.

_____
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Managers on the Part of the House.

[Form of conference report on a Senate bill when conferees agree on entirely new text instead of the amendment by the House of Representatives in the nature of a substitute for the bill, or the language of the bill as passed by the Senate.]

A SENATOR, from the committee of conference, submitted the following:

CONFERENCE REPORT

(To accompany S. _____)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. _____), _____ (title of bill), having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

* * * * * * *

That the Senate recede from its disagreement to the amendment of the House to the bill, and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

* * * * * * *

And the House agree to the same.

_____
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_____

Managers on the Part of the Senate.

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Managers on the Part of the House.