ORAL ARGUMENT NOT YET SCHEDULED

No. 14-1112 & No. 14-1151

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

No. 14-1112: IN RE MURRAY ENERGY CORPORATION

Petitioner.

No. 14-1151: MURRAY ENERGY CORPORATION

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and REGINA A. MCCARTHY, Administrator, United States Environmental Protection Agency

Respondents.

On Petition for Writ of Prohibition & On Petition for Judicial Review

OPENING BRIEF OF PETITIONER

Geoffrey K. Barnes
J. Van Carson
Wendlene M. Lavey
John D. Lazzaretti
Robert D. Cheren
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 479-8646
geoffrey.barnes@squirepb.com

Counsel for Murray Energy Corporation

December 15, 2014

PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioner states as follows:

I. PARTIES, INTERVENORS, AND AMICI

Case No. 14-1112

Petitioner:

Murray Energy Corporation

Intervenor for Petitioner:

National Federation of Independent Business

Movant-Intervenors for Petitioner:

Utility Air Regulatory Group, State of West Virginia, State of Alabama, State of Alaska, State of Indiana, State of Kansas, Commonwealth of Kentucky, State of Louisiana, State of Nebraska, State of Ohio, State of Oklahoma, State of South Dakota, and State of Wyoming

Amici Curiae for Petitioner:

State of West Virginia, State of Alabama, State of Alaska, Commonwealth of Kentucky, State of Nebraska, State of Ohio, State of Oklahoma, State of South Carolina, and State of Wyoming

Respondents:

United States Environmental Protection Agency and Gina McCarthy, Administrator, United States Environmental Protection Agency

Movant-Intervenors for Respondent:

Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club

Amici Curiae for Respondent:

State of New York, State of California, State of Connecticut, State of Delaware, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Hampshire, State of New Mexico, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, and District of Columbia

Movant-Amici Curiae for Respondent:

City of New York, Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, Clean Wisconsin, Michigan Environmental Council, and Ohio Environmental Council

Case No. 14-1151

Petitioner:

Murray Energy Corporation

Movant-Intervenors for Petitioner:

State of West Virginia, State of Alabama, State of Alaska, State of Indiana, State of Kansas, Commonwealth of Kentucky, State of Louisiana, State of Nebraska, State of Ohio, State of Oklahoma, State of South Dakota, and State of Wyoming

Respondents:

United States Environmental Protection Agency and Gina McCarthy, Administrator, United States Environmental Protection Agency

Movant-Intervenors for Respondent:

Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club

RULINGS UNDER REVIEW

The petition for an extraordinary writ, No. 14-1112, seeks a writ prohibiting EPA's *ultra vires* rulemaking styled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014).

The petition for review, No. 14-1151, seeks judicial review of an EPA legal conclusion embodied and announced in the initiation of EPA's *ultra vires* rulemaking styled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014).

RELATED CASES

West Virginia v. EPA, No. 14-1146 (petition to review EPA settlement).

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioner provides the following disclosure:

Murray Energy Corporation is a corporation organized and existing under the laws of the State of Ohio. No publicly-held corporation holds an ownership interest of 10 percent or more of Murray Energy Corporation. Murray Energy Holdings Co. is Murray Energy Corporation's parent corporation.

Murray Energy Corporation is the largest privately-owned coal company in the United States and the fifth largest coal producer in the country, employing approximately 7,500 workers in the mining, processing, transportation, distribution, and sale of coal. In 2014, Murray Energy Corporation expects to produce 65 million tons of coal from twelve active coal mining complexes in six States. Murray Energy Corporation also owns two billion tons of proven or probable coal reserves in the United States.

CONTENTS

AUTHORITIES

CASES

Note: Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

REGULATIONS AND OTHER AUTHORITIES

UNITED STATES CODE AMENDMENT NOTES

GLOSSARY

CAA	**Clean Air Act**
CO_2	**Carbon Dioxide**
EGUs	**Electric Utility Steam Generating Units**
EPA	**United States Environmental Protection Agency**
Power Plants	**Electric Utility Steam Generating Units**
The Office	**The House Office of Law Revision Counsel**
The Code	**The Code of Laws of the United States**

STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in the accompanying PETITIONER STATUTORY AND REGULATORY ADDENDUM.

INTRODUCTION

This is an extraordinary case. It presents the only time that EPA has ever proposed a regulation that would, *inter alia*, dramatically reorder the country's electrical power system, adversely affect the reliability and cost of electricity, impose immediate obligations on States to design compliance programs, and disrupt markets for coal — based entirely on a provision of the Clean Air Act that expressly prohibits the very action that EPA proposes to take. Petitioner asks this Court to rule that EPA's legal conclusion supporting the proposed rule is illegal, and that EPA may not proceed with the proposal. Under the unique circumstances of this case, this Court has authority to address the issues presented, and should halt a plainly unlawful proceeding that is already damaging Petitioner and Intervenors.

ISSUES

1. Given the express language in Section 111(d) of the Clean Air Act that EPA may only mandate state-by-state standards for emissions that are not "from a source category which is regulated under section 112," does EPA have the legal authority to mandate state-by-state emission standards for existing coal-fired power plants when it has already promulgated a national emission standard for those same sources under Section 112 of the Clean Air Act?

2. Should an extraordinary writ issue to stop EPA from engaging in conduct that is expressly prohibited by the Clean Air Act and is forcing an unprecedented and potentially irreversible shift in the nation's power sector without legal justification?

3. Is EPA's final conclusion that it has legal authority to doubly regulate existing coal-fired power plants under both Section 111(d) and Section 112 of the Clean Air Act arbitrary, capricious, or unlawful when it is expressly prohibited by the Clean Air Act and rests on reasoning that is inconsistent with the purpose and structure of the Act and EPA's own past representations?

STATEMENT OF THE CASE

Three years ago, EPA promulgated a national emission standard under Section 112 of the Clean Air Act for electric utility steam generating units ("power plants"). Under the express terms of the Clean Air Act, this action barred EPA from using Section 111(d) of the Act to mandate state-by-state standards for these same sources. Nonetheless, EPA has now announced its conclusion that the agency can force States to promulgate standards for existing power plants under Section 111(d) and has initiated a rulemaking to issue such a mandate. Because this attempt at double regulation is expressly prohibited by the Clean Air Act, Murray Energy Corporation petitions this Court to set aside EPA's legal conclusion as contrary to law and to issue a writ prohibiting EPA from continuing with its unlawful rulemaking.

I. IN 2012, EPA PROMULGATED A NATIONAL EMISSION STANDARD FOR POWER PLANTS UNDER SECTION 112 OF THE CLEAN AIR ACT.

On February 16, 2012, EPA promulgated one of the most expensive regulations in the history of the United States, a national emission standard for power plants, using EPA's authority under Section 112 of the Clean Air Act. *National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units*, 77 Fed. Reg. 9,304 (Feb. 16, 2012); 40 C.F.R. Part 63 Subpart UUUUU . This Court recently upheld the standard in *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014)

(cert. granted). This Court also upheld EPA's decision to regulate power plants under Section 112. *Id.* at 16–36. Unlike standards for other sources, EPA had a choice whether to issue this standard for power plants under Section 112 rather than rely on other programs to achieve reductions of power plant emissions.[1] 42 U.S.C. § 7412(n)(1)(A). Despite strenuous objections from stakeholders and a previous Administration's conclusion that it would neither be appropriate nor necessary, EPA decided to regulate power plants under Section 112 and issued the standard.

Every covered power plant in the nation must meet the emission limits in this standard that, as Section 112 of the Act requires, EPA designed to maximize emission reductions while taking costs into account. 77 Fed. Reg. at 9,307. EPA estimated the costs of this regulation will exceed 9.4 billion dollars *per year*. EPA, *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards* at 3-13 (2011) ["2011 *Regulatory Impact Analysis"*].

1. In contrast, the Act directly requires, rather than give EPA a choice, that existing incinerators may not be regulated under the Section 112 program and instead must be regulated by mandating state-by-state emission standards under Section 111(d). 42 U.S.C. § 7429(b). With the exception of incinerators and, due to the election granted in Section 112(n)(1)(A), the potential exception of power plants, Congress directed EPA to issue national standards for sources that emit in excess of specified thresholds and all other sources that "present[] a threat of adverse effects to human health or the environment . . . warranting regulation under" the Section 112 program. 42 U.S.C. § 7412(c).

EPA recognizes that its national emission standard will force many coal-fired power plants to shut down. EPA projects that the national standard will, by itself, result in the retirement of 4,700 megawatts of coal-fired generating capacity. *2011 Regulatory Impact Analysis* at 6A-8. That is nearly fourteen percent of the nation's total coal-fired generating capacity. *See id.* at 6A-8, 2-1. The new rule will also have dramatically greater impacts on certain regions, as, for example, Ohio relies on coal for more than two thirds of its electricity production. EPA projects that the rest of the coal-fired fleet will decide to invest billions of dollars to comply rather than shut down, but there is no guarantee that they will do so. With so many different decision makers deciding whether to shut down at once, any error in the projection or unforeseen shifts in prices could mean that EPA has woefully underestimated the risks of retirements. The final deadline to comply with the national emission standard is April 16, 2016. 40 C.F.R. § 63.9984(b).

II. EPA NOW SEEKS TO MANDATE STATE-BY-STATE STANDARDS FOR EXISTING POWER PLANTS UNDER SECTION 111(D) OF THE ACT.

As utilities across the country decide whether to shut down or invest many millions at coal-fired power plants, EPA has launched a second rulemaking, now under Section 111(d) of the Clean Air Act, requiring that States design and issue state-by-state emission standards for greenhouse gas emissions. *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014). Just as must any national emission standard under Section 112, any state-by-state emission standard mandated under Section 111(d) must maximize emission reductions in light of costs. 42 U.S.C. § 7411(a)(1); 42 U.S.C. § 7411(d).

EPA's mandate under Section 111(d) of the Clean Air Act calling for the development of state-by-state emission standards for existing power plants is unlawful. The Clean Air Act expressly prohibits EPA from mandating state-by-state standards for existing sources that are already subject to a national standard: EPA's authority is limited to mandating standards for emissions that are not "from a source category which is regulated under section [112]" of the Act. 42 U.S.C. § 7411(d). Here, existing coal- and oil-fired power plants are already subject to the national emission standard recently upheld by this Court. EPA proceeded with the Section 111(d) rulemaking anyway, and further announced its unequivocal legal conclusion that the agency not only can but *must* regulate categories of existing sources under both Section 111(d) and Section 112 of the Clean Air Act.

III. MURRAY ENERGY CORPORATION PETITIONS FOR JUDICIAL REVIEW AND AN EXTRAORDINARY WRIT TO STOP EPA'S UNLAWFUL ACTIONS.

Faced with EPA's erroneous pronouncement and *ultra vires* rulemaking, Murray Energy Corporation filed the two consolidated petitions requesting that this Court: (1) issue a writ prohibiting EPA from promulgating an *ultra vires* Section 111(d) mandate ordering States to design and impose state-by-state standards for power plants; and (2) hold unlawful and set aside EPA's erroneous legal conclusion that the agency may regulate power plants under Section 111(d) despite the express prohibition in that very section.

EPA opposed the petition for extraordinary writ and moved to dismiss the petition for judicial review, contending that this Court can offer no relief until the agency has completed its rulemaking. This Court, on its own motion, consolidated the petitions and ordered full briefing and argument. Per Curiam Order (Nov. 13, 2014).

JURISDICTION

This Court has jurisdiction over the petition for an extraordinary writ, No. 14-1112, and the petition for judicial review, No. 14-1151, because Congress provided this Court original and exclusive jurisdiction to review EPA's actions under the Clean Air Act that are "nationally applicable." 42 U.S.C. § 7607(b)(1); *see Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980).

EPA's legal conclusion, announced in EPA's June 18, 2014 publication in the Federal Register, applies nationwide to all existing sources regulated under Clean Air Act Section 112. This Court, therefore, has original and exclusive jurisdiction to review that action.

EPA's rulemaking similarly has national applicability. The Clean Air Act therefore also grants this Court original and exclusive jurisdiction to review challenges to EPA's rulemaking. 42 U.S.C. § 7607(b)(1). Under the law of this Circuit, the Clean Air Act's grant of original jurisdiction includes within its scope All Writs Act challenges seeking relief before EPA has taken final action such as the instant petition seeking a writ prohibiting EPA from proceeding with its *ultra vires* rulemaking. *See* 28 U.S.C. § 1651(a); *Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 42–43 (D.C. Cir. 2004) (holding an express grant of original jurisdiction to review an agency's final actions extends also to consideration of petitions for relief from nonfinal agency action authorized by the All Writs Act).

In its prior briefings in the consolidated cases, EPA contended that this Court's jurisdiction does not extend to petitions seeking to prohibit EPA from

taking an action beyond its authority. Response to Petition at 1–2, 7–18. EPA's contention is unsupportable in light of the undisputed law of this Circuit that this Court has jurisdiction under the Clean Air Act to provide relief authorized by the All Writs Act even in the absence of final agency action. *See, e.g., Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987). EPA's position would also create an unworkable split of jurisdiction between this Court and the district courts that Congress never intended. As this Court reasoned in *Sierra Club*, Congress provided for direct review by this Court to speed and centralize judicial supervision of EPA's administration of the Clean Air Act. Congress has not, simply by expressly providing for direct review in the Courts of Appeals, either limited or split the availability of relief from EPA's *ultra vires* agency action that could have otherwise been sought under the Administrative Procedure Act and the All Writs Act in the district courts had Congress not provided for direct review in this Court. *Cf. Leedom v. Kyne*, 358 U.S. 184, 188, 190–91 (1958).

SUMMARY

In 2012, EPA chose to regulate power plants under Section 112 of the Clean Air Act rather than mandate state-by-state standards under Section 111(d). It then promulgated one of the most expensive rules in the history of the United States. By the plain terms of the Clean Air Act, as interpreted by the Supreme Court and by EPA itself, this action foreclosed EPA from mandating state-by-state emission standards for these same sources. But in 2013 the President directed EPA to develop just such a mandate for greenhouse gas emissions from power plants. This directive was unlawful, but in response EPA initiated a rulemaking to mandate state-by-state greenhouse gas standards for existing power plants.

To justify its rulemaking in contravention of the clear statutory text, EPA rests its authority entirely on two fundamental errors. First, EPA argues that the text of Clean Air Act is not accurately reflected in the United States Code because of the existence of a superfluous conforming amendment. Second, EPA claims that it has authority to resolve the purported ambiguity raised by that conforming amendment and EPA demands that this Court defer to EPA's efforts in resolving it. But EPA, not the United States Code, is wrong, and EPA has no authority to second-guess the determinations made by the House Office of Law Revision Counsel in executing amendments whenever EPA finds that Acts of Congress have stymied its regulatory initiatives.

Finally, EPA argues that, even if its conduct is unlawful and in direct contravention of the Clean Air Act, it should be allowed to finish its unlawful conduct before this Court provides relief. There is nothing in the law to support this argument and no reason why EPA should be permitted to continue to pressure coal-fired power plants to shut down and continue to subject the States, the coal-fired power plants they regulate, and the hundreds of thousands of people who depend on coal-fired utilities for their businesses, jobs, and livelihoods, to suffer current injury and bear the burdens of preparing for compliance.

Because EPA's actions are in direct contravention of the Clean Air Act, because this Court has clear authority to stop the ongoing harm caused by EPA's unlawful conduct, and because there is no reason to delay relief until EPA promulgates a final rule it does not even have the authority to propose, Petitioner Murray Energy Corporation respectfully requests that this Court grant its petition for an extraordinary writ and petition for judicial review, declare EPA's legal conclusion not in accordance with law, and prohibit EPA from proceeding to mandate state-by-state emission standards for source categories already subject to Section 112.

STANDING

As the largest privately-held coal producer and the fifth largest overall in the United States, Murray Energy Corporation has standing to seek review of EPA's legal conclusion and to seek a writ of prohibition against EPA's rulemaking that jeopardizes the existence of many of the nation's coal-fired power plants, thereby directly harming the coal industry, including Murray Energy Corporation.[2] That the rulemaking is directed at coal is apparent from EPA's own statements.

In order to have standing, petitioner "must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc., v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Whatever the detail of EPA's mandate, and whatever the detail of the States' plans in response, one thing is clear: Reliance on coal as the source of electricity generating capacity is to be reduced. Each loss of a customer means less revenue. Even if a non-customer shutters a coal-fired unit, the reduced demand for coal impacts pricing, which means less revenue. Thus, each coal-fired unit that is closed, or scheduled for closing, presents a "concrete" and

2. Murray Energy Corporation's standing is supported by the Declaration of Robert E. Murray, December 11, 2014, provided in the attached PETITIONER STANDING ADDENDUM.

"'actual or imminent'" injury to Murray Energy Corporation. *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (citing *Allen v. Wright*, 468 U.S. 737, 756 (1984); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740–41 (1972)); *see also Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1005–06 (D.C. Cir. 2014) (injury-in-fact due to competitive disadvantage).

The harm is neither "conceptual" nor "hypothetical." *Lujan*, 504 U.S. at 560. Some customers have recently closed units. Another recently announced it would seek to repower its last unit to natural gas, reportedly due to the impact of upcoming regulations and the inability to obtain further rate increases to support capital improvements necessitated by them. Many have expressed their concerns in comments filed in the rulemaking. The planning for the forced retirement of coal-fired units is underway, often driven by deadlines under other EPA programs. Utilities do not have the luxury of deferring their decisions until the conclusion of the Section 111(d) rulemaking process.

Not only is the injury "fairly traceable" to EPA's actions, *id.*, it is contemplated by EPA. EPA's own modeling predicts significant reductions in coal production:

> The EPA projects coal production for use by the power sector, a large component of total coal production, will decline by roughly 25 to 27 percent in 2020 from base case levels. The use of coal by the power sector will decrease roughly 30 to 32 percent in 2030.

79 Fed. Reg. at 34,934. Even though EPA's modeling is predictive, EPA has designed the proposed rule to produce this result. There is more than a "substantial probability" of harm. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (internal quotations omitted). While EPA's rulemaking may not be technically directed at coal producers, the impacts are still traceable to EPA's action. *See Motor & Equip. Mfgs. Assn. v. Nichols*, 142 F.3d 449, 456–458 (D.C. Cir. 1998); *Ethyl Corp. v. EPA,* 306 F.3d 1144, 1147–48 (D.C. Cir. 2002); *see also Monroe Energy, LLC v. EPA*, 750 F.3d 909, 914–15 (D.C. Cir. 2014).[3]

The intended consequence of EPA's rulemaking is to force the shutdown of more coal-fired units than would otherwise occur. The petitions seek to stop EPA, now. If this Court does that, these additional shutdowns will not occur. Far from being "merely speculative," not only will a favorable decision by this Court "likely" redress the injury to Murray Energy, it will do so with certainty. *See Lujan,* 504 U.S. at 560.

For the foregoing reasons, the injury to Murray Energy Corporation is actual, concrete, and traceable to EPA's actions, and this Court has the ability to stop EPA. Accordingly, Murray Energy Corporation has standing to bring these petitions.

---

3. Additionally, "[p]arties motivated by purely commercial interests routinely satisfy the zone of interests test." *Amgen, Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004); *compare White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1256–57 (D.C. Cir. 2014) ("prudential standing" not found for a plaintiff whose sole interest was in seeing its competitor more rigorously regulated); *see generally Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. at 1389.

ARGUMENT

I. SECTION 111(D) PROHIBITS EPA FROM MANDATING STATE-BY-STATE EMISSION STANDARDS FOR EXISTING SOURCES THAT ARE ALREADY SUBJECT TO A SECTION 112 NATIONAL EMISSION STANDARD.

Power plants are already subject to a national emission standard. The unambiguous text of the Clean Air Act expressly prohibits EPA from mandating state-by-state emission standards for existing sources that are subject to a national standard by excluding from EPA's authority the power to mandate state-by-state standards "for any existing source for any air pollutant . . . emitted from a source category which is regulated under section [112]." 42 U.S.C. § 7411(d). This is an important protection against inconsistent and unaffordable double regulation of existing sources. Further, the Clean Air Act's evolution since 1970 confirms that ignoring this prohibition would disrupt Congress's careful balance between national and state control and jeopardize existing sources in a manner Congress consistently avoided.

A. The Clean Air Act Expressly Prohibits Regulating Sources under Both Section 111(d) and Section 112, as EPA Has Repeatedly Conceded.

Section 111(d) of the Clean Air Act authorizes EPA to mandate state-by-state emission standards for existing sources. 42 U.S.C. § 7411(d). However, this authority is limited to mandating standards for emissions that are not "from a source category which is regulated under section [112]" of the Act. *Id.* Section 112 of the Act authorizes EPA to issue national emission standards. 42 U.S.C. § 7412(a)–(q). Thus, once a source category is regulated under a

national emission standard, EPA may not thereafter mandate state-by-state emission standards for that source category.

As a result, existing sources can be subjected to national standards *or* mandated state-by-state standards, but they cannot be subjected to national standards *and* mandated state-by-state standards. With respect to power plants in particular, Congress specifically directed EPA to subject them to a national emission standard only if "appropriate and necessary," giving EPA the choice of whether to proceed with a national standard or allow power plants to be regulated through state-by-state standards. 42 U.S.C. § 7412(n)(1)(A) ("The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary . . . .").

EPA has repeatedly acknowledged that the text of Section 111(d), as reflected in the United States Code after the 1990 Amendments, unambiguously prohibits doubly regulating existing source categories. During the Clinton Administration, EPA found Congress's instructions on this point crystal clear, explaining that Section 111(d) does not permit or require mandates for emissions that are "emitted from a source category that is actually being regulated under section 112," so EPA's authority to issue a Section 111(d) mandate depends upon whether there is "a section 112 emission standard" applicable to the source category in question. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AIR EMISSIONS FROM MUNICIPAL SOLID WASTE LANDFILLS – BACKGROUND INFORMATION FOR FINAL

STANDARDS AND GUIDELINES 1-5 to 1-6 (1995). The Bush Administration's EPA agreed, recognizing that "a literal reading" of the text of Section 111(d) found in the United States Code provides that "EPA cannot" issue a mandate "under CAA section 111(d) for 'any pollutant' . . . that is emitted from a particular source category regulated under section 112," so "if a source category X is 'a source category' regulated under section 112, EPA could not regulate" any emissions "from that source category under section 111(d)." 70 Fed. Reg. 15,994, 16,031 (March 29, 2005). EPA reiterated its position to this Court as well, stating that "a literal reading of this provision could bar section 111 standards for any pollutant . . . emitted from a source category that is regulated under Section 112." Final Brief of Respondent at 104, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097). Even in the documents announcing EPA's conclusion and rulemaking, the current Administration's EPA has continued to acknowledge the clear and unambiguous "literal reading of th[e] language . . . mean[s] that the EPA c[an] not regulate any air pollutant from a source category regulated under section 112." LEGAL MEMORANDUM FOR PROPOSED CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING ELECTRIC UTILITY GENERATING UNITS at 26, EPA-HQ-OAR-2013-0602-0419.

The Supreme Court has also already confirmed that EPA is correct that the text of Section 111(d) as reflected in the United States Code prohibits EPA from mandating state-by-state standards for existing sources that are already subjected to a national emission standard. In *American Electric Power v. Connecticut*, the Court observed that Section 111(d) "requires regulation of

existing sources within [a source category regulated under Section 111(b)] but "[t]here is an exception: 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).[4] Similarly, the ABA's *Clean Air Act Handbook*, which has been cited by the Supreme Court,[5] observes, with no hint of uncertain meaning, that "[u]nder section 111(d), EPA may establish emissions guidelines for existing sources in a source category when . . . the category is not subject to regulation under section 112." CLEAN AIR ACT HANDBOOK 331 (J. Domike & A. Zacaroli eds., 3d ed. 2011).

The unambiguous words of Section 111(d) exclude from EPA's authority the power to issue "standards of performance for any existing source for *any* air pollutant . . . emitted from a source category which is regulated under section [112]." 42 U.S.C. § 7411(d) (emphasis added). Thus, Congress has directed that EPA may not regulate *any* air pollutant through the state-by-state mandate program of Section 111(d) if the existing source category is regulated under Section 112.

---

4. That EPA might foreclose itself from issuing a mandate under Section 111(d) by issuing a national emission standard under Section 112 is fully consistent with the Supreme Court's holding in *American Electric Power v. Connecticut* that federal common law was displaced by the Act because the Court explicitly held that delegation of authority "displaces federal common law" even if that authority is never actually exercised. 131 S.Ct. at 2538–39.

5. *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2435 (2014).

B. Section 111(d) Sensibly Protects Existing Sources From Double Regulation Under Standards that Each Seek to Independently Maximize Emission Reductions.

Congress sensibly banned EPA from doubly regulating source categories under both Sections 111(d) and 112 because simultaneous, uncoordinated design of national and state-by-state standards maximizing emission reductions would unduly jeopardize their viability by imposing conflicting or unaffordable requirements.

An EPA mandate of state-by-state standards under Section 111(d) must require the States, or EPA if the States do not, to design and impose emission standards determined to "reflect[] 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) . . . has been adequately demonstrated." 42 U.S.C. § 7411(a)(1); 42 U.S.C. § 7411(d).

A national emission standard under Section 112 must be designed to "require the maximum degree of reduction in emissions" determined to be "achievable" by EPA "taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements . . . through the application of measures, processes, methods, systems or techniques" and must meet statutory stringency floors. 42 U.S.C. § 7412(d).

Thus, both the state-by-state standard and the national standard programs require consideration of costs on the one hand and maximum

reductions on the other. Plainly, the Act orders the designers of these standards to go as far as possible in reducing emissions without threatening the economic viability of sources. Subjecting existing sources to both state-by-state standards and a national standard would set the designers at odds and result in standards requiring more expenditures than existing sources can reasonably afford.

The problem is exacerbated where, as here, the threat of state maximum emission reductions comes closely on the heels of an independent national requirement. Power plants are forced to make engineering, design, and economic choices now, based on the obligation to maximize the reduction of one set of pollutants selected by EPA today, knowing that the variables will change almost immediately after these commitments have been made.

Will the pollution controls installed to meet the national standard be enough to meet the States' as-yet unwritten standards? If not, will the technology and operational changes needed to meet a state's standard be compatible with those the source is committing to for the national standard? Moreover, do the financial projections that were made to justify continuing to operate at all in light of the millions that will be needed to meet the national standard still hold once a state standard is imposed? These are just some of the issues Congress avoided by prohibiting double regulation of the same existing sources under both programs.

C. The Act's Evolution Since 1970 Shows the Import and Purpose of the Section 111(d) Restriction.

The evolution of the Clean Air Act's state and national emission standards programs reflect a careful balance between federal and state control, and show Congress's keen interest in avoiding the double regulation of existing sources by overlapping emission standards programs.

1. The 1970 Clean Air Act Amendments Created a State-by-State Existing Source Standards Program and a Limited National Standards Program Only for Extremely Hazardous Emissions.

Today, EPA has authority to directly impose comprehensive national standards on existing sources, but this was not always so, and it was Congressional reluctance to give EPA this power in 1970 that led to the development of EPA's authority to mandate state-by-state emission standards for existing sources in the first place.

On February 9, 1970, President Nixon proposed amending the Clean Air Act to authorize national emission standards "for facilities that emit pollutants extremely hazardous to health" and "for selected classes of new facilities which could be major contributors to air pollution." A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 at 1498, 1505 (Comm. Print 1974).[6]

---

6. Citations to the historical development of the Clean Air Act are to the pages of the comprehensive committee print compilations. None of the materials referenced in this section are statements by legislators or committees. A more detailed discussion of the historical development of these provisions is included in Murray Energy Corporation's comments. COMMENTS OF MURRAY ENERGY CORPORATION at 25–36, EPA-HQ-OAR-2013-0602-23523 (Dec. 1, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-23523.

Congress considered a number of different options in response to the President's proposal, ranging from mandating the regulation of all sources to just new sources, and from the regulation of all existing source emissions that endangered "public health or welfare" to only regulation of existing source emissions that are "extremely hazardous to health."[7]

The final result, the 1970 Clean Air Act, created an emission standards program for existing sources in Section 111(d) that covered most pollutants found to endanger "public health or welfare," but it assigned the authority to develop these standards to the States, not the federal government. 42 U.S.C. § 1857c-6(d) (1976). The only exception was the narrow Section 112 program authorizing EPA to establish national standards for certain extremely hazardous emissions that were to be listed under Section 112(b)(1)(A) if found to have the potential to "cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C.

---

7. *See* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 at 1,489–92 (S. 3466 § 8 and H.R. 15848 § 8 as introduced proposed a Section 112 program authorizing standards for new sources of emissions found to endanger "public health or welfare" and standards for existing source emissions only when found to be "extremely hazardous to health"); *id.* at 920–24 (H.R. 17255 § 5(a) as reported proposed a Section 112 program authorizing standards only for new sources); *id.* at 1,467–68 (S. 3546 § 4(c) as introduced proposed a Section 108(i) program authorizing standards only for new sources); *id.* 392, 553–69 (S. 4358 § 6(b) as introduced and passed in the Senate proposed a Section 113 program authorizing standards for new source emissions found to endanger "public health and welfare," a Section 114 program for all sources of emissions found "to have an adverse effect on public health," and a Section 115 program authorizing standards for emissions from any source found to be "hazardous to the health of persons").

§ 1857c-7(a)(1) (1976). Congress also made clear that these programs were not to overlap, providing that state-by-state standards developed by States could only be mandated by EPA for emissions of pollutants which, among other things, were "not included on a list published under section . . . 112(b)(1)(A)." 42 U.S.C. § 1857c-6(d) (1976).

Notably, while Congress elsewhere in the 1970 Clean Air Act prescribed maximum emission reductions in light of costs for new sources, for existing sources Congress chose a different path: National emission standards for extremely hazardous emissions from existing sources would be set by EPA so as to "provide[] an ample margin of safety to protect the public health," 42 U.S.C. § 1857c-7(b)(1)(B) (1976), and standards for existing sources of other harmful emissions from existing sources would be determined by States on a state-by-state basis for each State's own existing sources but not according to any particular design formula imposed by EPA. 42 U.S.C. § 1857c-6(d) (1976).

2. The 1977 Amendments Required States to Maximize Emission Reductions at Existing Sources in Light of Costs.

Whereas the 1970 Act left to the States the task of determining the appropriate method for setting emission standards for each State's own existing sources of most air pollutants, the 1977 Act imposed for the first time the additional requirement that States design standards for existing sources to maximize emission reductions while considering costs and other factors. 42 U.S.C. § 7411(a)(1)(C) (1988). The standards for existing sources would still be set by the States in the first instance, but would now have to "reflect[] the

degree of emission reduction achievable through the application of the best system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated for that category of sources." *Id*.

The Act's Section 112 national emission standards program was not significantly altered. It remained limited to extremely hazardous emissions and continued to require an ample margin of safety rather than maximized emission reductions in light of costs. 42 U.S.C. § 7412 (1988). Meanwhile, the Act also continued after the 1977 Amendments to prohibit EPA from mandating state-by-state standards for any pollutant "included on a list published under section . . . 112(b)(1)(A)." 42 U.S.C. § 7411(d) (1988).

3. The 1990 Clean Air Act Amendments Significantly Expanded the National Standards Program and Retained the State-by-State Existing Source Standards Program Only for Source Categories Not Regulated Under the National Standards Program.

In 1990, Congress dramatically expanded Section 112 of the Act, altering the national emission standards program for existing sources from a limited program covering extremely hazardous emission to a broad national program covering all emissions "which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects . . . or adverse environmental effects." 42 U.S.C. § 7412(b)(2).

The 1990 Amendments also established, for the first time, a requirement that EPA impose national standards for existing sources that maximize

emission reductions in light of costs, requiring that EPA design the standards to achieve "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." 42 U.S.C. § 7412(d).

In addition, where Section 112(b)(1)(A) of the Act had previously contained a short requirement that the Administrator publish, and "from time-to-time thereafter revise" a list of the hazardous air pollutants covered by Section 112 (and therefore excluded from regulation under Section 111(d)), the 1990 Amendments replaced all of Section 112(b) with a list of nearly 200 pollutants and a detailed process for adding additional pollutants to the list, removing them, routinely updating the list, and allowing for private parties to petition for changes. 42 U.S.C. § 7412(b).

The 1990 Amendments also shifted the focus of Section 112's national emission standards from pollutants to source categories. Where before the Administrator was to publish standards for each pollutant listed in Section 112(b)(1)(A) (now Section 112(b)), the 1990 Amendments required EPA to develop "a list of all categories and subcategories of major sources and area sources . . . of the air pollutants listed pursuant to subsection (b)" and to establish emission standards for those "categories and subcategories the Administrator lists" on a category-by-category basis. 42 U.S.C. § 7412(c).

In the course of this expansion and change in focus, Congress sought to again ensure that there would be no double regulation under both programs.

The bill passed in the Senate merely updated the citation to the list of specific pollutants covered by Section 112 from 112(b)(1)(A) to 112(b) without limiting the scope of the Section 112 exclusion. A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 at 4,534 (Comm. Print 1993). This bill would have preserved the traditional approach that, as long as a pollutant is covered by a Section 112 national emission standard, it could not be the subject of an EPA mandated state-by-state emission standard. Of course, since the 1990 Amendments greatly expanded the set of pollutants that would be covered by Section 112, this would have essentially eliminated the Section 111(d) state-by-state standards program. The only exception the Senate bill provided was a special provision requiring Section 111(d) mandates for certain specified emissions from existing incinerators. *Id.* at 4,538–40, 4,556.

Meanwhile, the House passed a bill that preserved much more of the Section 111(d) mandate program by changing the focus of the Section 112 exclusion from the *pollutants* covered by Section 112 to the *source categories*, such that Section 111(d) standards could now be promulgated for almost any pollutant meeting the basic requirements of Section 111, as long as it did not cover emissions "from a source category which is regulated under Section 112." *Id.* at 1,979. In addition, the House bill included a provision that would allow EPA to *choose* whether the nations existing power plants should be regulated under Section 111(d) or the new Section 112 program. *Id.* at 2,149.

In conference, the House and Senate agreed to include in the final bill the Senate bill incinerator provision, the House bill power plant provision, and the House bill amendment to the mandate program.[8] *Id.* at 593, 572, 481; *see* 42 U.SC. § 7429(b); 42 U.S.C. § 7412(n)(1)(A); 42 U.S.C. § 7411(d).

Importantly, the Clean Air Act as amended in 1990 again continued to avoid authorizing EPA to subject any existing source simultaneously to multiple standards designed to maximize emission reductions in light of costs. Having provided for far more comprehensive national emission standards for existing sources, Congress decided to maintain the state-by-state standard mandate program for those sources not subject to the national standards. And having preserved this role for the state-by-state mandate program, Congress further decided incinerators would be subject only to the state-by-state mandate program but gave EPA discretion to decide which program power plants would be subject to, national or state-by-state.

Congress's special treatment of incinerators and power plants recognizes that these categories of existing sources are often older facilities that offer essential public or quasi-public services to their communities, frequently operating at little or no profit. Thus, regulation of existing incinerators and

---

8. As discussed further below, the 1990 Act also inadvertently included the conforming amendment that would have updated the pre-1990 Section 112 exclusion's reference from Section 112(b)(1)(A) to Section 112(b), but the House Office of Law Revision Counsel properly found that this conforming amendment failed to execute in light of the execution priority of the provision substantively amending the Section 112 exclusion.

power plants poses implications for the proper balance between state and federal control that regulation of other sources does not. Accordingly, Congress maintained a greater role for States in establishing standards for incinerators and gave EPA discretion to maintain a greater role for States in establishing standards for power plants. But Congress in no way empowered EPA to subject power plants (or any other category of existing sources) to *both* national and mandated state-by-state standards.

II. EPA WRONGLY IGNORES THE TEXT OF SECTION 111(D) AND ERRONEOUSLY CLAIMS THERE ARE DUELING "VERSIONS" OF THE STATUTE.

In launching its rulemaking and concluding that double regulation is authorized, EPA had to cast aside the text of the Clean Air Act based upon the vague and unsupportable assertion that the United States Code "conflict[s]" with the Statutes at Large. Response to Petition at 4. EPA then had to rest its authority to doubly regulate on a purported legislative glitch. Response to Petition at 28. In reality, there is no glitch — the text of the law now in force is accurately reflected in the Code. And even were there a reasonable doubt, Congress tasked its own legislative agency, not EPA, with determining in the first instance what the text of the law in force is and Congress provided that courts should defer to this agency's reasonable determinations.

A. The Code Accurately Reflects the Text of Section 111(d).

In addition to the substantive amendment to the mandate program that prohibits Section 111(d) mandates for sources regulated under Section 112, the 1990 Amendments also contained a conforming amendment. Pub. L. 101–549, § 302(a), 104 Stat. 2,399, 2,574 (1990). The conforming amendment has no effect on the Act because the provision substantively amending the mandate program and striking the reference to Section 112 that it would have amended has execution priority and the United States Code, prepared by the House Office of Law Revision Counsel ("the Office"), accurately reflects the text of Section 111(d) after application of the 1990 Amendments to the Clean Air Act.

The conforming amendment EPA stakes the rulemaking on purported to replace language that no longer existed due to the prior execution of the earlier substantive amendment, and so the Office determined the conforming amendment failed to execute. The two amendments are set out in the Statutes at Large as follows:

> **SEC. 108. MISCELLANEOUS GUIDANCE.** . . .
>
> (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". . . .
>
> **SEC. 302. CONFORMING AMENDMENTS.**
>
> (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)".

Pub. L. 101–549, § 108(g), 104 Stat. 2,399, 2,467 (1990); Pub. L. 101–549, § 302(a), 104 Stat. 2,399, 2,574 (1990). Prior to 1990, the Code's text provided for regulation of "any air pollutant . . . which is not included on a list published under section 7408(a) or 7412(b)(1)(A) of this title." 42 U.S.C. § 7411(d) (1988). The current Code's text now provides for regulation of "any air pollutant . . . 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." 42 U.S.C. § 7411(d) (2012). In the amendment note, the Office explained its determination in applying the amendments:

> Subsec. (d)(1)(A)(i). Pub. L. 101–549, §302(a), which directed the substitution of "7412(b)" for "7412(b)(1)(A)", could not be executed, because of the prior amendment by Pub. L. 101–549, §108(g), see below.

> Pub. L. 101–549, §108(g), substituted "or emitted from a source category which is regulated under section 7412 of this title" for "or 7412(b)(1)(A)".

42 U.S.C. § 7411, Amendments, 1990, Subsec. (d)(1)(A)(i) (2012). Thus, the substantive amendment — Section 108(g) — was duly executed while the conforming amendment — Section 302(a) — could not be executed and failed.

EPA asserts that "[t]his situation appears to be unique." Response to Petition at 23 n.8. EPA is wrong. A bill containing an amendment to a statutory provision that fails to execute because of another amendment to the same provision contained earlier in the same bill is not unusual. This happens often and Congress and the Office have an established rule to resolve it: An amendment fails to execute if a prior amendment in the same bill removes or alters the text that the subsequent amendment would amend. The Office consistently and frequently applies this rule in this circumstance.[9]

---

9. *See, e.g.*, 15 U.S.C. § 2064, Amendments, 2008, Subsec. (d)(2); 15 U.S.C. § 2081, Amendments, 2008, Subsec. (b)(1); 29 U.S.C. § 1053, Amendments, 1989, Subsec. (e)(1); 42 U.S.C. § 290bb-25, Amendments, 2000, Subsec. (m)(5); 42 U.S.C. § 300aa-15, Amendments, 1989, Subsec. (e)(2); 42 U.S.C. § 300ff-13, Amendments, 1996, Subsec. (b)(4)(B); 42 U.S.C. § 300ff-15, Amendments, 1996, Subsec. (c)(1); 42 U.S.C. § 300ff-28, Amendments, 1996, Subsec. (a)(1); 42 U.S.C. § 300ff-28, Amendments, 1996, Subsec. (b)(1); 42 U.S.C. § 677, Amendments, 1989, Subsec. (e)(1); 42 U.S.C. § 1320a-7a, Amendments, 1997, Subsec. (i)(6)(B); 42 U.S.C. § 1320a-7a, Amendments, 1997, Subsec. (i)(6)(C); 42 U.S.C. § 1395*l*, Amendments, 1990, Subsec. (a)(1)(K); 42 U.S.C. § 1395u, Amendments, 1994, Subsec. (b)(3)(G); 42 U.S.C. § 1395x, Amendments, 1990, Subsec. (aa)(3); 42 U.S.C. § 1395cc, Amendments, 2010, Subsec. (a)(1)(V); 42 U.S.C. § 1395ww, Amendments, 2003, Subsec. (d)(9)(A)(ii); 42 U.S.C. § 1396(a), Amendments, 1993, Subsec. (a)(54); 42 U.S.C. § 1396b, Amendments, 1993, Subsec. (i)(10); 42 U.S.C. § 1396r, Amendments, 1988, Subsec. (b)(5)(A); 42 U.S.C. § 3025, Amend-

This is Congress's rule — Congress is aware of this rule and drafts legislation in light of it. *See* UNITED STATES SENATE, OFFICE OF LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL § 126(d) (1997) ("If, after a first amendment to a provision is made . . . the provision is again amended, the assumption is that the earlier (preceding) amendments have been executed."); UNITED STATES HOUSE OF REPRESENTATIVES, OFFICE OF LEGISLATIVE COUNSEL, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE § 332(d) (1995) ["MANUAL ON DRAFTING STYLE"] ("The assumption is that the earlier (preceding) amendments have been executed."). In this case, the Office simply followed Congress's rule and correctly determined that the amendment directing the substitution of "112(b)(1)(A)" for "112(b)" failed to execute because a prior amendment earlier substituted "or emitted from a source category which is regulated under section 112" for "or 112(b)(1)(A)." The Code therefore accurately reflects the text of Section 111(d) in force today.[10]

---

ments, 1992, Subsec. (a)(2); 42 U.S.C. § 3793, Amendments, 1994, Subsec. (a)(9); 42 U.S.C. § 5776, Amendments, 1988; 42 U.S.C. § 6302, Amendments, 2007, Subsec. (a)(4); 42 U.S.C. § 6302, Amendments, 2007, Subsec. (a)(5); 42 U.S.C. § 6991e, Amendments, 2005, Subsec. (d)(2)(B); 42 U.S.C. § 7414, Amendments, 1990, Subsec. (a); 42 U.S.C. § 8622, Amendments, 1994, Par. (2); 42 U.S.C. § 9601, Amendments, 1986, Par. (20)(D); 42 U.S.C. § 9607, Amendments, 1986, Subsec. (f)(1); 42 U.S.C. § 9874, Amendments, 1990, (d)(1); 42 U.S.C. § 9875, Amendments, Subsec. (c).

10. Notably, the text of Section 111(d) would be the same if the conforming amendment had execution priority, for the substantive amendment would strike out the text that the conforming amendment updates and insert in its place the new substantive language.

The failure of the conforming amendment in no way frustrated the intent of Congress, as Congress never intends for a non-substantive amendment to limit or frustrate an important substantive amendment. Indeed, as this Court has held, conforming amendments that are unnecessary do not call into question the meaning of federal statutes or render them ambiguous. *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336–37 (D.C. Cir. 2013). The legal irrelevance of the conforming amendment here is especially obvious for it would do nothing other than update a reference by deleting the text "(1)(A)." It beggars belief that the superfluous instruction to remove these six characters when the entire reference "112(b)(1)(A)" had already been removed by a substantive amendment with real force and purpose could cloud the meaning of the Clean Air Act, let alone form the basis for a massive regulatory undertaking seeking to utterly transform the nation's energy system.

B. EPA Wrongly Asks this Court to Disregard the Current Text of Section 111(d) as Determined by the Office of Law Revision Counsel.

EPA claims that, because there was a failed conforming amendment, Section 111(d) "is rife with ambiguity" that "EPA should have the first opportunity to resolve" and that EPA must receive deference in resolving this purported "ambiguity." Response to Petition at 22, 30. But as explained above, there is no ambiguity because the conforming amendment failed to execute. Moreover, EPA is not entitled to deference in determining the current text of the Clean Air Act. Executive agencies may get deference on how to *construe* their statutes, but they do not get to *write* them as well. To the extent there is any question as to what the current text of the Clean Air Act is in light of the 1990 Amendments, that decision falls to the Office, a legislative agency, and then, in cases of clear error, to this Court, but never to EPA. Allowing EPA to usurp that function would unduly interfere with the functioning of the legislative process and subordinate the position of Congress.

The Office is the legislative agency that prepares and publishes the United States Code, including titles like Title 42 that are not yet positive law. 2 U.S.C. § 285b. The Office is directed by the nonpartisan Law Revision Counsel appointed by and serving at the pleasure of the Speaker of the House. 2 U.S.C. § 285c. Chief among its responsibilities, this nonpartisan legislative agency keeps the Code up to date by faithfully executing Acts and applying amendments according to Congress's instructions and thereby aids the functioning of the legislative branch.

Congress has commanded that, in determining the text of its statutes, deference be given to the Office's determinations, providing that "the Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States . . . in force." 1 U.S.C. § 204. To give effect to this provision, the Code must be considered to be the authoritative statement of the law unless it is plainly inconsistent with the Statutes at Large or the determinations of the Office are unreasonable. *See Stephan v. United States*, 319 U.S. 423, 426 (1943) (inclusion of provision "inconsistent" with the repeal of the provision in the Statutes at Large); *United States National Bank of Oregon v. Independent Insurance Agents of Am., Inc.*, 508 U.S. 439 (1993) (omission of provision unreasonably based on punctuation error in light of "overwhelming evidence from the structure, language, and subject matter" of the Act).

By deferring to the Office, courts will, as the Supreme Court has instructed, avoid "undue judicial interference with the functioning of the Legislative Branch" and follow the "precedent instructing [courts] to respect . . . coequal and independent departments." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2577 (2014) (quotation omitted). The Supreme Court has made clear that the avoidance of undue judicial interference with the legislative process is vital. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 669 (1892); *Noel Canning*, 134 S. Ct. at 2577. This separation of powers concern demands deference for the legislative process whenever "[j]udicial efforts to engage in" more searching "inquiries would risk undue judicial interference with the functioning of the Legislative Branch." *Noel Canning*, 134 S. Ct. at 2576. Deference is also

appropriate if "judges cannot easily determine . . . matters" relating to the legislative process. *Id*. Both of these circumstances are applicable here.

The determinations of the Office should also be deferred to because this is "how Congress would likely have meant to allocate . . . authority" amongst the three branches. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring). Congress crafts Acts with the aid of the congressional Offices of Legislative Counsel and closely supervises a reliable legislative agency that executes the congressional commands contained therein without regard to partisanship or policy. Then executive agencies under the President's supervision apply their technical and policy expertise in interpreting the statutory text. Courts review these agencies' interpretations to ensure they are neither inconsistent with the statutory text nor unreasonable. But if Congress cannot determine what the text of the law is or how amendments will be executed, Congress cannot effectively perform its central role in this process. Thus, rejecting reasonable determinations made by Congress's legislative agent "subordinates the legislature and disregards that coequal position in our system of the three departments of government." *Ex parte Wren*, 63 Miss. 512, 532 (1886).

Furthermore, failing to defer to the Office would also likely unnecessarily burden the judicial process by leading to "an amount of litigation, difficulty, and painful uncertainty appalling in its contemplation and multiplying a hundred fold the alleged uncertainty of the law" because "[e]very suit before every court where the validity of" the determinations of the Office

applying amendments "may be called in question" will be an appeal of the Office's determination embroiling courts into the intricacies of the legislative process. *Id.*

In this case, the Office did its job and applied the 1990 Amendments in updating the Code. EPA has identified no oversight or error by the Office. To the contrary, it is clear from the Office's amendment note to Section 111 that the Office executed the substantive amendment and determined that the superfluous conforming amendment failed. EPA cannot second guess that determination.

III. THE RELIEF SOUGHT BY THE PETITIONS IS AVAILABLE NOW.

Without any substantive defense for its actions, EPA has focused most of its efforts arguing that *even if* EPA has wrongly claimed authority expressly denied it by Congress, and *even if* it is relying on that illegal power grab to initiate rulemaking which it has no lawful right commence, and *even if* that rulemaking is costing States and the private sector millions to prepare for and in potentially wasted compliance costs and is weakening the nation's power grid by pressuring existing coal-fired power plants to shut down or abandon coal for more expensive and less reliable fuels, this Court has no authority to review its actions until EPA finalizes an unlawful rule. Again EPA's arguments are groundless. This Court has authority to issue extraordinary writs when appropriate, including to stop unlawful agency conduct. The Clean Air Act also expressly grants direct judicial review not just of final rules promulgated by EPA, but of "any other" final agency action as well. 42 U.S.C. § 7607(b)(1); *see Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980). EPA's legal conclusion, stated in certain and definitive terms, in a publication signed by the Administrator and supported by a lengthy legal memorandum, easily qualifies as a final agency action and is therefore reviewable regardless of whether EPA initiated any rulemaking under that improperly-claimed authority.

A. This Court Can and Should Issue a Writ Prohibiting EPA From Doubly Regulating Power Plants.

1. This Court Can Issue a Writ Prohibiting *Ultra Vires* Agency Action When It Is Necessary or Appropriate To Do So.

Under the All Writs Act, federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

This Court has long recognized its expansive authority to engage in expedited review under the All Writs Act when such review promotes the administration of justice. *See, e.g.*, *Colonial Times v. U.S. District Court* (*Gasch*), 509 F.2d 517, 525–26 (D.C. Cir. 1975). As explained in *Colonial Times* in the context of the availability of mandamus to a trial court notwithstanding the normal rule that a party may appeal only a final judgment, the "true test is whether the trial court had any legal power to act or refuse to act as it did." *Id.* at 523. The exercise of an "appellate supervisory power" over the lower court is a "more modern ground for the issuance of mandamus," *id.* at 524, but is firmly grounded in Supreme Court jurisprudence. In holding that mandamus was available, this Court applied the "principle of *Schlagenhauf*" in concluding that mandamus lies to review an issue of first impression in order to settle new and important problems. *Id.* at 524–25 (discussing *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964)). "*Schlagenhauf* authorizes departure from the final judgment rule when the appellate court is convinced that resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice." *Id.*

Similarly, an extraordinary writ is available when it is an administrative agency (rather than a trial court) acting beyond its power notwithstanding the general principle that affected parties may only appeal final agency actions (rather than final judgments). Thus, while proceedings under the All Writs Act to challenge non-final agency action may be relatively rare, a Court can and should issue a writ prohibiting an agency from taking an action beyond its power — an *ultra vires* action — before it is final.

In *Leedom v. Kyne*, the Supreme Court held that a court could strike down a non-final action taken "in excess of [the agency's] delegated powers and contrary to a specific prohibition." 358 U.S. 184, 188, 190–91 (1958). And in *McCulloch v. Sociedad Nacional*, the Supreme Court held that a court could enjoin an agency from taking unlawful non-final actions when those actions involve "public questions particularly high in the scale of our national interest" because such questions are "a uniquely compelling justification for prompt judicial resolution of [a] controversy." 372 U.S. 10, 16–17 (1963).

This Court, too, has recognized that appropriate circumstances warrant relief from non-final agency actions. In *Sierra Club v. Thomas*, this Court, in clarifying a line of previous cases, held that a court can provide "interlocutory review of an unreasonable delay claim" when interlocutory review is "necessary to protect" the court's "prospective jurisdiction." 828 F.2d 783, 790 (D.C. Cir. 1987) (quoting *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75–76 (D.C. Cir. 1984)). In that case, this Court explained that "this interlocutory intervention is necessary" when "a substantive statutory right

would be effectively denied as a result of agency delay . . . and such delay cannot be remedied when reviewing the final order because the clock cannot be turned back." *Id.* at 792 n.66. Additionally, in *Meredith v. Fed. Mine Safety & Health Review Comm'n*, this Court held that a court may review non-final agency action that meets the requirements of the collateral order doctrine — separability, unreviewability, and conclusiveness. 177 F.3d 1,042, 1,050 (D.C. Cir. 1999).

2. A Writ Is Necessary and Appropriate Under these Extraordinary Circumstances.

Here, a writ prohibiting EPA from issuing the unlawful mandate is necessary and appropriate. The petition for a writ is based on the fundamental legal infirmity of EPA's forthcoming mandate. EPA cannot resolve its lack of authority by revising the proposed rule, since EPA has no other legal basis for the rule and the illegality demonstrated by the petition can only be redressed by total withdrawal of the rule (with no future replacement rule). There is no other suitable "fix" to deal with EPA's *ultra vires* conduct other than to instruct EPA not to proceed.

Moreover, that instruction to EPA needs to occur now. Petitioner and others will suffer irreparable injury if this Court does not provide immediate relief. First, utility companies are now making decisions about the future viability of their coal-fired power plants in the face of impending compliance deadlines under the 2012 Section 112 rule that will cost millions to meet. The proposed mandate adds to that cost evaluation the prospect of even more

expenditures in order to comply with an independent standard that also strives to achieve maximum emission reductions. The power plants face an April 16, 2016 final compliance deadline under the 2012 rule, and prior to that time need to decide whether or not to seek the necessary compliance extension. In other words, utilities must make a decision over the coming months as to each of their coal-fired power plants whether to proceed with significant investments or to begin the process of shutting down (or converting) the power plant. They must now take into account the uncertainties of a Section 111(d) mandate as a part of that analysis. With the specter of the mandate hanging over them, utilities face uncertainty and many coal-fired power plants may shut down based on the risk that the mandate could be upheld, no matter its final form, and they would be forced to invest millions more. Meanwhile, utilities must grapple with the potential wasted investment to comply with the earlier Section 112 requirements.

Second, States right now must begin development of plans designed to meet the requirements of the Section 111(d) mandate. Although the President has announced that States will have one year from the date of the final mandate to submit their plans, each State must begin that process now given the complexities involved as it tries to balance intra-state power supply and demand, including reliability concerns, and concerns about economic growth and employment. In some cases, States have to enact enabling legislation as a preliminary step in order to abide by the demands by EPA. All of this effort takes time. Simply put, States cannot wait for the final mandate to begin a

complete overhaul of the nation's production and use of energy in the short time provided by EPA. A failure to meet the deadline would turn over critical policy decisions about the future of existing coal-fired power plants to EPA. To avoid these potential consequences, States must immediately devote tremendous time and resources toward an effort that, ultimately, stems from an *ultra vires* act by EPA.

These circumstances are different from the typical rulemaking. The scope and consequences of the proposed rule are unprecedented, with wholesale reordering of the power system and massive financial impacts on power plants and the coal industry. Also, unlike a typical rulemaking, the legal issue presented here cannot be impacted by revision of the proposed rule and will never be clearer. Because the legal issue presented focuses exclusively on the legal basis, it does not address the content of the proposed rule. It will, however, result in judicial economy since a ruling that EPA's legal foundation is flawed would moot the inevitable challenges to the final rule, avoiding the current injury and wasted effort of a continued rulemaking that has no valid legal basis.

These circumstances more than qualify as appropriate for relief by a writ prohibiting EPA from issuing the unlawful mandate. Analogizing to the test laid out by this Court in *Colonial Times* in the context of a trial court acting beyond its power, first, the issue of EPA's authority under Section 111(d) of the Act when the same source category has already been regulated under Section 112, is an important issue that must be expeditiously resolved. 509 F.2d at 525. Second,

given the massive undertaking called for by the proposed mandate, "there is an undeniable need to forestall future error and uncertainty" in the availability of Section 111(d) as a basis for greenhouse gas emission regulation of coal-fired power plants, as well as for future rulemaking efforts by EPA. *Id.* And third, clearly resolution of this issue is "significant" to finalization of the proposed rule, since the writ would result in the withdrawal of the proposed mandate. *Id.*

The analysis in the administrative context flows directly from the long history of the extraordinary writ authority recognized by the Supreme Court and this Court. As in *Leedom*, EPA acts beyond its authority. As in *McCulloch*, the issue is of urgent national importance. As in *Thomas*, only an immediate remedy can prevent a substantial portion of the harm facing the nation's power plants that must decide whether to invest millions or shut down coal fired power plants by the national standard's compliance deadline. And as in *Meredith*, each of the three requirements of the collateral order doctrine is satisfied. In short, the circumstances in this case present a compelling justification for prompt judicial resolution. A federal agency has commenced a rulemaking of unprecedented scope with significant implications for federal and state relations and the national economy, irrespective of the details of the final rule. Such a critical circumstance offers its own "uniquely compelling justification for prompt judicial resolution of [a] controversy." *McCulloch*, 372 U.S. at 17.

B. This Court Can and Should Hold Unlawful and Set Aside EPA's Erroneous Legal Conclusion that It Can Doubly Regulate Existing Sources Under Sections 111(d) and 112 of the Clean Air Act.

In addition to prohibiting EPA from proceeding with the *ultra vires* rulemaking, this Court can and should hold unlawful and set aside EPA's announced legal conclusion that double regulation is authorized and required by the Clean Air Act because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

1. EPA Has Concluded that It Has the Authority to Mandate the Double Regulation of Sources under Sections 111(d) and 112.

In the preamble to the proposed rule, EPA announced the agency's conclusion that the Clean Air Act authorizes EPA to regulate greenhouse gas emissions at these sources regardless of whether they are already regulated under the Section 112 program. *Carbon Pollution Emission Guidelines for Existing Stationary Sources*, 79 Fed. Reg. 34,830 (June 18, 2014). Specifically, in a section entitled "Summary of Legal Basis," the agency pronounced that "EPA *reasonably interprets* the provisions identifying which air pollutants are covered under CAA section 111(d) to authorize the EPA to regulate CO_2 from fossil fuel-fired EGUs." *Id.* at 34,852 (emphasis added). In Section V of the preamble, EPA unequivocally stated the agency's conclusion: "The EPA *has the authority* to regulate, under CAA section 111(d), CO_2 emissions from EGUs, *under the Agency's construction* of the ambiguous provisions in CAA section 111(d)(1)(A)(i) that identify the air pollutants subject to CAA section 111(d)." *Id.* at 34,853 (emphasis added). The preamble describes in detail the agency's

legal analysis in support of this conclusion, including its position on the meaning of Section 111(d), its interpretation of legislative history, and its analysis of Supreme Court precedent to support the agency's conclusion. *Id.* This Federal Register publication is signed by the Administrator of EPA, Gina McCarthy. *See id.* at 34,950.

Along with the publication of the agency's legal conclusion in the preamble in the Federal Register, EPA placed in the rulemaking docket a 104-page legal memorandum to "supplement the preamble by providing background for the legal issues discussed in the preamble. . . ." LEGAL MEMORANDUM FOR PROPOSED CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING ELECTRIC UTILITY GENERATING UNITS, EPA-HQ-OAR-2013-0602-0419 (posted June 18, 2014) ("Legal Memorandum"); *see also* 79 Fed. Reg. at 34,853 (referencing the Legal Memorandum for further discussion and legal support for the conclusion that EPA can doubly regulate power plants).

In a section entitled "Authority to regulate CO_2 from EGUs," EPA lays out in detail its case law, statutory, and regulatory history arguments, definitively concluding in certain and unequivocal terms: "Applying this interpretation of the Section 112 Exclusion to this rule, ***we conclude*** that section 111(d) authorizes the EPA to establish section 111(d) guidelines for GHG emissions from EGUs." Legal Memorandum at 27 (emphasis added). The Legal Memorandum is referred to directly in the preamble signed by EPA's Administrator and is listed in EPA's online docket as "issued by the Environmental Protection Agency (EPA)." *See Legal Memorandum for Proposed*

Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units, REGULATIONS.GOV (June 18, 2014) http://www.regulations.gov/#!document Detail;D=EPA-HQ-OAR-2013-0602-0419.

Since the publication of EPA's legal conclusion, both EPA's Administrator and the Acting Assistant for the Office of Air and Radiation have made statements, on the record before Congress, reaffirming that EPA intends to adhere to this legal position.[11]

While EPA has generally stated that EPA "invites further input through public comment on all aspects of" its proposal, 79 Fed. Reg. 34,835, at no

---

11. The day after EPA published its legal conclusion, Representative Morgan Griffith of Virginia, a member of the House Energy & Commerce Committee, asked Assistant Administrator Janet McCabe whether it was correct that the "decision by the EPA" to regulate power plants under Section 112 "foreclosed the agency's ability to regulate . . . under Section 111." EPA's Proposed Carbon Dioxide Regulations for Power Plants: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce at 2:09 (June 19, 2014), *available at* http:// energycommerce.house.gov/hearing/epa%E2%80%99s-proposed-carbon-di oxide-regulations-power-plants. Assistant Administrator McCabe answered: "That is not correct." *Id.* at 2:10. Then on July 23, 2014, Senator Roger Wicker of Mississippi, a member of the Senate Environment and Public Works Committee, asked Administrator McCarthy if it was correct that "Section 111(d) says if it's regulated under 112 you can't regulate it" under that provision and "EPA has imposed extensive regulations on coal-fired power plants under Section 112." Oversight Hearing: EPA's Proposed Carbon Pollution Standards for Existing Power Plants: Hearing Before the S. Comm. on Environment & Public Works at 1:38 (July 23, 2014), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.Li veStream&Hearing_id=8655edd9-03ac-bb36-cab8-7913ec6c2b94. McCarthy answered "I think that the framing of the legal argument is incorrect, Senator." *Id.* at 1:38.

point has EPA indicated that it is uncertain of its legal conclusion that EPA has authority to proceed with a rulemaking under Section 111(d) for sources regulated under Section 112 or that EPA is still evaluating its position on this specific and important issue or that there is any possible basis for the rule other than Section 111(d). To the contrary, while EPA in several places *proposes* legal positions in the preamble relating to the implementation of the proposed rule, *see, e.g.*, *Id.* at 34,903 ("EPA *is proposing to interpret* CAA section 111 as allowing state CAA section 111(d) plans to include measures that are neither standards of performance nor measures that implement or enforce those standards. . . .") (emphasis added); the legal conclusion at issue here is stated conclusively. *Id.* at 34,853 ("The EPA *has the authority to regulate*, under CAA section 111(d). . . .").

2. EPA's Legal Conclusion Is Final Action under the Clean Air Act.

EPA's legal conclusion published in the Federal Register in a preamble signed by the Administrator and supported by statements and analysis in a legal memorandum represents a "final" action reviewable under Section 307.

a. EPA's Legal Conclusion Is Presumptively Final Because It Was Signed by the Administrator of EPA.

An agency's interpretation of the law is presumptively final if it is signed by the head of the agency. *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 702–03 (D.C. Cir. 1971). The preamble announcing EPA's legal conclusion was signed by the Administrator. 79 Fed. Reg. at 34,950. It is therefore presumptively a final action by the agency.

Indeed, it would be surprising if EPA would initiate a rulemaking of the magnitude proposed, which has imposed significant and immediate obligations on States and others to start planning now for the dramatic impacts of the proposed rule, effectively re-ordering the electric generating system of the United States on a very tight time frame, if EPA had not first concluded that it had legal authority to do so. However, with the commencement of litigation, EPA's counsel now argue that the agency's legal conclusion was merely "tentative." Motion to Dismiss at 20. But EPA cannot rebut the presumption of finality through "mere argument by its court counsel." *Nat'l Automatic Laundry*, 443 F.2d at 703. Rather, EPA must produce *evidence* that the statutory interpretation is not final despite bearing the signature of the head of the agency. As this Court has held, such evidence would include "an affidavit by the agency head" adducing that the matter "is still under meaningful refinement and development." *Nat'l Automatic Laundry*, 443 F.2d. at 703. While an affidavit alone is not always enough, *cf. Fidelity Television, Inc. v. FCC*, 502 F.2d 443, 448 (D.C. Cir. 1974) (holding agency action final even after agency provided affidavit asserting nonfinality), here EPA has failed to provide this Court any evidence at all to rebut finality.

To the contrary, EPA's actions since the publication of its legal conclusion "belie[] the claim that its interpretation is not final." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 479 (2001). When questioned by members of Congress, EPA leadership brushed aside assertions that EPA's legal conclusion may be wrong and should be reconsidered. *See supra* note 11

and accompanying text. EPA leadership's statements before Congress stand in stark contrast to unsupported arguments by counsel before this Court that the agency's legal conclusion is merely "tentative."

It also does not matter that EPA has stated that it will accept public comments on "all aspects of [its] proposal." 79 Fed. Reg. at 34,835. The agency is free to modify its legal positions, but this does not render them any less final at the time they are made, or any less fit for judicial review. *See Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (the "mere possibility that an agency might reconsider does not suffice to make an otherwise final agency action nonfinal"); *UAW v. Brock*, 783 F.2d 237, 248 (D.C. Cir. 1986) (EPA could "reverse its interpretation at some future date, but that does not change the reality that the current interpretation could quite likely be used" until that happens.); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) ("The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment."). This is especially true for review of EPA's actions under the Clean Air Act, because Congress has explicitly provided for judicial review of EPA's actions that are the subject of petitions for reconsideration even though such petitions would ordinarily render the actions nonfinal. *See* 42 U.S.C. § 7607(b)(1).

b. EPA's Legal Conclusion Meets the General Conditions for Finality Announced by the Supreme Court in *Bennett v. Spear*.

EPA's failure to rebut the presumption that the Administrator's signed preamble represents the agency's final action justifies denial of EPA's Motion to Dismiss. EPA's legal conclusion also satisfies both conditions of the general standard for finality described in *Bennett v. Spear*, 520 U.S. 154 (1997). In *Bennett*, the Court explained that, as a general matter, "two conditions must be satisfied for agency action to be 'final': First, the action must mark the consummation of the agency's decisionmaking process — it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 177–78 (citations omitted).

First, EPA marked the consummation of its decisionmaking process when it certainly and unequivocally announced its legal conclusion in the Federal Register and immediately acted on its assumed authority.

EPA's unequivocal legal conclusion "'mark[s] the consummation of the agency's decisionmaking process" and "'EPA has rendered its last word on the matter' in question." *Whitman*, 531 U.S. at 478. Indeed, as this Court held in *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, the initiation of an agency proceeding can, in and of itself, constitute final action establishing the agency's conclusion that it has legal authority to proceed. 707 F.2d 1485, 1489 n.30 (D.C. Cir. 1983) ("By filing a complaint . . . the Commission, for all practical purposes, made a final determination that such proceedings were within its

statutory jurisdiction. . . . Thus, with respect to the issue we address, the Commission has taken a definitive position."). EPA cited no authority for its rulemaking other than Section 111(d) and expressly relied on that provision as its only legal basis. Accordingly, even without an explicit statement from EPA that it has concluded that it has authority to doubly regulate existing power plants under Section 111(d), this Court would still have jurisdiction to review the agency's implicit conclusion of legal authority. EPA has done far more here, however, pronouncing in no uncertain terms that it has concluded that it can doubly regulate power plants.

EPA arrived at its legal conclusion following a decisionmaking process that was spurred by a Presidential order *mandating* that EPA proceed with rulemaking under Section 111(d). President Barack Obama, Memorandum on Power Sector Carbon Pollution Standards for the Administrator of the Environmental Protection Agency at § 1(b), Daily Comp. Pres. Doc., 2013 DCPD No. 00457 (June 25, 2013). That process resulted in the 104-page Legal Memorandum that proclaims "***we conclude*** that section 111(d) authorizes the EPA to establish section 111(d) guidelines for GHG emissions from EGUs." Legal Memorandum at 27 (emphasis added). And EPA published a preamble signed by the Administrator that declares "EPA ***has the authority*** to regulate, under CAA section 111(d), CO_2 emissions from EGUs. . . ." 79 Fed. Reg. at 34853 (emphasis added). As this Court found in *Appalachian Power*, where the agency publishes, after deliberation, in "certain" and "unequivocal" terms its legal conclusion, the agency's conclusion is final:

> The . . . condition [that the decision marks the consummation of the agency's decisionmaking process] is satisfied here. The "Guidance," as issued in September 1998, followed a draft circulated four years earlier and another, more extensive draft circulated in May 1998. . . . On the question whether States must review their emission standards . . . the Guidance is unequivocal—the State agencies must do so. On the question whether the States may supersede federal and State standards . . . the Guidance is certain—the State agencies must do so if they believe existing requirements are inadequate . . . .

208 F.3d at 1022; *see also Her Majesty the Queen v. EPA*, 912 F.2d 1525, 1530–32 (D.C. Cir. 1990) (finding "nothing tentative," "equivocal," or unreviewable in EPA's statement of its historic view and conclusion that "we *continue* to hold [that] view" (emphasis and alterations in original)); *Natural Res. Def. Council, Inc. v. EPA*, 643 F.3d 311, 319 (D.C. Cir. 2011) (finding that language "definitively interpreted" the Clean Air Act where EPA stated that it was "electing to consider alternative programs to satisfy" a Clean Air Act requirement but that "if EPA's preliminary assessment indicates that the alternative program is not less stringent, we would issue a notice in the Federal Register proposing to make such a determination").

This Court has also looked to whether EPA has acted on its conclusions to determine whether they were final. *See Natural Res. Def. Council, Inc. v. EPA*, 22 F.3d 1125, 1132–33 (D.C. Cir. 1994). In *Natural Res. Def. Council, Inc.*, for example, EPA announced in a series of documents its intention to conditionally approve certain state submittals under the Clean Air Act. *Id.* at 1132. While EPA asserted that its decision was not yet final, and so unreviewable, this Court found that EPA's own actions relying on that

authority showed otherwise. "By granting such approval," this Court held, "the EPA has already caused the very effect that the NRDC claims is outside the agency's statutory authority . . . . Thus, the documents at issue reflect a final agency decision." *Id.* at 1133. EPA's legal conclusion here is similarly final because EPA has not only concluded that EPA has authority to mandate state-by-state standards for sources under Section 111(d) that are subject to Section 112 regulations, EPA has initiated a rulemaking to issue a mandate under that authority at the same time, "already caus[ing] the very effect" that is outside EPA's Clean Air Act authority. *Id.*

When, as here, the agency has staked out a certain and unequivocal legal position after considered deliberation, it is unquestionably final action. There is "nothing tentative about the EPA's interpretation" because "it is unambiguous and devoid of any suggestion that it might be subject to subsequent revision." *Her Majesty the Queen*, 912 F.2d at 1531–32. The language in the Federal Register publication and memorandum "clearly and unequivocally rejected" the contention that EPA does not have authority to doubly regulate power plants, and EPA's subsequent statements in response to Congressional questioning make clear that EPA's deliberations have concluded. *Id.*

It is irrelevant that EPA may get comments in the proposed rulemaking on the legal conclusion. "The mere possibility that an agency might reconsider in light of . . . invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal." *Sackett*, 132 S.Ct. at 1372; *see also Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1066 (D.C. Cir. 2014)

(finding no merit in EPA's argument that its directive was not final because "EPA's deliberations surrounding the matter are ongoing" because "[a]n agency action may be final even if the agency's position is 'subject to change' in the future") (internal quotations omitted). This is especially so where, as here, the agency has already brushed off efforts by Congress to question the agency's legal conclusion. *Cf. Sackett*, 132 S.Ct. at 1372.

Second, EPA's legal conclusion has legal consequences because it expansively redefines the scope of EPA's Clean Air Act authority and subjects numerous regulated sources to the threat of double regulation.

There is little question that EPA's expansion of its own authority under the Clean Air Act gives rise to significant legal consequences. EPA's legal conclusion does not address a hypothetical issue of no immediate significance. *Cf. Nat'l Automatic Laundry*, 443 F.2d at 699. Rather, it addresses the scope of EPA's entire Section 111(d) program, bearing "direct and appreciable legal consequences" for both the regulated community and those, like Murray Energy Corporation, who depend on them, States, and EPA itself. *Bennett*, 520 U.S. at 178; *see also Fund for Animals, Inc. v. Bureau of Land Mgmt.*, 460 F.3d 13, 29 (D.C. Cir. 2006) (Griffith, J., concurring in part and dissenting in part) ("Time and again, we have turned, ultimately, to the impact guidance has on an agency, a petitioner, or both. Where agency guidance alters the obligations of either, we have found final action." (internal citations omitted)).

EPA's legal conclusion fundamentally "alter[s] the legal regime" to which existing coal-fired power plants are subject. *Bennett*, 520 U.S. at 178.

Until EPA's determination, power plants subject to federal Section 112 standards knew that they could not be subject to federally mandated state-specific performance standards under Section 111(d). By issuing its legal conclusion, EPA has removed that certainty and left in place the risk that facilities can be subject to inconsistent, expanded, and more stringent regulation. Simultaneously, EPA initiated its Section 111(d) rulemaking to mandate state-by-state standards for greenhouse gases, confirming that EPA seeks to impose broader and more expensive regulatory burdens on the nation's existing coal-fired power plants. EPA's legal conclusion is also not limited to impacting power plants and coal companies, however. By concluding that it has authority to require state standards for sources already regulated under Section 112, EPA has changed the legal landscape for all source categories regulated under Section 112 and the States implementing the Act.

EPA's legal conclusion also "alter[s] the legal regime" to which the agency itself will be subject. *Bennett*, 520 U.S. at 178. By recasting the scope of Section 111(d), EPA has announced the conclusion that the agency is not just *authorized* to doubly regulate existing sources, the agency will be *required* to do so for all sources subject to Section 111(b) standards. *See* 79 Fed. Reg. at 34,844. Such a mandatory obligation under the Clean Air Act would be enforceable through citizen suits in district courts. *See* 42 U.S.C. § 7604(a)(2).

EPA's interpretation of its own authority under the Clean Air Act is fundamentally an agency action from which "legal consequences will flow" and from which the "rights and obligations" of numerous parties, from EPA

itself to the regulated community and beyond, will be impacted. *Bennett*, 520 U.S. at 178 (quotation omitted). EPA's announcement of a legal interpretation that expands the fundamental scope of its authority under the Section 111(d) program to extend that program to all existing sources that are already subject to national standards promulgated under Section 112, the second *Bennett* general condition for finality is easily satisfied.

* * *

EPA "rendered its last word on the matter in question" when EPA concluded that the agency has the authority to mandate state standards under Section 111(d) for power plants that are already subject to a national emission standard issued under Section 112. *Whitman*, 531 U.S. at 478 (quotation omitted). That legal conclusion is final action reviewable in this Court now. Accordingly, EPA's Motion to Dismiss should be denied.

CONCLUSION

For the foregoing reasons, Petitioner Murray Energy Corporation respectfully requests that this Court issue a writ for extraordinary relief prohibiting EPA from proceeding with its illegal rulemaking and vacate EPA's erroneous legal conclusion that it has the authority to doubly regulate sources under Section 111(d) and 112 of the Clean Air Act.

Dated: December 15, 2014

Respectfully submitted,

/s/ Geoffrey K. Barnes

Geoffrey K. Barnes
J. Van Carson
Wendlene M. Lavey
John D. Lazzaretti
Robert D. Cheren
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 479-8646
geoffrey.barnes@squirepb.com

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing OPENING BRIEF OF PETITIONER complies with the type-volume limitations of Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and this Court's order of November 13, 2014, limiting this brief to 14,000 words. I certify that this brief contains 13,905 words, as counted by the Microsoft Word software used to produce this brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

/s/ Geoffrey K. Barnes

Geoffrey K. Barnes

ORAL ARGUMENT NOT YET SCHEDULED

No. 14-1112 & No. 14-1151

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

No. 14-1112: IN RE MURRAY ENERGY CORPORATION

Petitioner.

No. 14-1151: MURRAY ENERGY CORPORATION

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and REGINA A. MCCARTHY, Administrator, United States Environmental Protection Agency

Respondents.

On Petition for Writ of Prohibition & On Petition for Judicial Review

PETITIONER STANDING ADDENDUM

Geoffrey K. Barnes
J. Van Carson
Wendlene M. Lavey
John D. Lazzaretti
Robert D. Cheren
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 479-8646
geoffrey.barnes@squirepb.com

Counsel for Murray Energy Corporation

December 15, 2014

CONTENTS

DECLARATION OF ROBERT E. MURRAY

BEFORE ME, the undersigned authority, personally appeared Mr. Robert E. Murray, who after being duly sworn states as follows:

1. My name is Robert E. Murray. I am the Founder, Chairman, President, and Chief Executive Officer of Murray Energy Corporation.

2. I am the son of a coal miner, and began working in the coal mines at the age of 17.

3. I received a Bachelor's Degree of Engineering in Mining from The Ohio State University, completed the advanced management program at the Harvard School of Business, and am a registered Professional Engineer.

4. I am serving or have served on the boards of the National Mining Association, American Coal Foundation, National Coal Council, Ohio Coal Association, and Pennsylvania Coal Association. I am also the past president and a trustee of the American Institute of Mining, Metallurgical and Petroleum Engineers, Inc. and the Society for Mining, Metallurgy and Exploration, Inc., and past president of the Rocky Mountain Coal Mining Institute.

5. Prior to founding Murray Energy Corporation, I was President and Chief Executive Officer of The North American Coal Corporation, which is now part of Nacco Industries, Inc.

6. Murray Energy Corporation began in 1988 with the purchase of a single continuous mining operation in the Ohio Valley mining region with an

annual output of approximately 1.2 million tons per year.

7. Today, Murray Energy Corporation is the largest privately-held coal company in the United States, the largest underground coal mine operator in the United States, and the fifth largest coal producer in the United States determined by combined annual coal production.

8. In 2014, Murray Energy Corporation will produce approximately 65 million tons of coal from twelve active coal mining complexes. We currently employ approximately 7,500 people.

9. Murray Energy Corporation's operations are located in six States: Illinois, Kentucky, Ohio, Pennsylvania, Utah and West Virginia.

10. Murray Energy Corporation also owns or controls approximately 2.0 billion tons of proven or probable coal reserves in the United States, strategically located near our customers, near favorable transportation, and high in heat value.

11. Additionally, Murray Energy Corporation owns about 80 subsidiary and support companies directly or indirectly related to the domestic coal industry, including numerous coal transportation facilities such as coal transloading facilities, harbor boats, towboats and barges.

12. The vast majority of the coal produced by Murray Energy Corporation is supplied to coal-fired electric utility generating units (i.e., "EGUs" or power plants), providing affordable energy to households and

businesses across the country.

13. In 2013-2014, we supplied coal from our mines to coal-fired EGUs located in sixteen (16) States: Alabama, California, Delaware, Florida, Georgia, Indiana, Kentucky, Mississippi, New Hampshire, New Jersey, North Carolina, Pennsylvania, Utah, West Virginia, and Wisconsin. Many of our customers operate EGUs throughout the United States.

14. I am familiar with the Administration's proposed plan to cut carbon emissions at coal-burning power plants, published by EPA on June 18, 2014 (*Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 40 CFR Part 60, Subpart UUUU*).

15. EPA's plan expressly contemplates the shifting of fuel at power plants from coal to other fossil fuels, and the shifting of energy supply from fossil fuel power plants to nuclear power plants and renewable energy sources such as wind and solar. Thus, EPA's plan calls for the shutting down and/or conversion of even more coal-fired power plants than already planned as a result of this piling on of regulation after regulation directly aimed at coal.

16. In fact, the Preamble to EPA's proposed rule states that, due to the rule, it estimates 24–32 gigawatts of additional coal-fired EGU retirements through 2020. EPA states that the rule will result in a decline in coal production for use by the power sector by roughly 25 to 27 percent in 2020 from base case levels. Further, according to EPA, the use of coal by the power sector will decrease roughly 30 to 32 percent in 2030. Based on other reports,

we suspect EPA is understating its predicted impact. But whether EPA is right or wrong in the detail, the intent of the rule is clear – reduce the use of coal.

17. Coal production in the central Appalachian region is already down approximately 43% compared to 2008 levels. The American Coalition for Clean Coal Electricity ("ACCCE") recently concluded that 421 coal-fired power plants in the United States are being shut down or converted to a different fuel source. This represents nearly 63,000 megawatts of electric generating capacity. Of this total, ACCCE found that 299 are being shut down and 39 are being converted due to EPA policies, for a total of 338 units representing over 51,000 megawatts of electric generating capacity.

18. SNL Energy reported in October 2014 that more than 12,000 megawatts of coal-fired capacity in the United States has converted or is slated to convert to alternative fuel sources between 2011 and 2023, and that the top NERC regions in terms of coal conversion are ReliabilityFirst and SERC Reliability Corp., which are the two NERC regions that include much of our customer base including Ohio, West Virginia and Kentucky.

19. SNL further reported that nearly 25,000 megawatts of coal capacity has been permanently retired since 2009, with about that much scheduled to be retired between now and 2022, noting that "the influx of coal unit conversion in the U.S. power sector heaps more pressure on coal producers already facing a dwindling customer base caused by the permanent retirement of a large number of coal-fired units."

20. Also in October 2014, the Institute for Energy Research ("IER") estimated that 72 gigawatts of generating capacity have already retired or are set to retire due to EPA regulations, approximately 7 times the predicted closure rate by EPA in its recent air regulations, without even taking into account EPA's proposed rules aimed at existing power plants.

21. The Electric Reliability Council of Texas ("ERCOT") reported in November 2014 that the proposed rule "will result in the retirement of between 3,300 MW and 8,700 MW of coal generation capacity" in Texas. This is up to half of the existing coal capacity in the ERCOT region.

22. The Salt River Project Agricultural Improvement and Power District's Coronado Generating Station ("SRP"), SRP recently stated in filings with EPA that "EPA's planned carbon dioxide (CO_2) performance standards for existing coal- and natural gas-fired electric generating units … will likely require Coronado to cease operations in 2020. The publication and pendency of the 111(d) Proposal create enormous uncertainty regarding the future viability of Coronado and whether installation of costly new emission controls to satisfy [best available retrofit technology, or BART] requirements … would be reasonable or economically feasible." SRP predicts the forced shutdown of its two coal-fired units by 2020. SRP must make decisions about massive additional capital expenditure now in order to meet BART deadlines, and if the 111(d) rule is going to force a shutdown by 2020, SRP stands to lose significant investment monies if it moves forward with BART compliance.

23. As a major supplier of coal to numerous power plants in the United States, Murray Energy's regularly tracks the analyses, studies and reports published by SNL Energy, ACCCE, IER and others, in order to plan for our survival in the face of increasingly stringent EPA regulation. We develop our marketing and business development plans based in part on this type of information; thus, announced conversions and shutdowns are affecting our plans today.

24. Specific examples of the direct impact upon Murray Energy's business include the following power plants, each of which is/was a customer of ours and has been shut down or slated for closure: First Energy Corporation's Hatfield Ferry Power Station, Mitchell Power Station, and Eastlake Plant; NRG's Indian River Generating Station; Appalachian Power Company's Philip Sporn Plant; GDF Suez Energy North America's Mount Tom Station; and Dairyland Power Cooperative's Alma Generating Station.

25. Indiana Power & Light, to whom Murray Energy has supplied coal for its coal-fired EGUs, recently announced that it will convert the last of the coal-fired units at its Harding Street Generation Station to natural gas in 2016. Reportedly, this last conversion (and prior conversions) is a direct result of EPA's increasingly stringent regulation, including the double regulation of the power plant industry under Section 111(d) of the Clean Air Act, and the Indiana Utility Commission advised that future rate increases due to Section 111(d) and other environmental rules would not be forthcoming, such that

future investment costs would be at IP&L's risk.

26. While we are not in a position to relay specific warnings from our customers of planned shutdowns, conversions or curtailments – for confidentiality reasons – Murray Energy's business is impacted even when coal-fired units not supplied with coal by Murray Energy are converted or shuttered. Basic concepts of supply and demand in the marketplace dictate that a decline in demand has a downward effect on pricing.

27. Clearly, the shift away from coal has and will have a direct and significant impact on the primary business of Murray Energy Corporation.

28. Based on the significant comments submitted by many States in the Administrative Record for the proposed rule, and/or in related litigation, and in my own conversations with various States, it is also clear that the re-writing of energy policy in the United States by EPA is underway right now, even though the proposed rule has not yet been promulgated in final form.

29. Murray Energy Corporation and its employees depend upon the presence of a stable and continuing domestic market for coal. Every coal fired power plant that is shut down (or converted) affects the financial bottom line of Murray Energy Corporation and enough shutdowns threaten the existence of Murray Energy Corporation and the well paid and well benefited jobs of our 7,500 employees.

Further Affiant sayeth naught.

By: Robert E. Murray

Robert E. Murray, Affiant

Subscribed and sworn to me this 11th day of December, 2014.

Gary M. Broadbent

Notary Public

NOTARY PUBLIC STATE OF OHIO

GARY M. BROADBENT
Notary Public, State of Ohio
My Commission Has No Expiration Date

CERTIFICATE OF SERVICE

I hereby certify that the foregoing OPENING BRIEF OF PETITIONER has been served electronically by Petitioner, Murray Energy Corporation, through the Court's CM/ECF system on all ECF registered counsel.

Dated: December 15, 2014

/s/ Geoffrey K. Barnes

Geoffrey K. Barnes