No. 14-1112

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

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In Re: Murray Energy Corporation,

Petitioner.

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On Petition for Extraordinary Writ to the
United States Environmental Protection Agency

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# RESPONSE TO PETITION

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November 3, 2014

## Certificate as to Parties, Rulings, and Related Cases

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

**Parties and Amici:**

All parties and amici appearing in this Court are listed in the Petition filed by Murray Energy Corporation, except for the following Amici for Respondent:

State of New York
State of Connecticut
State of Delaware
State of Maine
State of New Mexico
State of Oregon
State of Rhode Island
State of Vermont
State of Washington
Commonwealth of Massachusetts
District of Columbia
Natural Resources Defense Council
Environmental Defense Fund
Sierra Club
Clean Air Task Force

**Rulings under Review**:

Petitioner challenges a non-final EPA rulemaking, which has thus far resulted in a proposed rule entitled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34, 380 (June 18, 2014).

**Related Cases**:

There are two cases pending in this Circuit that qualify as "related cases" under the definition set forth in Circuit Rule 28(a)(1)(C), because they involve the same parties and the same or similar issues:

(1) Murray Energy Corp. v. EPA, No. 14-1151 (D.C. Cir. filed Aug. 15, 2014), wherein the same Petitioner again challenges the proposed rule identified above, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34, 380 (June 18, 2014).

(2) West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Aug. 1, 2014), wherein all but one of the Amici for Petitioner here (specifically, the states of West Virginia, Alabama, Kentucky, Nebraska, Ohio, Oklahoma, South Carolina and Wyoming) have petitioned the Court to enjoin EPA from continuing and finalizing the same rulemaking challenged here, based on the same argument presented by Petitioner and amici here.

## Tables of Authorities

### CASES



*Authorities chiefly relied upon are marked with an asterisk.

**STATUTES**

**CODE OF FEDERAL REGULATIONS**



**FEDERAL REGISTERS**



**LEGISLATIVE HISTORY**

## Table of Contents

## Introduction

This petition is one volley in a barrage of premature litigation trying to stop EPA from completing a rulemaking addressing carbon dioxide ($CO_2$) emissions from existing power plants under 42 U.S.C. § 7411(d). Indeed, Petitioner Murray Energy Corporation has filed a second petition asking the Court to bar the rulemaking,[1] and amici supporting Petitioner here have filed their own petition to the same end.[2]

In this particular variation on that theme, Petitioner asks the Court for an extraordinary writ "prohibit[ing]" the section 7411(d) rulemaking under the All Writs Act, 28 U.S.C. § 1651(a). Petition for Writ (ECF No. 1498341) ("Pet.") at 1-2, 29. In so requesting, Petitioner asks this Court to do something that is indeed truly extraordinary: to review a rulemaking before final action is taken, and stop EPA from completing its administrative process. The issuance of a writ for that purpose is neither within the Court's jurisdiction nor appropriate. Petitioner can raise its concerns about the section 7411(d) rulemaking with EPA during the comment period, and can bring any remaining issues before this Court once EPA takes final action.

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[1] Murray Energy Corp. v. EPA, No. 14-1151 (D.C. Cir. filed Aug. 15, 2014) (challenging the "initiat[ion of] a rulemaking . . . in violation of the Clean Air Act"). Murray has also sued in district court to enjoin EPA from issuing CAA regulations impacting the coal industry until it evaluates their effect on jobs. See Murray Energy Corp. v. McCarthy, No. 5:14-cv-00039-JPB (N.D. W. Va. filed Mar. 24, 2014).

[2] West Virginia v. EPA, No. 14-1146, ECF No. 1505986 at 4-5 (D.C. Cir. filed Aug. 1, 2014) (asking Court to "enjoin EPA" from "continuing the present ongoing comment period" and "finalizing a . . . rule under Section [74]11(d)").

## Jurisdiction and Standing

As explained in Section I below, the Court lacks jurisdiction because Petitioner challenges non-final agency action, and the All Writs Act, 28 U.S.C. § 1651(a), does not enlarge the Court's jurisdiction. As explained in Section II below, Petitioner lacks standing because it has failed to establish an injury that is concrete; actual or imminent, as opposed to conjectural or speculative; and not caused by a third party.

## Issues Presented

(1) Whether this Court has jurisdiction to issue a writ of prohibition to stop an ongoing rulemaking before EPA has the opportunity to take final action;

(2) Whether Petitioner has standing; and

(3) Whether the Court should take the truly extraordinary step of prohibiting an ongoing rulemaking based on Petitioner's interpretation of an ambiguous statutory provision.

## Background

### I. THE CLEAN AIR ACT

The Clean Air Act ("Act") was enacted in 1970 to "[r]espond[] to the growing perception of air pollution as a serious national problem." Ala. Power Co. v. Costle, 636 F.2d 323, 346 (D.C. Cir. 1979). The Act, which set out a comprehensive program for air pollution control through a system of shared federal and state responsibility, "addressed three general categories of pollutants emitted from stationary sources":

(1) "criteria pollutants[] for which air quality criteria and national ambient air quality standards are established under sections [7408 and 7409] of the Act";

(2) "pollutants listed as hazardous pollutants under section [7412] and controlled under that section"; and

(3) "pollutants that are (or may be) harmful to public health or welfare but are not or cannot be controlled under" the hazardous pollutant program or through national ambient air quality standards.

40 Fed. Reg. 53,340 (Nov. 17, 1975) (EPA implementing regulations).

Pollutants falling into the last of these categories are subject to regulation under 42 U.S.C. § 7411, which creates a program for the establishment of "standards of performance" for categories of stationary sources of such pollutants. Section 7411(b) requires EPA to promulgate standards of performance for *new* sources of pollutants, which are federal standards that must be met by new sources across the country. Once EPA has established new source standards for a source category, section 7411(d) provides that EPA will promulgate regulations requiring *states* to establish standards of performance for existing sources through a process that includes state rulemaking action followed by EPA review and (if the plan is "satisfactory") approval.

## II. THE 1990 AMENDMENTS

The Act was amended extensively in 1990 to address EPA's slow progress in regulating hazardous air pollutant emissions under section 7412. See New Jersey v. EPA, 517 F.3d 574, 578 (D.C. Cir. 2008) (in the first eighteen years of the Act, "EPA

listed only eight [hazardous air pollutants]" and "addressed only a limited selection of possible pollution sources"). To that end, Congress, inter alia, established a list of over 180 hazardous air pollutants, which EPA must periodically review and revise; set criteria for listing different "source categories" of such pollutants; and required EPA to "establish[] emissions standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation." 42 U.S.C. § 7412(a), (b)(1) & (2), & (d)(1). These changes were intended to "eliminate[] much of EPA's discretion" in regulating hazardous pollutant emissions. 517 F.3d at 578.

In the course of overhauling the regulation of hazardous air pollutant emissions under section 7412, Congress also amended section 7411(d). In doing so, however, the chambers passed two differing amendments to 42 U.S.C. § 7411(d)(1) – one from the House bill and one from the Senate bill – that were never reconciled in conference. The House amendment replaced a cross-reference to section 7412(b)(1)(A), eliminated by the 1990 Amendments, with the phrase "emitted from a source category which is regulated under section [7412]." Pub. L. No. 101-549, § 108(g), 104 Stat. 2467 (1990). The Senate amendment, however, replaced the cross-reference to old section 7412(b)(1)(A) with a cross-reference to new section 7412. Pub. L. No. 101-549, § 302(a), 104 Stat. 2574 (1990). Both amendments were included in the Statutes at Large, which supersedes the U.S. Code if there is a conflict. 1 U.S.C. §§ 112 & 204(a); Five Flags Pipe Line Co. v. Dep't of Transp., 854 F.2d

1438, 1440 (D.C. Cir. 1988) ("[W]here the language of the Statutes at Large conflicts with the language in the United States Code . . . the Statutes at Large controls").

## III. THE PROPOSED RULE

In June 2013, the President announced his "Climate Action Plan," describing action the Administration intended to take to address climate change. As part of that plan, the President directed EPA to work expeditiously to complete $CO_2$ emission standards for fossil fuel-fired electric utility generating units, or "power plants." Power plants emit more greenhouse gases than any other stationary source category in the United States, generating approximately 40 percent of all anthropogenic $CO_2$ emissions in the United States. 77 Fed. Reg. 22,392, 22,395 (Apr. 13, 2012).

In accordance with the President's directive, EPA proposed performance standards for new power plants on January 8, 2014.[3] 79 Fed. Reg. 1430 (Jan. 8, 2014). On June 18, 2014, EPA proposed rate-based emissions guidelines for states to follow in developing state plans to address $CO_2$ emissions from existing power plants pursuant to 42 U.S.C. § 7411(d).[4] 79 Fed. Reg. 34,830 (June 18, 2014) ("Proposed Rule"). Petitioner challenges the latter proposal.

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[3] EPA previously proposed $CO_2$ emission standards for new power plants in 2012, but withdrew the proposed rule after taking comment. See 77 Fed. Reg. 22,392 (Apr. 13, 2012) (proposal); 79 Fed. Reg. 1352 (Jan. 8, 2014) (withdrawing proposal).

[4] EPA also proposed standards for modified and reconstructed sources on this date. Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units Proposed Rules, 79 Fed. Reg. 34,959 (June 18, 2014).

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

EPA has solicited comments on all aspects of the Proposed Rule. 79 Fed. Reg. at 34,830. The comment period has already been extended, and is now scheduled to end on December 1, 2014. 79 Fed. Reg. 57,492 (Sept. 25, 2014). Although the close of the comment period is still a month away, more than 20,000 comments have been submitted so far. EPA also held four public hearings regarding the Proposed Rule in July 2014, 79 Fed. Reg. at 34,830, and has conducted hundreds of meetings with stakeholders. EPA will be required to respond to all significant written or oral comments on the proposal when taking final action, see 42 U.S.C. § 7607(d)(6)(A)(ii), which it intends to do in June 2015. 79 Fed. Reg. at 34,833.

## Summary of Argument

The Court lacks jurisdiction because the section 7411(d) rulemaking is not final agency action, and the All Writs Act does not enlarge the Court's jurisdiction.

Petitioner lacks standing because its claimed injury is not concrete or actual, but rather entirely conjectural, and Petitioner is not the object of the proposed rule.

Even if the Court has jurisdiction and Petitioner has standing, a writ of prohibition should not issue because there are no truly extraordinary circumstances justifying intervention into an ongoing agency rulemaking. Moreover, the statutory provision at issue here is not clear; rather, it is plainly ambiguous.

## Argument

### I. THE COURT LACKS JURISDICTION TO ISSUE A WRIT OF PROHIBITION TO STOP AN ONGOING RULEMAKING.

Petitioner bears the burden of demonstrating that the Court has subject-matter jurisdiction. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). Petitioner's invocation of the All Writs Act does not change that requirement. See In re Tennant, 359 F.3d 523, 527 (D.C. Cir. 2004) ("The requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception.'") (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998)).

Petitioner cannot meet its jurisdictional burden here. Rather, it is well established that there is no jurisdiction to review a proposed rule or ongoing rulemaking, and that the All Writs Act does not enlarge the Court's jurisdiction. Accordingly, the Court's inquiry should begin and end with the conclusion that it lacks jurisdiction to issue the requested writ.

#### A. The Court Lacks Jurisdiction Over an Ongoing Rulemaking.

It is firmly established that this Court does not have jurisdiction to entertain a challenge to a proposed rule or ongoing rulemaking. Rather, once EPA takes final

action on the rulemaking, Petitioner may then bring a challenge before the Court.

1. An ongoing rulemaking is not final action subject to review.

Under section 7607(b)(1) of the Act, this Court has jurisdiction over (1) EPA action "promulgating . . . any standard of performance or requirement under [42 U.S.C. § 7411]" or "any other nationally applicable regulations," or (2) any other EPA "final action." 42 U.S.C. § 7607(b)(1). The section 7411(d) rulemaking is neither.

First, the Proposed Rule is not a "promulgat[ed]" standard, requirement, or regulation. 42 U.S.C. § 7607(b)(1). The Act's general rulemaking provision distinguishes between "proposed rules" and "promulgated rules." "Proposed rules" are to be made available for public comment in the Federal Register and must include a notice specifying the period available for public comment. Id. The Proposed Rule meets these criteria. 79 Fed. Reg. at 34,830. "Promulgated rules," in contrast, are issued only *after* the public comment period and must be accompanied by "an explanation of the reasons for any major changes . . . from the proposed rule," and "a response to each of the significant comments, criticisms, and new data submitted." 42 U.S.C. § 7607(d)(6)(A)(ii), (B). EPA has published no such document regarding $CO_2$ emissions from existing power plants. Accordingly, the Proposed Rule is plainly a proposed, rather than promulgated, rule for purposes of section 7607(b)(1).

Second, neither the Proposed Rule, nor any other aspect of the ongoing rulemaking, constitutes a "final agency action" subject to review by this Court under 42 U.S.C. § 7607(b)(1). To be "final," an agency action must (1) "mark the

consummation of the agency's decisionmaking process" and "not be of a merely tentative or interlocutory nature," and (2) be an action "by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal quotations and citations omitted); see Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 478 (2001) (applying Bennett to determine whether EPA policy was final action).

Here, EPA has taken no action representing "the consummation of the [Administrator's] decision-making process." Bennett, 520 U.S. at 177-78. Because the ongoing administrative process that Petitioner asks this Court to "prohibit" has, to date, resulted in only a *proposed* rule, by definition it does not represent EPA's final determination in regard to any of the substantive issues implicated. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 845 (1986) ("[i]t goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute"). The Proposed Rule itself is plainly "interlocutory," id., as it necessarily precedes the issuance of a final rule. The Proposed Rule is also "tentative," in that EPA has sought comments on all aspects of it, 79 Fed. Reg. at 34,830, and may modify the rule in any number of ways based on those comments. For example, it would be within EPA's discretion to issue a supplemental proposal, modify the Proposed Rule, or even withdraw the Proposed Rule – as EPA in fact did in regard to its 2012 proposal to set $CO_2$ emission standards for new power plants. See n.3, supra. Thus, there has been no "consummation" of the decision-making process, and the

agency should not be forced to litigate an issue before it has had the opportunity to hear the views of all interested parties, and amend its position accordingly.

The second Bennett criterion also is not satisfied here, because the Proposed Rule does not determine rights or obligations or impose binding legal consequences. Bennett, 520 U.S. at 178. Rather, it is only the actual "promulgation" of a final rule containing state-specific emissions guidelines that would legally obligate states by requiring them to submit state plans. Therefore, Petitioner's challenge to the rulemaking must fail because there is as yet no final agency action subject to review. If and when EPA actually promulgates emission guidelines under section 7411(d), Petitioner will then have a full opportunity to challenge such action in this Court.

2. This Court routinely rebuffs challenges to ongoing rulemakings.

This Court "has never considered an agency decision to continue the rulemaking process to be a 'final agency action,' nor has any court held that we have jurisdiction to review such a decision under Section 7607(b)(2)." Portland Cement Ass'n v. EPA, 665 F.3d 177, 194 (D.C. Cir. 2011). Rather, this Court and others have consistently rebuffed such challenges at the jurisdictional stage. See, e.g., Fla. Power & Light Co. v. EPA, 145 F.3d 1414, 1418-19 (D.C. Cir. 1998) (statements in proposed rule are not subject to review because "the action at issue is merely a *proposed*, not a final, rulemaking" and "EPA is still in the process of clarifying" its position); United States v. Springer, 354 F.3d 772, 776 (8th Cir. 2004) ("it is well-settled that proposed regulations . . . have no legal effect") (internal quotation omitted); Carlton v. Babbitt,

147 F. Supp. 2d 4, 5-8 (D.D.C. 2001) (dismissing challenge to proposal to change the classification of grizzly bear populations under the Endangered Species Act, holding that such action is not reviewable until the agency "promulgate[s] a final rule").

Most analogous, however, are two recent challenges to rulemakings concerning $CO_2$ emission standards for *new* power plants. First, in Las Brisas Energy Center, LLC v. EPA, this Court declined to entertain industry challenges to the since-withdrawn 2012 proposal to regulate $CO_2$ emissions from new power plants under section 7411, stating: "The challenged proposed rule is not final agency action subject to judicial review." Order, No. 12-1248, 2012 WL 10939210, at *1 (D.C. Cir. Dec. 13, 2012) (citing 42 U.S.C. § 7607(b)(1) and Bennett, 520 U.S. at 177-78).

Then, a district court recently rejected Nebraska's challenge to EPA's 2014 proposal to regulate $CO_2$ from new power plants. Nebraska v. EPA, 4:14-cv-3006, 2014 WL 4983678 (D. Neb. Oct. 6, 2014). Nebraska argued that, by proposing the rule, EPA had violated the Energy Policy Act of 2005, 119 Stat. 594. Id. at *1. The court dismissed the challenge as an "attempt to short-circuit the administrative rulemaking process [that] runs contrary to basic, well-understood administrative law. Simply stated, the State cannot sue in federal court to challenge a rule that the EPA has not yet actually made." Id. Applying Bennett, the court found it unnecessary to venture beyond the first step because "[t]he Proposed Rule is, on its face, an interlocutory and tentative step in an ongoing process." Id. at *4. It concluded: "EPA gets first crack at deciding whether the Proposed Rule should be withdrawn or

adopted before anyone can demand that a federal court act on it." Id. at *5.

Petitioner is in no different position than the *Las Brisas* or *Nebraska* petitioners, and the action it demands – that the Court stop an ongoing rulemaking – is no more permissible or appropriate here than in those cases. Petitioner seeks to distinguish itself by requesting a writ of prohibition but, as discussed below, Petitioner's invocation of the All Writs Act cannot transform its challenge into more than what it is: an attempt to get the Court to take action that lies outside its jurisdiction.

### B. The All Writs Act Does Not Fill the Jurisdictional Gap.

Petitioner cannot overcome the non-final nature of the action it challenges by invoking the All Writs Act, which does not enlarge the Court's jurisdiction, but only enables a court to act "in aid of" its existing jurisdiction in narrow circumstances, where there is no other adequate remedy at law.

#### 1. An Extraordinary Writ May Only Issue "In Aid Of" a Court's Jurisdiction, Not to "Enlarge" that Jurisdiction.

The All Writs Act, 28 U.S.C. § 1651(a), "is not itself a grant of jurisdiction." Tennant, 359 F.3d at 527. While the Act "authorizes employment of extraordinary writs, it confines the authority to the issuance of process 'in aid of' the issuing court's jurisdiction" and "does not enlarge that jurisdiction." Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999); see also Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 76 (D.C. Cir. 1984) ("TRAC") ("section 1651 does not expand the jurisdiction of a court"). Thus, the All Writs Act "can never provide jurisdiction to a court that does

not and would not otherwise have jurisdiction." Ayuda, Inc. v. Thornburgh, 948 F.2d 742, 755 (D.C. Cir. 1991) (vacated and remanded on other grounds).

Here, entertaining an early challenge to the section 7411(d) rulemaking would not be "in aid of" this Court's jurisdiction, but rather would "enlarge" it. Goldsmith, 526 U.S. at 534-35. As discussed above, it is a fundamental principal of administrative law that courts only have jurisdiction to review final agency action. Allowing Petitioner to obtain review of a non-final rule would allow parties to bypass the limitations on judicial review imposed by Congress in 42 U.S.C. § 7607(b)(1), thereby enlarging the Court's jurisdiction. Ayuda, 948 F.2d at 755 (court "may not use the All Writs Act to exercise jurisdiction over an agency . . . before . . . the agency's action is final. Otherwise . . . courts could easily circumvent those jurisdictional bars.").

Moreover, premature review of the ongoing rulemaking would impede, rather than aid, the Court's exercise of its jurisdiction, as it places the Court in the position of having to review an agency position that has not been fully developed, without the benefit of an administrative record. See TRAC, 750 F.2d at 79 ("Postponing review until relevant agency proceedings have been concluded 'permits an administrative agency to develop a factual record, to apply its expertise to that record, and to avoid piecemeal appeals.'") (quoting Ass'n of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1156 (D.C. Cir. 1979)). Once a final rule issues, the Court can consider all challenges to that rule with the benefit of a complete record and a fullydeveloped agency analysis.

2. An Extraordinary Writ Is Only Available Where There Is No Other Adequate Remedy at Law.

The All Writs Act is also unavailable where there are "other, adequate remedies at law." Goldsmith, 526 U.S. at 537; TRAC, 750 F.2d at 78 ("Mandamus is an extraordinary remedy that is not available when review by other means is possible"). Here, the Clean Air Act provides a specific remedy for an allegedly "ultra vires" rule: review in accordance with the Act's judicial review provision, 42 U.S.C. § 7607(b)(1), once the rule is final. Thus, the Act provides an "other, adequate remedy at law," and so review under the All Writs Act is unavailable.

Petitioner suggests that review of the agency's final action is not adequate here because states and industry will have to expend significant resources before the rule is finalized. Pet. at 25-26. As discussed in Section II, that claim is unsubstantiated. But in any event, similar concerns have been found insufficient to justify issuing a writ where the challenged action will be reviewable in the normal course. See Public Util. Comm'r of Or. v. Bonneville Power Admin., 767 F.2d 622, 630 (9th Cir. 1985) (rejecting argument that "delay . . . will cause . . . irreparable harm" justified writ).

3. An Extraordinary Writ May Issue Only in Certain Circumstances.

Because an extraordinary writ may only issue "in aid of" a court's jurisdiction, courts have entertained petitions for a writ only in certain narrow categories of circumstances, otherwise concluding that jurisdiction is lacking. Petitioner's challenge to the section 7411(d) rulemaking fits into none of those categories.

First, "[t]he traditional use of the writ in aid of appellate jurisdiction . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). See also I.C.C. v. U.S. ex rel. Campbell, 289 U.S. 385, 394 (1933) ("Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action."). This petition, however, does not address a district court's exercise of jurisdiction it lacks or refusal to exercise jurisdiction, but rather the substantive lawfulness of a proposed administrative rulemaking.

Second, appellate courts have issued writs to address non-jurisdictional lower court action where "resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice." Colonial Times, Inc. v. Gasch, 509 F.2d 517, 524 (1975). Such cases have generally addressed discovery orders, see, e.g., Schlagenhauf v. Holder, 379 U.S. 104 (1964), which "are often collateral to the litigation and thus lost to appellate review in fact if not in theory." Gasch, 509 F.2d at 526.

Petitioner's request for a writ does not fall into this category either. No lower court action is at issue. Moreover, the goals of preventing similar errors and adding to the "efficient administration of justice" by addressing an issue that is likely to recur, but might otherwise evade review, are not in play. To the contrary, "[r]efusing intervention in current agency proceedings ensures against premature, possibly

unnecessary, and piecemeal judicial review." Bonneville Power, 767 F.2d at 629. The issue Petitioner raises can be addressed when the final rule is before this Court. While it may be important, "[n]ot every issue of first impression or every 'basic, undecided' problem should be the basis for mandamus relief." Gasch, 509 F.2d at 525.

Finally, courts "have the authority, under the All Writs Act, 28 U.S.C. § 1651, to issue a writ of mandamus" in regard to agency action where an agency has "unreasonably delayed" taking action required of it by law. Sierra Club v. Thomas, 828 F.2d 783, 795-96 (D.C. Cir. 1987); TRAC, 750 F.2d at 76 (court had jurisdiction over petition for a writ of mandamus alleging unduly lengthy delay by the FCC in responding to complaint). The delayed action must lie within the Court's future jurisdiction, see Tennant, 359 F.3d at 529, and issuance of the writ must be necessary "to protect [that] future jurisdiction." TRAC, 750 F.2d at 76. In other words, the court may only assume jurisdiction if "the agency might forever evade our review and thus escape its duties [while] we awaited final action." Thomas, 828 F.2d at 793.

This line of cases is also inapposite. Petitioner does not challenge agency delay that might frustrate the Court's review of final action. Rather, by seeking to prevent EPA from issuing a final rule, it is Petitioner that would deprive the Court of the opportunity to review that rule. Thus, a writ would not protect the Court's prospective jurisdiction here; rather, it would inappropriately address the substance of a proposed rule. See In re Bluewater Network, 234 F.3d 1305, 1312 (D.C. Cir. 2000)

("petitioners cannot use the present mandamus action to challenge the substance of" temporary regulations).

Petitioner attempts to overcome the traditional limitations on the availability of an extraordinary writ by cobbling together isolated aspects of some of the above cases, while ignoring the corresponding limitations. Petitioner points to Gasch and Schlagenhauf as authorizing review of "new and important problems" (Pet. at 23) – a label that could apply to any number of cases – but conveniently ignores that those cases were limited to addressing district court discovery orders that might have otherwise been "lost to appellate review." Gasch, 509 F.2d at 526. Petitioner points to Thomas and TRAC as holding that the Court can review non-final agency action (Pet. at 24), but glosses over the limitation of those holdings to undue delay claims where the court's opportunity to review the agency's action might be frustrated by a failure to take action. Thomas, 828 F.2d at 793; TRAC, 750 F.2d at 76. Petitioner also fails to mention that the Court declined to issue the writ in both cases. Id.

Apparently recognizing that the All Writs Act case law is insufficient to achieve its ends, Petitioner turns to several entirely inapposite cases. Petitioner relies on Leedom v. Kyne, 358 U.S. 184 (1958). Pet. at 23. But in Leedom, the National Labor Relations Board (NLRB) conceded that the district court had jurisdiction under a general review provision (28 U.S.C. § 1337, covering action under statutes regulating commerce), *unless* the National Labor Relations Act specifically deprived it of such jurisdiction. 358 U.S. at 187-91. Here, there is no general grant of jurisdiction that

allows the Court to review non-final action under the Clean Air Act. The All Writs Act is not such an animal; it does not "enlarge" the Court's jurisdiction.

Next, Petitioner incorrectly cites McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963), as holding that a court can enjoin non-final action that involves "public questions particularly high in the scale of our national interest." Pet. at 23. But no party challenged jurisdiction in that case, regarding whether the NLRB could hold an election on a Honduran ship. Addressing jurisdiction on its own initiative, the Court noted that the NLRB's action "aroused vigorous protests from foreign governments," creating "a uniquely compelling justification for prompt judicial resolution of the controversy." 372 U.S. at 16-17. No such circumstances are present here.

Finally, Petitioner relies on Meredith v. Federal Mine Safety and Health Review Commission, 177 F.3d 1042 (D.C. Cir. 1999), for the proposition that the Court may review non-final action that meets the requirements of the collateral-order doctrine (Pet. at 24), but offers no explanation as to how that doctrine might apply where two of the requirements –conclusiveness and unreviewability – are obviously lacking, as the challenged rulemaking has not concluded and this Court will have the opportunity to review the resulting final rule under 42 U.S.C. § 7607(b)(1) once it does.

Thus, Petitioner has provided no authority supporting the remarkable proposition it advances: that the Court, under the auspices of the All Writs Act, can intervene to stop an ongoing agency rulemaking. For these reasons, Petitioner's request for a writ lies outside this Court's jurisdiction and should not be entertained.

## II. PETITIONER LACKS STANDING TO CHALLENGE THE SECTION 7411(d) RULEMAKING.

To show that it has standing to challenge the existing source rulemaking, Petitioner must demonstrate, inter alia, (1) that it has suffered an "injury in fact" that is both concrete and particularized and actual or imminent, rather than conjectural or hypothetical; and (2) that the claimed injury is caused by the challenged action, rather than the result of the independent action of some third party. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Petitioner fails to meet these requirements.

Petitioner's claimed injury is, by definition, conjectural, given that Petitioner challenges a rulemaking that is not final. As this Court has recognized, when a party's claim of injury depends on discretionary action that the agency *may* take in the future, the party lacks standing because its injury would be caused not by the action challenged, but rather by presumed future actions. La. Envtl. Action Network v. Browner, 87 F.3d 1379, 1383-84 (D.C. Cir. 1996). Here, EPA may or may not promulgate a final rule that is similar to the proposed rule, depending on its analysis of the comments submitted. At this stage, predictions about what state guidelines may result from the rulemaking, let alone what requirements states might impose on power plants pursuant to such guidelines[5] – or what those requirements might then mean for a fuel vendor like Petitioner – are pure conjecture.

[5] Petitioner claims that "States have no choice but to move forward with . . . developing State-specific plans in conformance with the mandate," Standing Addendum at 2, but provides no support for that assertion.

Moreover, there is nothing "concrete" or "particularized" about the injury Petitioner alleges. The only concrete harm that Petitioner points to stems from EPA's 2012 Mercury and Air Toxics (MATS) Rule addressing hazardous pollutant emissions from power plants,[6] not the rulemaking at issue here. See Standing Addendum at 2 ("that standard alone will result in 4,700 megawatts of coal-fired utility retirements"). But the alleged impacts of a prior rule do not factor into the analysis of whether Petitioner has standing here.

Finally, Petitioner cannot show that its claimed injury will *not* result from the actions of a third party, Lujan, 504 U.S. at 561, such as the states that would develop plans under the Proposed Rule, or the power plants that states may regulate to meet their emissions guidelines. As the Supreme Court observed, "[w]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing . . . is ordinarily 'substantially more difficult' to establish." Id. at 562 (citation omitted). Here, Petitioner characterizes its "core business" as "the mining of coal supplied to . . . power plants," Standing Addendum at 1, thereby confirming that it is several steps removed from any impacts that may result from a rule addressing $CO_2$ emission guidelines for states. Thus, Petitioner lacks standing.

[6] This rule was upheld by the Court in White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014) (cert. petitions pending).

## III. THE WRIT SHOULD NOT ISSUE BECAUSE THE ACT DOES NOT PLAINLY PROHIBIT THE CHALLENGED RULEMAKING.

Even if the Court has jurisdiction and Petitioner can demonstrate standing, no writ of prohibition should issue. A writ may issue "only in extraordinary circumstances," where the "right to issuance . . . is 'clear and indisputable.'" In re United States, 925 F.2d 490, 1991 WL 17225, at *2 (D.C. Cir. Feb. 11, 1991) (quoting Kerr v. United States District Court, 426 U.S. 394, 403 (1976)). Petitioner's challenge to the section 7411(d) rulemaking does not meet these criteria.

### A. Petitioner's Challenge Presents No "Truly Extraordinary" Circumstances to Justify Issuing an Extraordinary Writ.

Even where jurisdiction exists, courts rarely conclude that issuing an extraordinary writ is appropriate. In regard to agency action, the circumstances must be "truly extraordinary" to justify issuing a writ. Bonneville Power, 767 F.2d at 630.

Petitioner's claim that EPA's section 7411(d) rulemaking is unlawful presents no "truly extraordinary" circumstances justifying intervention before the agency takes final action. Rather, claims that an agency action is outside of the agency's authority are endemic to rulemakings, and such claims are commonly addressed by this Court when reviewing final rules under the procedure prescribed in 42 U.S.C. § 7607(b)(1). E.g., NRDC v. EPA, 749 F.3d 1055 (D.C. Cir. 2014) (addressing claim that EPA exceeded its authority under the Act in creating an affirmative defense for violations caused by unavoidable malfunctions). Indeed, the Act expressly provides that the Court may overturn final agency action that is "in excess of statutory jurisdiction,

authority, or limitations," which indicates that such arguments should be addressed in the normal course of reviewing the agency's final action. 42 U.S.C. § 7607(d)(9)(C). Thus, Petitioner's "ultra vires" challenge to the section 7411(d) rulemaking does not warrant the "truly extraordinary" remedy of writ issuance.

### B. Issuance of an Extraordinary Writ Is Unwarranted Because the Act Does Not Clearly Prohibit the Challenged Rulemaking.

Petitioner also has no "clear and indisputable" right to issuance of a writ. Kerr, 426 U.S. at 403. This Court has stated that it "generally will hear only cases of 'clear right' such as outright violation of a clear statutory provision." TRAC, 750 F.2d at 79. The provision at issue here is far from "clear." Id. Rather, section 7411(d) is rife with ambiguity, which EPA should have the first opportunity to resolve.

#### 1. Section 7411(d) is not clear or unambiguous.

Petitioner argues that 42 U.S.C. § 7411(d) must be read as barring regulation, under that section, of a source category that was previously regulated under 42 U.S.C. § 7412,[7] even if in regard to *different* pollutants. Because EPA regulated emissions of certain hazardous air pollutants (such as mercury) from power plants under section 7412 in its 2012 MATS Rule, Petitioner asserts, EPA cannot now promulgate a rule under section 7411(d) addressing power plant emissions of $CO_2$, even though $CO_2$ is

[7] Petitioner continually refers to section 7412 as the "national emission standard program." See, e.g., Pet. at 19-20. This label seeks to obscure what is unique about that provision. While – like several other programs in the Act – 42 U.S.C. § 7412 allows EPA to set national standards, what differentiates that program from others is the category of pollutants it addresses: hazardous air pollutants.

not a hazardous pollutant listed or regulated under section 7412. But even if Petitioner's reading of section 7411(d) were one plausible interpretation (which, for the reasons explained below, is debatable), it is hardly the *only* possible interpretation of that provision. Rather, section 7411(d) is ambiguous in a number of ways.

*i. Interpreting section 7411(d) requires harmonizing two different versions of that provision.*

First, as Petitioner recognizes (see Pet. at 18-20), two different versions of section 7411(d) were enacted into law in the 1990 Clean Air Act Amendments.[8] Prior to 1990, that section authorized EPA to require standards of performance

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

42 U.S.C. § 7411(d)(1) (1988); Pub. L. No. 95-95, 91 Stat. 685 (1977). Section 7412(b)(1)(A), in turn, required the Administrator to publish a list of hazardous air pollutants. Thus, the pre-1990 version of section 7411(d) plainly provided that, while a pollutant listed as hazardous under section 7412(b)(1)(A) could not be regulated under section 7411(d), other pollutants from the same source could be regulated under that section.

[8] This situation appears to be unique. Amici argue that they have found "numerous examples [that] involved the precise 'drafting error' that occurred here." Amici Br. (ECF No. 1499435) at 11. But these examples are distinguishable, in that they involve either (a) a conflicting amendment in a separate law; or (b) a conflict created by one amendment revising or striking part of a provision that another amendment deleted. See id. at 11 n.6. Here, we have two simultaneously-enacted amendments to the same law striking the same language, but inserting different text to replace it.

The 1990 CAA Amendments did away with old section 7412(b)(1)(A), with section 7412(b) thereafter containing a list of hazardous air pollutants. The Senate accordingly sought to amend section 7411(d) by simply substituting "7412(b)" for the preexisting reference to "7412(b)(1)(a)." Pub. L. No. 101-549, § 302(a), 104 Stat. 2574. Thus, applying the language from the Senate bill, section 7411(d) directs EPA to require performance standards

> for any existing source for any air pollutant [] for which air quality criteria have not been issued or which is not included on a list published under section [74]08(a) or [74]12(b) . . . .

S. Rep. No. 101-228. As $CO_2$ is not a hazardous air pollutant "included on a list published under . . . section 7412(b)," this language plainly requires EPA to undertake the challenged rulemaking.

Congress at the same time also adopted the language from the House bill, and failed to reconcile that language in conference with the language from the Senate bill. The House amendment replaces the reference to old section 7412(b)(1)(A) with the phrase "emitted from a source category which is regulated under section [7412]." Pub. L. No. 101-549, § 108(g), 104 Stat. 2467 (1990); H.R. Rep. No. 101-490(I). Applying the language from the House amendment, 42 U.S.C. § 7411(d)(1) directs EPA to require state standards

> for any existing source for any air pollutant for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) or emitted from a source category which is regulated under section 7412. . .

Petitioner reads the House amendment to say that, once a source category has been regulated under section 7412 in regard to some *hazardous* pollutant, EPA may not regulate the emission of *any* pollutants from that source category under section 7411(d), hazardous or not. See Pet. at 19.[9] So interpreted, this would essentially eviscerate EPA's authority under section 7411(d), given that over 100 source categories, covering the full range of American industry, have been regulated under section 7412 in regard to some hazardous pollutant. See 40 C.F.R. Pt. 63.

In a Legal Memorandum accompanying the Proposed Rule,[10] EPA opined that the House amendment should not be interpreted to have that dramatic effect. Mem. at 21-27. Rather, EPA posited that, in light of the different readings of section

[9] Petitioner and amici suggest that, not only do they read section 7411(d) this way, the Supreme Court does as well, citing dicta in a footnote in Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2538 n.7 (2011) ("AEP") ("EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program."). First, the Court appears to be paraphrasing the U.S. Code; there was no indication that it was aware of the Senate amendment. Moreover, the Court's holding in AEP was that section 7411 "speaks directly to emissions of [$CO_2$] from the defendants' power plants," id. at 2537, and industry petitioners had argued that "EPA may . . . require States to submit plans to control designated pollutants" under 42 U.S.C. § 7411(d). Brief for Pet's, No. 10-174, 2011 WL 334707, at *7. Thus, the holding in AEP is fundamentally incompatible with Petitioner's argument that EPA may *not* regulate $CO_2$ emissions from existing power plants under section 7411(d). Finally, the Court's reference to "the pollutant in question" suggests that the regulatory exclusion set forth in section 7411(d) operates in a pollutant-specific way, not to bar regulation of all pollutants under that provision based on the regulation of some hazardous air pollutant under section 7412. In short, the cited footnote lends no support to Petitioner and amici's arguments.

[10] At http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule-legal-memorandum.

7411(d) that could result from enactment of both the House and the Senate amendments, section 7411(d) is ambiguous. Id. at 22-25. EPA reasonably proposed to resolve that ambiguity by interpreting section 7411(d) to bar regulation only where the pollutant at issue is a *hazardous pollutant* emitted from a source category regulated under section 7412, thereby "giv[ing] some effect to both amendments," id. at 26.

EPA's discussion of this issue was based on its prior analysis of the House and Senate amendments in the context of a 2005 rule. See 70 Fed. Reg. 15,994, 16,029-32 (Mar. 29, 2005). The precise question posed there, however, was a different one: whether section 7411(d) barred regulation of a source category's emissions of a hazardous pollutant once that pollutant was *listed* as hazardous under section 7412, or only if emissions of that hazardous pollutant were actually *regulated* under section 7412. See id. EPA concluded that the latter was more consistent with the legislative history of the 1990 Amendments. Id. No party suggested, and EPA did not consider, that section 7411(d) could be read to bar regulation of *non-hazardous* pollutant emissions. In fact, when the issue was brought before this Court, several of the amici supporting Petitioner in this case championed EPA's conclusion that section 7411(d) only bars regulation where the same pollutant is not only listed as hazardous, but actually regulated as such under section 7412. Joint Brief of State Respondent-Intervenors, New Jersey v. EPA, No. 05-1097, 2007 WL 3231261, at *25 (D.C. Cir. Aug. 3, 2007) ("EPA developed a reasoned way to reconcile the conflicting language

and the Court should defer to EPA's interpretation.").[11] That conclusion is entirely inconsistent with the reading of section 7411(d)'s exclusionary language that amici advance here, and the conflict between amici's past and present positions alone demonstrates that section 7411(d) is ambiguous.

Petitioner and amici now argue that EPA should ignore the Senate amendment on the grounds that it is a "clerical error" and, as a "conforming" amendment, should be disregarded in favor of the House amendment. Pet. at 20; Amici Br. at 9-11. But the Supreme Court has cautioned that "the heading of a section cannot limit the plain meaning of the text," Bhd. of R.R. Trainmen v. Balt. & O.R. Co., 331 U.S. 519, 528-29 (1947), and "[w]e must have regard to all the words used by Congress, and, as far as possible, give effect to them." Louisville & Nashville R.R. Co. v. Mottley, 219 U.S. 467, 475 (1911); see also Ricci v. DeStefano, 557 U.S. 557, 580 (2009) (we "must interpret the statute to give effect to both provisions where possible"). It has therefore treated "conforming" amendments no differently than other amendments, limiting their execution only where the amendment would effect a radical change that there is "no indication that Congress intended." Dir. of Revenue of Mo. v. CoBank ACB, 531 U.S. 316, 323 (2001). Here, it is the House amendment that – if read as Petitioner desires – would eviscerate the scope of section 7411(d), largely preventing regulation thereunder given that over 100 source categories have been regulated under

[11] The parties that filed this brief included the following *amici* for Petitioner: Alabama, Nebraska, West Virginia, and Wyoming.

section 7412 in regard to some hazardous pollutant. There is nothing in the legislative history of the 1990 Amendments that suggests Congress intended this result.

Given that the House and Senate amendments could be read to have opposite implications, Petitioner's interpretation of section 7411(d) as barring regulation under that section once a source category has been regulated under section 7412, even if in regard to a different pollutant, is neither "clear[ly] right" nor grounded on "clear" statutory language, such that it would be appropriate for this Court to take the extraordinary step of issuing a writ to stop the rulemaking. TRAC, 750 F.2d at 79.

*ii. Petitioner's preferred version of Section 7411(d) is not unambiguous.*

Furthermore, even if one disregards the Senate amendment and considers only the House amendment, as Petitioner and amici advocate, that text does not unambiguously say what Petitioner and amici believe it says. In fact, a truly "literal" reading (see Amici Br. at 4) results in precisely the opposite conclusion.

The relevant portion of section 7411(d), as amended by the House, contains a string of three exclusionary clauses, separated from each other by "or":

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

42 U.S.C. § 7411(d)(1) (emphasis and internal numbering added). Because Congress used the conjunction "or" rather than "and," the three exclusions arguably should be

viewed as alternatives,[12] rather than requirements to be imposed simultaneously. In other words, section 7411(d) "literally" provides that the Administrator may require states to establish standards for an air pollutant so long as *either* air quality criteria have not been established for that pollutant, *or* one of the other two remaining criteria is met. Air quality criteria have not been issued for $CO_2$. Thus, under a truly literal reading of section 7411(d)(1) as amended by the House, whether power plants have been regulated under section 7412 – and for what – is irrelevant here.

To compound the ambiguity, the third exclusionary clause in the House's version of section 7411(d)(1) – the basis of Petitioner's argument that EPA may not regulate a source category under section 7411(d) once that category has been regulated under section 7412 – differs from the first two in that it does not contain a negative:

> [EPA may require states to submit plans establishing standards for] any air pollutant [1] for which air quality criteria have **not** been issued or [2] which is **not** included on a list published under section 7408(a) of this title or [3] emitted from a source category which is regulated under section 7412 of this title . . . .

42 U.S.C. § 7411(d)(1) (emphasis and internal numbering added). Petitioner and amici presume that the negative from the second clause was intended to carry over into the third (i.e., implicitly inserting another "which is not" before "emitted from a source category"). But that is not what the text actually says; the text says that EPA may require state standards for "any air pollutant . . . emitted from a source category which

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

is regulated under section 7412." 42 U.S.C. § 7411(d)(1). Thus, read literally, the House's version of section 7411(d) means the exact opposite of what petitioners and amici argue, and provides that EPA may regulate emissions of a pollutant from a source category where that category *is* regulated under section 7412.

All this is not to say that EPA interprets the House's version of section 7411(d) in the manner outlined above. EPA has not yet reached a final conclusion regarding how that provision should be interpreted; the issue is currently the subject of comment and continued analysis. Rather, the point is simply that section 7411(d) is not "clear" statutory text, and so Petitioner has no "clear right" to an extraordinary writ prohibiting the section 7411(d) rulemaking. TRAC, 750 F.2d at 79.

2. EPA should be given the opportunity to interpret section 7411(d).

It is long and well established that a reviewing court must defer to an agency's reasonable interpretation of an ambiguous statute. Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 (1984). But even more critically here, the agency must be afforded the opportunity to interpret the statute in the first place. See Whitman, 531 U.S. at 486 (it must be "left to the EPA to develop a reasonable interpretation [of the statutory] provisions"). Only then can its interpretation be fairly subjected to scrutiny.

## Conclusion

Petitioner's demand for an extraordinary writ should be dismissed or denied.

Respectfully submitted,

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**Certificate of Service**

I hereby certify that the foregoing Response to Petition was electronically filed today with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, and that, pursuant to Circuit Rule 21(c), the original and four paper copies of the brief were delivered to the Court by hand.

I further certify that a copy of the foregoing Response to Petition was today served electronically through the Court's CM/ECF system on all registered counsel for Petitioners and Amici.

/s/ Amanda Shafer Berman

November 3, 2014