ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

Nos. 14-1112, 14-1151

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

IN RE MURRAY ENERGY CORPORATION

MURRAY ENERGY CORPORATION,

Petitioner,

STATE OF INDIANA, *et al.*,

Intervenors for Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents,

STATE OF NEW YORK, *et al.*,

Intervenors for Respondents.

On Petition for Review of EPA Notice of Proposed Rulemaking

FINAL BRIEF OF AMICI CURIAE TRADE ASSOCIATIONS IN SUPPORT OF PETITIONERS

Peter D. Keisler
Roger R. Martella, Jr.
C. Frederick Beckner III
Paul J. Ray
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
202.736.8000
pkeisler@sidley.com
Counsel for Amici Curiae Trade Associations

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Additional Counsel on Inside Cover

Of Counsel:

Steven P. Lehotsky
Sheldon Gilbert
U.S. Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
202.463.5337

Linda E. Kelly
Quentin Riegel
Patrick Forrest
National Association of Manufacturers
733 10th Street, NW
Suite 700
Washington, DC 20001
202.637.3000

Leslie A. Hulse
American Chemistry Council
700 2nd Street, NE
Washington, DC 20002
202.249.6131

Richard Moskowitz
American Fuel & Petrochemical Manufacturers
1667 K Street, NW
Washington, DC 20006
202.457.0480

STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Under D.C. Circuit Rule 29(d), *amici* state that they are aware of only one other planned *amicus* brief in support of petitioner. Separate briefing is necessary because the other *amicus* brief, to be filed by the National Mining Association ("NMA") and the American Coalition for Clean Coal Electricity ("ACCE"), will address only jurisdictional arguments on which *amici* trade associations take no position. The separate briefing will not burden this Court's resources, because the attached brief uses less than half of the 7,000 words permitted an *amicus* brief, *see* Fed. R. App. P. 29(d), and the *amicus* brief to be filed by NMA and ACCE will be similarly limited. This Court granted *amici*'s motion for leave to file this brief on January 13, 2015.

Under Federal Rule of Appellate Procedure 29(c), *amici* state that no party's counsel authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

All parties, intervenors, and *amici* appearing in this Court are listed in the brief for petitioner.

References to the notice of proposed rulemaking at issue and related cases also appear in the brief for petitioners.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1, *amici* state as follows:

1. The Chamber of Commerce of the United States of America (the "Chamber"), the world's largest business federation, represents 300,000 direct members and indirectly represents the interests of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

2. The National Association of Manufacturers (the "NAM") is a nonprofit trade association representing small and large manufacturers in every industrial sector and in all 50 States. The NAM is the preeminent U.S. manufacturers' association as well as the nation's largest industrial trade association. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

3. The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. The business of chemistry is an $812 billion enterprise and a key element of the nation's economy. ACC has no parent corporation, and no publicly held company has 10% or greater ownership in ACC.

4. The American Coatings Association ("ACA") is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors. ACA has no parent corporation, and no publicly held company has 10% or greater ownership in ACA.

5. The American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association of more than 400 companies. Its members include virtually all U.S. refiners and petrochemical manufacturers. AFPM has no parent corporation, and no publicly held company has 10% or greater ownership in AFPM.

6. The American Iron and Steel Institute ("AISI") is a trade association comprised of 20 member companies, including integrated and electric furnace steelmakers, and approximately 125 associate members who are suppliers to or customers of the steel industry. AISI serves as the voice of the North American steel industry in the public policy arena. AISI has no parent corporation, and no publicly held company has 10% or greater ownership in AISI.

7. The Council of Industrial Boiler Owners ("CIBO") is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws,

and regulations. CIBO has no parent corporation, and no publicly held company has 10% or greater ownership in CIBO.

8. The Independent Petroleum Association of America ("IPAA") is a trade association representing more than ten thousand independent oil and natural gas producers and service companies across the United States, serving as a voice for the exploration and production segment of America's oil and natural gas industry. IPAA has no parent corporation, and no publicly held company has 10% or greater ownership in IPAA.

9. The Metals Service Center Institute ("MSCI") is a non-profit trade association serving the industrial metals industry. MSCI's 400 member companies have over 1,500 locations throughout North America. MSCI has no parent corporation, and no publicly held company has 10% or greater ownership in MSCI.

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GLOSSARY

CAA	Clean Air Act
EPA	Environmental Protection Agency

INTEREST OF *AMICI CURIAE*

In the proposed rule, the Environmental Protection Agency ("EPA") seeks, for the first time, to substantially regulate greenhouse gas emissions from existing power generators. The proposed rule's annual compliance costs will reach at least $7.3 billion by 2030. 79 FR 34,830, 34,942-43 (June 18, 2014). *Amici* are among the country's most significant trade associations and represent many industries impacted by the rule. *Amici*'s members that own or operate power plants are already heavily governed by multiple EPA regulations imposing costs of billions of dollars per year on the industry. *See, e.g.*, 77 FR 9,304, 9,413 (Feb. 16, 2012). In addition, many of *amici*'s members are among the nation's largest purchasers of electricity. EPA's proposed rule would dramatically increase electricity's cost for *amici's* members while mandating obligations making electric service less reliable.

ARGUMENT

In 2012, EPA finalized a national emission standard for fossil-fuel fired power plants under §112 of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §7412. 77 FR 9,304 (Feb. 16, 2012) ("Mercury Rule").[1] On June 18, 2014, invoking the authority of CAA §111(d), 42 U.S.C. §7411(d), EPA issued a notice of proposed rulemaking (the "Notice") that would direct States to establish additional performance

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[1] On November 25, 2014, the United States Supreme Court granted certiorari to review challenges to the Mercury Rule. *Michigan v. EPA*, 2014 WL 3509008 (U.S. Nov. 25, 2014) (No. 14-46) (mem.).

standards for existing power plants that would substantially reduce carbon emissions. 79 FR 34,830, 34,832 (June 18, 2014).

CAA §111(d)(1), however, precludes EPA from directing States to "establish[] standards of performance for any existing source for any air pollutant … which is … emitted from a source category … regulated under section 7412 [*i.e.*, CAA §112]." Because the Mercury Rule regulates power plants under §112, EPA may not adopt the proposed rule. EPA's contrary argument rests principally on a conforming amendment inadvertently included in the 1990 amendments to the Act. But, as EPA has acknowledged, 70 FR 15,994, 16,031 (Mar. 29, 2005), this amendment is a drafting error; it therefore may not be given effect. Furthermore, EPA should receive no deference for its resolution of supposed ambiguity created, not by Congress's delegation, but by congressional error.

If the Court concludes it has jurisdiction over petitioner's challenge, it should hold the proposed rule beyond the agency's authority.

I. EPA'S PROPOSED RULE CONTRADICTS THE ACT'S PLAIN LANGUAGE.

A. Section 111(d)(1) Expressly Precludes EPA's Proposed Rule.

Section 111(d)(1) forbids EPA from regulating the same source category under both §112 and §111(d). As codified, §111(d)(1) reads in relevant part:

> [E]ach State shall submit to the Administrator a plan which (A) establishes standards of performance *for any existing source for any air pollutant* (i) for which air quality criteria have not been issued or *which is not* included on a list published under section 7408(a) of this title or *emitted from a source category which is regulated*

> *under section 7412 of this title* but (ii) to which a standard of performance under this section would apply if such existing source were a new source….

42 U.S.C. §7411(d)(1) (emphases added). Thus, EPA may direct States to establish performance standards for air pollutants from existing sources only if, *inter alia*, they are not "emitted from a source category which is regulated under section 7412." *Id.* The Mercury Rule, issued under §112, regulates the same existing sources as, and thereby precludes, EPA's proposed rule.

Both the Supreme Court and EPA have read the statute in this way. In *American Electric Power Co. v. Connecticut*, the Supreme Court stated that "EPA may not employ §7411(d) if existing stationary sources of the pollutant in question are regulated under the … 'hazardous air pollutants' program, §7412." 131 S. Ct. 2527, 2537 n.7 (2011). Until this rulemaking, EPA similarly did not doubt §111(d)(1)'s plain meaning. Shortly after the current version of §111(d)(1) was enacted in the 1990 amendments to the Act, Pub. L. No. 101-549, 104 Stat. 2399 (1990), EPA explained that §111(d)(1) did not bar regulation of landfill gases because they are "not emitted from a source category that is actually being regulated under section 112." EPA, *Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines*, Pub. No. EPA-453/R-94-021, 1-6 (1995) ("Air Emissions Standards"). In a later rule, the agency explained that "a literal reading of [§111(d)(1)] is that a standard of performance under section 111(d) cannot be established for any air

pollutant—[hazardous] and [non-hazardous]—emitted from a source category regulated under section 112." 70 FR at 16,031.[2]

This straightforward interpretation accords with §111(d)(1)'s purpose. When amending the CAA, Congress left undecided whether power plants should be regulated under §111(d) or §112. The 1990 CAA amendments required EPA to study "the hazards to public health reasonably anticipated to occur as a result of emissions by" power plants "after imposition of" other regulatory requirements, and instructed EPA to regulate power plants under §112 only if it "finds such regulation is appropriate and necessary after considering the results of the study." 42 U.S.C. §7412(n)(1)(A). EPA has observed that Congress's instruction to assess the impact of other regulations before regulating power plants under §112 "reveals Congress' recognition that [power plants] are a broad, diverse source category … subject to numerous CAA requirements, … and that such sources should not be subject to duplicative or otherwise inefficient regulation." 70 FR at 15,999.

Amended §111(d) comports with this broader purpose. The CAA amendments for the first time provided for listing source categories (rather than simply air pollutants) under §112. *Compare* 42 U.S.C. §7412 (1988), *with* Pub. L. No. 101-549, 104 Stat. at 2531, §301; *see* Pet'r Br. 25, Dkt.1527224. Congress was concerned about double-regulation of source categories—a concern with special

[2] This Court vacated that rule on other grounds in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

significance for power plants. It therefore "change[d] the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112," thus preventing double-regulation of existing power plants under both §111(d) and §112. 70 FR at 16,031.

Prohibiting double-regulation of existing power plants makes sense. An additional set of regulations under §111(d) would make operating power plants much more expensive. This increased cost would be difficult for existing power plants to bear, both because of their limited future life expectancy and the high cost of retrofitting already-constructed plants to comply with mandates created after they were designed. (In contrast, because §111(d)(1) applies only to "existing source[s]," regulation under §112 does not restrict EPA's regulation of any new source.)

Congress's judgment that double-regulation's costs were not worth the benefits is supported by the fact that, as EPA has explained, stringent emission controls of hazardous pollutants under §112 can also reduce emissions of other non-hazardous pollutants that might otherwise be regulated under §111(d). For example, in issuing the Mercury Rule, EPA explained that reducing hazardous pollutant emissions from power plants would also reduce emissions of non-hazardous pollutants, including carbon dioxide (the principal greenhouse gas the Notice at issue seeks to regulate, 79 FR at 34,830). 77 FR at 9,428-32. Likewise, when setting §112 standards for cement kilns and certain boilers, EPA has explained that "setting technology-based standards

for" one pollutant "will result in significant reductions … of other pollutants." 76 FR 15,608, 15,643 (Mar. 21, 2011).

B. Section 111(d)(1) Is Not Ambiguous.

EPA's litigation counsel here suggests that §111(d)(1)'s text is facially ambiguous. *See* EPA Prohibition Response Br. 28-30, Dkt.1520381. But this litigating position contradicts the agency's stated views. EPA previously concluded that the "literal reading" of §111(d)(1) "is that a standard of performance under section 111(d) cannot be established for any air pollutant … emitted from a source category regulated under section 112." 70 FR at 16,031; *see also* Air Emissions Standards 1-5–1-6. In the legal memorandum accompanying the *very Notice at issue*, EPA stated that §111(d)(1) "appears by its terms to preclude from section 111(d) any pollutant if it is emitted from a source category that is regulated under section 112."[3] EPA may "'not, of course, substitute counsel's *post hoc* rationale for the reasoning supplied by the [agency] itself.'" *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 714 n.1 (2001). As noted, the Supreme Court has also endorsed this "literal" reading of §111(d). *See supra* p.3.

Furthermore, EPA's lawyers' interpretation is grammatically flawed. That interpretation divides §111(d)(1) into three clauses:

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[3] EPA, *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* 22 (2014) ("Legal Memorandum"), http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf.

> [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….

EPA Prohibition Response Br. 29, Dkt.1520381 (quoting and altering §111(d)(1)). EPA's counsel argues the statute is supposedly ambiguous because only the first two clauses include the word "not," and it is therefore unclear whether the word "not" from the second clause should carry over to the third clause.

This interpretation fails to respect §111(d)(1)'s parallel structure. On the proposed reading, the first two of §111(d)(1)'s three clauses are introduced by the relative pronoun "which," but the third clause oddly lacks its pronoun. If Congress intended EPA's counsel's interpretation, surely it would have written "*which is* emitted from a source category … regulated under section 7412." By contrast, the plain text reading preserves Congress's parallel structure, because §111(d)(1)'s second relative pronoun "which" serves as the subject of both the two verb phrases following it ("is not included" and "is not … emitted").

Furthermore, counsel's newly-minted interpretation contradicts Congress's purpose for amending §111(d)(1). As EPA has explained, the 1990 amendment prevents double-regulation of power plants by precluding "regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112." 70 FR at 16,031. Counsel's alternative reading, however, transforms §111(d)(1) into an affirmative *mandate* to regulate pollutants under §111(d)

precisely *because* they are also regulated under §112, thus guaranteeing duplicative regulation—a mandate without any policy justification and exactly the opposite of Congress's goal.

EPA's counsel suggests EPA is prohibited from regulating a pollutant under §111(d) only if the pollutant satisfies all of §111(d)(1)'s three clauses. EPA Prohibition Response Br. 28-29, Dkt.1520381. This reading permits EPA to double-regulate sources already subject to extensive regulation under two of §111(d)(1)'s categories simply because they are not regulated under the third. EPA's counsel never explains why Congress might have wished this strange result, and the agency has previously read the statute in the opposite way. Air Emissions Standards 1-6 (landfill gas not subject to §111(d)(1) because it "is not a pollutant which satisfies *any* of these criteria" (emphasis added)). In fact, this Court, relying on EPA's consistent interpretation, found a regulation beyond EPA's §111(d) power because the source category was regulated under §112, without inquiring whether 111(d)(1)'s other criteria were satisfied. *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008).[4]

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[4] Nor can §111(d)(1) be read to apply "only when the emitting source category is 'regulated under section 112' for the *pollutant in question*, *i.e.*, the pollutant that is the candidate for regulation under section 111(d)." Amicus Br. of NRDC et al. 9-10, Dkt.1522612. Section 111(d)(1) forbids EPA to regulate "any air pollutant … emitted from a source category which is regulated under section 7412." EPA has rejected reading §111(d)(1)'s plain text to limit the scope of the term "any." *See* 70 FR at 16,031; *see also New Jersey*, 517 F.3d at 582 ("In the context of the CAA, 'the word "any" has an expansive meaning.'").

II. A DRAFTING ERROR DOES NOT ALTER §111(d)(1)'s PLAIN MEANING.

In its Legal Memorandum, EPA found §111(d)(1) ambiguous due to a conforming amendment buried in the 1990 CAA amendments. Legal Memorandum 23. But this conforming amendment is a drafting error, such as this Court has previously ruled fails to create statutory ambiguity, *see Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013). The Court should disregard it.

The pre-1990 CAA instructed EPA to direct States to establish existing-source standards "for any air pollutant … which is not included on a list published under section … 7412(b)(1)(A)." 42 U.S.C. §7411(d)(1)(A)(i) (1988). The cross-referenced subsection required EPA to list "each hazardous air pollutant for which [it] intends to establish an emission standard under this section."

Because the 1990 CAA amendments replaced old §7412(b)(1)(A) with new §7412(b)(1)–(4), the Senate included in its draft, under the heading "Conforming Amendments," a provision as follows: "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. No. 101-549, 104 Stat. at 2574, §302(a). As the Senate Legislative Drafting Manual explains, a "conforming amendment is an amendment of a provision of law that is necessitated by the substantive amendments or provisions of the bill." U.S. Senate, *Legislative Drafting Manual* §126(b)(2)(A) (Feb. 1997). Thus, the Senate amendment

was intended to maintain the *status quo* by updating the cross-reference to reflect substantive changes elsewhere in the statute.

In contrast, as EPA has recognized, the House adopted an amendment that "*substantively* amended section 111(d)." 70 FR at 16,031 (emphasis added). While pre-1990 §111(d)(1) referenced a list of specific pollutants under old §7412(b)(1)(A), the House amendment *prohibited* EPA from using §111(d) to regulate any pollutant "emitted from a source category … regulated under section 112." Pub. L. No. 101-549, 104 Stat. at 2467, §108(g). This formulation appeared in a substantive provision of the final bill passed by the House. 136 Cong. Rec. H2771-03 (daily ed. May 23, 1990); *see also* 70 FR at 16,031.

At conference, the House prevailed, and the revised bill included the House amendment. *See* H.R. Rep. No. 101-952, at 1 (1990) (Conf. Rep.); 70 FR at 16,030-31. However, the conferees neglected to delete the Senate amendment—hardly surprising in hindsight, as that provision was buried in a section entitled "Conforming Amendments," along with numerous other clerical amendments. *See* H.R. Rep. No. 101-952, at 182-83; S. 1630, 101st Cong. §305 (1990); Air Emissions Standards 1-5. Due to this error, the final bill contained both amendments.

As EPA has acknowledged, the Senate amendment's continued inclusion was an oversight: By amending the same text the Senate amendment purported to change, the prevailing House amendment rendered the Senate amendment unnecessary and impossible to execute. 70 FR at 16,031; *see also* Revisor's Note, 42 U.S.C. §7411

(Senate amendment "could not be executed, because of the prior amendment"). EPA has also recognized that the House amendment better accords with the 1990 changes giving EPA power to list source categories. Air Emissions Standards 1–5.

EPA's *amici* argue the Senate amendment is no scrivener's error because it leaves §111(d) with a "'plausible interpretation.'" Amicus Br. of NRDC et al. 7, Dkt.1522612. But no "plausible interpretation" can replace the same language in §111(d)(1) with both the House amendment's substantive language and the Senate amendment's conforming language. Furthermore, EPA has opined that, in light of Congress's purpose of avoiding double-regulation of power plants, "it is hard to conceive that Congress would have … retained the Senate amendment." 70 FR at 16,031. In any event, this Court does not demand that a statute present "no plausible interpretation" before it will find a scrivener's error. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1042 (D.C. Cir. 2001).

Despite acknowledging that a "drafting error" ordinarily "should not be considered," 70 FR at 16,031, EPA claims it has "attempt[ed] to give effect to both … amendments." *Id.* But where a drafting error is identified, a court *must* give effect to the "intention of the drafters, rather than the [statutory] language." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). This Court has acknowledged that, "in such matters as the revision and recodification of earlier legislation, … some errors will inevitably creep" in, and has explained that it "need not and ought not translate what is essentially a clerical oversight into a congressional intention." *United States v.*

Wallace & Tiernan, Inc., 349 F.2d 222, 226 (D.C. Cir. 1965). The Court has routinely disregarded drafting errors, in particular in situations with erroneous cross-references. *See Appalachian Power*, 249 F.3d at 1041, 1043-44. Doing so is especially warranted where a conforming amendment is concerned, because Congress is unlikely to make a "radical alteration" to a statutory scheme in a conforming amendment. *Boorda v. Subversive Activities Control Bd.*, 421 F.2d 1142, 1145 n.11 (D.C. Cir. 1969). Giving effect to the Senate conforming amendment rather than the House substantive amendment—thereby vitiating Congress's intent to "change the focus of section 111(d)," 70 FR at 16,031—would work precisely such a "radical alteration." *Boorda*, 421 F.2d at 1145 n.11.

But even if the Senate amendment should be given effect, the proposed rule would still be impermissible. "When there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). The two amendments can be fully reconciled by prohibiting EPA from regulating under §111(d) hazardous pollutants from any existing source (per the Senate amendment) *and* non-hazardous pollutants from source categories regulated under §112 (per the House amendment and thus barring the proposed rule). By contrast, under EPA's approach—§111(d) regulation is permitted unless both the pollutant *and* the source category are subject to regulation under §112, *see* Legal Memorandum 26-27—amended §111(d)(1) still precludes regulation only of hazardous pollutants listed under §112. EPA's approach thus effectively reads out of

the statute the House amendment, the purpose of which was to change §111(d)(1)'s focus to "preclude regulation of those pollutants … emitted from a particular source category … regulated under section 112." 70 FR at 16,031. EPA's proposed reading also fails to give the Senate amendment its intended effect of maintaining the *status quo*, because under that reading §111(d)(1) would forbid regulation only if both the pollutant *and* the source category are subject to regulation under §112. By narrowing §111(d)(1)'s scope to preclude regulation of only some hazardous pollutants, EPA is impermissibly reading the 1990 amendments to have somehow *broadened* its authority under §111(d) even though that was not the intent of *either* the Senate or House amendment.

III. EPA'S INTERPRETATION SHOULD RECEIVE NO DEFERENCE.

EPA's counsel suggests this Court must defer to EPA's interpretation under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). EPA Prohibition Response Br. 30, Dkt.1520381. Foremost, for the reasons given, the statutory text plainly forbids EPA's regulation. "If the relevant statutory language is plain but is inconsistent with … regulations, [this Court] must hold the regulations invalid." *Am. Fed'n of Gov't Emps. v. Gates*, 486 F.3d 1316, 1321-22 (D.C. Cir. 2007). The Senate amendment does not bring *Chevron* into play. Before affording *Chevron* deference, courts "must first exhaust the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue." *NRDC v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995). Because application of the traditional scrivener's error

doctrine resolves any possible ambiguity and leaves Congress's intent clear, deference is inappropriate.

More fundamentally, *Chevron* is inapplicable to the question of how to reconcile the Senate amendment's "drafting error" with codified §111(d)(1). This Court does "not give an agency alleging a scrivener's error … *Chevron* step two deference," "[l]est it 'obtain a license to rewrite the statute.'" *Appalachian Power*, 249 F.3d at 1043-44. Instead, "'the agency may deviate no further from the statute than is needed to protect congressional intent.'" *Id.* at 1044. As discussed, even if Congress wished to give effect to both 1990 amendments to §111(d)(1), that would not allow EPA to read out of the statute the House amendment, which sought to "change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category … regulated under section 112." 70 FR at 16,031.

Indeed, *Chevron* does not apply at all here because any "ambiguity" concerns only *what law* Congress intended to have effect. "'[T]he existence of ambiguity is not enough per se to warrant deference to the agency's interpretation.'" *Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 504 (D.C. Cir. 2013). Rather, "[t]he ambiguity must be such as to make it appear that Congress … delegated authority to cure that ambiguity." *Id.* But "when Congress assigns to an agency the responsibility for deciding whether" a particular source may be regulated, "it does not do so by simultaneously saying that [the source] should and that it should not" be regulated.

Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2214 (2014) (Roberts, C.J., concurring in the judgment).

CONCLUSION

For the foregoing reasons, if the Court reaches the merits of this case, it should hold EPA's proposed rule unlawful.

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Respectfully submitted,

/s/ Peter D. Keisler
Peter D. Keisler
Counsel of Record
Roger R. Martella, Jr.
C. Frederick Beckner III
Paul J. Ray
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
202.736.8000
pkeisler@sidley.com
Counsel for Amici Curiae Trade Associations

Of Counsel:

Steven P. Lehotsky
Sheldon Gilbert
U.S. Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
202.463.5337

Linda E. Kelly
Quentin Riegel
Patrick Forrest
National Association of Manufacturers
733 10th Street, NW
Suite 700
Washington, DC 20001
202.637.3000

Leslie A. Hulse
American Chemistry Council
700 2nd Street, NE
Washington, DC 20002
202.249.6131

Richard Moskowitz
American Fuel & Petrochemical Manufacturers
1667 K Street, NW
Washington, DC 20006
202.457.0480

CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared using 14-point Garamond Roman typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the brief is proportionally spaced and contains 3,497 words exclusive of the statement regarding separate briefing, certificate as to parties, rulings, and related cases, Rule 26.1 disclosure statement, table of contents, table of authorities, glossary, signature lines, and certificates of service and compliance. The undersigned used Microsoft Word 2007 to compute the count.

/s/ Peter D. Keisler
Peter D. Keisler

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users. I also caused the foregoing to be served via Federal Express on counsel for the following parties at the following addresses:

Michael C. Geraghty
Office of the Attorney General
State of Alaska Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Counsel for Intervenor State of Alaska

Peter K. Michael
James Kaste
123 State Capitol
Cheyenne, WY 82002
Counsel for Intervenor State of Wyoming

Kelvin Allen Brooks
Office of the Attorney General
State of New Hampshire
33 Capitol Street
Concord, NH 03301
Counsel for Amicus Curiae State of New Hampshire

/s/ Peter D. Keisler
Peter D. Keisler