ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1112 & No. 14-1151

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

IN RE: MURRAY ENERGY CORPORATION,

Petitioner.

MURRAY ENERGY CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

Respondents.

On Petition for Writ of Prohibition & Petition for Review

FINAL BRIEF FOR RESPONDENTS

JOHN C. CRUDEN
Assistant Attorney General

s/ Amanda Shafer Berman
AMANDA SHAFER BERMAN
BRIAN H. LYNK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1950 (phone)
Email: amanda.berman@usdoj.gov

Of Counsel:

Elliott Zenick
Scott Jordan
United States Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

March 9, 2015

Certificate as to Parties, Rulings, and Related Cases

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

Parties and Amici:

The parties in these consolidated cases are:

Petitioner: Murray Energy Corporation;

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

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

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

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

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

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

Rulings under Review:

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

Related Cases:

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

TABLE OF CONTENTS

TABLE OF AUTHORITES

CASES

*Authorities chiefly relied upon are marked with an asterisk.

STATUTES

FEDERAL REGISTERS

LEGISLATIVE HISTORY

MISCELLANEOUS

GLOSSARY

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

Jurisdiction and Standing

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

Issues Presented

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

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

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

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

Statutes and Regulations

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

Statement of the Case

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

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

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

Background

I. THE CLEAN AIR ACT

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

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

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

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

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

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

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

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

II. THE 1990 AMENDMENTS

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

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

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

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

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

[1] See 1 U.S.C. §§ 112 & 204(a).

III. THE MATS RULE

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

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

IV. THE PROPOSED RULE

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

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

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

Summary of Argument

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

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

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

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

Argument

I. MURRAY LACKS ARTICLE III STANDING.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

C. The Intervenors also lack Article III standing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[8] See 42 U.S.C. § 7607(b)(1).

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

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

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

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

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

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

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

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

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

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

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

2. Proposing a rule creates no binding legal consequence.

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

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

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

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

C. Murray's challenges are unripe.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The Senate Amendment should not be ignored.

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

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

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

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

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

[21] Id.

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

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

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

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

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

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

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

Intervenors NFIB and UARG seize on a line from the legislative history stating that the Senate "recedes to the House," arguing that this language indicates the Senate "defer[red] . . . to the . . . House amendment" and thereby "reconcile[ed] the alternate versions of the 1990 amendments." NFIB/UARG Br. 17 (citing S. 1631, 101st Cong., § 108 (Oct. 27, 1990), reprinted in 1 Leg. Hist. at 885) (JA 418)). Intervenors misuse this rather mundane legislative history snippet.

To begin with, the language quoted is not from the conference report as Intervenors state, but from a "Statement of Senate Managers" read into the record on the floor. See 1 Leg. Hist., at 880 (JA 413). As the reader noted, it was "not reviewed or approved by all of the conferees," id., and thus has limited value. Furthermore, "recedes" is a boilerplate term that signals that one chamber is withdrawing its prior objection to a provision of a bill, either because it has been amended, replaced, or otherwise. See Riddick's Senate Procedure S. Doc. 101-28 at pp. 1481-82 (JA 426-27). It does not mean one house is deferring to another. Moreover, the statement at issue here is specific to section 108 of the bill, and thus says nothing about the Senate's intentions regarding section 302, containing the Senate amendment. Indeed, the Senate Managers expressly stated that they were not addressing Title III of the bill, which contained that amendment. 1 Leg. Hist., at 880 (JA 413). In any event, the key

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

s/ Amanda Shafer Berman
AMANDA SHAFER BERMAN
BRIAN H. LYNK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1950 (phone)
E mail: amanda.berman@usdoj.gov

March 9, 2015

Certificate of Compliance

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

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because, as counted by the word count feature of Microsoft Office Word, it contains 13,960 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1); and

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

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

Dated: March 9, 2015

Certificate of Service

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

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

/s/ Amanda Shafer Berman
Counsel for Respondent

Dated: March 9, 2015

Attachment A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

EPA-77FR22392

Filed On: December 13, 2012

Las Brisas Energy Center, LLC,

Petitioner

v.

Environmental Protection Agency and Lisa Perez Jackson,

Respondents

Conservation Law Foundation, et al.,
Intervenors

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

BEFORE: Rogers, Garland, and Brown, Circuit Judges

O R D E R

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

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

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

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

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

Per Curiam