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

No. 14-1112: IN RE MURRAY ENERGY CORPORATION,

*Petitioner.*

No. 14-1151: MURRAY ENERGY CORPORATION,

*Petitioner*,

v.

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

*Respondents*.

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

## FINAL REPLY BRIEF OF PETITIONER

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March 9, 2015

## PARTIES, RULINGS, AND RELATED CASES

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

### PARTIES, INTERVENORS, AND AMICI

**Case No. 14-1112**

*Petitioner:*

Murray Energy Corporation

*Intervenors for Petitioner:*

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

*Movant-Intervenors for Petitioner:*

State of Arkansas and West Virginia Coal Association

*Amici Curiae for Petitioner:*

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

*Respondents:*

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

*Intervenors for Respondent:*

State of New York, State of California, State of Connecticut, State of Delaware, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Mexico, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, District of Columbia, City of New York, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club

*Amici Curiae for Respondent:*

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

**Case No. 14-1151**

*Petitioner:*

Murray Energy Corporation

*Intervenors for Petitioner:*

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

*Movant-Intervenors for Petitioner:*

State of Arkansas and West Virginia Coal Association

*Amici Curiae for Petitioner:*

American Chemistry Council, American Coatings Association, Inc., American Fuel & Petrochemical Manufacturers, American Iron and Steel Institute, Chamber of Commerce of the United States of America, Council for Industrial Boiler Owners, Independent Petroleum Association of America, Metals Service Center Institute, and National Association of Manufacturers

*Respondents:*

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

*Intervenors for Respondent:*

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

*Amicus Curiae for Respondent:*

Calpine Corporation

## RULINGS UNDER REVIEW

The petition for an extraordinary writ, No. 14-1112, seeks a writ prohibiting EPA's *ultra vires* rulemaking styled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014) (App.13).

The petition for review, No. 14-1151, seeks judicial review of an EPA legal conclusion embodied and announced in the initiation of EPA's *ultra vires* rulemaking styled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014) (App.13).

## RELATED CASES

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

## DISCLOSURE STATEMENT

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

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

Murray Energy is the largest privately-owned coal company in the United States and the fifth largest coal producer in the country, employing approximately 7,500 workers in the mining, processing, transportation, distribution, and sale of coal. In 2014, Murray Energy produced approximately 63 million tons of coal from 12 active coal mining complexes in six States. Murray Energy also owns two billion tons of proven or probable coal reserves in the United States.

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# GLOSSARY

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|---|---|
| **EPA** | **United States Environmental Protection Agency** |
| **Power Plants** | **Electric Utility Steam Generating Units** |
| **The Office** | **The House Office of the Law Revision Counsel** |
| **The Code** | **The Code of Laws of the United States** |

## STATUTES AND REGULATIONS

Except for the following, all applicable statutes, etc., are contained in the FINAL PETITIONER STATUTORY AND REGULATORY ADDENDUM to the FINAL OPENING BRIEF OF PETITIONER. Relevant excerpts from bills, hearings, and debates are contained in the FINAL PETITIONER LEGISLATIVE HISTORY ADDENDUM to this FINAL REPLY BRIEF OF PETITIONER, including material that is not available through online legal reference services without incurring additional document fees.

## SUMMARY OF ARGUMENT

The nation's coal-fired power plants are confronted with an existential challenge. The Administration's Clean Power Plan is forcing existing coal-fired power plants to decide now whether to invest millions to prepare for an onslaught of future requirements, switch from coal to other fuels, or shut down entirely. This plan will dramatically reduce the use of coal to generate electricity at the nation's coal-fired power plants, and thus attacks Murray Energy's customer base.

Whatever EPA's authority to wreak this kind of havoc in the abstract, its proposed carbon rule for existing power plants depends on purported authority explicitly prohibited by statute. The issue under review is a single question of EPA's statutory authority, and judicial review will abate significant and ongoing injury to Murray Energy that cannot be remedied by a later decision of this Court after the nation's existing coal-fired power plants have gone cold. Judicial review is available and appropriate now.

Respondents do not raise any credible question over this Court's authority under the All Writs Act to prohibit the finalization of a rule that would unlawfully subject power plants to double regulation and force many to commit to long-term construction projects or even shut down entirely before EPA publishes its final rule. Moreover, with EPA's definitive conclusion that Section 111(d) of the Clean Air Act suddenly no longer means what it says and no longer protects sources subject to national emission standards from costly over-regulation, this Court also has authority to vacate EPA's legal conclusion.

EPA's claim of authority rests entirely on an improper statutory interpretation that ignores the text of the United States Code and the role of the House Office of the Law Revision Counsel. EPA tries in vain to circumvent the Code, but fails to show that it contains any errors or is otherwise inconsistent or in conflict with the Statutes at Large. EPA further offers nothing in the text, structure, or legislative history of the Act that would permit it to ignore the clear and sensible limitation on its authority embodied in Section 111(d).

EPA's reliance on illusory authority is inflicting real and permanent injury on Murray Energy and its numerous supporting intervenors. This Court can and should stop EPA's *ultra vires* actions now.

## ARGUMENT

### I. MURRAY ENERGY HAS STANDING TO SEEK AN EXTRAORDINARY WRIT AND CHALLENGE EPA'S LEGAL CONCLUSION.

EPA's arguments that Murray Energy does not have Article III standing ring hollow. EPA essentially asks this Court to believe that its rulemaking, a key piece of the President's Clean Power Plan, is not really about reducing the use of coal at power plants. Yet, in Secretary of State John Kerry's own words just two months ago, while referring specifically to existing power plants and EPA's proposed rule, "we're going to take a bunch of them out of commission."[1]

EPA tries to defeat Murray Energy's standing by repeating the mantra that the rulemaking is a proposal. Even if this were a barrier to challenging the contents of a proposed rule, it is irrelevant to Murray Energy's standing to bring the petition for review of EPA's legal conclusion, which is final action. It is also no barrier to Murray Energy's standing to seek an extraordinary writ under the All Writs Act.[2] While Article III "requires more than the *possibility* of potentially adverse regulation," EPA Br. 12 (quoting *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1325 (D.C. Cir. 2013)) (emphasis by EPA), there is

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1. John Kerry, U.S. Sec'y of State, Remarks on Climate Change at COP-20, Lima, Peru (Dec. 11, 2014), *available at* http://www.state.gov/secretary/remarks/2014/12/234969.htm

2. EPA also conveniently ignores the petition for extraordinary writ when it argues that if the Court finds Murray Energy lacks standing none of the intervenors "can stand in Murray's shoes" because they did not intervene within 60 days. EPA Br. 16-17. There is no 60-day requirement for extraordinary writs.

nothing merely "possible" about the future here. There is *no* future version of the proposed rule, *no* revision of the various "building blocks," *no* change in detail, and *no* state implementation alternative that will not result — and is not intended to result — in reduced coal use. Curtailment of coal-fired power plant production, conversion to natural gas, increased use of wind or solar energy, energy conservation, and efficiency improvements all mean reduced coal demand. Thus, Murray Energy's claim is neither "too speculative" nor "based on predicting the substantive content of one possible final outcome of the rulemaking." EPA Br. 12. EPA's own modeling projects a 25 to 27 percent reduction in coal use to generate electricity by 2020 and a 30 to 32 percent reduction by 2030. While EPA now tries to distance itself from its own modeling, *id.* at 12–13, it cannot seriously contend that coal will be unaffected by its rulemaking.

Further ignoring the serious real-world impacts of its regulation, EPA apparently believes that, as a coal producer that supplies coal to power plants, Murray Energy would not have standing to challenge any final power plant rule because it is not the direct "object" of the rule. *See id.* at 14. Even if a petitioner who "is not himself the object of the government action or inaction he challenges" faces a somewhat higher burden to establish standing, *see id.* at 11 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)), coal producers *are* an "object" of EPA's action when the very purpose of that action is to substantially reduce the use of coal.

Moreover, EPA ignores that Murray Energy and its supporting intervenors have identified impacts occurring right now due to the proposed rulemaking. As a result, EPA's reliance on cases such as *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192 (D.C. Cir. 2011), and *Lujan* for the proposition that Murray Energy faces a heightened burden to establish standing because (according to EPA) only the expectation of future injury is asserted, *see* EPA Br. 10–11, is misplaced.[3] This case is no different from *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153–55 (2010) (standing conferred by costs incurred in planning for future risks caused by proposed agency action). The mere pendency of the proposed rule causes immediate harm because coal producers and utility customers must make — and are making — current business decisions now. EPA's pursuit of this rulemaking continues to pressure States and capital markets to dismantle Murray Energy's customer base.

3. Other cases relied upon by EPA do not defeat Murray Energy's standing either. Both *Alternative Research & Dev. Found. v. Veneman*, 262 F.3d 406 (D.C. Cir. 2001), and *Defenders of Wildlife* address the situation where the petitioner sought to challenge a schedule for proceeding with potential rulemaking. *See* EPA Br. 11–12. That is not the situation here.

## II. A WRIT IS AVAILABLE TO STOP THIS UNLAWFUL AGENCY PROCEEDING.

This Court has held that "[n]onfinal agency actions are interlocutorily reviewable in extraordinary circumstances — where, for example, they are in clear violation of law." *Aluminum Co. of Am. v. United States*, 790 F.2d 938, 942 (D.C. Cir. 1986). EPA argues the *only* "extraordinary circumstances" in which this Court can issue a writ to an agency are those where an agency has "unreasonably delayed taking action required of it by law." EPA Br. 30 (quotation omitted), but this argument is inconsistent with both the text of the All Writs Act and this Court's precedents. 28 U.S.C. § 1651(a); *Aluminum Co.*, 790 F.2d at 942; *In re GTE Serv. Corp.*, 762 F.2d 1024, 1027 (D.C. Cir. 1985) ("claims of unreasonable agency delay represent *one narrow class of cases*" in which All Writs Act relief is available) (emphasis added).

Even EPA acknowledges, as it must, that this Court can issue a writ to correct "a lower court's exercise of jurisdiction it lacks," and that this Court can issue a supervisory writ to correct a lower court's error. EPA Br. 31. But EPA argues this Court may not issue these same writs to correct an agency's exercise of authority it lacks, or to issue a supervisory writ to address an agency's error. *Id.* EPA offers no basis for this distinction. With original jurisdiction over this subject matter, this Court must have equal authority to issue writs to EPA with respect to its actions under the Clean Air Act as this Court has to issue writs to a district court.

EPA cites the familiar proposition that an All Writs Act claim may not be a mere substitute for appeal. *Id.* at 30. This is so because there is no

extraordinary circumstance justifying a writ when an ordinary appeal will do. Writs, however, may be issued whenever they are "necessary or appropriate" and "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). When there is a showing that the "ordinary mode of relief is inadequate," this Court has authority to issue a writ to an agency whose actions are within the subject matter of this Court's original jurisdiction. *In re GTE Serv. Corp.*, 762 at 1027.[4]

The availability of All Writs Act relief cannot be determined by rigid formulas. The Supreme Court has noted that while writs are rarely granted, they can be in the right case. That is why the Supreme Court has "answered the question as to the availability of mandamus in situations such as this with the refrain: 'What[,] never? Well, *hardly* ever!" *Allied Chem. Corp. v. Daiflon, Inc.,* 449 U.S. 33, 36 (1980) (per curiam) (referencing Gilbert & Sullivan's *H.M.S. Pinafore*).

Even though writs of prohibition are "hardly ever" issued, Murray Energy has made the requisite showing why the circumstances here qualify, based on the uniqueness of the present case as well as by analogy to several instructive decisions. EPA does not dispute that the circumstances of *Leedom v. Kyne*, 358 U.S. 184 (1958), are present here because EPA acts beyond its authority.

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4. EPA wrongly reads the words "in aid of" in the All Writs Act as supporting its position. However, these words are used in a phrase that merely identifies *which* courts can issue *which* writs. 28 U.S.C. § 1651(a) ("in aid of their respective jurisdictions").

As for *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963), EPA unconvincingly claims that "vigorous protests from foreign governments" are a more "compelling justification for prompt judicial resolution of the controversy" than the protests of the 14 sovereign States in this case. *Id.* at 17. And EPA fails to dispute the inadequacy of the ordinary mode of relief in this case. Accordingly, the sufficient showing of extraordinary circumstances remains unrebutted, and the extraordinary writ is available.

## III. EPA's Legal Conclusion Is Reviewable Final Agency Action.

EPA chiefly argues that "proposed requirements" are non-reviewable. EPA Br. 34. This is irrelevant. Murray Energy is not challenging EPA's proposed requirements. It is challenging EPA's legal conclusion that it has authority to propose any requirements at all. EPA not only published this conclusion in the Federal Register in a preamble signed by the Administrator, it has acted upon it to the detriment of Murray Energy, hundreds of sources, and millions of consumers. EPA cannot now shield its decision from review simply by putting it in a preamble.

It is true that Section 307 of the Clean Air Act provides several examples of promulgated rules that are subject to judicial review, but EPA goes too far when it argues that these examples show that Congress intended to *prevent* judicial review of other agency actions. 42 U.S.C. § 7607(b)(1). Section 307 of the Act expressly provides for review of not just the listed promulgated rules, but also "any other final action of the Administrator" under the Act. Moreover, the Supreme Court has already rejected EPA's argument, holding that "nothing in the legislative history" supports using the examples to narrow the scope of judicial review available under the Clean Air Act, and that "the phrase, 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, *any other* final action." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980).

The Clean Air Act does not require that an agency's actions take any specific form to be considered "final." As the Supreme Court held in *Whitman*

*v. American Trucking Associations, Inc.*: "The bite in the phrase 'final action' . . . is not in the word 'action,' which is meant to cover comprehensively every manner in which an agency may exercise its power. It is rather in the word 'final,' which requires that the action under review 'mark the consummation of the agency's decisionmaking process.'" 531 U.S. 457, 478 (2001) (internal citations omitted). No matter the form EPA chooses, judicial review is available as long as the agency has "'rendered its last word on the matter' in question." *Id.* (quoting *Harrison*, 446 U.S. at 586). Indeed, reviewable statutory interpretations can come in many forms, including guidance documents,[5] opinion letters,[6] administrative orders,[7] and regulatory preambles. In *Whitman* itself, the Supreme Court found final an "implementation policy" published in a preamble. *See Whitman*, 531 U.S. at 477–79.

EPA's only argument is that it has offered to accept comments on "all aspects" of the proposed rule and "may modify its final action in any number of ways." EPA Br. 23. This does not affect the finality of EPA's analysis. The core question is whether the agency has "adopted the interpretation" at issue. *Whitman*, 531 U.S. at 479. EPA clearly has. EPA's vague argument now that it might change its mind is small comfort to those who must currently deal with EPA's decision to construe away a legal safeguard that has been in place for a quarter century. As this Court held in *Appalachian Power Co. v. EPA*:

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5. *Appalachian Power Co. v. EPA*, 208 F. 3d 1015, 1022 (D.C. Cir. 2000).
6. *Harrison*, 446 U.S. at 583.
7. *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

> EPA may think that because the Guidance, in all its particulars, is subject to change, it is not binding and therefore not final action. There are suggestions in its brief to this effect. But all laws are subject to change. Even that most enduring of documents, the Constitution of the United States, may be amended from time to time. The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.

208 F.3d at 1022 (internal citations omitted).

EPA also asks this Court to ignore the "absence of hedge-words" in the preamble. EPA Br. 24. But what the agency says and what the agency does are the very touchstones of finality. As Justice Scalia held in *Whitman*, finality does not depend on whether the agency has "dressed its decision with the conventional procedural accoutrements of finality." *Whitman*, 531 U.S. at 479. Rather, it is EPA's "own behavior" that shows that EPA's decisionmaking process is concluded. *Id.*; *see also Appalachian Power*, 208 F.3d at 1022.

In this case, EPA's legal conclusion is also presumed final, since it was signed by the Administrator. *See National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971). Rather than producing evidence that rebuts this presumption, EPA tries to distinguish and minimize *Shultz*. Nothing in the Supreme Court's later decision in *Bennett v. Spear*, 520 U.S. 154 (1997), however, "erodes the force of" *Shultz,* and EPA has provided no "cogent basis favoring departure from" this Court's decision. *Brewster v. Comm'r*, 607 F.2d 1369, 1374 (D.C. Cir. 1979). EPA also cannot distinguish *Shultz* on the basis that it addressed an "interpretive ruling[]." EPA Br. 21. Murray Energy's challenge is also to an interpretation — EPA's interpretation of its authority under Section 111(d). Nor can EPA distinguish *Shultz* on its facts, since the

petitioner in *Shultz* sought judicial review under the Administrative Procedure Act, which the Supreme Court has held contains the same finality requirement as the Clean Air Act. *See Whitman*, 531 U.S. at 478.[8]

EPA next tries to avoid judicial review by claiming that no legal consequences flow from its proposed rule. EPA Br. 25. This second part of the two-part test used in *Bennett*, 520 U.S. at 177–78, however, applies only "[a]s a general matter." When an agency's legal conclusions are under review, there is no need for this part of the analysis. *See Whitman*, 531 U.S. at 477–479 (finding finality based only on the consummation of EPA's decisionmaking process). In addition, even if this analysis were required, legal consequences clearly flow from EPA's final decision to convert a limited and seldom-used provision of the Clean Air Act into a font of authority to impose regulations that have been prohibited for a quarter-century. EPA's conclusion determines the rights and obligations of the nation's coal-fired power plants, and their suppliers and customers; Murray Energy and the supporting intervenors have amply described the present-day consequences of EPA's decision. Moreover, under EPA's legal conclusion, every source-category that is currently regulated under

8. EPA also incorrectly argues that applying *Shultz* would "force[]" future petitioners to bring suits over proposed rules. *See* EPA Br. 22. Principles of exhaustion in the administrative law context and whether a legal determination is susceptible to challenge when first made and again when applied need not be addressed in this case. EPA chose here to state its legal determination conclusively and with the support of a detailed memorandum on a purely legal issue of statutory interpretation that is independent of the contents of the proposed rule, and that cannot be impacted by any changes EPA might make.

Section 112 may now be subjected to regulation under Section 111(d). Even EPA's own obligations have changed, as it may now be subjected to citizen suits for failure to promulgate Section 111(d) standards.

Finally, EPA's "ripeness" arguments are off the mark. *See* EPA Br. 26. EPA does nothing more than cite a handful of cases where courts found that challenges were unripe when the contents of a later rulemaking might render moot or otherwise alter the legal issues before the court. Nothing before this Court will change based on the contents of EPA's final rule.

Just yesterday, EPA Administrator Gina McCarthy testified unequivocally and under oath before Congress, and in direct response to a question about this case, that EPA has never considered *not* finalizing the rule. The Fiscal Year 2016 EPA Budget: Hearing Before the H. Comm. on Energy & Commerce at 2:03 (Feb. 25, 2015), *available at* http://www.c-span.org/video/?324543-1/administrator-gina-mccarthy-testimony-epa-fiscal-year-2016-budget. To the contrary, she is "confident we can get this done" and, months after the close of the comment period, has received no information "that would indicate we can't do so." *Id.* Whatever may be argued by EPA's lawyers, EPA will without question proceed with this rulemaking having reached a final conclusion that it can.

## IV. THIS COURT MUST DEFER TO THE REASONABLE DETERMINATION OF THE HOUSE OFFICE OF THE LAW REVISION COUNSEL.

EPA argues that the Office's determination of the text of Section 111(d) presented in the United States Code is entitled to no deference, *see* EPA Br. 46–49, refusing to acknowledge that Congress provided that the contents of the Code "establish prima facie the laws of the United States." 1 U.S.C. § 204(a). Instead of offering any interpretation of this statutory provision, EPA relies on a footnote in *United States v. Welden*, 377 U.S. 95 (1964), for the remarkable proposition that the Code "is entitled to 'no weight.'" *Id.* at 99 n.4. EPA neglects to mention that the *Welden* footnote dealt only with the "change of arrangement" of statutes and merely applied the rule that even when *Congress* changes the arrangement of statutes, "it will not be inferred that Congress . . . intended to change their effect unless such intention is clearly expressed." *Id.* (quotation omitted).

EPA also states that "the text in the Statutes at Large controls" over the Code when "there [is] a substantive difference between the two." EPA Br. 47. Instead of identifying *any* "substantive difference," EPA relies upon a failed conforming amendment that the Office correctly determined could not be executed because it did not have priority over an earlier substantive amendment in the same bill. EPA refers to the Section 302(a) conforming amendment as "unexecuted text" and demands that it be "considered and given effect." EPA Br. 48 n.23. But it has been "considered" by the Office and found to have no effect because it did not have execution priority. Given that a

separate provision in the same bill deletes the text it would amend, *there is no effect for it to have*. Even if it had priority over the earlier substantive Section 108(g) amendment, the result would be the same: After Section 302(a) conformed the cross-reference, the cross-reference would then be deleted by Section 108(g) and replaced with the language that is in the Code. Thus, the text of Section 111(d) in the Code is exactly the same as it would be if the two amendments were executed in reverse order.

EPA demands authority to second-guess the determination made by an expert, nonpartisan legislative agency so that EPA can reach a different result by ignoring the rule that is routinely applied by the Office, and is consistent with Congress's drafting manuals, that amendments are to be executed in order. EPA would instead execute amendments in reverse order, *see* EPA Br. 48 n.22,[9] or alternatively refuse to execute an earlier amendment whenever EPA finds a later amendment would fail as a result, so both amendments fail. EPA Br. 53. What EPA would do is irrelevant. The task of executing amendments is the job of the Office, not EPA.

In justifying its request to supersede the Office's determination, EPA says its rival "is not a 'legislative agency'" because it does not "make law."[10]

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9. EPA cites *Lodge 1858, Am. Fed'n of Gov't Emps. v. Webb*, 580 F.2d 496, 510 (D.C. Cir. 1978), as if its holding is inconsistent with the Office's determination, but that decision does not address the order in which statutory amendments are executed or their relative execution priority.

10. Murray Energy does not contend the Office can "make law." Rather, the contention is that the Office's reasonable determinations should be deferred to by courts as they perform their Article III responsibilities.

EPA Br. 47. Yet the Office is directed by the Law Revision Counsel who is appointed by and serves at the pleasure of the Speaker.[11] Accordingly, the Law Revision Counsel and by extension the Office he directs are "subservient" to Congress. *Bowsher v. Synar*, 478 U.S. 714, 730 (1986) ("In constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress."). Moreover, Congress has rules that permit Members to raise "questions of privilege" to countermand determinations of its agents that are inconsistent with the views of Congress. *See* Rule IX, Rules of the House of Representatives, 113th Cong. (2013); *see, e.g.*, H.R. Res. 362, 101st Cong. (1990); 136 CONG. REC. 4997, 5005–06 (199) (question of privilege used to countermand determination of House Bipartisan Legal Advisory Group). Here, Members of Congress received the second supplement to the 1988 edition of the United States Code early in 1991 containing the Office's determination. Murray Energy has found no evidence that any Member challenged the determination using a question of privilege or by other means.

Additionally, the Office assists in the one-time process of repeal and reenactment of the provisions of each title of the Code, referred to as "positive law codification." 2 U.S.C. § 285b. In the positive law codification of the Clean Air Act recently completed by the Office and submitted to Congress, the

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11. Furthermore, the Code maintained by the Office is "prepared and published under the supervision of the Committee on the Judiciary of the House of Representatives," 1 U.S.C. § 202, and every individual Member of Congress receives a copy of the Code and its supplement, 1 U.S.C. §§ 211 & 212.

text prohibits Section 111(d) mandates for "any air pollutant . . . emitted from a source category that is regulated under section 211112 of this title." OFFICE OF THE LAW REVISION COUNSEL, UNITED STATES HOUSE OF REPRESENTATIVES, DRAFT 55 U.S.C. § 211111(d) (App. 512).[12] In preparing a positive law codification, the Office "actively seeks input from Federal agencies, congressional committees, and others with expertise in the area of law." OFFICE OF THE LAW REVISION COUNSEL, UNITED STATES HOUSE OF REPRESENTATIVES, POSITIVE LAW CODIFICATION IN THE UNITED STATES CODE at 3. The Office prepared a document detailing changes and corrections that it recommended, and none were made for Section 111(d). LAW REVISION COUNSEL, DISCUSSION DRAFT, EXPLANATION OF H.R. _____, TO ENACT CERTAIN LAWS RELATING TO THE ENVIRONMENT AS TITLE 55, UNITED STATES CODE, "ENVIRONMENT" at 30 (2014), *available at* http://uscode.house.gov/codification/t55/exp.pdf (App.525).

The only circumstances justifying a departure from the text of the Code are those where the Office's determination is plainly inconsistent with the Statutes at Large or is unreasonable. Neither circumstance is present here. The Office duly executed an important substantive amendment rather than refusing to do so because later in the same bill Congress included a superfluous conforming amendment. For EPA to step in 25 years later in order to second-guess the Office unduly interferes with the functioning of the legislative process.

12. Section 211112 is the renumbered Section 112 program in the positive law codification of the Clean Air Act.

## V. EPA CANNOT JUSTIFY INTERPRETING SECTION 111(D) TO PERMIT DOUBLE REGULATION.

EPA claims that it can interpret away the Section 111(d) limitation on regulating emissions from source categories it regulates under Section 112, even if EPA cannot second-guess the Office's determination of the current text of Section 111(d). EPA Br. 35–45. But EPA cannot show that there is any relevant question that Congress has not answered, and EPA has not identified any actual structural problem or legislative history suggesting that Congress did not mean what it said. Therefore, the text of Section 111(d) prohibiting double regulation is both the beginning and end of this matter. EPA's arguments to the contrary are based on a complete misunderstanding of *Chevron*. *Compare* EPA Br. 34 (demanding deference whenever there is more than one "possible way to interpret" statutory text) *with Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding an agency interpretation is only relevant when Congress "has not directly addressed the precise question at issue"); *see also Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996) ("[T]o avoid a literal interpretation" EPA "must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.").

### A. EPA Wrongly Seeks to Circumvent the Limitations on Its Section 111(d) Authority.

Confronted with the prohibition on using Section 111(d) to mandate state-by-state standards "for any existing source for any air pollutant . . . emitted from a source category which is regulated under section [112]", 42 U.S.C. § 7411(d), EPA seeks to evade this restriction through interpretations that either obliterate or narrow a limitation set forth with "specific phrasing" even though that specificity demonstrates that all "necessary judgment" on this issue "has already been made by Congress." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2448 (2014).

First, EPA takes aim at *all* restrictions on Section 111(d), including the limitation that EPA has neither the duty nor the authority to regulate criteria pollutants under Section 111(d). EPA Br. 36–37. EPA claims that because Congress in 1970 used the word "or" instead of the word "and" in one part of the text of Section 111(d), EPA must regulate a particular source of emissions so long as the emissions do not violate any one of the three restrictions. *Id.* This reading obliterates all three restrictions because there are no pollutants that would fail to comply with both the first and second restrictions.[13] In other words EPA's authority to regulate under Section 111(d) would be unlimited,

13. The first restriction is that the pollutant be one "for which air quality criteria have not been issued." 42 U.S.C. § 7411(d). The second restriction is that it be one "which is not included on a list published under section [108(a)]." *Id.* The referenced "list" may not include any "air pollutants . . . for which air quality criteria had not been issued before December 31, 1970." 42 U.S.C. § 7408(a).

and EPA has failed since 1970 to comply with a statutory duty to mandate state-by-state standards under Section 111(d) for every Section 111(b) New Source Performance Standard issued by the agency during the past 45 years. This contention is as impermissible as it is outlandish. "EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman*, 531 U.S. at 485. For EPA to interpret the three restrictions as alternatives and thereby "render" all of them "utterly inoperative is to go over the edge of reasonable interpretation." *Id.* EPA cannot claim these "carefully designed restrictions on EPA discretion" were "utterly nugatory" from the moment they were passed. *Id*. at 484. Indeed, if the "or" makes the restrictions alternatives, the limitations on EPA's Section 111(d) authority were even more "abruptly obsolete" than the provisions EPA impermissibly interpreted out of existence in *Whitman*. *Id*. at 485.

Second, EPA claims that the third restriction is missing the word "not." EPA Br. 37. But the second and third restrictions are set forth together in a phrase that states that the pollutant must be one "which is not" described by either of the two descriptions that follow. There is nothing unusual or unclear about the grammar or logic of this phrase, and EPA's interpretation would once again impermissibly nullify this text. *See Whitman*, 531 U.S. at 485.

Finally, failing in other attempts to nullify the restriction, EPA claims authority to simply rewrite it by inserting words, redefining terms, or reassigning phrases. EPA Br. 37–38. But EPA cannot "replace[]" the Section 111(d) exclusions "with others of its own choosing" without going

"well beyond the bounds of its statutory authority." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2445 (quotation omitted). "The power of executing the laws" "does not include a power to revise clear statutory terms that turn out not to work in practice," or to revise them "to suit [EPA's] own sense of how the statute should operate." *Id.* at 2446.

EPA may issue a mandate only "for any existing source for any air pollutant . . . which is not . . . emitted from a source category which is regulated under section [112]." 42 U.S.C. § 7411(d). This highly "specific" language is the end of the matter, leaving nothing for EPA to add or subtract because Congress "has already" made its own "judgment." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2448. Once Congress has answered a question with this degree of specificity, EPA has no power to redefine words or reassign the phrases to circumvent the judgment of Congress. EPA can only execute the law, not change it. "An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Id.* at 2445.[14]

14. EPA's reliance on *Utility Air Regulatory Group*, EPA Br. 38, is difficult to comprehend. The Supreme Court held that the phrase "any air pollutant" in 42 U.S.C. § 7479(1), without any additional qualifier, required a reasonable interpretation to avoid rendering a program unrecognizable to the Congress that created it. 134 S. Ct. at 2444. The Court also held that the more specific phrase "each pollutant subject to regulation under [the Act]" in 42 U.S.C. § 7475(a) required no interpretation by EPA because its "more specific phrasing . . . suggests that the necessary judgment has already been made by Congress." 134 S. Ct. at 2448. The phrase at issue here is *even more* specific.

### B. The Limitations on EPA's Section 111(d) Authority Are Consistent with the Clean Air Act's Structure.

When a question has been answered by the text of a statute, its structure is relevant only when it is at odds with that text. *Engine Mfrs. Ass'n*, 88 F.3d at 1088. There is no such conflict here between the structure of the Act and its text.

EPA and its supporters urge the Court to ensure that the Section 111(d) program is not "eviscerated" as a result of the 1990 Amendments. *See, e.g.*, Envtl. Int. Br. 16. But Section 111(d) as amended in 1990 still plays a role — regulating sources not regulated under Section 112. It makes perfect sense that Congress decided to limit the Section 111(d) program to sources that are not subject to national standards. The value of using the Section 111(d) method of regulation through state-by-state standards is the ability to preserve greater diversity in a source category. The rigid Section 112 program offers no means of tailoring its regulations on a state-by-state basis;[15] every source subject to that program must conform to the nationwide performance standard. Once a Section 112 national standard is imposed, there is no reason to use the Section 111(d) program as there will be little if any diversity for it to preserve.

EPA's second "evisceration" argument is that Section 111(d) is needed to plug a "gaping hole" in the Clean Air Act's coverage that would otherwise "leav[e] sources' emissions of certain pollutants outside the Act's scope." EPA

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15. Notably, Congress considered but rejected utilizing the Section 111(d) method in the new Section 112 program. *See* H.R. 5555, 97th Cong. § 102(f) (as introduced in the House, Feb. 22, 1982) (proposing Section 112(g)).

Br. 41–42. EPA implies there are emissions from sources regulated under Section 112 that can only be regulated, if at all, under Section 111(d). While there certainly was a difference between what the old narrow Section 112 program covered and what Section 111(d) covers, it is unclear what, if any, difference remains. Section 111(d) covers emissions "which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A); 42 U.S.C. § 7602(h) (defining welfare). Section 112 now covers emissions "which present, or may present, . . . a threat of adverse human health effects . . . or adverse environmental effects." 42 U.S.C. § 7412(a)(7) (defining adverse environmental effect). Indeed, EPA believes that carbon dioxide meets both of these tests. *See* 73 Fed. Reg. 44,354, 44,493–95 (July 30, 2008). No party to this case has identified any pollutant that EPA has found cannot be regulated under new Section 112, but can be regulated under Section 111(d). In any event, the null or nearly empty set of purportedly orphaned pollutants is not a valid basis for EPA to create an overbroad exception that would cover even those emissions that EPA believes it could regulate under Section 112 but would prefer not to. The purported "gap" is quite possibly "illusory," and even if it exists at all, it is not so "large . . . in any event" as to be "demonstrably at odds" with congressional intent because it would not in any way render "the regulatory scheme" "unworkable or absurd." *Engine Mfrs. Ass'n*, 88 F.3d at 1090–93.

### C. Ample Legislative History Supports the Limitation on EPA's Authority.

EPA argues that "[t]he legislative history of the 1990 amendments . . . 'make it plain'" that it would not be "reasonable" to interpret Section 111(d) to mean what it says. EPA Br. 42 (quoting *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982)). This bold claim is simply wrong.

The plain meaning of a statute need not be stated elsewhere in its legislative history as "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison*, 446 U.S. at 592 (1980). For this reason, when "ascertaining the meaning of a statute, a court cannot . . . pursue the theory of the dog that did not bark." *Id.* Accordingly, the relevance of legislative history, if any, is in what it says, not in what it does not say. EPA provides the Court with three quotes describing changes to the Clean Air Act, EPA Br. 42 n.19, and the only one of these relevant in any way to this case identifies the very reason why Congress changed the scope of the Section 111(d) program — the decision to fundamentally restructure and expand the previously narrow Section 112 program to comprehensively cover industrial process emissions.

EPA offers nothing in the legislative history to suggest that, contrary to the text it enacted, Congress intended to authorize EPA to mandate state-by-state standards for existing sources under Section 111(d) after subjecting them to national standards under Section 112. In contrast, there are extensive

discussions in the legislative history in those instances where double regulation was authorized, whether for different pollutants,[16] or for the same pollutants but at different times.[17]

The purported absence of "a single statement in the legislative history indicating that Congress . . . sought to restrict EPA's authority under the existing source performance standards program," EPA Br. 43, would not be surprising since — as explained by the lead architect in the Senate of the new Section 112 program during a key committee hearing — Section 111(d) was considered during the drafting of the 1990 Amendments to be "some obscure, never-used section of the law." *Clean Air Act Amendments of 1987 (Part 2): Hearings on S. 300, S. 321, S. 1351, and S. 1384 Before the Subcomm. on Envtl. Prot. of the S. Comm. on Env't & Pub. Works*, 100th Cong. 13 (1987) (App.208). EPA later testified at another key hearing that imposing double regulation of a source category "in seriatum" even for different substances is "ridiculous." *Energy Policy Hearing* at 603 (App.343).

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16. The decision of how and whether EPA could doubly regulate power plants under both Section 112 for hazardous pollutants and under Title IV for sulfur dioxide involved extensive discussion and negotiation. *See, e.g.*, *Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearings Before the S. Comm. on Energy & Natural Res.*, 101st Cong. 7, 234–35, 240–41, 436–37, 483, 485, 492, 570–72, 596, 603 (1990) (hereinafter *Energy Policy Hearing*) (App. 323–43).

17. The decision to subject sources regulated under Section 112 to two rounds of regulation, the first imposing a floor and the second several years later to reduce residual health risks, engendered significant debate. *See, e.g.*, 136 CONG. REC. 3,493 (1990) (statement of Sen. Steven Symms).

Furthermore, there is plenty of evidence that Congress understood and responded to concerns that the new comprehensive national standard program under Section 112 posed significant problems when combined with other Clean Air Act programs. These concerns were first raised publicly at a hearing on June 22, 1989, in testimony pointing out that it would be problematic to subject power plants to both the new Section 112 and the new Title IV acid rain program. *Clean Air Act Amendments (Part 3): Hearings Before the Subcomm. on Health & the Env't of the H. Comm. on Energy & Commerce*, 101st Cong. 356–58, 470–71 (1990) (App. 229–33).[18] The following month, the Bush Administration submitted a bill to Congress, H.R. 3030 and S. 1490, that included the provision that became Section 108(g) of the 1990 Amendments and resolved the potential conflict between Section 112 and Section 111(d) by prohibiting double regulation. H.R. 3030, 101st Cong. § 108(d) (as introduced in the House, July 27, 1989).

The Administration's bill also dealt with the conflict between Section 112 and Title IV using a provision that became Section 112(n)(1)(A) and gave EPA the option of using Section 111(d) to regulate power plants if EPA found using Section 112 would not be "appropriate and necessary" after the imposition of Title IV. When the Senate failed to include a similarly adequate provision to address this issue, extensive debate and negotiation ensued — during which the Administration position prevailed — because Members of Congress

18. The central premise of both Title IV and Section 111(d) is the avoidance of national standard uniformity for a source category.

understood that subjecting existing sources to both the Section 112 program's rigid cost-blind minimum standards and other regulatory programs can be highly problematic. *See, e.g.*, *Energy Policy Hearing* at 7, 234–35, 240–41, 436–37, 483, 485, 492, 570–72, 596, 603 (App.323–43). That a similar debate did not occur with respect to the specific fix for Section 111(d) indicates only that it was not controversial.

It would be utterly unreasonable to find significance in any perceived legislative history silence as to the plain meaning of a provision that reasonably alters the scope of an "obscure, never-used section of the law" from one role to another in order to avoid a result EPA told Congress would be "ridiculous."

## CONCLUSION

This Court should vacate EPA's final legal conclusion, issue a writ prohibiting EPA from proceeding with the rulemaking, and deny EPA's motion to dismiss Murray Energy's petition for review.

Dated: March 9, 2015

Respectfully submitted,

*/s/ Geoffrey K. Barnes*

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing FINAL REPLY BRIEF OF PETITIONER complies with the type-volume limitations of Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and this Court's order of November 13, 2014, limiting this brief to 7,000 words. I certify that this brief contains 6,872 words, as counted by the Microsoft Word software used to produce this brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

*/s/ Geoffrey K. Barnes*

Geoffrey K. Barnes

## CERTIFICATE OF SERVICE

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

Dated: March 9, 2015

/s/ *Geoffrey K. Barnes*

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