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**Via Certified Mail & Email**

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460  
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**Re: EPA's Asserted Authority Under Section 111(d) Of The Clean Air Act To Regulate CO<sub>2</sub> Emissions From Existing Coal-Fired Power Plants**

Dear Administrator McCarthy:

On June 2, 2014, the United States Environmental Protection Agency ("EPA") launched one of the most far-reaching and expensive regulatory projects in American history: the *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units* ("Proposed Rule").<sup>1</sup> The Proposed Rule seeks to impose limitations on CO<sub>2</sub> emitted from existing coal-fired power plants, requiring a staggering 30% reduction in the emissions from these plants across the country in a mere 15 years. West Virginia—a major consumer of coal-generated electricity and one of the leading producers of coal—will be uniquely harmed by the restrictions of the Proposed Rule.

As the chief legal officer for the State of West Virginia, I respectfully request that you withdraw the Proposed Rule immediately because EPA lacks the legal authority to adopt that Rule. In the *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* ("Legal Memorandum" or "Mem.") that was issued together with and incorporated by reference into the Proposed Rule,<sup>2</sup> EPA offers only one legal basis for the Rule: the rarely invoked Section 111(d) of the Clean Air Act ("CAA"). See 42 U.S.C. § 7411(d). The problem is that Section 111(d) affirmatively *excludes* precisely what EPA is attempting to do in the Proposed Rule.

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<sup>1</sup> The Rule has not yet been published in the *Federal Register* and is currently available at <http://www2.epa.gov/sites/production/files/2014-05/documents/20140602proposal-cleanpowerplan.pdf>.

<sup>2</sup> <http://www2.epa.gov/sites/production/files/2014-05/documents/20140602tsd-legal-memorandum.pdf>.

As this letter explains, EPA lacks authority under the plain text of Section 111(d), as it appears in the United States Code, to promulgate the Proposed Rule. Section 111(d) expressly prohibits EPA from regulating “any air pollutant . . . emitted from a[n] [existing] source category which is regulated under [the national emission regime in Section 112 of the CAA].” 42 U.S.C. § 7411(d). Given that EPA has imposed extensive and onerous regulations on existing coal-fired power plants under Section 112, the agency cannot now use Section 111(d) to require regulation of CO<sub>2</sub> emissions from those same existing plants. This conclusion is so apparent that even EPA concedes in its Legal Memorandum that a “literal reading” of Section 111(d) prohibits the Proposed Rule. Mem. 26; *see also* 70 Fed. Reg. 15,994, 16,032 (Mar. 29, 2005) (EPA making the same admission in a prior rulemaking).

The *only* textual justification that EPA’s Legal Memorandum offers for departing from the “literal” terms of Section 111(d) is unpersuasive. The agency relies entirely on a one-sentence clerical entry in the 1990 Amendments to the Clean Air Act that was not codified in the U.S. Code but appears in the Statutes at Large. That entry, even EPA has admitted, was clearly a mistake because it sought to make a technical correction rendered moot by another amendment. *See* 70 Fed. Reg. at 16,031 (describing the entry as a “drafting error”). Nevertheless, EPA now claims that it must give meaning to this mistake and, as a result, has announced an interpretation of Section 111(d) that directly conflicts with the language in the U.S. Code. EPA’s interpretation rewrites Section 111(d) from a prohibition on the regulation of “any air pollutant . . . emitted from a source category which is regulated under [Section 112],” as stated in the U.S. Code, to a more limited prohibition on the regulation of “any *hazardous* air pollutant” emitted from such a source category. This sort of reasoning would be wrong under any circumstance, but it is particularly improper here, where it is being offered as the justification for one of the most costly regulations in this Nation’s history.

In light of the profound legal infirmities with the Proposed Rule, EPA’s unprecedented policy will not survive judicial review. As such, it would be contrary to the public interest to proceed with publication in the *Federal Register*. Failure to withdraw the Proposed Rule will only cause citizens, States, industry, and environmental groups to waste valuable resources analyzing and commenting on a futile endeavor. Moreover, given the short timeframe for compliance with the Rule’s objectives, many of these parties will be required to incur significant and unnecessary costs. This will trigger unwarranted market responses and economic dislocation from coerced reduction of the use of coal as parties struggle to meet the anticipated requirements. This is unacceptable. No matter how fervent the desire by some to advance the policies underlying these regulations, EPA cannot—and should not—do so at the expense of the rule of law.

**A. EPA Has Conceded That The Proposed Rule Is Unlawful Under The “Literal” Terms Of The Clean Air Act**

The only authority invoked by EPA for the onerous requirements in the Proposed Rule is Section 111(d) of the Clean Air Act, a little-used provision that grants EPA limited power to require States to regulate air pollutants from existing sources. Mem. 11-12. As it appears in the U.S. Code, Section 111(d) requires the EPA Administrator under narrow circumstances to

“prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan which establishes standards of performance” for certain existing sources and certain air pollutants. Among other things, the statutory provision specifically *excludes* from the Administrator’s authority the power to prescribe regulations relating to “standards of performance for any existing source for any air pollutant . . . emitted from a source category which is regulated under section 7412 of this title [*i.e.*, Section 112 of the CAA].” 42 U.S.C. § 7411(d). EPA admits in its Legal Memorandum for the Proposed Rule that “a literal reading of that language” means that “EPA c[an] not regulate *any* air pollutant from a source category regulated under section 112” of the Clean Air Act. Mem. 26 (emphasis added); *accord* 70 Fed. Reg. at 16,032 (EPA reaching the same conclusion). Simply put, Section 111(d)’s plain text provides that if an existing source category is regulated under Section 112, that source category may not also be regulated under Section 111(d).

The regime codified in Sections 112 and 111 is part of a measured, coherent approach to regulating air pollutants from new and existing pollution sources. Section 112 of the Clean Air Act concerns national emissions standards for hazardous air pollutants (“HAPs”) emitted from any number of new and existing sources. *See* 42 U.S.C. § 7412. Whether a source category is regulated under Section 112 is generally dependent upon a number of factors. *Id.* § 7412(c). With regard to coal-fired power plants, Congress specially provided that those sources need only be regulated under Section 112 if the Administrator finds such regulation to be “appropriate and necessary.” *Id.* § 7412(n). Section 111(d) in turn addresses the emission of air pollutants emitted from *existing* sources *not* regulated under Section 112. Specifically, when EPA has chosen not to regulate a source category nationally under Section 112, emissions from existing sources within that category must be subject instead to state-by-state emission standards under Section 111(d), assuming certain other predicates have been satisfied. The rest of Section 111, which is not at issue here, is not restricted by the scope of Section 112 and concerns national emissions standards for air pollutants emitted from *new* sources.

In the present case, it is clear that EPA has no authority under Section 111(d) to regulate “any” emission from coal-fired power plants, including CO<sub>2</sub> emissions. EPA categorized coal-fired power plants as part of a “source category” under Section 112 in 2000, *see* 65 Fed. Reg. 79,825, 79,826 (Dec. 20, 2000), and the D.C. Circuit in 2008 rejected EPA’s attempt to withdraw that finding, *see New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). Then, in 2012, EPA imposed significant Section 112 restrictions on coal-fired power plants, *see* 77 Fed. Reg. 9,304 (Feb. 16, 2012); 40 C.F.R. Part 63 subpart UUUUU, which the D.C. Circuit recently upheld, *see also White Stallion Energy Ctr., LLC v. EPA*, \_\_\_ F.3d \_\_\_, 2014 WL 1420294 (D.C. Cir. Apr. 15, 2014). Under the “literal” reading of Section 111(d), Mem. 26, these rules regulating existing coal-fired power plants under Section 112 prohibit EPA from invoking Section 111(d) to adopt the Proposed Rule.

**B. EPA’s Arguments Based Upon A Clerical “Drafting Error” In The 1990 Clean Air Act Amendments Cannot Displace The “Literal” Terms Of Section 111(d)**

Faced with the unambiguous terms of Section 111(d) in the U.S. Code, EPA falls back in its Legal Memorandum to an erroneous prior analysis that the agency conducted in 2005, in

which it concluded that Section 111(d) is actually “ambiguous” and therefore subject to the agency’s “reasonable” interpretation. Mem. 8, 26. That 2005 analysis—which was part of a rule under Section 111(d) that the D.C. Circuit vacated in *New Jersey v. EPA*, 517 F.3d 574—based its conclusion entirely upon a clerical entry in the 1990 Amendments to the Clean Air Act that was not codified in the U.S. Code but appears in the Statutes at Large. According to EPA, the 1990 Amendments included two entries relevant to Section 111(d). Both entries appear in the Statutes at Large, but only the first amendment—described by EPA as the “substantive” one—was incorporated into the U.S. Code. EPA argues that the mere existence of the second, clerical amendment creates an ambiguity sufficient to call into doubt the language of Section 111(d) in the U.S. Code. EPA’s attempt to displace the plain terms of Section 111(d) was wrong in 2005 and remains so today.

1. *The Clerical “Drafting Error” In The 1990 Clean Air Act Amendments Does Not Create An Ambiguity In The Terms Of Section 111(d)*

As a threshold matter, EPA’s analysis is wrong because the one-sentence clerical entry referred to by EPA falls far short of the showing necessary to cast doubt on the plain terms of Section 111(d) as they appear in the U.S. Code. The “Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States.” 1 U.S.C. § 204(a). As “prima facie” evidence, the language of Section 111(d) in the U.S. Code is displaced only where the U.S. Code is “inconsistent” with the Statutes at Large. *See Stephan v. United States*, 319 U.S. 423, 426 (1943). There is no inconsistency here.

A review of the two relevant entries in the Statutes at Large reveals that the clerical entry does not create an ambiguity or inconsistency, but rather is—as even EPA has admitted—a “drafting error [that] should not be considered.” 70 Fed. Reg. at 16,031.

The first relevant entry appears in the Statutes at Large among a list of other entries making *substantive* amendments to Section 111. Prior to these amendments in 1990, Section 111(d) had prohibited EPA from requiring state-by-state regulation of any air pollutant on the list of HAPs published under Section 112(b)(1)(A). This particular amendment made a significant substantive change by replacing the reference to “112(b)(1)(A)” with the language that now appears in the U.S. Code—“emitted from a source category which is regulated under section 112.” Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990). As a result, the restriction in Section 111(d) changed from one focused on HAPs regulated under Section 112 to one focused instead on source categories regulated under that section.

The second relevant entry appears much later in the Statutes at Large among a list of purely *clerical* changes—entitled “Conforming Amendments.” Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2474 (1990). As explained in the Senate’s Legislative Drafting Manual, “Conforming Amendment[s]” are “amendment[s] of a provision of law that [are] necessitated by the substantive amendments or provisions of the bill.” Senate Legislative Drafting Manual § 126(b)(2)(A). They effectuate the sorts of ministerial changes required to clean up a statute after it has been substantively amended. Thus, conforming amendments “include[] amendments,



such as amendments to the table of contents, that formerly may have been designated as clerical amendments.” *Id.*

Consistent with its description as a conforming amendment, this particular entry sought simply to bring up to date the cross-reference in Section 111(d) to Section 112(b)(1)(A). Other amendments to the Clean Air Act in 1990 had eliminated Section 112(b)(1)(A) entirely and replaced it with Sections 112(b)(1), 112(b)(2), and 112(b)(3). This clerical amendment was designed solely to account for those changes. Specifically, it provided that “Section 111(d)(1) of the Clean Air Act is amended by striking ‘[112](b)(1)(A)’ and inserting in lieu thereof ‘[112](b).’” Pub. L. No. 101-549, § 302(a). Unlike the substantive amendment described above, this non-substantive amendment would not have changed the restriction in Section 111(d) from its pre-1990 focus on hazardous air pollutants regulated under Section 112.

In light of the substantive amendment, however, the second non-substantive amendment was clearly an unnecessary mistake or, as EPA has put it, a “drafting error.” When the conforming amendment is applied after the substantive amendment, as is required by the very nature of conforming amendments, there is no clerical correction left to make because the cross-reference to 112(b)(1)(A) has already been removed by the substantive amendment. This is consistent with the codifier’s notation in the U.S. Code that the clerical amendment “could not be executed.” Revisor’s Note, 42 U.S.C. § 7411. Where a conforming amendment is entirely unnecessary, it is rightly understood as a clerical mistake that need not be given any effect. *See Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013).

EPA has correctly recognized as much—noting in 2005, for example, that the clerical entry “is a drafting error and therefore should not be considered”—but it then wrongly determined that it nevertheless “must attempt to give effect to both the [substantive] and [clerical] [entries], as they are both part of the current law.” 70 Fed. Reg. at 16,031; *accord* Mem. 21 (recognizing “apparent drafting errors during enactment of the 1990 CAA Amendments”). This fundamental flaw dooms EPA’s analysis. As the D.C. Circuit recently explained, where a mistake in renumbering a statute and correcting a cross-reference conflicts with substantive provisions of that statute, the mistake should be considered most likely “the result of a scrivener’s error[]” and should not be treated as “creating an ambiguity.” *Am. Petroleum*, 714 F.3d at 1336-37. Under this reasoning, it is clear that the clerical entry simply “should not be considered,” as EPA originally concluded. 70 Fed. Reg. at 16,031. At the very minimum, the existence of such a non-substantive, “drafting error” is not enough to overcome the fact that language codified in the U.S. Code is “prima facie” evidence of “the laws of the United States.” 1 U.S.C. § 204(a).

Put another way, EPA now asserts that the non-substantive and substantive amendments—if each were implemented into Section 111(d)’s prior text standing alone—would create two separate versions of Section 111(d). Mem. 24. The first version incorporates only the non-substantive amendment and therefore retains the pre-1990 prohibition on regulating HAPs under Section 111(d), regardless of whether the source category emitting those HAPs is regulated under Section 112. The second version is the one that actually appears in the U.S.

Code and *substantively changes* the prohibition to forbidding EPA from regulating under Section 111(d) any air pollutants emitted by any existing source regulated under Section 112. Mem. 24.

But this approach of treating both amendments as, in effect, creating two different versions of 111(d) directly contradicts EPA's concession that the inclusion of the non-substantive entry in the Statutes at Large was merely a clerical "drafting error." Critically, the *only* evidence EPA may use in its attempt to rebut the terms of Section 111(d) as expressed in the U.S. Code is the Statutes at Large, *see Stephan*, 319 U.S. at 426, and *the Statutes at Large simply do not reflect two separate versions of Section 111(d)*. Rather, they reflect only two amendments—one a substantive change and one a mere clerical entry—and the clerical entry is rendered moot by the substantive amendment.<sup>3</sup>

## 2. EPA's Policy Arguments Create No Ambiguity In Section 111(d)

EPA's policy arguments against the "literal" terms of Section 111(d) also cannot generate an ambiguity where none exists in the plain statutory text. As a threshold matter, even if EPA were correct that the "literal" terms of Section 111(d) produce overly harsh results for EPA's regulatory authority, EPA may not "redraft a statute in order to avoid what the agency characterized as the 'absurd results' that would flow from the statute's language" where it is, as here, "not inconceivable that Congress meant what the statute says." *Ass'n of Am. R.Rs. v. Surface Transp. Bd.*, 162 F.3d 101, 105 (D.C. Cir. 1998) (quoting *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1072 (D.C. Cir. 1998)). In any event, EPA's policy arguments miss the mark because the "literal" terms of Section 111(d) are part of a rational regulatory scheme.

This regime quite logically avoids subjecting *existing* sources to both new national standards for hazardous pollutants under Section 112 as well as new state-by-state standards under Section 111, while permitting regulation under both Section 111 and Section 112 of *new* sources. Unlike with new sources, the imposition of additional regulatory burdens on existing sources raises questions of fairness and lost investments, as existing sources that were built under a different regulatory regime may or may not have the technological or financial ability to come into compliance with two sets of new rules. Indeed, both Sections 112 and 111(d) recognize that the cost of compliance must be weighed against maximum achievable reductions. *See* 42 U.S.C.

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<sup>3</sup> Although some had argued in 2005 and 2008 that the clerical entry should take precedence over the substantive entry, EPA repeatedly and properly rejected those arguments as having "no merit." Final Brief of Respondent EPA, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), 2007 WL 2155494, at \*103 n.33; *accord* 70 Fed. Reg. at 16,031-32. For example, the agency has explained that the so-called "last in point of arrangement" rule of statutory construction "is inapplicable here, as it applies to discrete sections of the same Act, not competing amendments to the same section of an Act, as is the case here." 2007 WL 2155494, at \*103 n.33. Indeed, EPA *emphatically* declared that it is "hard to conceive" that Congress would have intended to give effect to the clerical change over the substantive change, because, among other things, only the substantive change gives meaning to Section 112(n)(1)(A), which was also adopted during the 1990 Amendments to the Clean Air Act. Section 112(n)(1)(A) required EPA to conduct a study to determine whether coal-fired power plants "should even be regulated under section 112." 70 Fed. Reg. at 15,995. As EPA recognized, this provision is strong evidence that Congress did not wish to subject such power plants to "duplicative or overlapping regulation," but rather sought to force EPA to choose between regulating power plants as a source category under Section 112 or 111(d), consistent with the substantive change and not the clerical one. *Id.* at 16,031.

§§ 7411(a)(1), 7411(d), 7412(d). In establishing this regime, under which regulation of existing sources occurs either under Section 112 or Section 111(d), Congress properly determined that requiring the same existing source categories to comply with two functionally-independent regulatory regimes would threaten these sources' economic viability. Indeed, EPA has recently imposed costly regulations on coal-fired power plants, which will cost those plants more than \$9 billion dollars *per year*. See EPA, *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards* at 3-13 (Dec. 2011), available at <http://www.epa.gov/ttn/ecas/regdata/RIAs/matsriafinal.pdf>. EPA's Proposed Rule would subject those same plants to billions of dollars of additional costs, through the imposition of duplicative regulatory requirements, forcing many of those plants to close. That is the exact scenario Congress intended to avoid when it amended Section 111(d).

In light of this understanding, EPA's policy arguments in favor of ignoring Section 111(d)'s plain language are insubstantial.

EPA first claims that a "literal reading" of Section 111(d) would be contrary to "Congress' desire in the 1990 CAA Amendments to require EPA to regulate more substances." Mem. 25-26. But the mere fact that *one* of the broad purposes behind the 1990 Amendments was to require EPA to regulate more substances under Section 112 does not mean that Congress was not cognizant of other values, such as the need to avoid costly double regulation. In fact—as EPA itself admitted in its 2005 analysis—the text, structure, and history of the 1990 Amendments indicates a desire by Congress to limit EPA's ability to doubly regulate coal-fired power plants. As explained above, the discussion and ultimate adoption of Section 112(n)(1)(A) "reveals" that Congress did not want to subject coal-fired power plants to "duplicative or otherwise inefficient regulation." 70 Fed. Reg. at 15,999. It is perfectly reasonable to understand Section 111(d) as seeking to forward this same general goal of avoiding duplicative regulation.

EPA's other policy argument is "the fact that the EPA has historically regulated non-HAPs under section 111(d), even where those air pollutants were emitted from a source category actually regulated under section 112." Mem. 26. But it is no answer to the unambiguous textual requirement in the 1990 Amendments to point to EPA's *pre-amendment* practice of regulating non-HAPs under Section 111(d). EPA at one time enjoyed the power of regulating existing source categories on separate regulatory tracks. See Mem. 9-10 & n. 17. When Congress amended the Clean Air Act in 1990 to require EPA to regulate more HAPs under Section 112, however, Congress sensibly paired that increased power with a textual limitation—embodied in Section 111(d)—against using that enhanced authority to impose duplicative regulations on the same existing source categories. EPA's argument that the "literal" terms of Section 111(d) would hamstring it from using a provision that it has only used to regulate "four pollutants from five source categories" in "forty years," Mem. 9, cannot possibly provide a basis for disregarding the literal terms of the Clean Air Act.

3. *EPA's Attempt To Resolve The Supposed Ambiguity Is Nevertheless Impermissible*

Even if the clerical error created an ambiguity in Section 111(d)'s "literal" text, EPA's analysis would still fail. To begin with, the agency's claim to some unidentified form of "deference" for its attempt to rewrite Section 111(d) is meritless. Mem. 12. Courts defer to agencies under the test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because there is reason to believe that when Congress "left ambiguity in a statute," it "understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996). EPA could not possibly argue that Congress intended EPA to resolve the import of Congress's inadvertent clerical "drafting error." Indeed, EPA does not so argue. EPA offers no justification whatsoever for its bald assertion that it is entitled to deference on this issue, and does not even cite to *Chevron* in its discussion of the issue.

In any event, EPA could not possibly prevail under *Chevron*—or some other similar form of deference—because it offers an "impermissible construction" of the supposedly ambiguous statute. *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1178 (D.C. Cir. 2003). EPA would interpret Section 111(d) as follows: "Where a source category is regulated under section 112, a section 111(d) standard of performance cannot be established to address any HAPs listed under section 112(b) that may be emitted from that particular source category." Mem. 26. This is flatly inconsistent with the substantive provision, embodied in the U.S. Code, that EPA may not "establish[] standards of performance for any existing source for *any* air pollutant . . . emitted from a source category which is regulated under [Section 112 of the CAA]." 42 U.S.C. § 7411(d) (emphasis added). EPA's proffered interpretation effectively replaces the term "*any* air pollutant" with the term "hazardous air pollutant." Even under *Chevron*, an agency is not entitled to deference when its interpretation is so "manifestly contrary to the statute." *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011) (internal quotations omitted); *accord Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 785 (D.C. Cir. 2012).

If EPA wanted to give effect to its view of both the substantive and the clerical entries in the Statutes at Large—which, as explained above, EPA nonsensically claims create two versions of Section 111(d)—without impermissibly changing the text of either, it could have done so. As one commentator has explained, all of EPA's textual concerns could be satisfied by interpreting Section 111(d) to prohibit the regulation of "any air pollutant . . . which is not included on a list published under . . . 112(b) [revision of the prior version of Section 111(d) after inputting the clerical entry] or emitted from a source category which is regulated under section 112 [revision of the prior version of Section 111(d) after inputting the substantive entry]." William J. Haun, *The Clean Air Act as an Obstacle to the Environmental Protection Agency's Anticipated Attempt to Regulate Greenhouse Gas Emissions from Existing Power Plants*, 14 Engage: J. Federalist Soc'y Prac. Groups 35, 38 (Mar. 2013) (parentheticals revised). EPA does not—and could not—dispute that this is the only interpretation that gives *full* effect and meaning to every word of both "versions" of Section 111(d) that it believes the Statutes at Large embodies. Accordingly, to the extent EPA continues to reject the position that the non-substantive entry must be discarded as an



The Honorable Gina McCarthy

June 6, 2014

Page 9

inadvertent “scrivener’s error[],” *see Am. Petroleum*, 714 F.3d at 1337, the agency is duty-bound to adopt this alternative interpretation.

EPA’s refusal to advance or acknowledge this alternative is unsurprising, of course, because under this approach the Proposed Rule would still be unlawful. Under this alternative interpretation, EPA would be prohibited from using Section 111(d) *both*: (1) to require regulation of any HAP listed in Section 112(b), regardless of whether the HAP is being emitted from a source regulated under Section 112; *and* (2) to require regulation of *any* pollutant emitted from a source category that is regulated under Section 112. Even under this alternative reading, EPA still cannot rely on Section 111(d) as a basis for the Proposed Rule because of the regulatory scheme established under Section 112.<sup>4</sup>

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EPA has fundamentally erred in relying upon the flawed reasoning in the vacated 2005 rule to justify the Proposed Rule. It is simply unconscionable for EPA to go forward with this massive and costly regulation based entirely upon what it has admitted to be a clerical “drafting error.” I urge you to withdraw the Proposed Rule immediately and avoid needless litigation.

Sincerely,



Patrick Morrissey  
Attorney General of West Virginia

cc: Avi Garbow  
General Counsel, Environmental Protection Agency

Hon. Eric Holder  
Attorney General, United States Department of Justice

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<sup>4</sup> In its prior briefing on this issue, EPA cited to *Citizens to Save Spencer County v. EPA*, 600 F.2d 844 (D.C. Cir. 1979), to justify its claim that it is entitled to deference. Final Brief of Respondent EPA, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), 2007 WL 2155494, at \*103. In its Legal Memorandum here, EPA does not cite or rely upon this case, and with good reason. In *Citizens to Save Spencer County*, EPA was forced to deal with a situation where one unquestionably substantive provision specifically conflicted with another unquestionably substantive provision. Faced with this truly irreconcilable conflict between two substantive provisions, the D.C. Circuit upheld EPA’s adoption of an interpretation that gave “maximum possible effect to both.” 600 F.2d at 872. In the present case, in contrast, the so-called conflict is between a substantive amendment and a clerical “drafting error,” in which case the substantive amendment simply prevails. *Am. Petroleum*, 714 F.3d at 1336-37. In addition, while EPA in *Citizens to Save Spencer County* had no option but to adopt a middle ground between two irreconcilable statutory commands, here EPA has ignored an interpretation that would give “maximum effect” to its own view of both the substantive and non-substantive provisions.