ORAL ARGUMENT NOT YET SCHEDULED

No. 14-1151

In the United States Court of Appeals for the District of Columbia Circuit

MURRAY ENERGY CORPORATION

Petitioner,

v.

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

Respondents.

On Petition for Review of an Action of the United States Environmental Protection Agency

MURRAY ENERGY'S OPPOSITION TO EPA'S MOTION TO DISMISS

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and District of Columbia Circuit Rule 26.1, Petitioner provides the following disclosure:

Murray Energy Corporation 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 Corporation. Murray Energy Corporation's parent corporation is Murray Energy Holdings Co.

Murray Energy Corporation is the largest privately-owned coal company in the United States and the fifth-largest coal producer in the country, employing approximately 7,400 workers in the mining, processing, transportation, distribution, and sale of coal. In 2014, Murray Energy Corporation expects to produce 65 million tons of coal from twelve active coal mining complexes in six States. Murray Energy Corporation also owns two billion tons of proven or probable coal reserves in the United States.

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INTRODUCTION

In its attempt to defeat jurisdiction, EPA has fundamentally mischaracterized what this case is about. This case does not present, as EPA misleadingly suggests, an attack on the substance of a proposed rule that might be changed in response to public comments. Instead, Murray Energy Corporation's petition for judicial review challenges EPA's unequivocal *legal conclusion* that EPA has the authority to subject the nation's coal-fired power plants to double regulation under both Section 111(d) and Section 112 of the Clean Air Act. Murray Energy Corporation will show in its merits brief that this legal conclusion is erroneous because double regulation is expressly prohibited by the Clean Air Act.

As controlling precedents of the Supreme Court and this Court make clear, EPA's certain and unequivocal legal conclusions under the Clean Air Act are subject to judicial review no matter the form they take, even if published in a preamble. Moreover, since EPA's legal conclusion is separate from the substance of EPA's proposed rule, the issues before the Court cannot be affected by EPA's final rule, or even EPA's decision *whether* to promulgate a final rule. While EPA's conclusion accompanies a proposed rule, EPA has made a *final* determination that is has authority to subject existing coal-fired power plants to double regulation under Section 112 and Section 111(d). This legal conclusion will remain in place regardless of the outcome of the current rulemaking, is collateral to it, and is therefore immediately reviewable.

Murray Energy Corporation respectfully requests that EPA's motion to dismiss be denied so that the case may proceed to a decision on the merits.

STATUTORY AND REGULATORY BACKGROUND

EPA is authorized to promulgate national, source-specific emission standards under Section 112 of the Clean Air Act. 42 U.S.C. § 7412. Section 111(d), in turn, authorizes EPA to mandate state-by-state emission standards for sources not subject to national standards issued under Section 112. *See* 42 U.S.C. § 7411(d)(1)(A)(i) (prohibiting EPA from mandating standards under Section 111(d) for any pollutants "emitted from a source category which is regulated under section 7412 of this title."). EPA promulgated a national emission standard under Section 112 for coal-fired power plants two years ago. *National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units*, 77 Fed. Reg. 9304 (Feb. 16, 2012). Accordingly, EPA cannot mandate regulations under Section 111(d) for power plants.

Despite the plain text of Section 111(d), in 2013 the President issued an order directing EPA to "use [its] authority under sections 111(b) and 111(d) of the Clean Air Act to issue standards, regulations, or guidelines, as appropriate, that address carbon pollution from modified, reconstructed, and existing power plants," and final "standards, regulations, or guidelines, as appropriate," no later than June 1, 2015, which are to include in the guidelines "a requirement that States submit to EPA the implementation plans required under section 111(d) of the Clean Air Act and its implementing regulations by no later than June 30, 2016." President Barack Obama, Memorandum on Power Sector Carbon Pollution Standards for the Administrator of the Environmental Protection Agency (June 25, 2013) ("White House Memorandum").

As ordered, EPA initiated rulemaking under Section 111(d) for existing power plants in June of this year. In the preamble to the proposed rule, EPA announced the agency's conclusion that the Clean Air Act authorizes EPA to regulate greenhouse gas emissions at these sources regardless of whether they are already regulated under the Section 112 program. *Carbon Pollution Emission Guidelines for Existing Stationary Sources*, 79 Fed. Reg. 34830 (June 18, 2014). Specifically, in a section entitled "Summary of Legal Basis," the agency pronounced that "EPA *reasonably interprets* the provisions identifying which air pollutants are covered under CAA section 111(d) to authorize the EPA to regulate CO_2 from fossil fuel-fired EGUs." *Id.* at 34852 (emphasis added). In Section V of the preamble, EPA unequivocally stated the agency's conclusion: "The EPA *has the authority* to regulate, under CAA section 111(d), CO_2 emissions from EGUs, *under the Agency's construction* of the ambiguous provisions in CAA section 111(d)(1)(A)(i) that identify the air pollutants subject to CAA section 111(d)." *Id.* at 34853 (emphasis added). The preamble describes in detail the agency's legal analysis in support of this conclusion, including its position on the meaning of Section 111(d), its interpretation of legislative history, and its analysis of Supreme Court precedent to support the agency's conclusion. *Id.* This Federal Register publication is signed by the Administrator of EPA, Gina McCarthy. *See id.* at 34,950.

Along with the publication of the agency's legal conclusion in the preamble in the Federal Register, EPA placed in the rulemaking docket a 104-page legal memorandum to "supplement the preamble by providing background for the legal issues discussed in the preamble. . . ." LEGAL MEMORANDUM FOR PROPOSED CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING ELECTRIC UTILITY GENERATING

UNITS, EPA-HQ-OAR-2013-0602-0419 (posted June 18, 2014) ("Legal Memorandum"); *see also* 79 Fed. Reg. at 34853 (referencing the Legal Memorandum for further discussion and legal support for the conclusion that EPA can doubly regulate power plants). In a section entitled "Authority to regulate CO_2 from EGUs," EPA lays out in detail its case law, statutory, and regulatory history arguments, definitively concluding in certain and unequivocal terms: "Applying this interpretation of the Section 112 Exclusion to this rule, ***we conclude*** that section 111(d) authorizes the EPA to establish section 111(d) guidelines for GHG emissions from EGUs." *Id.* at 27. The Legal Memorandum is referred to directly in the preamble signed by EPA's Administrator and is listed in EPA's online docket as "issued by the Environmental Protection Agency (EPA)."[1]

Since the publication of EPA's legal conclusion, both EPA's Administrator and the Acting Assistant for the Office of Air and Radiation have made statements, on the record before Congress, reaffirming that EPA intends to adhere to this legal position.[2]

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1. *See Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units*, REGULATIONS.GOV (June 18, 2014) http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-0419.

2. The day after EPA published its legal conclusion, Representative Morgan Griffith of Virginia, a member of the House Energy & Commerce Committee, asked Assistant Administrator Janet McCabe whether it was correct that the "decision by the EPA" to regulate power plants under Section 112 "foreclosed the agency's ability to regulate . . . under Section 111." EPA's Proposed Carbon Dioxide Regulations for Power Plants: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce at 2:09 (June 19, 2014), *available at* http://energycommerce.house.gov/hearing/epa%E2%80%99s-proposed-carbon-dioxide-regulations-power-plants. Assistant Administrator McCabe answered: "That is not correct." *Id.* at 2:10. Then on July 23, 2014, Senator Roger Wicker of Mississippi, a member of the Senate Environment and Public Works Committee,

While EPA has generally stated that EPA "invites further input through public comment on all aspects of" its proposal, 79 Fed. Reg. 34853, at no point has EPA indicated that it is uncertain of its legal conclusion that EPA has authority to proceed with a rulemaking under Section 111(d) for sources regulated under Section 112 or that EPA is still evaluating its position on this specific and important issue. To the contrary, while EPA in several places *proposes* legal positions in the preamble relating to the implementation of the proposed rule, *see, e.g.*, 79 Fed. Reg. at 34903 ("EPA *is proposing to interpret* CAA section 111 as allowing state CAA section 111(d) plans to include measures that are neither standards of performance nor measures that implement or enforce those standards. . . .") (emphasis added); the legal conclusion at issue here is stated conclusively. *Id.* at 34853 ("The EPA *has the authority to regulate*, under CAA section 111(d). . . .").

On August 15, 2014, Murray Energy Corporation filed a petition for review in this Court. On October 23, 2014, EPA moved to dismiss the petition for review, contending that EPA has not yet taken any final action subject to judicial review. At this stage in these proceedings, Movant, EPA, bears the burden.

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asked Administrator McCarthy if it was correct that "Section 111(d) says if it's regulated under 112 you can't regulate it" under that provision and "EPA has imposed extensive regulations on coal-fired power plants under Section 112." Oversight Hearing: EPA's Proposed Carbon Pollution Standards for Existing Power Plants: Hearing Before the S. Comm. on Environment & Public Works at 1:38 (July 23, 2014), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.LiveStream&Hearing_id=8655edd9-03ac-bb36-cab8-7913ec6c2b94. The Administrator answered "I think that the framing of the legal argument is incorrect, Senator." *Id.* at 1:38.

LAW AND ARGUMENT

I. THE PETITION FOR REVIEW DOES NOT CHALLENGE THE SUBSTANCE OF A PROPOSED RULE, BUT RATHER EPA'S FINAL LEGAL CONCLUSION THAT EPA HAS AUTHORITY TO DOUBLY REGULATE POWER PLANTS.

A. EPA Mischaracterizes the Petition for Review as a Challenge to a Proposed Rule in an Attempt to Avoid Judicial Review.

The majority of EPA's motion focuses on whether parties can obtain judicial review of proposed rules, implying that Murray Energy Corporation's petition is seeking review of a proposed rule. *See, e.g.*, Motion at 1. Not so. The petition for review disclaims any effort to "challenge the *substance* of a proposed rule." Petition at 3. Rather, the petition seeks review of EPA's unequivocal and erroneous *legal conclusion* that double regulation of sources regulated under Section 112 and Section 111(d) of the Clean Air Act is lawful. The fact that EPA announced the agency's unequivocal legal conclusion in the preamble to the July 18, 2014, proposed rule and in a memorandum issued by EPA does not change the fact that EPA's conclusion that it has authority to doubly regulate power plants is final action subject to this Court's review.

B. Judicial Review under the Clean Air Act is Not Limited to Promulgation of Final Rules.

The Clean Air Act expressly provides for judicial review of "any other . . . final action" of the Administrator. 42 U.S.C. § 7607(b)(1). As the Supreme Court has held, this phrase encompasses all final agency action under the Clean Air Act. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980) ("[W]e agree with [EPA] that the

phrase, 'any other final action,' . . . must be construed to mean exactly what it says, namely, *any other* final action.") (emphasis in original).

In *Harrison*, EPA's final action took the form of a letter offering EPA's interpretation of whether a standard of performance would apply to certain boilers. While other parties argued that Section 307 of the Clean Air Act limited review to actions taken after notice and comment or other similar procedures, EPA itself argued that since the Clean Air Act provided for judicial review of "any other final action" in Section 307, the provision "should be read literally to mean *any* final action of the Administrator." *Id.* at 585 (emphasis in original). The Supreme Court agreed with EPA, holding that, as long as "EPA ha[d] rendered its last word on the matter," EPA's conclusion is judicially reviewable under the Clean Air Act. *Id.* at 586.

The Supreme Court's holding in *Harrison* applies regardless of the form EPA chooses to document its conclusion. The Supreme Court has even applied *Harrison* to find that legal conclusions "published in [an] explanatory preamble" are judicially reviewable. *Whitman v. American Trucking Ass'ns, Inc.,* 531 U.S. 457, 478 (2001). In doing so, the Court found that it did not matter that "the agency ha[d] not dressed its decision with the conventional procedural accoutrements of finality." *Id.* at 479.

Whitman in fact bears many similarities to this case. Spurred by a Presidential Order, EPA published, in the preamble to a rule revising two ambient air quality standards, an "explanation" of its planned implementation procedures under Section 109 of the Clean Air Act, concluding that it had the authority under that provision to follow the President's directive. *Id.* at 477–78. Again, as here, EPA argued this conclusion was unreviewable because it was not yet "final." Despite EPA's decision to

publish its legal conclusion in a rulemaking preamble, the Supreme Court had "little trouble concluding that this constitut[ed] final agency action subject to review under § 307." *Id.* at 478.

This Court further addressed the distinction between review of EPA's statutory authority to promulgate rules and review of the rules themselves in *Chem. Waste Mgmt. Inc. v. EPA*, 869 F.2d 1526, 1533 (D.C. Cir. 1989). In *Chemical Waste*, EPA had published a rule establishing a "framework" for regulating hazardous waste. The rule did not establish hazardous waste standards, but the preamble stated that these standards, once promulgated, would apply retroactively, demonstrating EPA's legal conclusion that it had authority to promulgate retroactive standards. *See id.* at 1531. Despite the fact that this legal conclusion would not be applied until EPA published a hazardous waste standard and such standards were not even proposed yet, this Court held that it was final action because, regardless of the nature of the final rules that would be developed, EPA had "arrived at its ultimate decision on th[e] issue" of retroactivity even though "certain related questions . . . ha[d] yet to be resolved." As this Court noted, these undecided issues were "logically distinct from the issue of 'retroactivity.'" *Id.* at 1533.

This Court has also held that legal conclusions contained in documents that were expressly "non-final" were nonetheless final agency actions themselves. In *Appalachian Power Co. v. EPA*, for example, this Court addressed whether EPA's legal conclusion in a guidance document was final agency action even though the document stated that "[t]he policies set forth in this paper are intended solely as guidance, *do not represent final Agency action*, and cannot be relied upon to create any

enforceable rights by any party." 208 F.3d 1015, 1022 (D.C. Cir. 2000) (emphasis added). While the guidance document expressly stated that it was not "final," since the petitioner had challenged a portion of the guidance that represented EPA's settled position, judicial review was available. As this Court reasoned, "whatever EPA may think of its Guidance generally, the elements of the Guidance petitioners challenge consist of the agency's settled position, a position it plans to follow." *Id.*

The Clean Air Act broadly allows judicial review of any final action taken under the Act, regardless of form. EPA cannot immunize its legal conclusions from judicial review by placing them in a preamble to a proposed rule. *See Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 702 (D.C. Cir. 1971) ("The issue of finality is . . . determined not by the name assigned by the agency to its action but 'in a pragmatic way.'") (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

Moreover, since EPA's legal conclusion is independent from and collateral to the substance of EPA's proposed rule, there is no "plausible basis for believing that the specific [requirements] eventually promulgated will affect this court's judgment." *Chem. Waste Mgmt., Inc. v. EPA*, 869 F.2d at 1533. Even if EPA withdraws its rulemaking, this will not change the fact that EPA has concluded that it has the authority to subject coal-fired power plants to double regulation, or that coal-fired power plants, and all other industries regulated under Section 112, will remain subject to that threat. Therefore EPA's lengthy discussion of cases like *Nebraska v. EPA*, No. 4:14-CV-3006 (D. Neb.) and *Las Brisas Energy Center, LLC v. EPA*, No. 12-1248 (D.C. Cir.), which challenged the substance of EPA's proposed rules, are not relevant. In both of these cases, the petitions challenged the rulemaking itself, on substantive

issues that could have changed if the rule was modified, and that could have been resolved it EPA had withdrawn its rulemaking altogether. This case, on the other hand, involves no facts or issues that are dependent on the terms of the final rule, and will not be affected even if EPA withdraws the proposed rule entirely. Whatever happens to the proposed rule, EPA's separate and collateral legal conclusion that it has authority to impose Section 111(d) requirements on sources already regulated under Section 112 will remain.

EPA has initiated a rulemaking that, if it were to survive judicial review, would entail a massive overhaul of the nation's power sector, citing Section 111(d) of the Clean Air Act as the sole basis for its authority to do so. But EPA has also unequivocally pronounced in the Legal Memorandum and in the Federal Register that EPA concludes the agency has authority to doubly regulate power plants. EPA's rulemaking does not alter the finality of this action and does not preclude review of EPA's legal conclusion under the Clean Air Act.

II. EPA'S LEGAL CONCLUSION IS FINAL ACTION UNDER THE CLEAN AIR ACT.

As discussed above, the Clean Air Act broadly provides for judicial review of any "final action" of the Administrator. Even EPA does not dispute that its decision on the scope of its statutory authority constitutes an "action" of the Administrator. Nor could it. *See Whitman*, 531 U.S. at 478 ("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." (emphasis added)). The sole issue raised by EPA's motion to dismiss, rather, is whether EPA's legal conclusion, which was published in the Federal Register in a preamble signed by the Administrator and

supported by statements and analysis in a legal memorandum, represents a "final" action reviewable under Section 307 of the Clean Air Act. As discussed below, it does.

A. EPA's Legal Conclusion Is Presumptively Final Because It Was Signed by the Administrator of EPA.

An agency's interpretation of the law is presumptively final if it is signed by the head of the agency. *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 702–03 (D.C. Cir. 1971). The preamble announcing EPA's legal conclusion was signed by the Administrator. 79 Fed. Reg. 34950. It is therefore presumptively the final conclusion of the agency and EPA, not Murray Energy Corporation, bears the burden of rebutting that presumption of finality.

Indeed, it would be surprising if EPA would initiate a rulemaking of the magnitude proposed, which has imposed significant and immediate obligations on States and others to start planning now for the dramatic impacts of the proposed rule, effectively re-ordering the electric generating system of the United States on a very tight time frame, if EPA had not first concluded that it had legal authority to do so. However, with the commencement of litigation, EPA's counsel now argue that the agency's legal conclusion was merely "tentative." Motion at 20. But EPA cannot rebut the presumption of finality through "mere argument by its court counsel." *Nat'l Automatic Laundry*, 443 F.2d at 703. Rather, EPA must produce *evidence* that the statutory interpretation is not final despite bearing the signature of the head of the agency. As this Court has held, such evidence would include "an affidavit by the agency head" adducing that the matter "is still under meaningful refinement and development." *Nat'l Automatic Laundry*, 443 F.2d. at 703. While an affidavit alone is

not always enough, *cf. Fidelity Television, Inc. v. FCC*, 502 F.2d 443, 448 (D.C. Cir. 1974) (holding agency action final even after agency provided affidavit asserting nonfinality), here EPA has failed to provide this Court any evidence at all to rebut finality.

To the contrary, EPA's actions since the publication of its legal conclusion "belie[] the claim that its interpretation is not final." *Whitman*, 531 U.S. at 479. When questioned by members of Congress, EPA leadership brushed aside assertions that EPA's legal conclusion may be wrong and should be reconsidered. *See supra* note 2 and accompanying text. EPA leadership's statements before Congress stand in stark contrast to unsupported arguments by counsel before this Court that the agency's legal conclusion is merely "tentative."

It also does not matter that EPA has stated that it will accept public comments on "all aspects of [its] proposal." 79 Fed. Reg. at 34835. The agency is free to modify its legal positions, but this does not render them any less final at the time they are made, or any less fit for judicial review. *See Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (the "mere possibility that an agency might reconsider does not suffice to make an otherwise final agency action nonfinal"); *Int'l Union, UAW v. Brock*, 783 F.2d 237, 248 (D.C. Cir. 1986) (EPA could "reverse its interpretation at some future date, but that does not change the reality that the current interpretation could quite likely be used" until that happens.); *see also Appalachian Power*, 208 F.3d at 1022 ("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."). This is especially true for review of EPA's actions under the Clean Air Act, because Congress has explicitly provided for judicial review of EPA's

actions that are the subject of petitions for reconsideration even though such petitions would ordinarily render the actions nonfinal. *See* 42 U.S.C. § 7607(b)(1).

Having received Murray Energy Corporation's Statement of Issues to Be Raised over a month prior to filing its Motion to Dismiss, EPA did not include an affidavit or any similar statement from the Administrator disputing the finality of the agency's legal conclusion. Instead, the Administrator has gone on the record before Congress to affirm the agency's position. This fails to meet the standard set out in *Nat'l Automatic Laundry,* 443 F.2d. at 703.

B. EPA's Legal Conclusion Meets the General Conditions for Finality Announced by the Supreme Court in *Bennett v. Spear.*

EPA's failure to rebut the presumption that the Administrator's signed preamble represents the agency's final action justifies denial of EPA's motion to dismiss. EPA's legal conclusion also satisfies both conditions of the general standard for finality described in *Bennett v. Spear*, 520 U.S. 154 (1997). In *Bennett*, the Court explained that, as a general matter, "two conditions must be satisfied for agency action to be 'final': First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 177–78 (citations omitted).

1. EPA marked the consummation of its decisionmaking process when it certainly and unequivocally announced its legal conclusion in the Federal Register and immediately acted on its assumed authority.

EPA's unequivocal legal conclusion "'mark[s] the consummation of the agency's decisionmaking process" and "'EPA has rendered its last word on the matter'

in question." *Whitman*, 531 U.S. at 478. Indeed, as this Court held in *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, the initiation of a proceeding can, in and of itself, constitute final action establishing the agency's conclusion that it has legal authority to proceed. 707 F.2d 1485, 1489 n.30 (D.C. Cir. 1983) ("By filing a complaint . . . the Commission, for all practical purposes, made a final determination that such proceedings were within its statutory jurisdiction. . . . Thus, with respect to the issue we address, the Commission has taken a definitive position."). EPA cited no authority for its rulemaking other than Section 111(d) and expressly relied on that provision as its basis. Accordingly, even without an explicit statement from EPA that it has concluded that it has authority to doubly regulate existing power plants under Section 111(d), this Court would still have jurisdiction to review the agency's implicit conclusion of legal authority. EPA has done far more here, however, pronouncing in no uncertain terms that it has concluded that it can doubly regulate power plants.

EPA arrived at its legal conclusion following a decisionmaking process that was spurred by a Presidential order *mandating* that EPA proceed with rulemaking under Section 111(d). White House Memorandum at § 1(b). That process resulted in the 104-page Legal Memorandum that proclaims "***we conclude*** that section 111(d) authorizes the EPA to establish section 111(d) guidelines for GHG emissions from EGUs." Legal Memorandum at 27 (emphasis added). And EPA published a preamble signed by the Administrator that declares "EPA ***has the authority*** to regulate, under CAA section 111(d), CO_2 emissions from EGUs. . . ." 79 Fed. Reg. at 34853 (emphasis added). As this Court found in *Appalachian Power*, where the agency

publishes, after deliberation, in "certain" and "unequivocal" terms its legal conclusion, the agency's conclusion is final:

> The . . . condition [that the decision marks the consummation of the agency's decisionmaking process] is satisfied here. The "Guidance," as issued in September 1998, followed a draft circulated four years earlier and another, more extensive draft circulated in May 1998. . . . On the question whether States must review their emission standards . . . the Guidance is unequivocal—the State agencies must do so. On the question whether the States may supersede federal and State standards . . . the Guidance is certain—the State agencies must do so if they believe existing requirements are inadequate . . . .

208 F.3d at 1022; *see also Her Majesty the Queen v. EPA*, 912 F.2d 1525, 1530–32 (D.C. Cir. 1990) (finding "nothing tentative," "equivocal," or unreviewable in EPA's statement of its historic view and conclusion that "we *continue* to hold [that] view" (emphasis and alterations in original)); *Natural Res. Def. Council, Inc. v. EPA*, 643 F.3d 311, 319 (D.C. Cir. 2011) (finding that language "definitively interpreted" the Clean Air Act where EPA stated that it was "electing to consider alternative programs to satisfy" a Clean Air Act requirement but that "if EPA's preliminary assessment indicates that the alternative program is not less stringent, we would issue a notice in the Federal Register proposing to make such a determination").

This Court has also looked to whether EPA has acted on its conclusions to determine whether they were final. *See Natural Res. Def. Council, Inc. v. EPA*, 22 F.3d 1125, 1132–33 (D.C. Cir. 1994). In *Natural Res. Def. Council, Inc.*, for example, EPA announced in a series of documents its intention to conditionally approve certain state submittals under the Clean Air Act. *Id.* at 1132. While EPA asserted that its decision was not yet final, and so unreviewable, this Court found that EPA's own actions

relying on that authority showed otherwise. "By granting such approval," this Court held, "the EPA has already caused the very effect that the NRDC claims is outside the agency's statutory authority . . . . Thus, the documents at issue reflect a final agency decision." *Id.* at 1133. EPA's legal conclusion here is similarly final because EPA has not only concluded that EPA has authority to mandate state-by-state standards for sources under Section 111(d) that are subject to Section 112 regulations, EPA has initiated a rulemaking to issue a mandate under that authority at the same time, "already caus[ing] the very effect" that is outside EPA's Clean Air Act authority. *Id.*

EPA points to two cases where this Court has found agency statements to be too tentative or equivocal to constitute final agency action. *See* Motion at 13, 18. These cases, however, are easily distinguishable. In *Am. Petroleum Inst. v. EPA*, 684 F.3d 1342 (D.C. Cir. 2012), this Court held that an EPA statement was not final where the statement merely acknowledged EPA "had not yet, but would need to, carefully evaluate' the effect" under consideration. *Id.* at 1354 (alterations and quotation omitted). Similarly, in *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 686 F.3d 803, 809 (D.C. Cir. 2012), this Court held that an EPA statement suggesting an "indefinite, *anticipated* plan" was not final. (emphasis added.) These cases stand for the unsurprising proposition that statements of intent to take future final actions are not, in and of themselves, final agency actions. Where, as here, however, the agency has staked out a certain and unequivocal legal position after considered deliberation, it is unquestionably final action. There is "nothing tentative about the EPA's interpretation" because "it is unambiguous and devoid of any suggestion that it might be subject to subsequent revision." *Her Majesty the Queen*, 912 F.2d at 1531–32.

The language in the Federal Register publication and memorandum "clearly and unequivocally rejected" the contention that EPA does not have authority to doubly regulate power plants, and EPA's subsequent statements in response to Congressional questioning make clear that EPA's deliberations have concluded. *Id.*

It is also irrelevant that EPA may get comments in the proposed rulemaking on the legal conclusion. "The mere possibility that an agency might reconsider in light of . . . invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal." *Sackett*, 132 S.Ct. at 1372; *see also Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1066 (D.C. Cir. 2014) (finding no merit in EPA's argument that its directive was not final because "EPA's deliberations surrounding the matter are ongoing" because "[a]n agency action may be final even if the agency's position is 'subject to change' in the future") (internal quotations omitted). This is especially so where, as here, the agency has already brushed off efforts by Congress to question the agency's legal conclusion. *Cf. Sackett*, 132 S.Ct. at 1372.

2. EPA's legal conclusion has legal consequences because it expansively redefines the scope of EPA's Clean Air Act authority and subjects numerous regulated sources to the threat of double regulation.

There is little question that EPA's expansion of its own authority under the Clean Air Act gives rise to significant legal consequences. EPA's legal conclusion does not address a hypothetical issue of no immediate significance. *Cf. Nat'l Automatic Laundry*, 443 F.2d at 699. Rather, it addresses the scope of EPA's entire Section 111(d) program, bearing "direct and appreciable legal consequences" for both the regulated community and those, like Murray Energy Corporation, who depend on them, States,

and EPA itself. *Bennett*, 520 U.S. at 178; *see also Fund for Animals, Inc. v. Bureau of Land Mgmt.*, 460 F.3d 13, 29 (D.C. Cir. 2006) (Griffith, J., concurring in part and dissenting in part) ("Time and again, we have turned, ultimately, to the impact guidance has on an agency, a petitioner, or both. Where agency guidance alters the obligations of either, we have found final action." (internal citations omitted)).

EPA's legal conclusion fundamentally "alters the legal regime" to which existing coal-fired power plants are subject. Until EPA's determination, power plants subject to federal Section 112 standards knew that they could not be subject to federally mandated state-specific performance standards under Section 111(d). By issuing its legal conclusion, EPA has removed that certainty and left in place the risk that facilities can be subject to inconsistent, expanded, and more stringent regulation. Simultaneously, EPA initiated its Section 111(d) rulemaking to mandate state-by-state standards for greenhouse gases, confirming that EPA seeks to impose broader and more expensive regulatory burdens on the nation's existing coal-fired power plants. EPA's legal conclusion is also not limited to impacting power plants and coal companies, however. By concluding that it has authority to require state standards for sources already regulated under Section 112, EPA has changed the legal landscape for all source categories regulated under Section 112 and the States implementing the Act.

EPA's legal conclusion also "alters the legal regime" to which the agency itself will be subject. In recasting the scope of Section 111(d), EPA has announced the conclusion that the agency is not just *authorized* to doubly regulate existing sources, the agency will be *required* to do so for all sources subject to Section 111(b) standards.

See 79 Fed. Reg. at 34844; 42 U.S.C. § 7411(d). Such an obligation under the Clean Air Act is enforceable through citizen suits in district courts. *See* 42 U.S.C. § 7604(a)(2).

EPA is incorrect when it asserts that, to be final, the agency's action must also "impose . . . binding legal consequences." Motion at 15 (emphasis added). As this Court has held, "agency action does not necessarily have binding effect." *Appalachian Power*, 208 F.3d at 1015; see also *Harrison*, 446 U.S. at 607 (Stevens, J., dissenting) (noting that agency advice was final action even though it did "not, in itself, change any party's legal status"). EPA's confusion appears to come from its reliance on cases like *Florida Power & Light Co. v. EPA*, 145 F.3d 1414 (D.C. Cir. 1998), which interpret the Resource Conservation and Recovery Act, not the Clean Air Act. *See* Motion at 18. Unlike the Clean Air Act, the Resource Conservation and Recovery Act review provision is limited to "final regulations promulgated pursuant to" the Act and "denial of any petition for the promulgation, amendment, or repeal of any regulation. 42 U.S.C. § 6976. That provision and cases interpreting it are inapposite to petitions seeking review of agency actions under the Clean Air Act, which need only be final.

EPA's interpretation of its own authority under the Clean Air Act is fundamentally an agency action from which "legal consequences will flow" and from which the "rights and obligations" of numerous parties, from EPA itself to the regulated community and beyond, will be impacted. *Bennett*, 520 U.S. at 178 (quotation omitted). Given that EPA has unequivocally announced a legal interpretation that expands the fundamental scope of its authority under the Section 111(d) program to extend that program to all existing sources that are already subject to national

standards promulgated under Section 112 of the Clean Air Act, the second *Bennett* general condition for finality is easily satisfied.

CONCLUSION

This Court has jurisdiction to review any action under the Clean Air Act when "EPA has rendered its last word on the matter in question." *Whitman*, 531 U.S. at 478 (quotation omitted). EPA rendered its last word on the matter in question when it concluded that it has the authority to mandate state standards under Section 111(d) for power plants that are already subject to a national emission standard issued under Section 112. That conclusion is final action reviewable in this Court now. EPA cannot avoid review simply by placing its conclusion in the preamble to a proposed rule that is premised on that very authority. Nor can EPA render its legal conclusion, which it has published in the Federal Register under the Administrator's signature, supported with a lengthy and unequivocal discussion in a legal memorandum, and resolutely reiterated in public statements on the record before Congress, non-final simply by accepting public comments on "all aspects" of a proposed rule or stating in argument to this Court that its conclusion was really merely "tentative."

EPA has failed to rebut the presumption that its legal conclusion is final and has done nothing to indicate that it has not reached the end of its deliberative process with respect to its authority under Section 111(d) to doubly regulate sources already regulated under Section 112. For the foregoing reasons, therefore, Murray Energy Corporation respectfully requests that this Court deny EPA's motion to dismiss and hold that jurisdiction under Clean Air Act Section 307 has been established.

Dated: November 6, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing MURRAY ENERGY'S OPPOSITION TO EPA'S MOTION TO DISMISS has been served electronically by Petitioner, Murray Energy Corporation, through the Court's CM/ECF system on all ECF registered counsel.

Dated: November 6, 2014

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