NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 14-1146

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

STATE OF WEST VIRGINIA, et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

CITY OF NEW YORK, et al.

Intervenors.

BRIEF FOR PETITIONERS

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CERTIFICATES AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), Petitioners state as follows:

(A) Parties, Intervenors, and Amici:

The parties in this case are the State of West Virginia (Petitioner); the State of Alabama (Petitioner); the State of Indiana (Petitioner); the State of Kansas (Petitioner); the Commonwealth of Kentucky (Petitioner); the State of Louisiana (Petitioner); the State of Nebraska (Petitioner); the State of Ohio (Petitioner); the State of Oklahoma (Petitioner); the State of South Carolina (Petitioner); the State of South Dakota (Petitioner); the State of Wyoming (Petitioner); the United States Environmental Protection Agency (Respondent); the City of New York (Intervenor); the Commonwealth of Massachusetts (Intervenor); the District of Columbia (Intervenor); Environmental Defense Fund (Intervenor); Natural Resources Defense Council (Intervenor); Sierra Club (Intervenor); the State of California (Intervenor); the State of Connecticut (Intervenor); the State of Delaware (Intervenor); the State of Maine (Intervenor); the State of New Mexico (Intervenor); the State of New York (Intervenor); the State of Oregon (Intervenor); the State of Rhode Island (Intervenor); the State of Vermont (Intervenor); and the State of Washington (Intervenor). There are currently no amici.

(B) Rulings Under Review:

Under review in this case is a settlement agreement between EPA and the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, the City of New York, Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund. The settlement was finalized by EPA on March 2, 2011 and modified on June 13, 2011. *See* EPA-HQ-OGC-2010-1057-0002.

(C) Related Cases:

Related cases include *In re: Murray Energy Corporation*, No. 14-1112; and *Murray Energy Corporation v. Environmental Protection Agency and Regina A. McCarthy*, No. 14-1151. The related cases were consolidated on November 13, 2014. *See* Per Curiam Order, Case No. 14-1151, ECF 1522086.

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GLOSSARY

CAA	Clean Air Act
EPA	Environmental Protection Agency
HAP	hazardous air pollutant

INTRODUCTION

This case concerns a now-unlawful settlement agreement in which EPA committed to regulate carbon dioxide emissions from existing power plants under Section 111(d) of the Clean Air Act ("CAA"). Although EPA has repeatedly admitted that the "literal" terms of the law now prohibit such regulation because it decided to regulate those power plants under Section 112 of the Act, the agency nonetheless has announced (and begun to act upon) its legal conclusion that it may regulate those plants under both Section 111(d) and Section 112. EPA is mistaken.

Section 111(d) is a narrow, rarely used provision that authorizes EPA to require States to create state plans that set emission standards for existing sources *in limited circumstances*. 42 U.S.C. § 7411(d). One significant limitation is the provision's Section 112 Exclusion, which prohibits EPA from regulating under Section 111(d) the emission of "any air pollutant . . . emitted from a source category which is regulated under [Section 112 of the CAA]." Under Section 112, EPA imposes onerous national regulations on a great many sources. Congress enacted the Section 112 Exclusion because it concluded that existing sources—which have sunk costs and on-going operations—should not have to comply with both severe national regulations under Section 112 and the state program under Section 111(d). EPA has acknowledged that the "literal" terms of the Section 112 Exclusion bar it from regulating existing power plants under Section 111(d) because, in 2012, it is-

sued a rule that regulates power plants under Section 112 to the tune of $9 billion a year.

Ignoring its own admissions, EPA has pushed forward with a proposed Section 111(d) rule in compliance with the settlement agreement, concluding in a lengthy Legal Memorandum in June 2014 that it has the authority to rewrite the U.S. Code. The agency has determined that a clerical error in the 1990 Amendments to the CAA—which was excluded from the U.S. Code—creates an ambiguity that EPA is permitted to resolve. The clerical error is nothing more than a common legislative glitch that is routinely ignored, consistent with uniform legislative practice and binding case law, but EPA has used it here to justify expanded powers under Section 111(d) and a proposed rule that will require revolutionizing States' entire energy sectors. States are expending thousands of state employee hours to design state plans to comply with the requirements of a proposed rule that is unlawful in its entirety (no matter how EPA ultimately finalizes it).

The Court should put this wasted effort to an end. EPA's illegal actions are taken pursuant to a settlement agreement, which is unquestionably reviewable final agency action. Petitioners urge this Court to end EPA's lawless attempt to "rewrite clear statutory terms to suit its own sense of how the statute should operate," in order to "bring about an enormous . . . expansion in EPA's regulatory authority without clear congressional authorization." *Utility Air Regulatory Group v. EPA*, 134

S. Ct. 2427, 2445-46 (2014) ("*UARG*"). By declaring unlawful the Section 111(d) portion of the settlement, this Court can end the ongoing waste of public resources, and permit EPA to redirect its energies to lawful pursuits.

JURISDICTIONAL STATEMENT

This case is before the Court on a petition for review of a final settlement agreement that EPA finalized on March 2, 2011, under Section 113(g), 42 U.S.C. § 7413(g). *See* Memorandum from Scott Jordan, Air and Radiation Law Office, to Scott Fulton, General Counsel (Mar. 2, 2011), EPA-HQ-OGC-2010-1057-0036 ("EPA Approval Memo")(JA___). This Court has jurisdiction under CAA Section 307(b)(1), 42 U.S.C § 7607(b)(1).

STATEMENT OF ISSUES

1. Whether EPA's binding commitment in the settlement agreement to propose and then to finalize a rule regulating existing power plants under CAA Section 111(d), 42 U.S.C. § 7411(d), is now unlawful because EPA has regulated the same power plants under CAA Section 112, 42 U.S.C. § 7412.

2. Whether this Court has jurisdiction to determine the legality of a settlement agreement that EPA finalized under CAA Section 113(g).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The text of the relevant statutes and regulations is set forth in the Addendum.

STATEMENT OF THE CASE AND FACTS

I. Statutory Overview

A. Section 111 Of The Clean Air Act

In 1970, Congress enacted Section 111 of the CAA, entitled "standards of performance for new stationary sources." Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 111, 84 Stat. 1676, 1683. As its name suggests, the primary focus of Section 111 is the regulation of emissions from *new* sources. Under Section 111(b), EPA is permitted to establish emission standards for "categor[ies] of sources," under certain circumstances. Section 111(b) is a robust program, which EPA has employed "for more than 70 source categories and subcategories . . . [including] fossil fuel-fired boilers, incinerators, sulfuric acid plants . . . ." 73 Fed. Reg. 44,354, 44,486-87 nn.239 & 242 (July 30, 2008).

Although the principal focus of Section 111 is national regulation of "new source[s]," Section 111(d) provides a more limited program for State-based regulation of emissions from certain existing sources. If EPA has issued a federal new-source standard under Section 111(b) for a category of sources, Section 111(d) authorizes EPA in some situations to issue guidelines for States to develop existing-standards for the same category of sources. 42 U.S.C. § 7411(d). As relevant here, Section 111(d) includes a provision that prohibits EPA from requiring States to develop an existing source performance standard for "any air pollutant . . . emitted

from a source category which is regulated under [Section 112 of the CAA]." *Id.* (hereinafter "Section 112 Exclusion"). Both Section 112 and the Section 112 Exclusion are discussed below. *See infra*, at 6-11.

EPA has successfully invoked Section 111(d) only a few times and in limited circumstances. "Over the last forty years, under CAA section 111(d), [EPA] has regulated four pollutants from five source categories." 79 Fed. Reg. 34,830, 34,844 (June 18, 2014).[1] In each case, the regulations were directed at pollutants emitted by specialized industries, such as acid mist emitted from sulfuric acid plants. *See* 79 Fed. Reg. at 34,844 n.43. As EPA itself has explained, Section 111(d) is designed to address unique, industry-specific pollution problems, where pollutants are "highly localized and thus an extensive procedure, such as the SIPs require, is not justified." 40 Fed. Reg. 53,340, 53,342 (Nov. 17, 1975). Under Section 111(d), "the number of designated facilities per State should be few," and the required state plans will be "much less complex than the SIPs" that regulate criteria pollutants under CAA Section 110. *Id.* at 53,345.

[1] *See* 42 Fed. Reg. 12,022 (Mar. 1, 1977), 42 Fed. Reg. 55,796 (Oct. 18, 1977); 44 Fed. Reg. 29,828 (May 22, 1979); 45 Fed. Reg. 26,294 (Apr. 17, 1980); 61 Fed. Reg. 9,905 (Mar. 12, 1996).

B. Section 112 Of The Clean Air Act

In 1970, Congress also adopted Section 112 of the CAA. Pub. L. No. 91-604, § 112, 84 Stat. at 1685-86. As originally enacted, Section 112 required EPA to list and then regulate hazardous air pollutants ("HAPs"). HAPs were defined narrowly as pollutants that "may cause, or contribute to, an increase in mortality or an increase in serious irreversible[] or incapacitating reversible[] illness." *Id.*

In 1990, Congress undertook a comprehensive expansion of the reach and severity of Section 112. The new Section 112 established a preliminary list of 189 HAPs to be regulated. It also permitted EPA to add more HAPs to this list when EPA determines that a pollutant may present "a threat of adverse human health effects" "through inhalation or other routes of exposure" or "adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise." 42 U.S.C. § 7412(b).

Furthermore, Congress required EPA to publish a list of "source categories" that emit HAPs. *Id.* § 7412(c). Whether a source category is listed under Section 112, or removed after being listed, depends upon a variety of factors. *Id.* For each listed source category under Section 112, Congress required EPA to "impose[] specific, strict pollution control requirements on both new and existing sources of HAPs," reflecting "the . . . 'best available control technology.'" *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008) (quoting S. Rep. No. 101-228, at 133

(1989)). As EPA has explained, "the entire concept of 'source categories' in [S]ection 112 was new in 1990." Final Brief, EPA, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155494, at n.40 (D.C. Cir. July 23, 2007) ("2007 EPA Brief").

The 1990 Amendments provided special treatment under Section 112 for the category of sources known as "electric utility steam generating units," commonly referred to as power plants. Congress required EPA to study the "hazards to public health reasonably anticipated to occur as a result of" HAPs emitted from power plants *before* EPA determined whether to list them under Section 112. 42 U.S.C. § 7412(n)(1)(A). EPA was then to determine, based on that study, whether it is "appropriate and necessary" to regulate power plants under Section 112. *Id.*

C. Section 112 Exclusion

The Section 112 Exclusion is a statutory limitation on EPA's Section 111(d) authority, which Congress changed when it revised and strengthened Section 112 in 1990. Before the 1990 Amendments, the Section 112 Exclusion barred EPA from requiring States to regulate under Section 111(d) the emission from existing sources of "any air pollutant . . . included on a list published under section [112](b)(1)(A)." *See* Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990). At the time, that was the list of pollutants deemed by EPA to be HAPs under the narrow pre-1990 criteria. 70 Fed. Reg. 15,994, 16,030 (Mar. 29, 2005); *supra*, at 6.

In 1990, Congress fundamentally changed the Section 112 Exclusion, in light of its decisions to significantly expand the scope of what constitutes a HAP and to require regulation under Section 112 by "source category." Specifically, Congress amended the Exclusion to prohibit EPA from requiring States to regulate under Section 111(d) the emission of "any air pollutant . . . emitted from a source category which is regulated under section [112]." Pub. L. No. 101-549, § 108, 104 Stat. 2399 (codified at 42 U.S.C. § 7411(d)(1)). As EPA has consistently conceded, "a literal reading" of this language means "that a standard of performance under section 111(d) cannot be established for any air pollutant—HAP and non-HAP—emitted from a source category regulated under section 112." 70 Fed. Reg. at 16,031; *accord* EPA, Legal Memorandum, at 26 (June 2014), EPA-HQ-OAR-2013-0602-0419 ("2014 Legal Memo")(JA___).

According to EPA itself, the legislative history of the 1990 Amendments shows that the revision of the Section 112 Exclusion to "shift [its] focus to source categories" from air pollutants was "no accident." 2007 EPA Brief, 2007 WL 2155494 (quotations omitted). The House of Representatives—where the 1990 revision to the Section 112 Exclusion originated—"sought to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112." 70 Fed. Reg. at 16,031. This policy change reflected the House's judgment that

EPA should not be permitted to require state-by-state regulation of an existing source category under Section 111(d), when that category already had to comply with the more stringent national emission standards being introduced by amendment into Section 112. 70 Fed. Reg. at 16,031. This "desire" to avoid "duplicative regulation" of *existing* source categories makes sense, given that it may not be feasible for already up-and-running facilities to comply with Section 112's stringent requirement and also regulation imposed by States under Section 111(d). 70 Fed. Reg. at 16,032. EPA has noted that Congress seemed especially concerned about "duplicative or otherwise inefficient regulation" of existing power plants, 70 Fed. Reg. at 15,999, and that the change of the Section 112 Exclusion from pollutants to "source categories" was intended to work in tandem with EPA's obligation to study power plants under Section 112(n). Congress wanted to make EPA choose between regulating HAP emissions from existing power plants under the national standards of Section 112, or all emissions from those power plants under the state-by-state standards of Section 111(d). 70 Fed. Reg. at 15,995, 16,031.

This Court and the Supreme Court have discussed the Section 112 Exclusion on two important occasions:

First, in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), this Court struck down EPA's attempt to require under Section 111(d) that the States regulate the emission of mercury from existing power plants. 70 Fed. Reg. 28,606 (May

18, 2005). The critical issue was that EPA had previously determined under Section 112(n) to regulate power plants under Section 112. 70 Fed. Reg. 15,994. To avoid the Section 112 Exclusion, EPA sought to reverse that prior determination, *id.*, but this Court would not allow it. This Court held that if EPA wanted to undo Section 112 regulation of power plants, the agency had to follow the procedures for de-listing a source category under Section 112(c)(9). *New Jersey*, 517 F.3d at 582. Because EPA had not followed those procedures, power plants remained regulated under Section 112, and thus were prohibited by the Section 112 Exclusion from being regulated under Section 111(d). *Id.* at 583.

Second, in 2011, the Supreme Court confronted Section 111(d) in *American Electrical Power Company, Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*"). In *AEP*, the Court held that there was no action for federal common law public nuisance to abate carbon dioxide emissions from power plants. *Id.* at 2537. The Court explained that Congress has granted EPA the authority to require States to regulate carbon dioxide emissions under Section 111(d), and that the mere existence of this authority preempts any federal abatement cause of action, regardless of whether EPA has exercised that authority. *Id.* at 2537-38. The Court noted, however, that there are statutory "exception[s]" to EPA's authority under Section 111(d). *Id.* at 2537 n.7. As relevant here, "EPA may not employ [Section 111(d)]

if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program, [Section 112]." *Id.*

II. Background

A. EPA Reaches A Final Settlement Agreement That Commits The Agency To Propose And Then To Finalize Regulations Of Existing Power Plants Under Section 111(d)

In 2006, a group of States and environmental groups—the vast majority of whom are intervenors here[2]—filed petitions for review in this Court, arguing that EPA must regulate carbon dioxide emissions from new power plants under Section 111(b) and existing power plants under Section 111(d). Petition for Review, *New York v. EPA*, No. 06-1322, ECF 991299. Following the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), this Court ordered a remand to permit EPA to further consider issues related to EPA's regulation of carbon dioxide emissions. 75 Fed. Reg. 82,392, 82,392 (Dec. 30, 2010).

Over the next few years, the State and NGO Intervenors pressured EPA to regulate carbon dioxide emissions from power plants under Sections 111(b) and 111(d), including by threatening further litigation. *Id.* at 82,392. The State Inter-

[2] The intervenors in the present case are the States of California, Connecticut, Delaware, Maine, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, and the Commonwealth of Massachusetts, the City of New York, the District of Columbia ("State Intervenors"), and the Environmental Defense Fund, the Natural Resources Defense Council, and the Sierra Club ("NGO Intervenors").

venors submitted letters to EPA in 2008 and 2009, "stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111." *Id.* The NGO Intervenors submitted a letter to EPA in 2010, "seeking commitments" to rulemaking on carbon dioxide emissions under Sections 111(b) and 111(d), "as a means of avoiding further litigation." *Id.*

EPA, the NGO Intervenors, and the State Intervenors eventually reached a settlement agreement "intended to resolve threatened litigation over the EPA's failure to respond to . . . [the] remand in State of New York, et al. v. EPA, No. 06-1322." *Id*. In accordance with the procedures of CAA Section 113(g), 42 U.S.C. § 7413(g), the agency submitted the settlement agreement for public notice and comment. *Id.* On March 2, 2011, EPA finalized the settlement agreement. *See* EPA Approval Memo(JA___).

In the settlement, EPA committed that it "will" propose and then finalize rules regulating carbon dioxide emissions from new and existing power plants under Section 111(b) and Section 111(d). Settlement Agreement ¶¶ 1-4, EPA-HQ-OGC-2010-1057-0002(JA___). Relevant here are EPA's contractual promises for the regulation of existing power plants under Section 111(d), by which the agency expressly "inten[ded] to be bound." *Id.* ¶¶ 2, 4(JA___). Specifically, EPA committed that it "will" issue a "proposed rule under Section 111(d) that includes emissions guidelines for [carbon dioxide]," and "will sign" and "transmit . . . a fi-

nal rule that takes action with respect to" existing power plants under Section 111(d). *Id.* The agreement included compliance dates for EPA, which the parties later modified. *Id.*

As sole consideration for EPA's commitment, the State and NGO Intervenors gave up the right to further litigation. Intervenors agreed to "a full and final release of any claims" they may have "under any provision of law to compel EPA" to respond to this Court's remand in *New York v. EPA*. *Id.* ¶ 6. Intervenors' only obligation was not to "file any motion or petition" to "compel EPA action" in this respect, "unless" EPA violated the settlement. *Id.* ¶ 7.

On the day EPA announced the settlement, the policy director for the Natural Resources Defense Council (an NGO Intervenor), David Doniger, emailed Regina A. McCarthy, then-assistant administrator for EPA's Office of Air and Radiation, to congratulate her, calling the settlement "a major achievement." Email from David Doniger to Regina A. McCarthy (Dec. 23, 2010, 6:30 PM EST) (Exh. I) (JA___). Responding less than two hours later, McCarthy returned the compliment, saying, "[t]his success is yours as much as mine." Email from Regina A. McCarthy to David Doniger (Dec. 23, 2010, 8:19 PM EST) (Exh. I) (JA___).

On June 13, 2011, EPA and Intervenors agreed to modify the settlement, extending the agreement's compliance dates. Settlement Modification ¶¶ 1-2, ECF 1510914, Exh. 2 (JA___). EPA again confirmed that the settlement "resolved [In-

tervenors'] potential claims" and "became final" on March 2, 2011. *Id.* at 1. After these modified dates lapsed, the State and NGO Intervenors continued to perform their only obligation under the settlement by not "filing any motion or petition" to "compel EPA action." Settlement Agreement ¶ 7(JA___).

B. EPA Regulates Power Plants Under Section 112

On February 16, 2012, EPA finalized a national emission standard for new and existing power plants under Section 112. 77 Fed. Reg. 9,304 (Feb. 16, 2012). In this rule, EPA reaffirmed the agency's 2000 decision that it is "necessary and appropriate" for power plants to be listed as a "source category" under Section 112, and proceeded to impose on those plants significant regulations, which will cost over $9 billion per year. *See* 77 Fed. Reg. at 9,365-75; EPA, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards at 1-3–3-13 (Dec. 2011), EPA-HQ-OAR-2009-0234-20131(JA___). EPA explained that one of the "co-benefits" of the stringent regulations was a reduction in carbon dioxide emissions from power plants. 77 Fed. Reg. at 9,428. This Court upheld the rule earlier this year, and the Supreme Court will now review that decision. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1229 (D.C. Cir. 2014), *cert. granted*, No. 14-46, 2014 WL 3509008 (U.S. Nov. 25, 2014); *see infra,* at 59 n.12.

By issuing the Section 112 rule, EPA seemed to have determined to breach the Section 111(d) portion of the settlement agreement. As noted above, the Su-

preme Court had just confirmed in *AEP*, in 2011, that the Section 112 Exclusion prohibits the regulation of a source category under Section 111(d) that is already regulated under Section 112. EPA's decision in 2012 to regulate power plants under Section 112 thus signaled the agency's apparent intent to legally disable itself from regulating existing power plants under Section 111(d).

C. EPA Abides By The Settlement Agreement By Proposing To Regulate Existing Power Plants Under Section 111(d)

On June 2, 2014, EPA issued a Legal Memorandum claiming that it can still regulate power plants under Section 111(d). *See* Legal Memo, EPA-HQ-OAR-2013-0602-0419(JA___). Specifically, EPA "conclude[d]" that it has discretion to rewrite the "literal" terms of the Section 112 Exclusion, *id.* at 26, because the 1990 Amendments to the CAA contained "drafting errors," *id.* at 21, that create an "ambiguity" with respect to the Exclusion, *id.* at 12. The drafting error is another amendment that, according to EPA, would have left the Section 112 Exclusion unchanged from the pre-1990 version and still focused on pollutants rather than source categories. *Id.* at 24-25. EPA argued that this "ambiguity" permits the agency to adopt a new version of the Section 112 Exclusion, which is actually a narrower limitation than *either* the version of the Exclusion currently in the U.S. Code *or* the pre-1990 version: "Where a source category is regulated under section 112, a section 111(d) standard of performance cannot be established to address any

HAP listed under section 112(b) that may be emitted from that particular source category." *Id.* at 26.

On June 18, 2014, EPA published a proposed rule regulating carbon dioxide emission from existing power plants under Section 111(d), just as it had committed to doing in the settlement agreement. 79 Fed. Reg. 34,830. Twelve days earlier, Petitioner West Virginia had alerted EPA that the reasoning in the Legal Memo was erroneous, *see* ECF 1510480, Exh. B(JA___), but EPA nonetheless pressed forward. In the proposed Section 111(d) Rule, EPA stated that it intended to finalize the rule in June 2015. 79 Fed. Reg. at 34,838. The finalization would satisfy the last of EPA's Section 111(d) obligations under the settlement agreement.

D. EPA's Proposed Section 111(d) Rule Harms States

The proposed Section 111(d) Rule—issued to satisfy EPA's commitment under the settlement agreement—requires States to submit a plan to EPA that revolutionizes the States' entire energy sectors. Under the proposed rule, each State must submit a plan ("State Plan") that would lead to a cut in carbon dioxide emissions by an average of 30% nationwide from 2005 levels by 2030. 79 Fed. Reg. at 34,832-33. Absent special circumstances, States are required to submit their State Plans to EPA by June 2016. *Id.* at 34,838.

To reach the aggressive emission targets, EPA used a combination of four "building blocks": (1) requiring changes to power plants that increase efficiency in

converting fossil-fuel energy into electricity; (2) increasing natural gas-fired power plants, which EPA assumes will be sufficient to offset significant generation; (3) substituting low or zero-carbon generation, including the preservation or increase of existing nuclear capacity and increasing renewable sources, like wind and solar energy; and, (4) mandating more efficient use of energy by consumers. *Id.* at 34,836, 34,859, 34,862-63, 34,866-68, 34,870-71. Only the first of these "building blocks" takes place at the site of the affected power plant, while the remaining "building blocks" require wide-ranging energy policy changes "beyond the fence" of the power plants EPA seeks to regulate. *Id.* at 34,871.

As a result, the State Plans will be an extraordinarily complicated, unprecedented endeavor. *See* 79 Fed. Reg. at 34,835-39; *see, e.g.*, Ala. Decl. ¶ 3 (State's response "will be the most complex air pollution rulemaking undertaken by [Alabama] in last 40 years.") (Exh. A)(JA___); Ky. Decl. ¶ 3 (State's plan will be "particularly complicated" because it has power plants "part of larger companies, spanning over several states" and "single municipalities.") (Exh. B)(JA___); Ohio Decl. ¶¶ 4-5 (Exh. H)(JA___). Although States are not bound to follow the building blocks, States cannot achieve the emissions targets without employing multiple blocks. *See, e.g.*, Ind. Decl. ¶ 3 (State cannot meet targets through building block one alone.) (Exh. C)(JA___); W. Va. Decl. ¶ 7 (same) (Exh. D)(JA___); Kan. Decl. ¶ 3 (same) (Exh. E)(JA___). The rule thus effectively requires overhaul of

each State's energy economy. Instead of asking States to merely strengthen environmental controls on power plants, the proposal forces States to rely more heavily on natural gas, nuclear power, renewable energy sources, and even to press changes in their citizens' energy usage. *See* 79 Fed. Reg. at 34,836.

States will have to first undertake a comprehensive study to determine which measures each will implement. *See, e.g.*, S.D. Decl. ¶ 10 (feasibility of wind resources unknown given wind development already in existence) (Exh. F)(JA___). States will be faced with difficult policy choices. *See, e.g.*, S.D. Decl. ¶ 12 ("[M]ajor fundamental grants of new power to a state agency or agencies," of "matters that have traditionally been determined . . . by the marketplace" will be "a matter of significant debate before the South Dakota Legislature.") (Exh. F)(JA___); Kan. Decl. ¶ 4 (Implementation of a renewable portfolio and demand-side controls "will require significant policy shifts in the Kansas legislature and by other policymakers.") (Exh. E)(JA___). For example, States must decide how they can feasibly include more natural gas, nuclear, and renewable energy sources in its energy mixes. *See, e.g.*, Kan. Decl. ¶ 3 (Exh. E)(JA___); W. Va. Decl. ¶ 5 (Exh. D)(JA___). To fully consider the consequences of each choice, States will need to collect and review significant input from citizens, stakeholders, and local regulators. *See, e.g.*, Kan. Decl. ¶ 4 (Exh. E)(JA___); Ky. Decl. ¶ 4 (Exh. B)(JA___); Wyo. Decl. ¶¶ 5-6 (Exh. G)(JA___).

Then, States will have to engage their political processes to overhaul of their legal and regulatory structures necessary to implement the new energy program. *See, e.g.*, Ind. Decl. ¶¶ 3-4 (Exh. C)(JA___); Kan. Decl. ¶ 6 (Exh. E)(JA___). In many cases, States will be forced to establish entirely new institutions and regulatory structures. *See, e.g.*, S.D. Decl. ¶ 5 ("[S]tate legislative grants of authority . . . are not sufficient to meet the requirements of a Section 111(d) Plan.") (Exh. F)(JA___); W. Va. Decl. ¶ 7 (No state agency "has the authority to implement these building blocks in the measureable and enforceable fashion required by the Rule.") (Exh. D)(JA___); Wyo. Decl. ¶ 8 ("[C]reating a plan that conforms to the 111(d) Rule will require the Wyoming legislature to act.") (Exh. G)(JA___). These may require unprecedented changes to state statutes, constitutions, and regulations, or possibly the installation of a centralized resource planning structure. *See, e.g.*, Kan. ¶ 5 ("statutory and regulatory changes") (Exh. E)(JA___). As even EPA admits, these types of changes will take far more time than provided by the proposal. 79 Fed. Reg. at 34,914 ("[S]tate administrative procedures can be lengthy, some states may need new legislative authority, and states planning to join in a multi-state plan will likely need more than thirteen months to get necessary elements in place."); *see, e.g.*, Wyo. Decl. ¶ 8 ("Absent immediate efforts from the Department, obtaining the legislative authorization necessary to develop a plan that

complies with the EPA's rule on the EPA's proposed timeline will be practically impossible.") (Exh. G)(JA___).

Given the mismatch between the steps described above and the short timeframe EPA has proposed for submission of State Plans, States have had no choice but to begin expending significant public resources. *Compare* 79 Fed. Reg. at 34,838 (States must submit their State Plan to EPA by June 30, 2016, absent special circumstances.) *with* West Virginia Decl. ¶ 3 (Creating a state plan "will take 3 years or more.") (Exh. D)(JA___), Indiana Decl. ¶ 3 (same) (Exh. C)(JA___), and Kansas Decl. ¶ 3 (will take 3-5 years to create plan) (Exh. E)(JA___). Even EPA foresaw this need. *See* Regina A. McCarthy, Remarks Announcing Clean Power Plan (June 2, 2014) ("[u]nder our proposal, states have to design plans now, . . . so they're on a trajectory to meet their final goals in 2030").[3] State expenditures so far include the following:

- **Alabama**: Two full time State employees, as well as time from fifteen other employees. Ala. Decl. ¶¶ 5-6 (Exh. A)(JA___).

[3] The source is available at http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/c45baade030b640785257ceb003f3ac3!opendocument.

- **Indiana**: State officials spending time "coordinating among state agencies and [regional transmission organizations]," and "participating in external modeling and cost analyses." Ind. Decl. ¶ 5 (Exh. C)(JA___).
- **Kansas**: The State has expending resources including "significant staff time to date." Kan. Decl. ¶ 4 (Exh. E)(JA___).
- **Kentucky**: State officials meeting "with every [power plant] in the Commonwealth," and top agency officials have "testified before legislative committees." Ky. Decl. ¶ 5 (Exh. B)(JA___).
- **South Dakota**: Two full-time employees dedicated to "determining what changes needs to be made to South Dakota's laws and regulations to implement the Proposed Rule." S.D. Decl. ¶ 17 (Exh. F)(JA___).
- **West Virginia**: State officials "holding meetings with power plant owners/operators, the [State's Department of Energy] and [Public Service Commission]," among other things, which "detracts from efforts to implement other requirements of the CAA." W. Va. Decl. ¶ 9 (Exh. D)(JA___).
- **Wyoming**: More than 10% of the State's air quality employees and other employees devoting a total of 1,108 hours, including 152 hours by the agency director and 138 hours by the administrator of the air quality division. Wyo. Decl. ¶ 11 (Exh. G)(JA___); *see also id.* ¶¶ 12-13.

Other States are expending additional resources driven by the proposed rule. These expenditures will continue unless and until this Court concludes that EPA lacks authority to regulate power plants under Section 111(d). *See, e.g.*, Ind. Decl. ¶ 6 (Exh. C)(JA___); Kan. Decl. ¶ 6 (Exh. E)(JA___); W. Va. Decl. ¶ 10 (Exh. D)(JA___); Wyo. Decl. ¶ 14 (Exh. G)(JA___).

E. Petitioners Challenge The Settlement Agreement

On August 1, 2014, the States filed the instant petition for review under CAA Section 307(b)(1), challenging EPA's Section 111(d) commitments in the settlement agreement as unlawful and in violation of the Section 112 Exclusion. On November 13, 2014, this Court ordered that this case be argued on the same day and before the same panel as two related cases that also concern EPA's proposed Section 111(d) rule—*In re: Murray Energy Corporation*, No. 14-1112, and *Murray Energy Corporation v. EPA and Regina A. McCarthy*, No. 14-1151.

SUMMARY OF ARGUMENT

I. The settlement agreement must be vacated because it commits EPA to take action that is now illegal: regulate power plants under Section 111(d). In 2012, EPA issued extensive regulations on power plants under Section 112. In light of these regulations, the Section 112 Exclusion now prohibits EPA from regulating a source category under Section 111(d) if EPA has already regulated that source category under Section 112.

A. It is clear from the plain text and the legislative history that the Section 112 Exclusion prohibits the double regulation of a source category under both Section 112 and Section 111(d). As EPA itself has repeatedly admitted, a "literal" reading of the text of the Section 112 Exclusion in the U.S. Code mandates that "a standard of performance under section 111(d) cannot be established for any air pollutant—HAP and non-HAP—emitted from a source category regulated under section 112." 70 Fed. Reg. at 16,031. The Supreme Court has read the text the same way, *see AEP*, 131 S. Ct. at 2537 n.7, and the legislative history is consistent, as well, *see* 70 Fed. Reg. at 16,031.

B. EPA's attempt to rewrite the literal terms of the Section 112 Exclusion is meritless. The agency argues that a "conforming amendment" in the 1990 Amendments to the CAA—which is *not* reflected in the text of the Section 112 Exclusion in the U.S. Code—creates an ambiguity as to the meaning of the Exclusion. But under uniform legislative practice and binding case law, this extraneous conforming amendment was properly excluded from the U.S. Code as a common clerical error and should simply be ignored.

C. Even if EPA were correct that the extraneous conforming amendment must be given substantive meaning, that would not save the legality of the settlement agreement. Under basic principles of statutory construction, which require that "every word" be "give[n] effect," EPA's approach should simply result

in a Section 112 Exclusion that incorporates *both* the text currently in the U.S. Code and the additional text from the conforming amendment. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Such an Exclusion would still prohibit EPA from requiring States to issue under Section 111(d) "standards of performance 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)(1).

II. This Court has jurisdiction to review the settlement agreement because the agreement is final agency action, the challenge is ripe for review, and the case presents a live controversy.

A. The settlement agreement is a reviewable "final action" under CAA Section 307(b). Section 307(b) provides jurisdiction to review essentially any action by EPA, so long as it is final. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980). The settlement agreement is final—and thus reviewable under Section 307(b)—for at least two independently sufficient reasons. *First*, EPA followed all of the procedures required for "final[izing]" a settlement under Section 113(g). *Second*, the agreement satisfies the two-pronged finality inquiry under *Bennett v. Spear*, 520 U.S. 154 (1997).

B. The challenge raised by the States also satisfies the test for ripeness. The only substantive "issue[]" in this lawsuit—the scope of the Section 112 Exclusion—is fit for review because it "is purely one of statutory interpreta-

tion." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 479 (2001) (quotation omitted). In addition, States will suffer great "hardship" if this Court refuses consideration, *id.*, as they are currently and will continue expending substantial resources designing State Plans to comply with the proposed rule.

C. Finally, this case presents a live controversy because the settlement remains binding on EPA—committing it to take action that the law precludes it from taking. Under hornbook law, EPA remains bound by the terms of the agreement, and so it is pressing ahead with regulating action under Section 111(d). *See* 13 Williston on Contracts § 39:31 (4th ed.).

STANDARD OF REVIEW

Because the CAA does not specify a standard of review for an action arising under Section 307(b)(1), the "familiar default standard of the Administrative Procedure Act" applies. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 496 (2004). That standard requires this Court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A settlement agreement is contrary to law if it commits the agency to violate a federal statute. *See generally Conservation Nw. v. Sherman*, 715 F.3d 1181, 1185 (9th Cir. 2013).

EPA's interpretation of the CAA is subject to review. "Where the statute speaks to the direct question at issue, [this Court] afford[s] no deference to the

agency's interpretation of it and 'must give effect to the unambiguously expressed intent of Congress.'" *North Carolina v. EPA*, 531 F.3d 896, 906 (D.C. Cir. 2008) (quoting *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). And even where deference is due to an agency's "permissible construction of the statute," *Chevron*, 467 U.S. at 843, ordinary principles of statutory construction require that a statute be interpreted to "give effect, if possible, to every word Congress used," *Reiter*, 442 U.S. at 339.

STANDING

Petitioners have standing to challenge the settlement agreement. They have suffered at least two injuries-in-fact that are fairly traceable to the settlement agreement and that would be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Moreover, to the extent there is any doubt, sovereign States are "entitled to special solicitude in . . . standing analysis." *Massachusetts*, 549 U.S. at 518, 520.

1. With this brief, States have submitted declarations that demonstrate injury-in-fact resulting from the proposal of the Section 111(d) rule. States have expended substantial state resources as a direct result of the proposal, including thousands of hours of employee time. *See supra*, at 20-21. Such "concrete drains on . . . time and resources," *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 28-29 (D.C.

Cir. 1990), far exceed the "identifiable trifle" needed to satisfy the injury-in-fact requirement, *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 704 (D.C. Cir. 1988).

This injury is "fairly traceable" to the settlement agreement, as "mere indirectness of causation is no barrier to standing," so long as there are "plausib[le]" links in the chain of causation. *See id.* at 705. *First*, it is more than plausible that the settlement agreement was at least a "substantial factor" that "motivated" EPA to issue the proposed rule. *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001). After all, the settlement agreement is legally binding and provides unequivocally that EPA "will" issue a "proposed rule under Section 111(d) that includes emissions guidelines for [carbon dioxide]." Settlement Agreement ¶ 2(JA___).[4] *Second*, the States' declarations make clear that EPA's proposal is, in turn, the cause of the expended resources. *See supra*, at 17-22. As EPA Administrator McCarthy has admitted, it is a practical necessity that States begin "to design plans *now*, . . . so they're on a trajectory to meet their final goals in 2030." *See supra*, at 20 (emphasis added).

[4] *See Am. Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986) (presumption that settlement agreements are binding and enforceable); *Vill. of Kaktovik v. Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982) (settlement agreements "may not be unilaterally rescinded"); *see also Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 247 n.4 (3d Cir. 2011) (challenged agency document "directly result[ed]" from the settlement agreement that required issuance of the document).

Finally, this injury will be redressed by a favorable decision. The States seek a decision from this Court that the Section 111(d) portion of the settlement agreement is now unlawful and ask for equitable relief prohibiting EPA from continuing to comply with the agreement in that respect. ECF 1505986 at 4-5(JA___). If this Court grants such relief, the Section 111(d) rulemaking is likely to stop, which will allow the States to halt their efforts to comply. *See, e.g.*, Ind. Decl. ¶ 6 (Exh. C)(JA___); Kan. Decl. ¶ 7 (Exh. E)(JA___); W. Va. Decl. ¶ 10 (Exh. D)(JA___); Wyo. Decl. ¶ 14 (Exh. G)(JA___).

2. The States have a second and independent injury-in-fact resulting from their "certainly impending" obligation to submit a State Plan after the Section 111(d) rule is final. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quotations omitted). A State suffers an injury-in-fact when it must revise or create a state plan under the CAA. *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). Any final rule that regulates emissions under Section 111(d) will inflict precisely such an injury, since the core mandate of Section 111(d) is the submission to EPA of State Plans.

Although EPA has self-servingly claimed that it might still withdraw the proposed rule, ECF 1520381 at 9, it is plain that finalization of the rule is "certainly impending" and not mere speculation. *Clapper*, 133 S. Ct. at 1147. In the proposed rule itself, EPA has committed to issuing the final rule by June 2015. 79

Fed. Reg. at 34,838.[5] EPA has also admitted in this litigation that it believes itself bound by President Obama's directive, *see* ECF 1513050, at 6, which requires EPA to issue a rule regulating power plants under Section 111(d) by June 2015.[6] And finally, if EPA were actually to attempt to avoid issuing under Section 111(d) a final carbon emissions regulation of existing power plants, the NGO and State Intervenors would surely sue to force such a regulation, as contemplated by the settlement. The final rule and the resulting injury to the States are, "if not certain, definitely likely." *Biggerstaff v. FCC*, 511 F.3d 178, 183-84 (D.C. Cir. 2007).

This impending injury is also fairly traceable to the settlement agreement and will be redressed by a favorable decision. As discussed earlier, traceability requires only plausible links in causation, and it is more than plausible that the settlement agreement is at least a "substantial factor" that is "motivating" EPA to finalize the rule. *Tozzi*, 271 F.3d at 308. The plain text of the settlement provides that EPA "will sign" and "transmit . . . a final rule that takes action with respect to" Section 111(d). Settlement Agreement ¶ 4(JA___). As for redressability, the Section 111(d) rulemaking will likely stop if this Court grants the relief that the States

[5] *See also* Unified Agenda, EPA, Fall 2014 Statement of Priorities ("We plan to finalize standards for both new and existing plants in 2015.")(JA___).

[6] *See* Memorandum from President Obama to Administrator of the EPA (June 25, 2013), available at http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards(JA___).

request, which would eliminate the obligation to submit a State Plan and therefore redress the injury.

ARGUMENT

I. The Section 112 Exclusion Renders The Settlement Agreement's Section 111(d) Provisions Unlawful

The settlement agreement must be vacated because it "agree[s] to take action that conflicts with or violates" the Section 112 Exclusion. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 526 (1986); *see, e.g.*, *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1185 (9th Cir. 2013). In 2011, EPA agreed to "propose" and then "finalize" a rule under Section 111(d) requiring States to issue standards of performance for carbon dioxide emitted from existing power plants. Settlement Agreement ¶¶ 2, 4(JA___). Then, in a rule that EPA issued in 2012, the agency determined to list power plants under Section 112 and imposed significant Section 112 regulations on those plants. *See* 77 Fed. Reg. at 9,310-76. As shown below, the Section 112 Exclusion prohibits EPA from requiring States to regulate under Section 111(d) a source category that EPA already regulated under Section 112.

A. The Section 112 Exclusion—As It Appears In The U.S. Code—Unambiguously Prohibits EPA From Regulating A Source Category Under Section 111(d) That Is Already Regulated Under Section 112

1. The text of the Section 112 Exclusion in the U.S. Code is clear. It provides that EPA may not require States to issue "standards of performance 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)(1). None of the terms is ambiguous. "[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzalez*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). Accordingly, "any air pollutant" includes both HAPs and non-HAPs. "Source category" is a term of art under the Clean Air Act that includes power plants. *See* 70 Fed. Reg. 37,819, 37,822 tbl.1 (June 30, 2005); *see generally* 40 C.F.R. pt. 63; 42 U.S.C. § 7412(n)(1)(A). And "[r]egulated" means "[g]overned by rule, properly controlled or directed, adjusted to some standard, etc." 13 Oxford English Dictionary 524 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989).

As EPA itself has explained in detailed analyses in 2004, 2005, 2007, and 2014, "a literal reading" of the text of the Section 112 Exclusion in the U.S. Code mandates "that a standard of performance under section 111(d) cannot be established for any air pollutant—HAP and non-HAP—emitted from a source category

regulated under section 112." 70 Fed. Reg. at 16,031; *accord* EPA, Legal Memo at 26 ("[A] literal reading of that language would mean that the EPA could not regulate any air pollutant from a source category regulated under section 112.")(JA___); 2007 EPA Brief, 2007 WL 2155494 ("[A] literal reading of this provision could bar section 111 standards for any pollutant, hazardous or not, emitted from a source category that is regulated under section 112."); 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004) ("A literal reading . . . is that a standard of performance under CAA section 111(d) cannot be established for any air pollutant that is emitted from a source category regulated under section 112.").

The Supreme Court has read the language in the same way as EPA. In its *AEP* decision, the Court noted the statutory "exception[s]" to EPA's authority under Section 111(d). 131 S. Ct. at 2537 n.7. As relevant here, "EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program, [Section 112]." *Id.*

2. This literal reading of the text of the Section 112 Exclusion in the U.S. Code is bolstered by the legislative history of the 1990 Amendments to the CAA. As EPA has explained, the text that appears in the U.S. Code originated in the House of Representatives. The House, EPA notes, specifically "sought to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under

section 112." 70 Fed. Reg. at 16,031. With the expansion of federal regulation under Section 112 to include far more pollutants as HAPs and to require severe regulation of sources regulated under Section 112, the House was concerned about the effect on existing sources of "duplicative or overlapping regulation" imposed by the States under Section 111(d). *Id.* Existing—as opposed to new—sources have sunk costs and ongoing operations that make it especially difficult to comply with regulation by different sovereigns under both Section 112 and Section 111(d).

In fact, the House seemed particularly concerned about "duplicative or otherwise inefficient regulation" of existing power plants. 70 Fed. Reg. at 15,999. It had also drafted a new provision that—like the provision now codified at Section 112(n)(1)—gave EPA authority to decline to regulate power plants under Section 112. 70 Fed. Reg. at 16,031. As EPA has explained, the House specifically revised the Section 112 Exclusion to work in tandem with this new provision, so that EPA had a choice between regulating HAPs emitted from existing power plants under the national standards of Section 112 or all emissions from those power plants under the state-by-state standards of Section 111(d). 70 Fed. Reg. at 16,031. The pre-1990 version of the Section 112 Exclusion, which focused solely on pollutants and not on source categories, no longer made sense if EPA was being given *categorical* discretion over power plants.

To be sure, the new Section 112 Exclusion created a minor regulatory gap between Section 112 and Section 111(d): EPA has no authority to regulate non-HAP pollutants emitted from an existing source regulated under Section 112. But the record in 1990 amply explains why the House would propose—and the Senate would ratify—such a change. By 1990, twenty years since the enactment of the CAA, EPA had employed Section 111(d) only *four times*, all for pollutants in specialized industries like acid mist emitted from sulfuric acid plants. Indeed, EPA had not issued a single Section 111(d) rule in the decade leading up to the 1990 Amendments. 79 Fed. Reg. at 34,844 n.43. And once Congress determined to broaden the reach of Section 112 in 1990, the role that Section 111(d) needed to play shrank even further. Congress well understood that few, if any, pollutants of concern would not be captured by the new Section 112 definition of a HAP: pollutants "which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects . . . or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise." 42 U.S.C. § 7412(b)(2). Moreover, in the case of power plants, EPA was given the specific discretion under Section 112(n)(1)(A) to forgo national regulation of HAPs under Section 112 in exchange for state-by-state regulation of *both* HAPs and non-HAPs under Section 111(d).

Thus, the "gap" in EPA's authority that Congress created by revising the Section 112 Exclusion was small, and certainly insubstantial compared to the important policy concerns that animated the new Section 112 Exclusion: the rigorous nature of the new Section 112 regime, the sunk costs and ongoing operations that are a feature of all existing sources, and the problems arising from dual regulation of the existing sources by different sovereigns. Indeed, in the twenty-four years since the 1990 Amendments, EPA has finalized only two rules under Section 111(d), one of which this Court vacated under the Section 112 Exclusion in *New Jersey v. EPA*. *See* 70 Fed. Reg. 28,606 (May 18, 2005) (vacated); 61 Fed. Reg. 9,905 (Mar. 12, 1996) (municipal solid waste landfill gases).

3. In an attempt to escape the unambiguous text of the Section 112 Exclusion in the U.S. Code, and *EPA's own repeated concession about the "literal" meaning of those words*, EPA and Intervenors have recently imagined five other interpretations of the language. EPA Response Brief at 28–30, *In re Murray Energy Corp.*, No 14-1112 (D.C. Cir. Nov. 3, 2014), ECF 1520381 ("EPA Brief"); Amicus Brief of NRDC, et al., at 9–10 & n.18, *In re Murray Energy Corp.*, No 14-1112 (D.C. Cir. Nov. 17, 2014), ECF 1522612 ("NGO Brief"); Amicus Brief of the State of New York, et al., at 14–15, *In Re: Murray Energy Corp.*, No. 14-1112 (D.C. Cir. Nov. 10, 2014), ECF 1521617 ("NY Brief"). But as shown below, EPA and Intervenors seek to "create ambiguity where none exists." *Carey Canada, Inc.*

v. Columbia Cas. Co., 940 F.2d 1548, 1556 (D.C. Cir. 1991). This attempt to torture ambiguity out of the plain statutory language—and EPA's sudden about-face—does not withstand scrutiny. *Cf. Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (refusing to find language ambiguous where "statute is awkward, and even ungrammatical").

First, EPA points out that Section 111(d) includes "three exclusionary clauses," only one of which is the Section 112 Exclusion.[7] EPA Brief at 28-29, ECF 1520381. Because these exclusionary clauses are "separated from each other by 'or,'" the agency now asserts that it can regulate under Section 111(d) so long as one of the three clauses is not satisfied. *Id.* at 28, 30. Noting that one of the clauses is in fact not satisfied—air quality criteria have not been issued for carbon dioxide—EPA argues that it is "irrelevant" that the Section 112 Exclusion *is* satisfied. *Id.* at 29.

But this argument—which EPA has never made before—fails even the most basic scrutiny. Simple logic dictates that when an "exclusion clause" contains multiple "disjunctive subsections," "the exclusion applies if any one of the [multi-

[7] The other two exclusionary clauses prohibit Section 111(d) regulation of "any air pollutant": (1) "for which air quality criteria have not been issued"; or (2) "which is not included on a list published under [Section 108(a)]." 42 U.S.C. § 7411(d)(1)(A)(i).

ple] conditions is met." *Mt. Hawley Ins. Co. v. Dania Distrib. Ctr.*, 763 F. Supp. 2d 1359, 1365 (S.D. Fla. 2011); *accord Allstate Ins. Co. v. Brown*, 16 F.3d 222, 225 (7th Cir. 1994). For example, if a landlord advertises for a tenant who is not a smoker or pet owner or married, the landlord does not want a tenant who meets *any*—not just *one*—of those criteria. Thus, in *New Jersey v. EPA*, this Court vacated EPA's Section 111(d) rule regulating the emission of mercury from power plants because it violated the Section 112 Exclusion, even though it did not violate the other exclusionary clauses. 517 F.3d at 583.

Second, EPA asserts that it is ambiguous whether the Section 112 Exclusion is even an exclusion at all, but rather might be read to affirmatively *permit* regulation under Section 111(d) of any source categories regulated under Section 112. EPA Brief at 29-30, ECF 1520381. This assertion of ambiguity—which EPA has also never before suggested and even now does not embrace, *id.* at 30—is belied by EPA's own reference to the Section 112 Exclusion as "the third exclusionary clause," *id.* at 29; *see also id.* at 28 (referring to "three exclusionary clauses"). It is quite clear to EPA that the language in question is an exclusionary, and not an inclusionary, clause. This interpretation is also contrary to *New Jersey v. EPA*, in which this Court treated the Section 112 Exclusion as an exclusionary clause. And finally, this interpretation would render the Section 112 Exclusion superfluous,

since Section 111(d) would affirmatively permit the regulation of "any existing source" even without the Exclusion's text.

Third, the NGO Intervenors argue that the text of the Section 112 Exclusion can be read to have effectuated no change from the pre-1990 Amendment text—in other words, the Exclusion still prohibits only the regulation of HAPs under Section 111(d) regardless of whether the source category is regulated under Section 112. *See* NGO Brief at 9, ECF 1522612. EPA has repeatedly explained why this long-discredited argument has no merit. 70 Fed. Reg. at 16,030-31; 2007 EPA Brief, 2007 WL 2155494. The most significant flaw is that it renders the statutory phrase "emitted from a source category" entirely meaningless. *See Reiter*, 442 U.S. at 339 ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). It is also inconsistent with the legislative history.

Fourth, the NGO Intervenors claim that the word "regulated"—in the phrase "emitted from a source category which is *regulated* under section [112]"—is somehow ambiguous. NGO Brief at 9-10, ECF 1522612. They assert, in effect, that the Section 112 Exclusion could be read as follows: EPA may not require States to issue "standards of performance for any existing source for any air pollutant . . . emitted from a source category which is regulated under section [112], *where the air pollutant in question is regulated under Section 112*." *See id.* But the NGO Intervenors do not explain the ambiguity in the word "regulated," which

has a plain and ordinary meaning. *See* 13 Oxford English Dictionary 524 ("Regulated" means "[g]overned by rule"). What NGO Intervenors are really attempting is to insert into the Section 112 Exclusion language that is not there. That violates long-standing rules of statutory interpretation. *See, e.g.*, *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("[I]t is for Congress . . . to rewrite the statute.").

Fifth, the State Intervenors argue that "the phrase 'which is regulated under section [112]' could be read as modifying both 'any air pollutant' and 'source category.'" NY Brief at 14-15, ECF 1521617. The State Intervenors would thus read the Exclusion as follows: EPA may not require States to issue "standards of performance for any existing source for any air pollutant . . . *which is regulated under section [112] . . . where that pollutant is* emitted from a source category which is regulated under section [112]." *See id.* Again, however, this is simply wholesale and impermissible rewriting of the law. *Blount*, 400 U.S. at 419.

4. EPA and Intervenors also attempt to cast doubt on the Supreme Court's plain reading of the Section 112 Exclusion in *AEP*, but these arguments similarly fail. Pointing to the Supreme Court's use of the phrase "the pollutant in question," they first contend that the Court understood the Exclusion to apply only where a pollutant *and* a source category are regulated under Section 112. *See* ECF 1513050, at 17 n.7; NGO Brief at 10 n.18, ECF 2533612. But that is simply not what the Court said. It said: "EPA may not employ [Section 111(d)] if existing

stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program, [Section 112]." *AEP*, 131 S. Ct. at 2537 n.7. The object of the verb phrase "are regulated under . . . [Section 112]" is the noun phrase "existing stationary sources." There is no suggestion that "the pollutant in question"—which refers to the pollutant for which Section 111(d) regulation is contemplated—must also be regulated under Section 112 for the Exclusion to apply.

EPA further asserts that it is fundamentally incompatible with *AEP*'s other reasoning to read the Court's statement as recognizing a blanket prohibition on Section 111(d) regulation of source categories already regulated under Section 112. *See* ECF 1513050, at 17 n.7; NGO Brief at 10 n.18, ECF 1522612. This, too, lacks merit. What the Court held in *AEP* "is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants." *AEP*, 131 S. Ct. at 2538. That is fully consistent with the Section 112 Exclusion, which reflects that EPA was given the choice between imposing federal standards on HAPs emitted from power plants under Section 112, or requiring state-by-state regulation of all emissions from existing power plants under Section 111(d).

B. The Extraneous Conforming Amendment Was Properly Excluded From The U.S. Code Under Uniform Legislative Practice And Binding Caselaw

Recognizing the weakness of their argument against the "literal" meaning of the Section 112 Exclusion as it appears in the U.S. Code, EPA and Intervenors rely

primarily on an alleged ambiguity in the Statutes at Large. Congress has provided that the U.S. Code, which is prepared by the Office of Law Revision Counsel of the U.S. House of Representatives, *see* 2 U.S.C. §§ 285a-285g, "shall . . . establish prima facie the laws of the United States," 1 U.S.C. § 204(b). Accordingly, the U.S. Code is deemed to be an accurate recounting of the "laws of the United States" unless it can be shown that the Office of Law Revision Counsel made an error, such that the Code is "inconsistent" with the Statutes at Large. *Stephan v. United States*, 319 U.S. 423, 426 (1943).

As shown below, EPA and Intervenors' reliance on the Statutes of Large is mistaken because there is no inconsistency with the U.S. Code. The Statutes at Large reflect that, in 1990, Congress passed two amendments to Section 111(d)—a substantive amendment and an extraneous conforming amendment. Consistent with uniform legislative practice and binding precedent of this Court, the Office of the Legislative Counsel properly excluded the extraneous conforming amendment from the U.S. Code as a common clerical error. *See infra*, at 41-44. EPA and Intervenors' argument that this conforming amendment nevertheless creates an "ambiguity" in the Section 112 Exclusion is without merit.

1. Congress's official legislative drafting guides, which courts regularly consult in interpreting statutes, set forth well understood and accepted conventions for drafting a bill that makes amendments to an existing law. *See, e.g., Koons*

Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60-61 (2004) (analyzing the official legislative drafting manuals to interpreted a statute); *United States v. O'Brien*, 560 U.S. 218, 233-34 (2010) (same); *accord Frederick v. Shinseki*, 684 F.3d 1263, 1270 (Fed. Cir. 2012) (same)*; Perry v. First Nat'l Bank*, 459 F.3d 816, 820 (7th Cir. 2006) (same). As the Senate Legislative Drafting Manual ("Senate Manual") provides, "substantive amendments"—those amendments making substantive changes to the law—"should appear first in numerical sequence of the Act amended or be organized by subject matter." Senate Manual § 126(b)(1).[8] A bill should then list "[c]onforming [a]mendment[s]," which are "amendment[s] of a provision of law that [are] necessitated by the substantive amendments or provisions of the bill." Senate Manual § 126(b)(2). Conforming amendments thus make clerical adjustments to an existing law, such as changes to "tables of contents" and corrections to pre-existing cross-references, *after* the "substantive amendments" are executed. *Id.*; *accord* House Legal Manual on Drafting Style § 332(b) (1995) ("House Manual"), http://legcounsel.house.gov/HOLC/Drafting_Legislation/draftstyle.pdf.

Consistent with these drafting guides, the Office of the Legislative Counsel follows a consistent practice of first executing substantive amendments, then executing subsequent conforming amendments, all while excluding as clerical errors

[8] This source is available at http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf.

any conforming amendments rendered unnecessary by previously executed substantive amendments. *See* Senate Manual, § 126(d); House Manual, § 332(d). The States' extensive research has revealed that the Office's longstanding and uniform practice is to exclude from the U.S. Code any conforming amendment that conflicts with a prior substantive amendment, and to simply note that the conforming amendment "cannot be executed."[9] Many of the hundreds of examples located were similar to the circumstances here, where the substantive and conforming amendments appeared in the same bill and purported to amend the same preexisting statutory text.[10] The States have not found a single example of the Office of

[9] *See, e.g.*, Revisor's Note, 7 U.S.C. § 2018; Revisor's Note, 10 U.S.C. § 869; Revisor's Note, 10 U.S.C. § 1407; Revisor's Note, 10 U.S.C. § 2306a; Revisor's Note, 10 U.S.C. § 2533b; Revisor's Note, 12 U.S.C. § 1787; Revisor's Note, 14 U.S.C. ch. 17 Front Matter; Revisor's Note, 15 U.S.C. § 2081; Revisor's Note, 16 U.S.C. § 230f; Revisor's Note, 20 U.S.C. § 1226c; Revisor's Note, 20 U.S.C. § 1232; Revisor's Note, 20 U.S.C. § 4014; Revisor's Note, 22 U.S.C. § 3651; Revisor's Note, 22 U.S.C. § 3723; Revisor's Note, 26 U.S.C. § 105; Revisor's Note, 26 U.S.C. § 219; Revisor's Note, 26 U.S.C. § 4973; Revisor's Note, 29 U.S.C. § 1053; Revisor's Note, 33 U.S.C. § 2736; Revisor's Note, 37 U.S.C. § 414; Revisor's Note, 38 U.S.C. § 3015; Revisor's Note, 40 U.S.C. § 11501; Revisor's Note, 42 U.S.C. § 218; Revisor's Note, 42 U.S.C. § 290bb–25; Revisor's Note, 42 U.S.C. § 300ff–28; Revisor's Note, 42 U.S.C. § 1395x; Revisor's Note, 42 U.S.C. § 1396a; Revisor's Note, 42 U.S.C. § 1396r; Revisor's Note, 42 U.S.C. § 5776; Revisor's Note, 42 U.S.C. § 9601; Revisor's Note, 49 U.S.C. § 47115.

[10] Revisor's Note, 11 U.S.C. § 101; Revisor's Note, 12 U.S.C. § 4520; Revisor's Note, 15 U.S.C. § 2064; Revisor's Note, 18 U.S.C. § 2327; Revisor's Note, 21 U.S.C. § 355; Revisor's Note, 23 U.S.C. § 104; Revisor's Note, 26 U.S.C. § 1201; Revisor's Note, 42 U.S.C. § 1395u; Revisor's Note, 42 U.S.C. § 1395ww; Revi-

(Continued)

Law Revision Counsel giving *any* meaning to a conforming amendment that could not be executed as a result of a previously executed substantive amendment.

This Court similarly has recognized that a mistake in conforming an amended statute should be ignored and not treated as "creating an ambiguity." *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336 (D.C. Cir. 2013). In *American Petroleum*, this Court confronted a statute where Congress had renumbered a specific provision but failed to also correct, by way of a conforming amendment, a pre-existing cross-reference. *Id.* This Court refused to allow that clerical error to "creat[e] an ambiguity" that might alter the substantive meaning of the statute. *Id.* Instead, this Court recognized that an error in updating a cross-reference "was far more likely the result of a scrivener's error" and should be ignored. *Id.* Such minor errors in conforming a statute that has been substantively amended, this Court observed, are quite common in today's "enormous and complex" legislation and should not be elevated in significance. *Id.* at 1336-37; *cf. Dir. of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 323 (2001) (treating "conforming amendment" as non-substantive); *CBS, Inc. v. FCC*, 453 U.S. 367, 381–82 (1981) (same).

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sor's Note, 42 U.S.C. § 1396b; Revisor's Note, 42 U.S.C. § 3025; Revisor's Note, 42 U.S.C. § 9875.

2. Applying this uniform legislative drafting practice and binding case law to the present case makes clear that the text of the Section 112 Exclusion in the U.S. Code properly articulates the law. Faced with two amendments in 1990 to Section 111(d), the Office of the Legislative Counsel correctly excluded the extraneous conforming amendment from the U.S. Code.

The first amendment, which the Office of the Law Revision Counsel included in the U.S. Code, is a substantive amendment to Section 111(d) ("Substantive Amendment"). Before 1990, the Section 112 Exclusion prohibited EPA from requiring States to regulate under Section 111(d) any air pollutant "included on a list published under . . . 112(b)(1)(A)." 42 U.S.C. § 7411(d) (1989); Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990); *see* 70 Fed. Reg. at 16,030. This meant that if EPA had listed a pollutant as a HAP, the agency could not regulate that pollutant under Section 111(d). *See supra*, at 6. In order "to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112," 70 Fed. Reg. at 16,031, the Substantive Amendment instructs:

> *strik[e] "or 112(b)(1)(A)" and insert[] "or emitted from a source category which is regulated under section 112."*

Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990). This "change [in] focus" is plainly a *substantive* change, and the amendment is accordingly listed among other

substantive amendments in the Statutes at Large. *See* 2007 EPA Brief, 2007 WL 2155494 at *n.35 ("the House version . . . was included with a variety of substantive provisions").

The second amendment appears 107 pages later in the Statutes at Large, among a list of "[c]onforming [a]mendments" that make clerical changes to the CAA ("Conforming Amendment"). *See* 2007 EPA Brief, 2007 WL 2155494 at *n.35. As noted above, conforming amendments are "amendment[s] of a provision of law that [are] necessitated by the substantive amendments or provisions of the bill." Senate Manual § 126(b)(2). Consistent with this description, the Conforming Amendment merely updated the cross-reference in the Section 112 Exclusion. The Conforming Amendment instructs:

> *strik[e] "112(b)(1)(A)" and insert[] in lieu thereof "112(b)".*

Pub. L. No. 101-549, § 302(a), 104 Stat. 2399 (1990). This clerical update was necessitated by the fact that the substantive amendments expanding the Section 112 regime—broadening the definition of a HAP and changing the focus to source categories—had renumbered and restructured Section 112(b).

Applying the process required by the official legislative drafting guides, and consistent with this Court's case law, the Office of Law Revision Counsel correctly found the Conforming Amendment to be extraneous and excluded it from the U.S. Code. The Office first executed the Substantive Amendment, producing the text of

the Section 112 Exclusion that appears in the U.S. Code today. It then looked to the Conforming Amendment and determined that it "could not be executed" because the Substantive Amendment had deleted the reference to "[1]12(b)(1)(A)." *See* Revisor's Note, 42 U.S.C. § 7411. This was entirely proper because it was impossible now to "strik[e] '112(b)(1)(A)' and insert[] in lieu thereof '112(b),'" as the Conforming Amendment directed.

3. Although EPA has indicated that it understands the Conforming Amendment is "a drafting error and therefore should not be considered," 70 Fed. Reg. at 16,031, it has inexplicably refused (and continues to refuse) to follow that proper approach. During the rulemaking that led to *New Jersey v. EPA*, the agency declared itself bound to "give effect to both the [Substantive Amendment] and [Conforming Amendment], as they are both part of the current law." 70 Fed. Reg. at 16,031. Confronted then with a puzzle entirely of its own creation, EPA settled upon an entirely unprecedented solution: it would treat each Amendment as independently creating a separate revised version of the Section 112 Exclusion. The first "version" is the version in the U.S. Code, created by executing only the Substantive Amendment. This version, EPA explained, means that "a standard of performance under section 111(d) cannot be established for any air pollutant—HAP and non-HAP—emitted from a source category regulated under section 112." 70 Fed. Reg. at 16,031. The second "version" would be created by executing only the

Conforming Amendment, which in EPA's view would leave the Section 112 Exclusion substantively the same as it was pre-1990. *Id.* Out of these two "versions" of the Section 112 Exclusion, EPA's claim of "ambiguity" was born.

EPA's approach, which it continues to press today, is baseless. The only evidence that may rebut the terms of Section 111(d) as expressed in the U.S. Code is the Statutes at Large. *Stephan*, 319 U.S. at 426. But the Statutes at Large simply do not reflect two separate versions of Section 111(d). Rather, they include only the Substantive Amendment and the Conforming Amendment, which—when properly applied one after the other—reveal that the latter is a "drafting error" that should be ignored. Notably, if this Court were to adopt EPA's approach to the amendments, every one of the numerous instances where the Office of Law Revision Counsel has excluded from the U.S. Code an amendment that "could not be executed" would now need to be treated as creating previously unidentified statutes-in-exile. There is no basis in logic, legislative practice, or congressional intent to permit this unprecedented and deeply disruptive result.

C. Even Under EPA's Understanding, The Conforming Amendment Does Not Alter The Unambiguous Prohibition Against Double Regulation Of The Same Source Category Under Both Section 112 and Section 111(d)

Even if this Court were to agree with EPA that the Conforming Amendment created an additional "version" of the Section 112 Exclusion, that would not

change or eliminate the "version" created by the Substantive Amendment, which is currently in the U.S. Code. Under EPA's erroneous approach, both "versions" of the Exclusion must be treated as the law of the land, since both amendments were passed by both houses of Congress and signed by the President. And if both "versions" of the Exclusion are the law, then EPA is duty bound to "give effect" to both exclusions. *Reiter*, 442 U.S. at 339.

Although EPA does not acknowledge it, there is an entirely straightforward way to give full "effect" to "every word" of both exclusions that EPA believes Congress enacted. *Id.* Giving effect to the version that appears in the U.S. Code would mean honoring the prohibition that, as EPA has put it, "a standard of performance under section 111(d) cannot be established for any air pollutant—HAP and non-HAP—emitted from a source category regulated under section 112." 70 Fed. Reg. at 16,031. Giving effect to the version created by the Conforming Amendment would mean abiding by the pre-1990 prohibition on regulating any HAP under Section 111(d), regardless of whether the source of the HAP is actually regulated under Section 112. Every word of both exclusions can be given effect by simply applying both prohibitions. EPA cannot require States to regulate existing sources under Section 111(d) where the pollutants in question: (1) are "emitted from a source category which is regulated under section [112]"; *or* (2) are HAPs "included on a list published under section [112]."

In its 2014 Legal Memorandum, EPA refuses to address this comprehensive way to give "effect" to "[e]very word" that EPA believes Congress intentionally used, *Reiter*, 442 U.S. at 339, even though EPA was aware of this interpretation.[11] Instead, EPA asserted that it had the authority to simply rewrite both limitations to prohibit EPA from regulating under Section 111(d) only the emission of "any HAP[s] listed under section 112(b) that may be emitted from [a] particular source category" that "is regulated under section 112." Legal Memo at 26, EPA-HQ-OAR-2013-0602-0419(JA___). EPA's rewrite of the Section 112 Exclusion is narrower than either of the two limitations on EPA's authority that EPA believes Congress enacted. It is narrower than the limitation that appears in the U.S. Code because it permits EPA *some* regulation under Section 111(d) of source categories actually regulated under Section 112—specifically, the regulation of non-HAP emissions from such sources. And it is narrower than the alternative limitation purportedly created by the Conforming Amendment, since it permits EPA *some* regulation under Section 111(d) of HAPs—specifically, HAPs emitted from source categories not regulated under Section 112.

[11] *See, e.g.*, Letter from Nat'l Ass'n of Mfrs., et al. to EPA 26-27 (June 25, 2012), http://www.americanchemistry.com/Policy/Environment/Environmental-Regulations/Multi-Association-Comments-re-EPAs-Proposed-NSPS-for-GHG-Emissions-for-New-Stationary-Sources.pdf.(JA___)

EPA's position is remarkable and unprecedented. EPA does not—and could not possibly—claim that anyone in Congress intended to adopt this narrowed version of the Section 112 Exclusion. Yet, EPA claims that the fact that Congress adopted two different limitations on EPA's authority gives EPA the power to reduce the reach of *both* prohibitions.

It is apparent that what is driving EPA's interpretation of the Exclusion is its desire to avoid either "version" of the Exclusion that it believes Congress enacted. EPA understands that under either "version" of the Section 112 Exclusion, the agency will have some gap in its authority, where it will not be able to reach existing-source emissions that are not otherwise regulated under Section 112. Under the version in the U.S. Code, EPA cannot regulate non-HAP emissions from sources already regulated under Section 112. And under the alternative version, EPA cannot reach HAP emissions from sources *not* regulated under Section 112. But EPA's policy preference that there should be absolutely no gap in its authority—no matter how minor—does not give it the power to "rewrite clear statutory terms to suit its own sense of how the statute should operate." *UARG*, 134 S. Ct. at 2446; *see also Artuz v. Bennett*, 531 U.S. 4, 10 (2000) ("Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them.").

II. This Court Has Jurisdiction To Review The Settlement Agreement

A. The Settlement Agreement Is A Reviewable Final Action Under Section 307(b) of the CAA

The Supreme Court has made clear that Section 307(b) of the CAA provides jurisdiction to review essentially any action by EPA, so long as it is final. As relevant here, Section 307(b) permits the filing of a petition for review in this Court that challenges "any other nationally applicable regulations promulgated, or final action taken," by EPA. 42 U.S.C. § 7607(b)(1). This catch-all provision for national EPA actions mirrors a similar catch-all provision for local or regional EPA actions that the Supreme Court has construed extremely broadly. *See Harrison*, 446 U.S. at 589. The use of the words "any other," the Court has explained, evinces Congress's intent to allow for review of all final EPA actions. *Id.*

The settlement agreement is a final action by EPA—and thus reviewable under Section 307(b)—for two independently sufficient reasons. To begin, the settlement agreement was entered into under Section 113(g) of the CAA, which expressly sets forth procedures for making such an agreement "final." 42 U.S.C. § 7413(g). Specifically, EPA must go through at least thirty days of notice and comment before a "settlement agreement of any kind under this chapter" may be "final." *Id.* Where an agency action is "promulgated in [such] a formal manner after notice and evaluation of submitted comments," the Supreme Court has held

that there is "no question" that the action is "final." *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967) (internal quotations omitted).

The agreement is also final under the more generalized two-pronged finality inquiry under *Bennett v. Spear*, 520 U.S. 154 (1997). *See generally United States v. Carpenter*, 526 F.3d 1237, 1241-42 (9th Cir. 2008) (settlement reviewable as final agency action); *Exec. Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 761 (4th Cir. 1993) (same).

First, the settlement agreement represents the "consummation" of EPA's decisionmaking with respect to how to resolve its dispute with the NGO and State Intervenors. *Id.* at 178 (quotations omitted). The NGO and State Intervenors had threatened to sue EPA to force the agency to regulate carbon dioxide emission from power plants under Section 111, *see supra*, at 11-12, and then EPA and these parties reached a formal settlement agreement to avoid such a lawsuit. The agreement was EPA's final resolution—*i.e.*, "consummation"—of the dispute. *See* EPA Approval Memo at 2, EPA-HQ-OGC-2010-1057-0036 (explaining that EPA "finaliz[ed] this settlement" on March 2, 2011)(JA___); Settlement Modification at 1 ("the Settlement Agreement became *final* on March 2, 2011")(JA___).

Second, "legal consequences . . . flow" from the settlement. *Bennett*, 520 U.S. at 178 (quotations omitted). A settlement agreement embodies the final resolution of a dispute by defining the rights and obligations of the parties "in the na-

ture of [a] contract[].” *Makins v. District of Columbia*, 277 F.3d 544, 546 (D.C. Cir. 2002). In the present case, EPA made a legal commitment that it “will” issue a “proposed rule under Section 111(d) that includes emissions guidelines for [carbon dioxide],” and “will . . . transmit . . . a final rule that takes action with respect to” existing power plants under Section 111(d). Settlement Agreement ¶¶ 2, 4, EPA-HQ-OGC-2010-1057-0002(JA___). In turn, the NGO and State Intervenors promised to “not file any motion or petition seeking to compel EPA action . . . with respect to . . . emissions from [power plants],” unless EPA failed to comply with certain contractual conditions. *Id.* ¶ 7. These legally binding commitments are a paradigmatic case of an agency action that has legal consequences.

B. The Specific Challenge The States Raise Here Is Ripe

A lawsuit becomes ripe when two conditions are satisfied. *First*, the “issues” raised by the lawsuit must be “fit[] . . . for judicial decision.” *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 479 (2001) (quotation omitted). This requirement is fulfilled where “[t]he question . . . is purely one of statutory interpretation that would not benefit from further factual development of the issues presented,” and would not “inappropriately interfere with further administrative action.” *Id.* (quotation omitted). *Second*, the parties will suffer “hardship” if the court were to “withhold[] . . . consideration.” *Id.* This hardship inquiry is a “lower standard” in cases brought under Section 307(b) of the CAA because it is a statute

that "specifically provides for preenforcement review." *Id.* at 479-80 (quotations omitted).

Here, the specific challenge the States assert—that the settlement agreement's Section 111(d) provisions are now unlawful as a result of EPA's regulation of power plants under Section 112—became ripe in June 2014. In that month, EPA first announced in the detailed Legal Memorandum the agency's conclusion that it could still issue regulations of existing power plants under Section 111(d), notwithstanding its Section 112 rulemaking in 2012. EPA then issued its proposed Section 111(d) rule that began imposing harms upon the States immediately.

1. The "issue[]" raised by this lawsuit became "fit[] . . . for judicial decision" when EPA issued its Legal Memorandum. *Whitman*, 531 U.S. at 479 (quotations omitted). The *only* substantive issue presented here is whether EPA can lawfully abide by the settlement agreement's Section 111(d) commitments to propose and then finalize a rule regulating existing power plants under Section 111(d), which the Legal Memorandum concludes that the agency can do. This is quintessentially an issue of "pure[] . . . statutory interpretation that would not benefit from further factual development of the issues presented." *Id.* (quotations omitted).

The firm conclusions in the Legal Memorandum and the threshold nature of the question also mean adjudication of this issue at this time will not "*inappropriately* interfere with further administrative action." *Whitman*, 531 U.S. at 479 (em-

phasis added). In the Legal Memorandum, EPA unequivocally "*conclude[d]*" after seven pages of detailed legal analysis that "section 111(d) authorizes the EPA to establish section 111(d) guidelines for GHG emissions from EGUs," even though "EGUs are a source category that is regulated under CAA section 112." Legal Memo at 27, EPA-HQ-OAR-2013-0602-0419 (emphasis added)(JA___). Although EPA's ongoing rulemaking may generate a final Section 111(d) Rule that adjusts some of the particulars in the proposed Rule, the analysis in the Legal Memorandum suggests there is no realistic possibility that EPA will change its conclusion that it has the authority under Section 111(d) to issue a rule at all. Moreover, because the answer to the legal question at issue is binary—EPA either can issue under Section 111(d) a rule relating to existing power plants, or it cannot—a decision in this case will not entangle this Court in the administrative process. This Court will either halt an unlawful rulemaking or do nothing if it agrees that EPA is acting within its authority.

2. The States will unquestionably suffer "hardship" if this Court were to "withhold[] . . . consideration." *Whitman*, 531 U.S. at 479. As detailed above, States began expending substantial resources to prepare their State Plans immediately after EPA released its proposed Section 111(d) Rule in June 2014, consistent with the acknowledgment by EPA's Administrator that state preparations would have to begin "now." *See supra*, at 17-22. These are more than sufficient harms

under the "lower standard" applicable to a challenge brought under Section 307(b). *Whitman*, 531 U.S. at 479. After all, the Supreme Court has specifically held that the necessity of "promptly undertak[ing] . . . lengthy and expensive task[s]" constitutes sufficient hardship for purposes of ripeness. *Id.*

In sum, this case is ripe because both prongs of the ripeness inquiry were satisfied in June 2014. The case thus is properly brought now under the provision of Section 307(b)(1) that concerns the "occurrence of an event that ripens a claim," *see Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 129 (D.C. Cir. 2012), *aff'd in part and vacated in part on other grounds by UARG*, 134 S. Ct. at 2444, and is ripe under general ripeness principles, *see Whitman*, 531 U.S. at 478.

C. Petitioners' Challenge Presents A Live Controversy

In its procedural filings in this case, EPA has erroneously claimed that "Petitioners' challenge is moot given that the deadlines set in the Settlement Agreement have all long passed." ECF 1513050 at 14. "The mootness doctrine, deriving from Article III, limits federal courts to deciding actual, ongoing controversies." *Clarke v. United States*, 915 F.2d 699, 700-01 (D.C. Cir. 1990) (en banc) (quotations omitted). This case is not moot because the settlement agreement commanding Section 111(d) regulation remains in effect.

The settlement agreement is "in the nature of [a] contract[]" and remains in force under basic contract principles. *Makins*, 277 F.3d at 546. Under hornbook

contract law, one party's failure to perform an obligation under a contract does not relieve it from its duties under the contract, even if the other party does not seek to enforce the obligation. *See* 13 Williston on Contracts § 39:31 (4th ed.); *accord William W. Bierce, Ltd. v. Hutchins*, 205 U.S. 340, 346 (1907) ("[A party] may keep in force or may avoid a contract after the breach of a condition in his favor."). Here, the NGO and State Intervenors fully knew that EPA missed the settlement agreement's deadlines, but have chosen to maintain the agreement by continuing to uphold their sole obligation not to "file any motion or petition" against EPA "with respect to GHG emissions from EGUs." Settlement Agreement ¶ 7(JA___). Indeed, these parties have specifically intervened in this matter *to defend the vitality of the settlement*. *See* NY Motion to Intervene at 8, ECF 1510244 ("Intervenor States' interest in *avoiding annulment* of the settlement agreement is . . . manifest.") (emphasis added); NGO Motion to Intervene at 8, ECF 1510348 (interested as party to the settlement agreement). The settlement agreement thus remains "in force" today notwithstanding EPA's failures, and the present case is not moot. *William W. Bierce, Ltd.*, 205 U.S. at 346.

CONCLUSION

For the foregoing reasons, this Court should hold "unlawful" and "set aside" the settlement agreement's Section 111(d) provisions. 5 U.S.C. § 706(2)(A). This Court should also enjoin EPA from continuing and finalizing its Section 111(d) rulemaking regarding existing power plants unless and until EPA uses its authority to end the regulation of power plants under Section 112.[12]

[12] EPA has two paths to end the regulation of power plants under Section 112. *First*, the Supreme Court this week granted review of EPA's decision to regulate power plants under Section 112(n), without considering the costs of such regulation. *See supra*, at 14. Should the Court rule against EPA, the agency could decline on remand to regulate power plants under Section 112(n). *Second*, EPA alternatively could delist the regulation of power plants pursuant to Section 112(c)(9). *See New Jersey*, 517 F.3d at 582. Unless and until EPA chooses either of these paths, power plants will continue to be "regulated" under Section 112, and the Section 112 Exclusion will prohibit EPA from complying with the Section 111(d) portions of the settlement.

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7) because this brief contains 13,950 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Elbert Lin
Elbert Lin

CERTIFICATE OF SERVICE

I certify that on this 26th day of November, 2014, a copy of the foregoing *Brief for Petitioners* was served electronically through the Court's CM/ECF system on all registered counsel. I also filed five (5) paper copies with this Court, pursuant to Circuit Rule 31(b).

/s/ Elbert Lin
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