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

MURRAY ENERGY CORPORATION,	)	
Petitioner,	)	
	)	No. 14-1151
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and REGINA A. McCARTHY, Administrator, U.S. Environmental Protection Agency,	)	
Respondents.	)	

RESPONDENT EPA'S MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

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INTRODUCTION AND SUMMARY

Petitioner Murray Energy Corporation ("Murray") asks this Court to hear the merits of a petition challenging a *proposed* rule of the United States Environmental Protection Agency ("EPA" or the "Agency"). See "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule," 79 Fed. Reg. 34,830 (June 18, 2014) (the "Proposed Section 111(d) Rule").[1] *If* EPA takes a final action promulgating this proposed rule, it would establish requirements for existing power plants under Section 111(d) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7411(d), and the final, *promulgated* rule would then be subject to this Court's review. At present, however, the Proposed Section 111(d) Rule is still just that – a mere proposal.

The CAA expressly limits judicial review to *final* rules that have been "promulgated" after completion of the statutorily-prescribed rulemaking process, including EPA's evaluation of and responses to public comments on the proposal.

[1] Two additional premature cases seeking review of the Proposed Section 111(d) Rule are also now pending in this Court. Murray Energy Corp. v. EPA, No. 14-1112 (petition for an extraordinary writ setting aside the proposal, Doc. No. 1498341 in that case); West Virginia v. EPA, No. 14-1146 (purporting to seek review of an EPA settlement agreement). The Court has ordered that a response to the extraordinary writ petition be filed on November 3, 2014, but has not resolved whether it has jurisdiction in that case. Order dated Oct. 9, 2014 in Case No. 14-1112 (Doc. No. 1516440). In West Virginia, the Court has ordered that a schedule for merits briefs be submitted, expressly directing that the briefs must address whether jurisdiction exists. Order dated Oct. 21, 2014 in Case No. 14-1146 (Doc. No. 1518204).

See 42 U.S.C. §§ 7607(b)(1), 7607(d). Because the Agency publication challenged by Murray is only a *proposed* rule reflecting proposed legal interpretations and technical analysis, by definition it does not represent EPA's final determination with respect to the matters addressed. EPA is soliciting public comment on every issue that Murray would have the Court prematurely review in this case, and EPA has not yet had the opportunity to respond to those comments and make its final legal and technical determinations. While EPA *could* ultimately take final action to adopt the Proposed Section 111(d) Rule as a final rule, it also remains possible – until EPA makes a final decision – that EPA may *not* adopt the proposal or may modify it.

Hearing the merits of Murray's challenge now would undermine the statutory notice-and-comment process by depriving the Agency of the opportunity to consider the views of critical commenters and determine an appropriate response in the context of the rulemaking. Indeed, since the comment period is still ongoing, such premature judicial review would also deprive other members of the public of the opportunity to have *their* comments and views – which may differ from Murray's – be meaningfully considered by the Agency as part of its final administrative action. Because Murray's request for premature judicial intervention in this matter would thus undermine the public notice-and-comment process for proposed regulations under the Act, and because it is contrary to well-

settled principles of administrative law that limit the Court's jurisdiction to the review of *final* agency action, the Court should dismiss this petition.

I. STATUTORY AND REGULATORY BACKGROUND

A. Regulation of Stationary Source Pollutant Emissions under CAA Section 111

The CAA, enacted in 1970 and extensively amended in 1977 and 1990, provides a comprehensive program for controlling and improving the nation's air quality through a combination of state and federal regulation. Section 111 of the Act, 42 U.S.C. § 7411, establishes mechanisms for controlling emissions of air pollutants from stationary sources.

As a preliminary step, EPA must list categories of stationary sources that the Administrator, in his or her judgment, finds "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Once it has listed a source category, EPA must then establish "standards of performance" that apply to "new sources" in that category, which are defined as "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance" for the relevant category. Id. § 7411(a)(2). Standards of performance for new sources are sometimes referred to as "new source performance standards" or "NSPS."

The Act defines a "standard of performance" as:

> a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

Id. § 7411(a)(1).

When EPA establishes new source performance standards in a particular source category, it is also required, under Section 111(d)(1), to prescribe regulations for states to submit plans establishing "standards of performance for any existing source" in that category for any air pollutant, with certain enumerated exclusions. 42 U.S.C. § 7411(d)(1). Under Section 111(d), a state must submit its plan to EPA for approval, and EPA must approve the state plan if it is "satisfactory." Id. § 7411(d)(2)(A). If the state does not submit a plan, or if EPA does not approve the state's plan, then EPA must establish a plan for that state. Id.

B. Background Regarding EPA's Efforts to Control Greenhouse Gas Emissions

In 2007, the Supreme Court held that greenhouse gases such as carbon dioxide "unambiguous[ly]" are an "air pollutant" under the CAA. Massachusetts v. EPA, 549 U.S. 497, 529 (2007); see also Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2538-40 (2011) (the CAA and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon dioxide

emissions from existing fossil fuel-fired power plants). Prior to Massachusetts, EPA had promulgated revised standards of performance for power plants that were challenged, in part, due to their failure to address greenhouse gas emissions. See 79 Fed. Reg. 1430, 1444 (Jan. 8, 2014) (discussing prior rulemaking and litigation). EPA subsequently obtained from this Court a voluntary remand for the purpose of administrative reconsideration in light of Massachusetts and, in response to a Presidential Memorandum, set a timetable for completing several rules, including the present Section 111(d) rulemaking. See 79 Fed. Reg. at 34,833/3; Presidential Memorandum: Power Sector Carbon Pollution Standards (June 25, 2013).[2]

Two years after Massachusetts, EPA issued a finding that greenhouse gas air pollution may reasonably be anticipated to endanger Americans' public health and welfare, now and in the future, by contributing to climate change. See "Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act" ("Endangerment Finding"), 74 Fed. Reg. 66,496 (Dec. 15, 2009). Climate change is associated with a host of adverse effects that have already been observed or are projected to occur in the future including, but not limited to, "more frequent and intense heat waves, more severe wildfires, degraded air quality, heavier and more frequent downpours and flooding,

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[2] Available at http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards.

increased drought, greater sea level rise and storm surge, more intense storms, harm to water resources, continued ocean acidification, harm to agriculture, and harm to wildlife and ecosystems." 77 Fed. Reg. 22,392, 22,396 (Apr. 13, 2012). EPA's Endangerment Finding led to a series of initial regulations limiting greenhouse gases from mobile and stationary sources. See generally Coal. for Responsible Regulation v. EPA, 684 F.3d 102, 114-16, 126-49 (D.C. Cir. 2012), upheld in part and rev'd in part, UARG v. EPA, 134 S. Ct. 2427 (2014).

This year, EPA has published in the Federal Register three separate proposed rules under Section 111 to address greenhouse gas emissions from, respectively, new sources, existing sources, and modified and reconstructed sources in the power plant sector. See 79 Fed. Reg. at 1430 (proposal under Section 111(b) for new sources) (the "January 2014 Proposed Rule"); 79 Fed. Reg. at 34,830 (the Proposed Section 111(d) Rule for existing sources); 79 Fed. Reg. 34,960 (June 18, 2014) (proposed rule for modified and reconstructed sources). EPA has prioritized the development of rules for this stationary source category because fossil fuel-fired power plants emit more greenhouse gases than any other stationary source category in the United States, including roughly 40 percent of all anthropogenic carbon dioxide (CO_2) emissions in the United States. 79 Fed. Reg. at 1443/1.

C. Summary of the Proposed Section 111(d) Rule and Remaining Steps in the Rulemaking Process

The Proposed Section 111(d) Rule has two main elements: (1) state-specific emission rate-based CO_2 goals; and (2) guidelines for the development, submission and implementation of state plans. 79 Fed. Reg. at 34,833/1. While the proposal lays out state-specific CO_2 goals that each state would be required to meet, it does not prescribe how a state should meet its goal. Id. Rather, each state would have the flexibility to design a program to meet its goal in a manner that reflects its particular circumstances and energy and environmental policy objectives. Id.

As part of this proposal, EPA explained its initial analysis regarding whether it has legal authority to regulate carbon dioxide emissions from existing power plants under Section 111(d) notwithstanding its earlier promulgation of national emission standards for other pollutants (i.e., hazardous air pollutants) from coal and oil-fired power plants under Section 112, which is the issue for which Murray now seeks the Court's review. See Statement of Issues to Be Raised (Doc. No. 1512764 in this case, filed Sept. 27, 2014). EPA discussed this issue both in the preamble to the Proposed Section 111(d) Rule, and in a more detailed Legal Memorandum. See 79 Fed. Reg. at 34,853; see also EPA, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing [EGUs] at 11-12, 21-

27.[3] EPA made clear in the preamble that it "solicits comment on all aspects of its legal interpretations, including the discussion in the Legal Memorandum." 79 Fed. Reg. at 34,853/2. EPA also made clear that it seeks "public comment on all aspects of this proposal" including technical as well as legal issues. Id. at 34,835/2; see also, e.g., id. at 34,862/1, 34,865/3, 34,866/2, 34,867/3, 34,869/3, 34,870/2, 34,871/2, 34,875/1, 34,876/1, 34,876/2, 34,877/1, 34,877/2, 34,885/1, 34,890/2 and 34,892/2 (examples of additional, targeted requests for public comment on particular issues).

As of this date, the public comment period is not yet complete. EPA originally requested comments by October 16, 2014, but subsequently extended that deadline until December 1, 2014. See 79 Fed. Reg. at 34,830 (original deadline for comments); 79 Fed. Reg. 57,492 (Sept. 25, 2014) (extension of comment period). EPA also held four public hearings regarding the Proposed Section 111(d) Rule in July 2014, and has conducted an extraordinary public outreach effort including eleven public "listening sessions" and literally hundreds of other meetings with various stakeholders both before and after publishing the proposal. E.g., 79 Fed. Reg. at 34,830, 34,835-36. As part of the rulemaking process, EPA will be required to evaluate and respond to any significant written or oral comments on the proposal when taking final action. See 42 U.S.C.

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[3] Available at http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf.

§ 7607(d)(6)(A)(ii). Under the Presidential Memorandum, EPA is due to promulgate a final rule for existing sources by June 1, 2015. Supra at 5 n.2.

D. Prior Litigation Challenging Proposed Section 111 Rules for Power Plants, and the Current Petition for Review

Since 2012, courts have dismissed two lawsuits seeking judicial review of proposed rules that, if promulgated, would establish requirements for power plants under Section 111 of the CAA. The first such case involved five consolidated petitions to this Court seeking review of EPA's April 2012 proposed rule concerning standards of performance for new sources under Section 111(b), 42 U.S.C. § 7411(b) (the "April 2012 Proposed Rule"). See 77 Fed. Reg. at 22,392. The Court summarily dismissed that case for the obvious reason that a "proposed rule is not final agency action subject to judicial review." Las Brisas Energy Center, LLC v. EPA, No. 12-1248 & consolidated cases (Order dated Dec. 13, 2012) (Attachment A).

Following the Court's order of dismissal, EPA withdrew the April 2012 Proposed Rule and published, in its place, a modified proposal for new sources (the "January 2014 Proposed Rule" noted above). See 79 Fed. Reg. at 1430. Again, a lawsuit challenging this proposed rule was filed, this time in the District of Nebraska, and again it was dismissed on the same grounds. Nebraska v. EPA, No. 4:14-CV-3006, 2014 WL 4983678 (D. Neb. Oct. 6, 2014) (Attachment B).

Murray's petition for review acknowledges the Las Brisas result but claims that the Court may nonetheless hear the present petition because Murray contests "whether EPA had any authority to initiate a rulemaking at all" under Section 111(d). Petition for Review at 3. As described above, however, this very question regarding EPA's authority is among the issues under consideration in the ongoing notice-and-comment process. Supra at 7-8.

II. LEGAL STANDARD ON A MOTION TO DISMISS FOR LACK OF JURISDICTION

At all stages of the case, Murray bears the burden of demonstrating that subject-matter jurisdiction exists. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994); see also Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (recognizing "[t]he requirement that jurisdiction be established as a threshold matter" and that "[w]ithout jurisdiction the court cannot proceed at all in any cause") (internal quotation omitted). Murray cannot meet that burden here.

III. ARGUMENT

A. The Proposed Section 111(d) Rule Is Not a "Promulgated Standard of Performance or Requirement" Within the Meaning of 42 U.S.C. § 7607(b)(1).

Section 307(b)(1) of the CAA, 42 U.S.C. § 7607(b)(1), governs judicial review of EPA's nationally applicable air regulations and is an exclusive remedy. See Acker v. EPA, 290 F.3d 892, 894 (7th Cir. 2002) ("We are . . . without jurisdiction unless the EPA action at issue falls within . . . section[] 7607(b)(1)

. . . ."). Section 307(b)(1) states, in pertinent part, that action "*promulgating* . . . any standard of performance or requirement under [42 U.S.C. § 7411]," or "any other nationally applicable regulations *promulgated*, or *final* action taken, by the Administrator under this chapter" is subject to review by this Court. 42 U.S.C. § 7607(b)(1) (emphasis added). Thus, on its face, Section 307(b)(1) precludes any notion that the Court could have jurisdiction to hear a challenge to a "proposed" Section 111 rule such as this one. The Court confirmed this obvious reading of Section 307(b)(1) in Las Brisas. See Attachment A at 1 (holding that the April 2012 Proposed Rule under Section 111(b) "is not a final agency action subject to judicial review," and citing, inter alia, 42 U.S.C. § 7607(b)(1)).

The Act goes even further, eliminating any possible confusion about the difference between "proposed rules" and "promulgated rules" by helpfully distinguishing the two in the text of its general rulemaking provision, 42 U.S.C. § 7607(d), which expressly applies to rules EPA issues pursuant to Section 111. See id. § 7607(d)(1)(C). Specifically, the Act states that "proposed rules" are to be made available for public comment in the Federal Register and must include a notice specifying the period available for public comment. Id. § 7607(d)(3). "Promulgated rules," in contrast, are only issued *after* the public comment period and must be accompanied, inter alia, by "an explanation of the reasons for any major changes in the promulgated rule from the proposed rule," and "a response to

each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period." Id. § 7607(d)(6)(A)(ii), (B); see, e.g., Northeast Maryland Waste Disposal Auth. v. EPA, 358 F.3d 936, 950 (D.C. Cir. 2004) (remanding, in part, because when EPA issued the promulgated rule it failed to respond to certain comments on the proposed rule).

The Proposed Section 111(d) Rule plainly does not meet the statutory criteria to be considered "promulgated." Though EPA published it in the Federal Register, EPA did so to provide notice to the public and seek comments, consistent with the Act's requirements for a *proposed* rule. The comment period is still ongoing, and EPA has made clear that it will consider all comments in making its final determination and developing the content of any final rule, as the Act requires. Supra at 7-9. In short, it could not be clearer that the Proposed Section 111(d) Rule is not a "promulgat[ed] . . . standard of performance or requirement." 42 U.S.C. § 7607(b)(1).

B. The Proposed Section 111(d) Rule Also Does Not Constitute "Other Final Agency Action" Within the Meaning of the Act.

Because the Proposed Section 111(d) Rule obviously is not a "promulgated" rule, the only remaining question for purposes of determining its suitability for judicial review is whether it constitutes "other . . . final action of the Administrator" within the meaning of 42 U.S.C. § 7607(b)(1). As the Court recognized in Las Brisas, this inquiry is governed by the familiar two-part test

described in Bennett v. Spear, 520 U.S. 154 (1997): "First, the action must mark the consummation of the agency's decisionmaking process . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Id. at 177-78 (internal quotations and citations omitted); accord Attachment A at 1 (quoting Bennett); see also Whitman v. American Trucking Ass'ns, 531 U.S. 457, 478 (2001) (holding that "the phrase 'final action' . . . bears the same meaning in [42 U.S.C. § 7607(b)(1)] that it does under the Administrative Procedure Act" and applying Bennett to determine whether a national ambient air quality standard ("NAAQS") implementation policy set forth in conjunction with promulgating a NAAQS rule was final action); Am. Petroleum Inst. ("API") v. EPA, 684 F.3d 1342, 1354 (D.C. Cir. 2012) (applying Bennett to determine reviewability of interpretive statement in preamble to a promulgated NAAQS rule), cert. denied, 133 S. Ct. 1724 (2013); National Envt'l Development Ass'n's Clean Air Project ("NEDA-CAP") v. EPA, 686 F.3d 803, 808-09 (D.C. Cir. 2012) (same), cert. denied, 133 S. Ct. 983 (2013).

Murray cannot demonstrate that the first Bennett criterion is met, because the Proposed Rule clearly does *not* represent "the consummation of [the Administrator's] decision-making process." In the Whitman, API and NEDA-CAP cases cited above, courts had to examine the underlying regulatory context to

ascertain whether preamble statements associated with promulgated NAAQS rules should be understood to represent EPA's "final word" on NAAQS implementation issues. But here, unlike those cases, the answer to the finality question is a simple one – the process by which the Administrator promulgates "standards of performance" and other "requirements" under Section 111 is prescribed by 42 U.S.C. § 7607(d), as shown above, and EPA indisputably has not completed that process. Thus, the Proposed Section 111(d) Rule necessarily is an "interlocutory" action. Bennett, 520 U.S. at 178.

The Proposed Section 111(d) Rule is also "tentative," id. at 178, in that EPA has sought comments on all aspects of the proposal – including on the legal questions at the heart of Murray's challenge – *and EPA may modify its final action in any number of ways in response to those comments*. Hypothetically, it would be well within EPA's administrative discretion to issue a supplemental proposal, issue a modification to the Proposed Section 111(d) Rule, or even withdraw the proposal entirely, if the Administrator determined, after consideration of the comments, that such action was appropriate. Cf., e.g., Ctr. for Auto Safety v. National Highway Traffic Safety Admin., 710 F.2d 842, 846-47 (D.C. Cir. 1983) (evaluating whether agency's decision to terminate a rulemaking was ripe for review).

Indeed, such a scenario actually came to pass following this Court's dismissal of the petitions in Las Brisas seeking premature review of the April 2012

Proposed Rule for new sources. As described above, EPA ultimately withdrew that proposal and published a second, substantially modified proposed rule for new sources. Supra at 9. The recent history of EPA's Section 111 rulemaking efforts thus illustrates the sound logic behind limiting judicial review in the administrative rulemaking context to "final" Agency determinations, rather than committing scarce judicial resources to rendering "advisory" pronouncements on the merits of rules that may never be adopted at all or may be modified as part of the final determination. As the court observed in Nebraska, "If Congress had wished to allow immediate, interlocutory appeals of proposed rulemaking under the [CAA], it could have done so. It did not, and for good reason . . . ." Attachment B at 7.

The second Bennett criterion also is not satisfied here, because the Proposed Section 111(d) Rule does not "determine" rights or obligations or impose any binding legal consequences. In the absence of a promulgated rule, there is no requirement that any state submit the CO_2 plans described in the proposal to EPA for approval; and, by extension, there also are no new binding legal requirements applicable to Murray or other regulated entities. Rather, only a "promulgated" rule could impose such legal consequences.[4]

[4] Moreover, because Murray Energy Corporation is not an electric power producer, it would not be directly regulated by the Proposed Section 111(d) Rule even if the proposal were promulgated as a final rule. See Murray Energy Corp. v. EPA, No. 14-1112, Petition for Extraordinary Writ at ii (disclosure statement) (Doc. No. 1498341).

C. Case Law Overwhelmingly Supports Dismissal for Lack of Finality.

As discussed above, two courts, including this Court, have held that EPA's proposed rules to limit greenhouse gas emissions from new power plants under Section 111(b) of the CAA were not "final actions" and, accordingly, dismissed lawsuits seeking judicial review of those proposals. Supra at 9; Attachments A and B. The Court should follow these cases and grant the same result here.[5]

Indeed, courts long have recognized in a variety of contexts that proposed rules have no binding legal effect and are not "final actions." For example, in Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986), the Supreme Court rejected an argument that an agency's statutory interpretation expressed in a proposed rule should be deemed a "change" in the agency's historic position on the scope of its authority under the relevant statute (and, thus, should be treated as evidence that the agency had not been consistent in interpreting the statute and

[5] Murray purports to find contrary authority in a 1980 district court opinion, Dow Chemical USA v. EPA, 491 F. Supp. 428 (M.D. La. 1980). Petition for Review at 2. Although the district court referred to a proposed rule under Section 111(b) as a "final action," it did so in the context of deciding that it *lacked* jurisdiction to hear the suit for a different reason – because review of nationally applicable air rules is reserved to this Court by 42 U.S.C. § 7607(b)(1). 491 F. Supp. at 431-32. Thus, the Dow court neither reviewed the merits of the proposed rule, nor addressed the question relevant here, which is whether *this* Court may review a nationally applicable air rule before it has been "promulgated." Id. Moreover, Dow was decided prior to the Supreme Court opinion in Bennett, which established the governing two-part test for determining the finality of agency action. Accordingly, Dow's dictum regarding "final action" should carry no weight here.

merited less deference). Id. at 844-45. The Court found this reasoning to be in error because "[i]t goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound." Id. at 845.

In another case, the Eighth Circuit held that a district court had erred in treating as "final" the Attorney General's proposal to remove a drug from the federal list of "controlled substances" in accordance with a recommendation by the Secretary of Health and Human Services. United States v. Springer, 354 F.3d 772, 776 (8th Cir. 2004). As the court of appeals explained:

> A major purpose of formal rulemaking is to ensure that agencies gather as much relevant information as possible before promulgating final rules that will have the force and effect of law. For this reason, an agency that exercises its discretion to propose a rule has no duty to promulgate its proposal as a final rule. Thus, it is well-settled that proposed regulations . . . have no legal effect.

Id. at 776 (internal quotation and citations omitted). The Eighth Circuit's reasoning is equally apt here. See 42 U.S.C. § 7607(d)(6)(A)(ii), (B); Attachments A and B.

This Court similarly has held that preamble statements that "appear[ed] for the first time in a proposed rulemaking" were not subject to judicial review under the Resource Conservation and Recovery Act, 42 U.S.C. § 6976(a). Florida Power & Light Co. v. EPA, 145 F.3d 1414, 1418 (D.C. Cir. 1998). The Court noted that,

"[o]n its face, the action at issue is merely a *proposed*, not a final rulemaking." Id. at 1418 (emphasis in original). Further, "the fact that [EPA] has yet to promulgate final rules on many of the issues addressed in the . . . Proposed Rule" was clear evidence to this Court "that EPA is still in the process of clarifying" its position on the issues in dispute, and that the preamble statements therefore were not final for purposes of judicial review. Id. at 1418-19[6]; see also Center for Law & Educ. v. United States Dep't of Educ., 209 F. Supp. 2d 102, 111 (D.D.C. 2002), aff'd, 396 F.3d 1152 (D.C. Cir. 2005) (dismissing the complaint because "proposed rules have only recently been published," and "[i]t is the final rule which will mark the consummation of the agency's decisonmaking process and set forth the agency's definitive position") (internal quotations omitted); Carlton v. Babbitt, 147 F. Supp. 2d 4, 5-8 (D.D.C. 2001) (proposal to change classification of grizzly bear populations under the Endangered Species Act is not reviewable unless and until the agency "promulgate[s] a final rule combining [the bear populations]").[7]

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[6] Even where a rule has been "promulgated" under the CAA, that does not necessarily mean EPA has "consummated its decision-making process" and thereby taken a "final action" with respect to every issue addressed in the preamble to that rule. See API, 684 F.3d at 1353-54; NEDA-CAP, 686 F.3d at 808-09. Where a rule has only been "proposed," however, the lack of finality is evident.

[7] Cf. Utility Air Regulatory Group v. EPA, 320 F.3d 272, 278-79 (D.C. Cir. 2003) (a guidance document interpreting regulatory provisions was not "ripe" for review because EPA was undertaking a rulemaking to amend those provisions); Ctr. for Auto Safety, 710 F.2d at 848-49 (preliminary decision not to amend fuel efficiency standard was not ripe); Natural Resources Defense Council v. EPA, 824 F.2d 1146,

D. The Act and *Bennett* Foreclose Review of Proposed Rules Even Where the Issues in Dispute are Purely Legal.

Murray attempts to portray its challenge as somehow uniquely well suited for judicial review before EPA makes a final determination, by contending that EPA altogether lacks authority to regulate power plant emissions of carbon dioxide under Section 111(d) because it has promulgated a rule limiting emissions of *other* pollutants (specifically, hazardous air pollutants such as mercury) from a portion of the same industry under CAA Section 112, 42 U.S.C. § 7412. See Petition for Review at 2-3; see also 77 Fed. Reg. 9304 (Feb. 15, 2012) ("Mercury Air Toxics Standards" or "MATS" rule); White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014) (upholding the MATS rule), petition for cert. filed, 83 U.S.L.W. 3089 (July 14, 2014) (No. 14-46).[8] But in fact, the claimants that previously sought to cut short the rulemaking process for EPA's earlier Section 111 proposals made similar attempts to justify the timing of their lawsuits by asserting that those proposals, as well, were inherently unlawful. In each case, the courts recognized that such assertions carry no weight in deciding whether a *proposed* rule can be considered "final action" within the meaning of Act.

1150 (D.C. Cir. 1987) (the CAA requires exhaustion of administrative remedies, including the public comment process).

[8] The MATS rule limits emissions of hazardous air pollutants from coal- and oil-fired power plants. The rule does not set emission standards for hazardous air pollutants from natural gas-fired power plants. 77 Fed. Reg. at 9309.

In Las Brisas, for example, the Utility Air Regulatory Group ("UARG") moved this Court for a summary declaration that, "as a matter of law," the April 2012 Proposed Rule "cannot . . . constitute a proposed [new source performance standard] for coal-fired" power plants. Motion for Declaratory Relief of [UARG] at 20 (Doc. No. 1388731 in Case No. 12-1248; filed Aug. 10, 2012). In Nebraska, analogously, the State claimed that the January 2014 Proposed Rule is facially unlawful because it allegedly violates the Energy Policy Act of 2005. Attachment B at 1-3. In each instance, however, the courts – including this Court – declined to hear the merits. See Attachment A; accord Attachment B at 5-6. Such facial legal questions are themselves matters to be considered, first, by the public stakeholders that are invited to submit comments on the proposed rules, and, second, by the Agency in evaluating and responding to those comments and making its final determination. E.g., Attachment B at 5-6. Only after a *final* Agency determination and a properly-filed challenge to the final rule does the Court then acquire subject-matter jurisdiction to review the lawfulness or other merits of the final rule.

CONCLUSION

For the above reasons, the Court should hold that the Proposed Section 111(d) Rule is not reviewable, grant EPA's motion and dismiss Murray's petition.

Respectfully submitted,

SAM HIRSCH
Acting Assistant Attorney General

Environmental and Natural Resources
Division

Dated: October 23, 2014 By: /s/ Brian H. Lynk

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Respondent EPA's Motion to Dismiss for Lack of Subject-Matter Jurisdiction has been filed with the Clerk of the Court this 23rd day of October 2014 using the CM/ECF System, through which true and correct copies will be served electronically on all counsel of record that are registered to use CM/ECF.

/s/ Brian H. Lynk
Brian H. Lynk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

EPA-77FR22392

Filed On: December 13, 2012

Las Brisas Energy Center, LLC,

Petitioner

v.

Environmental Protection Agency and Lisa Perez Jackson,

Respondents

Conservation Law Foundation, et al.,
Intervenors

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

BEFORE: Rogers, Garland, and Brown, Circuit Judges

O R D E R

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

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

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

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

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

Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA,

Plaintiff,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and GINA McCARTHY, Administrator, U.S. EPA,

Defendants.

4:14-CV-3006

MEMORANDUM AND ORDER

This matter is before the Court on the motion to dismiss (filing 8) filed by the defendants, the Environmental Protection Agency and its administrator, Gina McCarthy (collectively, "the EPA"). As the EPA points out, the State of Nebraska's attempt to short-circuit the administrative rulemaking process runs contrary to basic, well-understood administrative law. Simply stated, the State cannot sue in federal court to challenge a rule that the EPA has not yet actually made. Accordingly, the Court will grant the EPA's motion and this case will be dismissed.

I. BACKGROUND

This case concerns the EPA's effort, under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, to draft new standards that would limit emissions of carbon dioxide from newly-built fossil fuel-fired "electric utility generating units" (i.e., the equipment used to produce electricity, such as in a power plant). The EPA's proposal focuses primarily on coal- and natural gas-fired units. The EPA first proposed a new standard on April 13, 2012. *See* Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22,392. After considering more than 2.5 million comments, the EPA determined that revisions were warranted. So, the EPA withdrew the 2012 proposal and published a new proposal on January 8, 2014. *See* Standards of Performance, 79 Fed. Reg. 1,430 (the "Proposed Rule").

The State contends that by basing the Proposed Rule (in part) on information from energy facilities that have received federal assistance, the

EPA has violated a portion of another statute, the Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594. To understand this dispute, it will help to briefly review the relevant portions of the Clean Air Act and Energy Policy Act.

A. THE CLEAN AIR ACT AND NEW SOURCE PERFORMANCE STANDARDS

The Clean Air Act established "a comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). Section 111 of the Clean Air Act sets forth mechanisms for controlling emissions of air pollutants from "stationary sources" (such as factories and power plants). 42 U.S.C. § 7411. The EPA is tasked with establishing "standard[s] of performance" for "new [stationary] sources." 42 U.S.C. § 7411(a)(2), (b). Standards of performance for new sources are sometimes referred to as "new source performance standards" or "NSPS."

A "standard of performance" is defined as

> a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the <u>best system of emission reduction</u> which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been <u>adequately demonstrated</u>.

42 U.S.C. § 7411(a)(1) (emphasis supplied). As the emphasized portions show, an NSPS must be based upon the "best system of emission reduction" which has been "adequately demonstrated." This latter concept lies at the heart of the current dispute. Bearing that in mind, the Court turns to the Energy Policy Act.

B. THE ENERGY POLICY ACT

Among other things, the Energy Policy Act of 2005 provided federal funding for the development of coal-based energy projects which were designed to "advance efficiency, environmental performance, and cost competitiveness well beyond the level of technologies" then in commercial service. 42 U.S.C. § 15962(a). Although the Energy Policy Act seeks to encourage the development of cleaner energy facilities, it also includes "several provisions that limit the EPA's authority to rely on information from those facilities in conducting rulemaking or taking other action" under various provisions of the Clean Air Act, including the promulgation of NSPS

under section 111. Standards of Performance, Notice of Data Availability, 79 Fed. Reg. 10750, 10752 (Feb. 26, 2014).

In particular, section 402(i) of the Energy Policy Act provides that "[n]o technology, or level of emission reduction, solely by reason of the use of the technology, or the achievement of the emission reduction, by 1 or more facilities receiving assistance under this Act, shall be considered to be . . . adequately demonstrated for purposes of" section 111 of the Clean Air Act. 42 U.S.C. § 15962(i) (emphasis supplied). In other words, the federal government cannot subsidize construction of facilities with the Energy Policy Act and then claim that the facilities for which it paid demonstrate, for Clean Air Act purposes, that the technology is viable.

C. THE STATE'S CHALLENGE TO THE PROPOSED RULE

As part of its Proposed Rule, the EPA found that certain technology was "adequately demonstrated" for purposes of section 111 of the Clean Air Act. In making that determination, the EPA relied, in part, on data from facilities receiving assistance under the Energy Policy Act. Filing 1 at ¶¶ 4, 18–26; *see e.g.*, Proposed Rule, 79 Fed. Reg. at 1478. The State filed suit, claiming that this violated section 402(i) of the Energy Policy Act. The EPA has responded by moving to dismiss the State's complaint for lack of jurisdiction and failure to state a claim.

II. STANDARD OF REVIEW

A. FED. R. CIV. P. 12(B)(1)

A motion pursuant to Fed. R. Civ. P. 12(b)(1) challenges whether the Court has subject matter jurisdiction. The party asserting subject matter jurisdiction bears the burden of proof. *Great Rivers Habitat Alliance v. FEMA*, 615 F.3d 985, 988 (8th Cir. 2010). Rule 12(b)(1) motions can be decided in three ways: at the pleading stage, like a Rule 12(b)(6) motion; on undisputed facts, like a summary judgment motion; and on disputed facts. *Jessie v. Potter*, 516 F.3d 709, 712 (8th Cir. 2008).

A Rule 12(b)(1) motion can be presented as either a "facial" or "factual" challenge. *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). When reviewing a facial challenge, the Court restricts itself to the face of the pleadings, and the nonmovant receives the same protections as it would facing a Rule 12(b)(6) motion. *Id.* By contrast, when reviewing a factual challenge, the Court considers matters outside the pleadings, and the nonmovant does not receive the benefit of Rule 12(b)(6) safeguards. *Id.* Moreover, unlike a motion for summary judgment, the Court is free to resolve disputed issues of fact. *Jessie*, 516 F.3d at 712.

B. FED. R. CIV. P. 12(B)(6)

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* While the Court must accept as true all facts pleaded by the nonmoving party and grant all reasonable inferences from the pleadings in favor of the nonmoving party, *Gallagher v. City of Clayton*, 699 F.3d 1013, 1016 (8th Cir. 2012), a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. *Iqbal,* 556 U.S. at 678. Determining whether a complaint states a plausible claim for relief requires the Court to draw on its judicial experience and common sense. *Id.* at 679.

III. ANALYSIS

The State brings its challenge to the Proposed Rule under the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq*. The APA empowers federal courts to hold unlawful and set aside agency action, findings, and conclusions, if they fail to conform with any of six specified standards. *Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 375 (1989). Among other things, a reviewing court may set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; or in excess of statutory authority. 5 U.S.C. § 706(2).

The State seeks a declaration that the Proposed Rule's consideration of federally-financed facilities is not in accordance with law and in excess of statutory authority. 5 U.S.C. § 706(2)(A), (C). And the State seeks an injunction ordering the EPA to withdraw the Proposed Rule and prohibiting the EPA from future consideration of these facilities as a basis for finding that certain technologies are adequately demonstrated under section 111 of the Clean Air Act. *See* filing 1 at ¶¶ 2–5 & pp. 8–9.

However, the APA only allows judicial review in two situations: when agency action is "made reviewable by statute" and for "final agency action[s] for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The State does not argue that any other statute provides for review. So, the State must show that promulgation of the Proposed Rule was a final agency action and that there is no other adequate remedy. The EPA contends that both prerequisites to judicial review are lacking, and the Court agrees. The Proposed Rule is not a final action, and the Clean Air Act already provides the State with an adequate remedy, albeit in a different federal court.

A. FINAL AGENCY ACTION

The Supreme Court uses a two-part test to determine whether an agency action is "final." First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. *Bennett v. Spear,* 520 U.S. 154, 177–78 (1997). And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. *Id.*

In this case, it is not necessary to proceed beyond the first prong of *Bennett*. The Proposed Rule is, on its face, an interlocutory and tentative step in an ongoing process. *See, e.g., Proposed Rule*, 77 Fed. Reg. at 1430. That process is set forth in section 111 of the Clean Air Act. As was done here, the EPA first issues a set of proposed regulations. 42 U.S.C. § 7411(b)(1)(B). The EPA must then allow interested parties to submit comments. *Id.*; *see also* 42 U.S.C. § 7607(d). Finally, and only after considering such comments, does the EPA promulgate a final rule, which includes "such modifications as [the EPA] deems appropriate." 42 U.S.C. § 7411(b)(1)(B). The EPA has only reached the proposal stage; it has not "'rendered its last word on the matter' in question;" so its action is not final. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 586 (1980)).

The State insists that there has, in fact, been a final agency action. In the State's view, section 402(i) "creates a *procedural right* for the State and members of the public and regulated community to have NSPS-rulemaking proceedings conducted without the influence of the Agency's consideration of . . . federally-funded facilities." Filing 11 at 9 (emphasis supplied). In other words, the State argues, section 402(i) prohibits the EPA "from considering instances of deployment of control technology at federally-funded facilities *at any stage* of a rulemaking proceeding." Filing 11 at 18. As best as the Court understands it, the remainder of the State's argument goes as follows: the EPA has already decided to "consider" information from federally-funded facilities, in violation of section 402(i); there is no way to remedy this violation without withdrawing the Proposed Rule; and, therefore, the decision to consider this information should be considered final.

But the State's argument shifts the finality inquiry away from its proper focus: The action complained of here is a component of a proposed rule. That proposal is not a final action. It does not matter if the EPA has purportedly violated section 402(i).[1] The fact that section 402(i) may confer a

[1] The merits of this claim are not before the Court. But the Court notes that § 402(i) only forbids the EPA from considering a given technology or level of emission reduction to be adequately demonstrated *solely* on the basis of federally-funded facilities. 42 U.S.C. § 15962(i). In other words, such technology might be adequately demonstrated if that determination is based at least in part on non-federally-funded facilities.

"procedural" right is also beside the point. That is not the same as conferring an immediate right to judicial review. The alleged violation has occurred in the context of a non-final agency action, and the APA expressly defers review of such violations until there has been a final action: "A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704.

The State's argument rests on the premise that one aspect of the Proposed Rule—the decision to consider federally-financed facilities—can be singled out and considered outside the context of the agency action of which it is a part. The Court is not convinced that this is an appropriate way to analyze the issue. But even when the focus is narrowed to this particular aspect of the Proposed Rule, the State cannot show a final agency action. That is because shortly after the EPA issued the Proposed Rule, it sought additional comment on this very aspect of the proposal.

Specifically, the EPA solicited further comment on whether the EPA was correct in its "preliminary interpretation" of section 402(i)—that it only forbids the EPA from relying *solely* on information from federally-financed facilities. Standards of Performance, Notice of Data Availability, 79 Fed. Reg. at 10752. The EPA also requested comment on whether any of the evidence presented in the Proposed Rule may not be evaluated due to the limits imposed by section 402(i), and if so, whether the remaining evidence is sufficient to support the EPA's finding of "adequate demonstration." Technical Support Document, *Effect of EPAct05 on BSER for New Fossil Fuel-fired Boilers and IGCCs*, Docket EPA-HQ-OAR-2013-0495 (January 8, 2014) [Filing 9-3 at 1, 17].

All of this goes to show that the EPA is still in the process of considering the very aspect of the Proposed Rule that the State insists is final. The EPA has expressly not taken "a definitive position on the issue," *DRG Funding Corp. v. Secretary of Housing and Urban Development*, 76 F.3d 1212, 1214 (D.C. Cir. 1996), and so there has not yet been a final agency action. In other words, even if this small step in the process could somehow become a "final action," *the EPA has yet to even take that step*.

To summarize: the EPA gets first crack at deciding whether the Proposed Rule should be withdrawn or adopted before anyone can demand that a federal court act on it. And as the Court next explains, the State also failed to show the other prerequisite for review under the APA: the lack of an adequate judicial remedy. 5 U.S.C. § 704.

B. THE CLEAN AIR ACT PROVIDES AN ADEQUATE REMEDY

Review under the APA is precluded where Congress has otherwise provided a "special and adequate review procedure." *Bowen v. Massachusetts*,

487 U.S. 879, 904 (1988). The Clean Air Act contains its own framework for obtaining judicial review, which includes review of the EPA's rulemaking under section 111. 42 U.S.C. § 7607(b)(1). To be adequate, the alternative remedy need not provide relief identical to that offered by the APA, so long as it offers relief of the "same genre." *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009). The Clean Air Act offers such relief.

The State seeks a declaration under the APA that the Proposed Rule was not drafted in accordance with law and is in excess of the EPA's statutory authority. 5 U.S.C. § 706(2)(A), (C). The judicial review provisions of the Clean Air Act similarly allow a court to reverse any agency action found to be (among other things) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory . . . authority." 42 U.S.C. § 7607(d)(9)(A), (C). The State should find this remedy adequate. *See Garcia*, 563 F.3d at 522.

The State will still have to wait until there is a final agency action, as § 7607(b) only authorizes review of final agency actions. *See,* 42 U.S.C. § 7607(b)(1); *Portland Cement Ass'n v. E.P.A.*, 665 F.3d 177, 193–94 (D.C. Cir. 2011). But that hardly renders the remedy inadequate, when the same is true under the APA. The only relevant difference is that, under the Clean Air Act, the State must seek relief in the Court of Appeals for the District of Columbia. *See,* 42 U.S.C. § 7607(b)(1); *Missouri v. United States*, 109 F.3d 440, 441 (8th Cir. 1997).

IV. CONCLUSION

The State has jumped the gun. If Congress had wished to allow immediate, interlocutory appeals of proposed rulemaking under the Clean Air Act, it could have done so. It did not, and for good reason: making environmental regulations is difficult and complicated enough without having federal judges weigh in at every step along the way. Instead, as dictated by basic and well-established principles of administrative law, the State must wait for a final agency action. Accordingly,

IT IS ORDERED:

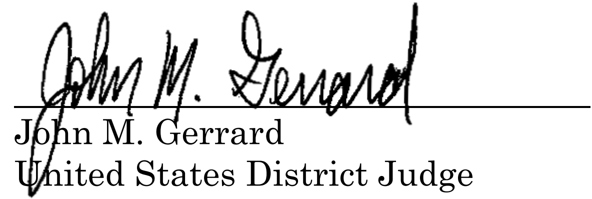
1. The EPA's motion to dismiss (filing 8) is granted;

2. This case is dismissed; and

3. A separate judgment will be entered.

Dated this 6th day of October, 2014.

BY THE COURT:



John M. Gerrard
United States District Judge