ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

14-1112 & 14-1151

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

IN RE: MURRAY ENERGY CORPORATION,
Petitioner.

MURRAY ENERGY CORPORATION,
Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND REGINA A. MCCARTHY, ADMINISTRATOR,
Respondents.

Brief for Intervenor-Petitioners National Federation of Independent Business and Utility Air Regulatory Group

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December 30, 2014
Final Form: March 9, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

A. Parties and *Amici*. Because these consolidated cases involve direct review of agency action, the requirement to furnish a list of parties, intervenors, and amici that appeared below is inapplicable. These cases involve the following parties:

Petitioner: The petitioner in Case No. 14-1112 and Case No. 14-1151 is Murray Energy Corporation.

Respondents: The respondents in Case No. 14-1112 and Case No. 14-1151 are the United States Environmental Protection Agency and Regina A. McCarthy, Administrator of the U.S. Environmental Protection Agency.

Intervenor-Petitioners: The intervenor-petitioners in Case No. 14-1112 are the State of Alabama, State of Alaska, State of Indiana, State of Kansas, State of Kentucky, State of Louisiana, State of Nebraska, State of Ohio, State of Oklahoma, State of South Dakota, State of West Virginia, State of Wyoming, State of Arkansas, the National Federation of Independent Business, the Utility Air Regulatory Group, and Peabody Energy Corporation.

The intervenor-petitioners in Case No. 14-1151 are the State of Indiana, the State of Kansas, the State of Louisiana, the State of South Dakota, and the State of Arkansas.

Intervenor-Respondents: The intervenor-respondents in Case No. 14-1112 are the State of California, State of Connecticut, State of Delaware, Commonwealth of Massachusetts, State of Maine, State of Maryland, State of New Mexico, State of New York, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, the District of Columbia, the City of New York, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club. There are no intervenor-respondents in Case No. 14-1151.

***Amici Curiae* for Petitioner:** The amici curiae for petitioner in Case No. 14-1112 are the State of South Carolina, the National Mining Association, the American Coalition for Clean Coal Electricity, the American Chemistry Council, the Chamber of Commerce of the United States of America, the National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, the American Coatings Association, Inc., the American Iron and Steel Institute; the Council of Industrial Boiler Owners; the Independent Petroleum Association of

America; and the Metals Service Center Institute. There are no amici curiae for petitioner in Case No. 14-1151.

***Amici Curiae* for Respondents:** The amici curiae for respondents in Case No. 14-1112 are the State of New Hampshire, Clean Wisconsin, Michigan Environmental Council, Ohio Environmental Council, Calpine Corporation, Jody Freeman, and Richard J. Lazarus. There are no amici curiae for respondents in Case No. 14-1151.

Movant *Amici Curiae* for Petitioners: The following parties are movant amici curiae for petitioners in Case No. 14-1151: Chamber of Commerce of the United States of America; National Association of Manufacturers; American Chemistry Council; American Fuel & Petrochemical Manufacturers; American Coatings Association, Inc.; American Iron and Steel Institute; Council of Industrial Boiler Owners; Independent Petroleum Association of America; and Metals Service Center Institute.

Movant *Amicus Curiae* for Respondents: Calpine Corporation is a movant *amicus curiae* for respondents in Case No. 14-1151.

B. Rulings Under Review. The Petitions relate to EPA's final determination that it has authority to regulate electric generating units

under Section 111(d) of the Clean Air Act when those units are already regulated under Section 112 and to EPA's proposed rulemaking styled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

C. Related Cases. This case is related to *West Virginia v. EPA*, No. 14-1146, which this Court has ordered to be argued on the same day and before the same panel as the present case.

Dated: March 9, 2015

/s/ Allison D. Wood
Allison D. Wood

DISCLOSURE STATEMENT

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

The National Federation of Independent Business ("NFIB") is a 501(c)(6) non-profit mutual benefit corporation. NFIB is the nation's leading association of small businesses, representing 350,000 member businesses. No publicly-held company has 10% or greater ownership of NFIB.

The Utility Air Regulatory Group ("UARG") is an ad hoc, unincorporated association of individual electric generating companies and industry groups that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

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GLOSSARY

CAA	Clean Air Act
EGU(s)	Electric Generating Unit(s)
EPA	United States Environmental Protection Agency
NFIB	National Federation of Independent Business
UARG	Utility Air Regulatory Group

STATEMENT OF ISSUES PRESENTED FOR REVIEW

In the extraordinary circumstance where a federal agency bases a proposed regulation on a single statutory provision that entirely prohibits the type of regulation proposed by the agency, should a writ of prohibition issue to halt the rulemaking proceedings where the agency's erroneous determination that it has authority to initiate the rulemaking raises serious constitutional concerns and the proceedings themselves are imposing tangible, demonstrable harms on the States that must implement the regulations and the parties targeted for regulation and their customers?

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the brief for petitioner Murray Energy Corporation ("Murray").

INTRODUCTION

As explained by petitioner Murray, the proposed Environmental Protection Agency ("EPA") rule at issue contemplates regulation of electric generating unit ("EGU") emissions on the authority of Section 111(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7411(d), even though EPA lacks any authority to regulate these sources under that provision. As Murray further explains, both the Agency itself and this Court have previously construed the CAA to say the opposite of the Agency's current Section 111(d) interpretation. Because Section 111(d) is the only basis for the proposed rule cited by the Agency in the rulemaking at issue; because Section 111(d) forecloses any regulation under its auspices of the EGUs targeted by EPA, which are already regulated under Section 112; because EPA's misinterpretation of Section 111(d) raises serious constitutional concerns; and because the very pendency of this rulemaking is imposing current, tangible, demonstrable harms on utilities and their customers, this Court should issue an extraordinary writ of prohibition to prevent the Agency from continuing its rulemaking proceeding.

STANDARD OF REVIEW

Courts reviewing agency action shall "hold unlawful and set aside agency action" that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2); *see also* 42 U.S.C. § 7607(d)(9). This standard applies to petitions for review of agency action. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 496-97 (2004). In the context of a writ of prohibition, the petitioner must also establish a "clear and indisputable" right to relief. *In re Wolf*, 842 F.2d 464, 465 (D.C. Cir. 1988) (per curiam) (internal quotation omitted). Review of non-final rules adds another step of analysis—the petitioner must establish that it has "no other adequate forum in which to seek relief." *Sierra Club v. Whitman*, 285 F.3d 63, 69 (D.C. Cir. 2002).

SUMMARY OF ARGUMENT

A writ of prohibition is uncommon relief, but this EPA rulemaking is uncommonly unlawful.

In this rulemaking, the Agency has announced its definitive legal conclusion that it enjoys authority to regulate existing EGUs based on a provision of the CAA—Section 111(d)—that entirely precludes EPA from regulating those sources. The text of Section 111(d), EPA's own interpretations of the provision, the precedent of this Court, and legislative history all confirm that sources that are regulated under Section 112, like the EGUs at issue here, may not be further regulated under Section 111(d). *See New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) ("[U]nder EPA's own interpretation of the section [111(d)], it cannot be used to regulate sources listed under section 112."). *See* Section I *infra*.

In this extraordinary and rare case, an extraordinary writ of prohibition should issue. EPA bases its rulemaking proceeding solely on a statutory provision that entirely prohibits the contemplated regulation—and then mistakenly justifies its proposal on interpretive grounds that give rise to violations of separation-of-powers principles and the nondelegation doctrine. Moreover, the mere pendency of the proposed rule is already imposing substantial costs on States, utilities, and their customers. Accordingly, the

Court should reach the merits of Murray Energy's challenge now and issue the requested extraordinary relief as a proportionate response to the Agency's extraordinary transgression of the bounds on its authority. *See* Section II *infra*.

STANDING

Intervenor-Petitioners have standing to challenge EPA's rulemaking.

The National Federation of Independent Business ("NFIB") includes numerous businesses that purchase electricity from the grid. *See* Decl. of K. Harned (Attachment A). Increases in the cost of electricity disproportionately impact small businesses, and EPA itself concedes that its contemplated rule will increase energy costs. 79 Fed. Reg. at 34,934, APP14, APP118 ("average nationwide retail electricity prices are projected to increase by roughly 6 to 7 percent in 2020 relative to the base case, and by roughly 3 percent in 2030"). NFIB's own research confirms that these costs are a major concern of its members. *See* Decl. of K. Harned at 2. Because one or more of NFIB's member organizations would have standing to participate in this case, and the issue presented for review is germane to

Intervenor's purpose, NFIB enjoys standing under this Court's organizational standing doctrine. *Int'l Bhd. of Teamsters v. Dep't of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013).

The members of the Utility Air Regulatory Group ("UARG") are electric generating companies and trade associations that are the target of the regulation at issue. UARG's standing under *Teamsters* is therefore self-evident. If more were needed, however, it is clear that electric generating companies are already suffering actual injury in fact from EPA's mere promulgation of the proposed regulation. *See* Decl. of W. Penrod (Attachment B).

Finally, Intervenor-Petitioners note that EPA is challenging Murray's standing to bring this case. NFIB and UARG contend that Murray enjoys standing. Should Murray be found to lack standing, however, the standing of the Intervenor-Petitioner States, NFIB, and UARG would allow the case to proceed. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986); *Bryant v. Yellen*, 447 U.S. 352, 366, 368 (1980).

ARGUMENT

I. The Clean Air Act Prohibits EPA's Proposed Rule.

EPA rests its proposed rule on a single statutory foundation—"the authority of Clean Air Act (CAA) section 111(d)." 79 Fed. Reg.

at 34,832, APP16. But as petitioner Murray explains, the statute in fact precludes EPA from regulating under Section 111(d) the sources targeted by the Agency's proposal. Indeed, EPA's efforts to obscure the clarity of Section 111, and the related provisions of CAA Section 112, are not only unpersuasive; they give rise to violations of the Constitution's nondelegation and separation-of-powers doctrines. As explained below, these constitutional infirmities are avoidable simply by interpreting and applying the statute as written.

A. EPA Is Precluded from Regulating Under Section 111(d) Sources Already Regulated Under Section 112.

This Court's precedent, the Act's legislative history, and EPA's own past administrative practice all confirm that sources regulated under Section 112 are unambiguously exempt from further regulation under Section 111(d).

1. The Plain Language of Section 111(d) Precludes Regulation of Sources Regulated Under Section 112.

Section 111(d) is an obscure, seldom-used CAA provision, employed by EPA only four times between 1970 and 1990 and only once after the 1990 amendments. 42 Fed. Reg. 12,022 (Mar. 1, 1977) (phosphate fertilizer plants); 42 Fed. Reg. 55,796 (Oct. 18, 1977)

(sulfuric acid production facilities); 44 Fed. Reg. 29,828 (May 22, 1979) (Kraft pulp mills); 45 Fed. Reg. 26,294 (Apr. 17, 1980) (primary aluminum plants); 61 Fed. Reg. 9905 (Mar. 12, 1996) (municipal solid waste landfills).

To briefly recap, Section 111(d) requires the Administrator to prescribe regulations for controlling pollution from "any existing source":

> i. for which air quality criteria have not been issued or which is *not* included on a list published under section 7408 (a) of this title *or emitted from a source category which is regulated under section 7412 of this title* but
>
> ii. to which a standard of performance under this section would apply if such existing source were a new source....

42 U.S.C. § 7411(d)(1) (emphases added).

Section 111(d) thus applies by its terms only to sources that are "not ... regulated under section 7412 [*i.e.,* Section 112] of this title." *Id.* The only merits question in this very straightforward case is, accordingly, whether existing EGUs are a source category regulated under Section 112.

Turning to Section 112, the CAA requires the Administrator to identify categories of "major sources" and "area sources," *id.*

§ 7412(c), and to "promulgate regulations establishing emission standards" for those sources in accordance with the statute, *id.* § 7412(d). And consulting the various subsections of Section 112 leaves no doubt that, under appropriate circumstances and based on appropriate EPA showings, existing EGUs may be regulated under that provision. *Id.* § 7412(a)(1) (defining "major source"); *id.* § 7412(a)(2) (defining "area source"); *id.* § 7412(n) (providing the EPA Administrator "shall regulate electric utility steam generating units under this section, if the Administrator finds that such regulation is appropriate and necessary" after considering the results of a mandated study).

As explained in detail by petitioner Murray, EPA has in fact invoked its Section 112(n) authority to regulate emissions from existing EGUs. Br. for Petitioner at 3-5; *see also* 77 Fed. Reg. 9304 (Feb. 16, 2012) (the "MATS rule") ("Pursuant to CAA section 112, the EPA is establishing NESHAP that will require coal- and oil-fired EGUs to meet hazardous air pollutant (HAP) standards reflecting the application of the maximum achievable control technology.").

Because EPA has adopted the MATS rule for existing EGUs under Section 112, it is crystal clear that EPA may not simultaneously regulate existing EGUs under Section 111(d). As the Supreme Court recently affirmed, "traditional rules of statutory interpretation" do not "change because an agency is involved." *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014). Given that EPA is currently regulating existing EGUs under Section 112, the carve-out from Section 111(d) unambiguously withholds authority for EPA to layer on additional Section 111(d) regulations of those same sources. *See Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011) ("EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408–7410, or the 'hazardous air pollutants' program, § 7412.") (citing 42 U.S.C. § 7411(d)(1)). Regardless of what EPA might do to tweak, tailor, or trim back its proposed regulatory program in light of rulemaking comments, the plain terms of the CAA render unlawful *any* regulation under Section 111(d) of existing EGUs already being regulated under Section 112.

2. Legislative History Confirms that Section 111(d) Precludes Regulation of Sources Regulated Under Section 112.

Although the statutory text needs no reinforcement, the history underlying Section 111(d)'s enactment confirms what the text establishes and *American Electric Power* recognizes.

For the first two decades of its existence, the exclusion in Section 111(d) applied to "any existing source for any air pollutant ... not included on a list published under section 108(a) or 112(b)(1)(A)...." Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1684 (1970). The Clean Air Act amendments of 1990 then amended the exclusion to focus on source categories as well as pollutants:

> "any existing source for any air pollutant ... not included on a list published under section 7408(a) of this title *or emitted from a source category which is regulated under section 7412 of this title*...."

42 U.S.C. § 7411(d)(1) (emphasis added). Accordingly, both before and after the 1990 amendments, the exclusion based on Section 108 (the NAAQS regime) focused on the pollutant at issue—that is, the Section 108 exclusion turned on whether the pollutant was already covered by a NAAQS. The exclusion for Section 112 pivoted, however, from focusing on *pollutants* regulated under Section 112(b)

to asking whether particular *source categories* were subject to Section 112 regulation—regardless of whether or not the pollutant in question was limited by those Section 112 regulations.

This shift in focus emerged from a drafting process in which the Senate and House of Representatives initially passed different language amending Section 111(d). The House bill provided the language currently found in 42 U.S.C. § 7411(d). *See* Pub. L. No. 101-549, § 108, 104 Stat. 2399, 2467 (1990). The Senate, which first passed its bill two months before the House adopted its substantive change to Section 111(d), initially adopted a simple clerical change to Section 111(d), one that merely updated a cross-reference from "112(b)(1)(A)" to "112(b)." *See id.* § 302, 104 Stat. 2574. S. 1630 (containing the ministerial cross-reference) passed on April 3, 1990, while H.R. 3030 (containing the substantive provision) passed on May 23, 1990. *See* H.R. Rep. No. 101-490, at 454 (1990), APP401, *reprinted in* 2 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 ("LEG. HISTORY"), at 3021, 3478 (1993) (report to accompany H.R. 3030); S. 1630, 101st Cong. § 305(a) (as passed by Senate, Apr. 3, 1990), APP353, *reprinted in* 3 LEG. HISTORY, at 4119,

4534. Although the Senate's technical amendment had a role to play prior to the House's substantive amendment, once the House amendment was adopted, inclusion of the earlier technical amendment in the Statutes at Large was simply a "drafting error," as EPA has previously and properly recognized. 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005). Hence, while the Statutes at Large do include both amendments, those amendments' codification in the United States Code rightly embodies the House's later, substantive amendment in total preference to the Senate's earlier, conforming amendment.

To be sure, the Statutes at Large would control in the event this codification decision were ever determined to be in error. *See Stephan v. United States*, 319 U.S. 423, 426 (1943). But as to these provisions, the decision of the codifier and the text of the United States Code are entirely correct.

In its first action under Section 111(d) following the 1990 amendments, EPA recognized the legal necessity and logical persuasiveness of conforming the exclusion in amended Section 111(d) to align with the amended version of Section 112. EPA, Air Emissions from Municipal Solid Waste Landfills—Background

Information for Final Standards and Guidelines, Pub. No. EPA-453/R-94-021, at 1-5 to 1-6 (1995), *available at* http://www.epa.gov/ttn/atw/landfill/bidfl.pdf, APP463-64 ("EPA also believes that [the House amendment] is the correct amendment because the Clean Air Act amendments revised section 112 to include regulation of source categories in addition to regulation of listed hazardous air pollutants, and [the House amendment] thus conforms to other amendments of section 112.").

Moreover, as EPA previously maintained before this Court—again correctly—the Senate's conforming amendment, which was rendered unnecessary by the later, substantive House amendment, was a mere "drafting error." *See* 70 Fed. Reg. at 16,031. Accordingly, as this Court stated, "under EPA's own interpretation of the section [111(d)], it cannot be used to regulate sources listed under section 112." *New Jersey*, 517 F.3d at 583; *see also Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013) (courts should disregard drafting errors in interpreting statutes). Accordingly, EPA has repeatedly conceded that a "literal" reading of the Code precludes the Agency from regulating a source category

under both Section 112 and Section 111(d). 70 Fed. Reg. at 16,031; *accord* Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units ("Legal Memorandum") at 26, APP161 ("[A] literal reading ... would mean that the EPA could not regulate any air pollutant from a source category regulated under section 112."); Br. of EPA, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155494 at 105 (D.C. Cir. July 23, 2007), APP491 ("[A] literal reading ... could bar section 111 standards for any air pollutant, hazardous or not, emitted from a source category that is regulated under section 112."); 69 Fed. Reg. 4652, 4685 (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.").

After decades of correctly interpreting the statute, however, EPA now describes Section 111(d) as an "ambiguous provision[]" and argues that the Agency is free to disregard the controlling House Amendment. *See* Legal Memorandum at 21, APP156. As an initial matter, this view represents a reversal of EPA's past practice

without providing a legitimate reason for the change. *See Indep. Petroleum Ass'n v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996) ("An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so."). EPA has provided no legitimate reason for changing its position at this juncture and inaugurating duplicative Section 111(d) and Section 112 regulation of the same sources. Indeed, EPA claims that the MATS rule will reduce carbon dioxide emissions from EGUs, the exact focus of the proposed Section 111(d) rule. 77 Fed. Reg. at 9428.

More fundamentally, however, the relevant legislative history confirms that the codification appearing in the United States Code correctly reflects the law enacted by Congress.

The 1990 Clean Air Act amendments significantly widened Section 112's regulatory ambit, in part by shifting the focus of that provision from risk-based regulation of individual hazardous pollutants to control technology-based regulation of categories of major sources emitting hazardous pollutants. *See* EPA, "Summary of the Clean Air Act," http://www2.epa.gov/laws-regulations/summary-clean-air-act, APP531-32; H.R. Rep. No. 101-

490, at 151 (1990), APP356, *reprinted in* 2 LEG. HISTORY, at 3175; S. Rep. No. 101-228, at 148 (1989), APP253, *reprinted in* 5 LEG. HISTORY at 8338, 8488.

But just as the focus of Section 112 regulation changed from risk-based regulation of pollutants to control technology-based regulation of source categories, so too did the focus of the Section 111(d) carve-out. In the wake of the 1990 amendments, Section 111(d) now operates unambiguously to forbid simultaneous regulation of the same sources under Sections 111(d) and 112—both of which now authorize control technology-based regulations. Significantly, the White House proposed precisely this shift in Section 111(d), which was ultimately passed by the House, accepted by the Senate, and codified into law. *See* White House Message at 112, APP239 ("(d) Regulation of Existing Sources. — Section 111(d)(1)(A)(i) of the Clean Air Act is amended by striking 'or 112(b)(1)(A)' and inserting 'or emitted from a source category which is regulated under section 112'."). The White House proposal thus embodied both transformative changes to (and a vast expansion of) regulation under Section 112 in tandem with the elimination of the

authority to regulate simultaneously the same source categories under both Sections 111(d) and 112.

Although the Senate initially passed a non-substantive conforming amendment (described above), the managers of the Senate bill stated *expressly* in their conference report reconciling alternate versions of the 1990 amendments that they were deferring or "receding" to the substantive House amendment:

> Conference agreement. *The Senate recedes to the House* except that with respect to the requirement regarding judicial review of reports, the House recedes to the Senate, and with respect to transportation planning, the House recedes to the Senate with certain modifications.

S. 1630, 101st Cong., § 108 (Oct. 27, 1990), APP418, *reprinted in* 1 LEG. HISTORY at 885 (1993) (Chafee-Baucus Statement of Senate Managers) (emphasis added). Both Houses of Congress thus announced their understanding that the 1990 amendments would do away with the outdated pollutant-based exclusion appearing in the pre-1990 version of Section 111(d) and replace it with a source category-based exclusion aligned with the newly amended, and now control technology-based, provisions of Section 112. Congress

wanted to avoid costly, onerous, duplicative regulation of source categories under both Sections 111(d) and 112.

Nonetheless, in an unexplained reversal of its prior position, EPA now relies on its own divination of congressional purposes, rather than employing traditional tools for reading statutes in light of statutory text, structure, and legislative history. *E.g.,* Legal Memorandum at 26, APP161. But these arguments based on "advancing 'the purpose of the Act'" are mistaken. *Rapanos v. United States*, 547 U.S. 715, 752 (2006) ("[N]o law pursues its purpose at all costs, and ... the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations."); *see also United States v. Rodriquez*, 553 U.S. 377, 385 (2008) (rejecting an "argument based on [the statute's] 'manifest purpose'").

Furthermore, EPA's current legal analysis overlooks that the Senate passed only a "conforming amendment[]," a fact it has previously conceded. Pub. L. No. 101-549, § 302, 104 Stat. 2574; 70 Fed. Reg. 16,030 (conceding Senate Amendment was a "conforming amendment"). Hence, even assuming an examination of "general purposes" were appropriate (and it is not), the one and only purpose

of the Senate amendment was to conform Section 111(d) to the newly amended provisions of Section 112. And, as explained by petitioner Murray, this goal is fully and fairly accomplished simply by giving effect to the House amendment.

In the alternative, however, even assuming EPA now wishes to depart from its previously established and correct view that inclusion of the Senate amendment in the Statutes at Large was a mere drafting error, its new Section 111(d) interpretation remains fatally flawed. Any such change in agency position—even if such an alternative interpretation were permissible—would still have to give effect to each individual clause appearing in the Statutes at Large. *See Watt v. Alaska*, 451 U.S. 259, 267 (1981). Hence, under such an alternative construction, the House amendment would remain operative and would still prohibit EPA from regulating any emissions from a *source category* (in this case, the EGU source category) regulated under Section 112, while the Senate amendment would, under this scenario, further prohibit EPA from regulating any *pollutant* covered by Section 112. Under such an alternative construction, then, the provisions would operate in parallel and

would together prohibit EPA from establishing standards of performance under Section 111(d) if *either* the source category *or* the pollutant in question were regulated under Section 112. Embracing an alternative construction giving substantive effect to the Senate's amendment, even assuming such a construction were permissible, thus serves only to further *restrict* EPA's authority. Such a construction does nothing to broaden the Agency's authority under the Act.

B. EPA's Statutory Interpretation Violates Separation of Powers Principles and the Nondelegation Doctrine.

EPA's principal response to the unambiguous terms of Section 111(d) is to rely on what it describes as a newly discovered "ambiguity" in the statutory text. Specifically, EPA posits that "ambiguities" resulted from the "drafting errors that occurred during enactment of the 1990 CAA amendments." Legal Memorandum at 21, APP156. As a result, the Agency maintains, "two different amendments to section 111(d) were enacted." *Id.* According to the Agency, these two amendments "conflict with each other," and this

"conflict" empowers EPA to construe Section 111(d) to allow regulation of sources covered by Section 112. *Id.* at 23, APP158.

Of course, the "drafting errors" cited by EPA are none other than the all-too-familiar differences between the House amendment and the Senate's ultimately unnecessary conforming amendment, which EPA has been aware of for years. Accordingly, the whole premise of EPA's interpretation is mistaken.

But beyond mistaken, EPA's interpretation is unconstitutional. The Constitution vests "[a]ll legislative powers" granted to the federal government "in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. 1, § 1. The Constitution further provides that "[e]very bill," in order to "become a Law," must pass both the House of Representatives and the Senate and either be approved by "the President of the United States" or be "approved by two thirds" of both Houses, thus overriding the President's veto. *Id.* art. 1, § 7, cl. 2.

Because the Constitution vests *all* federal legislative powers in Congress, and because Congress can enact laws only by following the constitutional requirements of bicameralism and presentment to the

President, the Constitution does not allow agencies to pick and choose between supposedly conflicting legislative enactments. Rather, "[t]he fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress ... and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). As the Supreme Court has explained, among the possible forms that unconstitutional delegation may assume is a delegation by Congress to an agency of a choice between competing versions of a statute. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) ("The very choice of which portion of the power to exercise ... would *itself* be an exercise of the forbidden legislative authority.") (emphasis original). Accordingly, where Congress enacts a law and contemplates that it will be carried into execution by an executive officer or agency, Congress itself (not the officer or agency) must articulate a constitutionally adequate "intelligible principle" to guide the executive action. *Id.* at 472.

As Professor Laurence Tribe aptly observes, EPA's interpretive approach in this rulemaking violates these fundamental precepts by seeking to license the Agency "to operate as a junior-varsity

unicameral legislature." Comments of Laurence H. Tribe and Peabody Energy Corporation, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, at 29 (Dec. 1, 2014), Docket ID No. EPA-HQ-OAR-2013-0602-23587, APP200. As Professor Tribe felicitously puts it, "not even Congress is authorized to legislate by tossing two substantively different versions of a law into the air and empowering an executive agency to decide which one to catch and run with." *Id.* at 28, APP199; *see also id.* at 5 ("EPA's claim that it is entitled to pick and choose which version [of section 111(d)] it prefers represents an attempt to seize *lawmaking* power that belongs to Congress.") (emphasis original).

EPA nonetheless reads Section 111(d) in a manner that maintains that no single statutory text empowers the Agency to act, and no single intelligible principle, or set of intelligible principles, channels the Agency's exercise of discretion under the law. Instead of a single enacted law, the Agency posits "two conflicting amendments." Legal Memorandum at 25, APP160. EPA then goes on to maintain that the Agency may reconcile this purported conflict—in what is itself an act of discretion—by curtailing the

reach of substantive provisions of law that the House framed, the Senate accepted, and the President signed. *Id.*; *see also id.* at 26, APP161 ("[I]t is not reasonable to give full effect to the House language").

EPA's whole underlying premise—that two 1990 amendments were enacted, each containing a competing "intelligible principle"—thus acknowledges that the Agency's interpretation reflects precisely the sort of agency "choice" regarding "which portion of [statutory] power to exercise" that *Whitman* rejects as "*itself* ... an exercise of the forbidden legislative authority." 531 U.S. at 473 (emphasis original).

Finally, EPA asserts that its statutory interpretation is "entitled to deference." Legal Memorandum at 12, APP154. But EPA's new interpretation is entitled to no deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), nor under any other doctrine governing judicial deference to administrative interpretations of law. At the first step of *Chevron*'s two-step analysis, an Agency must deploy all traditional canons of statutory construction to determine whether Congress's intent with

respect to a specific question is unambiguous. *See Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). But, as discussed above, the carve-out from Section 111(d) for pollution "emitted from a source category which is regulated under section 7412 of this title" contains no ambiguity. 42 U.S.C. § 7411(d)(1)(A)(i). And even if such ambiguity existed, resort to legislative history and past agency practice confirms that the Agency's novel, constitutionally problematic interpretation is not permissible. *See supra* Section I.A.

EPA engages none of this analysis and instead discovers ambiguity in what it describes as contradictory amendments. Legal Memorandum at 23, APP158. But even if two lawfully enacted provisions of law are irreconcilable, "*Chevron* is not a license for an agency to repair a statute that does not make sense." *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2214 (2014) (Roberts, C.J., concurring). In other words, "*[d]irect conflict is not ambiguity*, and the resolution of such a conflict is not statutory construction but legislative choice." *Id.* (emphasis added). Here, the Agency endeavors to "concoct ambiguity" for purposes of invoking *Chevron*. *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 108 (D.C. Cir. 2005).

But as in *Shays*, so too here the Court should reject this effort, especially in view of the serious constitutional questions that would otherwise result. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576-77 (1988) (rejecting agency's interpretation in light of constitutional difficulties).

II. A Writ of Prohibition Should Issue.

EPA's proposed rulemaking gives rise to extraordinary circumstances that justify a writ of prohibition.

A. This Case Presents a Rare Circumstance in Which the Sole Stated Basis for EPA's Proposed Rule Is a Provision Under Which EPA Has No Authority to Regulate.

A writ of prohibition is an extraordinary remedy authorized by the All Writs Act, 28 U.S.C. § 1651. *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985). To warrant issuance of the writ, petitioners must establish that they enjoy a "clear and indisputable" right to relief, *In re Wolf*, 842 F.2d at 465 (quotation marks and citation omitted), and that no other avenue of relief would be adequate, *Sierra Club*, 285 F.3d at 69; *In re Sealed Case*, 151 F.3d 1059, 1063 n.4 (D.C. Cir. 1998) (explaining that the grounds for issuing writs of prohibition and mandamus are "'virtually identical'"

and hence the writs can be employed interchangeably). This standard is demanding, but not insurmountable.

Here, EPA's very initiation of this rulemaking represents a remarkable lapse in the Agency's adherence to law—one that greatly and immediately prejudices utility customers (like NFIB's members), utility suppliers (like Murray), utility regulators (like those represented by various state intervenors), and utilities themselves (like UARG's members). As explained above, the Agency's stated legal basis for this rulemaking offers no possibility that the Agency might promulgate a lawful final rule within the scope of its proposal. Any final rule regulating EGUs on authority of Section 111(d) would be plainly unlawful. And any final rule regulating sources other than EGUs under Section 111(d), or regulating EGU emissions under a CAA provision other than Section 111(d) would not be a "logical outgrowth" of EPA's proposed rule. *Kennecott Greens Creek Mining. Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 950 (D.C. Cir. 2007). In these highly unusual circumstances, EPA has only one lawful course of action—to withdraw its proposal in its entirety.

This Court's decision in *In re Sealed Case* is instructive. That decision identifies a "category of cases for which mandamus is appropriate" based on the Supreme Court decision in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). *In re Sealed Case*, 151 F.3d at 1066. In *Schlagenhauf*, a district court construed Federal Rule of Civil Procedure 35 to order a civil defendant to undergo a physical examination, 379 U.S. at 108-09, even though the plain text of the Rule precluded this construction. Because the *Schlagenhauf* petitioner's question was purely legal, presented an issue of first impression, and was easily resolved based on the Rule's text, the Supreme Court held that the question was properly decided on mandamus. *Id.* at 110.

In the wake of *Schlagenhauf*, this Court has held that petitioners demonstrate a "clear and indisputable" right to relief in cases where an agency or lower court decides an "important" legal question in plain violation of the law. *In re Sealed Case*, 151 F.3d at 1066-67. Here, the legal question at the heart of this case is at least as important and straightforward as the questions at issue in *Schlagenhauf* and *In re Sealed Case*. For reasons explained in

Section I *supra*, provided EGUs are regulated under Section 112, which they are, EPA cannot deploy Section 111(d) in any way to regulate those same EGUs. Moreover, any question regarding the importance of EPA's statute-stretching effort to regulate greenhouse gas emissions was resolved by the Supreme Court earlier this year, when the Court pointedly rebuked EPA's claims to "unheralded power to regulate 'a significant portion of the American economy.'" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). This Court has likewise recognized separation-of-powers concerns as worthy of protection via extraordinary writ. *In re Aiken County*, 725 F.3d 255, 267 (D.C. Cir. 2013) ("[O]ur constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law...."). Accordingly, *Schlagenhauf* applies with full force, and "under these unusual circumstances and in light of the authorities," an extraordinary writ is appropriate. 379 U.S. at 110.

B. The Proposed Rule Is Already Inflicting Costs on States and Energy Producers and Consumers.

Although still a proposed rulemaking, EPA's action is already ripe for review. The proposed rule is imposing costs on States, utility customers, and electric generators, which have commenced efforts now to meet the deadlines the Agency has announced. The issues in this case are therefore appropriately postured for review.

Standing. The structure of the CAA aims to promote "cooperative activities" between EPA and the States. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1594 (2014). Section 111(d) serves this goal through a system by which EPA identifies the "best system of emission reduction" and States then develop implementation plans for the sources within their borders. 42 U.S.C. § 7411(a), (d). Under normal conditions, state plans target a specific pollutant and impose burdens on a small subset of the local economy. EPA's current rulemaking, however, departs from this model. Instead of identifying a specific "best system of emission reduction," it announces emissions targets at the state level, leaving to the States the massive task of altering the entire network of electricity production to meet those targets. *See, e.g.*, 79 Fed. Reg. at 34,925,

APP109 ("Instead, the EPA is proposing to establish state emission performance goals for the *collective group* of affected EGUs in a state...." (emphasis added)); *id.* at 34,833, APP17 ("this proposal lays out state-specific CO_2 goals").

Because of the massive task bearing down on them, States have no choice but to begin preparing now so they can reorganize their energy markets to comply with EPA's proposed rule in accordance with EPA's announced timeframes. Absent special circumstances, the proposed rule requires States to submit their plans to EPA by June 30, 2016. *Id.* at 34,915, APP99. With such a compressed timeframe in which to plan for such a major alteration to their economies, States have no choice but to begin modeling and designing their state plans and standards of performance now. Alabama, Indiana, Kansas, Kentucky, South Dakota, West Virginia, and Wyoming have filed declarations in the related *West Virginia v. EPA* case, No. 14-1146, attesting to the costs they have incurred from EPA's determination that it enjoys authority to regulate EGUs under both Section 112 and Section 111(d).

Moreover, this Court has held that "it makes no difference to the 'injury' inquiry whether the agency adopted the policy at issue in an adjudication, a rulemaking, a guidance document, or indeed by ouija board; provided *the projected sequence of events is sufficiently certain*, the prospective injury flows from what the agency is *going to do*...." *Teva Pharms USA, Inc. v. Sebelius*, 595 F.3d 1303, 1312 (D.C. Cir. 2010) (emphasis added and omitted). Given EPA's assertion of authority under Section 111(d), the States face a "realistic threat" that the chain of events already in motion will end in mandates that contradict the terms of the CAA.

Beyond the States' standing, private parties like petitioner Murray and Intervenors NFIB and UARG also have standing to challenge EPA's action in excess of its statutory authority. When a labor organization subject to regulation by the National Labor Relations Board challenged that body's certification of a bargaining unit, the Supreme Court held that review was available to resolve the union's claim that the Board transgressed "a definite statutory prohibition." *Leedom v. Kyne*, 358 U.S. 184, 189 (1958). This outcome prevailed despite the absence of a statutory right to bring

such suits. *Id.* at 187-88. Here, too, a "definite statutory prohibition" compels the conclusion that EPA may not force utilities and their customers to bear the cost of complying with an unlawful rule by announcing that requirements are coming such that a prudent agent would begin incurring compliance costs even before the regulation is finalized. *Id.* at 189.

Notwithstanding the CAA's "definite statutory prohibition," owners and operators of EGUs are, right now, prudently and reasonably expending significant money, time, and resources to prepare to comply. For example, Sunflower Electric Power Corporation in Kansas is actively considering projects that could achieve EPA's recommended 6 percent heat rate efficiency improvement for existing coal-fired EGUs. Decl. of W. Penrod ¶¶ 5-6. Some of these projects would necessarily involve long-term capital improvement projects that necessitate expensive and time-consuming engineering design studies. *Id.* ¶ 6. Because EPA would require compliance beginning in 2020, many of these projects must commence immediately and as a result design costs are already being incurred. *Id.* ¶ 7. Of course, these costs must be passed on to

electricity customers, including NFIB's members, in the form of higher electricity rates. *Id.* ¶¶ 12-13.

Justiciability. Whatever changes the Agency might adopt as a result of the ongoing notice-and-comment process, the statutory violation at the heart of the rule is effectively final. EPA's rulemaking notice repeatedly cites Section 111(d) as the sole basis for this Agency rulemaking. *See, e.g.*, 79 Fed. Reg. at 34,852-54, 34,950, APP36-38, APP134. Moreover, to bolster its analysis, the Agency issued a separate Legal Memorandum explaining its theory of how Section 111(d) is "ambiguous" and thus provides EPA with authority to regulate. *See* Legal Memorandum at 20-27, APP155-162; *see also* 79 Fed. Reg. at 34,853, APP37 (incorporating the Legal Memorandum).

EPA's lengthy discussion of Section 111(d) and the absence of any alternative statutory foundation make the lawfulness of the rulemaking's legal foundations ripe for review. This Court will not "'entangl[e]'" itself in cases based on a mere "speculative possibility" that a controversy might arise. *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1206 (D.C. Cir. 2013). Here, however, the disagree-

ment between EPA and Intervenor-Petitioners is based on much more than speculation. The Agency has articulated its legal position in both the rulemaking and an accompanying Legal Memorandum and has identified no alternative grounds to which it could retreat after the notice-and-comment process exposes the flaws in that position. Indeed, the Legal Memorandum demonstrates that the Agency has already eschewed its prior position regarding the relationship between Sections 111(d) and 112. *See* Legal Memorandum at 20-27, APP155-62.

Although not yet final, the proposed rule is properly subject to judicial review via issuance of a writ of prohibition. The only alternative to a writ of prohibition—waiting and petitioning for review of a final agency rule—is wholly inadequate to redress the injuries that States, utility customers, utility suppliers, and utilities themselves are already experiencing in light of the significant costs States and utilities are now incurring to prepare to implement the proposed rule. Forcing Intervenors to wait until the rule becomes final before permitting them to bring a challenge will cause irreparable injury. The unlawful proposal in question covers nearly

every producer and nearly every consumer of electricity and is already forcing utilities and their customers to incur compliance costs.

C. Granting the Writ in This Rare Case Poses No Risk of Opening the Floodgates.

As the Supreme Court noted in *Schlagenhauf*, it is only in "unusual circumstances" that the controlling text of a governing legal provision completely bars a challenged action. 379 U.S. at 110. There is little risk, then, that issuing an appropriate writ in this case will open broad new byways around the traditional avenues of judicial review. *See Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989) (granting writ of mandamus while cautioning that "mandamus remains an extraordinary remedy").

Section 111(d) has been used to regulate only five source categories in the past 40 years. 79 Fed. Reg. at 34,844, APP28. The provision is obscure, and the issue before the Court is unique to the rarely used Section 111(d).

Given these highly unusual circumstances, this Court need not fear that issuing the writ in this case will open a door to myriad similar petitions. The type of gross and enormously consequential

legal error committed by EPA in this case is extraordinarily uncommon—it is as if EPA were proposing to regulate commercial aircraft engines under the CAA provisions authorizing regulation of emissions from "[n]onroad engines and vehicles" (like all-terrain vehicles and snowmobiles), 42 U.S.C. § 7547, while entirely overlooking the statutory provision that expressly authorizes aircraft emission standards, *id.* § 7571. Here, the Agency's mistake is similar but far more extreme—it arises, not from mere inadvertence, but from well-considered interpretive errors of constitutional dimension. And here, EPA is inflicting current harms based on this unconstitutional, categorically mistaken position, as it invokes an entirely inapplicable provision as the sole basis for some of the most far-reaching rules in its history. In these unusual circumstances, immediate relief is warranted.

III. The Appropriate Remedy Is A Writ Prohibiting EPA's Rulemaking.

There is no doubt that EGUs are being regulated by EPA under Section 112. Accordingly, EPA enjoys no authority to proceed with a duplicative layer of regulation under Section 111(d). Indeed, this Court has been clear in insisting on formal de-listing before the

Agency can maintain that a certain source is not covered by Section 112. *New Jersey*, 517 F.3d at 581, 583 ("[O]nce the Administrator determined in 2000 that EGUs should be regulated under Section 112 and listed them under section 112(c)(1), EPA had no authority to delist them without taking the steps required under section 112(c)(9)," and "EPA … concedes that if EGUs remain listed under section 112, … then the [Section 111(d)] regulations for existing sources must fall."). The only remedy for this *ultra vires* rulemaking is a writ prohibiting EPA from proceeding with the rulemaking.

CONCLUSION

For the foregoing reasons, this Court should grant Murray's Petitions and issue a writ of prohibition barring EPA from proceeding with its unlawful proposal to regulate EGUs under Section 111(d) of the Clean Air Act.

December 30, 2014
Final Form: March 9, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and D.C. Cir. R. 32(a)(2)(C), I hereby certify that this brief contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), on the basis of a count made by the word processing system used to prepare the brief.

Dated: March 9, 2015

/s/ Allison D. Wood
Allison D. Wood

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March 2015, I filed the above final form document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

/s/ Allison D. Wood
Allison D. Wood

Attachment A

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

In re: Murray Energy Corporation	*	**No. 14-1112**

DECLARATION OF KAREN R. HARNED

I, Karen R. Harned, do hereby declare that the following statements made by me under oath are true and accurate to the best of my knowledge, information and belief:

1. I am the Executive Director of the National Federation of Independent Business ("NFIB") Small Business Legal Center.

2. I am submitting this Declaration in support of the NFIB's Intervenor's Brief in the above-captioned case.

3. NFIB represents approximately 350,000 small business owners across the United States.

4. In the course of performing my job responsibilities, I frequently interact with NFIB members. Despite these frequent interactions, I do not know of any members that produce their own electricity or otherwise do not purchase electricity from the grid in order to conduct their business. Indeed, if a significant number of such members exist at all, which I doubt, they surely would constitute only a fraction of one percent of NFIB's overall membership.

5. According to the NFIB Research Foundation report entitled *2012 Small Business Problems and Priorities*, the cost of electricity ranked number 12 out of 75 problems facing small businesses, ahead of major financial challenges like poor earnings performance.

6. According to NFIB's Energy Consumption poll, energy costs overall are one of the top three business expenses in 35% of small businesses. Moreover, increases in energy costs impose a disproportionate burden on small businesses, which are unable to negotiate favorable rates with electricity providers.

7. Many NFIB members have made substantial investments in plant, equipment, and business processes in reliance on continued supplies of affordable electricity.

8. As States begin implementing the proposed rulemaking at issue in this case, NFIB members suffer immediate costs and must alter their business plans to account for significant increases in the cost of electricity.

I make this Declaration under penalties for perjury pursuant to 28 U.S.C. § 1746, and I state that the facts set forth herein are true.

Karen R. Harned

Karen R. Harned

Dated: December 29, 2014

Attachment B

DECLARATION OF WAYNE E. PENROD

BEFORE ME, the undersigned authority, personally appeared Mr. Wayne E. Penrod, who after being duly sworn states as follows:

1. I am the Executive Manager, Environmental Policy, for Sunflower Electric Power Corporation (Sunflower) and serve in a similar capacity for Mid-Kansas Electric Company, LLC (Mid-Kansas), both of which are located in western Kansas. Sunflower is a member of the National Rural Electric Cooperative Association, which is a member of the Utility Air Regulatory Group. Sunflower and Mid-Kansas are not-for-profit electric generation and transmission cooperative corporations owned and operated by the rural electric distribution cooperatives to which they supply electricity. These distribution cooperatives, in turn, are owned by their members who are electric consumers—families, farms, and other businesses. These electric consumers select their distribution cooperative board members through democratic elections, and those board members in turn appoint the board members of Sunflower and Mid-Kansas.

2. Sunflower is a rural electric generating and transmission cooperative (G&T) that owns and operates facilities to provide essential electricity to its six member-owner distribution cooperatives in central and western Kansas. Sunflower is owned by members Lane-Scott Electric Cooperative, Inc., Dighton, Kansas; Prairie Land Electric Cooperative, Inc., Norton, Kansas; Pioneer Electric Cooperative, Inc., Ulysses, Kansas; The

Victory Electric Cooperative Association, Inc., Dodge City, Kansas; Western Cooperative Electric Association, Inc., WaKeeney, Kansas; and Wheatland Electric Cooperative, Inc., Scott City, Kansas. Sunflower owns and operates electricity generating resources and transmission resources for the express benefit of these members, including one affected electricity generating unit (EGU) in EPA's proposed rule regarding regulation of existing EGUs under section 111(d) of the Clean Air Act, which EPA calls the Clean Power Plan (Proposed Rule).

3. Mid-Kansas Electric Company, LLC, (Mid-Kansas) is a coalition of five rural electric cooperatives and one wholly-owned subsidiary company of a rural electric cooperative that owns facilities to provide essential electricity to its six member-owners in central and western Kansas. Mid-Kansas is owned by Lane-Scott Electric Cooperative, Inc., Dighton, Kansas; Prairie Land Electric Cooperative, Inc., Norton, Kansas; Southern Pioneer Electric Company, Ulysses, Kansas; The Victory Electric Cooperative Association, Inc., Dodge City, Kansas; Western Cooperative Electric Association, Inc., WaKeeney, Kansas; and Wheatland Electric Cooperative, Inc., Scott City, Kansas. Sunflower operates the Mid- Kansas facilities, including one affected EGU in the Proposed Rule, for their benefit.

4. Sunflower operates the combined Sunflower/Mid-Kansas resources, including 360 MW of coal-based and 710 MW of gas-based EGUs. Further, Sunflower and Mid-Kansas receive energy through power purchase

agreements of up to 400 MW/h, of which up to 225 MW/h is wind-based and 170 MW of which is coal-based. Additionally, Sunflower owns or operates and maintains approximately 2,250 miles of transmission lines at operating level voltages up to and including 345 kV, all located in central and western Kansas. Together our member-owners serve their over 200,000 members at retail, members who rely on affordable and reliable electricity for daily use for their farms, homes, and businesses. Together, the electrical power provided by Sunflower and Mid-Kansas to these distribution cooperatives and more than 25 municipalities within the service area meets the electricity requirements of more than 400,000 people in central and western Kansas. The people served at retail by the distribution cooperatives include more than 64,000 people (16%) above the age of 65 and more than 48,000 people (12%) whose annual household income is below the federal poverty level. Thus, approximately one-fourth of the all the people served face economic challenges. Because Sunflower, Mid-Kansas, and their distribution cooperative members operate on a not-for-profit basis, the cost of compliance with the Proposed Rule flows directly through to our customers.

5. In the Proposed Rule, EPA established four "building blocks" that represent their interpretation of the best system of emission reduction (BSER) to address carbon dioxide (CO_2) emissions from existing EGUs. These include a conclusion that heat rate efficiency improvements of 6% are achievable from existing EGUs (Building Block 1). Despite the fact that the Proposed Rule is

not final, Sunflower and Mid-Kansas are already having to make plans regarding what heat rate efficiency improvements it can make to comply with the proposed state emission goals. For example, Sunflower has evaluated the relevant heat rate improvements for its Holcomb 1 EGU following the general outlines set forth in the Sargent & Lundy Report and the National Energy Technology Laboratory reports cited by EPA as the basis for its conclusions on the heat rate efficiency improvements that can be made at existing coal-fired EGUs. The results of this evaluation identify 12 projects (at an estimated cost of approximately $15.6 million) that could be undertaken to attempt to improve heat rate at Sunflower's Holcomb 1 unit by between 1 and 2%. Sunflower would likely consider undertaking only one or two of these projects in the absence of the Proposed Rule.

6. Sunflower has also identified some possible major long-term capital improvement projects that could be performed to achieve a heat rate reduction. These types of projects are significantly more expensive and complicated from both an engineering and a regulatory perspective, however. For example, Sunflower has identified a major boiler improvement project bundle for which a net heat rate improvement of 1.5% may be realized (at full load) at a cost that might approach $136 million. Sunflower has also identified a major turbine improvement project at a cost of approximately $45 million, that could potentially yield close to a 2% improvement in heat rate. A decision about these projects would undoubtedly be influenced by potential new source review

implications and by scheduling issues identified below. A complicating factor is the fact that the Proposed Rule also contemplates re-dispatched energy production in Building Blocks 2 through 4, which would likely result in Holcomb 1 operating less. This would make the economic investment needed for these heat improvement projects prohibitive unless EPA proposes an alternate means to enable recovery of such investments over the necessary remaining useful life of the EGU.

7. Sunflower is undergoing all of this analysis now, even though the Proposed Rule is not final because the project design, engineering, permitting, vendor selection, manufacture and delivery, and installation of projects to reduce CO_2 emissions through the heat rate improvements contemplated by Building Block 1 of the Proposed Rule generally take anywhere from 18 to 48 months to complete. The Proposed Rule contemplates that these improvements must be complete by 2020, which requires these activities to begin now.

8. Further, the actual scheduled outage of the EGU needed to implement these projects may take up to four months just to complete final tie-in and will need to be coordinated with other utilities and with the Southwest Power Pool (SPP), the regional reliability and transmission organization that dispatches all of Sunflower (and Mid-Kansas) EGUs, to ensure reliability. The nature of utility management for production resources, especially for small utilities, necessarily requires much advance outage and general maintenance planning. Sunflower plans such activities at least three years into the future. For

example, we anticipate a major turbine outage for 2017 and are planning for it now. At the current time, we are having to evaluate how this outage might be impacted by the Proposed Rule. We are also currently evaluating how the Proposed Rule affects our current planning cycle. If we ignore the Proposed Rule, we might find ourselves in a situation necessitating an additional unplanned major turbine outage project 8 to 10 years in advance of the next turbine outage cycle. These are the types of decisions that are having to be made right now in light of the Proposed Rule. These kinds of decisions have immediate influence on our long-range plans.

9. SPP is also having to begin planning now for the major re-dispatch of generating resources to address the Proposed Rule's Building Block 2 and Building Block 3 assumptions regarding re-dispatch to gas-fired EGUs and increased renewable energy generation. As a member of SPP, Sunflower participates actively in the many committees established by the SPP membership to accomplish its purpose, and as such Sunflower is positioned to understand the relevant complexities associated with the dispatch priorities and decisions made by SPP. The Proposed Rule is going to require significant changes in the transmission system to accomplish the re-dispatch anticipated by Building Blocks 2 and 3. The current transmission system was developed over decades to move central station energy to current load centers. Those same transmission resources will NOT, without major revisions, be able to move large quantities of energy from these re-dispatched sources to load centers without major pre-

planned improvements to the transmission system. SPP is having to decide now how to accomplish their mission to retain the current reliability-based transmission improvement process and at the same time begin planning for a new transmission system that can accommodate the Proposed Rule.

10. Sunflower and Mid-Kansas have already been reviewing reliability issues associated with the Proposed Rule. If implemented as written, the Proposed Rule will significantly undermine the reliability of the electricity transmission and distribution system (while substantially increasing the cost of providing electric energy to Sunflower and Mid-Kansas member owner families in central and western Kansas). There is very real risk Sunflower and Mid-Kansas, and other Kansas utilities, will simply not be able to lawfully meet both the needs of their customers and comply with the rule at the same time. Modeling by SPP indicates the Proposed Rule will likely cause severe voltage reductions and even collapse (blackouts) in central and southwest Kansas, a significant part of Sunflower's and Mid-Kansas' service territory. In fact, in the SPP report on system impacts due to the Section 111(d) rule, Sunflower's transmission area is prominently mentioned as being at risk for these conditions in central and western Kansas. Under very predictable scenarios, the resulting low voltage can lead to electricity blackouts. Sunflower and Mid-Kansas are having to evaluate now these important reliability issues.

11. The SPP planning committees, on which Sunflower and Mid-Kansas actively participate, and staff work to ensure reliable operation of the

interconnected electricity transmission system into the future, a process described in Attachment O of the SPP Open Access Transmission Tariff. It utilizes three planning horizons. The Near Term Assessment is conducted annually and generally looks at a time horizon of three to five years. SPP long range transmission planning is conducted over a three-year planning cycle with a 20-year assessment being conducted during the first half of the three year cycle and a 10-year assessment conducted in the second half of the three year cycle. SPP is having to account for the Proposed Rule now in this planning process.

12. Sunflower also has grave concerns about the future price of electricity under the Proposed Rule. As Sunflower noted in its comments to EPA, its analysis of the cost impact of the Proposed Rule indicates the wholesale cost of electricity to Sunflower and Mid-Kansas members would increase by over 65%. Not all economies are the same. Rural agricultural economies are historically fragile, and ill-conceived regulation increasing costs by this amount will harm our members and the citizens they serve; they will suffer lost production and lost business opportunity that cannot be remedied if the Proposed Rule is overturned later after it is finalized.

13. Because, as discussed above, many of the decisions regarding what Sunflower and Mid-Kansas are going to do to comply with the Proposed Rule are occurring now, the possibility of the member-owners (i.e., electricity customers) of Sunflower and Mid-Kansas having to pay significant amounts to comply with the Proposed Rule is a very real risk. This potential might be

illustrated by a real world example that occurred with Sunflower's Holcomb 1 EGU. As originally promulgated, EPA's Cross-State Air Pollution Rule (CSAPR), which was effective on January 1, 2012, imposed immediate (early 2012) near-term requirements for Sunflower to reduce nitrogen oxide (NOx) emissions from Holcomb 1. CSAPR was timely appealed, but delivery of critical materials forced Sunflower's hand to commit to a $20 million low-NOx burner and over-fire air system boiler project in order to secure the necessary emission reductions. Although CSAPR was stayed by the D.C. Circuit on December 31, 2011, the commitments to materials and contractors had already been made, a necessary construction permit under the prevention of significant deterioration program had already been obtained, and contractors began work the first week of January 2012. All of these costs were passed on to Sunflower's member-owners at the time these investments were made. CSAPR was initially vacated by the D.C. Circuit but then was substantially re-instated in a modified form by the Supreme Court. Kansas, other states, Sunflower, and other utilities are appealing certain provisions of the rules that, if successful, may still remove Kansas utilities from CSAPR. If that occurs, the improvements originally required for the Holcomb 1 unit under the original CSAPR might not be required at all, meaning that the member-owners (i.e., electricity customers) of Sunflower will have paid for costly control equipment unnecessarily. Because the decisions to comply with the Proposed Rule are having to be made now for all of the reasons discussed herein, the possibility of customers of Sunflower and Mid-

Kansas having to pay for expensive investments in heat rate improvements and other measures related to the Proposed Rule are very real.

I make this Declaration under penalties for perjury pursuant to 28 U.S.C. § 1746, and I state that the facts set forth herein are true.

Wayne Penrod
Wayne Penrod (Dec 29, 2014)

Wayne E. Penrod

Dated: Dec 29, 2014