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RE: National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review
Docket ID No. EPA-HQ-OAR-2018-0794

Dear Administrator Wheeler and Assistant Administrator Wehrum:

The National Bituminous Coal Group ("NBCG") is an ad hoc association dedicated to vigorously defending the American coal industry. NBCG welcomes the opportunity to comment on your rulemaking proposal.

NBCG urges you to avoid a potentially disastrous second round of national uniform emission mandates under Section 112 for coal power plants. Whatever you may intend to do if coal power plants remain under Section 112, litigious anti-coal pawns such as the National Resources Defense Council and Sierra Club, funded with massive war chests filled by wealthy business interests that stand to profit from the retirement of existing power plants, will try to use Section 112 to gain what the stay of the Clean Power Plan denied them. These foes of coal need only find a way to force a moderate increase in the stringency of the non-mercury metal surrogate particulate matter standard to devastate the coal power plant fleet. Moreover, they will at a minimum be able to use reconsideration petitions and litigation to keep open and subject to amendment any Section 112 residual risk and technology review rulemaking past 2020.

To be clear, the first war on coal was largely fought through battles over sulfur dioxide and acid gas emission regulations through the New Source Review program and the Section 112 Utility Maximum Achievable Control Technology ("Utility MACT") rule. The second war on coal will be fought through battles over particulate matter emissions. Keeping coal power plants under Section 112 leaves this potent field of attack wide open—an opportunity for national uniform control mandates that force dozens of gigawatts to either install new controls or shut down, all in one fell swoop. And contrary to prior rulemaking proceedings, it is clear that regulated investor owned electric utilities, even those that continue to own and operate coal power plants, are most interested in securing rate base increases tied to the construction of new power plants (including natural gas combined cycle and heavily subsidized renewables) and transmission projects that, while creating profits for these companies, do very little to replace the American jobs, both mining and at coal power plants, that are lost when mines and coal power plants are shuttered.

Some have raised concerns over potentially stranded investments that have already been made to comply with the Utility MACT rule. It is argued that these investments might be disallowed by utility regulators if the rule is undone now, or that removing coal power plants from Section 112 will result in less operation of controls installed to comply with Utility MACT. But States can, and many already do, impose requirements to run the already installed controls pursuant to their own authority and as part of National Ambient Air Quality Standard ("NAAQS") implementation plans and construction and operation air quality permitting. Given ample lead time and forewarning, these legal requirements can all be expeditiously imposed without opposition from NBCG or anyone else. Claims that removing coal power plants from Section 112 will yield dire consequences are baseless, and in many instances, are mere covers for an anti-coal agenda which plans to use Section 112 to shut down more coal plants within the coming decade.

I. The Technology Review Memorandum Demonstrates the Enormous Stakes of this Rulemaking for the Future of the Coal Industry and EPA Should Conduct Modeling Now Showing the Disastrous Negative Consequences of a Potential *De Facto* Baghouse Mandate.

The July 2018 memorandum entitled "Technology Review for the Coal- and Oil-Fired EGU Source Category" denominated EPA-HQ-OAR-2018-0794-0015 ("Technology Review") is an incredibly significant analysis that shows how important this rulemaking is to securing the future for the coal power fleet and the industry that provides its fuel. NBCG urges EPA to take the next step and model the consequences of the *de facto* baghouse mandate that anti-coal interests are seeking to ultimately achieve through continued regulation of power plants under the Section 112.

Make no mistake, there is a reason that this proceeding has received significant attention from anti-coal nonprofits and politicians, and that reason is amply reviewed by EPA's Technology Review. For the better part of a decade, anti-coal groups have been filing comments, reconsideration petitions, and lawsuits intended to force EPA to impose an ever-so-slightly more stringent emission control mandate under Section 112 for emissions of particulate matter as a surrogate for non-mercury metals that cannot be achieved by power plants that are equipped with electrostatic precipitators (referred to as ESPs). The result of this would be a *de facto* mandate that every coal power plant install a baghouse, even though the regulatory benefits of installing baghouses on power plants that already operate electrostatic precipitators would be dwarfed by the economic costs and other resulting negative consequences.

As the Technology Review reveals, there are 323 coal power plant stacks that are not equipped with baghouses. If EPA were to imposed tighter non-mercury metal surrogate standards on these power plants, the coal generating units associated with these 323 stacks would face an existential threat as utilities and cooperatives decide whether to retire the units or install baghouses. For many if not most of these units, a tighter control mandate for particulate matter would render it uneconomic to continue operation and result in shut down.

Consistent with reasoned decision-making and the obligations imposed by the Unfunded Mandates Reform Act and the Regulatory Flexibility Act, EPA should model and consider the results of a tighter control mandate for non-mercury metals on the power plant fleet even if EPA does not impose such a mandate and even if EPA does not formally consider the results as a part of the reconsideration process.

NBCG strongly urges the Administration to use EPA's modeling capabilities to demonstrate the legal and policy stakes of this proceeding which will also set a benchmark against which future actions by the agency will be measured.

Providing this analysis to the public and to members of Congress has the potential to lead to legislation that avoids this problem. In addition, the analysis will help highlight for D.C. Circuit and the Supreme Court the significance to the nation of potential litigation efforts by anti-coal interests that may seem innocuous when they are anything but.

This Administration should take a strong lesson from the failure to conduct a similar modeling analysis in a timely manner with respect to acid gas emission control requirements. Running the model will reveal the number of coal power plants that would be threatened with potential closure as a result of a baghouse mandate. In addition, EPA can conduct a screening analysis to identify specific plants that could close as a result and identify which thermal coal mines supply them and are therefore at risk of layoffs if a baghouse mandate is imposed.

Accordingly, conducting this modeling exercise can help inform EPA in its legally mandated obligation to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision[s] of [the Clean Air Act] . . . including where appropriate investigating threatened plant closures or reductions in employment allegedly resulting from such administration and enforcement." 42 U.S.C. § 7621(a). While the provision mandating this analysis cannot be "construed to require or authorize the Administrator . . . to modify or withdraw any requirement imposed or proposed to be imposed under this chapter," 42 U.S.C. § 7621(d), that limitation only directs that "nothing in this section shall be" cited or relied on in this way. That provision does not prevent EPA from considering the resulting information itself where EPA is authorized to do so, such as in deciding whether it is appropriate and necessary to regulate power plants under Section 112.

In addition, the plain language of the employment effects provision of the Clean Air Act makes clear that EPA must identify and assess "potential" job losses and plant closures whenever they "may result from the Administration" of the Clean Air Act. Given that anti-coal groups have for years argued that EPA must, as a matter of law or reasoned decision-making, impose a more stringent non-mercury metal control, this is a clear and present threatened consequence of leaving power plants regulated under Section 112. Indeed, EPA will almost surely receive comments in this very proceeding in which anti-coal interests argue in favor of a *de facto* baghouse mandate, and that triggers EPA's Section 321(a) and reasoned decision-making obligation to examine the consequences that would result, if for no other purpose than to inform the public, members of Congress, and the White House of the risks involved in this proceeding and the litigation that will inevitably follow this proceeding.

EPA can and should model and consider the resulting plant closures, job losses, and other localized economic dislocations that would occur if power plants are left regulated under the national uniform Section 112 program and anti-coal groups succeed in forcing EPA to tighten the non-mercury metals control mandate. Indeed, the obligation of reasoned decision-making and the Supreme Court's decision in *Michigan v. EPA* leave no doubt that EPA cannot lawfully and reasonably select Section 112 as the means of regulating power plants without considering this crucial potential downside of doing so.

The public deserves to know when livelihoods and communities are at risk as early as possible so they can take action rather than sitting by unaware while decisions of enormous consequence to them are made in Washington, D.C.

NBCG applauds EPA for finally recognizing the disastrous consequences of layoffs on workers and their families and communities, especially in particular communities and industries where they cannot be easily transitioned into alternative employment. *See* U.S. EPA, *Regulatory Impact Analysis for the*

Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, at 5-10 to 5-14 (Aug. 2018) (cited pages incorporated here by reference). These effects can include increased "substance abuse," "poorer health," and "increased mortality rates." *Id.* at 5-14. Sudden shut downs of power plants and mines in vulnerable communities are accordingly not just an economic issue—lives are truly at stake. Running EPA's model to show what is potentially at stake in this proceeding is warranted by the circumstances and legally required so that EPA, the public, Congress, and the President can ensure that the agency does not now or in the near future impose unnecessary and undue harms on people and communities around the country in the name of environmental protection.

II. Stop the Misleading Practice of Calling the National Standards "Mercury and Air Toxics Standards" and "MATS."

Contrary to popular belief, Section 112 of the Clean Air Act is not limited to "[c]hemical compounds and elements that are known to cause or are suspected of causing cancer, birth defects, reproduction problems, and other serious health effects." U.S. EPA, *Legal Memorandum Accompanying the Proposed Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units (EGUs)* at 6 (undated), EPA-HQ-OAR-2009-0234-20519. This misconception stems from the fact that prior to 1990, Section 112 was limited to regulation of substances that "may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C. § 7412(a)(1) (1988). But that was the pre-1990 threshold for substances to be regulated under Section 112, and this narrow definition was not the criteria that EPA and Congress used to compile the list of substances in Section 112(b), nor the test that survived after Congress broadened the Section 112 program beyond its original mandate which was limited to specifically addressing health effects detrimental to the "productive capacity" of [the nation's] populace," rather than their general well-being and comfort. 42 U.S.C. § 7401(b)(1)).

The Section 112(b) list enacted in 1990 was derived from an ad hoc set of 224 substances. *See* Committee Report on S. 1894, S. Rep. No. 100-231 at 223–25 (1987). Of these, 201 were included on the list merely because they were included on the SARA Section 313 list and also in Table 4 of the 1986 National Air Toxics Information Clearinghouse Data Base Report on State and Local Agency Air Toxics Activities. *Id*. But between 46 and 128 of these substances were only included because they were part of the Maryland Toxic Substances Registry, and that program relied heavily on the ACGIH list of Threshold Limit Values even though those limits are intended for no other use apart from industrial hygiene and are not suitable for "evaluation of or control of community air pollution

nuisances." U.S. EPA, *Methods for Pollutant Selection and Prioritization* 2-4 (July 1987). That these substances were also included in Table 4 of the 1986 NATICH report is not surprising since so many state air standards relied on the same flawed misapplication of TLVs, which is why the 1986 NATICH report makes clear that it includes "any non-criteria air pollutant" for which any state or local agency had set an air standard and expressly clarified that "[i]nclusion of a pollutant . . . does not necessarily mean that it is toxic at ambient concentrations." 1 National Air Toxics Information Clearinghouse, Data Base Report on State and Local Agency Air Toxics Activities at iii (July 1986).

Thus, the Section 112(b) list of substances today is a highly inclusive potpourri of substances, and it is not a list of substances that are reasonably anticipated to be toxic at ambient concentrations. Notably, EPA has removed many of these substances from the SARA Section 313 list because they are not toxic. *See, e.g.*, 70 Fed. Reg. 37698 (deleting methyl ethyl ketone); *Am. Chemistry Council v. Johnson*, 406 F.3d 738, 743 (D.C. Cir. 2005) (holding a SARA Section 313 delisting petition must be granted if a substance does not "cause harm via exposure" and directing district court to order delisting of methyl ethyl ketone because "EPA's own analysis demonstrates that MEK fails this test"); 42 U.S.C. § 7412(b)(1)(A) (list including methyl ethyl ketone). But EPA has not removed those substances from the Section 112(b) list because Congress provided that EPA cannot delist substances until EPA determines "there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects," the latter of which is defined to include "any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas." 42 U.S.C. § 7412(b)(3)(C); 42 U.S.C. § 7412(a)(7).

Nowhere in the statute itself or in the development of the Section 112(b) list is there any indication whatsoever that all of the listed substances are properly characterized as particularly "toxic."

In addition, going forward mercury emission regulations are not the biggest issue at stake in the Section 112 program. Mercury controls have been installed and are being operated. Going forward, the major issue will be non-mercury metals and to a lesser extent acid gases.

Accordingly, it is misleading for the agency to refer to the regulations imposed under Section 112 on coal power plants as "Mercury and Air Toxics Standards." NBCG urges the agency to avoid this misleading description as well as the abbreviated "MATS."

Every other industry standard under this program has been described accurately as "National Emission Standards for Hazardous Air Pollutants," or "NESHAPs," and "Maximum Achievable Control Technology Standards," or "MACT standards." NBCG urges you to utilize terminology consistent with other industries rather than continuing to use terms that single out a particular industry regulation as dealing with "mercury" and "toxics" when the use of this phrase misleading suggests that Section 112 standards are limited to only addressing extremely hazardous substances.

III. EPA Should Expressly Weigh the Particular Characteristics and History of the Power Plant Fleet as Basis to Reject Section 112.

EPA should expressly consider the unique nature of the power plant fleet as a basis weighing against Section 112 regulation of power plants.

Section 112(n)(1) is a special provision that applies only to "electric utility steam generating units" (referred to herein as "power plants"). 42 U.S.C. § 7412(n)(1); 42 U.S.C. § 7412(a)(8). The entire point of Section 112(n)(1) is the assessment of the appropriateness of that program for power plants as opposed to other stationary sources. EPA accordingly must expressly consider issues specific to power plants that are addressed by Section 112(n)(1).

As EPA recognized long ago in 2005, "Congress plainly treated Utility Units differently from other source categories, and that special treatment reveals Congress' recognition that Utility Units are a broad, diverse source category." 70 Fed. Reg. at 15999. EPA should once again consider this key characteristic of power plants in the assessment of the costs of subjecting them to an inflexible, uniform, and cost-blind national standards program.

For over a century, States and local governments have constructed and supported the nation's power plants in order to provide affordable and reliable electric power. Power plants are as diverse in size and age as the States themselves and they vary widely in design and age because the fleet has evolved over decades of support and regulatory oversight by State and local governments taking into account widely differing local circumstances.

The Supreme Court has long recognized these pioneering State and local government efforts. As Justice Jackson stated, "[l]ong before the Federal Government could be stirred to regulate utilities, courageous states took the initiative and almost the whole body of utility practice has resulted from their experiences." *FPC v. East Ohio Gas Co.,* 338 U.S. 464, 489 (1950) (Jackson, J., dissenting); *see also FERC v. Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in judgment and dissenting in part) ("Utility regulation . . . is a field marked by valuable state invention."). Indeed, nearly all power plants in this

country, both public and private, are the result of significant State and local government efforts. Many were directly constructed by State and local governments. Most others owe their economic feasibility to a "regulatory compact" with the States. In exchange for territorial monopolies that protect their investments and provide the degree of certainty necessary for enormous capital outlays, private power utilities are intensely regulated by State commissions that determine what prices they charge and what power plants they build. Robert L. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*, 32 NAT. RES. J. 289, 289–90 (1992); *see generally General Motors Corp. v. Tracy*, 519 U.S. 278, 288–90 (1997) (citing Swartwout's article while discussing State regulation of utilities). This important legacy of State and local initiative is especially evident in the public power sector that provides electricity for communities previously unserved or underserved by private utilities. *See* THE POWER INDUSTRY AND THE PUBLIC INTEREST 104 (1944) ("Between 1882 and 1927 most municipal systems were operating in communities never before served by private companies."); 77 Fed. Reg. 9,304, 9,440 (Feb. 16, 2012) (estimating "80 municipalities, 5 states, and 11 political subdivisions" are currently operating large power plants that would be subject to regulation under Section 112).

Moreover, regulated utility investments in power plants are closely supervised by the State commissions that ensure investment decisions are made primarily for the benefit of users of electricity by keeping costs as low as possible. This supervision covers the decision where and when to build a new power plant, the determination of its design, the decision whether any upgrades should be made, and the decision when it should be retired and replaced.

In order to ensure that electricity costs are minimized for users, each of these decisions is influenced by local conditions such as the availability and cost of local fuel sources. Power plants are designed foremost according to the local availability and of fuel and its projected cost over the life of the unit. First, a designer of a fossil fuel fired power plant has to decide whether to use natural gas, coal, or oil for combustion. Over the long run and even today in many areas coal is less expensive per Btu than natural gas, and it remains less expensive than oil throughout the continental United States. Even where fuel cost savings associated with using natural gas might otherwise justify its use over coal, natural gas would not be available for power generation without an adequate pipeline. Access to natural gas is by no means universal, as your agency has recognized: "Natural gas pipelines are not available in all regions of the U.S. Even where pipelines provide access to natural gas, supplies of natural gas may not be available in adequate quantities for utilities. For example, it is common practice in large metropolitan areas during winter months (or periods of peak demand) to prioritize natural gas usage for residential areas before industrial areas (i.e., natural gas curtailments)." 69 Fed. Reg. at 4669. When there is no pipeline, it is no small feat to construct one. Even when natural gas is available, States and local governments still must limit their exposure to the potential for future volatility in fuel prices and supply by ensuring that the power system does not depend too heavily on any one fuel.

Thus, some communities have been unable to utilize natural gas while the rest must ensure that they do not depend too much on natural gas.

Once a fuel is chosen, that does not dictate an optimal power plant design, unlike in other industries where there is usually a single or few state of the art designs that would be employed anywhere in the country at a particular time. When a power plant designer selects coal as the source of fuel for a power plant, the designer must then perform "[e]ngineering calculations . . . to determine the optimum positioning and sizing" for the various "boiler components" necessary for "building an optimally efficient plant." 69 Fed. Reg. 4,652, 4,665 (Jan. 30, 2004). These calculations have to be made every time a power plant is built because optimization depends heavily on the projected cost of fuel for that plant, and the cost of fuel for that plant will depend on its location. As a rule, the more thermally efficient a power plant is designed to be, the more expensive it is to construct, and returns on investment in thermal efficiency differ depending on fuel costs. Therefore, State and local governments and regulated utilities must minimize the cost of electricity for users by choosing the correct amount of investment at which any further investments in thermal efficiency are not justified by fuel savings. This calculation differs depending on fuel cost projections for the power plant which depend on location because transportation is such a significant component of the price of coal. Power plants that can be located at or near mines pay much less for coal than power plants that are far away from mines and must obtain coal shipments by rail or barge over long distances. The price of coal is also subject to changes in supply and production costs, which also vary significantly by location.

EIA data on coal prices delivered to end users by State shows that the variations in price by location are very significant. For example, in October 2014, the average cost of coal delivered for electricity generation in the electric power sector in New Hampshire was $3.95 per MMBtu whereas it was $1.43 per MMBtu in North Dakota, such that New Hampshire's average cost was 2.8 times more expensive per MMBtu than North Dakota. *See* U.S. Energy Information Administration, *Average Cost of Coal Delivered for Electricity Generation by State, October 2015 and 2014*. Even states in the same general region have significant cost variation. For example, in October 2015, the average cost of coal delivered for electricity generation in the electric power sector in South Carolina was 1.3 times as expensive as Georgia, its neighbor next door: The average cost in South Carolina was at $3.64 per MMBtu while in Georgia it was $2.76 MMBtu. *Id*. Even coal-producing States face different costs. In October 2015 the average cost of coal delivered for electricity generation in Texas was $1.84 MMBtu, but was $2.28 MMBtu in West Virginia. *Id*. On the other hand, in Iowa, which is not a particularly prominent coal-producing state, the average cost of coal delivered for electricity generation was $1.60 in October 2015. *Id*. One of the largest coal-producing States, West Virginia, had an average cost nearly one and a half times as expensive as Iowa, a State which produces more corn than coal. Year to year, these cost variations by location remain relatively consistent. Thus, in October

2014, the average cost of coal delivered for electricity generation in New Hampshire was $4.46 per MMBtu and it was the same $1.43 per MMBtu in North Dakota, close to 3 times less expensive. *Id*. As a final example of the extreme differences in coal prices at different locations, the average cost of coal delivered for electricity generation in Alaska was $0.33 per MMBtu in October 2015 whereas in New Jersey, the cost was $3.45 per MMBtu in the same year. *Id*. In that particular month, the electric power sector in New Jersey paid nearly 12 times as much for coal as in Alaska.

In addition to variations by location, the cost of fuel also varies significantly over time. The price of coal has increased over time as the cheapest-to-mine resources have been depleted, and it is well-known that the cost of coal "depends on the cost of the factors of production—that is, coal, labor, equipment, capital funds, and scale of operations, technology, and coal transport costs." Emil D. Attanasi and Philips A. Freeman, *Chapter E: Coal Marketability: Current and Future Conditions*, U.S. Geological Survey and U.S. Department of the Interior (2009), 2. Beginning in the 1970s and until the early 1980s, "coal contract prices were at historical highs because powerplant fuel demand had shifted to coal from oil and gas." *Id*. at 8. However, "after the severe recession in the early 1980s, new coal contract prices declined." *Id*. Also, during that time and until around 2004, rail "rates declined by more than three-fourths." *Id*. at 29. Similarly, in the early 1990s, the price of coal rose and fell again, tracking the volatility of the gas market. *Id*. And around 2000, the cost of coal rose, also tracking transportation costs, where "rise in rates from 2004 through 2006 (assuming a 1,000-mile haul and an 8,800 Btu/lb of coal [5,891cal/g]) amount[ed] to an additional $0.43 per MMBtu . . . added to delivered cost." *Id*. at 29. In recent decades there has been substantial variance in the cost of coal.

The result of differences in fuel prices in different locations and at different times is that when fuel prices are higher for a specific power plant project then it is cost effective to design the power plant so that it generates more power with less fuel by investing more to achieve greater thermal efficiency. Thus, both the amount of money spent to construct a power plant and the thermal efficiency of its design depend on the fuel price projections over the expected life of a particular power plant and this projected price is principally a function of its location.

Given the variability of coal prices by location and over time, some States and local governments and utilities built very expensive power plants that cost far more to construct but that are also more thermally efficient than power plants built elsewhere at the same time. This led directly to a substantial diversity in the thermal efficiency of the power plant fleet even among power plants of the same age. The diversity in the power plant fleet has further increased over time because of improvements in techniques have also lowered the cost of achieving thermal efficiency. As thermal efficiency itself has become less expensive, succeeding generations of new facilities have been designed to be more efficient than the fuel prices would previously have justified. Indeed, technological improvements

caused the "heat energy required to produce 1 kWh of electricity" to "declin[e] by 11-fold between 1899 and the mid-1960s." 69 Fed. Reg. at 4669. But technology alone is not responsible for all the diversity in the fleet, as fuel prices remain highly variable by location.

While coal price variability and technological developments can change the calculation of optimal efficiency for a new power plant at a particular location or even more generally, it by no means renders an older less efficient power plant obsolete or wasteful. It takes decades to recoup the investment in a power plant. And even when that investment has been recouped, closing an existing power plant to build a new one increases the prices users must pay for electricity unless the difference in efficiency between the existing power plant and a proposed replacement makes the investment worth it. This is the reason why regulated utilities must justify their investments in new power plants to State commissions, so that States can ensure that power plants are not scrapped and replaced without a showing that the construction costs will be offset by fuel savings and lead to lower prices for electricity users. All else equal, the benefits of replacing a power plant with a more efficient power plant will always be relatively greater in the areas of the country that have higher fuel costs. In areas with higher fuel costs, power plants will be replaced more often and so they will generally have younger power plant fleets than those areas of the country that enjoy lower fuel costs.

Importantly, Congress has recognized the unquestionable benefits of having a diverse fleet of power plants tailored to local circumstances and Congress concluded that States are best positioned to regulate power plants in a way that achieves these benefits. Accordingly, the Federal Power Act has consistently preserved State authority to regulate power plants rather than preempt state regulation of electric generation with federal law and regulations. Congress declared that Federal regulation of "of matters relating to generation" would "extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). Accordingly, the Act provides that the Federal Energy Regulatory Commission "shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). So while the Commission has authority to promulgate and enforce reliability standards, the Act fastidiously prohibits "any requirement . . . to construct new . . . generation capacity," 16 U.S.C. § 824o(a)(3), and expressly prohibits the Commission from ordering "construction of additional generation . . . capacity." 16 U.S.C. § 824o(i). The Commission's authority over generation that is regulated by the states is essentially limited to the power "to conduct investigations regarding the generation . . . of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission" for the purpose of obtaining "information necessary or appropriate as a basis for recommending legislation." 16 U.S.C. § 825j. The Federal Energy Regulatory Commission's limited fact-finding authority over generation regulated by the States pales in comparison with the expansive authority of the Federal

Communications Commission over regulated communications utilities, because a single national regulator is far less equipped in this unique context where minimizing costs to users requires diverse approaches and decisions in different parts of the country.

Thus, that a power plant built in a location facing higher fuel prices is comparatively more fuel efficient than one built at the same time in a location facing lower fuel prices does not reflect a failing in judgment or lack of prudence. Rather, the difference in the degree of thermal efficiency of power plants built in different areas at the same time are the result of State commission decisions that account for differing local circumstances in determining the most cost effective way to generate electricity for users. And Congress has gone out of its way to permit and facilitate this beneficial diversity that results from the expertise and judgment of State commissions.

In addition to the appropriate diversity in the thermal efficiency, design characteristics, and age of power plants, the composition of emissions from burning coal and the potential health and environmental impacts of using coal also differs widely by location. The composition of emissions from a coal-fired power plant coal depend in large measure upon the characteristics of the locally available coal that the power plant uses. Coal in some parts of the country has a lower sulfur content, and burning this coal produces less sulfur dioxide. As transportation costs are such a significant component of fuel costs, the composition of the coal a power plant uses, and as a result the emissions it produces, depends chiefly on its location.

The differences in the composition of coal that power plants use combines with another aspect of diversity in power plant emissions that is highly relevant to determining whether imposing uniform and cost-blind standards for power plants under Section 112 is appropriate in light of the costs: The widely varying prevalence of controls that were installed in order to meet new national ambient air quality standards, new source performance standards, and combat the problem of acid rain by reducing sulfur dioxide emissions.

For decades, EPA carried out its job under the Clean Air Act to regulate power plant emissions from power plants to protect the public health without inefficiently displacing traditional State regulations designed to account for differing local circumstances.

EPA required that every power plant constructed since 1971 employ the best available technology that had been adequately demonstrated by that time. 40 C.F.R. Part 60, Subpart D. EPA then imposed an updated standard for new power plants constructed after 1978. 40 C.F.R. Part 60, Subpart Da. Even beyond the controls required by these standards, new power plants have been required since 1977 to install the best available technology for each new facility as determined

through an individualized case-by-case assessment in light of costs. And under the national ambient air quality standards program, further controls have been required at specific new and existing power plants when necessary and appropriate to address emissions that need only be controlled to the extent necessary in the aggregate to meet certain ambient levels in the local atmosphere.

In all, the set of sources and existing controls in any given area, as well as local geographic and atmospheric conditions and the timing of construction, have led to substantial diversity in the controls installed at power plants.

New power plants are now generally required to reduce sulfur dioxide emissions to a level that can only be achieved using controls, but attaining the national ambient air quality standards has not and does not require that every existing plant install those controls.

Meanwhile, the acid rain problem depends most on where coal-fired power plants are located and the overall regional level of the emissions that lead to acid rain. Given the differences in the cost of coal and the availability of other potential sources of power, coal power plants are not evenly dispersed throughout the United States, and acid rain is not a problem in areas where they are not concentrated. Coal power plants tend to be concentrated in areas where local circumstances heavily favor the use of coal. Coal power plants are far less concentrated in regions that rely on coal primarily to provide diversity in power generation portfolios even if though it is not the cheapest source of power, and power plants in these areas do not pose an acid rain problem. Furthermore, the acid rain problem can be cost-effectively addressed in areas where local circumstances permit low sulfur coal to be cost-effectively incorporated into the design and operation of power plants. However, the availability and cost of low sulfur coal varies according to location, and it is not a cost-effective means of reducing emissions in areas where its use requires long distance transportation.

Finally, given that acid rain depends on the total amount of emissions in an area, it can be managed without requiring that every coal fired power plant reduce emissions by the same amount, since the sulfur dioxide emission reductions required to address acid rain are fungible.

Thus, when it came time for Congress to address acid rain, many power plants did not have scrubbers and the reductions necessary to address acid rain did not require that every existing power plant install sulfur dioxide controls. Given that the controls used to reduce sulfur dioxide emissions cost hundreds of millions of dollars, and if they are to be installed in a new power plant or at an existing power plant, the costs are ultimately passed on to the consumers of electricity, the unique nature of the acid rain problem led Congress to create a program that allowed for the strategic rather than uniform deployment of scrubbers, and this has an important effect on emissions from power plants unrelated to acid rain.

Congress whole-heartedly encouraged strategic rather than uniform deployment of new scrubbers in enacting the federal acid rain program, Title IV of the 1990 Amendments to the Clean Air Act. Under this program, utilities are given incentives to efficiently identify the most cost-effective opportunities to reduce emissions that lead to acid rain, in some cases installing scrubbers, in some cases switching to more expensive low sulfur coal, and in other cases continuing operations as normal while providing financial support to power plants that have more cost-effective opportunities to achieve the reductions. The result is, as Congress intended, that some power plants have installed scrubbers to address acid rain while others did not and instead either used low sulfur coal or financially supported scrubber installations at other power plants where the investments were more cost-effective. This addressed acid rain in a way tailored to local conditions and obtained the same benefits at a much lower cost. Once the acid rain program was fully implemented, 30 new scrubbers were installed as a result, Legal Memo at 17 n.18, and the rest of the fleet either complied by burning low sulfur coal or by financially supporting the installation of these 30 new scrubbers. With the addition of these new scrubbers, by 2012 two-thirds of power plants had scrubbers and one-third of power plants did not. Exelon Comments on Proposed Toxics Rule at 25 n.47, 50-51, Exhibit 10 at 8-11, Exhibit 2 at 19-20, tbl. 5, Exhibit 4 at 10.

This prevailing pattern of strategic scrubber deployment lies at the heart of why the utility MACT sulfur dioxide surrogate standard for acid gases was woefully unjustified by the costs it imposed and the shutdowns and economic dislocation that resulted.

The problem is that the scrubbers installed to reduce sulfur dioxide emissions also reduce acid gas emissions, including hydrochloric acid and hydrofluoric acid, below the levels that would otherwise be emitted. Crucially, even though burning low sulfur coal emits far less sulfur dioxide, it does not emit correspondingly lower amounts of acid gases. While using low sulfur coal can achieve the sulfur dioxide emission levels that are achieved using scrubbers, using low sulfur coal cannot achieve the acid gas emission levels that are achieved using scrubbers.

That two-thirds of power plants installed scrubbers to address sulfur dioxide emissions when necessitated by local circumstances to meet national ambient air quality standards and address the acid rain problem made sense, but it was a far different question whether it made sense to install scrubbers on the remaining one third of power plants when the national ambient air quality standards and the acid rain program have not required them solely in order to achieve reductions in emissions in acid gases. Moreover, in a large number of cases, the result of the scrubber mandate was simply the retirement of coal power plants in favor of alternative generation sources, which resulted in significant economic dislocation and job losses and harms to vulnerable communities.

Even if additional scrubbers or scrubber upgrades could have been cost-effectively deployed at some existing power plants, EPA never considered whether it was rational to require scrubbers to be deployed at all existing power plants and for existing scrubbers to be upgraded merely to meet an arbitrary emission target based on the performance of other power plants that received subsidies to achieve greater control efficiencies under the acid rain program.

Using a tailored and case-by-case approach would have allowed the power plants that retired as a result of the Utility MACT scrubber mandate to have remained in operation while still requiring power plants that could have affordably installed or upgraded scrubbers to do so.

In sum, certain States have older and less thermally efficient fleets because they are closer to coal resources and enjoy lower fuel costs such that investing in new and larger plants does not offer the same return as in States that have much higher fuel costs. And certain States have been able to avoid requiring expensive scrubbers on every coal power plant while nevertheless achieving national ambient air quality standards and complying with the provisions of the Title IV acid rain program, largely through use of locally available low sulfur coal. Given the traditional and ongoing role of States in cultivating and overseeing the nation's power generation industry and the cooperative federalism model in the Clean Air Act and the Federal Power Act, it is no surprise that power plants are diverse in design, size, and age. This diversity is no accident — it is a central feature of the federal system. As with many issues they address, State and local governments have responded to differing local circumstance with decades of decisions that tailored their power plant fleets accordingly. Given this unique nature of the nation's power plant fleet, EPA in 2005 rightly concluded that "Congress plainly treated Utility Units differently from other source categories" because "Utility Units are a broad, diverse source category that is subject to numerous CAA requirements, including requirements under both Title I and Title IV, and that such sources should not be subject to duplicative or otherwise inefficient regulation." 70 Fed. Reg. at 15999.

In light of the forgoing, it is not rational to assume that Section 112(d)(3)'s cost-blind floor standards are reasonable for power plants. The differences in costs between the results of subjecting the power plant fleet to Section 112 and the many other major sources EPA has regulated under Section 112 shows that in the magnitude and in relative cost-effectiveness, regulating power plants under Section 112 is manifestly far different from regulating other stationary sources under that program, demonstrating that the assumption that the costs of setting MACT floors would be per se reasonable does not hold for power plants. This is because unlike other stationary sources, power plants are inherently more diverse and "the best-performing power plants' emissions limitations" do not reflect "cost-conscious decisions" that can serve as a proxy for the choice of whether other power plants can reasonably be forced to upgrade to match the performance of the lowest emitters. *Michigan v. EPA*, 135 S. Ct. at 2711. Indeed, the premise

of the Title IV acid rain program is that scrubbers should only be installed strategically and it creates incentives to install larger, more efficient, and more expensive controls at some plants rather than have every power plant install controls. And the installation of other control equipment reflects the need to attain national ambient air quality standards in light of local circumstances that do not exist elsewhere. Section 112 is not appropriate for power plants because by its very nature it will force wasteful investments in controls merely because the standards are driven by the level of emission reduction that has been obtained as a result of other programs that were themselves designed to avoid rather than require a one-size-fits-all approach to the regulation of emissions.

Due to the unique issues associated with regulation of power plants, Section 112 is a program that inappropriately nationalizes locally appropriate choices for these particular sources, and this is an important consideration that weighs against finding it is appropriate and necessary to regulate power plants under that program rather than using available alternatives.

The history of the enactment of Section 112(n)(1) confirms that the foregoing issues associated with regulating power plants under Section 112 with uniform national standards are the reason why Congress enacted it. *See* Letter from Murray Energy Corp. to Admin. Gina McCarthy Regarding Supplemental Finding at 19-29 (Jan. 15, 2016) (attached and incorporated herein by reference).

This history amply demonstrates that Congress was specifically concerned that regulating coal power plants under Section 112 "would increase power rates, while potentially providing little or no public health benefit." 136 CONG. REC. 3493 (Mar. 6, 1990) (statement of Sen. Steve Symms). Indeed, EPA reported to Congress that regulating power plants under Section 112 "may result in several billion dollars of unnecessary costs with unknown environmental benefits." Letter from William K. Reilly, Adm'r, EPA, to Members of the Senate (Jan. 26, 1990), *reprinted in Clean Air Act Amendments (Part 3): Hearing Before the Subcomm. on Health and the Environment of the H. Comm. on Energy and Commerce,* 101st Cong. 771, 775, 791, 837 (1990); *see also Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearing Before the S. Comm. on Energy & Natural Resources*, 101st Cong. 241 (1990) (testimony of William G. Rosenberg, Assistant Adm'r, Air & Radiation, EPA).

Today, the concern going forward which is amply revealed by the technology review is no longer about scrubbing mandates to address acid gases. Rather, the issue now is that a huge portion of the coal power plant fleet is equipped with electrostatic precipitators while another portion of the fleet has baghouses.

As the foregoing demonstrates, the coal fleet is highly diverse and has been tailored to local circumstances. The result, unsurprisingly, is that there is also a diversity in the particulate matter controls that are installed on coal power plants.

In some circumstances, either the particular design of a particular power plant or local air quality concerns have resulted in the installation of baghouses. Elsewhere, electrostatic precipitators are installed. It is true that in general baghouses, which are usually only found on the largest coal power plants, can technically achieve greater relative degrees of control efficiency than electrostatic precipitators. But it is only a marginal improvement, and not so large that it would ever be rational let alone appropriate to require a power plant with an electrostatic precipitator to either install a baghouse or shut down. Moreover, in today's age of lower natural gas prices, the result of a mandate for greater particulate matter control efficiency as a surrogate for non-mercury metal control would result in many, if not most or all, power plants faced with that ultimatum to be shut down.

EPA's Technology Review shows the results of decades of appropriate, localized decision that have resulted in differences in control technology. The foregoing information shows why this has occurred and why there is no basis to presume that it makes sense to leave the door open for tighter non-mercury metal control mandates that would supplement these differences with a uniform national standard that can only achieved by installing baghouses.

IV. Alternative Control Strategies.

NBCG urges EPA to expressly consider the use of Section 112 for power plants in light of alternative control strategies and also repudiate the prior Administration's false assertion that the question posed by Section 112(n)(1) is whether to regulate power plant emissions "at all." 76 Fed. Reg. 24,976, 24,989 (May 3, 2011).

EPA should finally expressly compare the costs and downsides of using Section 112 for power plants to the available alternatives of relying on States to regulate or utilizing the flexible, cooperative-federalism approach offered by Section 111.

EPA's first regulatory alternative is to regulatory option is to leave regulation of power plant emissions of Section 112(b) substances to the States. Unlike other federal laws, Congress preserved State authority over this regulatory problem because Congress found that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a). Congress intended for the Clean Air Act to "promote reasonable . . . State . . . and local governmental actions . . . for pollution prevention." 42 U.S.C. § 7401(c). Congress therefore preserved the authority of States to regulate "emissions of air pollutants," 42 U.S.C. § 7416, and expressly instructed EPA to "encourage cooperative activities by the States and local governments for the prevention and control of air pollution; encourage the enactment of improved and, so far as practicable in the light of varying conditions and needs, uniform State and local laws relating to the prevention and control of air pollution; and encourage the making of agreements and compacts between States for the prevention and control of air pollution." 42 U.S.C. § 7402(a).

There is no reason to believe that States are unable or unwilling to regulate potentially harmful emissions of Section 112(b) substances from power plants. Indeed, each substance on the Section 112(b) list was already being regulated by a State because the list only includes substances that were on Table 4 of the 1986 National Air Toxics Information Clearinghouse Data Base Report on State and Local Agency Air Toxics Activities. *See* Committee Report on S. 1894, S. Rep. No. 100-231 at 223–25 (1987). And EPA is statutorily required to provide States the technical information and assistance that is required for them to regulate Section 112(b) substances because the Act requires EPA to "establish and maintain an air toxics clearinghouse and center to provide technical information and assistance to State and local agencies . . . on control technology, health and ecological risk assessment, risk analysis, ambient monitoring and modeling, and emissions measurement and monitoring." 42 U.S.C. § 7412(l)(3). With all of the information and assistance EPA is required to provide, States are adequately equipped to address emissions of Section 112(b) listed substances from power plants and they can do so in far more innovative, effective, and appropriate ways than EPA can using the Section 112 program. And if EPA does leave this responsibility to the States and finds certain emissions from power plants are insufficiently addressed, EPA has the authority to "call a conference concerning this potential air pollution problem to be held in or near one or more of the places where such discharge or discharges are occurring or will occur" and to "send such findings, together with recommendations concerning the measures which the Administrator finds reasonable and suitable to prevent such pollution, to the person or persons whose actions will result in the discharge or discharges involved; to air pollution agencies of the State or States and of the municipality or municipalities where such discharge or discharges will originate; and to the interstate air pollution control agency, if any, in the jurisdictional area of which any such municipality is located." 42 U.S.C. § 7403(k). There is no basis to conclude that States and local governments would fail to respond to such findings.

Importantly, State regulation of Section 112(b) substances cannot be rejected out of hand because Congress instructed EPA to rely on that method in regulating area sources of Section 112(b) substances. Section 112(k) requires that EPA to "encourage and support areawide strategies developed by State or local air pollution control agencies that are intended to reduce risks from emissions by area sources within a particular urban area" and that at least 10% of funding for this purpose must "support areawide strategies addressing hazardous air pollutants emitted by area sources" that are "innovative and effective." 42 U.S.C. § 7412(k)(4). Furthermore, Congress also instructed EPA to support programs focused on "high-risk point source review" because of the undoubted benefits of that approach as opposed to national uniform standards.

EPA has never found that State regulators aided and encouraged by EPA's air toxics clearinghouse and center and given specific findings pursuant to EPA's conference authority would be unable to achieve all appropriate and necessary emission reductions from power plants. Absent such a finding, EPA should

consider deferring to the States as a viable approach as an alternative control strategy to Section 112 as part of EPA's reassessment of the decision whether to impose stringent national standards for power plant emissions under that program.

Section 111 is another alternative control strategy that EPA must consider. In light of the enormous costs of using the Section 112 program to regulate power plants, the potentially inconsistent treatment of power plants under the Acid Rain Program and Section 112, and the significant state role in assuring a diverse fleet of local power generation facilities that meets local power demand cost-effectively, in 1990 Congress specifically amended the statute to ensure that Section 111 is an alternative program. In general, Section 111 can be used to address emissions that "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). This includes regulation of new sources under Section 111(b) and regulation of existing sources under Section 111(d) provided that EPA does not regulate those existing sources under the Section 112 program. 42 U.S.C. § 7411(b); 42 U.S.C. § 7411(d).

The existence of Section 111 as an alternative to regulate power plant emissions is no happenstance. In the very legislation enacting Section 112(n)(1), Congress included an amendment to provide for the regulation of existing sources under Section 111(d) if they were not regulated under Section 112. Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990). Prior to 1990, the Act prohibited Section 111(d) regulation of the limited set of emissions that were regulated under the initially very narrow Section 112 program. See 42 U.S.C. § 7411(d) (1988); 42 U.S.C. § 7412(a)(1) (1988) (pre-1990 limitation on Section 112 regulation to those emissions "which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness"); 42 U.S.C § 7412 (post-1990 expanded authority for Section 112 regulation of those emissions "which present, or may present, . . . a threat of adverse human health effects . . . or adverse environmental effects"). By removing the pollutant based restriction and inserting a restriction on regulating emissions from source categories that EPA is regulating under Section 112, the amendment assured Section 111 is an alternative control strategy for directly regulating any harmful emissions from power plants that could be regulated under Section 112.

Thus, as EPA explained in advocating for passage of Section 112(n)(1), Congress adopted an approach that would "allow[] the needed flexibility to identify and address the most significant toxic chemicals from utilities without mandating expensive controls that may be unnecessary." Letter from William K. Reilly, Adm'r, EPA, to Members of the Senate (Jan. 26, 1990), *reprinted in Clean Air Act Amendments (Part 3): Hearing Before the Subcomm. on Health and the Environment of the H. Comm. on Energy and Commerce,* 101st Cong. 771, 775, 791, 837 (1990). The heart of this approach is the amendments that specifically allowed EPA to use Section 111 as an alternative control strategy for power plants

in order to selectively target emissions of concern without imposing national uniform and cost-blind control mandates.

Thus, Congress intentionally gave EPA the choice whether to subject power plants to Section 112 or Section 111. Accordingly, part of the decision that Section 112(n)(1) requires EPA to make is whether the costs of using Section 112 for power plants are justified relative to the costs of using the Section 111 to regulate them. Indeed, EPA found in 2005 and 2006 the alternative of using the Section 111 program to regulate emissions from new and existing power plants is available, adequate to the task, and more cost-effective than using the Section 112 program, and based on this fact EPA at that time found the Section 112 program was inappropriate and unnecessary for regulating potentially harmful emissions from power plants.

The reasoned decision-making requirement and the provisions of Section 112 demand consideration of these alternative control strategies in assessing whether it is appropriate and necessary to use Section 112 to regulate power plants.

Congress directed EPA first, to study the public health hazards reasonably anticipated to occur as a result of hazardous air pollutant emissions by power plants "after imposition of the requirements of this chapter." 42 U.S.C. § 7412(n)(1). Second, EPA was required to present the results of the study, including a description of "alternative control strategies for emissions found to warrant regulation under" the Section 112 program. *Id.* Then Congress directed EPA to "regulate electric utility generating units under this section" if and only if the Administrator reasonably concludes that "such regulation is appropriate and necessary after considering the results of the study" which must include analysis of alternative control strategies for the emissions from power plants that could be regulated under the Section 112 program. *Id.*

Congress expressly directed in Section 112(n)(1) that EPA "develop and describe" the "alternative control strategies for emissions which may warrant regulation under this section," which are "emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section." 42 U.S.C. § 7412(n)(1). These alternative control strategies are other regulatory options, not "technologies which are available to control . . . emissions." *Id.* This is confirmed by statutory context. Section 112 repeatedly uses "strategy" and "strategies" to refer to regulatory options. 42 U.S.C. § 7412(k)(3)(A) ("prepare" "comprehensive strategy to control emissions"); 42 U.S.C. § 7412(k)(4) ("encourage and support areawide strategies developed by State … agencies"); 42 U.S.C. § 7412(n)(5) ("develop and implement" "control strategy for emissions"). Indeed, Section 112(n)(5) calls for EPA to consider a "control strategy" under which EPA and the States work together to regulate under Section 111, illustrating that "alternative control strategies" include using Section 111 and

similar options like relying on and encouraging States to use their authority that is preserved by Section 116.

The "directive" to "study" alternative control strategies "is a[n] . . . indication of the relevance" of considering regulatory alternatives to Section 112 in deciding whether it is appropriate and necessary to select that program for power plants. *Michigan v. EPA*, 135 S. Ct. at 2708. EPA has "insisted that the provisions concerning all three studies 'provide a framework for [EPA's] determination of whether to regulate" emissions from power plants under the Section 112 program. *Id.* By ignoring the alternative control strategies in assessing costs and the use of Section 112, the prior Administration once again engaged in impermissible "interpretive gerrymander[ing] in which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Id*.

Furthermore, the Unfunded Mandates Reform Act further demonstrates that EPA has until now unlawfully failed to consider alternative control strategies for regulating power plant emissions because that statute requires EPA to explain "why the least costly, most cost-effective or least burdensome method of achieving the objectives of the rule was not adopted." Every one of EPA's alternative control strategies is less costly, more cost-effective, and less burdensome than Section 112, yet EPA has never addressed why it rejected superior approaches, contrary to the requirements of the Mandates Act and the "the backdrop of . . . established administrative practice," which has been defined by the provisions of the Mandates Act. *Michigan v. EPA*, 135 S. Ct. at 2708.

The Regulatory Flexibility Act also demonstrates EPA should have long ago expressly considered alternative control strategies for regulating power plant emissions because it requires the agency to describe "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact . . . on small entities" and it requires you to prepare "a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." 5 U.S.C. § 602(c); 5 U.S.C. § 604(6).

The alternative control strategies of relying on states or using Section 111(d) to accomplish the stated objectives of reasonably regulating power plant emissions and they substantially reduce the economic impacts on small entities by providing for greater flexibility in addressing emissions from power plants owned and operated by small entities that EPA has found faced compliance costs greater than 1% of generation revenue. *Cf.* Utility MACT RIA at 7-15. Accordingly, the Regulatory Flexibility Act and "the backdrop of . . . established administrative practice," which has been defined by the provisions of that Act require you to consider alternatives to using Section 112 to regulate power plant emissions. *Michigan v. EPA*, 135 S. Ct. at 2707.

As a matter of reasoned decision-making, EPA must specifically consider how the availability of alternative control strategies has the potential to allow EPA to regulate some emissions without having to impose cost-blind mandates for arbitrary levels of control of other emissions where the costs of doing so are dramatically outweighed by the benefits.

In particular, EPA should address the fact that the Section 112 standards that EPA imposed on power plants are really three distinct control mandates that result in distinct sets of costs and benefits.

First, EPA found that the controls required to meet the standards for mercury would cost $3 billion per year, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards at 3-10 (Dec. 2011), EPA-HQ-OAR-2009-0234-20131, to achieve only 20 tons of emission reductions, *id*. at Tbl. 3-4, and yield $4 to $6 million in quantified benefits, *id*. at 4-67.

Second, EPA found that the controls required to meet the standards for non-mercury metals would cost at least $1 to $2 billion per year to achieve an unspecified amount of emission reductions and zero quantified benefits. UARG Comments, Ex. 1, *The American Energy Initiative, Part 15: What EPA's Utility MACT Rule Will Cost U.S. Consumers: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 112th Cong. (2012) (statement of Anne E. Smith, Ph.D., at 6, Tbl. 1), EPA-HQ-OAR-2009-0234-20557 (incorporated herein by reference).

Third, EPA found that the controls required to meet the standards for acid gases (primarily scrubber installations and scrubber upgrades) would cost $5 billion per year, *id.* at 6, Tbl. 1, to achieve 39.8 thousand tons of hydrogen chloride emission reductions, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards at 3-10, Tbl. 3-4 (Dec. 2011), EPA-HQ-OAR-2009-0234-20131, an unspecified amount of other acid gas emission reductions, and yield zero quantified benefits.

The cost-benefit imbalance that results from regulating power plants under Section 112 is especially evident when these three control mandates are separately considered, and this bolsters the importance of considering flexible alternative control strategies that would result in more targeted and cost-conscious regulation by EPA and the States.

For example, if the benefits of regulating mercury outweigh the costs, then EPA has alternatives to ensure that mercury is appropriately regulated without forcing the agency to also impose acid gas and non-mercury metal control mandates that are not justified by their costs.

Under these circumstances, failing to consider the alternatives of deferring to State regulation pursuant to Section 116 or utilizing the Section 111 program would constitute an "artificial narrowing of option[s]" "antithetical to reasoned decisionmaking." *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 817 (D.C. Cir. 1983) (internal quotation marks and citation omitted).

V. EPA Must Consider that It Cannot Regulate Coal Power Plants under Section 111(d) Unless EPA First Ensures That Coal Power Plants Are Not Regulated under Section 112 Because Section 111(d) Is Superior to Section 112 in Every Conceivable Way.

Sources cannot be regulated under both Section 112 and Section 111(d). Full stop. *See* 42 U.S.C. 7411(d) (excluding regulation of emissions that are "emitted from a source category which is not regulated under section 7412").

As the Solicitor General acknowledged in the briefing that resulted in the unprecedented stay of the Clean Power Plan: "If EPA's decision to regulate power plants under Section 7412 ha[s] the dramatic legal effect that applicants attribute to it — i.e., if that decision foreclosed the agency from subsequently regulating power-plant emissions of non-hazardous pollutants under Section 7411(d) — EPA would [be] expected to take that consequence into account in determining whether regulation under Section 7412 was 'appropriate and necessary.'" Mem. Fed. Res. at 28, *Murray Energy v. EPA*, 136 S. Ct. 999 (2016) (No. 15A778). Now that EPA is reassessing the appropriateness of using Section 112 to regulate coal power plants, EPA should "take . . . into account th[e] consequence" that doing so renders the more flexible Section 111(d) option legally unavailable for regulating coal power plants. EPA should consider this legal issue and regulatory consequence as a part of reconsideration of the supplemental finding.

The straightforward limitation on EPA's power that forbids regulation of sources under both Section 112 and Section 111(d) should never have been doubted. The Supreme Court's unprecedented and extraordinary Clean Power Plan stay exposed the ridiculous folly rooted in a mistaken identification of an unofficial, error-riddled document in a legislative history print as a copy of the United States Statutes at Large. Congress meant precisely what Congress said in Section 108(g) of the 1990 Amendments. Congress's will cannot be subverted by pointing at the mere inclusion of an obvious and superfluous scriveners error in Section 302(a) held over without any amendment or mention from earlier bills which merely purports to delete a handful of characters from a cross reference that Congress elsewhere struck entirely from the law. Nothing but disagreement with Congress's enacted policy supports any argument to the contrary. The farcical saga of alleged uncertainty, not merely of the *meaning* of the law, but of what the law *says*, should be buried in history along with the Clean Power Plan.

This comment incorporates herein by reference the following attached material related to the Section 112 exclusion and Section 112(n)(1) of the Clean Air Act: Coal Industry Application for Immediate Stay of Final Agency Action Pending Judicial Review, *Murray Energy Corp. v. EPA*, 136 S. Ct. 999 (2016) (No. 15A778); Coal Industry Reply in Support of Application for Immediate Stay of Final Agency Action Pending Judicial Review, *Murray Energy Corp. v. EPA*, 136 S. Ct. 999 (2016) (No. 15A778); Brief of Murray Energy Corp. as Amicus Curiae in Support of Petition for Writ of Certiorari, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (No. 14-46); Brief of Murray Energy Corp. as Amicus Curiae in Support of Petitioners, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (No. 14-46); Final Opening Brief of Petitioner, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015) (No. 14-1112); Final Reply Brief of Petitioner, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015) (No. 14-1112); Letter from Murray Energy Corp. to EPA Admin. Gina McCarthy Regarding Supplemental Finding (Jan. 15, 2016); Reply Brief of State and Industry Petitioners, *Murray Energy v. EPA*, No. 16-1127 (D.C. Cir. Mar. 24, 2017) (see all attached). These materials amply refute EPA's legal authority to subject the power plant fleet to both the Section 112 and Section 111(d) programs.

The foreclosure of the use of Section 111(d) as a result of using Section 112 is an important aspect of the problem of whether to subject power plants to Section 112 and the obligation of reasoned decision-making requires that EPA consider the issue in this proceeding.

Foreclosing the use of Section 111(d) is a negative consequence that weighs against finding it is appropriate and necessary to subject power plants to the Section 112 program. Section 111(d) is far more flexible than Section 112 while still offering EPA ample authority to address problems that may be associated with emissions from power plants without imposing costs in excess of benefits.

The Supreme Court's decision in *Michigan v. EPA* demonstrates Section 111(d) guarantees that States have the discretion to adjust the stringency of standards for their own sources based on "other factors" which must include cost and localized circumstances under any reasonable reading of the statute. EPA "*shall permit* the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." 42 U.S.C. § 7411(d)(1)(B) (emphasis added). The plain language of (d)(1)(B) makes clear that EPA has no discretion—it must let the States consider remaining useful life and "other factors" in setting a standard for a particular source. Furthermore, a straightforward application of the *Michigan v. EPA* decision demonstrates that the only reasonable interpretation of "other factors" is that it includes consideration of cost and other localized factors. In that case, the Supreme Court determined the consideration of whether regulating power plants under Section 112 was "appropriate" could only reasonably interpreted to require assessment of cost, which includes all of the downsides of regulation. *Michigan v. EPA*, 135 S. Ct. 2699 (2015). EPA has given effect to this requirement by

proposing factors that "give meaning" to Section 111(d)(1)(B), such as "[u]nreasonable cost of control," "physical impossibility," and "[o]ther factors specific to the facility." 83 Fed. Reg. 44,746, 44,766, 44,773 (Aug. 31, 2018); *see* 40 C.F.R. 60.24(f). As this provision recognizes, under Section 111(d), States must be permitted to engage in their own tailored analyses of the costs of control and other localized concerns as they exercise their discretion to adjust the standards when applying them to their own set of sources. These analyses will flexibly consider plant age, location, or basic design process, and other factors in order to minimize the downsides of regulation and avoid imposing unreasonable costs and other negative consequences that are not justified.

Thus, Section 111(d) has a built-in tailoring mechanism that ensures that it will not result in excessive negative consequences that are not justified by the relevant benefits sought by the regulatory program. The Section 111(d) program also leverages the role of the States to consider the unique circumstances associated fuel availability, geographic factors, and local power needs and ensure that regulation is crafted considering these important factors, rather than through a one-size-fits-all inflexible federal program.

In particular, Section 111(d) even affords States the ability to impose regulations on a plant-by-plant basis, whereas Section 112 inflexibly requires EPA to regulate "a category or subcategory" which can only "distinguish among classes, types, and sizes of sources" without regard to specific situations that call for a more nuanced approach.

The Section 111(d) alternative also entirely avoids subjecting power plants to a second round of regulation under the residual risk and technology review provisions of Section 112, while still enabling EPA as appropriate to update and revise regulations as appropriate going forward.

Indeed, there is not one way that has been identified by any party to the decades of wrangling over the issue at the heart of this proceeding in which Section 112 is superior to Section 111(d). In every way, Section 111(d) is far better suited to addressing the diverse array of factors relevant to regulating power plants. Thus, Congress asked EPA to answer a question that has but one reasonable answer, that it is not necessary and appropriate to subject power plants to Section 112. Importantly, however, there was likely uncertainty at the time over precisely how Section 112's regime would work in practice and how that would apply to power plants. But as the D.C. Circuit and EPA have interpreted the program and as it has been administered, Section 112 is an unduly blunt instrument that does not even ensure that the standards that result are cost effective and achievable, despite the fact that Congress provided the Administrator must set the standards "taking into consideration the cost of achieving [the] emission reduction[s]" and "determine[]" that they are "achievable." 42 U.S.C. § 7412(d)(2). Whatever the wisdom of the cost-blind regime that EPA has administered over the past three decades, it is neigh impossible to justify its extension to sources that Congress provided cannot

be regulated in this manner unless it is "appropriate and necessary." 42 U.S.C. § 7412(n)(1).

VI. Title IV and Co-Benefits.

In addressing the potential consideration of co-benefits, EPA should specifically address the fact that the clear majority of co-benefits that EPA has previously projected were specifically the result of sulfur dioxide emissions from the very same sources that Congress itself specifically regulated in the Title IV program in painstaking detail. Whatever the appropriateness of considering co-benefits in general, in this situation the consideration of sulfur dioxide emission reductions beyond the amounts that Congress specifically agreed on in crafting the Title IV program contravenes Congress's intent that EPA must consider Section 112 regulation "after imposition of the requirements" that Congress enacted elsewhere in the Clean Air Act. 42 U.S.C. § 7412(n)(1).

* * *

NBCG appreciates your consideration of these comments on EPA's proposal.

Respectfully,

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ATTACHED MATERIAL CITED AND INCORPORATED BY REFERENCE

Coal Industry Application for Immediate Stay of Final Agency Action Pending Judicial Review, *Murray Energy Corp. v. EPA*, 136 S. Ct. 999 (2016) (No. 15A778)

Coal Industry Reply in Support of Application for Immediate Stay of Final Agency Action Pending Judicial Review, *Murray Energy Corp. v. EPA*, 136 S. Ct. 999 (2016) (No. 15A778)

Brief of Murray Energy Corp. as Amicus Curiae in Support of Petition for Writ of Certiorari, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (No. 14-46)

Brief of Murray Energy Corp. as Amicus Curiae in Support of Petitioners, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (No. 14-46)

Final Opening Brief of Petitioner, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015) (No. 14-1112)

Final Reply Brief of Petitioner, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015) (No. 14-1112)

Letter from Murray Energy Corp. to Admin. Gina McCarthy Regarding Supplemental Finding (Jan. 15, 2016)

Opening Brief of State and Industry Petitioners, *Murray Energy v. EPA*, No. 16-1127 (D.C. Cir. Mar. 24, 2017)

Reply Brief of State and Industry Petitioners, *Murray Energy v. EPA*, No. 16-1127 (D.C. Cir. Mar. 24, 2017)

No. ___-_____

IN THE

Supreme Court of the United States

MURRAY ENERGY CORPORATION,
PEABODY ENERGY CORPORATION, ET AL.,
Applicants,

v.

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

COAL INDUSTRY APPLICATION FOR IMMEDIATE STAY OF
FINAL AGENCY ACTION PENDING JUDICIAL REVIEW

DIRECTED TO THE HONORABLE JOHN G. ROBERTS, JR.,
CHIEF JUSTICE OF THE UNITED STATES AND
CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants provide the following disclosure statements:

Murray Energy Corporation has no parent corporation and no publicly held corporation holds 10% or more of its stock. Murray Energy is the largest privately-held coal company and largest underground coal mine operator in the United States.

Peabody Energy Corporation has no parent corporation and no publicly held corporation owns more than 10% of Peabody's outstanding shares. Peabody is the world's largest public sector coal company, the largest coal producer in the United States, and a publicly-traded company on the New York Stock Exchange ("NYSE") under the symbol "BTU."

The National Mining Association (NMA) is a non-profit, incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public, although NMA's individual members have done so.

The American Coalition for Clean Coal Electricity (ACCCE) is a partnership of companies involved in the production of electricity from coal. ACCCE has no parent corporation.

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Applicants Murray Energy Corporation, Peabody Energy Corporation, National Mining Association, and American Coalition for Clean Coal Electricity ("Coal Industry Applicants") respectfully request an immediate stay of the final rule of the United States Environmental Protection Agency ("EPA") entitled Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units. 40 C.F.R. Part 60, Subpart UUUU; 80 Fed. Reg. 64,662 (Oct. 23, 2015).[1]

The Coal Industry Applicants filed timely Petitions for Review of EPA's so-called "Clean Power Plan" (hereinafter "Power Plan") on the same day as publication of EPA's final rule in the Federal Register. Applicants Murray Energy Corporation, Peabody Energy Corporation and National Mining Association and others—including 27 States, multiple labor unions, and over one hundred other businesses and trade associations—also sought an immediate stay of the Power Plan from the United States Court of Appeals for the District of Columbia Circuit, again on the same day as publication. Those motions were denied on January 21, 2016, and EPA has refused to grant an administrative stay.

The Coal Industry Applicants support and incorporate by reference the Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review filed on January 26, 2016 (No. 15-

[1] A copy of EPA's Power Plan is included in Appendix B of the States' Stay Application, at App. 39B.

A-773) ("States' Stay Application").[2] The Coal Industry submits this separate Application given its unique position: the Power Plan's purpose is to dramatically lower the use of coal for electric power generation. When proposal of the Plan was announced, Secretary of State John Kerry described its expected impact on coal-fueled power plants: "We're going to take a bunch of them out of commission."[3] As explained in Section II below, EPA's own modeling shows that the Power Plan will cause the closure of 53 coal-fired electric generating units in 2016 and another three in 2018. The evidence shows that EPA's projection is a substantial underestimate, but in any event the near-term shutdowns represent tens of millions of tons of lost coal production, thousands of lost jobs in the mining industry, and rippling unemployment effects for those dependent on the coal industry. The number will grow as the Power Plan moves towards full implementation.

Awaiting the completion of judicial review, even on an expedited basis, is not an option. The coal industry is suffering irreparable harm now, as the Power Plan forces utilities to make investment decisions away from coal today and States begin the restructuring of the power sector within their respective borders today. Irreparable injury will occur long before the panel decision in the Court of Appeals

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[2] The Coal Industry Applicants also support the Application of Utility and Allied Parties for Immediate Stay of Final Agency Action Pending Appellate Review and the Application of Business Associations for Immediate Stay of Final Agency Action Pending Appellate Review, which they understand have been or soon will be filed with the Court.

[3] See Coral Davenport, Strange Climate Event: Warmth Toward U.S., N.Y. TIMES (Dec. 11, 2014).

(let alone possible en banc review and ultimate review by this Court). The time to act is now.

INTRODUCTION

The Power Plan comes on the heels of decisions in each of the last two Terms reining in similar EPA attempts to aggrandize its authority under the Clean Air Act by adopting ambitious policy-driven regulations without a clear statutory basis. In Utility Air Reg. Group v. EPA, 134 S. Ct. 2427 (2014) ("UARG"), this Court rejected a major part of EPA's first set of greenhouse gas regulations, concluding that the agency rule "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." Id. at 2444 (quotation omitted). The Court held that permitting EPA to exercise such authority "would deal a severe blow to the Constitution's separation of powers." Id. at 2446. Last Term, the Court rejected another set of aggressive EPA power sector regulations, finding that "EPA strayed far beyond" the bounds of reasonable interpretation. Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015).

Both decisions highlight the need for a stay, and Michigan underscores the irreparable harm that will befall industry in its absence. On the eve of that decision, EPA Administrator Gina McCarthy boasted in a press interview that the Court's ruling would not matter because "[m]ost of the [regulated facilities] are already in compliance, [and] investments have been made."[4] EPA repeated that view after the

[4] Timothy Cama and Lydia Wheeler, Supreme Court Overturns Landmark EPA Air Pollution Rule, THE HILL, June 29, 2015.

decision.[5] By the time this Court rejected the legal basis of the EPA rule in Michigan, about one-sixth of all coal-fired electric generation either had retired or (for 2016, when final compliance is required) had announced retirement because of the extraordinary high cost of complying with the rule. Schwartz Decl. ¶¶ 44-45; EVA Report 74-83 (attached to Schwartz Decl.).[6] The rest of the fleet spent billions of dollars on pollution controls, with consumers ultimately bearing the cost in the form of higher electric rates. Id. This Court's decision finding that EPA had improperly adopted the rule was a practical nullity.

EPA is using the same playbook with the Power Plan. In the words of the EPA Administrator, the Plan seeks to effect an "historic"[7] and comprehensive "transformation"[8] of the electric utility industry. The Plan is based on so-called "building blocks" that will severely reduce coal generation and instead favor electricity produced from natural gas and renewable resources. 80 Fed. Reg. at

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[5] Janet McCabe, EPA Acting Assistant Administrator for the Office of Air and Radiation, stated that Michigan came too late to have meaningful effect because "many plants ha[d] already installed controls and technologies" demanded by the regulation and "the majority of power plants [were] already in compliance or well on their way to compliance." EPA Connect, Official Blog of the EPA Leadership (June 30, 2015). An EPA spokeswoman commented: "EPA is disappointed that the Court did not uphold the rule, but this rule was issued more than three years ago, investments have been made and most plants are already well on their way to compliance." Timothy Cama and Lydia Wheeler, Supreme Court Overturns Landmark EPA Air Pollution Rule, THE HILL, June 29, 2015.

[6] All supporting declarations from the proceeding below that are referenced in this Application are reproduced in the Appendix.

[7] See nine of ten EPA Fact Sheets describing the Power Plan, available at http://www2.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants.

[8] EPA Chief Lays Out Bold Vision for Power Plant Greenhouse Gas Rule, SNL RENEWABLE ENERGY WEEKLY, Feb. 14, 2014.

64,667. The Power Plan will more than halve coal generation in the United States, reducing it far below its lowest level since the government began systematically tracking energy developments. EVA Report 28. It will result in more shuttered coal mines, tens of thousands of additional layoffs, and the economic devastation of the States and rural, economically depressed communities that rely on coal. Schwartz Decl. ¶ 4; EVA Report 69-72; Schwartz Reply Decl. ¶ 18.

These impacts will become locked in unless the Court issues a stay. Decisions to implement the Power Plan's comprehensive transformation of the electric power system are already occurring, with the Administrator declaring that the rule is now in the process of being "bak[ed] into the system."[9] As an unrebutted declaration in the court below explained: "Once utility decisions are made, they will be locked in. They will not be undone no matter how the Court rules months or years from now." Galli Decl. ¶ 21. A vast amount of new infrastructure development is required: a tripling of renewable generation; long-line, high-voltage electric transmission lines to bring this generation from the windy areas of the country to population centers; and a major expansion of the interstate natural gas pipeline system to accommodate large increases in natural gas-fired generation. Schwartz Decl. ¶¶ 12-15; EVA Report 30-47. The planning, design, engineering, siting, permitting, financing, and construction of this infrastructure require long lead times, are massively expensive, and will not be undone, even if the Power Plan is later vacated. Id.

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[9] Interview of EPA Administrator Gina McCarthy (Dec. 7, 2015), available at https://archive.org/details/KQED_20151207_235900_BBC_World_News_America#start/1020/end/1080.

Far from clearly authorizing this extraordinary assertion of authority, the Clean Air Act plainly bars it. EPA has premised the Power Plan on a little-used statutory provision—Section 111(d) of the Act—that affirmatively prohibits what EPA seeks to do. Section 111(d) expressly applies only to a pollutant "which is not . . . emitted from a source category which is regulated under section [112] of this title." Coal-fueled power plants are a "source category" regulated under Section 112.[10] Thus, the Power Plan is directly contrary to this Court's description of Section 111(d) in American Electric Power v. Connecticut, 131 S. Ct. 2527, 2537 n.7 (2011) ("AEP"). In addition, the Power Plan is contrary to a long-standing and bipartisan understanding of Section 111(d) that was shared by the Clinton Administration in 1995 and the George W. Bush Administration in 2005. As recently as 2014, EPA acknowledged that "a literal" application of section 111(d) would likely preclude its proposal and that, "[a]s presented in the U.S. Code," the statute "appears by its terms to preclude" the Power Plan.[11]

Further, Section 111(d) limits EPA to requiring "standards of performance" for "any existing source" based on "the best system of emission reduction" that will "assure continuous emission reduction" from that type of source. Until now, Section 111(d) rules have involved technological means of controlling emissions when a source is operating. The Power Plan is different. It shuts down coal-fired

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[10] See Michigan, 135 S. Ct. at 2705.

[11] LEGAL MEMORANDUM FOR PROPOSED CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING ELECTRIC UTILITY GENERATING UNITS at 22, EPA-HQ-OAR-2013-0602-0419 ("PROPOSED RULE LEGAL MEMO").

power plants and compels the construction and operation of EPA-favored generating facilities, as well as a vast new transmission system, to replace the electricity previously generated from coal. By regulatory fiat, the Power Plan will take a large amount of business away from coal-fired plants and award it to sources favored by EPA. According to EPA, it may regulate generation of electricity far beyond the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), rendering moot the limits on FERC authority noted in FERC v. Electrical Power Supply Ass'n., No. 14-840 (Jan. 25, 2016).

EPA appeals to the deference under Chevron U.S.A., Inc. v. Nat'l Resources Defense Council, 467 U.S. 837, 844 (1984). Section 111(d) is not ambiguous, however, and so no deference is due. Moreover, the Court's recent decision in King v. Burwell, 135 S. Ct. 2480 (2015), makes clear that Chevron does not apply here. "This is hardly an ordinary case," FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120, 159 (2000), and the Power Plan is not an example of interstitial rulemaking. Rather, the statutory question is one of "deep 'economic and political significance,'" such that, "had Congress wished to assign that question to an agency, it surely would have done so expressly." King, 135 S. Ct. at 2489 (quoting UARG, 134 S. Ct. at 2444). In addition, it is "especially unlikely" that Congress would have delegated the authority in question to EPA, an agency with "no expertise" in regulating electricity production and transmission. Id. (citing Gonzales v. Oregon, 546 U.S. 243, 266–67 (2006)). If Congress had intended to confer on EPA the authority to restructure the domestic power sector, it would have said so clearly. Congress does not "hide elephants in mouseholes." Whitman v. American Trucking

Assn's, Inc., 531 U.S. 457, 468 (2001). If ever there were an elephant in a mousehole, the Power Plan is it.

The changes wrought by the Power Plan are unprecedented in their magnitude and resemble those arising from landmark legislation rather than from agency rulemaking. Tellingly, EPA expects that the Power Plan will be implemented through the adoption of a cap-and-trade system similar to the program that the Administration proposed but that Congress rejected in 2009. 80 Fed. Reg. at 64,665. Under EPA's view of Section 111(d), there would have been no need for new legislation seven years ago. EPA is trying to adopt its Power Plan in the face of congressional rejection of cap-and-trade.[12] But Congress rejected such legislation partly out of concern for disproportionate harm to coal-reliant States.[13] Now, EPA is forcing those States (and their consumers, communities, businesses, and utilities) to bear the burden for a stated objective that is global in nature. EPA seeks to pit different parts of the country against one another and to foist potentially ruinous burdens on coal-reliant communities. Balancing competing interests of such magnitude is the job of Congress, not an unelected agency.

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[12] Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.").

[13] See, e.g., Bradford Plumer, Analyzing the House Vote on Waxman Markey, NEW REPUBLIC June 29, 2009 (quoting Sen. Claire McCaskill as expressing concern about "unfairly punish[ing] businesses and families in coal dependent states like Missouri").

To support its newfound authority, EPA advances an astonishing theory that the U.S. Code has contained the wrong "version" of Section 111(d) for the past 25 years. According to EPA, Congress unwittingly enacted two "versions" of Section 111(d) in 1990, one in a set of substantive amendments and the other in a subsequent set of clerical amendments, and the Office of the Law Revision Counsel mistakenly codified only one. See 80 Fed. Reg. at 64,711-15. EPA's extravagant theory flatly misreads the legislative record. But even if there were two "versions" of Section 111(d) (and there are not), EPA would lack the authority to decide which "version" to make legally operative. Chevron does not allow an agency to toss two "versions" of a statute into the air and choose which one to catch.

Additionally, the Power Plan violates the Tenth Amendment and principles of federalism by forcing States to implement EPA's Power Plan—to enact new state legislation, promulgate new state rules, and create entirely new state regulatory structures to carry out the federal mandate. If a State refuses to submit a "State Plan" as part of EPA's effort to reengineer the energy sector, EPA will impose a "Federal Plan." That plan will require a significant curtailment of coal-fueled generation and, as a consequence, it will force States to take a number of legislative and regulatory actions to ensure that the power needs of the public are met. The State government will have no choice but to adopt new or strengthened laws requiring the development of renewable resources, and it will have to make power plant siting decisions, issue permits, grant certificates of public convenience and necessity, and make innumerable other decisions to ensure the power stays on. A State cannot simply remain passive in the face of the Power Plan. Otherwise, it will

face the very real danger that EPA's shutdown of coal power plants will lead to brownouts and blackouts for its consumers and businesses, unless new generation is built and new transmission lines are constructed. Under any scenario, the States are dragooned as foot soldiers in EPA's revolution, whether they like it or not.

A stay is needed to preserve the status quo, afford meaningful judicial review, and ensure that the Michigan experience is not repeated on a much grander scale. Any suggestion that an agency order of the Power Plan's magnitude should be implemented without careful judicial scrutiny is inconsistent with the basic principles on which our legal system is founded. "In a nation that values due process, not to mention private property, such treatment is unthinkable." Sackett v. EPA, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring). Such an outcome cannot be abided in a polity that prizes an independent judiciary with the power to say "what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

INTERESTS OF THE APPLICANTS

Coal Industry Applicants are Murray Energy Corporation and Peabody Energy Corporation, two of the nation's largest coal companies; the National Mining Association, the coal industry's national trade association; and the American Coalition for Clean Coal Electricity, an association of coal producers, coal-hauling railroads, utilities that use coal for electric generation, and associated companies.

OPINION BELOW

On January 21, 2016, the D.C. Circuit issued an Order denying the motions to stay the Power Plan.[14]

JURISDICTION

The D.C. Circuit's judgment with respect to the Power Plan will be subject to review by this Court under 28 U.S.C. § 1254(1), and the Court therefore has jurisdiction to entertain and grant a request for a stay pending review under 28 U.S.C. § 2101(f). The Court has authority to issue a stay pursuant to 5 U.S.C. § 705, as well as under 28 U.S.C. § 1651(a) and U.S. Supreme Court Rule 23. See, e.g., Nken v. Mukasey, 555 U.S. 1042 (2008) (granting application to stay agency action while petition for review was pending before the Fourth Circuit after stay was denied by that court).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The pertinent constitutional, statutory and regulatory provisions are provided in Appendix B to the States' Stay Application.

STATEMENT OF THE CASE

On June 18, 2014, EPA issued its proposed rule. 79 Fed. Reg. 34,830 (June 18, 2014). After announcing to great ceremony the signing of the final rule in early August 2015, EPA published the final Power Plan in the Federal Register on October 23, 2015. 80 Fed. Reg. 64,662 (Oct. 23, 2015). The National Mining Association, the American Coalition for Clean Coal Energy, and Murray Energy

[14] Order, State of West Virginia v. EPA, No. 15-1363 (D.C. Cir. Jan. 21, 2016) (included in the Appendix to this Application).

Corporation filed petitions for review on that same day. See West Virginia v. EPA, Case No. 15-1363, et al. (D.C. Cir.). Four motions to stay the Power Plan were filed that day—including the Coal Industry Motion to Stay (filed jointly by Applicants National Mining Association, the American Coalition for Clean Coal Electricity, and Murray Energy Corporation). In all, 39 petitions for review have been filed by 157 petitioners, as well as ten motions to stay the Power Plan. On January 21, 2016, the D.C. Circuit denied the motions to stay and issued an expedited briefing schedule with oral argument set for June 2, 2016.

REASONS FOR GRANTING THE STAY

A stay may issue where an applicant demonstrates: (1) a reasonable probability of prevailing on the merits—i.e., a reasonable chance that four Justices will vote to grant certiorari and that, if the case is taken, a majority of the Court will vote to reverse; (2) a likelihood of irreparable harm; and (3) that the balance of the equities and the public interest militate in favor of a stay. Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, Circuit Justice). All three requirements are met.

I. Applicants Have Demonstrated a Reasonable Probability of Prevailing on the Merits.

In light of this Court's decisions in UARG, Michigan, AEP, and King, as well as the serious statutory and constitutional questions raised by EPA's Power Plan, there is more than a reasonable probability that four Justices will vote to grant certiorari and that a majority of the Court will vote to reverse.

A. The Power Plan Violates an Express Statutory Prohibition.

The Power Plan is an assertion of lawmaking power, not interstitial gap-filling. EPA's breathtaking exercise of power rests on its novel reinterpretation of a narrow provision of the Clean Air Act, Section 111(d), whose plain meaning prohibits rather than authorizes the Power Plan. The relevant portion of Section 111(d)—known as the "Section 112 Exclusion"—provides that Section 111(d) applies only to a pollutant "which is not . . . emitted from a source category which is regulated under section [112] of this title." 42 U.S.C. § 7411(d). Since coal power plants are "a source category" regulated under Section 112, the Clean Air Act expressly prohibits their regulation under Section 111(d).

1. The Clean Air Act Unambiguously Prohibits Using Section 111(d) to Regulate Emissions from Source Categories that Are Already Regulated under Section 112.

In AEP, a case involving regulation of carbon dioxide emissions, this Court correctly understood the plain meaning of the Section 112 Exclusion: "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." 131 S. Ct. 2527, 2537 n.7 (2011) (emphases added).

The Section 112 Exclusion dates to the 1990 Clean Air Act amendments, which revised Section 112 by replacing its prior pollution-specific focus (see 42 U.S.C. § 7412 (1988)) with an expansive new "source category" structure and aligned Section 111(d) with this new source-category approach. See Pub. L. 101-549, § 108, 104 Stat. 2,399, 2,467 (1990). The Section 112 Exclusion provides that existing sources may be subjected to national standards under Section 112 or state-

by-state standards under Section 111(d), but they may not simultaneously be subjected to both. This safeguard protects against inconsistent, unaffordable, and excessive regulation of existing sources. EPA officials supported this provision, testifying before Congress in 1990 that imposing emission standards on existing sources seriatim, even for different pollutants, would be "ridiculous."[15]

With respect to power plants in particular, Congress directed EPA to subject them to a Section 112 national emission standard only if "appropriate and necessary," 42 U.S.C. § 7412(n)(1), giving EPA the choice of whether to proceed with a Section 112 national standard or to proceed by mandating state-by-state standards for power plants under the Section 111(d) program. See Michigan, 135 S. Ct. at 2705-06. EPA chose to use the Section 112 national emission standard program for coal-fueled power plants and is now precluded from using Section 111(d) to impose the Power Plan.

Since the 1990 amendments, EPA has used Section 111(d) only twice, and both instances support Applicants' interpretation of the Section 112 Exclusion. In 1995, in adopting a rule involving existing municipal landfills (which were not at the time being regulated under Section 112), the Clinton Administration EPA noted that Section 111(d) does not permit standards for emissions "from a source category

[15] Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearings Before the S. Comm. on Energy & Natural Res., 101st Cong. 603 (1990).

that is actually being regulated under section 112"[16]—i.e., precisely the circumstance here.

Ten years later, the Bush Administration EPA agreed, recognizing that "a literal reading" of the text of Section 111(d) found in the United States Code provides that "EPA cannot" issue a mandate "under CAA section 111(d) for 'any pollutant' . . . that is emitted from a particular source category regulated under section 112," so "if a source category X is 'a source category' regulated under section 112, EPA could not regulate" any emissions "from that source category under section 111(d)." 70 Fed. Reg. 15,994, 16,031 (March 29, 2005).[17]

EPA acknowledges that its interpretation of Section 111(d) in support of the final Power Plan is contrary to its prior interpretations in 1995 and 2005. 80 Fed. Reg. at 64,714. EPA's new interpretation also contradicts the agency's own 2014 acknowledgement in connection with the proposed rule that "[a]s presented in the U.S. Code, the Section 112 Exclusion appears by its terms to preclude from Section 111(d) any pollutant if it is emitted from a source category that is regulated under

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[16] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AIR EMISSIONS FROM MUNICIPAL SOLID WASTE LANDFILLS – BACKGROUND INFORMATION FOR FINAL STANDARDS AND GUIDELINES 1-5 to 1-6 (1995) ("1995 BIFSG").

[17] In the 2005 rule, EPA had "listed" coal- and oil-fired power plants for regulation under Section 112 but subsequently decided to regulate those plants under Section 111(d). Recognizing that it could not simultaneously regulate these plants under both programs, EPA sought to "delist" those plants under Section 112. The D.C. Circuit found the delisting improper and therefore held that the Section 111(d) standard was invalid in light of the Section 112 Exclusion. See New Jersey v. EPA, 517 F. 3d 574, 583 (D.C. Cir. 2008) ("under EPA's own interpretation of [section 111(d)], it cannot be used to regulate sources listed under section 112").

Section 112."[18] EPA's view of the plain meaning of this language in Section 111(d) was correct in 1995, 2005, and 2014, and EPA is wrong today. The language plainly prohibits rather than authorizes the Power Plan.

2. EPA's Theory of Competing "Versions" Distorts the Legislative Record and Triggers a Separation of Powers Violation.

EPA has attempted to cast aside the text of the Clean Air Act based upon the assertions that (i) Congress enacted two "versions" of Section 111(d) as part of the 1990 Clean Air Amendments, one in a substantive "House" amendment and the other in a clerical "Senate" amendment; (ii) the Law Revision Counsel mistakenly codified the substantive one; and (iii) the United States Code has been wrong for 25 years. 80 Fed. Reg. at 64,711-15. Such an ambitious argument cannot help EPA. The decision of which "version" of a statute to make legally operative is a quintessential exercise of lawmaking power, not agency authority. See Whitman, 531 U.S. at 473 ("The very choice of which portion of the power to exercise . . . would itself be an exercise of the forbidden legislative authority."). EPA's theory would entail a classic violation of the separation of powers. Even under EPA's mistaken view that there are two "versions" of Section 111(d), at best its job would be to reconcile them by applying both prohibitions to the extent possible, see Brown & Williamson, 529 U.S. at 133, not by throwing the substantive amendment into the trashcan, as the Power Plan effectively does. Indeed, one could easily harmonize the two "versions" by applying both prohibitions simultaneously: EPA would be prohibited from using Section 111(d) both for source categories regulated under Section 112 and for pollutants

[18] PROPOSED RULE LEGAL MEMO at 22.

regulated under Section 112. This reconciliation would still mean that the Power Plan must fall because coal-fueled power plants are a "source category" regulated under Section 112 and are therefore excluded entirely from regulation under Section 111(d).

In any event, EPA's innovative theory misreads the legislative record. The substantive amendment is located in § 108 of Public Law 101-549 (the 1990 amendments), as part of a substantive provision occupying five pages of the Statutes at Large (Pub. L. 101–549, § 302(a), 104 Stat. 2,399, 2,465-69 (1990)), which rewrote Section 111 to mirror the new source-category focus and structure of Section 112. The clerical amendment was placed some 107 pages later, in a grab-bag section of eight small conforming changes to six different parts of the Clean Air Act. The clerical amendment provided, in its entirety:

> SEC. 302. CONFORMING AMENDMENTS.
>
> (a) Section 111(d)(1) of the Clean Air Act is amended by striking "112(b)(1)(A)" and inserting in lieu thereof "112(b)".

Pub. L. 101–549, § 302(a), 104 Stat. 2,399, 2,574 (1990). This clerical amendment simply deleted six characters ("(1)(A)"), four of which were parentheses. It was not a separate "version" of Section 111(d) and therefore could not possibly authorize EPA to do anything.[19] The amendment was in error; it purported to replace pre-existing

[19] EPA's claim that the Statutes at Large contains "two versions" of the Section 112 Exclusion can be traced to 2004, when EPA mistook for the Statutes at Large a document prepared by a paralegal at the Congressional Research Service that was included in the Committee Print of the 1990 Amendments legislative history. A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 at 46 (Comm. Print 1993). This document renders the relevant section using brackets: "any air pollutant . . . which is not . . . included on a list published under section

language that no longer existed due to the prior execution of the earlier substantive amendment in § 108(g). The Senate Managers expressly noted in their "detailed explanation" to supplement the Conference Report that the "Senate recedes to the House" with respect to the § 108(g) amendment. 136 CONG. REC. 36067 (Oct. 27, 1990).

Thus, the Law Revision Counsel properly concluded that the clerical amendment was an inadvertent and superfluous instruction that simply could not be executed:

> Subsec. (d)(1)(A)(i). Pub. L. 101–549, §302(a), which directed the substitution of "7412(b)" for "7412(b)(1)(A)", could not be executed, because of the prior amendment by Pub. L. 101–549, §108(g), see below.
>
> Pub. L. 101–549, §108(g), substituted "or emitted from a source category which is regulated under section 7412 of this title" for "or 7412(b)(1)(A)".

42 U.S.C. § 7411, Amendments, 1990, Subsec. (d)(1)(A)(i) (2012). The Clinton EPA came to the same conclusion in 1995, explaining that the substantive amendment was "the correct amendment" to codify and follow because it tracked the "revised section 112 to include regulation of source categories," while the conforming amendment "is a simple substitution of one subsection citation for another."[20] This Court has also distinguished between substantive amendments and conforming

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108(a) [or emitted from a source category which is regulated under section 112] [or 112(b)]." Id. In 2004, EPA quoted from this document in the Federal Register, identifying it as the Statutes at Large, and as a result of this error stated incorrectly that "two amendments are reflected in parentheses in the Statutes at Large." 69 Fed. Reg. 4,652, 4,684 (Jan. 30, 2004).

[20] 1995 BIFSG at 1-5.

amendments. See, e.g., Dir. of Revenue of Missouri v. CoBank ACB, 531 U.S. 316, 323 (2001) (treating "conforming amendment" as non-substantive); CBS, Inc. v. FCC, 453 U.S. 367, 381–82 (1981) (same).

The situation of a conforming amendment rendered moot by an earlier amendment in the same bill is quite common, and Congress and the Law Revision Counsel have an established rule to resolve it: An amendment fails to execute if a prior amendment in the same bill removes or alters the text that the subsequent amendment purports to amend.[21] The Law Revision Counsel consistently and frequently applies this rule.[22] Thus, in executing the 1990 Amendments, the Law Revision Counsel simply followed standard practice.

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[21] See UNITED STATES SENATE, OFFICE OF LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL § 126(d) (1997) ("If, after a first amendment to a provision is made . . . the provision is again amended, the assumption is that the earlier (preceding) amendments have been executed."); UNITED STATES HOUSE OF REPRESENTATIVES, OFFICE OF LEGISLATIVE COUNSEL, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE § 332(d) (1995) ("The assumption is that the earlier (preceding) amendments have been executed.")

[22] See, e.g., 15 U.S.C. § 2064, Amendments, 2008, Subsec. (d)(2); 15 U.S.C. § 2081, Amendments, 2008, Subsec. (b)(1); 29 U.S.C. § 1053, Amendments, 1989, Subsec. (e)(1); 42 U.S.C. § 290bb-25, Amendments, 2000, Subsec. (m)(5); 42 U.S.C. § 300aa-15, Amendments, 1989, Subsec. (e)(2); 42 U.S.C. § 300ff-13, Amendments, 1996, Subsec. (b)(4)(B); 42 U.S.C. § 300ff-15, Amendments, 1996, Subsec. (c)(1); 42 U.S.C. § 300ff-28, Amendments, 1996, Subsec. (a)(1); 42 U.S.C. § 300ff-28, Amendments, 1996, Subsec. (b)(1); 42 U.S.C. § 677, Amendments, 1989, Subsec. (e)(1); 42 U.S.C. § 1320a-7a, Amendments, 1997, Subsec. (i)(6)(B); 42 U.S.C. § 1320a-7a, Amendments, 1997, Subsec. (i)(6)(C); 42 U.S.C. § 1395l, Amendments, 1990, Subsec. (a)(1)(K); 42 U.S.C. § 1395u, Amendments, 1994, Subsec. (b)(3)(G); 42 U.S.C. § 1395x, Amendments, 1990, Subsec. (aa)(3); 42 U.S.C. § 1395cc, Amendments, 2010, Subsec. (a)(1)(V); 42 U.S.C. § 1395ww, Amendments, 2003, Subsec. (d)(9)(A)(ii); 42 U.S.C. § 1396(a), Amendments, 1993, Subsec. (a)(54); 42 U.S.C. § 1396b, Amendments, 1993, Subsec. (i)(10); 42 U.S.C. § 1396r, Amendments, 1988, Subsec. (b)(5)(A); 42 U.S.C. § 3025, Amendments, 1992, Subsec. (a)(2); 42 U.S.C. § 3793, Amendments, 1994, Subsec. (a)(9); 42 U.S.C. § 5776, Amendments, 1988; 42 U.S.C. § 6302, Amendments, 2007, Subsec. (a)(4); 42 U.S.C.

EPA has conceded, in an identical circumstance, that an amendment was "obviously in error" because the "section amended had been repealed" by an earlier amendment in the same bill.[23] Indeed, the U.S. Code would be turned upside down if superfluous clerical amendments caused prior versions of substantively amended statutory provisions to spring back to life.

In the last several months, EPA has taken the highly unusual step of attempting to block the routine positive law codification of the Clean Air Act, in a vain bid to rescue its meritless statutory interpretation.[24] The codification of the Clean Air Act recently completed by the Law Revision Counsel, submitted to Congress, and approved by the House Judiciary Committee simply restates the familiar form of Section 111(d) as it has existed in the U.S. Code for 25 years.[25] After not participating in the process for eight years, EPA submitted an eleventh-hour objection taking issue with the entire codification process and complaining that the Law Revision Counsel's codification of Section 111(d) "fails to include legislative language that is relevant to whether EPA has statutory authority to issue the Clean Power Plan and regulate greenhouse gas emissions from power

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§ 6302, Amendments, 2007, Subsec. (a)(5); 42 U.S.C. § 6991e, Amendments, 2005, Subsec. (d)(2)(B); 42 U.S.C. § 7414, Amendments, 1990, Subsec. (a); 42 U.S.C. § 8622, Amendments, 1994, Par. (2); 42 U.S.C. § 9601, Amendments, 1986, Par. (20)(D); 42 U.S.C. § 9607, Amendments, 1986, Subsec. (f)(1); 42 U.S.C. § 9874, Amendments, 1990, (d)(1); 42 U.S.C. § 9875, Amendments, Subsec. (c).

[23] Brief for Respondent in Nos. 14-1112, 14-1151 (D.C. Cir. ECF 1541205) at 48 n.23 (filed Mar. 9, 2015) (discussing 15 U.S.C. § 2081(b)(1)).

[24] See Letter of House Energy & Commerce Comm. to EPA dated Nov. 2, 2015, included in the Appendix ("Energy & Commerce Letter").

[25] See id. at 2.

plants and other stationary sources."[26] The Law Revision Counsel responded with a five-page letter rebutting EPA's specious argument point-by-point.[27] EPA's interference reveals its own recognition that the text of Section 111(d) in the United States Code repudiates the statutory basis for the Power Plan, and represents a back-door attempt by EPA to rewrite Section 111(d).

3. Section 111(d) Contains No Ambiguity.

Given the weakness of its arguments relying on the clerical amendment, EPA also argues that the phrase "regulated under section 112" is ambiguous as to whether the Section 112 Exclusion applies to pollutants regulated under Section 112 or source categories regulated under Section 112. 80 Fed. Reg. at 64,713–15. Yet EPA's own Legal Memorandum accompanying the proposed rule found no such ambiguity, properly recognizing that "[a]s presented in the U.S. Code, the Section 112 Exclusion appears by its terms to preclude from Section 111(d) any pollutant if it is emitted from a source category that is regulated under Section 112."[28]

Congress' handiwork is clear and unambiguous. The statute refers to "a source category which is regulated under section [112]"—not to "a pollutant which is regulated under section [112]."[29] EPA's gambit flies in the face of this Court's

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[26] EPA Letter of July 27, 2015, at 3, included as Attachment 1 to Energy & Commerce Letter.

[27] See Law Revision Counsel Letter of Sept. 16, 2015, included as Attachment 2 to Energy & Commerce Letter.

[28] PROPOSED RULE LEGAL MEMO 22 (emphasis added).

[29] The only natural reading is that the clause "which is regulated under section [112]" modifies the phrase "source category" because it immediately follows that phrase in the statute. Moreover, the phrase "any air pollutant" cannot refer solely to hazardous air pollutants because that same phrase is also modified by the

teaching in UARG that EPA cannot "replace[]" statutory terms "with others of its own choosing" without going "well beyond the bounds of its statutory authority." 134 S. Ct. at 2445 (quotation omitted). "The power of executing the laws" "does not include a power to revise clear statutory terms that turn out not to work in practice," or to revise them "to suit [EPA's] own sense of how the statute should operate." Id. at 2446. The highly "specific" language in Section 111(d) is the end of the matter, leaving nothing for EPA to add or subtract because Congress "has already" made its own "judgment." Id. at 2448. EPA can only execute the law, not change it.

Moreover, what EPA claims is a vice in the statute is actually a virtue. Applying the Section 112 Exclusion on the basis of source categories is a natural consequence of Congress' decision in 1990 to rewrite Section 111(d) to mirror the "source category" structure of the newly amended Section 112. In 1990, Congress fundamentally expanded the scope of what substances are regulated under Section 112 and required regulation under Section 112 by "source category." Compare Pub. L. 101-549, § 301, 104 Stat. 2,399, 2,531-74 (1990) (creating new Section 112), with 42 U.S.C. § 7412 (1988). The ordinary reading of the 112 Exclusion is better (not worse) because it aligns Section 111(d) with the "source category" focus of post-1990 Section 112. Section 111(d) as amended in 1990 still plays a significant role—that of regulating source categories not regulated under Section 112. Hence, EPA's last-

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words "for which air quality criteria have not been issued or which is not included on a list published under section [108(a)] of this title." "[A]ny air pollutant" must be broader than "hazardous air pollutants" because it must also include these other two categories, which overlap but are not coextensive.

ditch reinterpretation of the statutory language violates the express terms of Section 111(d), this Court's decision in UARG, and the structure of the 1990 amendments to the Clean Air Act.

B. The Power Plan Is an Attempt to Shut Down Coal Power Plants in Favor Of Sources Preferred By EPA, Not a "Performance Standard" Under Section 111(d).

Even if, arguendo, EPA had authority to regulate electric generating units under both Sections 111(d) and 112 of the Act (which it does not), the Power Plan far exceeds EPA's authority under Section 111(d), as shown in the States' Stay Application. Section 111(d) limits EPA to promulgating "standard[s] of performance," which requires EPA to identify, after considering cost and other factors, the "best system of emission reduction" that (1) has been "adequately demonstrated" for the type of "source" to be regulated and (2) will "assure continuous emission reduction" when the source is operating. 42 U.S.C. §§ 7411(a)(1), 7602(k), 7602(l). Section 111 further provides that a standard of performance must be "achievable through the application of the best system of emission reduction" to an individual "source," which the CAA defines as a "building, structure, facility, or installation" that emits air pollution. 42 U.S.C. § 7411(a)(3). Over the last 45 years, during which EPA has established more than a hundred "standards of performance" for new and existing sources under Section 111, all of these performance standards have been based on technological means of reducing emissions from a source. See States' Stay Application at 7.

EPA now says that the term "system of emission reduction" is "deliberately broad" and can include virtually anything that reduces emissions, including "actions

that may occur off-site" across the electric grid. 80 Fed. Reg. at 64,671. According to the agency, it can also mean "the application of a system" to the entire U.S. power sector, including renewable generating facilities and transmission over which EPA has no jurisdiction, given "the integrated nature of the utility power sector." Id. at 64,769.

EPA's interpretation conflicts with the plain language of the Clean Air Act. Under Section 111(d), a performance standard must "assure [a] continuous emission reduction" and must be applied to "any existing source" that would be subject to a new source standard "if such existing source were a new source"; and States must be permitted, "in applying a standard of performance to any particular source . . . to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." 42 U.S.C. § 7411(d); 42 U.S.C. §7206(l) All these statutory terms refer to individual sources, not the U.S. electricity system as a whole.

EPA's limitless view of its own power also runs headlong into this Court's rejection of a similarly expansive view of FERC's jurisdiction. See FERC v. Electrical Power Supply Ass'n., No. 14-840, slip op. at 15 (Jan. 25, 2016) ("Taken for all it is worth, that statutory grant could extend FERC's power to some surprising places. . . . We cannot imagine that was what Congress had in mind.").

In sum, the Power Plan is an unauthorized attempt by EPA to take business away from coal-fired power plants and award it to other energy sources favored by the agency.

C. The Power Plan Violates the Tenth Amendment and Principles of Federalism.

More than half the States in the Union have challenged the Power Plan — the most ever to challenge an EPA rule—representing almost 80% of the Power Plan's emissions reductions.[30] The States have convincingly shown that EPA's interpretation would "confer on federal agencies ultimate decisionmaking authority, relegating States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect." Alaska Dep't of Envt'l Conservation v. EPA, 540 U.S. 461, 518 (2004) (Kennedy, J., dissenting). "If cooperative federalism is to achieve Congress' goal of allowing state governments to be accountable to the democratic process in implementing environmental policies, federal agencies cannot consign States to . . . ministerial tasks . . . , while reserving to themselves the authority to make final judgments under the guise of surveillance and oversight." Id.

Private parties as well as States can invoke the protections of federalism. As the Court has observed, "[f]ederalism is more than an exercise in setting the boundary between different institutions of government for their own integrity . . . . 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" Bond v. United States, 131 S. Ct. 2355, 2364 (2011) (citation omitted). Hence, "the individual liberty secured by federalism is not simply derivative of the rights of the States." Id. "Federalism also protects the liberty of all

[30] The 18 States that have filed in support of the Power Plan represent 12% of the emissions reductions — including two states that the Power Plan does not affect at all (Vermont and Hawaii). Robin Bravender, "44 States Take Sides in Expanding Legal Brawl," GREENWIRE, Nov. 4, 2015.

persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." Id.

"Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." Alden v. Maine, 527 U.S. 706, 748 (1999). The Court has made clear that the federal government may not compel the States to implement federal regulatory programs. See Printz v. United States, 521 U.S. 898, 926 (1997); New York v. United States, 505 U.S. 144, 176-77 (1992). Because this limitation on federal power arises from a structural constitutional principle, "a 'balancing' analysis" is "inappropriate." Printz, 521 U.S. at 932. Further, the anti-commandeering principles bar unlawful complicity as much as coercion. See id. at 921 (federal-state separation is one of the "structural protections of liberty" designed to "reduce the risk of tyranny and abuse from either front") (emphasis added). Thus, no State—including the States that support the Power Plan—can permissibly collude with EPA to aggrandize the agency's authority. See New York, 505 U.S. at 181-82.

Whether coercive or collusive, federal commandeering blurs the lines of political accountability by making it appear as though the harmful effects of federal policies are attributable to State choices. Printz, 521 U.S. at 930. That is exactly what will occur here. The Power Plan will force States to adopt policies that will raise energy costs, kill jobs, threaten consumers on fixed and limited incomes, and

deprive the States of tax revenue from coal royalties and severance payments, which States use to fund schools and social services.[31] Those policies will be cloaked in the Emperor's garb of State "choice," even though they are, in fact, compelled by EPA.

Significantly, Congress did not delegate power to EPA in a way that clearly set up this entirely avoidable constitutional confrontation. It certainly did not expressly authorize, much less direct, the EPA to interpret the Clean Air Act so as to violate federalism and the Tenth Amendment. At the very least, the serious constitutional questions raised by the Power Plan eliminate any agency claim to Chevron deference and require that this Court construe Section 111(d) as not authorizing EPA's extravagant assertion of authority. See Edward J. DeBartolo Corp. v. Florida Gulf Construction Trades Council, 485 U.S. 568, 574-75 (1988).

EPA's response is that, if a State declines to propose a State Plan, the agency will impose a Federal Plan instead. See 80 Fed. Reg. at 64,942. But even under a Federal Plan, inaction is not an option for the States. Rather, state agencies will be forced to undertake extensive efforts to ensure that the Power Plan's shut down of coal plants does not lead to brownouts or blackouts, or otherwise imperil the supply of reliable electricity to state consumers and businesses. For example, state officials will be forced to review siting decisions, grant permit applications, and issue certificates of public convenience for EPA's preferred generation sources and for the associated new transmission lines that EPA's transformation of the power sector

[31] State of North Dakota, Motion for Stay, No. 15-1380, North Dakota v. EPA, (ECF 1580920), at 13-15 (D.C. Cir.) (filed Oct. 29, 2015).

will require. See, e.g., 220 Ill. Comp. Stat. 5/8-406(b) (utility must obtain certificate of public convenience and necessity before beginning construction). The States' ability to "choose" not to authorize new generation or transmission is no choice at all; it is a gun to the head. That is the very defect that the Court identified in striking down the congressional measure pressuring States to accept the Affordable Care Act's Medicaid expansion in NFIB v. Sebelius, 132 S. Ct. 2566, 2602 (2012).

Moreover, the Court has instructed that state participation in federal programs is "in the nature of a contract," with the key question being "whether the State voluntarily and knowingly accepts the terms of the 'contract.'" NFIB, 132 S. Ct. at 2602 (internal quotation marks and citations omitted). The Power Plan improperly remakes the agreement between States and the Federal Government that has existed since the Clean Air Act was enacted in 1970. States could not have expected, when they adopted plans to regulate conventional pollutants like nitrogen oxides, sulfur dioxide, and particulate matter, that EPA would seek to dictate State energy policies by forcing the phase-out of the most reliable and affordable sources of electricity and their replacement with EPA's preferred renewable sources. The Power Plan is completely unlike examples of cooperative federalism; it is entirely different from anything EPA has ever attempted under Section 111(d).

The circumstances of New York v. United States (on which EPA relies) were completely different. There, the back-up federal option, 505 U.S. at 174, entailed no direct regulation of anything in a noncomplying State. Rather, it simply authorized States with waste disposal sites to raise fees and ultimately shut their sites to waste from freeloading States that were not managing their own waste. Moreover,

the "federal option" in New York was enacted by Congress, where States, through their representation in the Senate and in other ways, retain an assured avenue of direct political influence over how the legislature will decide to regulate their citizens under Article I. The situation is entirely different if, as here, a federal agency makes the decision of how the people of noncomplying States will be regulated, because an agency is not open to the structurally assured state influence that rescued the fallback in New York from constitutional infirmity.

The Power Plan therefore violates the Tenth Amendment and principles of federalism.

II. A Stay of the Power Plan Is Necessary to Prevent Irreparable Injury and Preserve the Status Quo and Rights of Applicants Pending Judicial Review.

The Power Plan will cause extensive irreparable harm during the pendency of judicial review, even expedited review.[32] EPA's own modeling shows that the Power Plan will cause the closure of 53 coal-fired generating units in 2016 and the closure of another 3 units by 2018. Schwartz Decl. ¶¶ 4, 16-22, 27-31, EVA Report 11-15, 62-64. The near-term retirement of these 56 units will reduce annual national coal production by nearly 55 million tons, creating an obvious and immediate impact to the business of coal mining and to coal employment. Schwartz Decl. ¶ 30. Moreover, the retirement of these units will cause specific coal mines to

[32] The Sixth Circuit stayed a Clean Water Act rule even without any showing of irreparable harm, in light of the "whirlwind of confusion" caused by the regulation. In re EPA, Nos. 15-3799, 2015 WL 589381, *3 (6th Cir. Oct. 9, 2015). The "whirlwind of confusion" caused by the Power Plan is no less, and indeed substantially worse. Accordingly, the D.C. Circuit's failure to grant a stay in this case is inconsistent with the Sixth Circuit's decision.

close, specific miners to lose their jobs, and specific communities and States to lose the economic benefits that these mining jobs create—virtually all occurring in 2016, according to EPA's own model.[33]

In the court below, EPA downplayed the accuracy of its modeling, but such self-criticism flies in the face of the agency's own statements that its modeling produces the "best assessment of likely impacts of the CPP under a range of approaches that states may adopt," and is "a state-of-the-art, peer-reviewed, dynamic linear programming model that can be used to project power sector behavior" and "to project likely future electricity market conditions with and without the Clean Power Plan Final Rule."[34] EPA's modeling not only provides the basis for the Regulatory Impact Assessment (RIA) of the Power Plan, but also is the basis for the design and level of the performance standards that constitute the

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[33] Schwartz Decl. ¶ 31; Schwartz Reply Decl. ¶ 18; Murray Decl. ¶¶ 37-42 (identifying Murray Energy coal mines that are significant suppliers of the retiring units); Neumann Decl. ¶¶ 6-18 (consequences of retiring Coal Creek and Coyote stations); Cottrell Decl. ¶ 9 (consequences of retiring Naughton station); Jenkins Decl. ¶¶ 7-8 (lost coal transportation).

[34] Regulatory Impact Assessment for Final Rule at 3-1, 3-11 (emphasis added). According to EPA, "[t]he analysis is a reasonable expectation of the incremental effects of the rule." Id. at 3-11. "This type of analysis, using IPM, has undergone peer review and been upheld in federal courts." 76 Fed. Reg. 48,208, 48,314 (Aug. 8, 2011). EPA recently told the D.C. Circuit that "the Integrated Planning Model ('IPM'), [is] an economic model widely used throughout private industry and the government to forecast how the power sector produces electricity at least cost while meeting energy demand, reliability constraints, and environmental requirements. This Court has previously recognized the use of IPM as reasonable for this purpose." EPA Respondents' Brief, EME Homer City Generation, L.P. v. EPA, No. 11-1302, at 40 (D.C. Cir. filed Jan. 16, 2015), Doc. No. 1532516 (citing Appalachian Power Co. v. EPA, 249 F.3d 1032, 1052-53 (D.C. Cir. 2001)).

Power Plan. Schwartz Reply Decl. ¶¶ 19-31. EPA cannot disavow its own modeling without rendering the Power Plan fatally defective.

In fact, the evidence shows that EPA's modeling actually understates the harmful effects of the Power Plan. EPA manipulated its "base case" (the future electric grid without the Rule) by arbitrarily reducing the amount of coal generation assumed to be in existence at the beginning of 2016 so as to make it seem as if the Rule causes fewer coal unit retirements than it really does. Schwartz Decl. ¶¶ 4, 18-26, 32-38; EVA Report 17-24, 64-68. The expert and unbiased forecast of the U.S. Energy Information Administration shows that the impact of the Rule will be much greater: the shutdown on 233 coal-fired power plants in 2016 and another five in 2018. Id.; Schwartz Reply Decl. ¶¶ 14-16. These shutdowns represent 171.5 million tons of lost coal production, about 20 percent of the current level. EVA Report 64.[35]

Regardless of their precise magnitude, the substantial shutdowns beginning in 2016 demonstrate that even expedited judicial review will not avoid irreparable injury. Decisions to implement those closures must begin immediately, and planning for future retirements is underway now. Both the utility industry and the coal business are highly capital-intensive, with long lead times measured in years and decades, not months. See Schwartz Decl. ¶¶ 12-15; EVA Report 30-47; Cottrell Decl. ¶ 5; Marshall Decl. ¶ 10; Murray Decl. ¶ 32; Galli Decl. ¶¶ 16-22; Neumann ¶ 25. Moreover, as the federal government itself has observed, even pending

[35] EPA's modeling already takes account of alternative explanations of coal's hardship, such as market trends and low natural gas prices. The Power Plan, not alternative causes, is responsible for the harm documented here. See also Schwartz Reply Decl. ¶¶ 3-13.

regulation strongly affects the economics of the coal industry. U.S. ENERGY INFORMATION ADMINISTRATION, ANNUAL ENERGY OUTLOOK, E-14 (2014).

Accordingly, the shutdowns will become locked in, long before any decision by the D.C. Circuit panel (let alone en banc review and this Court's review). As one expert has opined, "the electric power industry requires long lead times to plan, permit and construct new power plants to generate electricity and new transmission lines to connect the power plants and deliver the electricity to customers." Schwartz Decl. ¶ 12. "Once utility decisions are made, they will be locked in. They will not be undone no matter how the Court rules months or years from now." Galli Decl. ¶ 21. Customers have already started making planning decisions, and the pace of closure and curtailment decisions will only accelerate, leading to irreparable losses of coal sales. See id. at ¶¶ 12–13, 16–22.

Absent a stay, the Power Plan's targeted attack on the coal industry will artificially eliminate buyers of coal, forcing the coal industry to curtail production, idle operations, lay off workers, and close mines. See, e.g., Schwartz Decl. ¶¶ 4, 39-40; EVA Report 69-72; Siegel Decl. ¶ 6; Marshall Decl. ¶ 11–18; Cottrell Decl. ¶ 7; McCourt Decl. ¶ 7–8. Forced shut-downs will render completely worthless hundreds of millions of dollars of investments in power plants and in the mines supplying them. Motion to Intervene of Dixon Bros., No. 15-1363, ECF Doc. 1584767, at 9-10 (D.C. Cir. November 20, 2015). The market understands these realities. From the time EPA first proposed the Rule and condemned the coal industry to a greatly diminished future, coal company share prices have plummeted and coal companies

have declared bankruptcy. Schwartz Decl. ¶¶ 39-40; EVA Report 56-59; Murray Decl. ¶ 49. All of this will worsen in the coming months.

EPA has ensured immediate irreparable harm. By design, EPA has set overaggressive deadlines for states to finalize plans to comply with the Power Plan. 80 Fed. Reg. at 64,855. The Power Plan seeks "to promote early action," id. at 64,669, and to "establish the path towards emissions reductions as early as possible." Id. at 64,675. In light of these deadlines and the substantial changes necessary for compliance, EPA's Power Plan coerces states, businesses, and the energy industry to undergo immediate and irreversible changes, in an apparent attempt to change the facts on the ground before meaningful judicial review can be completed. EPA is using the same strategy it successfully employed for the Michigan rule.

Indeed, absent a stay, a future decision that the Power Plan is unlawful may in a sense exacerbate the irreparable harm. For example, a utility in Montana and the Dakotas already has spent approximately $350 million on upgrades to comply with EPA's Section 112 national emission standard for power plants. Galli Decl. ¶ 28. However, in light of the Court's decision in Michigan, the Montana Public Service Commission has not decided whether to approve a rate increase needed for the utility to pay for the upgrades. Id. Therefore, the utility faces the prospect of being left holding the bag for the compliance costs it has already incurred, with no practical way to recoup those costs. Id.

Here, too, EPA's strategy is to use the Power Plan to force enormously expensive immediate changes "on the ground," all across the country, making after-

the-fact judicial relief a Pyrrhic victory. A stay is required to prevent EPA from manipulating ripeness to manufacture mootness—from delaying judicial review of the Power Plan while insisting on compliance with an unlawful Rule now. EPA hopes that, by the time the judiciary adjudicates the legality of the Power Plan, the judicial action will come too late to make much if any practical difference. As with the Michigan rule, the principal damage will be done. Compliance will be a fait accompli, and judicial review will be—for most practical purposes—an afterthought.

III. The Balance of Equities and Public Interest Support a Stay.

A stay will merely preserve the status quo while the courts consider the lawfulness of the Power Plan. In this instance, "[t]he injury against which a court would protect is not merely the expense to the plaintiff, . . . but . . . the enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry." PepsiCo, Inc. v. FTC, 472 F.2d 179, 187 (2d Cir. 1972) (Friendly, C.J.).

EPA cannot genuinely protest urgency during the period necessary for judicial review. EPA tellingly declined to quantify any impact of the Power Plan on global temperatures or the environment—not a thousandth of a degree of temperature or single millimeter of sea level change (see Regulatory Impact Analysis ("RIA") for the Clean Power Plan Final Rule (Aug. 2015), at ES-10 through ES-14)—let alone one that would irreversibly occur during the short window during which judicial review is pending. EPA's Administrator testified before the Senate Environment and Public Works Committee on July 23, 2014: "The great thing about this [EPA Power Plan] proposal is that it really is an investment opportunity. This

is not about pollution control."[36] In fact, EPA has waited years to regulate power plant carbon dioxide emissions, has already allowed its deadlines to slip numerous times,[37] and argued in the D.C. Circuit that the Power Plan does not require carbon dioxide reductions until after the year 2022.[38]

Power plants that begin to shut down and States that begin to implement the Power Plan will essentially lock in EPA's policy preferences. The likelihood—indeed, the near certainty–that such a fundamentally important agency action would inflict irreversible harm before judicial review can occur risks unacceptable impairment of the judicial function and thereby raises serious separation of powers concerns. As Federalist No. 48 explained, "none of [the branches] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power . . . of an encroaching nature . . . ought to be effectually restrained . . . . After discriminating . . . in theory, the several classes of power . . . [between] legislative, executive or judiciary, the next and most difficult task is to provide some practical security for each against invasion of the others." (James Madison, February 1, 1788) (emphasis added).)

Absent a stay, the "practical security" necessary to protect diminishing judicial power and aggrandizing executive power will be lost, and judicial review

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[36] U.S. House Energy Commerce Comm. Press Release, Pollution vs. Energy: Lacking Proper Authority, EPA Can't Get Carbon Message Straight (Jul. 23, 2014) (emphasis added).

[37] See Settlement Agreement ¶¶ 1–4, EPA-HQ-OGC-2010-1057-0002 (settlement obligating EPA to adopt carbon dioxide regulation by May 26, 2012).

[38] EPA Opp. to Stay Motion in D.C. Cir. Nos. 15-1363, et al., at 10 (ECF 1586661) (filed Dec. 3, 2015).

will—for all practical purposes—become irrelevant. Only granting an immediate stay will enable this Court's ultimate review of the Power Plan to come in time to prevent, rather than merely lament, those profoundly damaging and dangerous departures from our constitutional scheme.

CONCLUSION

The Power Plan's magnitude and scope are unprecedented. It should be stayed, and all deadlines in it suspended, pending the completion of all judicial review.

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No. 15A778 (related to Nos. 15A773, 15A776, 15A787, 15A793)

IN THE

Supreme Court of the United States

MURRAY ENERGY CORPORATION,
PEABODY ENERGY CORPORATION, ET AL.,
Applicants,

v.

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

COAL INDUSTRY REPLY IN SUPPORT OF APPLICATION FOR IMMEDIATE STAY OF FINAL AGENCY ACTION PENDING JUDICIAL REVIEW

DIRECTED TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY IN SUPPORT OF APPLICATION FOR STAY

Applicants Murray Energy Corporation, Peabody Energy Corporation, National Mining Association, and American Coalition for Clean Coal Electricity ("Coal Industry Applicants") respectfully submit this brief response to certain arguments directed at the Coal Industry Applicants in EPA's Opposition to the Stay Applications (EPA Opp. to Stay).

1. Applicants Have Shown Irreparable Harm.

With respect to irreparable harm, EPA does not deny that its own modeling shows that the Power Plan will cause the closure of 53 coal-fired power plants **in 2016** and another three in 2018, and that such near-term shutdowns represent tens of millions of tons of lost coal production, thousands of lost jobs in the mining industry, and rippling unemployment effects for those dependent on the coal industry. But EPA claims that its own predictions that the Power Plan will lead to closures of coal-fueled plants are "wholly speculative." (EPA Opp. to Stay at 60.) To the contrary: concrete evidence shows many examples of **closures attributable to the Power Plan**, as well as examples of long-term planning by utilities, which are currently making plant shut-down and resource decisions that will be implemented or made permanent **in 2016**:

- On July 9, 2015, Minnesota Power announced it will indefinitely suspend its Taconite Harbor Energy Center plant in third quarter **2016**, and completely retire it in 2020.[1] Minnesota Power blamed the closure on the Power Plan.[2]

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[1] Brady Slater, *Coal-Fired Operations to End at Taconite Harbor Energy Center; Plant Will Be Idled in 2016*, DULUTH NEWS TRIBUNE, July 9, 2015, available at

- Ten units at coal-fueled power plants in Michigan are set to retire **in 2016** (and a total of 25 by 2020), with a Michigan utility official explaining that most coal plants will close because "there is no piece of control equipment we can put on to meet carbon rules under the Clean Power Plan."[3]

- In October 2015, Westar Energy announced it would retire two coal-fueled units **in 2016**. The company acknowledged that the Clean Power Plan "played a role in the decision."[4]

- In **January 2016**, Xcel submitted a **2016-2030 resource plan** for approval by state regulators that would close two coal fueled units because "it is the only scenario that is nearly certain to be compliant with the Clean Power Plan."[5]

- **Utilities began making closure plans even in anticipation of the Rule**. For example, in January 2015, Kansas City Power & Light announced it would no longer burn coal at three of its power plants,

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http://www.duluthnewstribune.com/news/3782973-coal-fired-operations-end-taconite-harbor-energy-center-plant-will-be-idled-2016.

[2] *Minnesota Power Plans to Idle Taconite Coal Plant*, ARGUS, July 10, 2015, available at http://www.argusmedia.com/pages/NewsBody.aspx?id=1069256&menu=yes (emphasis added) ("Minnesota Power, … says its move is part of [a] … regulatory shift to less carbon-intensive resources, *particularly as result of the US Environmental Protection Agency's proposed Clean Power Plan to regulate CO_2 from existing power plants*, due to be finalized next month.").

[3] JC Reindl, "25 Michigan Coal Plants Are Set to Retire by 2020, DETROIT FREE PRESS (Oct. 10, 2015), available at http://www.freep.com/story/money/business/michigan/2015/10/10/25-michigan-coal-plants-set-retire-2020/73335550/.

[4] Bob Matyi, "Midwest Utilities Plan Retirements for Coal, Gas, Biomass Power Plants," PLATTS (Oct. 14, 2015), available at http://www.platts.com/latest-news/electric-power/louisville-kentucky/midwest-utilities-plan-retirements-for-coal-gas-21293379; Peter Hancock, "Kansas Faces Stiff Carbon Reduction Target," LAWRENCE JOURNAL-WORLD (Oct. 16, 2015), available at http://www2.ljworld.com/news/2015/oct/16/kansas-faces-stiff-carbon-reduction-target/.

[5] Kirsti Marohn, "Xcel Wants to Close 2 Sherco Coal Units, Add Gas Plant," ST. CLOUD TIMES (Oct. 2, 2015), available at http://www.sctimes.com/story/news/local/2015/10/02/xcel-wants-close-sherco-coal-units-add-gas-plant/73228342/; Supplement to Upper Midwest 2016-2030 Resource Plan, Jan. 2016, p. 5, Docket No. E002/RP-15-21, available at https://www.xcelenergy.com/Company/Rates_&_Regulations/Resource_Plans/Upper_Midwest_2016-2030_Resource_Plan.

including at two units **in 2016**. The company cited "future environmental regulation compliance" as the reason for its decision.[6]

In sum, the Plan's impact on the coal industry is clear and concrete. As the EPA Administrator admitted, the Rule is really about "investment opportunities," not "pollution control."[7] Forcing closures and shut-downs was the agency's very purpose. Absent a stay, irreversible harm will occur **in 2016** by EPA's design.

2. Applicants Have Shown A Reasonable Probability of Prevailing On The Merits.

(a) EPA reads out of the statute prohibitions on its authority. The Government attempts to avoid the Section 112 Exclusion by advancing a statutory interpretation premised on "Congress's use of the word 'or'" (EPA Opp. to Stay at 23). Yet EPA itself properly rejected that interpretation in the Final Rule because it is "not a reasonable reading of the statute." 80 Fed. Reg. at 64,713. The interpretation would impermissibly obliterate all of the exclusions in Section 111(d). As EPA originally explained, "the result would be that CO2 from power plants could be regulated under … 111(b) because air quality criteria have not been issued for CO2 and therefore whether CO2 *or* power plants are regulated under … section 112 would be irrelevant. This reading, however, is not a reasonable reading of the statute because, among other reasons, it gives little or no meaning to the

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[6] "KCP&L Announces Plans to Cease Burning Coal at Three Power Plants," Jan. 20, 2015, available at http://www.kcpl.com/about-kcpl/media-center/2015/january/kcpl-announces-plans-to-cease-burning-coal-at-three-plants.

[7] U.S. House Energy Commerce Comm. Press Release, Pollution vs. Energy: Lacking Proper Authority, EPA Can't Get Carbon Message Straight (Jul. 23, 2014).

limitation covering HAPs that are regulated under … section 112." *Id.* (emphasis added).[8]

(b) The "ratification" argument is specious. The Government asserts that Congress has not "ratified" Section 111(d) as it appears in the United States Code. EPA Opp. to Stay. However, there is absolutely no evidence that EPA or any member of Congress disagreed with the United States Code language, after it was first published in the second supplement to the 1988 edition of the United States Code early in 1991, which every member of Congress received and the agency surely reviewed at that time, *see* 1 U.S.C. §§ 211 & 212. *See* Coal Indus. Appl. 17 n.19. This Court cannot simply cast aside the United States Code as maintained by the Law Revision Counsel, given Congress's command in 1 U.S.C. § 204 that "the Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States . . . in force." 1 U.S.C. § 204. To give effect to this provision, the Code must be considered to be the authoritative statement of the law unless it is plainly inconsistent with the Statutes at Large or the determinations of the Law Revision Counsel are unreasonable. See *Stephan v. United States*, 319 U.S. 423, 426 (1943); *United States Nat'l Bank of Oregon v. Independent Insurance Agents of Am., Inc.*, 508 U.S. 439 (1993).

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[8] Notably, there are only two pollutants on the Section 108(a) list, lead and nitrogen dioxides, because it does not contain "air pollutants . . . for which air quality criteria had not been issued before December 31, 1970." 42 U.S.C. § 7408(a). The Solicitor General's argument would mean that Section 111(d) covers all other criteria pollutants, even though it has universally been understood not to cover any criteria pollutants.

The Government does not deny that EPA inadvertently mistook an unofficial document for the Statutes at Large and then erroneously claimed that there were alternative parentheses containing language from each amendment in the Statutes at Large omitted from the Code. *See* Coal Indus. Appl. 17 n.19. Indeed, it was in reliance on this erroneous assertion that some States at the time agreed with EPA's misinterpretation of an inaccurate and unofficial document prepared by a paralegal. The Government's note recounting that agreement, EPA Opp. to Stay at 25 n.6, leaves out the crucial fact that it resulted from EPA's misrendering of the Statutes at Large in the Federal Register.

(c) The gap-filling argument lacks merit. The Government contends the Section 112 Exclusion would be absurd unless it is pollutant-specific, not source-category-specific, and that it should bar EPA from regulating only pollutants listed as "Hazardous Air Pollutants." EPA Opp. to Stay at 24–29. To support this non-textual reading, the Government claims there are significant emissions from sources regulated under Section 112 that can only be regulated, if at all, under Section 111(d). EPA Opp. to Stay at 24–26. But this argument relies on a Senate Committee Report describing the **pre-1990** Section 112 program, which focused on a highly limited set of pollutants. In 1990, Congress expanded Section 112 dramatically. At stake here is *duplication* (regulation of the same source category under both Section 111(d) and Section 112), not a regulatory "gap." Indeed, EPA has previously used Section 111(d) in only a handful of cases, involving nothing like CO_2.

The Government also argues for its non-textual reading by claiming that "[n]othing in the CAA suggests . . . that Congress expected EPA to evaluate th[e] tradeoff" of choosing Section 112 instead of Section 111(d). EPA Opp. to Stay at 28–29. But if EPA never took the consequences of regulating power plants under Section 112 into account, the fault was the agency's, not Congress', because the legislative history and Section 112(n)(1) make clear that this is precisely what EPA was supposed to consider. Indeed, Congress explicitly directed EPA to consider "alternative control strategies" in Section 112(n)(1), and the legislative history indicates this was intended to refer to the option of using Section 111(d) instead of Section 112 for power plants (and alternatively deferring to State regulation).[9]

CONCLUSION

The Clean Power Plan rule-making process has all of the hallmarks of rule by the fiat of men. Permitting the Rule's implementation to proceed without judicial review at this stage would irreparably cement into our nation's history this searing defeat of the Rule of Law.

The Applications for Stay should be granted.

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[9] EPA has itself explained that the legislative history of Section 112(n)(1) and Section 108(g) are intimately connected. 70 Fed. Reg. 15994, 16030–31 (Mar. 29, 2005). Both of these two amendments first appeared at the same time in the Administration's bill and appeared together in every subsequent bill in which they were contained, because one of the purposes of the Section 108(g) amendment was to give EPA the alternative option of using the more flexible Section 111(d) program to regulate power plants instead of the costly inflexible Section 112 program. See id.

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IN THE

Supreme Court of the United States

STATE OF MICHIGAN, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF MURRAY ENERGY CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress ordered EPA to regulate power plants under Clean Air Act Section 112 only if the agency determined it would be "appropriate and necessary" because Congress recognized that this would undo a century of state and local decisions on how best to provide affordable and reliable electricity. Congress also amended Clean Air Act Section 111 to provide a more flexible alternative that preserves a far greater role for the states.

Can EPA find it is "appropriate and necessary" to regulate power plants under Section 112 without first considering the Section 111 alternative?

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INTERESTS OF THE *AMICUS CURIAE*

Murray Energy Corporation ("Murray Energy") respectfully supports the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.*

Murray Energy is the largest privately-owned coal company in the United States and the fifth largest coal producer in the country, employing roughly 7,300 workers in the mining, processing, transportation, distribution, and sale of coal. In 2014, Murray Energy expects to produce 65 million tons of coal from twelve active coal mining complexes in six states. Murray Energy also owns 2 billion tons of proven or probable coal reserves in the United States.

Murray Energy sells coal to public and private power plants. Affordable and reliable power, much of which is generated by coal, remains essential to the health of our nation's economy. Murray Energy and its employees proudly serve their public and private power plant customers in providing this essential service.

Here, a court has affirmed a crucial decision by EPA that failed to comply with requirements of the Clean Air Act, and that will have a dramatic adverse impact on the nation's power sector unless reviewed and overturned by the Court.

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* No counsel for any party authored any portion of this brief. No person or entity other than Murray Energy made any monetary contribution to the preparation and submission of this brief. Murray Energy gave timely notice to counsel of record and obtained consent to the filing of this brief.

SUMMARY OF ARGUMENT

For over a century, state and local governments have constructed and supported power plants in order to provide affordable and reliable electric power. These power plants are as diverse in size and age as the states themselves and also vary widely in design.

Applying Section 112 of the Clean Air Act to these power plants will undo much of the state and local governments' efforts and effectively nationalize the power industry. Section 112 does this by forcing all existing power plants to either equal the emission levels achieved by a small set of the nation's best-performing facilities or else shut down completely. Section 112 also prohibits the construction of any new power plants unless they match the emission levels achieved by the nation's very best power plant. These requirements are imposed without regard to cost, energy requirements, or local resources.

Mindful that regulating power plants under Section 112 might well be a costly mistake, Congress ordered EPA to do so only after first evaluating the degree of health impacts from power plant emissions in light of all other Clean Air Act requirements, and then to subject power plants to Section 112 only after deciding that regulation under Section 112 was still "appropriate and necessary."

As an alternative, Congress provided Section 111 of the Clean Air Act. Section 111 is a more flexible program that considers costs, energy requirements, and the remaining useful life of existing sources. Section 111 provides a greater role for the states by tasking them with setting standards for their own existing facilities rather than imposing a uniform nationwide standard set by EPA.

In 2012, EPA decided to regulate power plants under Section 112. But in making this decision EPA defined "appropriate and necessary" so narrowly that it allowed EPA to avoid considering any factor other than whether power plant emissions posed any risks to public health whatsoever. This allowed EPA to ignore both the costs of regulating power plants under Section 112 and the alternative regulatory program Congress provided in Section 111.

EPA's decision to subject power plants to Section 112 will, by EPA's estimate, impose $9.6 billion per year in compliance costs on utilities and shutter generating capacity sufficient to power three and half million households. In the past, EPA had found that Section 111 could be used to adequately regulate power plant emissions without the need for these harsh consequences. But in EPA's latest rulemaking, EPA has refused to even *consider* the lower cost and more flexible alternative of regulating power plants under Section 111 instead. In doing so, EPA has effectively abdicated its responsibility to decide whether regulating power plants under Section 112 is "appropriate and necessary."

EPA's abdication is not only clear error in its own right, it also fails to give effect to a provision designed to properly respect the states. By providing in Section 111 a flexible alternative that would give states the primary say in deciding which power plants to shutter, if any, and ordering EPA to decide whether Section 112 regulation would be "appropriate and necessary," Congress showed deep concern and appreciation for the federalism implications of undoing a century of state and local effort and supplanting traditional state authority with the strict and inflexible Section 112 program.

Federalism "occupies a highly important place in our Nation's history and its future." *Younger v. Harris*, 401 U.S. 37, 44 (1971). EPA's refusal to consider costs and the availability of Section 111 as an alternative has allowed EPA to seize control of an important state function and force the closure of power plants built and supported by state efforts. Federalism concerns demand this action usurping state authority and intruding on legitimate state activities should not be taken lightly, if at all, and only after full and fair consideration of alternatives. As the lower court decision upholding the agency's conduct pays short shrift to these weighty concerns, this case is worthy of the Court's review.

This case also involves a rare situation where review must come now or never. The Court of Appeals has previously held that EPA's decision whether to subject power plants to Section 112 is a permanent and irreversible "listing decision." In light of this precedent, the agency cannot change its mind later, reverse its decision, or seek judicial review after these appeals have run their course. Thus, critical issues that will affect our national energy supply, as well as important issues of federalism presented by the lower court's decision, will only be addressed if the Court grants certiorari.

REASONS FOR GRANTING THE WRIT

1. Regulating power plants under Section 112 would undo state and local government efforts to provide affordable and reliable electric power and supplant the traditional role of the states.

a. State and local governments have historically played a key role in building the nation's diverse array of power plants.

At stake in this litigation is the fate of a century of state efforts to provide affordable and reliable electricity by building and supporting the construction of public and private power plants.

The Court has long recognized that the nation's utilities are the legacy of pioneering state efforts. As Justice Jackson stated, "[l]ong before the Federal Government could be stirred to regulate utilities, courageous states took the initiative and almost the whole body of utility practice has resulted from their experiences." *FPC v. East Ohio Gas Co.,* 338 U.S. 464, 489 (1950) (Jackson, J., dissenting); *see also FERC v. Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in judgment and dissenting in part) ("Utility regulation . . . is a field marked by valuable state invention."). Indeed, nearly all power plants in this country, both public and private, are the result of significant state and local government efforts. Many were directly constructed by state and local governments. Most others owe their economic feasibility to a "regulatory compact" with the states. In exchange for territorial monopolies that protect their investments and provide the degree of certainty necessary for enormous capital outlays, private

power utilities are intensely regulated by state commissions that determine what prices they charge and what power plants they build. Robert L. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*, 32 NAT. RES. J. 289, 289–90 (1992).

Governmental support, whether direct or indirect, has proved essential for the success of power utilities, *see General Motors Corp. v. Tracy*, 519 U.S. 278, 288–90 (1997), and in this country that support has come largely from the states rather than the national government. This important legacy of state initiative is especially evident in the public power sector that provides electricity for communities that were previously unserved or underserved by private utilities. *See* THE POWER INDUSTRY AND THE PUBLIC INTEREST 104 (1944) ("Between 1882 and 1927 most municipal systems were operating in communities never before served by private companies."); 77 Fed. Reg. 9,304, 9,440 (Feb. 16, 2012) (estimating "80 municipalities, 5 states, and 11 political subdivisions" are currently operating large power plants that would be subject to regulation under Section 112).

Given the traditional role of states in cultivating the nation's power industry, it is no surprise that power plants are diverse in design, size, and age. This diversity is no accident—it is a central feature of the federal system, which allows each community to balance its own needs and resources and experiment with different solutions to the same problem. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

b. Regulating power plants under Section 112 will undo the states' historic efforts and supplant the states' traditional role in regulating power plants with an inflexible federal standard.

Applying the Section 112 regulatory program to power plants will unnecessarily and unwisely undo the decades of state and local government effort put into building and supporting the power plants that are needed to make electricity available and affordable.

By design, subjecting power plants to Section 112 will force many existing plants to shut down. Specifically, Section 112 requires existing sources in categories or subcategories with more than 30 sources to achieve emission standards that are no "less stringent . . . than . . . the average emission limitation achieved by the best performing 12 percent of existing sources." 42 U.S.C. § 7412(d)(3). Thus, existing power plants will have to either upgrade to match the performance of the highest performing facilities in the nation or stop operating entirely. There is no opportunity to consider costs, the age of the facility, or the needs of the community. For many power plants, this is no choice at all—application of Section 112 is a death sentence.

Section 112 also strips the states of their traditional authority to decide what types of new power plants to build. Every single new power plant must be designed to meet emission standards that are no "less stringent than the emission control that is achieved in practice by the best controlled similar source." *Id*. In other words, any new power plant must match the performance of the best-performing power plant in the nation, again regardless of costs, energy requirements, or local needs.

The result is that, under Section 112, states with more money or newer power plants will be able to set the emission standards for the entire country, forcing other states to scrap many of their existing power plants and either buy power from other states or devote hundreds of millions of dollars building new power plants, upgrading existing plants, or retrofitting plants to accept alternative fuels.

At the outset of the underlying rulemaking, EPA acknowledged that subjecting power plants to the Section 112 program would completely transform the electric power generation fleet. 76 Fed. Reg. at 24,979. Yet EPA has refused to consider the wisdom of such a drastic reshaping of a core component of the nation's economy, despite Congress' command to take this step only if it was "appropriate and necessary."

In light of the important traditional role of state and local efforts in the power sector, EPA's finding that regulating power plants under Section 112 was "appropriate and necessary" without considering the costs of unwinding a century of state and local decisions on how best to provide a necessary utility to their citizens was a clear error with national implications and thus worthy of review by the Court.

2. The lower court upheld EPA's decision based on EPA's erroneous claim that no alternative to Section 112 existed.

EPA justified its refusal to consider the costs of Section 112 by claiming there was no alternative. *See* 76 Fed. Reg. at 24,989. The lower court, in turn, then relied on EPA's assertion that there was no alternative to Section 112 in upholding EPA's decision. Opp. at 28 (quoting 76 Fed. Reg. at 24,989). EPA's claim, however, was wrong because Congress had provided EPA with the alternative to regulate any sources whose emissions "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). This includes regulation of new sources under Section 111(b), and regulation of existing sources under Section 111(d). Thus, the decision Section 112(n)(1)(A) required EPA to make was not *whether* to regulate power plant emissions, as EPA claimed, but whether to use Section 112 or Section 111 to regulate them.

The existence of Section 111 as an alternative to regulate power plant emissions is no happenstance. In the very legislation enacting Section 112(n)(1)(A) Congress included an amendment to provide for the regulation of sources under Section 111(d) if they were not regulated under Section 112. Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990). Without that key amendment, Section 112(n)(1)(A) would have required EPA to decide whether to regulate some emissions from existing power plants at all, because Section 111(d) would have excluded the pollutants listed for regulation under Section 112.

The amendment assured that Section 111 could be used to regulate any harmful power plants emissions that could be regulated under Section 112 if EPA found Section 112 inappropriate or unnecessary. This demonstrates that through Section 112(n)(1)(A), Congress intended to give EPA the choice whether to subject power plants to Section 112 or Section 111.

Section 111 is far more flexible than Section 112. Rather than mandate that EPA force all sources to match the performance of the top performing sources, Section 111 standards for new and existing sources must be designed with cost and energy requirements "take[n] into account." 42 U.S.C. § 7411(a)(1). For existing sources, the standards are designed by the states, not the federal government, and must "take into consideration . . . the remaining useful life of the existing source." 42 U.S.C. § 7411(d)(1)–(2). Under Section 111, the single very best performing source also does not become the de facto blueprint for all other new sources.

Thus, EPA's assertion that it is "reasonable to conclude that costs may not be considered" because EPA was "evaluating whether to regulate HAP emissions from EGUs at all," 76 Fed. Reg. at 24,989, and the lower court's reliance on this assertion, *see* Opp. at 28, were clear error.

It was also inexcusable for EPA not to bring Section 111 to the lower court's attention. Not only did EPA wrongly claim that there was no alternative to Section 112, EPA disingenuously proclaimed in its rulemaking that it had no duty to identify and consider any alternatives, claiming that EPA was not "requir[ed] . . . to scour the CAA to determine whether there is a direct or indirect manner in which EPA could regulate HAP emissions from EGUs."

76 Fed. Reg. at 24,992. In essence, the agency is saying that Congress did not expect the agency to be aware of its own authority under the very statute that EPA is charged with administering. But this is precisely the form of agency expertise that EPA claims as justification for *Chevron* deference in interpreting Section 112(n)(1)(A). Either EPA is an expert in the Clean Air Act or not. EPA cannot have it both ways. And as a purported expert in the Clean Air Act, the agency cannot feign ignorance of Section 111 as a flexible regulatory alternative for regulating the very same emissions that could be regulated under Section 112. As EPA noted in this rulemaking, EPA previously in 2005 "[s]pecifically . . . pointed to" Section 111 regulation for power plant "HAP emissions" in finding it would not be "appropriate and necessary" to regulate power plants under Section 112, 76 Fed. Reg. at 24,985, and criticized its earlier 2000 decision for failing to "consider[] actions under" Section 111 in determining whether it would be "appropriate and necessary" to regulate power plants under Section 112. *Id.* So EPA would not have to "scour" the Act to find Section 111. EPA had already found it. EPA had even already attempted to use it to regulate the very emissions EPA claimed could not be directly regulated "at all" unless EPA subjected power plants to Section 112.

Before choosing to regulate power plants under Section 112, EPA was directed by Congress to determine that it was "appropriate and necessary." Because EPA neglected to even consider an available alternative to a rule that will have a dramatic impact on this country's energy system, and indeed led the court to believe that no alternative existed, this case is worthy of the Court's review.

3. EPA's refusal to evaluate an alternative that would have preserved a larger role for states implicates important federalism concerns that make this case worthy of review.

This case is especially worthy of the Court's review because Section 112(n)(1)(A) reflects vital federalism concerns that EPA should have considered but ignored. While Congress created a strict and inflexible federal program in Section 112, Congress simultaneously amended Section 111 in a way that would allow power plants to be regulated entirely under Section 111 in the alternative, and mandated that EPA avoid regulation of power plants under Section 112 unless EPA determined it was "appropriate and necessary." In this way, Congress provided a way to preserve, as much as possible, the decades of state and local government efforts to provide reliable and affordable power by assuring power plants would not be inappropriately and unnecessarily subjected to Section 112 regulation. This reflects a "proper respect for state functions" and serves to avoid regulations that could "unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S. at 44. As made clear by the Court's decision in *Bond v. United States*, Acts of Congress "must be read consistent with principles of federalism inherent in our constitutional structure" because Congress carefully preserves the traditional role of the states. *Bond v. United States*, 134 S. Ct. 2077 (2014). The interpretation of Section 112(n)(1)(A) upheld by the court below fails on this score entirely.

Federalism is built on the fundamental premise that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."

Younger, 401 U.S. at 44. For "diversity" serves "values which centralization and uniformity destroy." *East Ohio Gas Co.*, 338 U.S. at 488. Protecting diversity requires "sensitivity to the legitimate interests of both State and National Governments" and especially "a proper respect for state functions." *Younger*, 401 U.S. at 44.

EPA's decision to regulate power plants under Section 112 sacrifices a great deal of state effort in favor of centralization and uniformity. While there certainly can be an appropriate role for the federal government in national environmental regulation, when Congress has provided a middle course — one that shows respect for the legitimate efforts of states by allowing for costs and energy requirements to be considered and allowing states to tailor standards to their own power plants and needs — EPA must provide a reasoned analysis of why this alternative must be rejected.

Yet EPA has refused to consider regulation under Section 111 as an alternative, instead favoring a program EPA knows will "level" the power industry and nationalize power plants. 76 Fed. Reg. at 24,979.

EPA has failed to make this decision in a way that, as Congress intended, assures that the federal government will not "unduly interfere with the legitimate activities of the States" by supplanting the role of the states going forward and by undoing decades of past effort. *Younger*, 401 U.S. at 44.

The decision whether to regulate power plants under Section 112 is imbued with highly important federalism concerns that EPA and the court below have ignored. Accordingly, this case is especially worthy of review by the Court.

4. EPA's decision to usurp state authority over power plants and impose a stringent nationwide standard will be permanent without the Court's review at this time.

Certiorari in this case is particularly important in light of the D.C. Circuit's *New Jersey v. EPA* decision. 517 F.3d 574 (D.C. Cir. 2008). In that case, the D.C. Circuit ruled that EPA's "appropriate and necessary" determination cannot be revisited once it is made. As a result, if the Court denies certiorari, the parties will not be able to challenge EPA's determination again, no matter how devastating the consequences.

Even EPA will not be able to revisit its decision. As the D.C. Circuit reasoned, Section 112(n)(1)(A) required EPA to "evaluate regulatory options with care and to meet certain conditions before listing EGUs as an HAP source under section 112(c)(1)." *New Jersey*, 517 F.3d at 579. Once this decision is made, the court held EPA can delist power plants "only after determining that 'emissions from no source in the category or subcategory concerned exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source.'" *Id*. at 579 (quoting 42 U.S.C. § 7412(c)(9)) (internal edits omitted). Thus, the D.C. Circuit reasoned, the only way for EPA to correct a "listing error" is through "section 112(c)(9)'s delisting process" or a "court-sanctioned vacatur" of EPA's original listing decision. *Id*. at 583.

As the court below rejected the petitioners' efforts to challenge the listing decision, denial of certiorari in this case would permanently foreclose further consideration and review of EPA's decision to regulate

power plants under Section 112. Unlike most petitions for certiorari, therefore, this is the only opportunity for the Court to review whether EPA properly fulfilled its obligations to the states before deciding to regulate power plants under Section 112.

CONCLUSION

Twenty-three states and one governor submitted a petition for a writ of certiorari. Below, fourteen states and the District of Columbia intervened to support EPA's decision. "This alliance of state authorities . . . suggests that there must be more to this case than meets the eye." *East Ohio Gas Co.*, 338 U.S. at 476. Indeed, "[t]his is a real conflict in which experience shows state control will wither away and leave the federal rule in possession of the field." *Id.* at 478. But before that happens, Congress required that EPA decide how far to intrude upon traditional state authority in full view of the costs and after evaluating a more flexible regulatory alternative that would preserve a greater role for the states. EPA has failed to do so and has thereby failed to respect the states and honor their decades of efforts as Congress intended.

The Court should grant a writ of certiorari.

Respectfully submitted,

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No. 14-46, No. 14-47 & No. 14-49

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF MURRAY ENERGY CORPORATION IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICUS CURIAE*

Murray Energy Corporation ("Murray Energy") respectfully files this brief in support of Petitioners.*

Murray Energy is the largest privately-owned coal company in the United States and the fifth largest coal producer in the country, employing roughly 7,500 workers in the mining, processing, transportation, distribution, and sale of coal. In 2014, Murray Energy produced approximately 63 million tons of coal from twelve active coal mining complexes in six states. Murray Energy also owns two billion tons of proven or probable coal reserves in the United States.

Murray Energy sells coal to public and private power plants. Affordable and reliable power, much of which is generated by coal, remains essential to the health of our nation's economy. Murray Energy and its employees proudly serve their customers that provide this essential service.

In developing the current Section 112 program as part of the Clean Air Act Amendments of 1990, Congress recognized the drastic consequences that would occur from subjecting the nation's power plants to inflexible Section 112 standards. Instead of automatically authorizing or requiring imposition of the Section 112 program on power plants, Congress directed the Environmental Protection Agency ("EPA")

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* No counsel for any party authored any portion of this brief. No person or entity other than Murray Energy made any monetary contribution to the preparation and submission of this brief. Murray Energy obtained consent to the filing of this brief.

to complete a detailed study of emissions from power plants and then to regulate them under Section 112 only if "appropriate and necessary" to do so. 42 U.S.C. § 7412(n)(1)(A). But when EPA undertook the required "appropriateness" analysis, the agency refused to consider the costs of such regulation on the nation's power sector, while at the same time estimating — as it was required to do pursuant to the Unfunded Mandates Reform Act of 1995 — that regulating power plants under Section 112 would cost $9.6 billion per year.

EPA's decision to regulate power plants under Section 112 will have a dramatic effect on the power sector and those who supply the fuel to be converted to electricity at those power plants, including Murray Energy and other coal companies.

Murray Energy supports the Opening Briefs of Petitioners, but offers this Amicus Brief in order to present in greater detail why EPA's determination under Section 112(n)(1)(A) was arbitrary and capricious. By refusing to consider costs, EPA ignored an important aspect of the regulatory choice it faced. Indeed, once Section 112(n)(1)(A) is fully understood, it is evident that EPA ignored the most important factor that would otherwise inform that choice.

SUMMARY OF THE ARGUMENT

For over a century, state and local governments have constructed and supported power plants in order to provide affordable and reliable electric power. These power plants are as diverse in size and age as the states themselves and also vary widely in design.

Applying Section 112 of the Clean Air Act forces all existing power plants to either equal the emission levels achieved by a small set of the nation's best-performing facilities or else shut down completely. Section 112 also prohibits the construction of any new power plants unless they match the emission levels achieved by the nation's very best power plant. These requirements are imposed without regard to costs, energy requirements, or local resources.

Mindful that regulating power plants under Section 112 might well be a costly mistake, Congress ordered EPA to do so only after first evaluating the degree of health impacts from power plant emissions in light of all other Clean Air Act requirements, and then to subject power plants to Section 112 only after deciding that regulation under Section 112 was still "appropriate and necessary."

As an alternative, Congress provided Section 111 of the Clean Air Act. Section 111 is a more flexible program that considers costs, energy requirements, and the remaining useful life of existing sources. Section 111 provides a greater role for the states by tasking them with setting standards for their own existing facilities rather than imposing a uniform nationwide standard set by EPA.

As held by this Court, EPA acts arbitrarily and capriciously when it fails "to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v.*

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). In this case, the "problem" facing EPA is the regulatory decision as to whether or not to regulate power plants under Section 112, recognizing that Congress provided an alternative in Section 111. The key difference between the Section 111 and Section 112 programs is, in fact, costs. Yet EPA has refused to consider the $9.6 billion in annual costs it estimates would result from subjecting power plants to the inflexible Section 112 program.

This refusal renders EPA's decision to regulate power plants under Section 112 arbitrary and capricious. Accordingly, the Section 112 rule — and the determination on which it was based that it was "appropriate" to regulate power plants in this manner — must be vacated.

ARGUMENT

I. EPA acts unreasonably when it refuses to consider an "important aspect of the problem."

In 1990, Congress tasked EPA with determining if the Clean Air Act's Section 112 regulatory program was appropriate for power plants. 42 U.S.C. § 7412(n)(1)(A). The Clean Air Act provides for judicial review of this determination to ensure it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). This is the same standard as that found in the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

This "arbitrary and capricious" standard demands that, in making its decision, EPA "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted). Moreover, EPA's determination is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, *entirely failed to consider an important aspect of the problem*, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (emphasis added).

EPA acknowledges that it did not consider costs when deciding to subject power plants to the Section 112 program, notwithstanding the $9.6 billion annual cost the agency has estimated will result from its decision with virtually no offsetting benefits.

In fact, EPA agrees that it *could* have considered costs, but *chose* not to do so.

Thus, whether EPA acted arbitrarily and capriciously in determining that power plants should be regulated under Section 112 hinges on whether costs were an "important aspect of the problem" before the agency.[1] This question cannot be answered without first understanding the "problem." When the "problem" is properly understood, it is clear that costs are an "important aspect" of that problem.

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1. Whether Congress has intended to prohibit consideration of a factor, *see State Farm*, 463 U.S. at 43, is a statutory interpretation question governed by the familiar *Chevron* analysis. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns., Inc.,* 531 U.S. 457, 471 (2001) (applying *Chevron* to determine that Congress intended to prohibit cost consideration under another section of the Clean Air Act). In this case, Congress has not done so. EPA recognized in 2005 that consideration of cost was not prohibited. *See* 70 Fed. Reg. 15,994, 16,001 n.19 (Mar. 29, 2005) ("Nothing precludes EPA from considering costs in assessing whether regulation of Utility Units under section 112 is appropriate in light of all the facts and circumstances presented."). And the Solicitor General has indicated that EPA is not now advancing a contrary view. EPA Opp. at 2 (stating that "EPA declined to consider costs when making th[e] determination"). Were EPA to now reject its 2005 position, it would propound an unreasonable interpretation of the meaning of the statute that would be rejected under *Chevron*.

II. The "problem" facing EPA was whether or not to regulate power plants under Section 112, or in some other way.

Section 112(n)(1)(A) is a special provision that applies only to "electric utility steam generating units" (referred to herein as "power plants"). 42 U.S.C. § 7412(n)(1)(A); 42 U.S.C. § 7412(a)(8).

Under this provision, Congress directed EPA, first, to undertake a study of the public health hazards reasonably anticipated to occur as a result of hazardous air pollutant emissions by power plants "after imposition of the requirements of this chapter." 42 U.S.C. § 7412(n)(1)(A).[2] Second, EPA was to present the results of the study, including a description of alternative control strategies for emissions found to warrant regulation "under this section." *Id.*[3] Then, and only then, Congress directed EPA to "regulate electric utility generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph." *Id.*

EPA has erroneously defined the regulatory question — or "problem" — as whether or not to regulate harmful power plant emissions "at all." *See*

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2. This "chapter" refers to Chapter 85 of Title 42 of the United States Code, which is the entire body of Clean Air Act programs.

3. This "section" refers to Section 112 of Chapter 85 of Title 42 of the United States Code, which establishes the framework for addressing hazardous air pollutants.

76 Fed. Reg. 24,976, 24,989 (May 3, 2011).[4] However, the problem is not *whether* any harmful power plant emissions are to be regulated "at all," but *how* they are to be regulated.

By misapprehending the problem, EPA ignored the issues specific to power plants addressed by Section 112(n)(1)(A). Yet, it is only with an understanding of Section 112(n)(1)(A) that "important aspects" of the decision to be made under this provision can be identified.

A. The nation's power plants evolved over decades of support and regulatory oversight by state and local governments taking into account differing local circumstances.

The nation's power industry is the product of a century of efforts to provide affordable and reliable electricity, much of which was pioneered by states and local governments building and supporting the construction of public and private power plants. These efforts have resulted in a diverse fleet of power plants that vary significantly in size, age, cost of operation, fuel costs, and efficiencies.

The Court has long recognized these pioneering efforts. As Justice Jackson stated, "[l]ong before the Federal Government could be stirred to regulate utilities, courageous states took the initiative and almost the whole body of utility practice has resulted from their experiences." *FPC v. East Ohio Gas Co.,* 338 U.S. 464, 489 (1950) (Jackson, J., dissenting); *see*

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4. EPA's erroneous statement of the problem was then adopted by the court below. Op. at 28 (quoting 76 Fed. Reg. at 24,989).

also FERC v. Mississippi, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in judgment and dissenting in part) ("Utility regulation . . . is a field marked by valuable state invention.").

Indeed, nearly all power plants in this country, both public and private, are the result of significant state and local government efforts. Many were directly constructed by state and local governments. Most others owe their economic feasibility to a "regulatory compact" with the states. In exchange for territorial monopolies that protect their investments and provide the degree of certainty necessary for enormous capital outlays, private power utilities are intensely regulated by state commissions that determine what prices they charge and what power plants they build. Robert L. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*, 32 NAT. RES. J. 289, 289–90 (1992); *see generally General Motors Corp. v. Tracy*, 519 U.S. 278, 288–90 (1997) (citing Swartwout's article while discussing state regulation of utilities).

This important legacy of state initiative is especially evident in the public power sector that provides electricity for communities previously unserved or underserved by private utilities. *See* THE POWER INDUSTRY AND THE PUBLIC INTEREST 104 (1944) ("Between 1882 and 1927 most municipal systems were operating in communities never before served by private companies."); 77 Fed. Reg. 9,304, 9,440 (Feb. 16, 2012) (estimating "80 municipalities, 5 states, and 11 political subdivisions" are currently operating large power plants that would be subject to regulation under Section 112).

Moreover, utility investments in power plants are closely supervised by state commissions that must ensure the investment decisions are made primarily for the benefit of users of electricity by keeping costs as low as possible. This supervision covers the decision where and when to build a new power plant, the determination of its design, the decision whether any upgrades should be made, and the decision when it should be retired and replaced. In order to ensure that electricity costs are minimized for users, each of these decisions is influenced by local conditions such as the availability of local fuel sources.

For example, some states have older fleets because they are closer to coal resources and enjoy lower fuel costs such that investing in new plants does not offer the same return as in states that have much higher fuel costs. Other states have been able to avoid requiring expensive scrubbers on every coal power plant while nevertheless achieving national ambient air quality standards and complying with the provisions of the Title IV acid rain program, largely through the use of locally available low sulfur coal.

Given the traditional and ongoing role of states in cultivating and overseeing the nation's power generation industry, it is no surprise that power plants are diverse in design, size, and age. This diversity is no accident — it is a central feature of the federal system. As with many issues they address, state and local governments have responded to differing local circumstance with decades of decisions that have tailored their power generation fleets accordingly.

B. Regulating power plants under Section 112 supplants state and local governments' role with an inflexible and uniform standard.

In light of this variability, Congress has shown understandable caution in implementing national emission standards for power plants.

At the same time that the current version of Section 112 was being developed, for example, much effort was spent developing a national cap and trade program to address acid rain concerns to avoid imposing uniform national sulfur dioxide standards on power plants. The acid rain program, which was established by Title IV of the 1990 Clean Air Act Amendments, was designed to give power plants the choice among spending millions of dollars to install scrubbers, or using more lower-sulfur coal, or purchasing emission "credits" in a marketplace, rather than require every power plant in the nation take the same steps to reduce the acid rain problem.[5]

Section 112 threatens to be equally inappropriate for power plants as Title IV would have been had that program imposed one-size-fits-all standards. This is because Section 112 would require that EPA mandate potentially drastic emissions standards at great cost and for little benefit, without regard for differences in power plant performance that reflect differing local circumstances. Specifically, Section 112

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5. The market-based credit system ensures that facilities can operate with existing controls without gaining a competitive advantage over those capable of cost-effectively achieving lower rates of emissions.

requires existing sources in categories or sub-categories with more than 30 sources to achieve emission standards that are no "less stringent . . . than . . . the average emission limitation achieved by the best performing 12 percent of the existing sources." 42 U.S.C. § 7412(d)(3). Thus, by design, subjecting power plants to Section 112 indiscriminately forces many existing power plants to shut down. They have to either upgrade to match the performance of the highest performing facilities in the nation or stop operating. There is no opportunity to consider costs, the age of the facility, or the needs of the community. This consequences-blind mandate to match the performance of the highest performing power plants takes no account of the diversity of power plants built and maintained to address differing local circumstances. As a result, for many power plants, this mandate offers no choice at all — Section 112 regulation of power plants is a death sentence.

Section 112 also strips the state commissions of their traditional authority to tailor new power plants to local circumstances in order to minimize electricity costs for users. Every new power plant must be designed to meet emission standards that are no "less stringent than the emission control that is achieved in practice by the best controlled similar source." *Id*. In other words, any new power plant must match the performance of the best-performing power plant in the nation, again regardless of costs, energy requirements, or local needs.

The result is that, under Section 112, states that face higher fuel prices and have accordingly built the more expensive power plants required to minimize electricity costs for their citizens will now set a uniform performance standard for power plants in

other states. But these other states have built and preserved less expensive power plants because doing so is the best way to minimize electricity costs for their citizens given their differing local conditions. By imposing a uniform consequences-blind standard for every new and existing power plant, Section 112 will force these states to depart from the tailored cost-minimizing electricity generation systems by scrapping many of their existing power plants and either buying power from other states or devoting hundreds of millions of dollars on new power plants, upgrades to existing power plants, or retrofitting power plants to accept alternative fuels. To put the matter simply, a lot of people are going to have to pay a lot more for their electricity if power plants have to meet a rigid Section 112 standard.

Furthermore, regulating power plants under the Section 112 program threatened to combine with the Title IV program to produce a grossly inefficient and unjustifiable result — a mandate to spend billions of dollars to install scrubbers after first having to purchase emission credits to avoid the cost of installing these same scrubbers and to subsidize the cost of installing them on competitors. So long as just 12 percent of the industry has installed scrubbers, the emission limitation they achieve for acid gases will be the "emission limitation achieved by the best performing 12 percent of the existing sources" in the category and every existing power plant in the nation must match this level of performance or shut down. 42 U.S.C. § 7412(d)(3). This aspect of Section 112 regulation alone will force closure of many power plants and force many others to spend billions of dollars to install scrubbers without any benefits to public health or the environment to show for it.

As stated by one legislator: "The basic concern" in considering whether to subject power plants to Section 112 regulation is that "certain otherwise 'clean' utilities might be forced to install scrubbers even where "[s]uch 'scrubbing' would increase power rates, while potentially providing little or no public health benefit." 136 CONG. REC. 3,493 (1990) (statement of Sen. Steven Symms) (quoting staff memorandum).

C. Congress provided the flexible Section 111 program as an alternative to power plant regulation under Section 112.

In light of the enormous costs of Section 112 for power plants, the potentially inconsistent treatment of power plants under the Acid Rain Program and Section 112, and the significant state role in assuring a diverse fleet of local power generation facilities that meets local demands cost-effectively, Congress in 1990 provided an alternative program to regulate any sources whose emissions "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare" — Section 111. 42 U.S.C. § 7411(b)(1)(A). This included regulation of new sources under Section 111(b) and regulation of existing sources under Section 111(d). 42 U.S.C. § 7411(b); 42 U.S.C. § 7411(d).

The existence of Section 111 as an alternative to regulate power plant emissions is no happenstance. In the very legislation enacting Section 112(n)(1)(A), Congress included an amendment to provide for the regulation of existing sources under Section 111(d) if they were not regulated under Section 112. Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990).

Without that key amendment, Section 112(n)(1)(A) would have required EPA to decide whether to regulate some emissions from existing power plants at all, because Section 111(d) would have excluded the pollutants listed for regulation under Section 112.[6] The amendment assured that Section 111 could be used to regulate any harmful power plants emissions that could be regulated under Section 112 if EPA found Section 112 inappropriate or unnecessary.

Thus, through Section 112(n)(1)(A), Congress gave EPA the choice whether to subject power plants to Section 112 or Section 111. The decision Section 112(n)(1)(A) required EPA to make — i.e., the "problem" confronting EPA — was not *whether* to regulate power plant emissions, as EPA claimed, but whether to use Section 112 or Section 111 to regulate them.

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6. Prior to 1990, the Clean Air Act prohibited Section 111(d) regulation of the limited set of emissions that were regulated under the initially very narrow Section 112 program. *See* 42 U.S.C. § 7411(d) (1988); 42 U.S.C. § 7412(a)(1) (1988) (pre-1990 limitation on Section 112 regulation to those emissions "which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness"); 42 U.S.C § 7412 (post-1990 expanded authority for Section 112 regulation of those emissions "which present, or may present, . . . a threat of adverse human health effects . . . or adverse environmental effects").

D. EPA has acknowledged that it erroneously ignored Section 111 as an alternative for regulating power plant emissions.

Over the last 14 years, EPA changed its mind a few times on whether or not Section 111 is an alternative to regulation of power plants under Section 112, a choice that in turn impacts whether costs are important in deciding if Section 112 regulation is appropriate. At first, EPA seemingly forgot about Section 111. A few years later, EPA acknowledged it had been mistaken in rendering a decision to regulate under Section 112 without recognizing the Section 111 alternative. More recently, EPA repeated its initial mistake, a mistake acknowledged by the Solicitor General in this case.

When EPA first set out to determine whether Section 112 is appropriate for power plants, the agency failed to consider costs, and did so without the benefit of notice and comment from the public. 65 Fed. Reg. 79,825 (Dec. 20, 2000). Following EPA's announcement of its assessment of the "appropriateness" of regulating power plants under Section 112, utilities filed a petition for review seeking an order for EPA to conduct the finding through rulemaking. Petition for Review, *Util. Air Regulatory Grp. v. EPA*, No. 01-1074 (D.C. Cir. Feb. 16, 2001). The utilities objected to EPA's failure to provide an opportunity for notice and comment. Statement of Issues ¶ 4, *Util. Air Regulatory Grp. v. EPA*, No. 01-1074 (D.C. Cir. Mar. 26, 2001). And they further pointed out that EPA had wrongly believed that the Section 112 program was the "sole source of regulatory authority for hazardous air pollutant emissions from coal- and oil-fired power plants." *Id.* ¶ 2.

EPA first responded by moving to dismiss the petition for review on the ground that even if the finding was either procedurally or substantively defective, it constituted a "listing" decision that, per a provision of Section 112, could only be challenged at the time standards for the category were issued, not when the listing was made. The D.C. Circuit Court of Appeals agreed and issued a per curiam order dismissing the petition. *Util. Air Regulatory Grp. v. EPA*, No. 01-1074 (D.C. Cir. July 26, 2001) (per curiam).

Subsequently, EPA concluded that it had erred by failing to recognize the Section 111 alternative Congress had provided for addressing the very same emissions that could be regulated under Section 112. EPA explained that it had found Section 112 appropriate and necessary "based . . . solely on its belief, at the time, that there were no other authorities under the CAA that would adequately address Hg and Ni emissions" from power plants. 69 Fed. Reg. 4,652, 4,684 (Jan. 30, 2004). But after "conduct[ing] a more thorough review of the available authorities under the CAA," EPA had now "identified a viable statutory mechanism other than section 112" that could be used to "adequately address" power plant emissions: The Section 111 program. *Id.*

Having recognized the availability of Section 111, EPA found power plants should not be subject to Section 112 and accordingly proceeded with a rule to regulate power plants under Section 111 instead. 70 Fed. Reg. 15,994 (Mar. 29, 2005).

But when EPA promulgated the Section 111 rule for power plants and retracted the agency's flawed Section 112 appropriateness finding, certain stakeholders successfully challenged EPA's authority to

rescind the earlier finding. The court agreed that EPA itself could not accomplish a "delisting" of power plants by simply admitting its error. *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). Accordingly, the court of appeals vacated the revision of the finding and also EPA's Section 111 rule for power plants. *Id.* at 583.[7]

As a result of the court of appeals' decision, EPA was in an awkward position. Had EPA continued to acknowledge that the initial finding was erroneous because it was made in ignorance of the Section 111 alternative, EPA would have had to go through all the work of preparing and promulgating a Section 112 rule, finalize it, and then refuse to defend the finding on which it rested. This scenario did not occur, however, because EPA simply reverted to its initial mistake by once again failing to recognize the availability of Section 111, claiming that it was deciding whether to regulate power plants "at all." 76 Fed. Reg. at 24,989. On that basis, EPA defended the original finding's failure to consider costs and then went even further and affirmatively *refused* to consider costs.

In its brief to the court below defending this refusal to consider costs, EPA's counsel did not repeat — but also did not correct — this assertion that the agency had no alternative to Section 112 for regulating power plant emissions. As a result, the

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7. The Court vacated the Section 111(d) guideline because EPA cannot regulate power plants or any existing source category under both Section 111(d) and Section 112. *Id.* The Court vacated EPA's Section 111(b) standard for new power plants on the basis that EPA would not have issued it without the Section 111(d) guideline. *Id.*

court below relied on the erroneous statement in its opinion upholding EPA's refusal to consider costs as reasonable. Op. at 28 (quoting 76 Fed. Reg. at 24,989). In support of several states' petition for certiorari challenging this decision, Murray Energy identified this error by EPA and the court below. Brief at 9.

In opposition to the petition for certiorari, the Solicitor General acknowledged that, as EPA had previously recognized, the agency had the alternative to use Section 111 to regulate power plants. EPA Opp. 7 ("In 2005 . . . EPA concluded that it was instead appropriate to regulate power-plant mercury emissions through an alternative statutory authority, 42 U.S.C. 7411."). The Solicitor General did not dispute that the existence of the Section 111 alternative renders erroneous EPA's principal basis for refusing to consider costs, that EPA was deciding whether to regulate power plant emissions "at all."

III. Costs are an "important aspect" of the decision to regulate power plants under Section 112 or Section 111.

That the costs of Section 112 are enormous is not in dispute. EPA has projected that regulating power plants under Section 112 will impose far greater costs than any other category of sources that EPA has ever regulated under that program, an estimated $9.6 billion per year, nearly ten times more than every other Section 112 rule but one. It is difficult to imagine any decision-maker concluding that this unprecedented price tag ought not be considered before deciding it is appropriate to impose those costs.

However, it is the availability of the Section 111 alternative that underscores the importance of costs to the "problem" EPA seeks to address — costs are the principal difference between the two options. Additionally, the choice to use Section 112 comes at great cost to public power plants which, given the Unfunded Mandates Reform Act of 1995, surely is an "important aspect of the problem" for EPA to consider.

A. Costs are the principal difference between Section 111 and Section 112.

Section 111 is far more flexible and less costly than Section 112 because Section 111 would allow state and local governments to continue to tailor their power generation fleets to address differing local circumstances. Rather than mandate that EPA force all sources to match the performance of the top performing sources, Section 111 standards for new and existing sources must be designed with costs and energy requirements "take[n] into account." 42 U.S.C. § 7411(a)(1).

Crucially, Section 111 standards for existing sources are separately designed by the states for each state's own set of sources, not by EPA for every source in the category. 42 U.S.C. § 7411(d)(1)–(2). Furthermore, the states are authorized to account not only for the differences in their sources from other states, but differences in the lifespan of sources as well. The standards may "take into consideration . . . the remaining useful life of the existing source" in order to limit the potential for stranded investments and wasteful retirements. *Id.*

EPA sets nationwide Section 111 standards for new sources, but these standards are not subject to a formula in which the single very best performing source automatically dictates the standard of performance for every new source in the nation, as is the case with Section 112. Rather, EPA must identify a standard that takes cost and other considerations into account. Accordingly, if the very top performing source in the nation is tailored to local circumstances that are very different from the rest of the country, EPA can exercise its judgment not to set a lower standard of performance for other new sources.

EPA itself recognized the importance of cost in choosing between Section 111 and Section 112 as the method for regulating power plants. Having admitted that it mistakenly overlooked Section 111 as a viable alternative to Section 112 in its earlier Section 112 rulemaking, EPA proceeded with a Section 111 rule instead. In doing so, EPA found that costs are an important aspect of the problem under consideration. 70 Fed. Reg. at 16,000–01 ("[I]t might not be appropriate . . . if the health benefits expected as the result of such regulation are marginal and the cost of such regulation is significant and therefore

substantially outweighs the benefits. . . . [S]ituation specific-factors, including cost, may affect whether it 'is appropriate' . . . .").

While Section 111 offers the flexibility necessary for regulating a widely diverse source category like power plants without imposing unjustified costs and without eliminating the ability of states to respond to differing local circumstances, it nevertheless offers the ability to address all of the same public health and environmental concerns as Section 112 because the Section 111 program can be used to regulate at least as many substances as Section 112.[8]

Accordingly, the choice Congress tasked EPA to make between using Section 112 or Section 111 as the alternative does not require EPA to determine whether the public health and the environment will be protected. The choice is how it will be done, and that depends foremost on the costs of subjecting power plants to Section 112.

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8. The opinion of the court below incorrectly implies that the substances listed by Congress for Section 112 regulation "cause, or contribute to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." Op. at 7. But that standard has been removed from the statute and replaced, as EPA conceded in its brief in opposition to certiorari, with a standard requiring only that the emissions "present . . . a threat of adverse human health effects . . . or adverse environmental effects." 42 U.S.C. § 7412(b)(2); EPA Opp. at 2–3. This is similar to the standard in Section 111 that emissions must "endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A).

B. EPA's decision imposes significant costs on state and local providers of public power.

EPA estimates that subjecting power plants to Section 112 imposes "compliance costs greater than 1 percent of base generation revenue in 2016" on "42 government entities" that provide public power and of these "32 may experience compliance costs greater than 3 percent of base revenues." 77 Fed. Reg. at 9,439. All told, EPA estimates it will "impose approximately $294 million in annual direct compliance costs on an estimated 96 state or local governments." *Id.* at 9,440. Perhaps most significant, EPA projects that as a result of its decision to subject power plants to Section 112, "6 units owned by government entities are expected to retire" completely. *Id.* at 9,439.

Thus, the costs to public power providers further supports the conclusion that costs are an important aspect of the problem, and must be considered by EPA.

C. The Unfunded Mandates Reform Act of 1995 underscores the importance of costs in this case.

It was the states' concerns over precisely the kind of disproportional mandate resulting from Section 112 regulation of power plants that prompted states to exercise their political clout in Washington to obtain enactment of the Unfunded Mandates Reform Act of 1995. S. REP. NO. 104-1, at 2 (1995) ("State and local officials from all over the Nation came to Washington" and "conveyed a powerful message to Congress."). These officials demonstrated that EPA and other agencies had issued many regulatory mandates that imposed hundreds of millions of dollars in unjustified costs.

The Mayor of Columbus, Ohio, noted in particular the concern that state and local officials could be "forced to . . . raise . . . utility bills to pay for" federal mandates when they had no means of assuring that these mandates would be "appropriate." S. REP. NO. 104-1, at 2 (1995). And in seeking the Mandates Act to redress this issue, the Governor of Ohio explained that the states were in part following the guidance from the Court, which, in holding that state and local governments have no regulatory immunity from unfunded mandates, essentially advised the states to work out their issues with Congress. *Joint Hearing on S. 1 Before the S. Comm. on Governmental Affairs and the S. Comm. on the Budget*, 104th Cong. 61 (1995) (testimony of Hon. Gov. George V. Voinovich, on behalf of the National Governors' Association) (referring to *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985)).

As required by Section 202 of the Mandates Act, EPA calculated the costs of its decision to subject power plants to regulation under Section 112 will cost $9.6 billion per year. 77 Fed. Reg. at 9,439. EPA knew its regulatory decision would result in costs well over the statutory threshold of $100 million. In fact, EPA also calculated that nearly $300 million in costs would be imposed on state and local providers of public power. *Id.* at 9,440.

But EPA is refusing entirely to consider any of the information it was required by the Mandates Act to develop — and did in fact develop. Somehow, EPA concludes it was not an important aspect of its decision.

Importantly, while Congress did not specify in the Mandates Act what EPA was to do with the cost estimates it was required to develop, Congress did

provide that the cost estimate would be examined as part of the record for judicial review. *See* 2 U.S.C. § 1571(a)(4) ("Any information generated under" Section 202 of the Mandates Act "that is part of the rulemaking record for judicial review under the provisions of any other Federal law may be considered as part of the record for judicial review conducted under such other provisions of Federal law."); *see also* Conference Report on S. 1, H.R. REP. No. 104-76, at 45 (1995). This assuredly assumed that federal agencies would keep faith with the states by considering the results of the Mandates Act estimates at the very least in the rare circumstances where the estimates in fact demonstrate the kind of disproportionality in costs and benefits that the states had complained of before Congress.

EPA's conduct in this case announces to state and local governments that the millions in costs they must bear are irrelevant to the determination of the federal policies that impose them. The "observance of good faith with the states requires" that more than this blithe disregard of the Mandates Act estimates. *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 490 (1950) (Jackson, J., dissenting).

IV. EPA's refusal to consider costs renders its decision arbitrary and capricious.

EPA's analysis of the appropriateness of using Section 112 to regulate power plants is as obviously unfinished as if the agency had prefaced its discussion with "On the one hand" without following it up with another, for EPA never weighs the health effects *against* any countervailing consideration. Yet at the outset of the Section 112 rulemaking, EPA admitted that applying Section 112 to power plants would transform the nation's power generation fleet. 76 Fed. Reg. at 24,979. By refusing to consider the costs, EPA failed to determine the wisdom of such a drastic reshaping of a core component of the nation's economy and the relationship between the states and the federal government, despite the command to take this step only if it was "appropriate."

Congress presented EPA with a decision to make pursuant to Section 112(n)(1)(A): Should power plants be regulated under Section 112? In presenting that decision to EPA, Congress was well aware of the regulatory alternative it provided in Section 111 for both new and existing power plants. While EPA forgot about this alternative authority for a period of time, the agency eventually recognized that the question under Section 112(n)(1)(A) calls for a choice between regulatory programs — one of which is far more inflexible and costly than the other. EPA's refusal to consider costs, one of the most important aspects of making that choice, is arbitrary and capricious under the standard established in *State Farm*.

CONCLUSION

The judgment of the court of appeals should be reversed and EPA's determination that power plants could be appropriately regulated under Section 112 — together with the rule itself — should be vacated.

Respectfully submitted,

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ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1112 & No. 14-1151

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

No. 14-1112: IN RE MURRAY ENERGY CORPORATION,

Petitioner.

No. 14-1151: MURRAY ENERGY CORPORATION,

Petitioner,

v.

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

Respondents.

On Petition for Writ of Prohibition & On Petition for Judicial Review

FINAL OPENING BRIEF OF PETITIONER

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GLOSSARY

CAA	**Clean Air Act**
CO_2	**Carbon Dioxide**
EGUs	**Electric Utility Steam Generating Units**
EPA	**United States Environmental Protection Agency**
Power Plants	**Electric Utility Steam Generating Units**
The Office	**The House Office of the Law Revision Counsel**
The Code	**The Code of Laws of the United States**

STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in the accompanying FINAL PETITIONER STATUTORY AND REGULATORY ADDENDUM.

INTRODUCTION

This is an extraordinary case. It presents the only time that EPA has ever proposed a regulation that would, *inter alia*, dramatically reorder the country's electrical power system, adversely affect the reliability and cost of electricity, impose immediate obligations on States to design compliance programs, and disrupt markets for coal — based entirely on a provision of the Clean Air Act that expressly prohibits the very action that EPA proposes to take. Petitioner asks this Court to rule that EPA's legal conclusion supporting the proposed rule is illegal, and that EPA may not proceed with the proposal. Under the unique circumstances of this case, this Court has authority to address the issues presented, and should halt a plainly unlawful proceeding that is already damaging Petitioner and Intervenors.

ISSUES

1. Given the express language in Section 111(d) of the Clean Air Act that EPA may only mandate state-by-state standards for emissions that are not "from a source category which is regulated under section 112," does EPA have the legal authority to mandate state-by-state emission standards for existing coal-fired power plants when it has already promulgated a national emission standard for those same sources under Section 112 of the Clean Air Act?

2. Should an extraordinary writ issue to stop EPA from engaging in conduct that is expressly prohibited by the Clean Air Act and is forcing an unprecedented and potentially irreversible shift in the nation's power sector without legal justification?

3. Is EPA's final conclusion that it has legal authority to doubly regulate existing coal-fired power plants under both Section 111(d) and Section 112 of the Clean Air Act arbitrary, capricious, or unlawful when it is expressly prohibited by the Clean Air Act and rests on reasoning that is inconsistent with the purpose and structure of the Act and EPA's own past representations?

STATEMENT OF THE CASE

Three years ago, EPA promulgated a national emission standard under Section 112 of the Clean Air Act for electric utility steam generating units ("power plants"). Under the express terms of the Clean Air Act, this action barred EPA from using Section 111(d) of the Act to mandate state-by-state standards for these same sources. Nonetheless, EPA has now announced its conclusion that the agency can force States to promulgate standards for existing power plants under Section 111(d) and has initiated a rulemaking to issue such a mandate. Because this attempt at double regulation is expressly prohibited by the Clean Air Act, Murray Energy Corporation petitions this Court to set aside EPA's legal conclusion as contrary to law and to issue a writ prohibiting EPA from continuing with its unlawful rulemaking.

I. IN 2012, EPA PROMULGATED A NATIONAL EMISSION STANDARD FOR POWER PLANTS UNDER SECTION 112 OF THE CLEAN AIR ACT.

On February 16, 2012, EPA promulgated one of the most expensive regulations in the history of the United States, a national emission standard for power plants, using EPA's authority under Section 112 of the Clean Air Act. *National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units*, 77 Fed. Reg. 9,304 (Feb. 16, 2012); 40 C.F.R. Part 63 Subpart UUUUU. This Court recently upheld the standard in *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014)

(cert. granted). This Court also upheld EPA's decision to regulate power plants under Section 112. *Id.* at 16–36. Unlike standards for other sources, EPA had a choice whether to issue this standard for power plants under Section 112 rather than rely on other programs to achieve reductions of power plant emissions.[1] 42 U.S.C. § 7412(n)(1)(A). Despite strenuous objections from stakeholders and a previous Administration's conclusion that it would neither be appropriate nor necessary, EPA decided to regulate power plants under Section 112 and issued the standard.

Every covered power plant in the nation must meet the emission limits in this standard that, as Section 112 of the Act requires, EPA designed to maximize emission reductions while taking costs into account. 77 Fed. Reg. at 9,307. EPA estimated the costs of this regulation will exceed 9.4 billion dollars *per year*. EPA, *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards* at 3-13 (2011) ["2011 *Regulatory Impact Analysis"*].

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1. In contrast, the Act directly requires, rather than give EPA a choice, that existing incinerators may not be regulated under the Section 112 program and instead must be regulated by mandating state-by-state emission standards under Section 111(d). 42 U.S.C. § 7429(b). With the exception of incinerators and, due to the election granted in Section 112(n)(1)(A), the potential exception of power plants, Congress directed EPA to issue national standards for sources that emit in excess of specified thresholds and all other sources that "present[] a threat of adverse effects to human health or the environment . . . warranting regulation under" the Section 112 program. 42 U.S.C. § 7412(c).

EPA recognizes that its national emission standard will force many coal-fired power plants to shut down. EPA projects that the national standard will, by itself, result in the retirement of 4,700 megawatts of coal-fired generating capacity. *2011 Regulatory Impact Analysis* at 6A-8. That is nearly fourteen percent of the nation's total coal-fired generating capacity. *See id.* at 6A-8, 2-1. The new rule will also have dramatically greater impacts on certain regions, as, for example, Ohio relies on coal for more than two thirds of its electricity production. EPA projects that the rest of the coal-fired fleet will decide to invest billions of dollars to comply rather than shut down, but there is no guarantee that they will do so. With so many different decision makers deciding whether to shut down at once, any error in the projection or unforeseen shifts in prices could mean that EPA has woefully underestimated the risks of retirements. The final deadline to comply with the national emission standard is April 16, 2016. 40 C.F.R. § 63.9984(b).

II. EPA NOW SEEKS TO MANDATE STATE-BY-STATE STANDARDS FOR EXISTING POWER PLANTS UNDER SECTION 111(D) OF THE ACT.

As utilities across the country decide whether to shut down or invest many millions at coal-fired power plants, EPA has launched a second rulemaking, now under Section 111(d) of the Clean Air Act, requiring that States design and issue state-by-state emission standards for greenhouse gas emissions. *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014) (App.13). Just as must any national emission standard under Section 112, any state-by-state emission standard mandated under Section 111(d) must maximize emission reductions in light of costs. 42 U.S.C. § 7411(a)(1); 42 U.S.C. § 7411(d).

EPA's mandate under Section 111(d) of the Clean Air Act calling for the development of state-by-state emission standards for existing power plants is unlawful. The Clean Air Act expressly prohibits EPA from mandating state-by-state standards for existing sources that are already subject to a national standard: EPA's authority is limited to mandating standards for emissions that are not "from a source category which is regulated under section [112]" of the Act. 42 U.S.C. § 7411(d). Here, existing coal- and oil-fired power plants are already subject to the national emission standard recently upheld by this Court. EPA proceeded with the Section 111(d) rulemaking anyway, and further announced its unequivocal legal conclusion that the agency not only can but *must* regulate categories of existing sources under both Section 111(d) and Section 112 of the Clean Air Act.

III. MURRAY ENERGY CORPORATION PETITIONS FOR JUDICIAL REVIEW AND AN EXTRAORDINARY WRIT TO STOP EPA'S UNLAWFUL ACTIONS.

Faced with EPA's erroneous pronouncement and *ultra vires* rulemaking, Murray Energy Corporation filed the two consolidated petitions requesting that this Court: (1) issue a writ prohibiting EPA from promulgating an *ultra vires* Section 111(d) mandate ordering States to design and impose state-by-state standards for power plants; and (2) hold unlawful and set aside EPA's erroneous legal conclusion that the agency may regulate power plants under Section 111(d) despite the express prohibition in that very section.

EPA opposed the petition for extraordinary writ and moved to dismiss the petition for judicial review, contending that this Court can offer no relief until the agency has completed its rulemaking. This Court, on its own motion, consolidated the petitions and ordered full briefing and argument. Per Curiam Order (Nov. 13, 2014).

JURISDICTION

This Court has jurisdiction over the petition for an extraordinary writ, No. 14-1112, and the petition for judicial review, No. 14-1151, because Congress provided this Court original and exclusive jurisdiction to review EPA's actions under the Clean Air Act that are "nationally applicable." 42 U.S.C. § 7607(b)(1); *see Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980).

EPA's legal conclusion, announced in EPA's June 18, 2014 publication in the Federal Register, applies nationwide to all existing sources regulated under Clean Air Act Section 112. This Court, therefore, has original and exclusive jurisdiction to review that action.

EPA's rulemaking similarly has national applicability. The Clean Air Act therefore also grants this Court original and exclusive jurisdiction to review challenges to EPA's rulemaking. 42 U.S.C. § 7607(b)(1). Under the law of this Circuit, the Clean Air Act's grant of original jurisdiction includes within its scope All Writs Act challenges seeking relief before EPA has taken final action such as the instant petition seeking a writ prohibiting EPA from proceeding with its *ultra vires* rulemaking. *See* 28 U.S.C. § 1651(a); *Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 42–43 (D.C. Cir. 2004) (holding an express grant of original jurisdiction to review an agency's final actions extends also to consideration of petitions for relief from nonfinal agency action authorized by the All Writs Act).

In its prior briefings in the consolidated cases, EPA contended that this Court's jurisdiction does not extend to petitions seeking to prohibit EPA from

taking an action beyond its authority. Response to Petition at 1–2, 7–18. EPA's contention is unsupportable in light of the undisputed law of this Circuit that this Court has jurisdiction under the Clean Air Act to provide relief authorized by the All Writs Act even in the absence of final agency action. *See, e.g., Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987). EPA's position would also create an unworkable split of jurisdiction between this Court and the district courts that Congress never intended. As this Court reasoned in *Sierra Club*, Congress provided for direct review by this Court to speed and centralize judicial supervision of EPA's administration of the Clean Air Act. Congress has not, simply by expressly providing for direct review in the Courts of Appeals, either limited or split the availability of relief from EPA's *ultra vires* agency action that could have otherwise been sought under the Administrative Procedure Act and the All Writs Act in the district courts had Congress not provided for direct review in this Court. *Cf. Leedom v. Kyne*, 358 U.S. 184, 188, 190–91 (1958).

SUMMARY

In 2012, EPA chose to regulate power plants under Section 112 of the Clean Air Act rather than mandate state-by-state standards under Section 111(d). It then promulgated one of the most expensive rules in the history of the United States. By the plain terms of the Clean Air Act, as interpreted by the Supreme Court and by EPA itself, this action foreclosed EPA from mandating state-by-state emission standards for these same sources. But in 2013 the President directed EPA to develop just such a mandate for greenhouse gas emissions from power plants. This directive was unlawful, but in response EPA initiated a rulemaking to mandate state-by-state greenhouse gas standards for existing power plants.

To justify its rulemaking in contravention of the clear statutory text, EPA rests its authority entirely on two fundamental errors. First, EPA argues that the text of Clean Air Act is not accurately reflected in the United States Code because of the existence of a superfluous conforming amendment. Second, EPA claims that it has authority to resolve the purported ambiguity raised by that conforming amendment and EPA demands that this Court defer to EPA's efforts in resolving it. But EPA, not the United States Code, is wrong, and EPA has no authority to second-guess the determinations made by the House Office of the Law Revision Counsel in executing amendments whenever EPA finds that Acts of Congress have stymied its regulatory initiatives.

Finally, EPA argues that, even if its conduct is unlawful and in direct contravention of the Clean Air Act, it should be allowed to finish its unlawful conduct before this Court provides relief. There is nothing in the law to support this argument and no reason why EPA should be permitted to continue to pressure coal-fired power plants to shut down and continue to subject the States, the coal-fired power plants they regulate, and the hundreds of thousands of people who depend on coal-fired utilities for their businesses, jobs, and livelihoods, to suffer current injury and bear the burdens of preparing for compliance.

Because EPA's actions are in direct contravention of the Clean Air Act, because this Court has clear authority to stop the ongoing harm caused by EPA's unlawful conduct, and because there is no reason to delay relief until EPA promulgates a final rule it does not even have the authority to propose, Petitioner Murray Energy Corporation respectfully requests that this Court grant its petition for an extraordinary writ and petition for judicial review, declare EPA's legal conclusion not in accordance with law, and prohibit EPA from proceeding to mandate state-by-state emission standards for source categories already subject to Section 112.

STANDING

As the largest privately-held coal producer and the fifth largest overall in the United States, Murray Energy Corporation has standing to seek review of EPA's legal conclusion and to seek a writ of prohibition against EPA's rulemaking that jeopardizes the existence of many of the nation's coal-fired power plants, thereby directly harming the coal industry, including Murray Energy Corporation.[2] That the rulemaking is directed at coal is apparent from EPA's own statements.

In order to have standing, a petitioner "must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc., v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Whatever the detail of EPA's mandate, and whatever the detail of the States' plans in response, one thing is clear: Reliance on coal as the source of electricity generating capacity is to be reduced. Each loss of a customer means less revenue. Even if a non-customer shutters a coal-fired unit, the reduced demand for coal impacts pricing, which means less revenue. Thus, each coal-fired unit that is closed, or scheduled for closing, presents a "concrete" and

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2. Murray Energy Corporation's standing is supported by the Declaration of Robert E. Murray, December 11, 2014, provided in the attached PETITIONER STANDING ADDENDUM.

"'actual or imminent'" injury to Murray Energy Corporation. *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (citing *Allen v. Wright*, 468 U.S. 737, 756 (1984); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740–41 (1972)); *see also Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1005–06 (D.C. Cir. 2014) (injury-in-fact due to competitive disadvantage).

The harm is neither "conceptual" nor "hypothetical." *Lujan*, 504 U.S. at 560. Some customers have recently closed units. Another recently announced it would seek to repower its last unit to natural gas, reportedly due to the impact of upcoming regulations and the inability to obtain further rate increases to support capital improvements necessitated by them. Many have expressed their concerns in comments filed in the rulemaking. The planning for the forced retirement of coal-fired units is underway, often driven by deadlines under other EPA programs. Utilities do not have the luxury of deferring their decisions until the conclusion of the Section 111(d) rulemaking process.

Not only is the injury "fairly traceable" to EPA's actions, *id.*, it is contemplated by EPA. EPA's own modeling predicts significant reductions in coal production:

> The EPA projects coal production for use by the power sector, a large component of total coal production, will decline by roughly 25 to 27 percent in 2020 from base case levels. The use of coal by the power sector will decrease roughly 30 to 32 percent in 2030.

79 Fed. Reg. at 34,934 (App.118). Even though EPA's modeling is predictive, EPA has designed the proposed rule to produce this result. There is more than a "substantial probability" of harm. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (internal quotations omitted). While EPA's rulemaking may not be technically directed at coal producers, the impacts are still traceable to EPA's action. *See Motor & Equip. Mfrs. Ass'n. v. Nichols*, 142 F.3d 449, 456–458 (D.C. Cir. 1998); *Ethyl Corp. v. EPA,* 306 F.3d 1144, 1147–48 (D.C. Cir. 2002); *see also Monroe Energy, LLC v. EPA*, 750 F.3d 909, 914–15 (D.C. Cir. 2014).[3]

The intended consequence of EPA's rulemaking is to force the shutdown of more coal-fired units than would otherwise occur. The petitions seek to stop EPA, now. If this Court does that, these additional shutdowns will not occur. Far from being "merely speculative," not only will a favorable decision by this Court "likely" redress the injury to Murray Energy, it will do so with certainty. *See Lujan,* 504 U.S. at 560.

For the foregoing reasons, the injury to Murray Energy Corporation is actual, concrete, and traceable to EPA's actions, and this Court has the ability to stop EPA. Accordingly, Murray Energy Corporation has standing to bring these petitions.

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3. Additionally, "[p]arties motivated by purely commercial interests routinely satisfy the zone of interests test." *Amgen, Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004); *compare White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1256–57 (D.C. Cir. 2014) ("prudential standing" not found for a plaintiff whose sole interest was in seeing its competitor more rigorously regulated); *see generally Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. at 1389.

ARGUMENT

I. SECTION 111(D) PROHIBITS EPA FROM MANDATING STATE-BY-STATE EMISSION STANDARDS FOR EXISTING SOURCES THAT ARE ALREADY SUBJECT TO A SECTION 112 NATIONAL EMISSION STANDARD.

Power plants are already subject to a national emission standard. The unambiguous text of the Clean Air Act expressly prohibits EPA from mandating state-by-state emission standards for existing sources that are subject to a national standard by excluding from EPA's authority the power to mandate state-by-state standards "for any existing source for any air pollutant . . . emitted from a source category which is regulated under section [112]." 42 U.S.C. § 7411(d). This is an important protection against inconsistent and unaffordable double regulation of existing sources. Further, the Clean Air Act's evolution since 1970 confirms that ignoring this prohibition would disrupt Congress's careful balance between national and state control and jeopardize existing sources in a manner Congress consistently avoided.

A. The Clean Air Act Expressly Prohibits Regulating Sources under Both Section 111(d) and Section 112, as EPA Has Repeatedly Conceded.

Section 111(d) of the Clean Air Act authorizes EPA to mandate state-by-state emission standards for existing sources. 42 U.S.C. § 7411(d). However, this authority is limited to mandating standards for emissions that are not "from a source category which is regulated under section [112]" of the Act. *Id.* Section 112 of the Act authorizes EPA to issue national emission standards. 42 U.S.C. § 7412(a)–(q). Thus, once a source category is regulated under a

national emission standard, EPA may not thereafter mandate state-by-state emission standards for that source category.

As a result, existing sources can be subjected to national standards *or* mandated state-by-state standards, but they cannot be subjected to national standards *and* mandated state-by-state standards. With respect to power plants in particular, Congress specifically directed EPA to subject them to a national emission standard only if "appropriate and necessary," giving EPA the choice of whether to proceed with a national standard or allow power plants to be regulated through state-by-state standards. 42 U.S.C. § 7412(n)(1)(A) ("The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary . . . .").

EPA has repeatedly acknowledged that the text of Section 111(d), as reflected in the United States Code after the 1990 Amendments, unambiguously prohibits doubly regulating existing source categories. During the Clinton Administration, EPA found Congress's instructions on this point crystal clear, explaining that Section 111(d) does not permit or require mandates for emissions that are "emitted from a source category that is actually being regulated under section 112," so EPA's authority to issue a Section 111(d) mandate depends upon whether there is "a section 112 emission standard" applicable to the source category in question. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AIR EMISSIONS FROM MUNICIPAL SOLID WASTE LANDFILLS – BACKGROUND INFORMATION FOR FINAL STANDARDS

AND GUIDELINES 1-5 to 1-6 (1995) (App.463–64). The Bush Administration's EPA agreed, recognizing that "a literal reading" of the text of Section 111(d) found in the United States Code provides that "EPA cannot" issue a mandate "under CAA section 111(d) for 'any pollutant' . . . that is emitted from a particular source category regulated under section 112," so "if a source category X is 'a source category' regulated under section 112, EPA could not regulate" any emissions "from that source category under section 111(d)." 70 Fed. Reg. 15,994, 16,031 (March 29, 2005). EPA reiterated its position to this Court as well, stating that "a literal reading of this provision could bar section 111 standards for any pollutant . . . emitted from a source category that is regulated under Section 112." Final Brief of Respondent at 105, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097) (App.491). Even in the documents announcing EPA's conclusion and rulemaking, the current Administration's EPA has continued to acknowledge the clear and unambiguous "literal reading of th[e] language . . . mean[s] that the EPA c[an]not regulate any air pollutant from a source category regulated under section 112." LEGAL MEMORANDUM FOR PROPOSED CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING ELECTRIC UTILITY GENERATING UNITS at 26, EPA-HQ-OAR-2013-0602-0419 (App.161).

The Supreme Court has also already confirmed that EPA is correct that the text of Section 111(d) as reflected in the United States Code prohibits EPA from mandating state-by-state standards for existing sources that are already subjected to a national emission standard. In *American Electric Power v. Connecticut*, the Court observed that Section 111(d) "requires regulation of

existing sources within [a source category regulated under Section 111(b)]" but "[t]here is an exception: 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." 131 S.Ct. 2527, 2537 n.7 (2011).[4] Similarly, the ABA's *Clean Air Act Handbook*, which has been cited by the Supreme Court,[5] observes, with no hint of uncertain meaning, that "[u]nder section 111(d), EPA may establish emissions guidelines for existing sources in a source category when . . . the category is not subject to regulation under section 112." CLEAN AIR ACT HANDBOOK 331 (J. Domike & A. Zacaroli eds., 3d ed. 2011).

The unambiguous words of Section 111(d) exclude from EPA's authority the power to issue "standards of performance for any existing source for *any* air pollutant . . . emitted from a source category which is regulated under section [112]." 42 U.S.C. § 7411(d) (emphasis added). Thus, Congress has directed that EPA may not regulate *any* air pollutant through the state-by-state mandate program of Section 111(d) if the existing source category is regulated under Section 112.

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4. That EPA might foreclose itself from issuing a mandate under Section 111(d) by issuing a national emission standard under Section 112 is fully consistent with the Supreme Court's holding in *American Electric Power v. Connecticut* that federal common law was displaced by the Act because the Court explicitly held that delegation of authority "displaces federal common law" even if that authority is never actually exercised. 131 S.Ct. at 2538–39.

5. *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2435 (2014).

B. Section 111(d) Sensibly Protects Existing Sources From Double Regulation under Standards that Each Seek to Independently Maximize Emission Reductions.

Congress sensibly banned EPA from doubly regulating source categories under both Sections 111(d) and 112 because simultaneous, uncoordinated design of national and state-by-state standards maximizing emission reductions would unduly jeopardize their viability by imposing conflicting or unaffordable requirements.

An EPA mandate of state-by-state standards under Section 111(d) must require the States, or EPA if the States do not, to design and impose emission standards determined to "reflect[] 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) . . . has been adequately demonstrated." 42 U.S.C. § 7411(a)(1); 42 U.S.C. § 7411(d).

A national emission standard under Section 112 must be designed to "require the maximum degree of reduction in emissions" determined to be "achievable" by EPA "taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements . . . through application of measures, processes, methods, systems or techniques" and must meet statutory stringency floors. 42 U.S.C. § 7412(d).

Thus, both the state-by-state standard and the national standard programs require consideration of costs on the one hand and maximum

reductions on the other. Plainly, the Act orders the designers of these standards to go as far as possible in reducing emissions without threatening the economic viability of sources. Subjecting existing sources to both state-by-state standards and a national standard would set the designers at odds and result in standards requiring more expenditures than existing sources can reasonably afford.

The problem is exacerbated where, as here, the threat of state maximum emission reductions comes closely on the heels of an independent national requirement. Power plants are forced to make engineering, design, and economic choices now, based on the obligation to maximize the reduction of one set of pollutants selected by EPA today, knowing that the variables will change almost immediately after these commitments have been made.

Will the pollution controls installed to meet the national standard be enough to meet the States' as-yet unwritten standards? If not, will the technology and operational changes needed to meet a state's standard be compatible with those the source is committing to for the national standard? Moreover, do the financial projections that were made to justify continuing to operate at all in light of the millions that will be needed to meet the national standard still hold once a state standard is imposed? These are just some of the issues Congress avoided by prohibiting double regulation of the same existing sources under both programs.

C. The Act's Evolution Since 1970 Shows the Import and Purpose of the Section 111(d) Restriction.

The evolution of the Clean Air Act's state and national emission standards programs reflect a careful balance between federal and state control, and show Congress's keen interest in avoiding the double regulation of existing sources by overlapping emission standards programs.

1. The 1970 Clean Air Act Amendments Created a State-by-State Existing Source Standards Program and a Limited National Standards Program Only for Extremely Hazardous Emissions.

Today, EPA has authority to directly impose comprehensive national standards on existing sources, but this was not always so, and it was Congressional reluctance to give EPA this power in 1970 that led to the development of EPA's authority to mandate state-by-state emission standards for existing sources in the first place.

On February 9, 1970, President Nixon proposed amending the Clean Air Act to authorize national emission standards "for facilities that emit pollutants extremely hazardous to health" and "for selected classes of new facilities which could be major contributors to air pollution." A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 at 1498, 1505 (Comm. Print 1974).[6]

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6. Citations to the historical development of the Clean Air Act are to the pages of the comprehensive committee print compilations. None of the materials referenced in this section are statements by legislators or committees. A more detailed discussion of the historical development of these provisions is included in Murray Energy Corporation's comments. COMMENTS OF MURRAY ENERGY CORPORATION at 25–36, EPA-HQ-OAR-2013-0602-23523 (Dec. 1, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-23523 (App.173–84).

Congress considered a number of different options in response to the President's proposal, ranging from mandating the regulation of all sources to just new sources, and from the regulation of all existing source emissions that endangered "public health or welfare" to only regulation of existing source emissions that are "extremely hazardous to health."[7]

The final result, the 1970 Clean Air Act, created an emission standards program for existing sources in Section 111(d) that covered most pollutants found to endanger "public health or welfare," but it assigned the authority to develop these standards to the States, not the federal government. 42 U.S.C. § 1857c-6(d) (1976). The only exception was the narrow Section 112 program authorizing EPA to establish national standards for certain extremely hazardous emissions that were to be listed under Section 112(b)(1)(A) if found to have the potential to "cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C.

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7. *See* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 at 1,489–92 (S. 3466 § 8 and H.R. 15848 § 8 as introduced proposed a Section 112 program authorizing standards for new sources of emissions found to endanger "public health or welfare" and standards for existing source emissions only when found to be "extremely hazardous to health"); *id.* at 920–24 (H.R. 17255 § 5(a) as reported proposed a Section 112 program authorizing standards only for new sources); *id.* at 1,467–68 (S. 3546 § 4(c) as introduced proposed a Section 108(i) program authorizing standards only for new sources); *id.* 392, 553–69 (S. 4358 § 6(b) as introduced and passed in the Senate proposed a Section 113 program authorizing standards for new source emissions found to endanger "public health and welfare," a Section 114 program for all sources of emissions found "to have an adverse effect on public health," and a Section 115 program authorizing standards for emissions from any source found to be "hazardous to the health of persons").

§ 1857c-7(a)(1) (1976). Congress also made clear that these programs were not to overlap, providing that state-by-state standards developed by States could only be mandated by EPA for emissions of pollutants which, among other things, were "not included on a list published under section . . . [112(b)(1)(A)]." 42 U.S.C. § 1857c-6(d) (1976).

Notably, while Congress elsewhere in the 1970 Clean Air Act prescribed maximum emission reductions in light of costs for new sources, for existing sources Congress chose a different path: National emission standards for extremely hazardous emissions from existing sources would be set by EPA so as to "provide[] an ample margin of safety to protect the public health," 42 U.S.C. § 1857c-7(b)(1)(B) (1976), and standards for existing sources of other harmful emissions from existing sources would be determined by States on a state-by-state basis for each State's own existing sources but not according to any particular design formula imposed by EPA. 42 U.S.C. § 1857c-6(d) (1976).

2. The 1977 Amendments Required States to Maximize Emission Reductions at Existing Sources in Light of Costs.

Whereas the 1970 Act left to the States the task of determining the appropriate method for setting emission standards for each State's own existing sources of most air pollutants, the 1977 Act imposed for the first time the additional requirement that States design standards for existing sources to maximize emission reductions while considering costs and other factors. 42 U.S.C. § 7411(a)(1)(C) (1988). The standards for existing sources would still be set by the States in the first instance, but would now have to "reflect[] the

degree of emission reduction achievable through the application of the best system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated for that category of sources." *Id.*

The Act's Section 112 national emission standards program was not significantly altered. It remained limited to extremely hazardous emissions and continued to require an ample margin of safety rather than maximized emission reductions in light of costs. 42 U.S.C. § 7412 (1988). Meanwhile, the Act also continued after the 1977 Amendments to prohibit EPA from mandating state-by-state standards for any pollutant "included on a list published under section . . . [112(b)(1)(A)]." 42 U.S.C. § 7411(d) (1988).

3. The 1990 Clean Air Act Amendments Significantly Expanded the National Standards Program and Retained the State-by-State Existing Source Standards Program Only for Source Categories Not Regulated under the National Standards Program.

In 1990, Congress dramatically expanded Section 112 of the Act, altering the national emission standards program for existing sources from a limited program covering extremely hazardous emission to a broad national program covering all emissions "which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects . . . or adverse environmental effects." 42 U.S.C. § 7412(b)(2).

The 1990 Amendments also established, for the first time, a requirement that EPA impose national standards for existing sources that maximize

emission reductions in light of costs, requiring that EPA design the standards to achieve "the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost-of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable." 42 U.S.C. § 7412(d).

In addition, where Section 112(b)(1)(A) of the Act had previously contained a short requirement that the Administrator publish, and "from time-to-time thereafter revise" a list of the hazardous air pollutants covered by Section 112 (and therefore excluded from regulation under Section 111(d)), the 1990 Amendments replaced all of Section 112(b) with a list of nearly 200 pollutants and a detailed process for adding additional pollutants to the list, removing them, routinely updating the list, and allowing for private parties to petition for changes. 42 U.S.C. § 7412(b).

The 1990 Amendments also shifted the focus of Section 112's national emission standards from pollutants to source categories. Where before the Administrator was to publish standards for each pollutant listed in Section 112(b)(1)(A) (now Section 112(b)), the 1990 Amendments required EPA to develop "a list of all categories and subcategories of major sources and area sources . . . of the air pollutants listed pursuant to subsection (b)" and to establish emission standards for those "categories and subcategories the Administrator lists" on a category-by-category basis. 42 U.S.C. § 7412(c).

In the course of this expansion and change in focus, Congress sought to again ensure that there would be no double regulation under both programs.

The bill passed in the Senate merely updated the citation to the list of specific pollutants covered by Section 112 from 112(b)(1)(A) to 112(b) without limiting the scope of the Section 112 exclusion. A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 at 4,534 (Comm. Print 1993). This bill would have preserved the traditional approach that, as long as a pollutant is covered by a Section 112 national emission standard, it could not be the subject of an EPA mandated state-by-state emission standard. Of course, since the 1990 Amendments greatly expanded the set of pollutants that would be covered by Section 112, this would have essentially eliminated the Section 111(d) state-by-state standards program. The only exception the Senate bill provided was a special provision requiring Section 111(d) mandates for certain specified emissions from existing incinerators. *Id.* at 4,538–40, 4,556.

Meanwhile, the House passed a bill that preserved much more of the Section 111(d) mandate program by changing the focus of the Section 112 exclusion from the *pollutants* covered by Section 112 to the *source categories*, such that Section 111(d) standards could now be promulgated for almost any pollutant meeting the basic requirements of Section 111, as long as it did not cover emissions "from a source category which is regulated under Section 112." *Id.* at 1,979. In addition, the House bill included a provision that would allow EPA to *choose* whether the nations existing power plants should be regulated under Section 111(d) or the new Section 112 program. *Id.* at 2,149.

In conference, the House and Senate agreed to include in the final bill the Senate bill incinerator provision, the House bill power plant provision, and the House bill amendment to the mandate program.[8] *Id.* at 593, 572, 481; *see* 42 U.SC. § 7429(b); 42 U.S.C. § 7412(n)(1)(A); 42 U.S.C. § 7411(d).

Importantly, the Clean Air Act as amended in 1990 again continued to avoid authorizing EPA to subject any existing source simultaneously to multiple standards designed to maximize emission reductions in light of costs. Having provided for far more comprehensive national emission standards for existing sources, Congress decided to maintain the state-by-state standard mandate program for those sources not subject to the national standards. And having preserved this role for the state-by-state mandate program, Congress further decided incinerators would be subject only to the state-by-state mandate program but gave EPA discretion to decide which program power plants would be subject to, national or state-by-state.

Congress's special treatment of incinerators and power plants recognizes that these categories of existing sources are often older facilities that offer essential public or quasi-public services to their communities, frequently operating at little or no profit. Thus, regulation of existing incinerators and

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8. As discussed further below, the 1990 Act also inadvertently included the conforming amendment that would have updated the pre-1990 Section 112 exclusion's reference from Section 112(b)(1)(A) to Section 112(b), but the House Office of the Law Revision Counsel properly found that this conforming amendment failed to execute in light of the execution priority of the provision substantively amending the Section 112 exclusion.

power plants poses implications for the proper balance between state and federal control that regulation of other sources does not. Accordingly, Congress maintained a greater role for States in establishing standards for incinerators and gave EPA discretion to maintain a greater role for States in establishing standards for power plants. But Congress in no way empowered EPA to subject power plants (or any other category of existing sources) to *both* national and mandated state-by-state standards.

II. EPA WRONGLY IGNORES THE TEXT OF SECTION 111(D) AND ERRONEOUSLY CLAIMS THERE ARE DUELING "VERSIONS" OF THE STATUTE.

In launching its rulemaking and concluding that double regulation is authorized, EPA had to cast aside the text of the Clean Air Act based upon the vague and unsupportable assertion that the United States Code "conflict[s]" with the Statutes at Large. Response to Petition at 4. EPA then had to rest its authority to doubly regulate on a purported legislative glitch. Response to Petition at 28. In reality, there is no glitch — the text of the law now in force is accurately reflected in the Code. And even were there a reasonable doubt, Congress tasked its own legislative agency, not EPA, with determining in the first instance what the text of the law in force is and Congress provided that courts should defer to this agency's reasonable determinations.

A. The Code Accurately Reflects the Text of Section 111(d).

In addition to the substantive amendment to the mandate program that prohibits Section 111(d) mandates for sources regulated under Section 112, the 1990 Amendments also contained a conforming amendment. Pub. L. 101–549, § 302(a), 104 Stat. 2,399, 2,574 (1990). The conforming amendment has no effect on the Act because the provision substantively amending the mandate program and striking the reference to Section 112 that it would have amended has execution priority and the United States Code, prepared by the House Office of the Law Revision Counsel ("the Office"), accurately reflects the text of Section 111(d) after application of the 1990 Amendments to the Clean Air Act.

The conforming amendment EPA stakes the rulemaking on purported to replace language that no longer existed due to the prior execution of the earlier substantive amendment, and so the Office determined the conforming amendment failed to execute. The two amendments are set out in the Statutes at Large as follows:

> **SEC. 108. MISCELLANEOUS GUIDANCE.** . . .
>
> (g) REGULATION OF EXISTING SOURCES.—Section 111(d)(1)(A)(i) of the Clean Air Act (42 U.S.C. 7411(d)(1)(A)(i)) is amended by striking "or 112(b)(1)(A)" and inserting "or emitted from a source category which is regulated under section 112". . . .
>
> **SEC. 302. CONFORMING AMENDMENTS.**
>
> (a) Section 111(d)(1) of the Clean Air Act is amended by striking "112(b)(1)(A)" and inserting in lieu thereof "112(b)".

Pub. L. 101–549, § 108(g), 104 Stat. 2,399, 2,467 (1990); Pub. L. 101–549, § 302(a), 104 Stat. 2,399, 2,574 (1990). Prior to 1990, the Code's text provided for regulation of "any air pollutant . . . which is not included on a list published under section 7408(a) or 7412(b)(1)(A) of this title." 42 U.S.C. § 7411(d) (1988). The current Code's text now provides for regulation of "any air pollutant . . . 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." 42 U.S.C. § 7411(d) (2012). In the amendment note, the Office explained its determination in applying the amendments:

> Subsec. (d)(1)(A)(i). Pub. L. 101–549, §302(a), which directed the substitution of "7412(b)" for "7412(b)(1)(A)", could not be executed, because of the prior amendment by Pub. L. 101–549, §108(g), see below.

> Pub. L. 101–549, §108(g), substituted "or emitted from a source category which is regulated under section 7412 of this title" for "or 7412(b)(1)(A)".

42 U.S.C. § 7411, Amendments, 1990, Subsec. (d)(1)(A)(i) (2012). Thus, the substantive amendment — Section 108(g) — was duly executed while the conforming amendment — Section 302(a) — could not be executed and failed.

EPA asserts that "[t]his situation appears to be unique." Response to Petition at 23 n.8. EPA is wrong. A bill containing an amendment to a statutory provision that fails to execute because of another amendment to the same provision contained earlier in the same bill is not unusual. This happens often and Congress and the Office have an established rule to resolve it: An amendment fails to execute if a prior amendment in the same bill removes or alters the text that the subsequent amendment would amend. The Office consistently and frequently applies this rule in this circumstance.[9]

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9. *See, e.g.*, 15 U.S.C. § 2064, Amendments, 2008, Subsec. (d)(2); 15 U.S.C. § 2081, Amendments, 2008, Subsec. (b)(1); 29 U.S.C. § 1053, Amendments, 1989, Subsec. (e)(1); 42 U.S.C. § 290bb-25, Amendments, 2000, Subsec. (m)(5); 42 U.S.C. § 300aa-15, Amendments, 1989, Subsec. (e)(2); 42 U.S.C. § 300ff-13, Amendments, 1996, Subsec. (b)(4)(B); 42 U.S.C. § 300ff-15, Amendments, 1996, Subsec. (c)(1); 42 U.S.C. § 300ff-28, Amendments, 1996, Subsec. (a)(1); 42 U.S.C. § 300ff-28, Amendments, 1996, Subsec. (b)(1); 42 U.S.C. § 677, Amendments, 1989, Subsec. (e)(1); 42 U.S.C. § 1320a-7a, Amendments, 1997, Subsec. (i)(6)(B); 42 U.S.C. § 1320a-7a, Amendments, 1997, Subsec. (i)(6)(C); 42 U.S.C. § 1395*l*, Amendments, 1990, Subsec. (a)(1)(K); 42 U.S.C. § 1395u, Amendments, 1994, Subsec. (b)(3)(G); 42 U.S.C. § 1395x, Amendments, 1990, Subsec. (aa)(3); 42 U.S.C. § 1395cc, Amendments, 2010, Subsec. (a)(1)(V); 42 U.S.C. § 1395ww, Amendments, 2003, Subsec. (d)(9)(A)(ii); 42 U.S.C. § 1396(a), Amendments, 1993, Subsec. (a)(54); 42 U.S.C. § 1396b, Amendments, 1993, Subsec. (i)(10); 42 U.S.C. § 1396r, Amendments, 1988, Subsec. (b)(5)(A); 42 U.S.C. § 3025, Amend-

This is Congress's rule — Congress is aware of this rule and drafts legislation in light of it. *See* UNITED STATES SENATE, OFFICE OF LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL § 126(d) (1997) ("If, after a first amendment to a provision is made . . . the provision is again amended, the assumption is that the earlier (preceding) amendments have been executed.") (App.474); UNITED STATES HOUSE OF REPRESENTATIVES, OFFICE OF LEGISLATIVE COUNSEL, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE § 332(d) (1995) ("The assumption is that the earlier (preceding) amendments have been executed.") (App.451). In this case, the Office simply followed Congress's rule and correctly determined that the amendment directing the substitution of "112(b)(1)(A)" for "112(b)" failed to execute because a prior amendment earlier substituted "or emitted from a source category which is regulated under section 112" for "or 112(b)(1)(A)." The Code therefore accurately reflects the text of Section 111(d) in force today.[10]

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ments, 1992, Subsec. (a)(2); 42 U.S.C. § 3793, Amendments, 1994, Subsec. (a)(9); 42 U.S.C. § 5776, Amendments, 1988; 42 U.S.C. § 6302, Amendments, 2007, Subsec. (a)(4); 42 U.S.C. § 6302, Amendments, 2007, Subsec. (a)(5); 42 U.S.C. § 6991e, Amendments, 2005, Subsec. (d)(2)(B); 42 U.S.C. § 7414, Amendments, 1990, Subsec. (a); 42 U.S.C. § 8622, Amendments, 1994, Par. (2); 42 U.S.C. § 9601, Amendments, 1986, Par. (20)(D); 42 U.S.C. § 9607, Amendments, 1986, Subsec. (f)(1); 42 U.S.C. § 9874, Amendments, 1990, (d)(1); 42 U.S.C. § 9875, Amendments, Subsec. (c).

10. Notably, the text of Section 111(d) would be the same if the conforming amendment had execution priority, for the substantive amendment would strike out the text that the conforming amendment updates and insert in its place the new substantive language.

The failure of the conforming amendment in no way frustrated the intent of Congress, as Congress never intends for a non-substantive amendment to limit or frustrate an important substantive amendment. Indeed, as this Court has held, conforming amendments that are unnecessary do not call into question the meaning of federal statutes or render them ambiguous. *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336–37 (D.C. Cir. 2013). The legal irrelevance of the conforming amendment here is especially obvious for it would do nothing other than update a reference by deleting the text "(1)(A)." It beggars belief that the superfluous instruction to remove these six characters when the entire reference "112(b)(1)(A)" had already been removed by a substantive amendment with real force and purpose could cloud the meaning of the Clean Air Act, let alone form the basis for a massive regulatory undertaking seeking to utterly transform the nation's energy system.

B. EPA Wrongly Asks this Court to Disregard the Current Text of Section 111(d) as Determined by the Office of the Law Revision Counsel.

EPA claims that, because there was a failed conforming amendment, Section 111(d) "is rife with ambiguity" that "EPA should have the first opportunity to resolve" and that EPA must receive deference in resolving this purported "ambiguity." Response to Petition at 22, 30. But as explained above, there is no ambiguity because the conforming amendment failed to execute. Moreover, EPA is not entitled to deference in determining the current text of the Clean Air Act. Executive agencies may get deference on how to *construe* their statutes, but they do not get to *write* them as well. To the extent there is any question as to what the current text of the Clean Air Act is in light of the 1990 Amendments, that decision falls to the Office, a legislative agency, and then, in cases of clear error, to this Court, but never to EPA. Allowing EPA to usurp that function would unduly interfere with the functioning of the legislative process and subordinate the position of Congress.

The Office is the legislative agency that prepares and publishes the United States Code, including titles like Title 42 that are not yet positive law. 2 U.S.C. § 285b. The Office is directed by the nonpartisan Law Revision Counsel appointed by and serving at the pleasure of the Speaker of the House. 2 U.S.C. § 285c. Chief among its responsibilities, this nonpartisan legislative agency keeps the Code up to date by faithfully executing Acts and applying amendments according to Congress's instructions and thereby aids the functioning of the legislative branch.

Congress has commanded that, in determining the text of its statutes, deference be given to the Office's determinations, providing that "the Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States . . . in force." 1 U.S.C. § 204. To give effect to this provision, the Code must be considered to be the authoritative statement of the law unless it is plainly inconsistent with the Statutes at Large or the determinations of the Office are unreasonable. *See Stephan v. United States*, 319 U.S. 423, 426 (1943) (inclusion of provision "inconsistent" with the repeal of the provision in the Statutes at Large); *United States Nat'l Bank of Oregon v. Independent Insurance Agents of Am., Inc.*, 508 U.S. 439 (1993) (omission of provision unreasonably based on punctuation error in light of "overwhelming evidence from the structure, language, and subject matter" of the Act).

By deferring to the Office, courts will, as the Supreme Court has instructed, avoid "undue judicial interference with the functioning of the Legislative Branch" and follow the "precedent instructing [courts] to respect . . . coequal and independent departments." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2577 (2014) (quotation omitted). The Supreme Court has made clear that the avoidance of undue judicial interference with the legislative process is vital. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 669 (1892); *Noel Canning*, 134 S. Ct. at 2577. This separation of powers concern demands deference for the legislative process whenever "[j]udicial efforts to engage in" more searching "inquiries would risk undue judicial interference with the functioning of the Legislative Branch." *Noel Canning*, 134 S. Ct. at 2576. Deference is also

appropriate if "judges cannot easily determine . . . matters" relating to the legislative process. *Id*. Both of these circumstances are applicable here.

The determinations of the Office should also be deferred to because this is "how Congress would likely have meant to allocate . . . authority" amongst the three branches. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring). Congress crafts Acts with the aid of the congressional Offices of Legislative Counsel and closely supervises a reliable legislative agency that executes the congressional commands contained therein without regard to partisanship or policy. Then executive agencies under the President's supervision apply their technical and policy expertise in interpreting the statutory text. Courts review these agencies' interpretations to ensure they are neither inconsistent with the statutory text nor unreasonable. But if Congress cannot determine what the text of the law is or how amendments will be executed, Congress cannot effectively perform its central role in this process. Thus, rejecting reasonable determinations made by Congress's legislative agent "subordinates the legislature and disregards that coequal position in our system of the three departments of government." *Ex parte Wren*, 63 Miss. 512, 532 (1886).

Furthermore, failing to defer to the Office would also likely unnecessarily burden the judicial process by leading to "an amount of litigation, difficulty, and painful uncertainty appalling in its contemplation and multiplying a hundred fold the alleged uncertainty of the law" because "[e]very suit before every court where the validity of" the determinations of the Office

applying amendments "may be called in question" will be an appeal of the Office's determination embroiling courts into the intricacies of the legislative process. *Id.*

In this case, the Office did its job and applied the 1990 Amendments in updating the Code. EPA has identified no oversight or error by the Office. To the contrary, it is clear from the Office's amendment note to Section 111 that the Office executed the substantive amendment and determined that the superfluous conforming amendment failed. EPA cannot second guess that determination.

CONCLUSION

For the foregoing reasons, Petitioner Murray Energy Corporation respectfully requests that this Court issue a writ for extraordinary relief prohibiting EPA from proceeding with its illegal rulemaking and vacate EPA's erroneous legal conclusion that it has the authority to doubly regulate sources under Section 111(d) and 112 of the Clean Air Act.

Dated: March 9, 2015

Respectfully submitted,

/s/ *Geoffrey K. Barnes*

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ORAL ARGUMENT NOT YET SCHEDULED

No. 14-1112 & No. 14-1151

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

No. 14-1112: IN RE MURRAY ENERGY CORPORATION

Petitioner.

No. 14-1151: MURRAY ENERGY CORPORATION

Petitioner,

v.

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

Respondents.

On Petition for Writ of Prohibition & On Petition for Judicial Review

PETITIONER STANDING ADDENDUM

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Counsel for Murray Energy Corporation

March 9, 2015

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DECLARATION OF ROBERT E. MURRAY

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

1. My name is Robert E. Murray. I am the Founder, Chairman, President, and Chief Executive Officer of Murray Energy Corporation.

2. I am the son of a coal miner, and began working in the coal mines at the age of 17.

3. I received a Bachelor's Degree of Engineering in Mining from The Ohio State University, completed the advanced management program at the Harvard School of Business, and am a registered Professional Engineer.

4. I am serving or have served on the boards of the National Mining Association, American Coal Foundation, National Coal Council, Ohio Coal Association, and Pennsylvania Coal Association. I am also the past president and a trustee of the American Institute of Mining, Metallurgical and Petroleum Engineers, Inc. and the Society for Mining, Metallurgy and Exploration, Inc., and past president of the Rocky Mountain Coal Mining Institute.

5. Prior to founding Murray Energy Corporation, I was President and Chief Executive Officer of The North American Coal Corporation, which is now part of Nacco Industries, Inc.

6. Murray Energy Corporation began in 1988 with the purchase of a single continuous mining operation in the Ohio Valley mining region with an

annual output of approximately 1.2 million tons per year.

7. Today, Murray Energy Corporation is the largest privately-held coal company in the United States, the largest underground coal mine operator in the United States, and the fifth largest coal producer in the United States determined by combined annual coal production.

8. In 2014, Murray Energy Corporation will produce approximately 65 million tons of coal from twelve active coal mining complexes. We currently employ approximately 7,500 people.

9. Murray Energy Corporation's operations are located in six States: Illinois, Kentucky, Ohio, Pennsylvania, Utah and West Virginia.

10. Murray Energy Corporation also owns or controls approximately 2.0 billion tons of proven or probable coal reserves in the United States, strategically located near our customers, near favorable transportation, and high in heat value.

11. Additionally, Murray Energy Corporation owns about 80 subsidiary and support companies directly or indirectly related to the domestic coal industry, including numerous coal transportation facilities such as coal transloading facilities, harbor boats, towboats and barges.

12. The vast majority of the coal produced by Murray Energy Corporation is supplied to coal-fired electric utility generating units (i.e., "EGUs" or power plants), providing affordable energy to households and

businesses across the country.

13. In 2013-2014, we supplied coal from our mines to coal-fired EGUs located in sixteen (16) States: Alabama, California, Delaware, Florida, Georgia, Indiana, Kentucky, Mississippi, New Hampshire, New Jersey, North Carolina, Pennsylvania, Utah, West Virginia, and Wisconsin. Many of our customers operate EGUs throughout the United States.

14. I am familiar with the Administration's proposed plan to cut carbon emissions at coal-burning power plants, published by EPA on June 18, 2014 (*Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 40 CFR Part 60, Subpart UUUU*).

15. EPA's plan expressly contemplates the shifting of fuel at power plants from coal to other fossil fuels, and the shifting of energy supply from fossil fuel power plants to nuclear power plants and renewable energy sources such as wind and solar. Thus, EPA's plan calls for the shutting down and/or conversion of even more coal-fired power plants than already planned as a result of this piling on of regulation after regulation directly aimed at coal.

16. In fact, the Preamble to EPA's proposed rule states that, due to the rule, it estimates 24–32 gigawatts of additional coal-fired EGU retirements through 2020. EPA states that the rule will result in a decline in coal production for use by the power sector by roughly 25 to 27 percent in 2020 from base case levels. Further, according to EPA, the use of coal by the power sector will decrease roughly 30 to 32 percent in 2030. Based on other reports,

we suspect EPA is understating its predicted impact. But whether EPA is right or wrong in the detail, the intent of the rule is clear – reduce the use of coal.

17. Coal production in the central Appalachian region is already down approximately 43% compared to 2008 levels. The American Coalition for Clean Coal Electricity ("ACCCE") recently concluded that 421 coal-fired power plants in the United States are being shut down or converted to a different fuel source. This represents nearly 63,000 megawatts of electric generating capacity. Of this total, ACCCE found that 299 are being shut down and 39 are being converted due to EPA policies, for a total of 338 units representing over 51,000 megawatts of electric generating capacity.

18. SNL Energy reported in October 2014 that more than 12,000 megawatts of coal-fired capacity in the United States has converted or is slated to convert to alternative fuel sources between 2011 and 2023, and that the top NERC regions in terms of coal conversion are ReliabilityFirst and SERC Reliability Corp., which are the two NERC regions that include much of our customer base including Ohio, West Virginia and Kentucky.

19. SNL further reported that nearly 25,000 megawatts of coal capacity has been permanently retired since 2009, with about that much scheduled to be retired between now and 2022, noting that "the influx of coal unit conversion in the U.S. power sector heaps more pressure on coal producers already facing a dwindling customer base caused by the permanent retirement of a large number of coal-fired units."

20. Also in October 2014, the Institute for Energy Research ("IER") estimated that 72 gigawatts of generating capacity have already retired or are set to retire due to EPA regulations, approximately 7 times the predicted closure rate by EPA in its recent air regulations, without even taking into account EPA's proposed rules aimed at existing power plants.

21. The Electric Reliability Council of Texas ("ERCOT") reported in November 2014 that the proposed rule "will result in the retirement of between 3,300 MW and 8,700 MW of coal generation capacity" in Texas. This is up to half of the existing coal capacity in the ERCOT region.

22. The Salt River Project Agricultural Improvement and Power District's Coronado Generating Station ("SRP"), SRP recently stated in filings with EPA that "EPA's planned carbon dioxide (CO_2) performance standards for existing coal- and natural gas-fired electric generating units ... will likely require Coronado to cease operations in 2020. The publication and pendency of the 111(d) Proposal create enormous uncertainty regarding the future viability of Coronado and whether installation of costly new emission controls to satisfy [best available retrofit technology, or BART] requirements ... would be reasonable or economically feasible." SRP predicts the forced shutdown of its two coal-fired units by 2020. SRP must make decisions about massive additional capital expenditure now in order to meet BART deadlines, and if the 111(d) rule is going to force a shutdown by 2020, SRP stands to lose significant investment monies if it moves forward with BART compliance.

23. As a major supplier of coal to numerous power plants in the United States, Murray Energy's regularly tracks the analyses, studies and reports published by SNL Energy, ACCCE, IER and others, in order to plan for our survival in the face of increasingly stringent EPA regulation. We develop our marketing and business development plans based in part on this type of information; thus, announced conversions and shutdowns are affecting our plans today.

24. Specific examples of the direct impact upon Murray Energy's business include the following power plants, each of which is/was a customer of ours and has been shut down or slated for closure: First Energy Corporation's Hatfield Ferry Power Station, Mitchell Power Station, and Eastlake Plant; NRG's Indian River Generating Station; Appalachian Power Company's Philip Sporn Plant; GDF Suez Energy North America's Mount Tom Station; and Dairyland Power Cooperative's Alma Generating Station.

25. Indiana Power & Light, to whom Murray Energy has supplied coal for its coal-fired EGUs, recently announced that it will convert the last of the coal-fired units at its Harding Street Generation Station to natural gas in 2016. Reportedly, this last conversion (and prior conversions) is a direct result of EPA's increasingly stringent regulation, including the double regulation of the power plant industry under Section 111(d) of the Clean Air Act, and the Indiana Utility Commission advised that future rate increases due to Section 111(d) and other environmental rules would not be forthcoming, such that

future investment costs would be at IP&L's risk.

26. While we are not in a position to relay specific warnings from our customers of planned shutdowns, conversions or curtailments – for confidentiality reasons – Murray Energy's business is impacted even when coal-fired units not supplied with coal by Murray Energy are converted or shuttered. Basic concepts of supply and demand in the marketplace dictate that a decline in demand has a downward effect on pricing.

27. Clearly, the shift away from coal has and will have a direct and significant impact on the primary business of Murray Energy Corporation.

28. Based on the significant comments submitted by many States in the Administrative Record for the proposed rule, and/or in related litigation, and in my own conversations with various States, it is also clear that the re-writing of energy policy in the United States by EPA is underway right now, even though the proposed rule has not yet been promulgated in final form.

29. Murray Energy Corporation and its employees depend upon the presence of a stable and continuing domestic market for coal. Every coal fired power plant that is shut down (or converted) affects the financial bottom line of Murray Energy Corporation and enough shutdowns threaten the existence of Murray Energy Corporation and the well paid and well benefited jobs of our 7,500 employees.

Further Affiant sayeth naught.

By: _____

Robert E. Murray, Affiant

Subscribed and sworn to me this 11th day of December, 2014.

_____

Notary Public

NOTARY PUBLIC STATE OF OHIO

GARY M. BROADBENT
Notary Public, State of Ohio
My Commission Has No Expiration Date

ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1112 & No. 14-1151

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

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FINAL REPLY BRIEF OF PETITIONER

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March 9, 2015

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AUTHORITIES

CASES

Note: Authorities upon which we chiefly rely are marked with asterisks.

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LEGISLATIVE HISTORY

REGULATIONS AND OTHER AUTHORITIES

GLOSSARY

EPA	**United States Environmental Protection Agency**
Power Plants	**Electric Utility Steam Generating Units**
The Office	**The House Office of the Law Revision Counsel**
The Code	**The Code of Laws of the United States**

STATUTES AND REGULATIONS

Except for the following, all applicable statutes, etc., are contained in the FINAL PETITIONER STATUTORY AND REGULATORY ADDENDUM to the FINAL OPENING BRIEF OF PETITIONER. Relevant excerpts from bills, hearings, and debates are contained in the FINAL PETITIONER LEGISLATIVE HISTORY ADDENDUM to this FINAL REPLY BRIEF OF PETITIONER, including material that is not available through online legal reference services without incurring additional document fees.

SUMMARY OF ARGUMENT

The nation's coal-fired power plants are confronted with an existential challenge. The Administration's Clean Power Plan is forcing existing coal-fired power plants to decide now whether to invest millions to prepare for an onslaught of future requirements, switch from coal to other fuels, or shut down entirely. This plan will dramatically reduce the use of coal to generate electricity at the nation's coal-fired power plants, and thus attacks Murray Energy's customer base.

Whatever EPA's authority to wreak this kind of havoc in the abstract, its proposed carbon rule for existing power plants depends on purported authority explicitly prohibited by statute. The issue under review is a single question of EPA's statutory authority, and judicial review will abate significant and ongoing injury to Murray Energy that cannot be remedied by a later decision of this Court after the nation's existing coal-fired power plants have gone cold. Judicial review is available and appropriate now.

Respondents do not raise any credible question over this Court's authority under the All Writs Act to prohibit the finalization of a rule that would unlawfully subject power plants to double regulation and force many to commit to long-term construction projects or even shut down entirely before EPA publishes its final rule. Moreover, with EPA's definitive conclusion that Section 111(d) of the Clean Air Act suddenly no longer means what it says and no longer protects sources subject to national emission standards from costly over-regulation, this Court also has authority to vacate EPA's legal conclusion.

EPA's claim of authority rests entirely on an improper statutory interpretation that ignores the text of the United States Code and the role of the House Office of the Law Revision Counsel. EPA tries in vain to circumvent the Code, but fails to show that it contains any errors or is otherwise inconsistent or in conflict with the Statutes at Large. EPA further offers nothing in the text, structure, or legislative history of the Act that would permit it to ignore the clear and sensible limitation on its authority embodied in Section 111(d).

EPA's reliance on illusory authority is inflicting real and permanent injury on Murray Energy and its numerous supporting intervenors. This Court can and should stop EPA's *ultra vires* actions now.

IV. THIS COURT MUST DEFER TO THE REASONABLE DETERMINATION OF THE HOUSE OFFICE OF THE LAW REVISION COUNSEL.

EPA argues that the Office's determination of the text of Section 111(d) presented in the United States Code is entitled to no deference, *see* EPA Br. 46–49, refusing to acknowledge that Congress provided that the contents of the Code "establish prima facie the laws of the United States." 1 U.S.C. § 204(a). Instead of offering any interpretation of this statutory provision, EPA relies on a footnote in *United States v. Welden*, 377 U.S. 95 (1964), for the remarkable proposition that the Code "is entitled to 'no weight.'" *Id.* at 99 n.4. EPA neglects to mention that the *Welden* footnote dealt only with the "change of arrangement" of statutes and merely applied the rule that even when *Congress* changes the arrangement of statutes, "it will not be inferred that Congress . . . intended to change their effect unless such intention is clearly expressed." *Id.* (quotation omitted).

EPA also states that "the text in the Statutes at Large controls" over the Code when "there [is] a substantive difference between the two." EPA Br. 47. Instead of identifying *any* "substantive difference," EPA relies upon a failed conforming amendment that the Office correctly determined could not be executed because it did not have priority over an earlier substantive amendment in the same bill. EPA refers to the Section 302(a) conforming amendment as "unexecuted text" and demands that it be "considered and given effect." EPA Br. 48 n.23. But it has been "considered" by the Office and found to have no effect because it did not have execution priority. Given that a

separate provision in the same bill deletes the text it would amend, *there is no effect for it to have*. Even if it had priority over the earlier substantive Section 108(g) amendment, the result would be the same: After Section 302(a) conformed the cross-reference, the cross-reference would then be deleted by Section 108(g) and replaced with the language that is in the Code. Thus, the text of Section 111(d) in the Code is exactly the same as it would be if the two amendments were executed in reverse order.

EPA demands authority to second-guess the determination made by an expert, nonpartisan legislative agency so that EPA can reach a different result by ignoring the rule that is routinely applied by the Office, and is consistent with Congress's drafting manuals, that amendments are to be executed in order. EPA would instead execute amendments in reverse order, *see* EPA Br. 48 n.22,[9] or alternatively refuse to execute an earlier amendment whenever EPA finds a later amendment would fail as a result, so both amendments fail. EPA Br. 53. What EPA would do is irrelevant. The task of executing amendments is the job of the Office, not EPA.

In justifying its request to supersede the Office's determination, EPA says its rival "is not a 'legislative agency'" because it does not "make law."[10]

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9. EPA cites *Lodge 1858, Am. Fed'n of Gov't Emps. v. Webb*, 580 F.2d 496, 510 (D.C. Cir. 1978), as if its holding is inconsistent with the Office's determination, but that decision does not address the order in which statutory amendments are executed or their relative execution priority.

10. Murray Energy does not contend the Office can "make law." Rather, the contention is that the Office's reasonable determinations should be deferred to by courts as they perform their Article III responsibilities.

EPA Br. 47. Yet the Office is directed by the Law Revision Counsel who is appointed by and serves at the pleasure of the Speaker.[11] Accordingly, the Law Revision Counsel and by extension the Office he directs are "subservient" to Congress. *Bowsher v. Synar*, 478 U.S. 714, 730 (1986) ("In constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress."). Moreover, Congress has rules that permit Members to raise "questions of privilege" to countermand determinations of its agents that are inconsistent with the views of Congress. *See* Rule IX, Rules of the House of Representatives, 113th Cong. (2013); *see, e.g.*, H.R. Res. 362, 101st Cong. (1990); 136 CONG. REC. 4997, 5005–06 (199) (question of privilege used to countermand determination of House Bipartisan Legal Advisory Group). Here, Members of Congress received the second supplement to the 1988 edition of the United States Code early in 1991 containing the Office's determination. Murray Energy has found no evidence that any Member challenged the determination using a question of privilege or by other means.

Additionally, the Office assists in the one-time process of repeal and reenactment of the provisions of each title of the Code, referred to as "positive law codification." 2 U.S.C. § 285b. In the positive law codification of the Clean Air Act recently completed by the Office and submitted to Congress, the

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11. Furthermore, the Code maintained by the Office is "prepared and published under the supervision of the Committee on the Judiciary of the House of Representatives," 1 U.S.C. § 202, and every individual Member of Congress receives a copy of the Code and its supplement, 1 U.S.C. §§ 211 & 212.

text prohibits Section 111(d) mandates for "any air pollutant . . . emitted from a source category that is regulated under section 211112 of this title." OFFICE OF THE LAW REVISION COUNSEL, UNITED STATES HOUSE OF REPRESENTATIVES, DRAFT 55 U.S.C. § 211111(d) (App. 512).[12] In preparing a positive law codification, the Office "actively seeks input from Federal agencies, congressional committees, and others with expertise in the area of law." OFFICE OF THE LAW REVISION COUNSEL, UNITED STATES HOUSE OF REPRESENTATIVES, POSITIVE LAW CODIFICATION IN THE UNITED STATES CODE at 3. The Office prepared a document detailing changes and corrections that it recommended, and none were made for Section 111(d). LAW REVISION COUNSEL, DISCUSSION DRAFT, EXPLANATION OF H.R. _____, TO ENACT CERTAIN LAWS RELATING TO THE ENVIRONMENT AS TITLE 55, UNITED STATES CODE, "ENVIRONMENT" at 30 (2014), *available at* http://uscode.house.gov/codification/t55/exp.pdf (App.525).

The only circumstances justifying a departure from the text of the Code are those where the Office's determination is plainly inconsistent with the Statutes at Large or is unreasonable. Neither circumstance is present here. The Office duly executed an important substantive amendment rather than refusing to do so because later in the same bill Congress included a superfluous conforming amendment. For EPA to step in 25 years later in order to second-guess the Office unduly interferes with the functioning of the legislative process.

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12. Section 211112 is the renumbered Section 112 program in the positive law codification of the Clean Air Act.

V. EPA CANNOT JUSTIFY INTERPRETING SECTION 111(D) TO PERMIT DOUBLE REGULATION.

EPA claims that it can interpret away the Section 111(d) limitation on regulating emissions from source categories it regulates under Section 112, even if EPA cannot second-guess the Office's determination of the current text of Section 111(d). EPA Br. 35–45. But EPA cannot show that there is any relevant question that Congress has not answered, and EPA has not identified any actual structural problem or legislative history suggesting that Congress did not mean what it said. Therefore, the text of Section 111(d) prohibiting double regulation is both the beginning and end of this matter. EPA's arguments to the contrary are based on a complete misunderstanding of *Chevron*. *Compare* EPA Br. 34 (demanding deference whenever there is more than one "possible way to interpret" statutory text) *with Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding an agency interpretation is only relevant when Congress "has not directly addressed the precise question at issue"); *see also Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996) ("[T]o avoid a literal interpretation" EPA "must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.").

A. EPA Wrongly Seeks to Circumvent the Limitations on Its Section 111(d) Authority.

Confronted with the prohibition on using Section 111(d) to mandate state-by-state standards "for any existing source for any air pollutant . . . emitted from a source category which is regulated under section [112]", 42 U.S.C. § 7411(d), EPA seeks to evade this restriction through interpretations that either obliterate or narrow a limitation set forth with "specific phrasing" even though that specificity demonstrates that all "necessary judgment" on this issue "has already been made by Congress." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2448 (2014).

First, EPA takes aim at *all* restrictions on Section 111(d), including the limitation that EPA has neither the duty nor the authority to regulate criteria pollutants under Section 111(d). EPA Br. 36–37. EPA claims that because Congress in 1970 used the word "or" instead of the word "and" in one part of the text of Section 111(d), EPA must regulate a particular source of emissions so long as the emissions do not violate any one of the three restrictions. *Id.* This reading obliterates all three restrictions because there are no pollutants that would fail to comply with both the first and second restrictions.[13] In other words EPA's authority to regulate under Section 111(d) would be unlimited,

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13. The first restriction is that the pollutant be one "for which air quality criteria have not been issued." 42 U.S.C. § 7411(d). The second restriction is that it be one "which is not included on a list published under section [108(a)]." *Id.* The referenced "list" may not include any "air pollutants . . . for which air quality criteria had not been issued before December 31, 1970." 42 U.S.C. § 7408(a).

and EPA has failed since 1970 to comply with a statutory duty to mandate state-by-state standards under Section 111(d) for every Section 111(b) New Source Performance Standard issued by the agency during the past 45 years. This contention is as impermissible as it is outlandish. "EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman*, 531 U.S. at 485. For EPA to interpret the three restrictions as alternatives and thereby "render" all of them "utterly inoperative is to go over the edge of reasonable interpretation." *Id.* EPA cannot claim these "carefully designed restrictions on EPA discretion" were "utterly nugatory" from the moment they were passed. *Id*. at 484. Indeed, if the "or" makes the restrictions alternatives, the limitations on EPA's Section 111(d) authority were even more "abruptly obsolete" than the provisions EPA impermissibly interpreted out of existence in *Whitman*. *Id*. at 485.

Second, EPA claims that the third restriction is missing the word "not." EPA Br. 37. But the second and third restrictions are set forth together in a phrase that states that the pollutant must be one "which is not" described by either of the two descriptions that follow. There is nothing unusual or unclear about the grammar or logic of this phrase, and EPA's interpretation would once again impermissibly nullify this text. *See Whitman*, 531 U.S. at 485.

Finally, failing in other attempts to nullify the restriction, EPA claims authority to simply rewrite it by inserting words, redefining terms, or reassigning phrases. EPA Br. 37–38. But EPA cannot "replace[]" the Section 111(d) exclusions "with others of its own choosing" without going

"well beyond the bounds of its statutory authority." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2445 (quotation omitted). "The power of executing the laws" "does not include a power to revise clear statutory terms that turn out not to work in practice," or to revise them "to suit [EPA's] own sense of how the statute should operate." *Id.* at 2446.

EPA may issue a mandate only "for any existing source for any air pollutant . . . which is not . . . emitted from a source category which is regulated under section [112]." 42 U.S.C. § 7411(d). This highly "specific" language is the end of the matter, leaving nothing for EPA to add or subtract because Congress "has already" made its own "judgment." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2448. Once Congress has answered a question with this degree of specificity, EPA has no power to redefine words or reassign the phrases to circumvent the judgment of Congress. EPA can only execute the law, not change it. "An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Id.* at 2445.[14]

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14. EPA's reliance on *Utility Air Regulatory Group*, EPA Br. 38, is difficult to comprehend. The Supreme Court held that the phrase "any air pollutant" in 42 U.S.C. § 7479(1), without any additional qualifier, required a reasonable interpretation to avoid rendering a program unrecognizable to the Congress that created it. 134 S. Ct. at 2444. The Court also held that the more specific phrase "each pollutant subject to regulation under [the Act]" in 42 U.S.C. § 7475(a) required no interpretation by EPA because its "more specific phrasing . . . suggests that the necessary judgment has already been made by Congress." 134 S. Ct. at 2448. The phrase at issue here is *even more* specific.

B. The Limitations on EPA's Section 111(d) Authority Are Consistent with the Clean Air Act's Structure.

When a question has been answered by the text of a statute, its structure is relevant only when it is at odds with that text. *Engine Mfrs. Ass'n*, 88 F.3d at 1088. There is no such conflict here between the structure of the Act and its text.

EPA and its supporters urge the Court to ensure that the Section 111(d) program is not "eviscerated" as a result of the 1990 Amendments. *See, e.g.*, Envtl. Int. Br. 16. But Section 111(d) as amended in 1990 still plays a role — regulating sources not regulated under Section 112. It makes perfect sense that Congress decided to limit the Section 111(d) program to sources that are not subject to national standards. The value of using the Section 111(d) method of regulation through state-by-state standards is the ability to preserve greater diversity in a source category. The rigid Section 112 program offers no means of tailoring its regulations on a state-by-state basis;[15] every source subject to that program must conform to the nationwide performance standard. Once a Section 112 national standard is imposed, there is no reason to use the Section 111(d) program as there will be little if any diversity for it to preserve.

EPA's second "evisceration" argument is that Section 111(d) is needed to plug a "gaping hole" in the Clean Air Act's coverage that would otherwise "leav[e] sources' emissions of certain pollutants outside the Act's scope." EPA

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15. Notably, Congress considered but rejected utilizing the Section 111(d) method in the new Section 112 program. *See* H.R. 5555, 97th Cong. § 102(f) (as introduced in the House, Feb. 22, 1982) (proposing Section 112(g)).

Br. 41–42. EPA implies there are emissions from sources regulated under Section 112 that can only be regulated, if at all, under Section 111(d). While there certainly was a difference between what the old narrow Section 112 program covered and what Section 111(d) covers, it is unclear what, if any, difference remains. Section 111(d) covers emissions "which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A); 42 U.S.C. § 7602(h) (defining welfare). Section 112 now covers emissions "which present, or may present, . . . a threat of adverse human health effects . . . or adverse environmental effects." 42 U.S.C. § 7412(a)(7) (defining adverse environmental effect). Indeed, EPA believes that carbon dioxide meets both of these tests. *See* 73 Fed. Reg. 44,354, 44,493–95 (July 30, 2008). No party to this case has identified any pollutant that EPA has found cannot be regulated under new Section 112, but can be regulated under Section 111(d). In any event, the null or nearly empty set of purportedly orphaned pollutants is not a valid basis for EPA to create an overbroad exception that would cover even those emissions that EPA believes it could regulate under Section 112 but would prefer not to. The purported "gap" is quite possibly "illusory," and even if it exists at all, it is not so "large . . . in any event" as to be "demonstrably at odds" with congressional intent because it would not in any way render "the regulatory scheme" "unworkable or absurd." *Engine Mfrs. Ass'n*, 88 F.3d at 1090–93.

C. Ample Legislative History Supports the Limitation on EPA's Authority.

EPA argues that "[t]he legislative history of the 1990 amendments . . . 'make it plain'" that it would not be "reasonable" to interpret Section 111(d) to mean what it says. EPA Br. 42 (quoting *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982)). This bold claim is simply wrong.

The plain meaning of a statute need not be stated elsewhere in its legislative history as "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison*, 446 U.S. at 592 (1980). For this reason, when "ascertaining the meaning of a statute, a court cannot . . . pursue the theory of the dog that did not bark." *Id.* Accordingly, the relevance of legislative history, if any, is in what it says, not in what it does not say. EPA provides the Court with three quotes describing changes to the Clean Air Act, EPA Br. 42 n.19, and the only one of these relevant in any way to this case identifies the very reason why Congress changed the scope of the Section 111(d) program — the decision to fundamentally restructure and expand the previously narrow Section 112 program to comprehensively cover industrial process emissions.

EPA offers nothing in the legislative history to suggest that, contrary to the text it enacted, Congress intended to authorize EPA to mandate state-by-state standards for existing sources under Section 111(d) after subjecting them to national standards under Section 112. In contrast, there are extensive

discussions in the legislative history in those instances where double regulation was authorized, whether for different pollutants,[16] or for the same pollutants but at different times.[17]

The purported absence of "a single statement in the legislative history indicating that Congress . . . sought to restrict EPA's authority under the existing source performance standards program," EPA Br. 43, would not be surprising since — as explained by the lead architect in the Senate of the new Section 112 program during a key committee hearing — Section 111(d) was considered during the drafting of the 1990 Amendments to be "some obscure, never-used section of the law." *Clean Air Act Amendments of 1987 (Part 2): Hearings on S. 300, S. 321, S. 1351, and S. 1384 Before the Subcomm. on Envtl. Prot. of the S. Comm. on Env't & Pub. Works*, 100th Cong. 13 (1987) (App.208). EPA later testified at another key hearing that imposing double regulation of a source category "in seriatum" even for different substances is "ridiculous." *Energy Policy Hearing* at 603 (App.343).

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16. The decision of how and whether EPA could doubly regulate power plants under both Section 112 for hazardous pollutants and under Title IV for sulfur dioxide involved extensive discussion and negotiation. *See, e.g.*, *Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearings Before the S. Comm. on Energy & Natural Res.*, 101st Cong. 7, 234–35, 240–41, 436–37, 483, 485, 492, 570–72, 596, 603 (1990) (hereinafter *Energy Policy Hearing*) (App. 323–43).

17. The decision to subject sources regulated under Section 112 to two rounds of regulation, the first imposing a floor and the second several years later to reduce residual health risks, engendered significant debate. *See, e.g.*, 136 CONG. REC. 3,493 (1990) (statement of Sen. Steven Symms).

Furthermore, there is plenty of evidence that Congress understood and responded to concerns that the new comprehensive national standard program under Section 112 posed significant problems when combined with other Clean Air Act programs. These concerns were first raised publicly at a hearing on June 22, 1989, in testimony pointing out that it would be problematic to subject power plants to both the new Section 112 and the new Title IV acid rain program. *Clean Air Act Amendments (Part 3): Hearings Before the Subcomm. on Health & the Env't of the H. Comm. on Energy & Commerce*, 101st Cong. 356–58, 470–71 (1990) (App. 229–33).[18] The following month, the Bush Administration submitted a bill to Congress, H.R. 3030 and S. 1490, that included the provision that became Section 108(g) of the 1990 Amendments and resolved the potential conflict between Section 112 and Section 111(d) by prohibiting double regulation. H.R. 3030, 101st Cong. § 108(d) (as introduced in the House, July 27, 1989).

The Administration's bill also dealt with the conflict between Section 112 and Title IV using a provision that became Section 112(n)(1)(A) and gave EPA the option of using Section 111(d) to regulate power plants if EPA found using Section 112 would not be "appropriate and necessary" after the imposition of Title IV. When the Senate failed to include a similarly adequate provision to address this issue, extensive debate and negotiation ensued — during which the Administration position prevailed — because Members of Congress

18. The central premise of both Title IV and Section 111(d) is the avoidance of national standard uniformity for a source category.

understood that subjecting existing sources to both the Section 112 program's rigid cost-blind minimum standards and other regulatory programs can be highly problematic. *See, e.g.*, *Energy Policy Hearing* at 7, 234–35, 240–41, 436–37, 483, 485, 492, 570–72, 596, 603 (App.323–43). That a similar debate did not occur with respect to the specific fix for Section 111(d) indicates only that it was not controversial.

It would be utterly unreasonable to find significance in any perceived legislative history silence as to the plain meaning of a provision that reasonably alters the scope of an "obscure, never-used section of the law" from one role to another in order to avoid a result EPA told Congress would be "ridiculous."

CONCLUSION

This Court should vacate EPA's final legal conclusion, issue a writ prohibiting EPA from proceeding with the rulemaking, and deny EPA's motion to dismiss Murray Energy's petition for review.

Dated: March 9, 2015

Respectfully submitted,

/s/ *Geoffrey K. Barnes*

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January 15, 2016

SUBMITTED VIA EMAIL AND REGULATIONS.GOV
Docket: EPA-HQ-OAR-2009-0234

VIA CERTIFIED MAIL (RETURN RECEIPT REQUESTED)

U.S. Environmental Protection Agency
EPA Docket Center
EPA-HQ-OAR-2009-0234
Mail Code 2821T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
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Re: "Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units," 80 Fed. Reg. 75025 (Dec. 1, 2015)
Docket: EPA-HQ-OAR-2009-0234

Dear Administrator McCarthy:

Murray Energy is the largest privately-owned coal company in the United States and the fifth largest coal producer in the country, employing thousands of workers in the mining, processing, transportation, distribution, and sale of coal. Murray Energy owns two billion tons of proven or probable coal reserves in the United States. Affordable and reliable power, much of which is generated using coal, remains essential to the health of our nation's economy. Murray Energy and its employees proudly serve their customers that provide this service. Your decision to regulate power plants under Section 112 will have a dramatic effect on the electric power generation sector and those who supply the fuel to be converted to electricity at power plants, including Murray Energy and other coal companies.

Your agency's prior decision to subject power plants to the uniform national emission standards under the stringent Clean Air Act Section 112 program without first considering the costs "strayed far beyond" the "bounds of reasonable interpretation" of Congress's instruction that you only do so if you found "such regulation is appropriate and necessary." *Michigan v. EPA*, 135 S. Ct. 2699, 2701 (2015). You now propose to make the same decision as before but you again fail to consider the relevant consequences of your decision that Congress intended you consider in violation of the statute and settled principles of administrative law, and in light of the costs your proposal to find that it is appropriate and necessary to regulate power plants under the Section 112 program is unlawful, arbitrary, and capricious.

Contents

You Must Consider Costs in Light of the Reasoned Decisionmaking Requirement.

As you appear to acknowledge, you must consider each of "the cost considerations generally relevant" to your decision. Legal Memo. at 5. In 1990, Congress tasked you with determining if the Clean Air Act's Section 112 regulatory program was appropriate and necessary for power plants. 42 U.S.C. § 7412(n)(1)(A). The Clean Air Act provides for judicial review of this determination to ensure it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). This is the same standard that is found in the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). This "arbitrary and capricious" standard demands that, in making your decision, you "must examine the relevant data and articulate a satisfactory explanation for [your] action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted). Moreover, your determination is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* You must "display awareness" when you are "changing position" from a prior decision, and you may not "depart from a prior policy *sub silentio* or simply disregard" a prior decision. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). You must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when your "new policy rests upon factual findings that contradict those which underlay [your] prior policy" because "[i]t would be arbitrary or capricious to ignore such [a] matter[]" and "a reasoned explanation is needed for disregarding facts and circumstances that underlay . . . the prior policy." *Id.* To comply with the reasoned decisionmaking requirement, you must act reasonably in light of "the backdrop of . . . established administrative practice," *Michigan v. EPA*, 135 S. Ct. at 27087, which has been defined in significant part by the Unfunded Mandates Reform Act, the Regulatory Flexibility Act, and certain Executive Orders.

You acknowledged that you did not consider costs when you decided to subject power plants to the Section 112 program, notwithstanding the $9.6 billion annual cost the agency has estimated will result from its decision with virtually no offsetting benefits. In fact, you agreed that you *could* have considered costs, but *chose* not to do so. *Michigan v. EPA*, 135 S. Ct. at 2706 ("The Agency accepts that it *could* have interpreted this provision to mean that cost is relevant to the decision to add power plants to the program. . . . But it chose to read the statute to mean that cost makes no difference to the initial decision to regulate." (citing Tr. of Oral Arg. 44)); EPA Opp., *Michigan v. EPA*, 135 S. Ct. at 2706 (stating that "EPA declined to consider costs when making th[e] determination"). As a result, you acted arbitrarily and capriciously in determining that power plants should be regulated under Section 112 without considering costs because the consequences of your choice is one of the most "important aspect[s] of the problem" before you. Now to redress your error, you must (1) fully address and appreciate the nature of the "problem" before you, (2) identify and consider your alternative control strategies of deferring to the States or using Section 111, (3) address your significant prior decision in 2005 that Section 111 is a superior and far more cost-effective alternative to regulate power plant emissions, (4) assess the cost-effectiveness of Section 112 relative to your alternative control strategies, (5) consider the costs your decision imposes on State, local, and tribal governments that provide public power, (6) address the especially significant impacts of your decision on particular regions, sectors, entities, and dislocated workers, and (7) consider the federalism costs of your decision. Only then can you claim to have adequately considered "the advantages *and* the disadvantages" of your decision whether to use Section 112 to regulate power plants. *Michigan v. EPA*, 135 S. Ct. at 2716.

You Must Consider Costs in Light of the Unique Nature of Power Plants.

You must consider the unique nature of the power plant fleet "to determine the cost considerations generally relevant" to your decision. Legal Memo. at 5. Section 112(n)(1)(A) is a special provision that applies only to "electric utility steam generating units" (referred to herein as "power plants"). 42 U.S.C. § 7412(n)(1); 42 U.S.C. § 7412(a)(8). Under this provision, Congress directed you, first, to undertake a study of the public health hazards reasonably anticipated to occur as a result of hazardous air pollutant emissions by power plants "after imposition of the requirements of this chapter." 42 U.S.C. § 7412(n)(1). Second, you were required to present the results of the study, including a description of "alternative control strategies for emissions found to warrant regulation under" the Section 112 program. *Id.* Then Congress directed you to "regulate electric utility generating units under this section" if and only if you reasonably conclude that "such regulation is appropriate and necessary after considering the results of the study" that must include analysis of alternative control strategies for the emissions from power plants that could be regulated under the Section 112 program. *Id.*

You fail to address the unique nature of power plants that is relevant to your decision. You note that "CAA section 112 is the authority intended to regulate HAP emissions from stationary sources." 80 Fed. Reg. at 75027 (citing 60 Fed. Reg. 79825, 79830/2). But the entire point of Section 112(n)(1) is the assessment of the appropriateness of that program for power plants as opposed to other stationary sources. In assessing the costs of your decision you cannot continue to ignore the issues specific to power plants addressed by Section 112(n)(1).

In 2005, when your predecessor recognized that using Section 112 regulation was neither appropriate nor necessary to regulate emissions from power plants, your predecessor specifically relied on and considered that "Congress plainly treated Utility Units differently from other source categories, and that special treatment reveals Congress' recognition that Utility Units are a broad, diverse source category." 70 Fed. Reg. at 15999. Your proposal and supporting legal memorandum never address the crucial nature of power plants in the assessment of the costs of subjecting them to an inflexible, uniform, and cost-blind national standards program. You appear to have little appreciation for the unique nature of the power plant fleet and why power plants are so diverse. In fact, you and your staff have even characterized the diversity in the power plant fleet as an "investment" opportunity. And you also acknowledged that your decision will "level" the power industry power plants without ever addressing how inappropriate that would be for this diverse sector. 76 Fed. Reg. at 24,979.

You must assess the costs of your decision in light of a full appreciation of this unique and diverse sector, and to that end, you must consider these comments on how and why the nation's power plants are so diverse in their characteristics, and you must articulate your reasons why it is appropriate to sacrifice that diversity.

For over a century, State and local governments have constructed and supported the nation's power plants in order to provide affordable and reliable electric power. Power plants are as diverse in size and age as the States themselves and they vary widely in design and age because the fleet has evolved over decades of support and regulatory oversight by State and local governments taking into account widely differing local circumstances. The Supreme Court has long recognized these pioneering State and local government efforts. As Justice Jackson stated, "[l]ong before the Federal Government could be stirred to regulate utilities, courageous states took the initiative and almost the whole body of utility practice has resulted from their experiences." *FPC v. East Ohio Gas Co.,* 338 U.S. 464, 489 (1950) (Jackson, J., dissenting); *see also FERC v. Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in judgment and dissenting in part) ("Utility regulation . . . is a field marked by valuable state invention."). Indeed, nearly all power plants in this country, both public and private, are the result of significant State and local government efforts. Many were directly constructed by State and

local governments. Most others owe their economic feasibility to a "regulatory compact" with the States. In exchange for territorial monopolies that protect their investments and provide the degree of certainty necessary for enormous capital outlays, private power utilities are intensely regulated by State commissions that determine what prices they charge and what power plants they build. Robert L. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*, 32 NAT. RES. J. 289, 289–90 (1992); *see generally General Motors Corp. v. Tracy*, 519 U.S. 278, 288–90 (1997) (citing Swartwout's article while discussing State regulation of utilities).

This important legacy of State and local initiative is especially evident in the public power sector that provides electricity for communities previously unserved or underserved by private utilities. *See* THE POWER INDUSTRY AND THE PUBLIC INTEREST 104 (1944) ("Between 1882 and 1927 most municipal systems were operating in communities never before served by private companies."); 77 Fed. Reg. 9,304, 9,440 (Feb. 16, 2012) (estimating "80 municipalities, 5 states, and 11 political subdivisions" are currently operating large power plants that would be subject to regulation under Section 112).

Moreover, regulated utility investments in power plants are closely supervised by the State commissions that ensure investment decisions are made primarily for the benefit of users of electricity by keeping costs as low as possible. This supervision covers the decision where and when to build a new power plant, the determination of its design, the decision whether any upgrades should be made, and the decision when it should be retired and replaced. In order to ensure that electricity costs are minimized for users, each of these decisions is influenced by local conditions such as the availability and cost of local fuel sources.

Power plants are designed foremost according to the local availability and of fuel and its projected cost over the life of the unit. First, a designer of a fossil fuel fired power plant has to decide whether to use natural gas, coal, or oil for combustion. Over the long run and even today in many areas coal is less expensive per Btu than natural gas, and it remains less expensive than oil throughout the continental United States. Even where fuel cost savings associated with using natural gas might otherwise justify its use over coal, natural gas would not be available for power generation without an adequate pipeline Access to natural gas is by no means universal, as your agency has recognized:

> Natural gas pipelines are not available in all regions of the U.S. Even where pipelines provide access to natural gas, supplies of natural gas may not be available in adequate quantities for utilities. For example, it is common practice in large metropolitan areas during winter months (or periods of peak demand) to prioritize natural gas usage for residential areas before industrial areas (i.e., natural gas curtailments).

69 Fed. Reg. at 4669. When there is no pipeline, it is no small feat to construct one. Even when natural gas is available, States and local governments still must limit their exposure to the potential for future volatility in fuel prices and supply by ensuring that the power system does not depend too heavily on any one fuel. Thus, some communities have been unable to utilize natural gas while the rest must ensure that they do not depend too much on natural gas.

Once a fuel is chosen, that does not dictate an optimal power plant design, unlike in other industries where there is usually a single or few state of the art designs that would be employed anywhere in the country at a particular time. When a power plant designer selects coal as the source of fuel for a power plant, the designer must then perform "[e]ngineering calculations . . . to determine the optimum positioning and sizing" for the various "boiler components" necessary for "building an optimally efficient plant." 69 Fed. Reg. 4,652, 4,665 (Jan. 30, 2004). These calculations have to be made every time a power plant is built because

optimization depends heavily on the projected cost of fuel for that plant, and the cost of fuel for that plant will depend on its location. As a rule, the more thermally efficient a power plant is designed to be, the more expensive it is to construct, and returns on investment in thermal efficiency differ depending on fuel costs. Therefore, State and local governments and regulated utilities must minimize the cost of electricity for users by choosing the correct amount of investment at which any further investments in thermal efficiency are not justified by fuel savings. This calculation differs depending on fuel cost projections for the power plant which differs depending on location because transportation is a significant component of the price of coal. Power plants that can be located at or near mines pay much less for coal than power plants that are far away from mines and must obtain coal shipments by rail or ship over long distances. The price of coal is also subject to changes in supply and production costs, which also vary significantly by location.

EIA data on coal prices delivered to end users by State shows that the variations in price by location are very significant. For example, in October 2014, the average cost of coal delivered for electricity generation in the electric power sector in New Hampshire was $3.95 per MMBtu whereas it was $1.43 per MMBtu in North Dakota, such that New Hampshire's average cost was 2.8 times more expensive per MMBtu than North Dakota. *See* U.S. Energy Information Administration, *Average Cost of Coal Delivered for Electricity Generation by State, October 2015 and 2014*. Even states in the same general region have significant cost variation. For example, in October 2015, the average cost of coal delivered for electricity generation in the electric power sector in South Carolina was 1.3 times as expensive as Georgia, its neighbor next door: The average cost in South Carolina was at $3.64 per MMBtu while in Georgia it was $2.76 MMBtu. *Id*. Even coal-producing States face different costs. In October 2015 the average cost of coal delivered for electricity generation in Texas was $1.84 MMBtu, but was $2.28 MMBtu in West Virginia. *Id*. On the other hand, in Iowa, which is not a particularly prominent coal-producing state, the average cost of coal delivered for electricity generation was $1.60 in October 2015. *Id*. One of the largest coal-producing States, West Virginia, had an average cost nearly one and a half times as expensive as Iowa, a State which produces more corn than coal. Year to year, these cost variations by location remains relatively consistent. Thus, in October 2014, the average cost of coal delivered for electricity generation in New Hampshire was $4.46 per MMBtu and it was the same $1.43 per MMBtu in North Dakota, close to 3 times less expensive. *Id*. As a final example of the extreme differences in coal prices at different locations, the average cost of coal delivered for electricity generation in Alaska was $0.33 per MMBtu in October 2015 whereas in New Jersey, the cost was $3.45 per MMBtu in the same year. *Id*. In that particular month, the electric power sector in New Jersey paid nearly 12 times as much for coal as in Alaska.

In addition to variations by location, the cost of fuel also varies significantly over time. The price of coal has increased overtime as the cheapest-to-mine resources have been depleted, and it is well-known that the cost of coal "depends on the cost of the factors of production--that is, coal, labor, equipment, capital funds, and scale of operations, technology, and coal transport costs." Emil D. Attanasi and Philips A. Freeman, *Chapter E: Coal Marketability: Current and Future Conditions*, U.S. Geological Survey and U.S. Department of the Interior (2009), 2. Beginning in the 1970s and until the early 1980s, "coal contract prices were at historical highs because powerplant fuel demand had shifted to coal from oil and gas." *Id*. at 8. However, "after the severe recession in the early 1980s, new coal contract prices declined." *Id*. Also, during that time and until around 2004, rail "rates declined by more than three-fourths." *Id*. at 29. Similarly, in the early 1990s, the price of coal rose and fell again, tracking the volatility of the gas market. *Id*. And around 2000, the cost of coal rose, also tracking transportation costs, where "rise in rates from 2004 through 2006 (assuming a 1,000-mile haul and an 8,800 Btu/lb of coal [5,891cal/g]) amount[ed] to an additional $0.43 per MMBtu . . . added to delivered cost." *Id*. at 29. Within the last 45 to 50 years, there has been substantial

variance in the cost of coal. Changes in natural gas prices have also varied over the last 40 or so years, and there has been "dramatic price effects in the natural gas market. . . . due to the physical nature of natural gas . . . limited to pipeline transport." *See* Timothy Fitzgerald, *Frackonomics: Some Economics of Hydraulic Fracturing*, 63 CAS. W.RES L. REV. 1337 (2013), 1349. For example, in 1997, the Henry Hub spot price for natural gas was at a low of $2.00 per MMBtu, but the price spiked in 2001, rising to over $14.00 per MMBtu. *Id*. at 1350, Figure 3. This is 7 times greater in a span of 4 years. The price dropped again in 2007 to around $4.00 per MMBtu, rose to $13.00 per MMBtu in 2009, and then fell again in 2010 to its 1997 price at just over $2.00 per MMBtu, hovering between $2.00 and over $6.00 per MMBtu from 2010 until 2013. *Id*. Even during its most constant period between 2010 and 2013, there was still a price difference of $4.00 per MMBtu. And overall, between 1997 and 2013, there was a nearly $12.00 MMBtu difference in a 16 year period.

The result of differences in fuel prices in different locations and at different times is that when fuel prices are higher for a specific power plant project then it is cost effective to design the power plant so that it generates more power with less fuel by investing more to achieve greater thermal efficiency. Thus, both the amount of money spent to construct a power plant and the thermal efficiency of its design depend on the fuel price projections over the expected life of a particular power plant and this projected price is principally a function of its location.

Given the variability of coal prices by location and over time, some States and local governments and utilities built very expensive power plants that cost far more to construct but that are also more thermally efficient than power plants built elsewhere at the same time. This led directly to a substantial diversity in the thermal efficiency of the power plant fleet even among power plants of the same age. The diversity in the power plant fleet has further increased over time because of improvements in techniques have also lowered the cost of achieving thermal efficiency. As thermal efficiency itself has become less expensive, succeeding generations of new facilities have been designed to be more efficient than the fuel prices would previously have justified. Indeed, technological improvements caused the "heat energy required to produce 1 kWh of electricity" to "declin[e] by 11-fold between 1899 and the mid-1960s." 69 Fed. Reg. at 4669. But technology alone is not responsible for all the diversity in the fleet, as fuel prices remain highly variable by location.

While coal price variability and technological developments can change the calculation of optimal efficiency for a new power plant at a particular location or even more generally, it by no means renders an older less efficient power plant obsolete or wasteful. It takes decades to recoup the investment in a power plant. And even when that investment has been recouped, closing an existing power plant to build a new one increases the prices users must pay for electricity unless the difference in efficiency between the existing power plant and a proposed replacement makes the investment worth it. This is the reason why regulated utilities have to justify their investments in new power plants to State commissions, so that States can ensure that power plants are not scrapped and replaced without a showing that the construction costs will be offset by fuel savings and lead to lower prices for electricity users. All else equal, the benefits of replacing a power plant with a more efficient power plant will always be relatively greater in the areas of the country that have higher fuel costs. In areas with higher fuel costs, power plants will be replaced more often and so they will generally have younger power plant fleets than those areas of the country that enjoy lower fuel costs.

Importantly, Congress has recognized the unquestionable benefits of having a diverse fleet of power plants tailored to local circumstances and Congress concluded that States are best positioned to regulate power plants in a way that achieves these benefits. Accordingly, the Federal Power Act has consistently preserved State authority to regulate power plants rather than preempt state regulation of electric generation with federal law and regulations. Congress declared that Federal regulation of "of matters relating to generation" would

"extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). Accordingly, the Act provides that the Federal Energy Regulatory Commission "shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). So while the Commission has authority to promulgate and enforce reliability standards, the Act fastidiously prohibits "any requirement . . . to construct new . . . generation capacity," 16 U.S.C. § 824o(a)(3), and expressly prohibits the Commission from ordering "construction of additional generation . . . capacity." 16 U.S.C. § 824o(i). The Commission's authority over generation that is regulated by the states is essentially limited to the power "to conduct investigations regarding the generation . . . of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission" for the purpose of obtaining "information necessary or appropriate as a basis for recommending legislation." 16 U.S.C. § 825j. The Federal Energy Regulatory Commission's limited fact-finding authority over generation regulated by the States pales in comparison with the expansive authority of the Federal Communications Commission over regulated communications utilities, because a single national regulator is far less equipped in this unique context where minimizing costs to users requires diverse approaches and decisions in different parts of the country.

Thus, that a power plant built in a location facing higher fuel prices is comparatively more fuel efficient than one built at the same time in a location facing lower fuel prices does not reflect a failing in judgment or lack of prudence. Rather, the difference in the degree of thermal efficiency of power plants built in different areas at the same time are the result of State commission decisions that account for differing local circumstances in determining the most cost effective way to generate electricity for users. And Congress has gone out of its way to permit and facilitate this beneficial diversity that results from the expertise and judgment of State commissions.

Your comments about "investment" opportunities are deeply troubling. Retiring an existing power plant and building a new one is not an "investment" when the resulting fuel savings are not enough to lead to lower electricity costs. If a utility made such a decision to "invest" by scrapping and replacing a power plant when doing so increases electricity costs, a State regulator would have no choice but to disallow recovery of the costs. And in modern unregulated electric generation markets with competition, market forces ensure that merchant generators and unregulated utilities only scrap and replace power plants when doing so would decrease their generation costs. Thus, expenditures to "level" the thermal efficiency, design characteristics, and age of the nation's power plant fleet would not be "investments" in any sense of the word and you must confront the significant costs and inefficiency associated with reducing or eliminating diversity in the nation's power plant fleet. That your decision will reduce the average age of power plants below that which resulted from decisions by State commissions, utilities, and merchant generators that have already minimized generation costs. The existing paradigm already inherently achieves the minimum electricity costs to end users and you identify no reason to suppose that utilities and merchant generators would ever fail to make prudent investments, and it was nonsensical for you to ever suggest that all possible prudent investments were not being made given the regulatory and market forces that assure they are.

In addition to the appropriate diversity in the thermal efficiency, design characteristics, and age of power plants, the composition of emissions from burning coal and the potential health and environmental impacts of using coal also differs widely by location.

The composition of emissions from a coal-fired power plant coal depend in large measure upon the characteristics of the locally available coal that the power plant uses. Coal in some parts of the country has a lower sulfur content, and burning this coal produces less

sulfur dioxide. As transportation costs are such a significant component of fuel costs, the composition of the coal a power plant uses, and as a result the emissions it produces, depends chiefly on its location.

The differences in the composition of coal that power plants use combines with another aspect of diversity in power plant emissions that is highly relevant to determining whether imposing uniform and cost-blind standards for power plants under Section 112 is appropriate in light of the costs: The widely varying prevalence of controls that were installed in order to meet new national ambient air quality standards, new source performance standards, and combat the problem of acid rain by reducing sulfur dioxide emissions. For decades, your agency carried out its job under the Clean Air Act to regulate power plant emissions from power plants to protect the public health without inefficiently displacing traditional State regulations designed to account for differing local circumstances. Your agency required that every power plant constructed since after 1971 employ the best available technology that had been adequately demonstrated by that time. 40 C.F.R. Part 60, Subpart D. Your agency then imposed an updated standard for new power plants constructed after 1978. 40 C.F.R. Part 60, Subpart Da. Even beyond the controls required by these standards, new power plants have been required since 1977 to install the best available technology for each new facility as determined through an individualized case-by-case assessment in light of costs. And under the national ambient air quality standards program, further controls have been required at specific new and existing power plants when necessary and appropriate to address emissions that need only be controlled to the extent necessary in the aggregate to meet certain ambient levels in the local atmosphere. In all, the set of sources and existing controls in any given area, as well as local geographic and atmospheric conditions and the timing of construction, have led to substantial diversity in the controls installed at power plants.

New power plants are now generally required to reduce sulfur dioxide emissions to a level that can only be achieved using controls, but attaining the national ambient air quality standards has not and does not require that every existing plant install those controls.

Meanwhile, the acid rain problem depends most on where coal-fired power plants are located and the overall regional level of the emissions that lead to acid rain. Given the differences in the cost of coal and the availability of other potential sources of power, coal power plants are not evenly dispersed throughout the United States, and acid rain is not a problem in areas where they are not concentrated. Coal power plants tend to be concentrated in areas where local circumstances heavily favor the use of coal. Coal power plants are far less concentrated in regions that rely on coal primarily to provide diversity in power generation portfolios even if though it is not the cheapest source of power, and power plants in these areas do not pose an acid rain problem. Furthermore, the acid rain problem can be cost-effectively addressed in areas where local circumstances permit low sulfur coal to be cost-effectively incorporated into the design and operation of power plants. However, the availability and cost of low sulfur coal varies according to location, and it is not a cost-effective means of reducing emissions in areas where its use requires long distance transportation. Finally, given that acid rain depends on the total amount of emissions in an area, it can be managed without requiring that every coal fired power plant reduce emissions by the same amount, since the sulfur dioxide emission reductions required to address acid rain are fungible.

Thus, when it came time for Congress to address acid rain, many power plants did not have scrubbers and the reductions necessary to address acid rain did not require that every existing power plant install sulfur dioxide controls. Given that the controls used to reduce sulfur dioxide emissions cost hundreds of millions of dollars, and if they are to be installed in a new power plant or at an existing power plant, the costs are ultimately passed on to the consumers of electricity, the unique nature of the acid rain problem led Congress to create a program that allowed for the strategic rather than uniform deployment of scrubbers, and this

has an important effect on emissions from power plants unrelated to acid rain that would be regulated by Section 112 if power plants are subjected to that program, under your agency's interpretation that you must regulate every substance on the Section 112(b) list.

Congress whole-heartedly encouraged strategic rather than uniform deployment of new scrubbers in enacting the federal acid rain program, Title IV of the 1990 Amendments to the Clean Air Act. Under this program, utilities are given incentives to efficiently identify the most cost-effective opportunities to reduce emissions that lead to acid rain, in some cases installing scrubbers, in some cases switching to more expensive low sulfur coal, and in other cases continuing operations as normal while providing financial support to power plants that have more cost-effective opportunities to achieve the reductions. The result is, as Congress intended, that some power plants have installed scrubbers to address acid rain while others did not and instead either used low sulfur coal or financially supported scrubber installations at other power plants where the investments were more cost-effective. This addressed acid rain in a way tailored to local conditions and obtained the same benefits at a much lower cost. Once the acid rain program was fully implemented, 30 new scrubbers were installed as a result, Legal Memo at 17 n.18, and the rest of the fleet either complied by burning low sulfur coal or by financially supporting the installation of these 30 new scrubbers. With the addition of these new scrubbers, by 2012 two-thirds of power plants had scrubbers and one-third of power plants did not. Exelon Comments on Proposed Toxics Rule at 25 n.47, 50-51, Exhibit 10 at 8-11, Exhibit 2 at 19-20, tbl. 5, Exhibit 4 at 10.

This prevailing pattern of strategic scrubber deployment is centrally relevant to assessing the costs of your decision to subject power plants to the Section 112 program because the scrubbers installed to reduce sulfur dioxide emissions also reduce acid gas emissions, including hydrochloric acid and hydrofluoric acid, below the levels that would otherwise be emitted. Crucially, even though burning low sulfur coal emits far less sulfur dioxide, it does not emit correspondingly lower amounts of acid gases. While using low sulfur coal can achieve the sulfur dioxide emission levels that are achieved using scrubbers, using low sulfur coal cannot achieve the acid gas emission levels that are achieved using scrubbers.

That two-thirds of power plants installed scrubbers to address sulfur dioxide emissions when necessitated by local circumstances to meet national ambient air quality standards and address the acid rain problem made sense, but it is a far different question whether it would make sense to install scrubbers on the remaining one third of power plants when the national ambient air quality standards and the acid rain program have not required them to install scrubbers solely in order to achieve reductions in emissions in acid gases, and this is a question you have refused to answer even though that is precisely the consequence of your decision to subject power plants to the Section 112 program. This continued refusal runs afoul of the reasoned decisionmaking requirement and you cannot lawfully regulate power plants under Section 112 unless and until you specifically address whether or not the costs of the resulting universal scrubber requirement are justified. And even if you were to find that additional scrubbers could cost-effectively be deployed at *some* existing power plants, you do not address whether it is rational to require scrubbers to be deployed at *all* existing power plants. Using a tailored and case-by-case approach would allow the power plants that would retire as a result of Section 112 regulation to remain in operation while still requiring power plants that can affordably install scrubbers to do so. You do not address the uniquely unjustifiable costs of the avoidable retirements at all in your proposed supplemental finding, leaving unaddressed the most important aspect of the costs of your decision to use Section 112 regulation rather than use an alternative control strategy to address emissions from power plants.

In sum, certain States have older and less thermally efficient fleets because they are closer to coal resources and enjoy lower fuel costs such that investing in new and larger plants does not offer the same return as in States that have much higher fuel costs. And certain States

have been able to avoid requiring expensive scrubbers on every coal power plant while nevertheless achieving national ambient air quality standards and complying with the provisions of the Title IV acid rain program, largely through use of locally available low sulfur coal. Given the traditional and ongoing role of States in cultivating and overseeing the nation's power generation industry and the cooperative federalism model in the Clean Air Act and the Federal Power Act, it is no surprise that power plants are diverse in design, size, and age. This diversity is no accident — it is a central feature of the federal system. As with many issues they address, State and local governments have responded to differing local circumstance with decades of decisions that tailored their power plant fleets accordingly. Given this unique nature of the nation's power plant fleet, your predecessor in 2005 concluded that "Congress plainly treated Utility Units differently from other source categories" because "Utility Units are a broad, diverse source category that is subject to numerous CAA requirements, including requirements under both Title I and Title IV, and that such sources should not be subject to duplicative or otherwise inefficient regulation." 70 Fed. Reg. at 15999. You once again must assess the costs of your decision accordingly rather than ignore reality.

You Must Consider Costs in Light of the Unique Nature of Section 112.

You must consider the unique nature of the Section 112 program "to determine the cost considerations generally relevant" to your decision. Legal Memo. at 5. Congress directed you to undertake a study of the public health hazards reasonably anticipated to occur as a result of hazardous air pollutant emissions by power plants "after imposition of the requirements of this chapter." 42 U.S.C. § 7412(n)(1)(A). Then Congress required you to present the results of the study and also include a description of "alternative control strategies for emissions found to warrant regulation under" the Section 112 program. *Id.* Then Congress directed you to "regulate electric utility generating units under this section" if and only if you reasonably conclude that "such regulation is appropriate and necessary after considering the results of the study" that includes alternative control strategies for regulating power plant emissions that could be regulated under Section 112. *Id.* Thus, your assessment of costs must reflect the highly unique nature of the Section 112 program that is central to deciding whether it is appropriate and unnecessary to inflict it upon the nation's power plant fleet.

First, you misleadingly imply that only "[c]hemical compounds and elements that are known to cause or are suspected of causing cancer, birth defects, reproduction problems, and other serious health effects, often in very small quantities, are considered HAP," Legal Memo. at 6, and you rely heavily on the erroneous claim that "context provided by CAA section 112 generally demonstrates Congress's focus on the inherent risks posed by HAP emissions." Legal Memo. at 9–10. The Section 112(b) list is not limited to only especially and inherently harmful substances, and indeed it includes substances that your agency has determined are not toxic because they do not cause harm via exposure. Yet you refer to the Section 112(b) list of pollutants as if it only contains substances that "may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C. § 7412(a)(1) (1988). But that was the pre-1990 threshold for substances to be regulated under Section 112, and this narrow definition was not the criteria that your agency and Congress used to compile the list of substances in Section 112(b), nor the test that survived after Congress broadened the Section 112 program beyond its original mandate (which was unmistakably limited to addressing health effects detrimental to the "productive capacity" of [the nation's] populace," rather than their general well-being and comfort. 42 U.S.C. § 7401(b)(1)). The Section 112(b) list enacted in 1990 derived from an ad hoc set of 224 substances. *See* Committee Report on S. 1894, S. Rep. No. 100-231 at 223–25 (1987). Of these, 201 were included on the list merely because they were included on the SARA Section 313 list and also in Table 4 of the 1986 National Air Toxics Information Clearinghouse Data Base Report on State and Local Agency Air Toxics Activities. *Id*. But between 46 and 128 of these substances were only included because they were part of the Maryland Toxic Substances Registry, and that program relied heavily on the ACGIH list of Threshold Limit Values even though those limits are intended for no other use apart from industrial hygiene and are not suitable for "evaluation of or control of community air pollution nuisances." U.S. EPA, *Methods for Pollutant Selection and Prioritization* 2-4 (July 1987). That these substances were also included in Table 4 of the 1986 NATICH report is not surprising since so many state air standards relied on the same flawed misapplication of TLVs, which is why the 1986 NATICH report makes clear that it includes "any non-criteria air pollutant" for which any state or local agency had set an air standard and expressly clarified that "[i]nclusion of a pollutant . . . does not necessarily mean that it is toxic at ambient concentrations." 1 National Air Toxics Information Clearinghouse, Data Base Report on State and Local Agency Air Toxics Activities at iii (July 1986). The Section 112(b) list is nothing more than a flawed and highly over inclusive potpourri of substances, and it is not a list of substances that are reasonably anticipated to be toxic at ambient concentrations. Notably, you have removed many substances from the SARA Section 313 list because they are not toxic. *See, e.g.*, 70 Fed. Reg.

37698 (deleing methyl ethyl ketone); *Am. Chemistry Council v. Johnson*, 406 F.3d 738, 743 (D.C. Cir. 2005) (holding a SARA Section 313 delisting petition must be granted if a substance does not "cause harm via exposure" and directing district court to order delisting of methyl ethyl ketone because "EPA's own analysis demonstrates that MEK fails this test") 42 U.S.C. § 7412(b)(1)(A) (list including methyl ethyl ketone). But you have not removed those substances from the Section 112(b) list because Congress provided you cannot delist substances until you determine "there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects," the latter of which is defined to include "any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas." 42 U.S.C. § 7412(b)(3)(C); 42 U.S.C. § 7412(a)(7). Nowhere in the statute itself or in the development of the Section 112(b) list is there any indication whatsoever that all of the listed substances pose "inherent risks," and your cost consideration cannot be based on the erroneous premise that the current Section 112 program reflects a Congressional adoption of an overarching precautionary principle to deal with extremely toxic substances.

You further rely on the argument that "CAA section 112 is the authority intended to regulate HAP emissions from stationary sources." 80 Fed. Reg. at 75027 (citing 64 Fed. Reg. 79825, 79830/2). But this ignores your own admission that Section 112 is premised on the crucial assumption that the cost blind MACT floors are "per se reasonable" to impose on "major sources" which are defined to be facilities that emit very large quantities of substances listed under Section 112(b). Legal Memo. at 18 ("[S]ection 112(d) sets a specific minimum level of control for HAP which is based on what has already been achieved by similar sources in the source category. By establishing this requirement, Congress in essence determined that this level of control is per se reasonable."). You admit that this crucial assumption depends entirely on whether "section 112(d)(3) ensures standards will be technologically feasible and cost reasonable because they are based on the levels of controls already achieved by existing sources." Legal Memo. 9. You must assess whether that crucial assumption holds for power plants in light of the unique nature of the power plant fleet. The differences in costs between the results of subjecting the power plant fleet to Section 112 and the many other major sources you have regulated under Section 1122 shows that in the magnitude and in relative cost-effectiveness, regulating power plants under Section 112 is manifestly far different from regulating other stationary sources under that program, demonstrating that the crucial assumption that the costs of setting MACT floors would be per se reasonable does not hold for power plants. This is because unlike other stationary sources, power plants are inherently more diverse and "the best-performing power plants' emissions limitations" do not reflect "cost-conscious decisions" that can serve as a proxy for the choice of whether other power plants can reasonably be forced to upgrade to match the performance of the lowest emitters. *Michigan v. EPA*, 135 S. Ct. at 2711. The premise of the Title IV acid rain program is that scrubbers should only be installed strategically and it creates incentives to install larger, more efficient, and more expensive controls at some plants rather than have every power plant install controls. And the installation of other control equipment reflects the need to attain national ambient air quality standards in light of local circumstances that do not exist elsewhere. Section 112 is not appropriate for power plants because by its very nature it will force wasteful investments in controls merely because the standards are driven by the level of emission reduction that has been obtained as a result of other programs that were themselves designed to avoid rather than require a one-size-fits-all approach to the regulation of emissions. Section 112 inappropriately nationalizes locally appropriate choices and you must weigh the costs accordingly.

You Must Consider Costs in Light of the Purpose of Section 112(n)(1).

As you acknowledge, you must consider the "purpose" of Section 112(n)(1) "to determine the cost considerations generally relevant" to your decision. Legal Memo. at 5. In developing the current Section 112 program as part of the Clean Air Act Amendments of 1990, Congress recognized the drastic consequences that would occur from subjecting the nation's power plants to inflexible Section 112 standards. Instead of automatically authorizing or requiring imposition of the Section 112 program on power plants, Congress directed your agency to complete a detailed study of emissions from power plants and then to regulate them under Section 112 only if "appropriate and necessary" to do so. 42 U.S.C. § 7412(n)(1)(A). The history of this provision shows its purpose and is crucial to "determin[ing] the cost considerations generally relevant" to your decision that must be considered. Legal Memo. at 5. Yet there is no indication in your proposal and legal memorandum that you have considered or reviewed the extensive materials showing this history. Your predecessor in 2005 was evidently far more familiar with this history than you are today because he understood that "Congress plainly treated Utility Units differently from other source categories" because "Utility Units are a broad, diverse source category that is subject to numerous CAA requirements, including requirements under both Title I and Title IV, and that such sources should not be subject to duplicative or otherwise inefficient regulation." 70 Fed. Reg. at 15999. You must consider this history and comprehensively and carefully assess the costs of your decision in a manner faithful to the purpose of Section 112(n)(1).

On June 22, 1989, testimony by General Counsel of Iowa Southern revealed that power plants would be subject to air toxics program contained in H.R. 4 and H.R. 2585 and that this would, among other consequences, render the acid rain program provisions irrelevant:

> Iowa Southern is concerned with the potential economic impact that H.R. 4 and H.R. 2585 could have on our ratepayers. We believe the economic impact of these bills on the people of southern Iowa could be more severe than any acid rain legislation yet proposed.
>
> . . .
>
> . . . [A]n emission source, such as an electric utility coal fired boiler, will be defined as a major source under either of these bills if the unit emits or has the potential to emit 10 tons per year or more of any air pollutant or 25 tons per year or more of any combination of air pollutants which have been listed. These bills list 187 chemicals for regulation. Iowa Southern's Ottumwa Generating Station is known to emit 13.
>
> Ottumwa Generating Station is a new source performance standard plant which began commercial operation in May 1981. Ottumwa Generating Station is a 725 gross megawatt plant which burns low sulfur Wyoming coal and is equipped with the state-of-the-art electrostatic precipitator with a control efficiency of 99.4 percent. The sulfur emissions from the Ottumwa Generating Station have historically averaged 0.5 pounds of sulfur dioxide per mi[ll]ion BTU heat input. On average Ottumwa Generating Station burns approximately 2.1 million tons of coal per year.
>
> Over the last year Iowa Southern has performed a series of mass balance tests on ash and coal to determine the weight of the listed chemicals known to be emitted at Ottumwa Generating Station. . . .
>
> . . .

. . . The test results for each of the chemicals summarized as follows:

Element:	Tons emitted per year
Arsenic	1.5
Beryllium	0.5
Cadmium	0.5
Chlorine	1,050.0
Chromium	0.5
Cobalt	1.0
Copper	0.5
Lead	2.0
Manganese	9.8
Mercury	0.5
Nickel	3.0
Selenium	2.0
Total	1,071.8

The results of these tests have been shared with the EPA in Washington and EPA staffers at Research Triangle Park in North Carolina. The EPA is in general agreement with our test results.

Chlorine is an anomaly. Neither EPA nor the Electric Power Research Institute were aware that chlorine would be emitted in this amount from low sulfur coal. . . .

Trace elements in coal vary with each shipment, so the amount of their emissions is hard to predict. But without question, our company and others burning low sulfur coal will emit these elements in trace amounts at times below and at times slightly in excess of the 10 to 25 ton limit. In short, at these low levels of detection we are always going to be on the margin of those numbers.

. . .

According to the Electric Power Research Institution, chlorine is emitted primarily as hydrochloric acid which can be controlled by use of a wet scrubber or spray dryer. Installation and operation of such control equipment would be extremely expensive. For example, the appromiximat[e] cost of the wet scrubber at Ottumwa Generating Station would be in the range of $150 to $180 million.

To pay for the installation of scrubbing equipment at all our generating stations would result in a rate increase to our customers in the range of 25 to 30 percent.

. . . [P]art of our service territory is the third most impoverished portion of the United States. . . . [A] rate increase of this magnitude upon the rural impoverished people in our service territory would cause them undue harm.

Iowa Southern is a small utility company in a medium sized State, and we know the impact of H.R. 4 and H.R. 2585 will be a serious burden on our ratepayers. We can only suggest that the economic impact of these bills upon the Nation's utility ratepayers could easily be as severe or even greater than the proposed legislation to control acid rain.

> This subcommittee should take note of the potential overlap in legislation to control air toxics and legislation to control acid rain precursers.
>
> Proposed congressional acid rain legislation and especially the presidential proposal will extract its toll from Iowa Southern Utilities Co.'s ratepayers. The efforts by this subcommittee and others to draft an acid rain bill which will allow the utility industry the freedom to choose which compliance method best suits its needs would be wasted as H.R. 4 and H.R. 2585 will require most, if not all, coal fired units to scrub.
>
> Based on the above information . . . Iowa Southern Utilities Co. respectfully submits a recommendation to the committee. Either expressly exempt the utility industry from H.R. 4 and H.R. 2585, as the trace emissions emitted from utility boilers are de minimis. Or at the very least, require EPA to conduct comprehensive research to determine the health risk associated with these emissions and report to Congress.
>
> . . .
>
> . . . We are not here to say that we are against air toxics cleanup, but at the same time, our industry is concerned that it may be affecting these very trace elements that are present in the coal; you would require additional technology on units that are already extremely clean on SO_2 and NO_x, and we don't want to have to impose that type of more stringent cleanup standard on plants that are doing very well already.

Clean Air Act Amendments (Part 3): Hearing Before the Subcomm. on Health and the Environment of the H. Comm. on Energy and Commerce, 101st Cong. 356–58, 469 (1990).

Senator Howard C. Nielson of Utah responded:

> You seem to be making your case. People in southern and southwestern Iowa couldn't stand to have rates increased, because they are the third poorest in the country, and you couldn't afford to put any controls. . . . You are talking about economics. . . . Do you feel that you can meet the Clean Air Act and the Toxics Act without duplication? Or will they duplicate each other? . . . Is the acid rain provision and the toxics provision, are they compatible? Can you make one fix to take care of the two at the same time?

Id. at 470. Iowa Southern's General counsel answered:

> [W]e would be able to, under some of the freedom-of-choice bills, do a fuel choice switch, which will keep the rates down lower. But we would be able to use lower sulfur coal. The other plants, we are using lower sulfur coal. We don't want to put a scrubber on. It would not be necessary to achieve acid rain [reductions.]

Id. Senator Gerry Sikorski of Minnesota weighed in:

> [O]n that point, you make a pretty good statement in here about scrubbers and acid rain, and how freedom of choice would be wasted as H.R. 4 and H.R. 2585 would require most, if not all coal-fired units to scrub.

Id.

On July 27, 1989, the Administration introduced bills H.R. 3030 and S. 1490 that contained a proposed Section 112(m) utility study provision and a substantive amendment to Section 111(d):

SEC. 108. MISCELLANEOUS.

(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.".

. . .

TITLE III—HAZARDOUS AIR POLLUTANTS

SEC. 301. TECHNOLOGY-BASED STANDARDS FOR HAZARDOUS AIR POLLUTANTS.

Section 112 of the Clean Air Act is amended to read as follows:

"HAZARDOUS AIR POLLUTANTS

"**SEC. 112. (a) DEFINITIONS**.—

. . .

"(5) The term 'electric utility steam generating unit' means any fossil fuel fired steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than twenty-five megawatts electrical output to any utility power distribution system.

. . .

"**(m) ELECTRIC UTILITIES**.—The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) after imposition of the requirements of this Act. The Administrator shall report the results of this study to the Congress within three years after the date of enactment. The Administrator shall develop and describe in his report to Congress alternative control strategies for emissions which may warrant regulation under this section. The Administrator may not regulate electric utility steam generating units under this section unless he finds such regulation is appropriate and necessary after considering the results of the study required in this subsection.".

On September 19, 1989, the staff of the Senate Environment and Public Works committee sent committee members a memorandum including the following summary of this "major issue":

> Regulation of Electric Utilities. A powerplant burning coal emits several heavy metals which are contained in trace amounts in the coal and are not burned. The most significant of these is mercury. Powerplants may also emit chlorine compounds, although the nature of these chlorine emissions is less clearly understood. Baghouses would be MACT to control heavy metal emissions. There is already a NESHAP for mercury, but powerplants have always been exempt because of the high cost of control. Cost estimates for compliance range from $2.55 to $10 billion. Growing evidence of mercury contamination in freshwater lakes across the northern tier of states indicates that the issue should be reexamined. The electric utility industry would like a complete exemption from the requirements of the new air toxics program. The Administration bill requires a study of costs and benefits before control requirements are imposed on utility boilers and requirements may only be imposed, if EPA finds them 'necessary and appropriate'.

Air Toxics Hearings, Memorandum to Members, Committee on Environment and Public Works from Committee Staff 10–11 (Sept. 19, 1989) (obtained from Sen. Chafee's papers).

On December 20, 1989, the Senate Environment and Public Works Committee reported S. 1630 with a new proposed Section 112(e)(5) utility standard provision:

> **TITLE III—AIR TOXICS**
>
> **HAZARDOUS AIR POLLUTANTS**
>
> **SEC. 301.** Section 112 of the Clean Air Act is amended to read as follows:
>
> **"HAZARDOUS AIR POLLUTANTS**
>
> **"SEC. 112. (a) DEFINITIONS.—**For the purposes of this section—
>
> . . .
>
> "(5) The term 'electric utility steam generating unit' means any fossil fuel fired steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than twenty-five megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is also considered in determining the electrical energy output capacity of the facility.
>
> **"(e) SCHEDULE FOR STANDARDS AND REVIEW.—**
>
> . . .
>
> "(5) The Administrator shall not promulgate any standard with respect to the emissions of chlorine or compounds containing chlorine from electric utility steam generating units before the date three years after the date of enactment of this paragraph.

On January 24 and 25, 1990, the Senate Energy and Natural Resources Committee held a hearing on the energy policy implications of the Clean Air Act amendments that addressed at length the problem of applying the new Section 112 to power plants, including testimony by the Department of Energy and EPA on the problem and the two proposed solutions, especially with respect to the Section 112(e)(5) utility standard provision:

> Senator WALLOP. . . . The air toxic title is another attempt to impose scrubbers on utilities . . . . This section is a disaster for many reasons. In this instance, coal-fired utilities would be required to control for air emissions with unknown, if any, health hazards. The only technology for controlling the compounds released by combustion is through scrubbing. Thus, the air toxic provision mandates all coal-fired utilities to install scrubbers. If they do so for air toxic requirements, they may as well use them to meet their acid rain requirements. The air toxic title is the most costly in the bill. It costs five times the annual cost of the acid rain section, $25 billion versus $5 billion. Yet the rationale for the section is weak, if it exists at all. . . . The President has suggested a 3-year study to identify culprits. This would make more sense than the committee approach.
>
> . . .
>
> Sen. FORD. . . . We have talked about nothing but scrubbers, and we have only talked about acid rain here today as if this is the only problem; but we are going to get into toxics. Acid rain costs will be only about 10 percent of toxics

and ozone. . . . If we pass [the air toxics program in] Title III of the committee bill, we do not have to worry about the rest of them. We are stuck. We will not even argue about acid rain or anything else. If we pass Title III, we can just quit, and that is the end of it. Then you have won your battle. My coal miners can go home and wait for those brown envelopes to come in on the third or fifth of the month, and it will look like fall in the lobby of the bank as they open up those checks and you pay for them because they are out of work, absolutely out of work.

. . .

Senator CONRAD. . . . Is there not the potential that the whole air toxics provisions would drive the earlier sections of the bill as well? In other words, in order to meet these kinds of air toxic provisions, you would require scrubbing that would go to the effects on SO_2 and that there is a direct connection between what you do in the air toxics provisions and what happens over in the SO_2 and acid rain provisions of the bill.

Mr. ROSENBERG. [EPA Assistant Admin. for Air and Radiation.] Well, one of the differences between the President's proposals and the Senate is the impact on the electric utility industry, . . . the requirement that the electric utilities do function under the air toxics provisions as written by the Senate would add billions of dollars to a utility rate with again very marginal environmental benefit.

. . .

Ms. STUNTZ. [DOE Deputy Under Secretary for Policy, Planning and Analysis.] . . . Let me turn, finally, to the air toxics title. As we discussed yesterday, and I wholeheartedly concur with Senator Ford's statement, the air toxics provisions of S. 1630, if left unamended, in some ways will make the whole acid rain title irrelevant. Because if you have to scrub electric utility emissions to get at chlorine and all the other trace toxic gases that exist, you will have to go to such a level of control that the standards for acid rain . . . are irrelevant. They are basically superseded. Under the particulate standard virtually every utility would have to apply bag houses. The cost of that ranges in the billions. . . . I think it is critical that in order to understand why the air toxics provisions of S. 1630 are so dramatically more burdensome to the utility industry than the provisions of S. 1490, you need to understand that the Administration bill requires that special studies be carried out before utility toxic air emissions are regulated. Therefore cost benefit and environment improvements to be achieved by application of these costs and technologies can be considered. The regulatory program can be tailored where it is truly appropriate and important. That flexibility is gone from the Senate bill. The only flexibility contained is that chlorine emissions are explicitly not to be regulated for three years. Everything else, and there are many other elements, apparently is to be regulated immediately, because there is no flexibility. . . . So, in closing, let me say that we think there are billions of dollars at stake in this air toxics title.

. . .

STATEMENT OF LINDA G. STUNTZ. . . . Powerplants . . . are already subject to a diversity of required controls for particles and gases. Use of a rigid regulatory regime such as that provided in the air toxics title, may take away much of the flexibility provided to power plants in Title IV with respect to SO2

and NOx emission reductions. This is one of several reasons why we support the study of electric utility emissions and the tailoring of any air toxic regulation to the special circumstances of electric utilities, as needed, as is proposed in S. 1490, before any added regulation to reduce air toxic emissions is promulgated. . . . Installing MACT will be costly, particularly for coal-fired power plants. These controls would be required without any demonstration that such controls are necessary to produce any significant reduction in public health risks. Greater discretion in study, regulation and permitting is needed here. S. 1490 provides such discretion for electric utilities. . . . Under the MACT air toxic standards, coal burning utilities, which would have to control for trace amounts of air toxics, would incur substantial added costs. For example, it is estimated that for control of chlorine, added costs to coal-fired powerplants could be on the order of several billion dollars. This could jeopardize the Clean Coal Program and also force utilities to switch to alternative fuels or technologies. Given the other control costs, special studies of options and risks are needed.

. . .

Mr. ROSENBERG. . . . Specifically relating to the electric utilities, the administration's proposal requires EPA to conduct a study of the potential health risks, if any, due to air toxics emissions from utilities prior to imposing any air toxics regulatory requirements. . . . The Environmental Committee took a different approach. It requires utilities to comply with air toxic regulation for all pollutants which they emit except chlorine compounds. Not only would these regulations overlap with regulations under the acid rain provisions, but they would set up a two-track regulatory system for utilities which would consider chlorine emissions separately from other air toxics. This could result in one set of controls being applied for nonchlorine compounds and three years later another set of controls for the chlorine controls and then later another set of controls for acid rain controls. The administration believes it is far more sensible to study the potential health risks from utility air toxic emissions and to consider how to implement those provisions in the context of implementing the acid rain control provisions before imposing any mandatory requirements.

. . .

Dr. GOODMAN. [Southern Co. Vice President of Research and Environmental Affairs.] My chief purpose . . . is to focus briefly on the fundamental changes that we believe title III of S. 1630 would make in the way that section 112 of the existing Clean Air Act treats emissions from electric utility boilers. This drastic restructuring of section 112 would impose enormous cost burdens on electric consumers, burdens that are especially punishing to the poor and those on fixed income . . . . That would raise energy costs for American industry and, I believe, make us less competitive in the world markets. . . . The issue is a real world economic issue that can be measured in billions of dollars, a cost that is completely out of proportion to any benefit that can be claimed in light of the scientific data. For our company, the Sun Electric System, which represents five electric utilities in the southeast, it would result in capital expenditures of something like $12.5 billion for us, for a 25 percent rate increase. Now that includes the acid rain provisions. Basically it triples the cost of compliance with the acid rain provisions for us. Basically it means we are going to put bag houses in something similar to desulphurization in our facilities. . . . If you are in a utility business and you are going to have to build

that equipment anyway and you are concerned about not just about low-sulphur coal and its chlorides, but any coal having various parts of these trace constituents, you just as well build it to do scrubbing too and take advantage of the lowest cost coal you can find. And for us that, in most cases, will be high-sulphur, the most local coal we can find. . . . It is . . . going to raise costs significant[ly] . . . .

The CHAIRMAN. That means you have got to always scrub?

Dr. GOODMAN. That means we have got to always scrub under our interpretation of what EPA would have to do to us to determine maximum available control technology for the category of utility boilers.

. . .

Senator FORD. Are you saying to us now this ace group with the low-sulphur coal, that group is whistling Dixie? That with your position under this legislation that low-sulphur [sic] coal is going to be your best buy, and you are just going to go ahead and scrub? Am I correct in that assumption?

Dr. GOODMAN. Under our acid rain provision analysis, we have a balance between using the low sulphur coal and scrubbers on the 20,000 megawatts or so of coal-fired power plants we have. If we have these air toxics provisions—chlorides is an issue that has been discussed a lot—we are going to put scrubbers on everything anyway, then paying those additional premiums for . . . low-sulphur coal . . . would not be worth it.

. . .

Senator HEFLIN. Assuming the most stringent interpretation of this Title III, what would be your company's specific compliance response?

Mr. GOODMAN. . . . [R]etrofitting, bag houses, and putting scrubbers on each of our units. Which would be over a $12 billion capital investment.

Senator HEFLIN. Does not that strategy make other provisions of the bill moot, like calling for scrubbers for toxics but not for sulfur-dioxides resulting in a 100 percent nationwide scrubbing?

Mr. GOODMAN. That is right. I think it has been said several times that the air toxics provision makes the acid rain provisions irrelevant.

. . .

Senator MCCLURE. Coal contains trace amounts of chlorine, fluorine and other Table A substances . . . [. I]f the chlorine study provision, which is in section 112(e)(5)[,] was correct, why not a similar study provision for other pollutants at least until we can quantify the cumulative impacts of acid rain and any additional ozone-related NOx controls before we impose new air toxics controls.

Mr. ROSENBERG. Well, that is what is in the Administration bill, is a study of all of the health risks, a deferral of utility action, until that study is complete, which would give the EPA the opportunity to coordinate between the different sections of the bill and so we do not have—even if we impose additional obligations it would be ridiculous to do it in seriatum. We should do it all at once, so that the companies can plan it efficiently.

See Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearing Before the S. Comm. on Energy and Natural Resources, 101st Cong. 7, 234–35, 240–41, 436–37, 483, 485, 492, 570–72, 596, 603 (1990).

On January 26, 1990, the Administration sent every member of the Senate a letter outlining differences between Administration bill and S. 1630 that contained a rationale for the supporting the proposed Section 112(m) utility study provision:

Administration Proposal	Senate Bill	Recommended Change
. . .		
ELECTRIC UTILITY REGULATION		
Provides for a three year study by EPA on the toxic emissions from electric utilities. Regulations under this section occur only if the study shows they are warranted.	Provides for a study of chlorine emissions from utilities, but utilities would otherwise be subject to regulation under MACT standards.	Add study requirements in Administration bill.

. . .

> [T]he Senate Committee failed to exempt electric utilities from the bill's toxics provisions until after a study . . . on whether it is appropriate to regulate utilities . . . . Failure to do this may result in several billion dollars of unnecessary costs with unknown environmental benefits.
>
> . . .
>
> Rationale for Administration Position:
>
> Electric utilities have already been singled out for regulation under Title V of the Administration's proposal (acid rain) and will already be facing significant control costs.
>
> Utilities do emit a variety of toxic chemicals including acid gasses and metals. While improved controls which reduce these emissions have recently been applied to utilities, the acid rain program will reduce some of these pollutants even more.
>
> The exposure to air toxics from utilities could be low for many toxic compounds in the vicinity of power plants.
>
> The Administration approach allows the needed flexibility to identify and address the most significant toxic chemicals from utilities without mandating expensive controls that may be unnecessary.

See *Clean Air Act Amendments (Part 3): Hearing Before the Subcomm. on Health and the Environment of the H. Comm. on Energy and Commerce*, 101st Cong. 771, 775, 791, 837 (1990).

On March 1, 1990, Senator George Mitchell provided a summary of a bipartisan compromise in the Senate on the issue:

> With respect to electric utility boilers, only particulate and mercury emissions are to be regulated with a MACT standard. EPA is not authorized to require flue gas scrubbers to control emissions of hazardous air pollutants from utility boilers.

136 Cong. Rec. 3184 (Mar. 1, 1990); *see also* 136 Cong. Rec. 3392 (Mar. 5, 1990).

On March 5, 1990, the Senate bipartisan compromise S. Amendment No. 1293 to S. 1630 was introduced and contained an extensively redrafted Section 112(e)(5):

TITLE III—AIR TOXICS

HAZARDOUS AIR POLLUTANTS

SEC. 301. Section 112 of the Clean Air Act is amended to read as follows:

"HAZARDOUS AIR POLLUTANTS

"SEC. 112. (a) DEFINITIONS.—

. . .

"(7) The term 'electric utility steam generating unit' means any fossil fuel fired steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than twenty-five megawatts electrical output to any utility power distribution system.

. . .

"(e) SCHEDULE FOR STANDARDS AND REVIEW.—

"(5)(A) The Administrator shall conduct, and transmit to the Congress not later than three years after the date of enactment of this paragraph, a study of emissions of hazardous air pollutants which are particulates from electric utility steam generating units.

"(B) The Administrator shall conduct, and transmit to the Congress not later than four years after the date of enactment of this paragraph, a study of mercury emissions from electric utility steam generating units considering the rate and mass of such emissions, the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies.

"(C) Notwithstanding the requirements of subsection (e), standards under subsection (d) for the control of emissions of hazardous air pollutants which are particulates and mercury emissions from electric utility steam generation units shall be promulgated not sooner or later than five years after the date of enactment of this paragraph. Electric utility steam generating units shall be in compliance with such standards not later than eight years after the date of enactment of this paragraph.

"(D) Notwithstanding the provisions of this section, the Administrator shall not be required to promulgate standards to control emissions of organic or inorganic acid gases from electric utility steam generating units unless the Administrator finds that such standards are warranted to protect public health or the environment. Nothing in this section shall be construed to authorize the Administrator to promulgate standards requiring use of flue gas stream scrubbing technology by electric utility steam generating units for the control of hazardous air pollutants.

"(E) Notwithstanding the provisions of this section, the Administrator shall not promulgate standards to control emissions of any hazardous air pollutant, other than mercury, which is emitted in gaseous form from electric utility steam generating units, if the emissions of such pollutant are less than ten tons per year.

> "(F) Emissions of organic and inorganic acid gases shall be included in determining whether an electric utility steam generating unit is a major source of hazardous air pollutants which are particulates or mercury under this section.

On April 3, 1990, the Senate passed a bill containing the Section 112(e)(5) utility provision:

> "(5)(A) The Administrator shall conduct, and transmit to the Congress not later than three years after the date of enactment of this paragraph, a study of emissions of hazardous air pollutants which are particulates from electric utility steam generation units, considering the rate and mass of such emissions, the health and environmental effects of such emissions, technologies which are available to control such emissions and the costs of such technologies.
>
> "(B) The Administrator shall conduct, and transmit to the Congress not later than four years after the date of enactment of this paragraph, a study of mercury emissions from electric utility steam generating units considering the rate and mass of such emissions, the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies.
>
> "(C) The National Institute of Environmental Health Sciences shall conduct, and transmit to the Congress not later than four years after the date of enactment of this paragraph, a study to determine the threshold level of mercury.
>
> "(D) Notwithstanding the requirements of subsection (e), standards under subsection (d) for the control of emissions of hazardous air pollutants which are particulates and mercury emissions from electric utility steam generation units shall be promulgated not sooner or later than five years after the date of enactment of this paragraph. The studies required by subparagraphs (A), (B), and (C) shall be placed in the relevant docket for any rulemaking that would establish emissions standards under subsection (d) for particulates or mercury from electricity utility steam generating units and shall be considered by the Administrator, along with other public comments, before any such standard is promulgated. Such standards shall be consistent with the requirements of subsection (d) and take into account such information on cost and feasibility as is contained in the study required by subparagraph (B). Electric utility steam generating units shall be in compliance with such standards not later than eight years after the date of enactment of this paragraph.
>
> "(E) Notwithstanding the provisions of this section, the Administrator shall not be required to promulgate standards to control emissions of organic or inorganic acid gases from electric utility steam generating units unless the Administrator finds that such standards are warranted to protect public health or the environment. Nothing in this section shall be construed to authorize the Administrator to promulgate standards requiring use of flue gas stream scrubbing technology by electric utility steam generating units for the control of hazardous air pollutants.
>
> "(F) Notwithstanding the provisions of this section, the Administrator shall not promulgate standards to control emissions of any hazardous air pollutant, other than mercury, which is emitted in gaseous form from electric utility steam generating units, if the emissions of such pollutant are less than ten tons per year.

> "(G) Emissions of organic and inorganic acid gases shall be included in determining whether an electric utility steam generating unit is a major source of hazardous air pollutants which are particulates or mercury under this section.

Then, on May 17, 1990 and May 21, 1990, the House Committee reported H.R. 3030 with proposed the Section 112(l) utility study provision:

> **TITLE III—HAZARDOUS AIR POLLUTANTS**
>
> Sec. 301. Technology-based standards for hazardous air pollutants.
>
> **SEC. 301. TECHNOLOGY-BASED STANDARDS FOR HAZARDOUS AIR POLLUTANTS.**
>
> Section 112 (42 U.S.C. 7412) is amended to read as follows:
>
> **"SEC 112. HAZARDOUS AIR POLLUTANTS.**
>
> **"(a) Definitions.—**For the purposes of this section—
>
> . . .
>
> "(4) Electric Utility.— The term 'electric utility steam generating unit' means any fossil fuel fired any fossil steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical output capacity energy of for the sale facility is also considered in determining the electrical energy output capacity of the facility.
>
> . . .
>
> **"(l) Electric Utilities.—**The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) after imposition of the requirements of this Act. The Administrator shall report the results of this study to the Congress within 3 years after the date of the enactment of the Clean Air Act Amendments of 1990. The Administrator shall develop and describe in the Administrator's report to Congress alternative control strategies for emissions which may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required in this subsection.

The House Committee report described the provision as follows:

> *Electric utilities*.—Under new section 112(1), the Administrator is directed to perform an assessment of the hazards to public health which may reasonably be anticipated to result from emissions listed under this section from certain electric utilities after imposition of the requirements of this Act. The Administrator is directed to report the results of this study to the Congress within three years after enactment. The Administrator shall develop and describe in his report to the Congress alternative control strategies for emissions from affected sources warranting regulation under this section. The Administrator is required to regulate such sources if he finds such regulation appropriate and necessary after considering results of the study.

Committee Report on H.R. 3030, H. Rep. No. 101-490 at 334.

On May 23, 1990, the House passed its bill containing Section 112(l) utility study provision:

> "(l) ELECTRIC UTILITIES.—The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) after imposition of the requirements of this Act. The Administrator shall report the results of this study to the Congress within 3 years after the date of the enactment of the Clean Air Act Amendments of 1990. The Administrator shall develop and describe in the Administrator's report to Congress alternative control strategies for emissions which 6 may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required in this subsection.

On October 26, 1990, the Conference agreement rejected the Senate utility standard provision in favor of the House utility study provision. The House agreed to the Conference Report that same day, and Representative Nielson supplemented his remarks in the Congressional Record for that day to detail the sense of the conferees on their agreement to Section 112(n):

> In receding to the House provision on utility emissions, the Senate acted in part to recede from its conference proposal that would have created the discretionary authority to require scrubbing of utility emissions. The Senate recognized that the House provision includes the directive that EPA examine alternative control strategies. This provision contains the appropriate flexibility so that, in the event EPA finds it appropriate to regulate certain utility emissions, EPA could avoid any scrubbing requirement. In receding, the Senate is consistent with the intent of the Senate-passed subparagraph (e)(5)(E) that prohibited imposition of utility scrubber requirements. It is the sense of the conferees that EPA's ultimate decision avoid any conflict with title IV implementation, including the compliance flexibility and cost-effectiveness goals which are central to the acid rain program. It is my understanding that no provision in this title or subsection of this title will in any way limit a utility's flexibility of choice in complying with the requirements of this act.

136 Cong. Rec. 35013 (Oct. 26, 1990). Representative Oxley likewise supplemented his remarks at length on the subject of the agreement to Section 112(n):

> While title III addresses 189 toxic air pollutants and the control of those pollutants, I wish to focus on the provisions of the utility air toxics study, section 112(n) of the act as added by the conference agreement. With respect to air toxics generally, the Senate and House bills included provisions that differed substantially with respect to scientific studies, timing, and regulatory requirements. The House provision required that the EPA Administrator perform a 3-year study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units and report the results of that study to the Congress.
>
> On the other hand, the Senate provision was the result of a complex, and ultimately unsatisfactory, set of negotiations. Unlike the House provision, scientific studies were not to serve as the basis for regulation, but simply were

to be included in the docket of the regulatory process leading to regulations. Under the Senate provision, regulations for the control of particulates and mercury would have had to be promulgated no sooner or later than 5 years after enactment.

Rather than accept the Senate provision, the conference favored an approach that adopted the basic House provision. The provision did contain two constructive elements found in the Senate provision; a direction to the National Institute of Environmental Health Sciences to conduct a study on a mercury threshold below which adverse effects on human health are not expected to occur and the requirement that EPA study mercury emissions from all sources. The conferees agreed to the House provisions because of the logic of basing any decision to regulate on the results of scientific study and because of the emission reductions that will be achieved and the extremely high costs that electric utilities will face under other provisions of the new Clean Air Act amendments.

As we all know, the utility industry has been singled out for regulation under the acid rain provisions. The utility industry may also face additional controls for NO_x emissions for ozone control, and revised PM10 controls. All of these programs will result in substantial reductions in emissions of conventional and potentially hazardous air pollutants. Even without all of these reductions in air pollution, the health risks from emissions of hazardous air pollutants from powerplants are vanishingly small, as EPA has repeatedly recognized.

Under the existing section 112 of the Clean Air Act, EPA has addressed the question whether additional regulation of powerplants is necessary to control air toxic emissions to protect the public health. EPA, thus far, has studied several substances for which emissions data and some indicator of toxicity exist: arsenic, beryllium, cadmium, hexavalent chromium, formaldehyde, and radionuclides. EPA found that additonal regulation of emissions of these substances from powerplants was unnecessary. For some other substances listed in S. 1630, such as mercury and other volatile substances, little scientific evidence exists about either emissions rates or effects on public health or welfare. Under the conference agreement adopting the approach that the House included in its bill, these and other scientific issues will be examined, and regulations will be imposed only if warranted by the scientific evidence.

As I noted, the conferees changed only slightly the provision approved by the House. The changes to this provision, and other parts of the bill, clarified the nature of the studies to be conducted on emissions from powerplants and specifically exempted utility units from the provisions of section 112(c)(6), which addresses regulation of seven specified categories of substances.

In addition, section 112(n) provides that the Administrator shall regulate electric utility steam generating units if he finds, based on the studies, that regulation is appropriate and necessary. Under the conference agreement, if the Administrator regulates fossil fuel fired electric utility steam generating units by adopting any major source standard or any area source standard under section 112 for those units, he may do so only in compliance with subsection (n).

Pursuant to section 112(n), the Administrator may regulate fossil fuel fired electric utility steam generating units only if the studies described in section 112(n) clearly establish that emissions of any pollutant, or aggregate of pollutants, from such units cause a significant risk of serious adverse effects on

> the public health. Thus, If the Administrator regulates any of these units, he may regulate only those units that he determines—after taking into account compliance with all provisions of the act and any other Federal, State, or local regulation and voluntary emission reductions—have been demonstrated to cause a significant threat of serious adverse effects on the public health.
>
> In sum, I believe that the conference committee produced a utility air toxics provision that will provide amply protection of the public health while avoiding the imposition of excessive and unnecessary costs on residential, industrial, and commercial consumers of electricity.

136 Cong. Rec. 35075 (Oct. 26, 1990).

On October 27, 1990, Senator Burdick, member of the Conference Committee and Chairman of the Committee on Environment and Public Works, summarized the purpose of the provision on the floor of the Senate:

> Under section 112(n) utility emissions are exempt from air toxics regulation until studies are completed and the Administrator determines, based on the studies, that air toxics regulation is warranted. The hazardous substance of greatest concern here is Hg. The Senate bill required Hg reductions from coal-fired units. The Senate provision could not be sustained by the scientific facts. What little is known of Hg movement in the biosphere, suggests that its long residence time makes it a long-range transport problem of international or worldwide dimensions. Thus, a full control program in the United States requiring dry scrubbers and baghouses to control Hg emissions from coal-fired power plants would double the costs of acid rain control with no expectation of perceptible improvement in public health in the United States. I am pleased the conferees adopted the House provision on hazardous air pollutants with respect to Utility Units.

136 Cong. Rec. 36030 (Oct. 27, 1990). The Senate then agreed to the Conference Report and the bill was signed by the President on November 15, 1990.

Thus, the decision of how and whether EPA could doubly regulate power plants under both Section 112 for hazardous pollutants and under Title IV for sulfur dioxide involved extensive discussion and negotiation. *See, e.g.*, *Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearings Before the S. Comm. on Energy & Natural Res.*, 101st Cong. 7, 234–35, 240–41, 436–37, 483, 485, 492, 570–72, 596, 603 (1990). Congress understood and responded to concerns that the new comprehensive national standard program under Section 112 posed significant problems when combined with other Clean Air Act programs. These concerns were first raised publicly at a hearing on June 22, 1989, in testimony pointing out that it would be problematic to subject power plants to both the new Section 112 and the new Title IV acid rain program. *Clean Air Act Amendments (Part 3): Hearings Before the Subcomm. on Health & the Env't of the H. Comm. on Energy & Commerce*, 101st Cong. 356–58, 470–71 (1990) (App. 229–33). The following month, the Bush Administration submitted a bill to Congress, H.R. 3030 and S. 1490, and the Administration's bill dealt with the conflict between Section 112 and Title IV using a provision that became Section 112(n)(1) and gave EPA the option of using Section 111(d) to regulate power plants if EPA found using Section 112 would not be "appropriate and necessary" after the imposition of Title IV, while also included the provision that became Section 108(g) of the 1990 Amendments which permitted Section 111(d) to be used for power plant emissions of Section 112(b) listed substances as long as power plants were not regulated under Section 112. H.R. 3030, 101st Cong. § 108(d) (as introduced in the House, July 27, 1989). When the Senate failed to include similarly adequate provisions to address this issue, extensive debate and negotiation ensued — during which the

Administration position prevailed — because Members of Congress understood that subjecting existing sources to the Section 112 program's rigid cost-blind minimum standards could be a disastrous mistake that would entirely obviate the benefits of the diversity permitted by Title IV and the national ambient air quality standards program. Indeed, your agency's top air official itself testified at a key hearing that subjecting power plants to Title IV and then later subjecting them to Section 112 "in seriatum" would be "ridiculous." *Id.* at 603. Relatedly, there was also significant concern over the Section 112 residual risk provision because it subjected sources regulated under Section 112 to two rounds of regulation, the first imposing a floor and the second several years later to reduce residual health risks. *See, e.g.*, 136 Cong. Rec. 3,493 (1990) (statement of Sen. Steven Symms).

You Must Consider Costs in Light of Alternative Control Strategies.

You fail to consider costs in light of your alternatives, contrary to the requirements of Section 112(n)(1), the Unfunded Mandates Reform Act, the Regulatory Flexibility Act, and the reasoned decisionmaking requirement.

Congress expressly directed in Section 112(n)(1) that you "develop and describe" the "alternative control strategies for emissions which may warrant regulation under this section," which are "emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section." 42 U.S.C. § 7412(n)(1). These alternative control strategies are other regulatory options, not "technologies which are available to control . . . emissions." *Id.* You failed to meet your obligation in your report to Congress but that does not permit you to continue to ignore the alternative control strategies in considering the cost of your decision to regulate power plant emissions under the inflexible Section 112 program rather than one of the alternatives that are available. The "directive" to "study" alternative control strategies "is a further indication of the relevance" of your alternatives in assessing the costs of your decision, and you have already "insisted that the provisions concerning all three studies 'provide a framework for [EPA's] determination of whether to regulate" emissions from power plants under the Section 112 program. *Michigan v. EPA*, 135 S. Ct. at 2708. Ignoring the alternative control strategies in assessing costs would require you to engage in impermissible "interpretive gerrymander[ing] in which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Id.* Yet you wrongly claim that "the statute d[oes] not require the EPA to consider . . . the cost of alternative control strategies." Legal Memo at 13. And you recognize that your agency previously committed in the Utility Study to analyze the costs of alternative control strategies "as part of the rulemaking process," yet you never actually did. You cannot claim to consider costs as required by Section 112(n)(1) without having done so.

Furthermore, the Mandates Act further demonstrates that you are required to consider the alternative control strategies for regulating power plant emissions because it requires you to explain "why the least costly, most cost-effective or least burdensome method of achieving the objectives of the rule was not adopted." Every one of your alternative control strategies is less costly, more cost-effective, and less burdensome than Section 112, yet you fail entirely to explain why you are rejecting those superior approaches, contrary to the requirements of the Mandates Act and the "the backdrop of . . . established administrative practice," which has been defined by the provisions of the Mandates Act. *Michigan v. EPA*, 135 S. Ct. at 2708.

The Regulatory Flexibility Act also demonstrates that you are required to consider the alternative control strategies for regulating power plant emissions because it requires you to describe "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact . . . on small entities" and it requires you to prepare "a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." 5 U.S.C. § 602(c); 5 U.S.C. § 604(6). The alternative control strategies accomplish the stated objectives of reasonably regulating power plant emissions and they substantially reduce the economic impacts on small entities by providing for greater flexibility in addressing emissions from power plants owned and operated by the 40 small entities that you have found face compliance costs greater than 1% of generation revenue. Utility MACT RIA at 7-15. Accordingly, the Regulatory Flexibility Act and "the backdrop of . . . established administrative practice," which has been defined by the provisions of that Act require you to consider alternatives to using Section 112 to regulate power plant emissions. *Michigan v. EPA*, 135 S. Ct. at 2707.

You repeatedly make statements mischaracterizing the regulatory question before you as whether or not to regulate harmful power plant emissions "at all," 76 Fed. Reg. 24,976, 24,989 (May 3, 2011), characterizing your task as "determining whether it is appropriate to regulate HAP emissions from EGUs," 80 Fed. Reg. at 75030, rather than acknowledging that the real task before you is determining whether to regulate those emissions under the Section 112 program or in some other way. *See, e.g.*, 80 Fed. Reg. at 75026 ("In light of the . . . decision in *Michigan v. EPA* . . . the EPA has taken cost into account in evaluating whether such regulation is appropriate and has determined that including such consideration does not alter the EPA's original conclusion that it is appropriate to regulate hazardous air pollutant (HAP) emissions from EGUs."); 80 Fed. Reg. at 75027 ("In this document, the EPA concludes that including such consideration of cost does not alter the agency's previous determination that it is appropriate to regulate HAP emissions from EGUs."); 80 Fed. Reg. at 75027 ("In this document, the EPA provides detailed information on how the agency has taken cost into account in evaluating whether regulation of HAP from coal- and oil-fired electric utility steam generating units is appropriate and explains why the EPA proposes to find that including such consideration does not alter the previous determination."); 80 Fed. Reg. at 75038 ("The EPA has now evaluated cost and considered cost in light of the other factors relevant to determining whether regulation of HAP emissions from EGUs is appropriate. Based on a consideration of these factors, the EPA concludes that the consideration of cost does not cause us to alter our determination that regulation of HAP emissions from EGUs is appropriate."); 80 Fed. Reg. at 75041 ("The EPA finds that the analysis set forth in Section IV of this document and the benefit-cost analysis in the RIA for MATS (and summarized in Section V) each provide independent support for a conclusion that regulation of HAP emissions from EGUs is appropriate."); 80 Fed. Reg. at 75029 ("[I]n evaluating costs . . . the agency has considered whether the cost of compliance estimated to be incurred by the utility sector under MATS is reasonable when weighed against, among other things, the substantial hazards to public health and the environment posed by HAP emissions from EGUs.").

The problem is not *whether* any potentially harmful power plant emissions are to be regulated "at all," but *how* potentially harmful power plant emissions should be regulated. You know full well that you have alternative ways to directly regulate power plant emissions of substances listed under Section 112(b), even though in making the original decision in 2000 and in reaffirming that decision in 2011 and 2012 that you erroneously believed the Section 112 program was your only regulatory option. Indeed, you distance yourself from those errors by artfully recounting that your agency previously "stated that the only way to ensure permanent reductions in HAP emissions from U.S. EGUs and the associated risks to public health and the environment is through standards set under CAA section 112." 80 Fed. Reg. at 75029. Murray Energy Corporation has made amply clear in briefs before the Supreme Court in *Michigan v. EPA* that such prior statements by your agency are false, and nowhere in your proposal or supporting legal memorandum do you assert otherwise. You are required to assess costs in light of those alternatives rather than continuing to ignore them.

You offer the tautology that "absent regulation of HAP emissions from EGUs, such units would continue to emit significant volumes of HAP emissions without a need to reduce or even monitor such emissions." 80 Fed. Reg. at 75038. But again, that is irrelevant because alternative control strategies are available for regulating those emissions apart from the costly and inflexible Section 112 program.

Your failure to assess alternatives is altogether more unjustified because you do not need a public comment to tell you that assessing the costs of your Section 112(n)(1) decision is required by "Agency and Executive Order requirements" to "fully analyz[e] the cost-benefit of regulatory alternatives," because your agency's Office of Inspector General investigated the

Section 112(n)(1) decisionmaking process and informed your agency that such consideration of the relative costs of alternatives was required. EPA, Office of Inspector General, Report No. 2005-P-00003 at ES (Feb. 3, 2005). The Office of Inspector General "recommend[ed] that the Agency conduct more in-depth analyses of the regulatory alternatives" in determining whether to use Section 112 to regulate power plant emissions. *Id.* at ES, 35 ("Conduct more in-depth cost-benefit analyses of the proposed mercury options to determine the preferred approach."). You offer no basis why you can now make this decision without considering the costs of other options and weighing them against the costs of using Section 112.

Your first regulatory option is to leave regulation of power plant emissions to the States. Unlike other federal laws, Congress preserved State authority over this regulatory problem because Congress found that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a). Congress intended for the Clean Air Act to "promote reasonable . . . State . . . and local governmental actions . . . for pollution prevention." 42 U.S.C. § 7401(c). Congress therefore preserved the authority of States to regulate "emissions of air pollutants," 42 U.S.C. § 7416, and expressly instructed you to "encourage cooperative activities by the States and local governments for the prevention and control of air pollution; encourage the enactment of improved and, so far as practicable in the light of varying conditions and needs, uniform State and local laws relating to the prevention and control of air pollution; and encourage the making of agreements and compacts between States for the prevention and control of air pollution." 42 U.S.C. § 7402(a). Congress certainly did not intend for you to entirely ignore the existence of State regulators in deciding how best to address emissions from power plants. Yet nowhere in your proposal do you ever acknowledge or address the alternative strategy of leaving regulation of power plant emissions of Section 112(b) substances to the States for them to regulate as appropriate based on local circumstances and experience.

There is no reason to believe that States are unable or unwilling to regulate potentially harmful emissions of Section 112(b) substances from power plants. Indeed, each substance on the Section 112(b) list was already being regulated by a State because the list only includes substances that were on Table 4 of the 1986 National Air Toxics Information Clearinghouse Data Base Report on State and Local Agency Air Toxics Activities. *See* Committee Report on S. 1894, S. Rep. No. 100-231 at 223–25 (1987). And you are statutorily required to provide States the technical information and assistance required for them to regulate Section 112(b) substances because the Act requires you to "establish and maintain an air toxics clearinghouse and center to provide technical information and assistance to State and local agencies . . . on control technology, health and ecological risk assessment, risk analysis, ambient monitoring and modeling, and emissions measurement and monitoring." 42 U.S.C. § 7412(l)(3). With all of the information and assistance you are required to provide, States are adequately equipped to address emissions of Section 112(b) emissions from power plants and they can do so in far more innovative, effective, and appropriate ways than you can using the Section 112 program. And if you did leave this responsibility to the States and you found certain emissions from power plants were insufficiently addressed, you have the authority to "call a conference concerning this potential air pollution problem to be held in or near one or more of the places where such discharge or discharges are occurring or will occur" and to "send such findings, together with recommendations concerning the measures which the Administrator finds reasonable and suitable to prevent such pollution, to the person or persons whose actions will result in the discharge or discharges involved; to air pollution agencies of the State or States and of the municipality or municipalities where such discharge or discharges will originate; and to the interstate air pollution control agency, if any, in the jurisdictional area of which any such municipality is located." 42 U.S.C. § 7403(k). You have no basis to conclude that States and local governments would fail to respond to such findings. Importantly, you cannot reject State regulation of Section 112(b) substances out of hand because Congress instructed you to

rely on that method in regulating area sources of Section 112(b) substances. Section 112(k) requires that you "encourage and support areawide strategies developed by State or local air pollution control agencies that are intended to reduce risks from emissions by area sources within a particular urban area" and that at least 10% of funding for this purpose must "support areawide strategies addressing hazardous air pollutants emitted by area sources" that are "innovative and effective." 42 U.S.C. § 7412(k)(4). Furthermore, Congress also instructed you to support programs focused on "high-risk point source review" because of the undoubted benefits of that approach as opposed to national uniform standards. Since you have not found that State regulators aided and encouraged by your air toxics clearinghouse and center and given specific findings pursuant to your conference authority would be unable to achieve all appropriate and necessary emission reductions from power plants, you must consider this viable approach as an alternative to Section 112 as part of your assessment of the costs of your decision to impose stringent national standards for power plant emissions under that program.

Section 111 is another alternative control strategy that you entirely ignore. In light of the enormous costs of Section 112 for power plants, the potentially inconsistent treatment of power plants under the Acid Rain Program and Section 112, and the significant state role in assuring a diverse fleet of local power generation facilities that meets local power demand cost-effectively, Congress in 1990 provided Section 111 as an alternative program to regulate any sources whose emissions "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). This included regulation of new sources under Section 111(b) and regulation of existing sources under Section 111(d) provided that you did not regulate those existing sources under the Section 112 program. 42 U.S.C. § 7411(b); 42 U.S.C. § 7411(d). The existence of Section 111 as an alternative to regulate power plant emissions is no happenstance. In the very legislation enacting Section 112(n)(1), Congress included an amendment to provide for the regulation of existing sources under Section 111(d) if they were not regulated under Section 112. Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990). As you well know, prior to 1990, the Act prohibited Section 111(d) regulation of the limited set of emissions that were regulated under the initially very narrow Section 112 program. *See* 42 U.S.C. § 7411(d) (1988); 42 U.S.C. § 7412(a)(1) (1988) (pre-1990 limitation on Section 112 regulation to those emissions "which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness"); 42 U.S.C § 7412 (post-1990 expanded authority for Section 112 regulation of those emissions "which present, or may present, . . . a threat of adverse human health effects . . . or adverse environmental effects"). By removing the pollutant based restriction and inserting a restriction on regulating emissions from source categories that you regulate under Section 112, the amendment assured Section 111 would be an alternative control strategy for directly regulating any harmful emissions from power plants that could be regulated under Section 112. Congress intentionally gave you the choice whether to subject power plants to Section 112 or Section 111. Accordingly, part of the decision that Section 112(n)(1) requires you to make is whether the costs of using the Section 112 program for power plants are justified relative to the costs of using the Section 111 to regulate them.

Indeed, your agency found in 2005 and 2006 the alternative of using the Section 111 program to regulate emissions from new and existing power plants is available, adequate to the task, and more cost-effective than using the Section 112 program, and based on this fact your agency found the Section 112 program is inappropriate and unnecessary for regulating potentially harmful emissions from power plants. The reasoned decisionmaking requirement demands that you assess the costs of using the Section 112 program instead in light of that previous determination.

Furthermore, one of the chief benefits of using the Section 111 option is that you would be able to selectively regulate only harmful emissions rather than being forced (as you claim you are) to regulate each and every substance on the Section 112(b) list. Because you have this alternative control strategy at your disposal, you cannot comply with Section 112(n)(1) and the reasoned decisionmaking requirement by only considering the costs of "regulating HAP emissions from EGUs collectively," because Section 111 would not require you to take such an ill-considered approach of regulating emissions of a substance even when neither you nor anyone else has determined that emissions of that substance from power plants are actually harmful. Since you have concluded that you must regulate all Section 112(b) substances under Section 112 if you use that program, you must specifically address that particular and important regulatory disadvantage in your assessment of the costs of your decision.

You wrongly refuse to assess the advantages and disadvantages of using Section 112 for "individual HAPs" rather than lumping them all together to consider only the advantages and disadvantages of using Section 112 for "the collective HAP emissions." Legal Memo. at 18. The Supreme Court admonished in *Michigan v. EPA* that it is not even "rational, never mind 'appropriate," to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." Only Section 112 as you have interpreted that program requires costly regulation of each and every substance found on the Section 112(b) list, and the result of that choice and your interpretation is that you are requiring billions of dollars to be spent to control acid gas emissions for health and environmental benefits that are negligible at best and far more likely nonexistent. Without considering separately the compliance costs associated with each individual Section 112(b) substance, you irrationally mandate billions in spending to address acid gases without ever even claiming that the massive costs are justified. You must therefore consider the costs of regulating individual substances under that program, because your alternatives such as the Section 111 program would not blindly require irrational overspending to control emissions of harmless substances no matter the costs. If you do not make an independent assessment of the costs of your decision with respect to acid gases you will violate the Court's holding in *Michigan v. EPA* that Section 112(n)(1) does not allow you to impose billions in costs to control emissions without ensuring the costs do not dramatically outweigh the health and environmental benefits. You cannot launder away or ignore the senseless universal scrubber mandate that results from you deciding to regulate power plant emissions of acid gasses under Section 112. Just because it might be appropriate to control one set of emissions under Section 112 does not mean it is reasonable to control a different set of emissions under Section 112 as well, and it is not appropriate to regulate power plants under Section 112 if any of the MACT floors for Section 112(b) substances imposes unjustified costs.

By ignoring your alternative control strategies, you fail to even address the nature of the choice before you, and you accordingly fail to consider important aspects of the question Congress and the Supreme Court have directed you to answer. Over and over again you reiterate in your proposal that you find it to be appropriate to regulate emissions from power plants in general, but you never address whether or not the Section 112 program is a more cost-effective regulatory option than using the alternative authority Congress provided you under Section 111, or permitting States to use their authority expressly preserved in the Clean Air Act and the Federal Power Act to regulate power plants, or if necessary seeking new authority from Congress, even though Congress ordered you to identify and examine "alternative control strategies for emissions which may warrant regulation" in determining whether regulating emissions using Section 112 rather than other alternatives is appropriate and necessary. 42 U.S.C. § 7412(n)(1). You cannot claim to have considered the costs of your decision without comparing the costs to these alternatives. Now that you have been ordered to consider costs, you must also address your alternatives.

You Must Consider Costs in Light of EPA's 2005 Section 112(n)(1) Finding.

You must fully consider your agency's significant prior finding in 2005 that Section 112 is not appropriate because you have a far superior and less costly alternative to regulate power plant emissions under Section 111, and you must specifically consider your agency's prior finding in 2006 that Section 112 is not a cost-effective strategy of regulating emissions from power plants. The reasoned decisionmaking requirement demands you to "display awareness" when you are "changing position" from a prior decision, and you may not "depart from a prior policy *sub silentio* or simply disregard" a prior decision. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). You must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when your "new policy rests upon factual findings that contradict those which underlay [your] prior policy" because "[i]t would be arbitrary or capricious to ignore such [a] matter[]" and "a reasoned explanation is needed for disregarding facts and circumstances that underlay . . . the prior policy." *Id.* Your proposed supplemental finding fails entirely to meet this requirement.

First, you do not address that your agency previously found that cost considerations made it inappropriate to regulate power plants under the Section 112 program. Your agency first noted the importance of cost in the 2005 final finding that Section 112(n)(1) was not appropriate and necessary. Your agency stated that "there may be other relevant factors" that are "particular to the situation that would lead the Agency to conclude that it is not . . . 'appropriate' to regulate Utility Units under section 112," and observed that it is not appropriate and necessary to regulate power plants under Section 112 if "the cost of such regulation is significant and therefore substantially outweighs the benefits." 70 Fed. Reg. at 16001. Then in a 2005 technical support document your agency found that a "bounding analysis approach supports our reasonable belief that the costs of reducing mercury emissions beyond CAIR under section 112 from power plants outweigh the health benefits of reduced utility-attributable mercury exposure." *Technical Support Document: Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the Section 112(c) List: Reconsideration* (Oct. 21, 2005) ("2005 TSD"). In 2006 your agency expressly found the excessive costs of Section 112 regulation showed it was not appropriate and necessary because "the lower bound cost of regulating under CAA section 112 beyond CAIR e.g., $750 million) exceeds the upper bound estimate of the benefits of such regulation (e.g., $210 million). 71 Fed. Reg. at 33394. Your supplemental finding never discusses your agency's prior finding that Section 112(n)(1) was not appropriate for power plants in light of the costs and you never address the cost-effectiveness of using the Section 112 program for power plants even though those factual findings contradict your current finding that the costs of Section 112(n)(1) do not render it inappropriate for emissions of Section 112(b) substances from power plants. This is impermissible because under *Fox*, you must make it clear when you are changing position from a prior conclusion. You further impermissibly fail to address why considering cost-effectiveness was central to your agency's previous finding and yet you reject considering cost-effectiveness as part of your cost consideration now.

Your failure to address your agency's cost-effectiveness analysis in 2005 and 2006 is all the more unjustifiable because that basis for finding Section 112 was not appropriate was so indisputably correct that in the *New Jersey v. EPA* litigation no environmental group, State, or tribal group challenged your agency's determination that it is "not 'appropriate' to regulate power plants under section 112 because to do so would not be cost-effective." Final Brief of Respondent at 84, *New Jersey v. EPA*, Case No. 05-1097 (2008).

Second, you do not address that your agency previously found that Section 111 is an alternative control strategy to obtain all the same benefits at far lower cost than Section 112. Your agency proposed two regulatory alternatives based on the fact that the 2000 finding did not show the emissions posed a significant hazard to public health and had failed to consider the costs. 60 Fed. Reg. 4652 (2004). The first approach was to regulate under Section 112, and the second, was to remove power plants from the Section 112(c)(1) list and regulate power plants under Section 111. *Id*. Your agency chose to regulate power plant emissions using Section 111 instead of Section 112 in large part because it was more cost-effective to do so and your agency found that the Section 111 option made Section 112 inappropriate after assessing the relative cost-effectiveness of Section 111 and Section 112, but you impermissibly never address this previous determination in your proposed supplemental finding in direct violation of the reasoned decisionmaking requirement.

Critically, the *New Jersey v. EPA* decision did not address and did not vacate the 2005 and 2006 findings and analysis. Therefore, you must address them now that you are required to consider the costs of your decision and you propose to find Section 112 appropriate in spite of the costs. The procedural defect in your delisting of power plants before judicial review of your invalid 2000 finding did not discard the underlying finding and methodology that led your agency to conclude in 2005 and 2006 that Section 112 is not appropriate for power plants in light of the costs and the relative cost-effectiveness of the Section 111 alternative. You are required to correct this failure.

You Must Consider Relative Cost-Effectiveness.

Rather than reasonably consider costs in light of the nature of the power plant fleet, the nature of the Section 112 program, the purpose of Section 112(n)(1), the availability of other alternative control strategies, and EPA's previous determination that Section 112 is neither appropriate nor necessary, you consider cost in an arbitrarily and unreasonably limited way, what you call a "holistic fashion" that only considers costs at the level of national industry impacts on the power sector "collectively," essentially adopting an extreme environmental advocacy definition of costs that is designed to all but entirely ignore the disadvantages and harmful consequences of your decision. Legal Memo. at 16. You treat costs as if it "only concerns whether 'the standard is too expensive for the industry to achieve,' in essence whether the standards would bankrupt the industry." *NRDC v. EPA*, 749 F.3d 1055 (2014). You claim that a single statement in a committee report would permit you to decide to regulate power plants under Section 112 so long as you do not destroy the "'productive capacity' of the power sector" and inhibit its "ability to perform its primary and unique function—the generation, transmission, and distribution of electricity.)." 80 Fed. Reg. at 75031. Yet the purpose of Section 112(n)(1) was directly focused on cost-effectiveness and disparate impacts, not whether the power sector could waste billions of dollars without the lights going out if required to do so. The Court made perfectly clear that such an analysis is insufficient, admonishing that it is not even rational, let alone appropriate, "to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. EPA*, 135 S. Ct. at 2707. Even if the billions can be spent without destroying the productive capacity of the power sector, it is still irrational and inappropriate to force billions of dollars to be spent when the benefits are small and the cost-effectiveness is minimal.

Considering the cost-effectiveness of regulation is the established administrative practice, and you cannot unreasonably abandon that practice merely because you disfavor these sources and the coal industry. You have consistently considered cost-effectiveness in other contexts and for other industries, and defended the reasonableness of that approach to costs in court successfully. *NRDC v. EPA*, 749 F.3d 1055 (2014) ("[W]e reject petitioners' argument that EPA was required to exclude consideration of cost-effectiveness and to set a beyond-the-floor standard"); *National Association of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1156–57 (D.C.Cir.2013) (affirming consideration of cost-effectiveness in setting a beyond-the-floor standard under Section 129(a)(2)); *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013) (per curiam) ("EPA reasonably explained that further reductions were unwarranted due to concerns about . . . cost-effectiveness"); *Arteva Specialties S.a.r.l. v. EPA*, 323 F.3d 1088, 1092 (D.C. Cir. 2003) (affirming considering facility-wide cost-effectiveness of controls); *Husqvarna AB v. EPA*, 254 F.3d 195, 200 (D.C.Cir. 2001) ("[W]e find reasonable the EPA's choice to consider costs on the per ton of emissions removed basis."); 75 Fed. Reg. 54,988 (employing cost-effectiveness analysis to reject beyond-the-floor standard for PM); 76 Fed. Reg. 15,704, 15,732 (Mar. 21, 2011) (same).

You impermissibly give no explanation why you suddenly adopt the extreme approach advocated by NRDC that you consider cost only to consider if the decision will destroy the entire industry, other than to claim that "it would make little sense within the context of the statute, at the threshold listing stage, to try to ascertain the monetized benefits of regulating each individual HAP so that a comparison could be made to the cost of regulation" Legal Memo. at 17. But you have never had to "monetize" the benefits of reductions of individual pollutants to consider cost-effectiveness before, since your established practice is to consider the costs per amount of reductions in each pollutant. Using that established practice you are able to compare cost-effectiveness against other regulations addressing the substances at issue in order to determine if the costs are comparatively excessive. For example:

> These total costs are high compared to the small nationwide emission reductions, and the cost effectiveness of these reductions is correspondingly high: approximately $268,000 per ton of PM removed. This is significantly higher cost effectiveness for PM than the EPA has accepted in other NESHAP standards. See 76 FR 15704 (rejecting $48,501 per ton of PM as not cost effective for PM emitted by CISWI energy recovery units); see also 72 FR 53814, 53826 (proposing (and later accepting) cost effectiveness of $10,000 per ton for PM as reasonable in determining Generally Available Control Technology, and noting that the EPA had viewed cost effectiveness only as high as approximately $31,000 per ton as reasonable under its Title II program for mobile sources).

78 Fed. Reg. at 10021. This crucial analysis that you fail to conduct is necessary because "too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." *Michigan v. EPA*, 135 S. Ct. at 2707 (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 233 (2009) (Breyer, J., concurring in part and dissenting in part)). Spending billions to obtain relatively expensive reductions when far more cost-effective options are available is the epitome of irrationality.

You unquestionably have sufficient data to consider cost-effectiveness. You projected that your decision will "will drive the installation of an additional 20 GW of dry FGD (dry scrubbers), 44 GW of DSI, 99 GW of additional ACI, 102 GW of additional fabric filters, 63 GW of scrubber upgrades, and 34 GW of ESP upgrades." Utility MACT RIA at 3-15. You have adequate emissions modeling to determine the reductions in emissions that would result from the installation of this enormously expensive control equipment. Based on your own modeling, you will achieve 20 tons of mercury emission reductions and 36.3 thousand tons of hydrogen chloride emission reductions. Utility MACT RIA at 3-9 to 3-10. You have data on the other substances as well. You can apportion the costs of controls to the emission reductions because you know the emissions that are reduced by each kind of control project.

Tellingly, you hide the minimal reductions in emissions you are achieving by only considering the percentage of national reductions rather than the actual amount of emissions. You consider only that your decision "would reduce annual emissions of mercury by 75 percent, hydrogen chloride by 88 percent, and fine particulate matter (PM2.5) (filterable PM is a surrogate for non-mercury metal HAP) by 19 percent from coal-fired EGUs greater than 25 megawatts (MW) projected for 2015." 80 Fed. Reg. at 15033. You well know that the only reason the percentages are so high is that you have obtained far more cost-effective reductions in mercury and hydrogen chloride through your extensive regulation of other industries and through the Title IV acid rain program. But additional reductions of the remaining emissions from power plants will be far more expensive and less cost-effective because you will obtain less benefits due to the decreasing marginal benefit of additional reductions and the costs will be higher due to the increasing marginal cost of additional controls. Indeed, when it comes to hydrogen chloride and other acid gases, the Title IV acid rain program ensured that the most cost-effective control opportunities have already be taken advantage of and that only the least cost-effective potential control projects remain. Additional control of hydrogen chloride and other acid gases will necessarily be more expensive and less beneficial than any previous EPA action ever taken, and given the complete lack of evidence that reducing acid gasses improves public health, your decision to blindly demand these reductions strongly indicates that you are continuing to refuse "to consider whether the costs of [your] decision outweighed the benefits." *Michigan v. EPA*, 135 S. Ct. at 2706.

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You also irrationally claim that your decision is supported by the fact that the Title IV acid rain program cost less than initially projected, 80 Fed. Reg. at 75031, turning the crucial connection between that program and Section 112(n)(1) entirely upside down. The purpose of Section 112(n)(1) was to prevent having the requirements of Section 112 impose a national scrubber mandate that would obviate the benefit of the trading model adopted in the Title IV acid rain program. As stated by one legislator: "The basic concern" in considering whether to subject power plants to Section 112 regulation is that "certain otherwise 'clean' utilities might be forced to install scrubbers even where "[s]uch 'scrubbing' would increase power rates, while potentially providing little or no public health benefit." 136 CONG. REC. 3,493 (1990) (statement of Sen. Steven Symms) (quoting staff memorandum). Section 112(n)(1) directly addressed the concern that subjecting power plants to Section 112 would demand the uniform deployment of scrubbers when the entire point of the Title IV acid rain program was to deal with acid rain without requiring every single power plant in the nation to install scrubbers. Your decision is therefore more unreasonable, not less unreasonable, if fewer scrubbers were installed than originally projected and if the overall program was less costly than projected. Your decision entirely eliminates the cost-effectiveness of the strategy Congress adopted to address the acid rain problem.

You must also compare the cost-effectiveness of using Section 112 to your alternatives in order to assess the relative cost-effectiveness of your options. You must determine whether the blunt instrument is less cost-effective than the scalpel. You cannot choose one tool without giving meaningful consideration of other tools to achieve the same goals. While there may be some power plants that can cost-effectively install additional controls to reduce emissions, there are unquestionably many power plants that cannot, and the alternative options all allow for a superior approach that improves the overall cost-effectiveness through selection and differentiation. For example, using the Section 111(d) program, your regulations provide for you to require States to apply standards of performance that consider case-by-case and class-by-class factors that would allow them to limit the requirement to install additional controls to those instances in which it is actually found to be cost-effective and achievable. 40 C.F.R. § 60.24(f). You must consider the relative inferiority of your approach at achieving beneficial emission reductions in a cost-effective way, and once you do, there is simply no way that you (or anyone else) could rationally conclude your proposed finding is justified.

Indeed, your counsel acknowledged to the D.C. Circuit that your agency found in 2005 that the costs of regulating power plants under the Section 112 program are "extreme" while the health benefits are "nominal." Final Brief of Respondent at 10, *New Jersey v. EPA*, Case No. 05-1097 (2008). And your agency recognized in 2005 that Section 112 is inflexible program that prevents you from using a "least-cost compliance option to achieve the required emission reductions." 70 Fed. Reg. at 16005. But now you fail to consider the cost effectiveness of your decision even though you previously found it would not be cost-effective. This crucial about-face without adequate explanation renders your proposed finding arbitrary and capricious.

Moreover, in the *New Jersey v. EPA* litigation no environmental group, State, or tribal group challenged your agency's determination that it is "not 'appropriate' to regulate power plants under section 112 because to do so would not be cost-effective." Final Brief of Respondent at 84, *New Jersey v. EPA*, Case No. 05-1097 (2008). After all, the highest estimate that any of the petitioners offered of the potential benefits was $4.9 billion, which is far less than the costs of your decision. Your refusal to consider cost-effectiveness suggests that you recognize it remains beyond all dispute that Section 112 is not a cost-effective way to regulate power plant emissions. But after *Michigan v. EPA*, you cannot simply ignore reality. You must conclude that Section 112 is not appropriate for regulation of power plants in light of the relative cost-effectiveness of alternatives compared to the "extreme" costs of Section 112.

You Must Consider Costs of Residual Risk Standards.

The costs of your decision to regulate power plants under the Section 112 program include the costs of any second phase of regulation under Section 112(f) residual risk standards, yet you limit your consideration of costs to the costs of the first phase of regulation under Section 112(d) without concluding that power plants will not trigger Section 112(f) in 2020. Unless you find Section 112(f) will not be triggered, you must consider the relative cost-effectiveness of using the Section 112(f) provision to address residual risk. As pointed out during the 1990 Amendments, identifying and relocating at-risk individuals is usually more cost-effective than requiring installation of controls that cost hundreds of millions of dollars. Further, you must determine whether Section 112(f) will require you to impose standards that every power plant in the nation must meet even if residual risks are posed by a few sources, and whether such regulation would be a relatively cost-effective way of reducing residual risk.

You are in a position now to answer these questions. You can use the data that you possess to determine what the higher bound emissions rates will be after compliance with the Utility MACT standard by identifying the highest emission rates from power plants that already achieve the standard. You can then project whether Section 112(f) will likely be triggered in 2020. If you determine that it will be triggered, you can determine what additional controls would be required under Section 112(f) to address the residual risk at such units by identifying what level of emissions would be required for the units not to pose residual risk. You must then interpret Section 112(f) to determine whether you have the authority to address residual risk on a source-by-source basis. If not, you must project and consider the costs of a decision to lock your agency into addressing residual risk without such tailoring. If you conclude you have authority to address residual risk on a source-by-source basis, then you must project and consider the costs of that approach by determining how cost-effective it would be today to address residual risk at one of the units that you identify as the indication that Section 112(f) will be triggered in 2020 by assessing how costly it would be to address residual risk for that unit today by requiring controls. If it is not cost-effective for that unit, then the Section 112(f) approach is not cost-effective, and using the Section 112 program to regulate power plants is not cost-effective.

While this aspect of the cost consideration requires technical analysis and projection of future regulatory costs, that does not excuse you from considering these costs. You argued to the Court in *Michigan v. EPA* that you did not have to consider the cost of Section 112(d) standards because you could not know what those standards would be at the time you initially made the Section 112(n)(1) finding, and the Court rejected your argument. Furthermore, you have significant experience with making residual risk determinations, using the results of your Section 112 data collections, and assessing control costs, and so you can easily perform the necessary analysis to consider the potential costs of Section 112(f) regulation of power plants.

The Court in *Michigan v. EPA* explicitly ordered you to consider the costs of compliance, and that includes what you project to be the potential costs of compliance with Section 112(f) regulation in 2020, unless you conclude now that Section 112(f) will not be triggered. Given that you did not perform this critical step prior to taking comment on the supplemental finding, you should expeditiously prepare and seek comments on a technical support document that determines whether or not Section 112(f) will be triggered and if so whether actions to address residual risk consistent with the statutory requirements are a relatively cost-effective way to address residual risks in 2020.

If you ignore the potential costs of subjecting power plants to Section 112(f) in 2020 without concluding that power plants will not likely be subject to Section 112(f), you will commit precisely the same reversible error that led to *Michigan v. EPA*.

You Must Consider Costs Imposed on State, Local, and Tribal Governments.

You fail to give special attention to the costs imposed on State and local government as providers of public power. You must act reasonably in light of "the backdrop of . . . established administrative practice," *Michigan v. EPA*, 135 S. Ct. at 2708, which has been defined in significant part by the Unfunded Mandates Reform Act. The Mandates Act requires "Federal agencies [to] prepare and consider estimates of the budgetary impact of regulations containing Federal mandates upon State, local, and tribal governments . . . before adopting such regulations, and ensuring that small governments are given special consideration in that process." 2 U.S.C. § 1501(7)(B). The Mandates Act commands that: "Each agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments . . . ." 2 U.S.C. § 1531, and agencies are required to identify "any disproportionate budgetary effects of the Federal mandate upon any . . . particular State, local, or tribal governments." 2 U.S.C. § 1532(a)(3)(B). This recognizes that federally mandated expenditures inherently "displace other essential State, local, and tribal governmental priorities," for example, because "increases in local property taxes and cuts in essential services threaten the ability of many citizens to attain and maintain the American dream of owning a home in a safe, secure community." 2 U.S.C. § 1501(2); 2 U.S.C. § 1513(a)(3). Costs to State, local, and tribal governments must therefore be given special solicitude in examining the costs of your decision. You have not afforded this aspect of the problem any consideration in your decision, even though you have already identified these very effects. You estimated that subjecting power plants to Section 112 imposes "compliance costs greater than 1 percent of base generation revenue in 2016" on "42 government entities" that provide public power and of these "32 may experience compliance costs greater than 3 percent of base revenues." 77 Fed. Reg. at 9,439. All told, you estimated your decision will "impose approximately $294 million in annual direct compliance costs on an estimated 96 state or local governments." *Id.* at 9,440. Perhaps most significant, you projected that as a direct result of your decision to subject power plants to Section 112, "6 units owned by government entities are expected to retire." *Id.* at 9,439. You must address these especially important costs of imposing this significant unfunded mandate on state and local government providers of public power in deciding whether using Section 112 to regulate power plant emissions is appropriate, including an adequate consideration of the resulting displacement of other "governmental priorities" and "increases in local property taxes and cuts in essential services" that "threaten the ability of many citizens to attain and maintain the American dream of owning a home in a safe, secure community." 2 U.S.C. § 1501(2); 2 U.S.C. § 1513(a)(3). As the Honorable Mayor Ed Rendell of Philadelphia, Pennsylvania explained to Congress, "when you pass a mandate down to us and we have to pay for it, the police force goes down, the firefighting force goes down" and "[r]ecreation departments are in disrepair." S. REP. NO. 104-1, at 2. You ignore these especially concerning consequences entirely by only "consider[ing] the advantages and disadvantages of regulating the source category under section 112 in a holistic fashion." Legal Memo. at 16. At the very least, you must consider the consequences of the 6 shutdowns by government entities that you projected result from your decision, because however well the entire national electric power sector can stomach your regulation, these communities will suffer far more.

Your failure to consider costs to State, local, and tribal governments is especially problematic because it was concern over precisely this kind of disproportional mandate resulting from Section 112 regulation of power plants that prompted State, local, and tribal governments to obtain enactment of the Mandates Act. S. REP. NO. 104-1, at 2 (1995) ("State and local officials from all over the Nation came to Washington" and "conveyed a powerful message to Congress."). These officials demonstrated that EPA and other agencies had issued many regulatory mandates that imposed hundreds of millions of dollars in unjustified costs.

As a general matter, it was your agency's actions that "head[ed] the list of areas that State and local officials have claimed to be the most burdensome." S. Rep. No. 104-1, at 6. And the Honorable Mayor of Columbus, Ohio, noted in particular the concern that state and local officials could be "forced to . . . raise . . . utility bills to pay for" federal mandates when they had no means of assuring that these mandates would be "appropriate." S. REP. NO. 104-1, at 2 (1995). Yet your failure to consider these costs to public power announces to State and local governments that the millions in costs they must bear are irrelevant to the determination of the federal policies that impose them. The "observance of good faith with the states requires" more than this blithe disregard of the specific cost analyses required by the Mandates Act. *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 490 (1950) (Jackson, J., dissenting).

You Must Consider Costs Imposed on Particular Regions, Sectors, and Entities.

In light of the purpose of Section 112(n)(1) and established administrative practice, you must consider the economic impacts of your decision on all of the appropriate dimensions, geographic, economic, and demographic. You fail entirely to do so.

Regional Impacts.

The purpose of Section 112(n)(1) is relevant "to determine the cost considerations generally relevant" to your decision. Legal Memo at 5. But you fail to consider the costs to regions which are impacted by this rule that were at the heart of Section 112(n)(10. *See Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearing Before the S. Comm. on Energy and Natural Resources*, 101st Cong. 7, 234–35, 240–41, 436–37, 483, 485, 492, 570–72, 596, 603 (1990). Additionally, your decision forces substantial rate increases and retirements which will have widely disparate regional impacts. *See id*. ("[A] rate increase of this magnitude upon the rural impoverished people in our service territory would cause them undue harm."). Further, the Mandates Act commands that agencies identify "any disproportionate budgetary effects of the Federal mandate upon any particular regions of the nation" and "urban or rural or other types of communities." 2 U.S.C. § 1532(a)(3)(B). Regional impact consideration is especially important when you are imposing national uniform standards. *See* 77 Fed. Reg. at 9435 ("One commenter noted the rule will create a more serious compliance hurdle for small communities that depend on coal-fired generation to meet their base load demand."). Costs to the affected regions and communities must therefore be given special consideration in analyzing the costs of your decision.

You only address costs at a national level and you thereby hide the significantly higher costs that are actually borne by individuals and communities. While $9 billion averages only $30 per person if that cost was evenly spread, you know that the costs will be very heavily concentrated on particular regions and communities. Without even attempting to determine how thin or thick the costs will be spread, you have not come close to considering the significance of that total cost figure. Your total cost figure is meaningless without identifying who will pay it, and you willfully ignore this crucial information by considering costs as if it will be borne equally throughout the nation. Indeed, you even misleadingly compare the total costs of your decision against the national revenue for the entire electric power sector in order to claim it is a small amount of costs, but this ratio is wholly irrelevant when the costs are not spread evenly nationwide. Offering this apples to oranges comparison is nothing but a specious and obvious attempt to hide the true costs of your decision in order to justify the unjustifiable.

You fail to consider the regional impacts upon coal producing regions and regions that rely heavily on coal to produce electricity. One region you especially must consider in light of the purpose of Section 112(n)(1) is the Powder River Basin that produces low sulfur coal. EIA found that in 2013, the Powder River Basin produced 407,567 thousand short tons of coal out of a nationwide total of 984,842 thousand short tons. *U.S. EIA, Annual Coal Report: Coal Production and Number of Mines by State and Coal Rank* (2013). This is 41% of nationwide coal production, and this is in large part because low sulfur coal is used by power plants that would otherwise purchase cheaper locally available high sulfur coal solely as a way to attain national ambient air quality standards and comply with the Title IV acid rain program But if you force every power plant in the nation to install scrubbers by subjecting them to the Section 112 program and imposing MACT floors for acid gases set based on the emission limitation achieved by the units that have scrubbers, then the benefits of using low sulfur coal over cheaper locally available high sulfur coal disappear. The result will necessarily be decreased production in the Powder River Basin. You must consider the economic impact of that shift resulting from your decision, because concerns over the consequences for the Powder River Basin if a national scrubber mandate were to be imposed under Section 112. Just as Members

of Congress feared, your decision will cause mine closures and layoffs in the Powder River Basin. The regional economic impact will be devastating, yet you give it no consideration, let alone the special attention that you are required to give such an especially concerning consequence that lays at the heart of the purpose of Section 112(n)(1).

Similarly, you must consider the regional impacts for other coal producing regions that will result from the retirements and fuel switching caused by your decision. You must consider the impact of decreased coal production on each and every region that will suffer, including but not limited to the Appalachia region. EIA found in 2013 that the Appalachia region had 877 mines out of the United States total of 1,061 mines, and produced 269,672 thousand short tons out of the 984,842 thousand short tons produced elsewhere. *U.S. EIA, Annual Coal Report: Coal Production and Number of Mines by State and Coal Rank* (2013). The Appalachia region produces around 27% of the nation's coal. *Id*. Additionally, in 2013, the Appalachia region employed 49,855 people in coal production out of 80,396 nationwide, which is around 62% of all coal employment. *U.S. EIA, Annual Coal Report: Average Number of Employees by State and Mine Type* (2013). EIA predicted that 8 gigawatts of the nearly 13 gigawatts projected to retire in 2015 alone due to your decision will be in the Appalachia region. *U.S. EIA*, *Today in Energy: Scheduled 2015 capacity additions mostly wind and natural gas; retirements mostly coal* (March 10, 2015). Reducing national coal power generation and production by 2 percent, based on your nation-wide estimate, would have a devastating impact on the Appalachia region, but given that so many of the retirements will be in the Appalachia region, the reductions in coal generation and production will be even higher in the Appalachia region. You must determine how much higher rather than relying on national figures and then you must consider these especially concerning consequences of your decision for affected regions and communities.

Particular Sectors.

Similar to regional impacts, you must consider impacts on particular segments of the private sector in light of the purpose of Section 112(n)(1) and the Mandates Act. Private sector power companies testified that subjecting power plants to Section 112 would "result in capital expenditures of something like $12.5 billion for us, for a 25 percent rate increase . . . basically it triples the cost of compliance." *See Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearing Before the S. Comm. on Energy and Natural Resources*, 101st Cong. 7, 234–35, 240–41, 436–37, 483, 485, 492, 570–72, 596, 603 (1990). And once again, the Mandates Act contemplates this is an especially concerning consequence by requiring agencies to address "disproportionate budgetary effects of the Federal mandate upon any . . . particular segments of the private sector." 2 U.S.C. § 1532(a)(3)(B). The coal industry is a particular segment of the private sector. As stated, EIA projected that nearly 13 gigawatts of coal-fired generation would retire in 2015 alone because of your decision. *U.S. EIA*, *Today in Energy: Scheduled 2015 capacity additions mostly wind and natural gas; retirements mostly coal* (March 10, 2015). Additionally, EIA reports in its Annual Energy Outlook 2014 that a total of 60 gigawatts of coal generation will close by 2020 and that 90% of these retirements will occur by 2016, "coinciding with the first year of enforcement" of Utility MACT. *U.S. EIA, Today in Energy: AEO2014 projects more coal-fired power plant retirements by 2016 than have been scheduled.* (2014). This is no coincidence, and you must consider the harms to the coal industry that result from this massive waive of retirements and you have failed entirely to consider the impact of these retirements on the coal industry. You say that "[a]fter considering the potential costs of MATS in light of power sector sales, the EPA concludes that the costs to the power sector are reasonable" and that "[t]hese projected retirements reflect less than two percent of all coal-fired generation capacity projected in 2015 (310 GW in the base case without MATS)." 80 Fed. Reg. at 75033–36. You must consider the impact on the coal industry that will result from these retirements, yet you do not even discuss the resulting drop in demand for coal and offer no consideration of how that will impact the coal industry and coal miners.

Small Entities.

The costs of your decision for small power plants owners must be considered in light of the Regulatory Flexibility Act and the purpose of Section 112(n)(1). The key testimony that led to Section 112(n)(1) addressed the concerns for Iowa Southern having to pay the "cost of the wet scrubber… [costing] in the range of $150 to $180 million." *Clean Air Act Amendments (Part 3): Hearing Before the Subcomm. on Health and the Environment of the H. Comm. on Energy and Commerce*, 101st Cong. 356–58, 469 (1990). Not only is the cost to a small entity to install scrubbers significant, the cost is passed onto the ratepayer and this will be highly detrimental for smaller utilities whose ratepayers will bear the full burden. Thus, in the Iowa Southern testimony that directly led to Section 112(n)(1), Congress learned that "[t]o pay for the installation of scrubbing equipment at all our generating stations would result in a rate increase to our customers in the range of 25 to 30 percent." *Id*. These disproportionate burdens on small entities also must be considered because of the established administrative practice owing to the Regulatory Flexibility Act. The Act states that "[e]ach initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. § 603(c). Further, agencies must prepare "a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." 5 U.S.C. § 604(a)(6). Accordingly, established administrative practice requires that you give special attention to consequences for small entities.

While you claim projected retirements are 2% of total generation, you do not consider that many retirements will be at small entities providing power, and you fail to consider the impact for ratepayers that are currently serviced by these small entities. These are especially concerning consequences that you must consider. In addition to the retirements, how many small entities will have to bear excessive costs? While in the RIA for Utility MACT you identified a significant number of small entities that will bear excessive costs, you give no consideration of those especially concerning costs in your supplemental finding. You cannot ignore these consequences in light of the purpose of Section 112(n)(1) and the requirement to act reasonably in light of established administrative practice.

You also fail to adequately address the 3 private small entitles that will retire all of their affected units as uneconomic in your Utility MACT Regulatory Impact Analysis, and you also fail to address your prior small entities analysis in your supplemental finding. *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards* (Dec. 2011). In the RIA you projected that the entire generating capacity owned by 3 private small entities will be eliminated, but your analysis stops at that point. *Id*. at 7-15. You fail entirely to address the impact those shutdowns will have on these entities and the communities or ratepayers which rely on those small entities to provide power.

Large Entities.

Your decision inflicts such devastating reductions in the demand for coal that it has set off a wave of bankruptcies in the coal industry that include large coal producers. You must consider this especially concerning consequence rather than ignore it.

You Must Consider Costs Imposed on Dislocated Workers.

You fail to consider the effect of your regulation on dislocated workers. Section 321(a) of the Clean Air Act shows Congress is very concerned about "potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter" and also especially concerned about "threatened plant closures" and "reductions in employment." 42 U.S.C. § 7621(a). And in the legislative history for Section 112(n)(1), Senator Ford expressed concern that a decision to regulate power plants under Section 112 would mean that "coal miners can go home and wait for those brown envelopes to come in on the third or fifth of the month, and it will look like fall in the lobby of the bank as they open up those checks and you pay for them because they are out of work, absolutely out of work." *Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearing Before the S. Comm. on Energy and Natural Resources*, 101st Cong. 7, 234–35. EIA found that the coal industry employed over 80,000 people in 2013 in the United States. *U.S. EIA: Average Number of Employees by State and Mine Types* (2013). This is not even the full picture because EIA excludes contract workers at mines and prep plants with less than 5,000 employee hours. Coal industry employees work at 1,461 mines. *U.S. EIA: Coal Productivity by State and Mine Type* (2013). When one of these mines closes, it has the possibility of devastating a large number of workers. For example, PBS Coal Inc. and its affiliate RoxCoal Inc laid off 225 workers as part of an immediate idling of deep and surface mines in Somerset County, Pennsylvania, citing softened demand for coal and the escalating cost and uncertainty generated by your regulations, including your decision to subject power plants to Section 112. *Severstal Press Release, PSC Coals, Inc. Idles Mining Operations* (July 20, 2012). Likewise, in June 2013, Arch Coal Company announced the loss of nearly 110 jobs in Virginia and Kentucky. *The Business Journal: Arch Coal Scaling Back in Kentucky, Virginia* (June 10, 2013). Also, in November 2012, The American Coal Company, Utah American Energy, Inc., and Kanawha Transportation Center, Inc., were each forced to cut jobs, 163 in total. *Bloomberg, Murray Energy fires 163 Workers, Citing a 'War on Coal'* (November 9, 2012. You only consider projected retirements at a national level, thereby minimizing their devastating effect on workers by considering them only in a nation context, asserting that "these projected retirements reflect less than two percent of all coal-fired generation capacity projected in 2015." 80 Fed. Reg. at 75035-36. You do not consider the fact that 2% could amount to thousands of dislocated workers and you do not consider the costs imposed on them, their families, and their communities.

Additionally, you do not consider the worker dislocations resulting from your decision of workers at coal power plants and workers involved in transporting coal. Typically, for coal-fired boilers, there are 3, 8-hour shifts with 1 plant operator in each room, for each boiler unit. Thus, if there are 2 boiler units, there would be 6 employees needed for the entire 24-hour day. *Steven A. Lefton, APTECH Engineering Service, The Cost of Cycling Coal Fired Power Plants* (2006). The retirements caused by your decision put these workers out of a job. For example, in June 2011, American Electric Power announced a plan for compliance with proposed EPA regulations that involved permanently retiring 5 coal-fired power plants in West Virginia, Virginia, and Ohio, and retiring generating units at an additional 6 facilities in Kentucky, Virginia, Ohio, and Texas. *The Business Journal: American Electric Power Set to Shut 6 Coal-fired Plants* (April 2015). In addition, operating a natural gas plant requires less workers than operating a natural gas plant, and your decision forces many power plants to convert to natural gas to avoid the massive costs of installing controls. You must consider all of the thousands of workers that are losing their jobs as a result of your decision and the impacts of those job losses on the workers, their families, and their communities.

You Must Consider Federalism Costs.

The decision whether to regulate power plants under Section 112 is imbued with highly important federalism concerns you must consider in light of the purpose of Section 112(n)(1) and "the backdrop of . . . established administrative practice" as defined by the provisions of the Unfunded Mandates Reform Act and Executive Order 13132. *Michigan v. EPA*, 135 S. Ct. at 2708.

When you promulgated Utility MACT in 2012 you recognized that your decision to use Section 112 to regulate power plant emissions has "federalism implications because the rule may impose approximately $294 million in annual direct compliance costs on an estimated 96 state or local governments." 77 Fed. Reg. at 9440. And twenty-three states and one governor vigorously challenged your decision all the way to the United States Supreme Court because you have intruded on their traditional authority to regulate power plants and imposed a rule supplanting local choice with a centralized and uniform regulatory regime that will "level" the power generation industry. 76 Fed. Reg. at 24,979. Yet somehow you now conclude that your decision "does not have federalism implications" and "will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government." 80 Fed. Reg. at 75042. To the contrary, your decision seizes control of an important state function, forces the closure of power plants built and supported by State efforts, and imposes enormous costs on State and local providers of public power. Federalism concerns demand this action usurping State authority and intruding on legitimate State activities should not be taken lightly, if at all, and only after full and fair consideration of the costs in light of the alternatives that preserve a far greater role for the States: Federal abstention or use of the Section 111 program.

Section 112(n)(1) "must be read consistent with principles of federalism inherent in our constitutional structure" because Congress carefully preserves the traditional role of the states. *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). Federalism "occupies a highly important place in our Nation's history and its future," *Younger v. Harris*, 401 U.S. 37, 44 (1971), and is built on the fundamental and vital insight that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger*, 401 U.S. at 44. "The Framers recognized that the States possess unique authorities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy" and so "our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires." Executive Order 13132 (1999). Permitting "diversity" serves "values which centralization and uniformity destroy," *East Ohio Gas Co.*, 338 U.S. at 488, and taking "[o]ne-size-fits-all approaches to public policy problems can inhibit the creation of effective solutions to those problems." Executive Order 13132 (1999). Protecting diversity requires "sensitivity to the legitimate interests of both State and National Governments" and especially "a proper respect for state functions." *Younger*, 401 U.S. at 44. This requires that "[t]he national government . . . be deferential to the States when taking action that affects the policymaking discretion of the States." Executive Order 13132 (1999). In light of these important bedrock federalism concerns, Executive Order 13132 established that administrative agencies must "where possible, defer to the States to establish standards," and "in determining whether to establish uniform national standards, consult with appropriate State and local officials as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority." *Id.*

Given the traditional role of states in cultivating the nation's power industry, it is no surprise that power plants are diverse in design, size, and age. This diversity is no accident —

it is a central feature of the federal system, which allows each community to balance its own needs and resources and experiment with different solutions to the same problem. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); Executive Order 13132 (1999) ("In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues."). In Section 112(n)(1), Congress showed deep concern and appreciation for the federalism implications of eliminating this diversity in the power plant fleet and supplanting traditional State authority with the strict and inflexible Section 112 program. You must assess the costs of establishing uniform national standards rather than either deferring to the States or using the Section 111 alternative that would better preserve State prerogatives and authority.

Your decision to regulate power plants under Section 112 needlessly sacrifices diversity and intrudes on traditional State authority in favor of centralization and uniformity. While there certainly can be an appropriate role for the federal government in environmental regulation, when Congress provided and insisted that you study alternatives that show respect for the legitimate efforts of States by allowing States to tailor regulation to their own unique fleets of power plants and local needs, you must provide a reasoned analysis of why those alternatives must be rejected and you must consider the costs of rejecting federalism in order to impose inflexible nationwide power plant standards. Subjecting power plants to Section 112 regulation will "unduly interfere with the legitimate activities of the States" by supplanting the role of the States going forward and by eliminating the fruits of decades of State efforts, and you must consider this disadvantage rather than ignore it. *Younger*, 401 U.S. at 44. Otherwise, you will continue to fail to give effect to a provision designed to properly respect the States and to act reasonably in light of long established administrative practice.

Cost Consideration Must be the Predominant and Overriding Factor.

You claim that "section 112(n)(1) does not support a conclusion that cost should be the predominant or overriding factor." Legal Memo. at 15. You are wrong because your decision is one among many alternatives, and it is unmistakable that cost more than any other factor dominates any reasoned attempt to make that decision, since the alternatives also allow you to achieve the benefits you seek. You are also wrong because you must act reasonably in light of "the backdrop of . . . established administrative practice," and "[a]gencies have long treated cost as a **centrally relevant factor** when deciding whether to regulate." *Michigan v. EPA*, 135 S. Ct. at 2707–78 (emphasis added).

The Proposed Finding Is Substantively Arbitrary and Capricious.

Your proposed supplemental finding is arbitrary and capricious. By failing to adequately consider costs, you are ignoring important aspects of the regulatory choice you faced.

At the outset of the Section 112 rulemaking, you admitted that applying Section 112 to power plants would transform the nation's power generation fleet. 76 Fed. Reg. at 24979. By failing to adequately consider the costs as you are required by Section 112(n)(1), the Court's decision in *Michigan v. EPA*, and the reasoned decisionmaking requirement, you continue to abdicate your duty to determine the wisdom of such a drastic reshaping of a core component of the nation's economy and the relationship between the States and the federal government, despite the command to take this step only if it was "appropriate and necessary." You appear to recognize that a reasonable consideration of cost would necessarily alter your decision, and for that reason you first refused to consider costs and defended that choice all the way to the Supreme Court, and you now purport to consider costs but your supplemental finding is artificially and unreasonably limited as if you are absolutely committed to using Section 112 to regulate power plants whether or not it is in fact appropriate and necessary in light of both the advantages and the disadvantages. Indeed, your initial refusal to consider costs and your subsequent wholly inadequate attempt to consider costs both strongly suggest that you are making an indefensible, irrational, arbitrary, and capricious decision that you can only justify by entirely ignoring reality.

Your proposed supplemental finding that it is appropriate and necessary to regulate power plants under Section 112 rather address the problem using alternative control strategies is therefore substantively arbitrary and capricious.

Sincerely,

MURRAY ENERGY CORPORATION

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ORAL ARGUMENT SCHEDULED FOR MAY 18, 2017

No. 16-1127 (and consolidated cases)

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

MURRAY ENERGY CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petitions for Review of Final Agency Action of the
United States Environmental Protection Agency
81 Fed. Reg. 24,420 (Apr. 25, 2016)

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MISCELLANEOUS

GLOSSARY OF TERMS

Act (or CAA)	Clean Air Act
EGU	Electric Generating Unit
EPA (or Agency)	United States Environmental Protection Agency
GW	Gigawatts
HAP	Hazardous Air Pollutant
JA	Joint Appendix
MATS	Mercury and Air Toxics Standards, 77 Fed. Reg. 9304 (Feb. 16, 2012)
NAAQS	National Ambient Air Quality Standards
$PM_{2.5}$	Fine Particulate Matter
RIA	Regulatory Impact Analysis
Rule	Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units; Final Rule, 81 Fed. Reg. 24,420 (Apr. 25, 2016)
SO_2	Sulfur Dioxide
UARG	Utility Air Regulatory Group

JURISDICTIONAL STATEMENT

These consolidated cases challenge a final action of the U.S. Environmental Protection Agency ("EPA" or "Agency") under the Clean Air Act ("CAA" or "Act"), published at 81 Fed. Reg. 24,420 (Apr. 25, 2016) (the "Rule"), Joint Appendix ("JA") 0050-0082. This Court has jurisdiction under CAA § 307(b)(1).[1] Petitions for review were timely filed.

STATEMENT OF ISSUES

The Supreme Court held in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), that EPA must consider cost in determining whether it is "appropriate and necessary" to regulate emissions of hazardous air pollutants ("HAPs") from electric generating units ("EGUs") under § 112 of the Act. The Rule consists of EPA's supplemental finding that such regulation is appropriate and necessary, notwithstanding estimated quantifiable annual costs of $9.6 billion and benefits of $4 to $6 million.

1. Whether EPA's "preferred approach," under which EPA finds that § 112 regulation is appropriate and necessary if it is affordable for the industry as a whole, is contrary to *Michigan* and § 112(n)(1)(A), and is otherwise arbitrary, capricious, or unlawful.

2. Whether EPA's alternative "formal benefit-cost analysis," which relies on the "co-benefits" of incidental reductions of non-HAPs to justify the $9.6 billion

[1] The Table of Authorities provides parallel citations to the U.S. Code.

annual cost of regulating EGU HAPs under § 112, is contrary to *Michigan* and § 112(n)(1)(A), and is otherwise arbitrary, capricious, or unlawful.

3. Whether EPA's refusal to consider alternative strategies in lieu of regulating EGUs under § 112 and to consider *all* relevant costs and disadvantages, is contrary to *Michigan* and § 112(n)(1)(A), and is otherwise arbitrary, capricious, or unlawful.

STATUTES AND REGULATIONS

This case involves EPA's finding made pursuant to a claim of authority under CAA § 112(n)(1)(A). The addendum reproduces pertinent portions of cited statutes and regulations.

INTRODUCTION

There is no escaping these facts: the most expensive rulemaking in EPA's history—costing at least $9.6 billion annually by EPA's estimation—would result in a paltry $4 to $6 million in purported public health benefits from reducing the pollutants it aims to address. In its previous attempt to justify regulating EGUs under § 112, EPA sought to avoid these inconvenient facts by asserting that costs do not matter at all under § 112(n)(1)(A). The Supreme Court emphatically rejected EPA's position, admonishing that "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan*, 135 S. Ct. at 2707.

Instead of developing a thoughtful comparison of costs and benefits on remand, EPA fell back on its prior determination of small, uncertain, and largely unquantifiable benefits associated with regulation of HAPs[2] under § 112 and concluded those benefits are justified so long as the industry can afford to spend $9.6 billion on this regulation annually. But affordability cannot satisfy the Supreme Court's direction that EPA weigh benefits and costs to ensure they are not disproportionate. *Id.* at 2707 ("No regulation is 'appropriate' if it does significantly more harm than good."). In fact, EPA never examined whether the benefits of regulation under § 112 outweigh the substantial costs. EPA did not ask whether it is "even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for" the particular benefits it identified. *Id.* And it did not ask whether $9.6 billion annual costs are "disproportionate to the[se particular] benefits." *Id.* at 2710.

EPA alternatively relies on the co-benefits of reducing a non-HAP—fine particulate matter ("$PM_{2.5}$"), which in turn would result from mandating reductions in another non-HAP: sulfur dioxide ("SO_2")—to justify the costs of regulating EGU HAPs under § 112. But the benefit-cost analysis EPA cites, which was developed for the original rulemaking, shows unequivocally that the costs dwarf the benefits attributable to reducing the regulated pollutants (i.e., the HAPs). EPA cannot properly

[2] In this brief, "HAPs" refers to substances listed under § 112(b).

conclude that it is "appropriate and necessary" to regulate HAPs under § 112 if virtually all the benefits of doing so derive from incidental reductions in non-HAPs that are regulated under numerous other CAA programs.

STATEMENT OF THE CASE

I. The Clean Air Act's Regulation of HAPs

A. Section 112 Program Prior to 1990

Prior to 1990, § 112 required EPA to identify hazardous substances for regulation and develop emission standards for each to provide an "ample margin of safety" to protect public health. Pub. L. No. 91-604, § 112, 84 Stat. 1676, 1685 (1970); 42 U.S.C. § 1857c-7(a)(1), (b)(1)(B) (1970). EPA interpreted the phrase "ample margin of safety" to authorize a risk management decision considering "all health information … as well as other relevant factors including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision." 54 Fed. Reg. 38,044, 38,045 (Sept. 14, 1989), JA1438.

EPA listed eight hazardous substances and regulated seven of them before 1990, for a limited number of source categories. *See New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008). In part because emissions of these substances comprise a minuscule percentage of overall EGU emissions, every EPA evaluation of EGUs before 1990 under the "ample margin of safety" standard concluded their hazardous-substance emissions did not pose a significant public health risk. *See, e.g.*, 40 Fed. Reg. 48,292, 48,297, 48,298 (Oct. 14, 1975) (examining EGU mercury emissions), JA1423,

1424; 52 Fed. Reg. 8724, 8725 (Mar. 19, 1987) (same), JA1433; 54 Fed. Reg. 51,654, 51,671-72 (Dec. 15, 1989) (radionuclides), JA1443-44.

Over this same period, other CAA programs required EGUs to install controls for a variety of conventional (non-hazardous) pollutants, including flue gas desulfurization systems (known as "scrubbers") for SO_2 emissions and fabric filters or electrostatic precipitators for particulate matter emissions. Hazardous substances emitted during EGU combustion were also "incident[ally]" reduced by these controls.[3]

B. Section 112 Program After the 1990 CAA Amendments

In 1990, Congress amended the CAA to substantially broaden the scope of substances to be addressed under § 112 and also transformed § 112 from a strictly health-based program to a control technology-driven program. S. Rep. No. 101-228, at 131-33 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3516-18, JA1602-04; *New Jersey*, 517 F.3d at 578. Congress listed 189 HAPs, CAA § 112(b)(1), and required EPA to regulate any source category containing at least one source that emits more than either 10 tons per year of any one HAP or 25 tons per year of all HAPs, *id.* § 112(a)(1), (c)(1).

[3] EPA, The Benefits and Costs of the Clean Air Act, 1970 to 1990, at 39 (Oct. 1997), https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1970-1990-retrospective-study, JA2008.

For listed categories, Congress directed EPA initially to promulgate "technology-based" emission standards under § 112(d), which are set at the levels of control achieved by the best performers in the category. *Id.* § 112(d)(2), (3). It directed EPA to later consider more stringent standards under § 112(f) if needed to protect public health with an "ample margin of safety."

Congress in 1990 also enacted significant additional requirements to reduce EGU emissions of conventional pollutants (i.e., non-HAPs), such as SO_2, nitrogen oxides, and PM. These programs included the regional haze and acid rain programs, and imposed new criteria pollutant nonattainment requirements. These programs reduced EGU emissions of non-HAP, conventional pollutants by many millions of tons. The additional controls EGUs installed to comply with these programs also lowered EGU HAP emissions beyond already low, pre-1990 levels.[4]

Congress was concerned that regulating EGUs under § 112 also "would increase power rates, while potentially providing little or no public health benefit." 136 CONG. REC. 3493 (Mar. 6, 1990) (statement of Sen. Steve Symms), JA1911. Indeed, EPA reported to Congress that regulating EGUs under § 112 "may result in several billion dollars of unnecessary costs with unknown environmental benefits."

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[4] *See* National Acid Precipitation Assessment Program, National Acid Precipitation Assessment Program Report to Congress 2011: An Integrated Assessment (Dec. 2011), www.whitehouse.gov/sites/default/files/microsites/ostp/2011_napap_508.pdf, JA2185-2203.

Letter from William K. Reilly, Adm'r, EPA, to Members of the Senate (Jan. 26, 1990) ("Administrator 1990 Letter to Senate"), JA1820. The Agency also warned that doing so would cost "billions of dollars" and yield only "very marginal environmental benefit."[5]

To address the fact that Congress adopted in 1990 in other parts of the Act several comprehensive new programs to reduce EGU emissions, and recognizing the cost-benefit imbalance of further constraining EGU HAP emissions, Congress enacted an EGU-specific regulatory threshold: § 112(n)(1). Pub. L. No. 101-549, 104 Stat. 2399, 2558-59 (1990), JA1933-34. That provision instructs EPA to conduct "a study of the hazards to public health reasonably anticipated to occur as a result of [the EGU HAP] emissions" that remain "*after* imposition of the [other] requirements of this [Act]." CAA § 112(n)(1)(A) (emphasis added). As part of that evaluation (commonly known as the "Utility Study"), EPA must "develop and describe … alternative control strategies for [any HAP] emissions which may warrant regulation under this section." *Id.* Then, for those HAP emissions that might "warrant" regulation, Congress authorized EPA to regulate them "under this section" *only* if it

[5] *Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearing Before the S. Comm. on Energy & Natural Resources*, 101st Cong. 241 (1990) (testimony of William G. Rosenberg, Assistant Adm'r, Air & Radiation, EPA) ("Energy Policy Hearing"), JA1652; *see also* Comments of Murray Energy Corporation on EPA's Proposed Supplemental Finding at 14-29 (Jan. 15, 2016), EPA-HQ-OAR-2009-0234-20536 ("Murray Comments"), JA0854-69 (presenting extensive legislative history).

determines that "such regulation is appropriate and necessary after considering the results of the study." *Id.* Congress also directed EPA to perform a study (commonly known as the "Mercury Study") to evaluate the "rate and mass" of EGU mercury emissions, "the health and environmental effects of such emissions," and the cost of available control technologies for mercury. *Id.* § 112(n)(1)(B).

As a companion to § 112(n)(1), which required EPA to consider alternative control strategies, Congress agreed to the Administration's proposal to provide one particular such alternative: flexible, cooperative state and federal regulation of existing EGU emissions under § 111(d). *See* H.R. 3030, 101st Cong. § 108(d) (1989) and S. 1490, 101st Cong. § 108(d) (1989) (as introduced), JA1570; Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990), JA1930. EPA explained this proposal would "allow[] the needed flexibility to identify and address the most significant toxic chemicals from utilities without mandating expensive controls that may be unnecessary." Administrator 1990 Letter to Senate, JA1866.

II. EPA's § 112 Rulemakings for EGU HAPs

Most HAP emissions from EGUs result from chemical elements that are naturally present in trace amounts in the fuels they burn. They include mercury, non-mercury metals (such as chromium), and acid gases (such as hydrogen chloride).

The Mercury and Utility Studies – After the 1990 CAA Amendments, EPA began updating information on HAPs emitted by EGUs, and conducted modeling to determine how those emissions may affect public health. The results of these efforts

were reported in the December 1997 Mercury Study[6] and the February 1998 Utility Study.[7]

EPA's studies found EGU HAPs presented limited exposure to humans. In particular, humans are exposed to mercury chiefly through consuming fish containing methylmercury formed in the first instance by aquatic microbes. 76 Fed. Reg. 24,976, 24,983 (May 3, 2011), JA0090; Comments of the Utility Air Regulatory Group on EPA's Proposed Supplemental Finding at 10 (Jan. 15, 2016), EPA-HQ-OAR-2009-0234-20557 ("UARG Comments"), JA1018. EPA found in 1998 that U.S. coal-fired EGUs emitted about 51.5 tons of mercury, or about 1 percent of the 5,000 tons of worldwide mercury emissions, Utility Study at 7-8, Tbl. 7-1, which by 2010 had fallen dramatically to 29 tons, 76 Fed. Reg. at 25,002, JA0109. Of the nine tons of domestic EGU mercury emissions deposited in the U.S., a very small portion ends up as methylmercury in fish people eat, and consequently human exposure to methylmercury resulting from coal-fired EGUs is exceedingly small. UARG Comments at 10 (citing, e.g., 70 Fed. Reg. 15,994, 16,019-21 (Mar. 29, 2005)), JA1018.

Likewise, trace amounts of non-mercury metals, naturally present in coal and oil, adhere to particulate ash, virtually all of which is captured by control devices.[8] In

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[6] EPA, Mercury Study Report to Congress, Vol. 1, EPA-452/R-97-003 (Dec. 1997), EPA-HQ-OAR-2009-0234-3054 ("Mercury Study"), JA0227-0321.

[7] EPA, Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units, Final Report to Congress, Vol. 1, EPA-453/R-98-004a (Feb. 1998), EPA-HQ-OAR-2009-0234-3052 ("Utility Study"), JA0152-0226.

the Utility Study, EPA found that only two coal-fired facilities had cumulative carcinogenic risks from HAP metals greater than one in one million, and neither exceeded three in one million. Utility Study at 6-3 to 6-4, JA0211-12. Exposure levels for non-carcinogenic effects were far below the reference concentration. *Id.*

And emission of the non-carcinogenic "acid gases" like hydrogen chloride, meanwhile, result in exposures an order of magnitude or more below health-protective thresholds, according to EPA's own models. *Id.* at 6-7, JA0215.

Given the uncertainties, however, EPA stated it "believes that mercury from coal-fired utilities is the HAP of greatest potential concern" and that "[f]urther research and evaluation are needed to gain a better understanding of the risks and impacts of utility mercury emissions." *Id.* at ES-27, JA0206. For other HAPs, EPA noted "potential concerns and uncertainties that may need further study." *Id.*

The December 2000 "Notice of Finding" – In December 2000, well before EPA could complete the data collection and research on mercury it said was necessary, then-departing Administrator Browner published a "[n]otice of regulatory finding," announcing her conclusion that regulation of two EGU HAPs—mercury from coal-fired EGUs and nickel from oil-fired EGUs—was "appropriate and

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[8] EGUs generally use electrostatic precipitators or fabric filters to capture 99 percent or more of particulate matter emissions to comply with other CAA requirements. *See, e.g.*, EPA, Air Pollution Control Technology Fact Sheet; Dry Electrostatic Precipitator (ESP) – Wire-Plate Type at 1, Tbl. 1, EPA-452/F-03-028 (undated), JA2213.

necessary" under § 112. 65 Fed. Reg. 79,825, 78,829 (Dec. 20, 2000) ("2000 Finding"), JA1465. EPA claimed "it is unnecessary to solicit … public comment on today's finding [because] … [t]he regulation developed subsequent to the finding will be subject to public review and comment." *Id.* at 79,831, JA1467. In that future rulemaking, she explained, EPA would invite comment on the "notice of regulatory finding," develop refined risk estimates, and consider alternative control strategies. *Id.* at 79,830, JA1466.

The 2005 "Not Appropriate" Rulemaking Determination – In 2004, EPA initiated rulemaking to address emissions from coal- and oil-fired EGUs under § 112(n)(1)(A). 69 Fed. Reg. 4652 (Jan. 30, 2004), JA1468. The Agency solicited comments on its 2000 "notice of regulatory finding" and a number of regulatory options including: (1) no further regulation of EGU mercury emissions; (2) adoption of a § 112(d) rule regulating only EGU mercury emissions; (3) adoption of rules under § 112(n)(1)(A) addressing any EGU emissions that warrant regulation as "appropriate and necessary"; and (4) adoption of rules under other CAA sections to confirm that further control under § 112 is not appropriate and necessary. *Id.* at 4659-62, JA1475-78.

In support of this rulemaking, EPA's modeling showed that only a small fraction of the mercury deposited in the U.S. comes from domestic EGUs, and that EGUs contribute a "relatively small percentage" to fish tissue methylmercury levels after implementation of other CAA requirements. 70 Fed. Reg. at 16,019-20, JA1512-

13. "Because this new information demonstrates that the level of [mercury] emissions projected to remain 'after imposition of' section 110(a)(2)(D) does not cause hazards to public health," consistent with earlier findings, *supra* pp. 4, 9-10, EPA "conclude[d] that it is not appropriate to regulate coal-fired Utility Units under section 112 on the basis of [mercury] emissions," 70 Fed. Reg. at 16,004, JA1497.

As it had under the 1970 and 1977 versions of the Act, EPA found that EGU emissions of non-mercury HAPs were too insignificant to warrant regulation. *Id.* at 16,006, JA1499. Indeed, EPA found the excessive costs of § 112 regulation showed such regulation was not appropriate because "the lower bound cost of regulating under CAA § 112 beyond CAIR [a § 110 regulation for EGUs] (e.g., $750 million) exceeds the upper bound estimate of the benefits of such regulation (e.g., $210 million)." 71 Fed. Reg. 33,388, 33,394 (June 9, 2006), JA1528. EPA instead regulated mercury emissions from EGUs under § 111 to ensure use of advanced emission controls regardless of public health risk, 70 Fed. Reg. 28,606 (May 18, 2005) (Clean Air Mercury Rule), JA1516, reversed the 2000 Finding, and removed EGUs from the § 112(c) list of source categories, 70 Fed. Reg. at 15,994, JA1487.

New Jersey v. EPA – In litigation over EPA's 2005 finding and delisting of EGUs, no party challenged the determination that it is "not 'appropriate' to regulate power plants under section 112 because to do so would not be cost-effective." *See* Final Br. of Resp't EPA at 84, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097), JA2182; *see also id.* at 10 (EPA's counsel informing this Court that the costs

of regulating EGUs under the § 112 program are "extreme" while the health benefits are "nominal"), JA2170. Nonetheless, this Court vacated both EPA's decision to remove EGUs from the § 112(c) source category list and its rule regulating mercury emissions under § 111. *New Jersey*, 517 F.3d 574. The Court held that, once included on the § 112(c) list by way of the December 2000 "notice of finding," the only way for EPA to remove EGUs from that list was by making the "de-listing" showings required by § 112(c)(9) for all other source categories. *Id.* at 581-82. Because EPA did not follow the § 112(c)(9) procedure, the Court vacated the § 112 finding and the § 111 Clean Air Mercury Rule. *Id.* at 583. The Court did *not* rule on EPA's 2005 determination that regulation of EGU emissions under § 112 was not "appropriate and necessary."

The MATS Rule – On remand from *New Jersey*, EPA proposed the Mercury and Air Toxics Standards ("MATS") rule in May 2011, 76 Fed. Reg. 24,976 (May 3, 2011), JA0083, and finalized it in February 2012, 77 Fed. Reg. 9304 (Feb. 16, 2012), JA0637. In that rulemaking, EPA asserted, based on newer information, that EGU HAP emissions presented several public health and environmental risks. But those risks, in fact, were relatively small and had not changed much from EPA's previous assessments.

For mercury, the only HAP for which EPA could quantify *any* benefits of regulation, the Agency found, as it had before, "potential health risks do not likely result from [mercury] inhalation exposures associated with [mercury] emissions from

utilities." 76 Fed. Reg. at 25,000, JA0107; *see also* Utility Study at 6-3, Tbl. 6-1, 7-44, 7-45, JA0211, 0225, 0226. But the greatest health concern associated with mercury, EPA asserted, was consumption of methylmercury, 76 Fed. Reg. at 24,999, JA0106, of which only an exceedingly small portion results from EGU emissions.[9] EPA identified $4 to $6 million in benefits to reduce these emissions due to a very small calculated IQ loss for some hypothetically exposed persons, 77 Fed. Reg. at 9428, JA0699, and asserted that there could be other unquantifiable benefits, *id.* at 9306, 9323, 9426-32, JA0639, 0656, 0697-0703.

For trace non-mercury metals, EPA found only four coal-fired EGUs in the entire industry presenting a cancer risk greater than the de minimis risk threshold of one in one million, with the highest just five in one million. *Id.* at 9319, JA652. While the results of these higher risks were associated with contaminated sampling data, *see* UARG Comments at 11-12, JA1019-20,[10] even if correct, a risk of five in one million

[9] EPA, Revised Technical Support Document: National-Scale Assessment of Mercury Risk to Populations with High Consumption of Self-caught Freshwater Fish In Support of the Appropriate and Necessary Finding for Coal- and Oil-Fired Electric Generating Units at 65, EPA-452/R-11-009 (Dec. 2011), EPA-HQ-OAR-2009-0234-19913 ("U.S. [mercury] deposition is generally dominated by sources other than U.S. EGUs"), JA0369; *id.* at 64, Tbl. 2-2 (median "percent of total mercury deposition attributable to U.S. EGUs" in a given watershed is about 1%), JA0368.

[10] The issue of EPA's arbitrary and capricious reliance on contaminated sampling data in its "appropriate and necessary" finding is the subject of an appeal by Petitioner UARG in a related case, *ARIPPA v. EPA*, No. 15-1180 (D.C. Cir. filed June 22, 2015), which will be submitted and argued before the same panel as the

from just a few units is well within the range that EPA has previously determined is sufficient to protect public health and the environment with an "ample margin of safety." *See NRDC v. EPA*, 529 F.3d 1077, 1081-83 (D.C. Cir. 2008). Accordingly, EPA did not quantify any benefits from regulating trace non-mercury metals.

For acid gases, EPA's modeling showed, as it had before, that human exposures to EGU acid gas emissions are an order of magnitude or more below conservative health-protective levels. 76 Fed. Reg. at 25,016, JA0123; *see* Utility Study at 6-7, JA0215. Therefore, the only *potential* environmental risk EPA could identify was that in areas where acidification already exists, hydrogen chloride emissions "*could* exacerbate these impacts." 76 Fed. Reg. at 25,050 (emphasis added), JA0126.[11]

Because risks associated with EGU emissions remained so small, EPA interpreted § 112(n)(1)(A) to require regulation of all HAPs emitted by EGUs under § 112 if *any* HAP emitted by *any* EGU was projected to create either an environmental risk or a public health risk greater than a "one-in-one million" risk level. *See* 77 Fed. Reg. at 9310-11, 9325-26, 9358, JA0643-44, 0658-59, 0672. Because it found such risks for non-mercury metals and acid gases, and because mercury is a neurotoxin,

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instant case. Order at 2, *ARIPPA v. EPA*, No. 15-1180, and *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Aug. 29, 2016), ECF No. 1632520.

[11] Arguing it had no obligation to do so, EPA did not quantify "the precise contribution of power-plant acid gas emissions to ecosystem acidification," Br. for the Fed. Resp'ts in Opp'n at 31, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (No. 14-46), and did not identify any EGU contributing to such "exacerbation," *see* 77 Fed. Reg. at 9404 (noting "information gaps regarding facility-specific emissions"), JA0682.

EPA reversed its 2005 rulemaking determination that regulation of EGU HAP emissions under § 112 was not "appropriate and necessary." *Id.* at 9355-56, 9363, JA0669-70, 0677.

EPA found the annual cost of complying with the § 112(d) standards was $9.6 *billion*,[12] even though the predicted health benefits were extraordinarily low (only about $4 to $6 million of quantified benefits, all from reducing mercury). *See id.* at 9428, JA0699. The imbalance between costs and benefits is especially stark when examining the three control requirements EPA promulgated:

- EPA found that the controls required to meet the standards for mercury would cost $3 billion per year, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards at 3-10, EPA-452/R-11-011 (Dec. 2011), EPA-HQ-OAR-2009-0234-20131 ("MATS RIA"), JA0441, to achieve only 20 tons of emission reductions, *id.* at Tbl. 3-4, JA0441, and yield $4 to $6 million in quantified benefits, *id.* at 4-67, JA0534.
- EPA found that the controls required to meet the standards for non-mercury metals would cost at least $1 to $2 billion per year to achieve an unspecified amount of emission reductions and *zero* quantified benefits.[13]

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[12] EPA's $9.6 billion cost figure focuses only on compliance costs, not other costs that EPA has recognized elsewhere, like effects on work force and consumers of electricity. EPA, The Benefits and Costs of the Clean Air Act 1990 to 2010, at iii, EPA-410-R-99-001 (Nov. 1999), https://www.epa.gov/sites/production/files/2015-07/documents/fullrept.pdf, JA2012.

[13] UARG Comments, Ex. 1, *The American Energy Initiative, Part 15: What EPA's Utility MACT Rule Will Cost U.S. Consumers: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 112th Cong. (2012) (statement of Anne E. Smith, Ph.D., at 6, Tbl. 1), EPA-HQ-OAR-2009-0234-20557 ("Smith Statement"), JA1040.

- EPA found that the controls required to meet the standards for acid gases (primarily scrubbers) would cost $5 billion per year, Smith Statement at 6, Tbl. 1, JA1040, to achieve 39.8 thousand tons of hydrogen chloride emission reductions, MATS RIA at 3-10, Tbl. 3-4, JA0441, an unspecified amount of other acid gas emission reductions, and yield *zero* quantified benefits.

EPA interpreted § 112(n)(1)(A), however, to preclude consideration of these costs of regulation. 77 Fed. Reg. at 9326-27, JA0659-60. EPA also claimed in its MATS RIA that the benefits of regulating EGUs under § 112 were substantially more than the costs of compliance because the SO_2 emission standard it promulgated as a "surrogate" for acid gas regulation would produce reductions in $PM_{2.5}$. MATS RIA at ES-3, JA0414. According to EPA, the "co-benefits" of reductions in $PM_{2.5}$ were the "great majority" of the quantifiable benefits to be achieved by the MATS rule. 77 Fed. Reg. at 9305, JA0638.[14] At the same time, EPA emphatically maintained that these co-benefits played no role in its threshold "appropriate and necessary" finding. *Id.* at 9320, JA0653.

III. *Michigan v. EPA*

Numerous parties petitioned for review of the MATS rule, including EPA's finding that regulating EGU HAP emissions is "appropriate and necessary" without consideration of cost. The D.C. Circuit upheld EPA's determination. *White Stallion*

[14] In fact, the SO_2 standard for regulation of acid gases constitutes both the bulk of the costs for the MATS rule (about $5 billion annually) and 95% of the alleged $PM_{2.5}$-related co-benefits (about $32 to $87 billion annually). Smith Statement at 6, JA1040; *see also* MATS RIA at 5-14, JA0575.

Energy Ctr., LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014). The Supreme Court reversed, holding that "EPA strayed far beyond [the] bounds [of reasonable interpretation] when it read § [112](n)(1) to mean that it could ignore cost when deciding whether to regulate power plants." *Michigan*, 135 S. Ct. at 2707. The Court rejected EPA's attempt to "harmonize[]" Congress's treatment of EGUs under § 112(n)(1) with its treatment of other sources, noting that such an approach "overlooks the whole point of having a separate provision about power plants: treating power plants *differently* from other stationary sources." *Id.* at 2710.

Moreover, the Court explained that its underlying concern was not just that EPA ignored cost, but that EPA had "refused to consider whether the costs of its decision outweighed the benefits." *Id.* at 2706. The Court held that "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Id.* at 2707. And while the Court did not require EPA to conduct "a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value," *id.* at 2711, it stressed that EPA must weigh the benefits against the costs of regulating EGU HAP emissions under § 112, *id.* at 2707 (explaining "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions"). The Court emphasized that "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Id.*

For these reasons, the Supreme Court remanded the case for "further proceedings consistent with this opinion," *id.* at 2712, and this Court remanded to the Agency with the same instruction, *White Stallion Energy Ctr., LLC v. EPA*, No. 12-1100, 2015 WL 11051103 (D.C. Cir. Dec. 15, 2015).

IV. The Supplemental Finding

On remand, EPA proposed to address the Court's decision in *Michigan* by issuing a "supplemental finding" that "consideration of cost does not alter the agency's previous determination that it is appropriate and necessary to regulate coal- and oil-fired EGUs under section 112 of the CAA." 80 Fed. Reg. 75,025, 75,026 (Dec. 1, 2015), JA0002. In doing so, EPA made clear it would "accept[] comment *only* on the consideration of cost in making the appropriate determination." *Id.* at 75,027 (emphasis added), JA0003. Neither the basis for EPA's previous determination that "regulation under [§ 112]" was "appropriate," nor the magnitude or significance of any public health or environmental risk associated with that determination, nor any opportunities to reduce those risks in less costly ways, were open for discussion. As EPA said, it "ha[d] already determined [in the MATS rulemaking] that HAP emissions from EGUs present significant hazards to public health and the environment," *id.* at 75,038, JA0014, and that prior determination would stand unless EPA found industry compliance costs excessive, *id.* at 75,026, JA0002.

EPA offered two alternative justifications for affirming, after a siloed consideration of costs, its prior finding that regulation of EGU HAPs under § 112 is

"appropriate." First, under its "preferred" alternative, EPA "interpret[s] CAA section 112(n)(1)(A) as not requiring a benefit-cost analysis." *Id.* at 75,039, JA0015; 81 Fed. Reg. at 24,429, JA0059. Rather, the "focus" of EPA's justification is whether the electric utility industry as a whole could "reasonably absorb" the costs of regulating under § 112 all of the HAPs emitted from EGUs. 80 Fed. Reg. at 75,030, JA0006. In other words, if the industry were "ab[le] to afford compliance" with the MATS rule without disrupting "the generation, transmission, and distribution of affordable and reliable electricity," regulation of all EGU HAPs would be automatically "appropriate" based on the benefits, however small, identified as the basis for the prior "appropriate and necessary" determination. Legal Memorandum Accompanying the Proposed Supplemental Finding that it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units (EGUs) at 19-20 (undated), EPA-HQ-OAR-2009-0234-20519 ("Legal Memorandum"), JA0037-38; *see also* 80 Fed. Reg. at 75,031, 75,038, JA0007, 0014; 81 Fed. Reg. at 24,424, 24,427, JA0054, 0057.

To determine whether the costs of regulating EGUs under § 112 are "affordable," EPA relied on the RIA performed in 2011 for the MATS rule, which predicted compliance costs of $9.6 billion per year. 80 Fed. Reg. at 75,032-33, JA0008-09. This estimate reflects only the compliance costs with the MATS standards for the electric utility industry projected in 2011, and does not include more recent cost information or costs imposed on other sectors of the economy, nor even the full

implications and attendant disadvantages and costs of regulating EGUs under § 112. EPA evaluated these projected costs using four metrics, *id.* at 75,033-36, JA0009-12, and concluded that "every one of [these metrics] supports its conclusion that costs are reasonable," *id.* at 75,036, JA0012. The Agency then concluded that because "the costs imposed by MATS are reasonable, it is appropriate for the EPA to regulate HAP emissions from EGUs in light of the meaningful progress the rule makes toward achieving key statutory goals and reducing the previously identified significant hazards to public health and the environment." *Id.* at 75,038-39, JA0014-15.

Second, EPA's "alternative" approach purported to show that regulation of EGU HAPs is "appropriate" based on a "formal benefit-cost analysis" pulled from the 2011 RIA for the MATS rule. *Id.* at 75,039, JA0015. The Agency explained a formal benefit-cost analysis "attempts to quantify all significant consequences of an action in monetary terms in order to determine whether an action … [has] positive net benefits (i.e., benefits exceed costs)." 81 Fed. Reg. at 24,423 n.13, JA0053.

Under this alternative approach, EPA compared the MATS rule's estimated $9.6 billion annual compliance costs to EPA's estimated $37 to $90 billion in annual benefits. 80 Fed. Reg. at 75,040, JA0016. Those cited benefits, however, almost exclusively consisted of the purported benefits of reductions in pollutants that are *not* regulated as HAPs under § 112, but are instead regulated under other CAA programs. EPA acknowledged that the monetary benefits from HAP reductions—due to health benefits from reducing mercury in fish—are worth no more than $4 to $6 *million* per

year. *Id.* The remaining benefits—representing the overwhelming majority of EPA's purported $37 to $90 *billion* in benefits—reflect reductions in $PM_{2.5}$ ambient concentrations due to lower SO_2 emissions (which form $PM_{2.5}$ in the atmosphere) resulting from the acid gas SO_2 standard.[15] When only HAP-related benefits are considered, the costs of compliance are "between 1,600 and 2,400 times as great as the quantifiable benefits from reduced emissions of hazardous air pollutants." *Michigan*, 135 S. Ct. at 2706.

In the final Rule, EPA adopted its supplemental finding largely as proposed, relying on both its "preferred" and "alternative" approaches to considering cost. 81 Fed. Reg. at 24,425, JA0055. At the same time, EPA rejected commenters' requests to consider less costly alternative control strategies when "evaluating the cost reasonableness of" using § 112 to regulate EGUs, insisting that "EPA is not required to consider the potential cost of alternative approaches to regulating HAP emissions from EGUs before finding that regulation is appropriate and necessary." *Id.* at 24,447 (emphasis removed), JA0077. These alternatives included § 111, which EPA can use to impose less costly national standards for new sources under § 111(b) and to require States to impose individually achievable control requirements for existing EGUs under § 111(d), and can do so without requiring EPA to regulate every HAP.

[15] MATS RIA at 5-14 (explaining co-benefits), JA0575; *id.* ("[T]he SO_2 emission reductions are the main driver for the health co-benefits of this rule.").

EPA rejected considering § 111 as an alternative strategy, claiming commenters failed to "suggest a clear framework for developing standards" under § 111, 81 Fed. at 24,447, JA0077, even though commenters outlined the process, EPA itself has detailed regulations for using § 111, and EPA had previously promulgated regulations for new and existing EGU emissions of mercury under § 111. Murray Comments at 33; 40 C.F.R. pt. 60, subpt. B.

Another alternative strategy presented by commenters was to defer to States using their reserved authority under § 116 to regulate EGU emissions they conclude are worth reducing. Murray Comments at 32-33, JA0872-73. In refusing "to evaluate the potential for state action" as an alternative control strategy, EPA interpreted § 112(n)(1) to *prohibit* EPA from considering such an alternative due to a purported "limitation" on its authority found in a reference in one of the studies to the "imposition of the requirements" of the CAA. EPA, Response to Comments for Supplemental Finding that it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units at 23-24 (Apr. 2016), EPA-HQ-OAR-2009-0234-20578 ("RTC"), JA1231-32; *see* 81 Fed. Reg. at 24,447 n.57, JA0077.

Finally, EPA refused to consider the full range of disadvantages resulting from regulating EGUs under § 112, limiting its evaluation to four sector-wide cost metrics, 81 Fed. Reg. at 24,424-25, JA0054-55. EPA's narrow cost analysis thus ignored the

costs imposed more broadly on States, workers, communities and electricity consumers. *See, e.g.*, RTC at 65, 90, JA1273, 1298.

SUMMARY OF ARGUMENT

In determining that it was "appropriate and necessary" to regulate EGUs under § 112 of the Act in the 2012 MATS rule, "EPA refused to consider whether the costs of its decision outweighed the benefits." *Michigan*, 135 S. Ct. at 2706. The Supreme Court emphatically rejected EPA's determination, explaining "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Id.* at 2707.

On remand, EPA recognizes *Michigan* requires the Agency to weigh the costs and benefits of regulating EGU HAPs under § 112 and advances two rationales for reaffirming the appropriate and necessary determination rejected by the Supreme Court. In its "preferred approach," EPA concludes that its previously-determined benefits of such regulation—benefits that at best are small, uncertain, and in most instances unquantifiable—are justified, so long as the utility industry, as a whole, can afford to spend $9.6 billion annually to obtain them. And other than a bald, conclusory declaration that these benefits outweigh the costs, EPA nowhere actually weighs anything, much less explains *how* it weighed the purported benefits against these very large costs. Nor does EPA ask whether it is "rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for" these

particular benefits, 135 S. Ct. at 2707, or whether a cost of $9.6 billion annually is "disproportionate to the[se particular] benefits," *id.* at 2710. EPA's "preferred approach"—its affordability analysis—ignores *Michigan* and violates § 112(n)(1)(A).

Alternatively, EPA repackages its earlier MATS regulatory impact analysis into a "formal benefit-cost analysis" to claim large, monetized benefits from regulating EGUs under § 112. But EPA reaches this conclusion by ignoring the HAP-specific focus of § 112 and relying on purported benefits associated with incidental reductions in other, non-HAP pollutants ($PM_{2.5}$, as a result of SO_2 reductions). When the inquiry is properly limited to the effects of regulating EGU HAPs, EPA's own evaluation shows that the $9.6 billion price tag unequivocally outweighs the meager $4 to $6 million in benefits that EPA calculates, even accounting for unquantified benefits. EPA cannot lawfully rely on the purported benefits of reducing non-HAP pollutants—ones regulated under numerous other CAA programs—as the basis for concluding that regulation of *HAPs* under § 112 is "appropriate and necessary."

In addition, considering costs in determining whether it is "appropriate" to regulate EGU HAPs under § 112 necessarily requires consideration of whether alternative, less costly control strategies are available. As the Supreme Court noted, this is reinforced by statutory context—which directs EPA to perform studies that focus on HAPs emitted by EGUs after other requirements of the Act have been implemented, to evaluate alternative control strategies for such HAPs that may warrant regulation, and to make the appropriate and necessary determination after

considering these studies. *Michigan*, 135 S. Ct. at 2708. EPA's refusal to consider such alternative control strategies (especially regulation under § 111(d)—an alternative that Congress unlocked in the 1990 Amendments specifically for this purpose when it also enacted the current § 112) disregards the statutory framework and is inconsistent with *Michigan*.

Finally, EPA's supplemental finding considers only the costs of compliance of meeting the § 112(d) MATS standards. EPA's adamant refusal to consider *all* costs and disadvantages, including the impacts on coal companies, communities, and workers, as well as localized impacts, is contrary to the Supreme Court's direction for EPA on remand to "consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary." *Id.* at 2711; *see also Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 737, (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (Agency must consider "*all* of the relevant costs.").

STANDING

Petitioners have standing to challenge the Rule. The Rule sets forth EPA's finding that it is "appropriate and necessary" to regulate HAP emissions from coal- and oil-fired EGUs under CAA § 112. This finding is a necessary legal prerequisite to such regulation. Several Petitioners own and operate EGUs or have members who own or operate them. By enabling EPA to regulate these units, the Rule subjects these Petitioners to emission standards that have, in some instances, required affected units to be idled; in others have required emission control technologies that are costly to

install or to operate; and that have otherwise constrained EGUs' operations. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (when a party is the object of government regulation "there is ordinarily little question that the [governmental] action … has caused him injury").

The other petitioners also have standing. The Rule harms State Petitioners by raising the prices that State Petitioners themselves (not just their citizens) must pay as consumers of electricity. The Rule also subjects State Petitioners to ongoing regulatory burdens that require them to incur costs, including staff time. For example, the Michigan Department of Environmental Quality, operating under a delegation of authority from EPA, must "implement and enforce without changes the Section 112 standards promulgated by EPA," which include the MATS rule. 63 Fed. Reg. 64,632, 64,633 (Nov. 23, 1998), JA1457.

Likewise, because the Rule subjects coal-fired EGUs to costly regulation, it discourages the construction of new units and causes existing units to retire or operate less often. This has the effect of harming Petitioner Murray Energy Corporation by diminishing the demand for coal in the electric generating sector.

Both this Court in *White Stallion* and the Supreme Court in *Michigan* have recognized that Petitioners have standing to challenge the underlying MATS rule.

STANDARD OF REVIEW

The Court must set aside EPA's action under the CAA if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." CAA

§ 307(d)(9); 5 U.S.C. § 706. Agency action is invalid if the agency failed to consider an important aspect of a problem, offered an explanation for its decision that runs counter to the evidence, or is so implausible that the decision could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. EPA's "Affordability" Analysis Does Not Satisfy Its Obligation To Determine Whether the Benefits of Regulating EGUs Under § 112 Are Worth the Costs.

In *Michigan*, the Supreme Court directed EPA to weigh the benefits of regulation against the costs before determining whether it is "appropriate and necessary" to regulate HAP emissions from EGUs under § 112. 135 S. Ct. at 2707-11. In response, EPA's "preferred approach" is to simply determine that the costs of regulation are "afford[able]" for the electric utility industry as a whole, and are therefore reasonable. Legal Memorandum at 19, JA0037; *see also* 80 Fed. Reg. at 75,030 ("focus [of cost inquiry is] on whether the power sector can reasonably absorb the cost of compliance"), JA0006. Other than a bald claim that it weighed those costs against previously-identified benefits of regulation, EPA never explained how and what standard it used for such weighing, much less why "it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for" these uncertain and unquantifiable purported benefits. *Michigan*, 135 S. Ct. at 2707. Instead, EPA "interpret[ed] … section 112(n)(1)(A) as not requiring a benefit-cost analysis"—

i.e., that EPA need not compare benefits to costs in order to determine whether the benefits outweigh the costs. 80 Fed. Reg. at 75,039, JA0015. EPA's "preferred approach" ignores *Michigan* and violates the statute.

A. EPA Must Consider Costs in Relation to Benefits To Justify its "Appropriate and Necessary" Determination.

The Supreme Court held that the cost of regulation is an essential factor that EPA must consider when determining whether regulation of EGU HAP emissions under § 112 is "appropriate and necessary." *Michigan*, 135 S. Ct. at 2707 ("Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate."). The Court did not simply direct EPA to consider cost in the abstract: its underlying concern was that EPA had "refused to consider whether the costs of its decision outweighed the benefits" in any way. *Id.* at 2706. To be sure, the Court did not require "a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. But the Court repeatedly stressed that EPA must weigh the benefits against the costs of regulating EGU HAP emissions under § 112. *Id.* at 2707 (explaining "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions"). As the Court succinctly put it, "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Id.*

The Court's emphasis on the need to compare the costs and benefits of § 112 regulation of EGU HAPs pervades its opinion in *Michigan*. The Court specifically

faulted EPA's refusal to "consider whether the costs of its decision outweighed the benefits," *id.* at 2706, stating unequivocally that "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits," *id.* at 2707. The Court indicated that the fundamental aim of considering cost in the "appropriate and necessary" analysis is to "ensure that the costs are not disproportionate to the benefits." *See id.* at 2710. Even the dissent acknowledged an agency "acts unreasonably" in ignoring costs and benefits because "such a process would 'threaten[] to impose massive costs far in excess of any benefit.'" *See id.* at 2716-17 (Kagan, J., dissenting) (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 234 (2009) (Breyer, J., concurring in part and dissenting in part)).[16]

[16] The dissent argued, however, that the § 112(d) standard-setting process itself would ensure the costs of the regulation are reasonable because the standards are set at levels that are achieved in practice, albeit by only the best performing units in the category. *Michigan*, 135 S. Ct. at 2719 (Kagan, J., dissenting). The majority rejected that reasoning, not just because it was not advanced by EPA, but because it does not compare benefits to costs. Using a hypothetical example, the Court observed that if "regulating power plants would yield $5 million in benefits, the prospect of mitigating cost from $11 billion to $10 billion at later stages of the program would not by itself make regulation appropriate." *Id.* at 2711. That approach does nothing to "ensure cost-effectiveness," *id.*, or to ensure "that the costs are not disproportionate to the benefits," *id.* at 2710. EPA's "preferred approach," which considers costs merely by finding that they are "affordable," is similar to the dissent's argument in that it is divorced from any measure of cost-effectiveness and is thus inconsistent with *Michigan*.

This emphasis on evaluating the costs of regulating EGU HAP emissions under § 112 in relation to their benefits is not novel: comparing costs and benefits is an "established administrative practice" that has long been recognized as an essential feature of rational agency decisionmaking. *Id.* at 2707-08. The Court has long held an agency's interpretation of its standard-setting authority "unreasonable" where it "would give [the agency] power to impose enormous costs that might produce little, if any, discernible benefit." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980). A standard "is neither 'reasonably necessary' nor 'feasible' … if it calls for expenditures wholly disproportionate to the expected health and safety benefits." *Id.* at 667 (Powell, J., concurring in part and concurring in the judgment). More recently, the Court recognized that when an agency considers costs, "whether it is 'reasonable' to bear a particular cost may well depend on the resulting benefits." *Entergy Corp.*, 556 U.S. at 225-26. Justice Breyer observed that "every real choice requires a decisionmaker to weigh advantages against disadvantages," *id.* at 232 (Breyer, J., concurring in part and dissenting in part); *see also id.* at 232-33 ("[I]t would make no sense to require plants to spend billions to save one more fish or plankton … even if the industry might somehow afford those billions.") (internal quotation marks and citation omitted).

Congress had these very concerns in mind when it chose to "treat[] power plants differently from other sources for purposes of the hazardous-air-pollutants program." *Michigan*, 135 S. Ct. at 2707. Congress and the Administration, which was

heavily involved in drafting the 1990 CAA Amendments, understood that, given the reductions in HAP emissions expected to result from the Act's new Acid Rain Program, the substantial costs of also regulating EGUs under § 112 (particularly for a pollutant such as SO_2 that is already extensively regulated under these other programs) "would increase power rates, while potentially providing little or no health benefit." 136 CONG. REC. 3493 (Mar. 6, 1990) (statement of Sen. Steve Symms), JA1911; *see supra* pp. 6-8.

To avoid this result, Congress adopted § 112(n)(1)(A) so that EPA would be required to examine whether regulating EGU emissions under § 112 would be worth the costs. As Representative Oxley (co-sponsor of the 1990 CAA Amendments) explained, the purpose of § 112(n)(1)(A) was to "protect[] … the public health while avoiding the imposition of excessive and unnecessary costs on residential, industrial, and commercial consumers of electricity." *See* 136 CONG. REC. 35,075 (Oct. 26, 1990) (statement of Rep. Michael Oxley), JA1918. Administration officials likewise noted that the provision's purpose was that "cost benefit and environment improvements to be achieved by application of these costs and technologies can be considered." Energy Policy Hearing at 436, JA1671.

The importance of comparing costs and benefits under § 112(n)(1)(A) is also evident in the studies that Congress mandated under that section, which "'provide a framework'" for EPA's decision. *Michigan*, 135 S. Ct. at 2708. EPA was required to study "the hazards to public health reasonably anticipated to occur" from EGU HAP

emissions after implementation of other CAA provisions—that is, to identify the benefits that could be gained by further regulation under § 112. CAA § 112(n)(1)(A). Rather than addressing those emissions collectively, EPA's report must describe "alternative control strategies for emissions *which may warrant regulation* under this section." *Id.* (emphasis added). Likewise, Congress directed EPA to perform the Mercury Study to evaluate the "rate and mass" of EGU mercury emissions and "the health and environmental effects of such emissions" in addition to the cost of available control technologies, *id.* § 112(n)(1)(B), demonstrating that Congress was concerned with not just *whether* mercury emissions would remain after imposition of other CAA programs, but *how much* and *how significant* those emissions would be in relation to the costs of reducing them.

Thus, the statute, congressional purpose, and "established administrative practice," all require that EPA determine whether the benefits are worth the costs when deciding whether regulation under § 112 is "appropriate and necessary."

B. EPA's "Preferred Approach" Ignores *Michigan* and the Statute.

Despite the Court's directive, EPA in its "preferred approach" carefully walled off its cost analysis from any comparison to the benefits that regulating EGU HAP emissions under § 112 might achieve. As a result, the "preferred approach" is inconsistent with *Michigan* and violates § 112(n)(1)(A).

1. EPA Unlawfully Failed To Weigh Costs Against Benefits.

EPA asserts that "the regulation of and reduction in the significant amounts of HAP emissions from EGUs, *and the presumed reduction in risk* attendant to such reductions, is the benefit" that justifies EGU HAP regulation under § 112. Legal Memorandum at 18 (emphasis added), JA0036. As to the "risks" from EGU HAP emissions, EPA "maintain[s] [its] position from the MATS rule that *the volume* of HAP emissions from EGUs, including acid gas HAP emissions, may form the basis for finding that HAP emissions from EGUs pose a hazard to public health and the environment that is appropriate to regulate." 81 Fed. Reg. at 24,450 (emphasis added), JA0080. Otherwise, EPA merely points to its prior findings (findings EPA said were not open for comment, *see* 80 Fed. Reg. at 75,027, JA0003) that at least one HAP emitted from EGUs (non-mercury metals) presents a public health risk above a one in one million risk level, that acid gases present an environmental risk, and that mercury is a known neurotoxin. 81 Fed. Reg. at 24,449, JA0079; 80 Fed. Reg. at 75,038, JA0014.

Nowhere in its preferred approach did EPA actually evaluate whether purported benefits outweigh a cost of $9.6 billion annually. Nor did EPA explain *how* purported benefits were weighed against such exceptionally large costs. Instead, EPA relied on an *ipse dixit*, declaring that it "weigh[ed] … [costs] against the many identified

advantages to regulation."[17] 81 Fed. Reg. at 24,421, JA0051. All but ignoring *Michigan*, EPA did not even ask whether it was "rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for" these particular benefits, 135 S. Ct. at 2707, or whether a cost of $9.6 billion annually is "disproportionate to the[se particular] benefits," *id.* at 2710.

Rather, as EPA described it, its focus was solely on whether the electric utility industry as a whole could "absorb" the costs of regulating all of the HAPs emitted from coal- and oil-fired EGUs under § 112. 81 Fed. Reg. at 24,424, JA0054. In other words, if at least *one HAP emitted by one EGU* presented a one in one million public health risk of carcinogenic effects or an environmental risk, and the industry was "ab[le] to afford compliance" with the MATS rule without disrupting "the generation, transmission, and distribution of affordable and reliable electricity," then regulation of *all EGUs for all HAPs they emit* would be "appropriate" regardless of the magnitude of the benefit. *See* Legal Memorandum at 19-20, JA0037-38; 80 Fed. Reg. at 75,030, JA0006; *see also id.* at 75,031, 75,038, JA0007, 0014; 81 Fed. Reg. at 24,424, 24,427, JA0054, 0057.

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[17] EPA's *ipse dixit* is reminiscent of a Churchill Martini. Reportedly, Sir Winston Churchill, when asked how much vermouth he wanted in his martini, replied, "'I would like to observe the vermouth from across the room while I drink my martini.'" Warren Dockter, *How to drink like Winston Churchill*, THE TELEGRAPH (Jan. 28, 2015), http://www.telegraph.co.uk/news/winston-churchill/11374144/How-to-drink-like-Winston-Churchill.html. Similarly, EPA here "weighs costs" by observing them from across the room.

But finding that regulating EGUs under § 112 is "affordable" is a far cry from demonstrating its advantages are worth the burdens imposed, as § 112(n)(1)(A) and *Michigan* require. *See AFL-CIO*, 448 U.S. at 668 n.4 (Powell, J., concurring in part and concurring in the judgment) ("The cost of complying with a standard may be 'bearable' and still not reasonably related to the benefits expected.").

Stated another way, under EPA's "affordability" analysis, the fact that over 99 percent of EGUs present risks of carcinogenic effects from non-mercury metal emissions of less than one in one million—and that *all* present risks of less than five in one million, 77 Fed. Reg. at 9319, JA0652—is irrelevant. That EGU acid gas emissions present no public health risk and constitute less than one percent of U.S. emissions with acidification potential,[18] is irrelevant. That EPA can quantify only $4 to $6 million in public health benefits associated with reducing EGU mercury emissions is irrelevant. Indeed, according to EPA, Congress determined that HAPs are "inherently harmful," and the only way to avoid regulating EGUs under § 112 for HAP emissions that present no public health risk is not through a § 112(n)(1)(A) determination that "such regulation" is *not* appropriate, but rather "to petition the Administrator to remove those pollutants from the CAA section 112(b) list" for all sources, including non-EGU sources for which no cost-benefit analysis is allowed or

[18] Comments of Electric Power Research Institute on EPA's Proposed MATS Rule at 3-46 to 3-48 (Aug. 4, 2011), EPA-HQ-OAR-2009-0234-17621, JA0335-37.

required under § 112. *See* 81 Fed. Reg. at 24,450, JA0080. This is not the cost-benefit analysis called for by *Michigan* or the statute. *See supra* Section I.A.

EPA's rationale continues to ignore the fact that Congress treated EGUs differently from every other source of HAPs. *See Michigan*, 135 S. Ct. at 2707. If the main consideration for whether to regulate EGUs under § 112 was that EGUs emit a certain volume of HAPs—a basic fact that Congress and the other parties involved in drafting the 1990 CAA Amendments understood—then it would have made no sense to enact § 112(n)(1) at all. *See id.* at 2710 ("[I]f uncertainty about the need for regulation were the *only* reason to treat power plants differently, Congress would have required the Agency to decide only whether regulation remains 'necessary,' not whether regulation is 'appropriate *and* necessary.'"). By relying simply on its finding that the costs are "affordable" and failing to weigh these costs against the benefits of its decision, EPA's new determination continues to violate the statute and *Michigan*.

2. EPA Errs By Interpreting § 112(n)(1)(A) Not To Require Any Comparison of Costs and Benefits.

EPA attempts to justify its refusal to compare the costs and benefits of regulation under § 112 on the grounds that neither the statute nor *Michigan* require "benefit-cost analysis … to support a finding that regulation is appropriate." Legal Memorandum at 26, JA0044; *see also* 80 Fed. Reg. at 75,031 ("[A] benefit-cost analysis is not required to support a threshold finding that regulation is appropriate."), JA0007; *id.* at 75,039 (EPA "interprets CAA section 112(n)(1)(A) as not requiring a

benefit-cost analysis."), JA0015; 81 Fed. Reg. at 24,429 ("EPA disagrees that a benefit-cost analysis, particularly one that only … monetized HAP … benefits, … is required by CAA section 112(n)."), JA0059. In fact, EPA asserts the statute requires no "finding of an economic positive net benefit" associated with regulation "under this section" at all. 81 Fed. Reg. at 24,429, JA0059. EPA says this position is consistent with what EPA calls § 112's focus on "whether the *collective* HAP emissions from EGUs should be regulated, not the manner in which they should be regulated" under § 112. Legal Memorandum at 18, 25 (emphasis omitted and added), JA0036, 0043.

To begin, the focus of § 112(n)(1)(A) is not on collective EGU HAP emissions, but only those posing "hazards to public health" "which warrant regulation." EPA's refusal to balance costs and benefits is inconsistent with § 112(n)(1)(A), as construed in *Michigan*, *see supra* Section I.A. There is no material difference between EPA's "preferred approach" in the Rule and its 2012 "appropriate and necessary" analysis the Supreme Court rejected in *Michigan*. In the MATS rule, EPA found that regulation was "appropriate" because EGU HAP emissions pose some remaining but indeterminate risk to health or the environment that can be reduced through regulation. *Michigan*, 135 S. Ct. at 2705 (summarizing EPA's rationale). The Supreme Court rejected this approach because, by focusing on the "need for regulation"—i.e., the existence of some remaining HAP emissions to reduce and the means to do so—

EPA effectively read the term "appropriate" out of "appropriate and necessary." *See id.* at 2710.

On remand, EPA essentially doubles down on its rationale, adding only one caveat that cannot possibly change the result. Now, EPA says, regulation is "appropriate" because EGU HAP emissions pose some remaining but indeterminate risk to health or the environment that can be reduced through regulation that the industry, as a whole, can afford. "Affordability" to the industry, however, imposes no constraint on EPA's authority at all—especially with respect to this industry, in which customers are heavily dependent on the service provided and there is a well-established process for regulated sources to recover costs of compliance. As the Supreme Court recognized in *AFL-CIO*, a program of "pervasive regulation limited only by the constraint of feasibility" would reflect "unprecedented power over American industry" and "would give [the agency] power to impose enormous costs that might produce little, if any, discernible benefit." 448 U.S. at 645. Yet that is precisely how EPA envisions its authority under § 112(n)(1)(A).

EPA suggests in the Rule that it may refuse to evaluate costs in relation to benefits because the benefits of reducing EGU HAP emissions are not easy to quantify. *See* 81 Fed. Reg. at 24,429, JA0059. But even if true, this difficulty does not relieve EPA of its burden to weigh costs against benefits. Whether EPA conducts a formal cost-benefit analysis or not, reasoned decision-making, *Michigan*, and the CAA require EPA to explain why and how the benefits outweigh the costs. At a minimum,

EPA must evaluate and explain whether the specific benefits it identified are worth the costs it estimated, or that the costs would not "do[] significantly more harm than good." *See Michigan*, 135 S. Ct. at 2707.

Moreover, as explained in Section II below, EPA routinely quantifies the benefits of regulation even where uncertain (as it did here when it quantified the purported IQ benefits of reducing mercury emissions). In fact, as the *Michigan* dissent noted, EPA is required to do so by Executive Order 12866. *See id.* at 2721. EPA was able to quantify the benefits associated with "the predominant exposure pathway," 76 Fed. Reg. at 24,999, JA0106, for EGU HAP emissions—and the record shows these benefits are far outweighed by the costs. EPA's assertion that the collective volume of EGU HAP reductions can be a substitute for "benefit," and its generalized reference to the "significant hazards to public health and the environment," 81 Fed. Reg. at 24,428, JA0058, is plainly an attempt to mask the minuscule benefits of regulating EGUs under § 112, especially as compared to its $9.6 billion sticker price, *see supra* p. 16.

3. EPA Unlawfully Fails To Assess the Costs and Benefits of Each of the Three, Multi-Billion Dollar Control Mandates.

The cost-benefit imbalance is especially stark when examining each of the three control requirements EPA promulgated in MATS. *See supra* pp. 16-17. Any costs and benefits that exist derive solely from the pollutant-specific control requirements. Just

because it may be appropriate to control one HAP under § 112 does not mean it is reasonable to control other HAPs under § 112 as well.

The statute focuses on each EGU HAP "*which may warrant regulation* under this section." CAA § 112(n)(1)(A). Accordingly, and especially in light of alternatives available to EPA to regulate particular HAPs and not others, *see infra* Section III.A, EPA must consider the cost and benefits of regulating each HAP (or group of related HAPs, such as non-mercury metals) emitted by EGUs in evaluating whether it is appropriate and necessary to regulate each. EPA flatly refused to do so. RTC at 21-22, JA1229-30. Thus, in a situation where the benefits of regulating mercury *did* outweigh the costs, but controlling acid gases cost $5 billion and yielded minuscule or no benefit, EPA would still illogically conclude it appropriate to regulate both (or even all) HAPs from EGUs. But in such a circumstance, "it is [not] even rational, never mind 'appropriate'" for EPA to regulate under § 112 those HAPs that yield no benefit at all. *Michigan*, 135 S. Ct. at 2707. This is especially so where Congress unlocked the option of regulating only mercury under § 111 specifically to avoid such a result. *See infra* Section III.A.

EPA's "preferred approach" cannot be squared with § 112(n)(1)(A) and the Supreme Court's directive in *Michigan* to weigh costs against benefits in determining whether regulation is "appropriate and necessary."

II. EPA's "Alternative" Benefit-Cost Approach Is Also Invalid Because It Is Based on the "Co-Benefits" of Reducing Pollutants Other than HAPs.

EPA's "alternative" approach to considering costs fares no better. The Agency claims that a "formal benefit-cost analysis" shows that the benefits of regulating EGUs' HAP emissions outweigh the costs. 81 Fed. Reg. at 24,421, JA0051. But EPA reaches this conclusion by ignoring the HAP-specific focus of § 112 and relying on purported benefits associated with incidental reductions in other pollutants ($PM_{2.5}$, resulting from SO_2 reductions) that are already regulated under other provisions of the Act.

Section 112(n)(1)(A) directs EPA to determine whether, after the implementation of other CAA requirements (with attendant reductions in HAP emissions), the benefits of addressing the remaining risks posed by EGU HAP emissions justify the costs of regulating those HAP emissions under § 112. EPA cannot answer that question by relying on reductions in pollutants that are not the target of § 112—particularly when, as here, those reductions may not yield benefits at all. When the inquiry is properly limited to the effects of regulating *HAPs*, the costs unequivocally outweigh the benefits.

A. Congress Did Not Authorize EPA To Regulate EGU HAP Emissions Under § 112 Based on Reductions in Pollutants Regulated Under Other CAA Programs.

EPA has no authority to base its decision to regulate EGU HAP emissions under § 112 on the "co-benefits" of reducing pollutants that are not HAPs (i.e.,

pollutants that are not listed under § 112). Congress directed EPA in § 112(n)(1)(A) to address a specific problem: the hazards to public health caused by any HAPs emitted by EGUs after implementing other CAA programs. Congress explicitly required EPA to decide whether regulation of EGUs under § 112 is "appropriate and necessary" to address *that* problem, not to address health hazards caused by $PM_{2.5}$ resulting from SO_2 or other emissions not listed under § 112. Nothing in Congress's singular focus on HAPs in § 112(n)(1) suggests EPA may impose costly controls on EGU HAP emissions based on reductions in other pollutants that are already extensively regulated through entirely separate programs in the Act. EPA's alternative finding impermissibly "relied on factors which Congress has not intended it to consider." *State Farm*, 463 U.S. at 43.

1. Section 112(n)(1)(A) Limits EPA's Consideration to Whether the Benefits of Reducing *HAPs* Are Worth the Costs.

Both the history and the text of § 112(n)(1)(A) demonstrate EPA has no authority to determine it is appropriate to regulate EGU HAP emissions under § 112 based on the benefits of reducing non-HAPs. As the Supreme Court noted in *Michigan*, Congress in 1990 "subjected power plants to various regulatory requirements" that "were expected to have the collateral effect of reducing power plants' emissions of hazardous air pollutants." 135 S. Ct. at 2705. These other regulatory requirements included, among others, the ongoing national ambient air quality standards ("NAAQS") program and a new program to address acid rain under

Title IV of the Act. CAA §§ 401 *et seq*. To comply with the latter, many plants installed "scrubbers" to reduce SO_2 emissions that contribute to acid rain. 70 Fed. Reg. at 16,003, JA1496. Those measures also reduced HAP emissions.

Congress also enacted § 112(n)(1)(A) in 1990, requiring EPA to satisfy two conditions before it can regulate EGU HAPs. First, EPA was required to undertake the Utility Study to assess "the hazards to public health reasonably anticipated to occur as a result of emissions" of HAPs from EGUs "after imposition of the requirements" of the Act. CAA § 112(n)(1)(A). Second, EPA had to find that "such regulation is appropriate and necessary *after considering the results of the study*." *Id.* (emphasis added). Thus, the operative statutory provision explicitly limits EPA's authority to regulate any remaining EGU HAPs to the extent that the effects of *those HAP emissions* justify regulation.

Nothing elsewhere in § 112(n)(1) gives EPA authority to base its "appropriate" finding on the benefits of regulating non-HAPs. For example, the next subsection—§ 112(n)(1)(B)—requires EPA to conduct a second study (the Mercury Study) on the costs of technologies that can control "mercury emissions from electric utility steam generating units." And the following subsection requires EPA to conduct a third study on "the threshold level of mercury exposure below which adverse human health effects are not expected to occur." *Id.* § 112(n)(1)(C). These additional studies confirm that Congress in § 112(n)(1) focused on the hazards to public health caused by EGU HAP emissions (including mercury), and required that EPA base its decision on the

health risks from those pollutants, not the risks from non-HAPs. *See Michigan*, 135 S. Ct. at 2708 (studies required by § 112(n)(1)(B) and (C) inform scope of "appropriate and necessary" analysis).

EPA's claim, 81 Fed. Reg. at 24,438-39, JA0068-69, that § 112(n)(1) implicitly allows the Agency to rely on $PM_{2.5}$ co-benefits as the basis for regulating EGU HAPs is also foreclosed by the Supreme Court's ruling in *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001). *American Trucking* focused on whether EPA could consider cost when setting a NAAQS where the governing statutory provision—§ 109—expressly requires the standard to be set at a level "requisite to public health" with an "adequate margin of safety." CAA § 109(b). The Court refused to interpret the statute as providing implicit authority to consider cost where authority to do so had "elsewhere, and so often, been expressly granted." *American Trucking*, 531 U.S. at 467. As the Supreme Court in *Michigan* explained, "*American Trucking* thus establishes the modest principle that where the Clean Air Act expressly directs EPA to regulate on the basis of a factor that on its face does not include cost, the Act normally should not be read as implicitly allowing the Agency to consider cost anyway." 135 S. Ct. at 2709.

That principle of statutory interpretation applies with equal force here. Section 112(n)(1)(A) expressly directs EPA to make its "appropriate and necessary" finding on the basis of a factor (hazards to public health from HAPs emitted by EGUs) that on its face only addresses the benefits of reducing exposure to listed HAPs, which

does not include $PM_{2.5}$. Because Congress expressly addressed regulation of $PM_{2.5}$ health effects in the NAAQS program, *see* CAA §§ 108-109, and directed that EPA make its appropriate finding in § 112(n)(1)(A) based on health hazards from EGU HAP emissions, EPA has no implicit authority to consider $PM_{2.5}$ co-benefits.

This Court has previously rejected EPA's similar attempts to rely on factors other than those specified by Congress when deciding whether and how to regulate. *See Am. Petroleum Inst. v. EPA*, 52 F.3d 1113 (D.C. Cir. 1995) ("*API*") (EPA may not base fuel requirements for reducing toxics on incidental global warming benefits); *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995) (EPA may not deny fuel additive waiver on public health grounds when statute only permits denial on emission control interference grounds); *see also State Farm*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider."). In *API*, the Court addressed a provision that directed EPA to promulgate regulations governing reformulated gasoline with the aim of reducing emissions of volatile organic compounds and toxic air pollutants. 52 F.3d at 1115 (citing CAA § 211(k)). In response, EPA adopted a regulatory program that promoted renewable oxygenates over others—not because it achieved greater reductions in volatile organic compounds and toxics, but because it would promote "global warming benefits" and would otherwise "effect the purposes of the Act" generally. *Id.* at 1116-17.

This Court held EPA exceeded its authority: "[t]he sole purpose of the [reformulated gasoline] program is to reduce air pollution … through specific performance standards for reducing VOCs and toxics emissions," and not to advance other goals not specified by Congress. *Id.* at 1119. This was true even though the statute allowed EPA to consider the "nonair-quality and other air-quality related health and environmental impacts and energy requirements" of its reformulated gasoline regulations. CAA § 211(k). Those considerations were "subordinate" to that section's overarching goal of reducing specific pollutants, and "the statute does not authorize [EPA] to use these factors as a basis for imposing any additional restrictions on [reformulated gasoline], even if the additional restrictions would yield some benefit among the factors to be taken into consideration." *API*, 52 F.3d at 1120.

Here, reducing emissions of non-HAP pollutants is not even a subordinate goal of § 112. "[T]he aims and limits of the section as a whole" are focused entirely on HAP emissions. *Id.* Because the "sole purpose" of § 112(n)(1) is to address EGU HAP emissions, *id.* at 1119, EPA erred by basing its decision that regulation is "appropriate and necessary" on the potential benefits of reducing non-HAPs.

2. Predicating § 112 Regulation of EGU HAP Emissions on $PM_{2.5}$ Co-Benefits Resulting from SO_2 Reductions Is an End-Run Around CAA Programs That Already Regulate These Non-HAPs.

EPA's lack of authority to consider $PM_{2.5}$ co-benefits is further reinforced by the fact that $PM_{2.5}$ is addressed under a completely different CAA provision—the § 109 NAAQS program. Under that program, EPA regulates $PM_{2.5}$ and other

"criteria" pollutants according to detailed legislative instructions regarding the manner and extent to which those pollutants are to be controlled. EPA cannot base a decision that it is "appropriate" to establish § 112 standards for EGU HAPs on alleged benefits of reducing another pollutant ($PM_{2.5}$) beyond the levels EPA has already determined meet the statutory directives applicable to that pollutant. Indeed, at oral argument in *Michigan*, Chief Justice Roberts described relying on co-benefits as "an end run" around § 109's restrictions. Tr. of Oral Arg. at 59-61, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (No. 14-46); *see also id.* at 62-63 (noting EPA's citation of co-benefits "raises the red flag").

EPA's reliance on $PM_{2.5}$ co-benefits is particularly egregious here, because these co-benefits largely result from reductions in SO_2 obtained through the installation and upgrade of scrubbers forced by the § 112(d) standard for acid gases. In the 1990 Amendments, Congress decided to treat EGUs differently from all other source categories under § 112 in no small part because of concerns that § 112(d) standards would undo the efficiency of the Title IV program by mandating uniform controls of acid gases so as to eliminate the flexibility, freedom of choice, and efficiency that are the core goals of Title IV. *See, e.g.*, Murray Comments at 16 (statement of Sen. Gerry Sikorski) ("[F]reedom of choice would be wasted" if § 112 is used to "require most, if not all coal-fired units to scrub."), JA0856; 136 CONG. REC. 35,013 (Oct. 26, 1990) (statement of Rep. Howard Nielson) ("It is the sense of the conferees that EPA's ultimate decision avoid any conflict with title IV implementation, including the

compliance flexibility and cost-effectiveness goals which are central to the acid rain program."), JA1916; Murray Comments at 18-19 (quoting statements of Sens. Malcolm Wallop and Wendell Ford), JA0858-59.

Title IV's Acid Rain Program was exhaustively negotiated by Congress to reduce EGU SO_2 emissions using "prescribed emission limitations," "specified deadlines," and an "emission allocation and transfer system." CAA § 401(b). The trading program was included to provide for the strategic and non-universal deployment of scrubbers while allowing those with the highest retrofit costs to avoid installing them in exchange for subsidizing emission reductions achieved at other EGUs. Thus, Congress itself determined the best approach to cost-effectively reduce EGU SO_2 emissions. EPA's attempt to justify using § 112 based on additional reductions of this very same pollutant from these very same sources, but in a command-and-control program that is the antithesis of Title IV's market-based program, is plainly an "end run" around the latter.

B. EPA's Arguments for Relying on Co-Benefits Are Unavailing.

1. EPA's Invocation of General "Economic Principles" Is Irrelevant.

EPA maintains that its "formal" benefit-cost analysis may include incidental co-benefits because doing so is consistent with "standard economic principles." 81 Fed. Reg. at 24,439, JA0069. "Standard economic principles," however, cannot override the requirements of § 112(n)(1)(A). Indeed, no economic principle endorses the consideration of costs or benefits that are irrelevant for a given context. And the

context here, as discussed above, is Congress's command in § 112(n)(1)(A) for EPA to determine whether the risks from EGU HAP emissions justify the costs of regulating those emissions under § 112. Whatever role co-benefits may play in other economic analyses, they have no place in EPA's "appropriate and necessary" analysis.

Indeed, EPA's own policy for conducting benefit-cost analyses demonstrates this very point. *See* EPA, Guidelines for Preparing Economic Analyses (Dec. 17, 2010, updated May 2014), EPA-HQ-OAR-2009-0234-20503, JA0709-69. The Guidelines do not advise that EPA consider all conceivable effects of a regulation: they state that EPA must identify the "*relevant* economic variables" based on the "environmental problem that the regulation addresses." *Id.* at 5-3 (emphasis added), JA0738. The "environmental problem" that Congress instructed EPA to address in § 112(n)(1)(A) is the hazard to public health from EGU HAP emissions after implementation of other CAA programs, not the risks posed by emissions of other pollutants already regulated under other provisions of the Act. Under EPA's own guidelines, $PM_{2.5}$ co-benefits are not a "relevant economic variable" and cannot be used as the basis for a determination to regulate EGU HAPs.

2. EPA's Justification for Considering Co-Benefits Relies on a Logical Fallacy.

Congress understood that programs targeted at reducing pollutants other than HAPs (like SO_2 in Title IV's Acid Rain Program) may result in collateral reductions of HAPs. Congress therefore required EPA to perform the Utility Study to determine

"the hazards to public health reasonably anticipated to occur as a result of emissions by" EGUs of HAPs "after imposition of" these programs. CAA § 112(n)(1)(A).

EPA asserts that because it must determine in the Utility Study the extent to which CAA programs addressing *non-HAP pollutants* will reduce risks from EGU *HAP* emissions, it may conversely consider risks from *non-HAP pollutants* when determining whether regulation of EGU *HAP* emissions is "appropriate and necessary." 81 Fed. Reg. at 24,438-39, JA0068-69. The Agency's argument is a red herring.

Had Congress intended that EPA regulate under § 112 based on health effects of HAP and non-HAP EGU emissions, it would have said so. It did not. Congress in the Utility Study asked EPA to address two questions: (1) what EGU HAP emissions remain after controls under other programs; and (2) what HAP risks are posed by those remaining HAP emissions. Congress's exclusive focus in § 112(n)(1)(A) is on EGU *HAP* emissions. The sole purpose of the Utility Study and the "appropriate and necessary" requirement in § 112(n)(1)(A) is thus to determine whether EGUs' *remaining* HAP emissions pose significant risks and should be regulated under § 112. Ancillary $PM_{2.5}$ "co-benefits" play no role in answering that question.

3. EPA Relies on the Illusory Co-Benefits of Reducing $PM_{2.5}$ Below Levels That the Agency Has Already Found Protect the Public Health.

Even if EPA had the legal authority to consider $PM_{2.5}$ co-benefits for its "appropriate and necessary" finding, the $PM_{2.5}$ co-benefits on which it relies are illusory. The Agency determined in 2013 when it analyzed the $PM_{2.5}$ NAAQS that its

confidence in the association between reducing $PM_{2.5}$ below the level already required by the NAAQS (12 μg/m^3) and the health benefits from such additional reductions is inadequate to conclude that any additional reductions are warranted. 78 Fed. Reg. 3086, 3116 (Jan. 15, 2013), JA1542; *see also id.* at 3089 (stating that 12 μg/m^3 provides the "*appropriate* degree of increased public health protection") (emphasis added), JA1540. Yet most of the $PM_{2.5}$ reductions EPA cites to support its "appropriate and necessary" finding occur in areas that have already attained the NAAQS. MATS RIA at ES-4, JA0415. EPA cannot justify its decision to regulate EGU HAPs under § 112 based on asserted public health benefits it only recently concluded did not justify regulation of those non-HAPs.

Section 109 requires EPA to promulgate "primary" NAAQS for criteria pollutants, like $PM_{2.5}$. CAA § 109(b). Primary NAAQS are defined as standards "which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." *Id.* § 109(b)(1).[19]

When setting a primary NAAQS with an "adequate margin of safety," the Administrator must decide "what margin of safety will protect the public health from the pollutant's adverse effects—not just known adverse effects, but those of scientific

[19] The Act also requires EPA to promulgate "secondary" standards to protect the public welfare, including crops and buildings, from the effects of air pollution. CAA §§ 109(b)(2), 302(h). The secondary NAAQS for $PM_{2.5}$ are all less stringent than or equal to the corresponding primary NAAQS. *See* 40 C.F.R. §§ 50.13, 50.18.

uncertainty or that 'research has not yet uncovered.'" *Am. Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998) (quoting *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1153 (D.C. Cir. 1980)). The NAAQS must protect "not only average healthy individuals, but also 'sensitive citizens.'" *Id.* at 389; *see American Trucking*, 531 U.S. at 475-76.

In 2013, EPA reviewed the most recent scientific research and revised the NAAQS for $PM_{2.5}$. 78 Fed. Reg. at 3086, JA1537. The Administrator explained that when selecting the ambient concentration that would protect public health with an adequate margin of safety, her judgment was informed by "the degree of confidence in the observed associations in the epidemiological studies" between exposure to $PM_{2.5}$ and adverse health effects. *Id.* at 3161, JA1548. As to the level of the standard, EPA found, "the available evidence interpreted in light of the remaining uncertainties does not justify a standard level set below 12 $\mu g/m^3$ as necessary to protect public health with an adequate margin of safety." *Id.* at 3162, JA1549. Put another way, although NAAQS are "precautionary and preventive" in nature, *Lead Indus. Ass'n, Inc.,* 647 F.2d at 1155, and intended to protect the most sensitive subgroups in the population, EPA did not have confidence that a level below 12 $\mu g/m^3$ was needed to provide the rigorous protections the Act requires.

Indeed, EPA explained any health benefits that may occur at $PM_{2.5}$ concentrations below 12 $\mu g/m^3$ are not merely "less certain"—they are so uncertain that it is not appropriate to include exposures below 12 $\mu g/m^3$ within the "adequate

margin of safety" provided by the NAAQS. *See* 78 Fed. Reg. at 3161, JA1548. EPA's lack of confidence in any such benefits was so low that a standard below 12 $\mu g/m^3$ "would not be warranted." *Id.*

Yet EPA now claims that reductions of $PM_{2.5}$ (as a result of a § 112(d) standard that forces installation of scrubbers to reduce SO_2) below the current $PM_{2.5}$ NAAQS level will provide additional health benefits worth $37 to $89 *billion* each year. EPA has not identified any new scientific information that would overcome its 2013 determination that an ambient $PM_{2.5}$ concentration of 12 $\mu g/m^3$ is not only sufficient to protect the public health—including sensitive citizens—but will do so with an adequate margin of safety. Nor has it explained why it now has sufficient confidence in the existence of health benefits from further reductions in $PM_{2.5}$ when in 2013 it did not.

In fact, EPA asserts that almost all of the "estimated avoided premature deaths" on which the purported co-benefits are based would occur in areas where the concentration of $PM_{2.5}$ in the ambient air is below 10 $\mu g/m^3$—lower than even the current 12 $\mu g/m^3$ $PM_{2.5}$ NAAQS. MATS RIA at ES-4, JA0415. Nevertheless, EPA, without explanation, "considers them to be legitimate components of the total benefits estimate." *Id.*

In sum, EPA's recent findings establish that reductions in $PM_{2.5}$ concentrations beyond those already required by the revised NAAQS do not provide any reliable benefits at all, much less benefits that could amount to $37 to $89 billion every year.

Equally important for this case, EPA has not explained its reliance on the "benefits" of reducing $PM_{2.5}$ concentrations below the NAAQS in light of its 2013 conclusion that it has no confidence in the existence of those benefits. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (Where action "rests upon factual findings that contradict those which underlay its prior policy …. a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."). Because EPA has not provided an "explanation for its action" that includes "a 'rational connection between the facts found and the choice made,'" the appropriate finding is arbitrary and capricious. *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

Finally, even if EPA now has greater confidence that health benefits would accrue from further reductions in $PM_{2.5}$ levels, the Act's NAAQS provisions—and not § 112(n)(1)—provide a mechanism for implementing such reductions. Each NAAQS and the related scientific evidence supporting it must be reviewed at least every five years, resulting in NAAQS revision if appropriate. CAA § 109(d)(1). In fact, EPA has already begun to review the 12 $\mu g/m^3$ $PM_{2.5}$ NAAQS. *See* 81 Fed. Reg. 22,977 (Apr. 19, 2016). Any health benefits potentially available from further reducing $PM_{2.5}$ levels are properly addressed and accounted for through the NAAQS program, not through regulating EGU HAP emissions under § 112.

C. EPA's Vague Reference to Unquantifiable Benefits Does Not Support Its "Appropriate and Necessary" Finding.

The cited $PM_{2.5}$ co-benefits of $36 to $89 billion per year are the primary justification for EPA's conclusion in its alternative approach that the benefits of regulating EGU HAP emissions under § 112 outweigh its costs. *See* MATS RIA at ES-3, JA0414. When these co-benefits are eliminated from EPA's analysis, the quantified net benefits are overwhelmingly negative: as the Supreme Court noted, the costs of the MATS rule are "between 1,600 and 2,400 times as great as the quantifiable benefits from reduced emissions of [HAPs]." *Michigan*, 135 S. Ct. at 2706. In light of this imbalance, regulating EGU HAP emissions under § 112 clearly "does significantly more harm than good" and is not "appropriate." *Id.* at 2707. The vague un-monetized HAP-related benefits EPA alludes to cannot alter this conclusion. *See* 80 Fed. Reg. at 75,040 (claiming EPA "accounted for" unquantified benefits "by adding a '+B' to denote the sum of all unquantified benefits"), JA0016.

Aside from the meager $4 to $6 million in benefits EPA quantified for "the predominant exposure pathway by which humans are affected by [methylmercury]," 76 Fed. Reg. at 24,999, JA0106, the Agency otherwise points to empty generalities and speculative claims regarding health and environmental effects. For example, EPA asserts that the benefits of regulation include "the statutory goal of reducing the inherent hazards associated with HAP emissions." 81 Fed. Reg. at 24,429, JA0059. But the Supreme Court has already rejected this rationale, noting that the fact some

reduction in HAPs will occur is not sufficient to make such regulation "appropriate." *See Michigan*, 135 S. Ct. at 2710 ("[I]f uncertainty about the need for regulation were the *only* reason to treat power plants differently, Congress would have required the Agency to decide only whether regulation remains 'necessary,' not whether regulation is 'appropriate *and* necessary.'").

EPA also claims that, even though it was able to quantify highly uncertain IQ benefits purportedly resulting from mercury emissions, other health and environmental benefits of reducing EGU mercury, acid gas, and non-mercury metals emissions simply could not be quantified. 81 Fed. Reg. at 24,441, JA0071; 80 Fed. Reg. at 75,040, JA0016. But these purported benefits are too speculative to support an "appropriate and necessary" finding for the same reasons the Agency cannot quantify them: they are not supported by the scientific literature. *See* 80 Fed. Reg. at 75,040, JA0016. As the Agency acknowledges, at the low exposures presented by EGU HAP emissions, benefits cannot be quantified due to

> gaps in toxicological data, uncertainties in extrapolating results from high-dose animal experiments to estimate human effects at lower doses, limited monitoring data, difficulties in tracking diseases such as cancer that have long latency periods, and insufficient economic research to support the valuation of the health impacts often associated with exposure to individual HAP.

Id. at 75,040 n.53, JA0016; *see also, e.g.*, MATS RIA at 4-64 to 4-66, JA0531-33.

Finally, even if the science allowed one to establish additional benefits of reducing EGU HAP emissions with any confidence, EPA makes no effort to

demonstrate that these benefits would be significant enough—in combination with the $4 to $6 million in quantifiable benefits—to justify the $9.6 *billion* in compliance costs required by the MATS rule. Even if the unquantified benefits EPA cites are worth ten times the benefits for the "predominant exposure pathway" it *can* quantify, they would still be orders of magnitude less than the costs of this regulation. The Court stated that "[i]f (to take a hypothetical example) regulating power plants would yield $5 million in benefits, the prospect of mitigating cost from $11 billion to $10 billion ... would not by itself make regulation appropriate." *Michigan*, 135 S. Ct. at 2711. Likewise, if regulating EGU HAP emissions would cost nearly $10 billion, increasing the benefits from $5 million to $6 million (or even $50 million) would not make regulation appropriate.

III. EPA's Refusal To Consider Alternative Control Strategies and All Relevant Costs, Is Contrary to the Statute and the Supreme Court's Direction.

A. EPA Impermissibly Ignores Less Costly Alternative Control Strategies for Reducing Emissions from EGUs.

In the final Rule, EPA limited its analysis to the costs of MATS (and only to some of those costs, *see* Section III.B *infra*), and refused to consider alternative control strategies that would avoid many of the disadvantages resulting from costly regulation of EGUs under § 112, which requires emission standards based on uniform national standards set at the levels achieved by the best performing EGUs. CAA § 112(d)(3),

(d)(3)(A). EPA's refusal to consider such alternatives as part of its "appropriate and necessary" determination is contrary to *Michigan* and violates the statute.

Congress directed EPA to perform the Utility Study and, in reporting on that study, to "develop and describe" "alternative control strategies for emissions which may warrant regulation under this section." *Id.* § 112(n)(1)(A). EPA may regulate EGUs under § 112 *only* if it finds "such regulation is appropriate and necessary after considering the results of the study required by this subparagraph." *Id.* This "[s]tatutory context reinforces the relevance" of considering less costly and more flexible alternatives in assessing cost and deciding whether § 112 regulation—as opposed to regulation under another program or not at all—is "appropriate and necessary." *Michigan*, 135 S. Ct. at 2708 (recognizing that "all three studies 'provide a framework for [EPA's] determination.'").

EPA's Rule disregards this statutory framework. EPA insists it "is not required to consider the potential cost of alternative approaches to regulating HAP emissions from EGUs before finding that regulation is appropriate and necessary" under § 112. 81 Fed. Reg. at 24,447 (emphasis omitted), JA0077. EPA's refusal even to consider how § 112 regulation compares to less costly and more flexible alternatives "overlooks the whole point" of § 112(n)(1), *Michigan*, 135 S. Ct. at 2710: to address the many warnings from EPA and others that regulating EGUs under § 112 could lead to massive costs with little benefits, *see supra* pp. 6-7 (discussing these warnings). This is why Congress directed EPA to identify alternative control strategies for reducing

HAP emissions before concluding that regulation under § 112 was both "necessary" *and* "appropriate." Section 112(n)(1) requires EPA to address alternatives that would "avoid any conflict with title IV implementation, including the compliance flexibility and cost-effectiveness goals which are central to the acid rain program." 136 CONG. REC. 35,013 (Oct. 26, 1990) (statement of Rep. Howard Nielson), JA1916.[20]

EPA did not need to look far in performing the required statutory analysis. As EPA itself has previously recognized, *supra* pp. 11-12 (discussing 2005 rulemaking), the CAA provides more effective alternative strategies for controlling EGU emissions. Indeed, Congress provided in the 1990 Amendments one such alternative precisely to "allow[] the needed flexibility to identify and address the most significant toxic chemicals from utilities without mandating expensive controls that may be unnecessary." Administrator 1990 Letter to Senate, JA1866.

Specifically, § 111(d) of the Act allows EPA and States to regulate EGU emissions without imposing unreasonable burdens on existing sources, permitting States to tailor requirements for "any particular source" based on "consideration" of "remaining useful life" and "other factors." EPA's regulations allow States to establish

[20] Title IV is "flexible" and "cost-effective" because it allows some sources to install larger and more expensive scrubbers such that others can install smaller and less expensive scrubbers or avoid installing scrubbers at all, all while still achieving the desired SO_2 emission reductions. *See* Murray Comments at 10, 13, JA0850, 0853. By contrast, the § 112 acid gas emission standard requires that nearly every EGU install or upgrade SO_2 controls.

"less stringent emission standards or longer compliance schedules" "on a case-by-case basis for particular" sources or "classes" of sources whenever necessary to avoid imposing any "[u]nreasonable cost of control resulting from plant age, location, or basic process design," or to account for "[p]hysical impossibility" or any "[o]ther factors" "that make application of a less stringent standard or final compliance time significantly more reasonable." 40 C.F.R. § 60.24(f).

EPA has recognized that the 1990 Amendments to § 111(d) "reflect[] a desire to change the pre-1990 approach and to expand EPA's authority as to the scope of pollutants that could be regulated under section 111(d)" so as not to "preclude EPA from regulating under section 111(d) those pollutants emitted from source categories which were not actually being regulated under section 112" including "existing Utility Units." 69 Fed. Reg. at 4685, JA1483. Thus, *if* mercury is the HAP emitted by EGUs after imposition of the requirements of the Act that "may warrant regulation," CAA § 112(n)(1)(A), then EPA can regulate that pollutant under § 111(d) without regulating other pollutants—such as acid gases—at great cost, even though those other pollutants pose no public health risk. That is what EPA did in the Clean Air Mercury Rule, promulgated under § 111(d). *See supra* pp. 11-12. EPA's disregard of a less costly option that Congress unlocked specifically for the purpose of providing an alternative for regulating EGUs is especially egregious.

In addition, Congress provided EPA with opportunities to defer regulation of EGU emissions to States, including using States' preserved authority to regulate

"emissions of air pollutants" under § 116. *See also* CAA § 102(a). To that end, § 112 requires EPA to provide States the technical information and assistance required for States to regulate HAPs, directing EPA to "establish and maintain an air toxics clearinghouse and center to provide technical information and assistance to State and local agencies … on control technology, health and ecological risk assessment, risk analysis, ambient monitoring and modeling, and emissions measurement and monitoring." *Id.* § 112(*l*)(3).

Congress also instructed EPA to "encourage and support areawide strategies developed by State or local air pollution control agencies that are intended to reduce risks from emissions by area sources within a particular urban area," with at least ten percent of funding to support "innovative and effective" areawide strategies. *Id.* § 112(k)(4). By interpreting § 112(n)(1) to *prohibit* EPA from considering the alternative of deferring to State regulation of EGU emissions as part of the appropriate and necessary determination, 81 Fed. Reg. at 24,447 n.57, JA0077, EPA "strayed far beyond" the "bounds of reasonable interpretation," *Michigan*, 135 S. Ct. at 2707 (internal quotation marks omitted).

Besides avoiding the conflict with Title IV and the unreasonable results of imposing § 112(d) standards on EGUs, EPA's § 111 and § 116 alternatives would give States far more say in the regulation of emissions from power plants. By interpreting § 112(n)(1) to require nationally-uniform § 112 regulation of EGU emissions if EPA found regulation was "appropriate," EPA ignored the federalism implications of

undoing a century of State and local effort and supplanting traditional State authority with the strict and inflexible § 112 program.[21] EPA chose a regulatory program EPA knows will "level" the power industry by imposing national uniform emission standards. 76 Fed. Reg. at 24,979, JA0086. Congress did not tie EPA's hands in § 112(n)(1) to regulate EGUs the same as all other industries. Indeed, that was the point of § 112(n)(1), as the Supreme Court emphasized—treat EGUs differently.

In addition, well-settled principles of administrative law require "consideration of alternatives" and "an adequate explanation when … alternatives are rejected." *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 817 (D.C. Cir. 1983); *see also id.* ("It is absolutely clear … that … an 'artificial narrowing of options,' … is antithetical to reasoned decisionmaking and cannot be upheld." (quoting *Pillai v. Civil Aeronautics Bd.*, 485 F.2d 1018, 1027 (D.C. Cir. 1973)).[22] EPA's decision "is lawful only if it rests 'on a consideration of the relevant factors.'" *Michigan*, 135 S. Ct. at 2706 (quoting *State Farm*, 463 U.S. at 43). Thus, EPA may not "fail to consider an

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[21] *See* Murray Comments at 4-11 (detailing state and local efforts and traditional state authority over EGUs) & 47-48 (identifying and explaining the need to consider federalism concerns), JA0844-51, 0887-88; *see generally Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (statutes "must be read consistent with principles of federalism inherent in our constitutional structure").

[22] *See also* 2 U.S.C. § 1535 (Unfunded Mandates Reform Act, requiring, *inter alia*, EPA to explain why the least costly method of achieving its objectives was not adopted); 5 U.S.C. § 602(c) (Regulatory Flexibility Act, requiring, *inter alia*, EPA to consider "significant" alternatives that minimize "significant economic impact" on small entities").

important aspect of the problem when deciding whether regulation" under § 112 "is appropriate" for EGUs. *Id.* at 2707 (internal quotation marks and alteration omitted). EPA's refusal to consider alternatives and explain why it rejected them is a "complete failure to satisfy these quintessential aspects of reasoned decisionmaking." *Donovan,* 722 F.2d at 818.

B. EPA Cannot Find § 112 "Appropriate" for EGUs Without Considering all Costs, Including Important Disadvantages and Localized Impacts.

The Rule is also flawed because it provides an incomplete account of the costs of regulating HAP emissions from EGUs under § 112. The Supreme Court directed EPA to account for "more than the expense of complying with regulations." *Michigan*, 135 S. Ct. at 2707. Instead, EPA must consider "any disadvantage" of using § 112. *Id.*; *see also State Farm*, 463 U.S. at 43 (EPA must "consider … important aspect[s] of the problem"). EPA concedes it must "determine" that using § 112 "will, on the whole, be beneficial as opposed to detrimental to society." 81 Fed. Reg. at 24,430, JA0060. EPA cannot make that determination without considering "*all* of the relevant costs." *See Mingo Logan*, 829 F.3d at 737 (Kavanaugh, J., dissenting).

Because EPA did not examine alternative control strategies, *see supra* Section III.A, it ignored the relative costs of available alternative control strategies that would—and should—have informed its decision whether "regulation under this section" was "appropriate." Indeed, *if* EPA is going to interpret § 112 as requiring that EGUs be regulated the same as other source categories, it must address the full

implications of that decision, including the applicability of all aspects of "regulation under this section." This includes the disadvantage of a possible second round of regulation under the § 112(f) residual risk review provision.[23] *See* Murray Comments at 40, JA0880. That possibility is a "cost" that must be considered as part of the § 112(n)(1)(A) determination, and EPA's refusal to do so, RTC at 35, JA1243, is contrary to *Michigan*, 135 S. Ct. at 2711.[24]

EPA's evaluation ignores myriad costs and disadvantages, including the localized impacts of § 112 regulation of EGUs on certain States, the coal mining industry, and consumers. Congress itself identified many disadvantages of using § 112 to regulate EGUs. *See generally* Murray Comments at 14-29, JA0854-69. For example, Senator Ford specifically expressed concern that coal miners would be "out of work, absolutely out of work." *See id.* at 19 (quoting statement of Sen. Ford, Hearing Before the Sen. Comm. on Energy & Nat. Res. (Jan. 24-25, 1990)), JA0859. Members of industry raised important localized concerns before Congress in 1990, including impacts on consumers. *See, e.g., id.* at 15 ("[A] rate increase of this magnitude upon the

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[23] If this Court upholds the Rule, it would be unlawful for EPA to impose on EGUs in the future additional compliance costs that were not accounted for in the "appropriate and necessary" determination required by *Michigan*.

[24] EPA refused to consider § 112(f) because it said it was not possible, at this time, to look into the future to project precisely the contours of potential § 112(f) regulation. *See* RTC at 35, JA1243. But even if true, in *Michigan*, the Court rejected EPA's similar argument that it could not consider costs of a future § 112(d) rule at the time of a § 112(n)(1)(A) determination. 135 S. Ct. at 2706-08.

rural impoverished people in our service territory would cause them undue harm.") (quoting testimony of Gen. Counsel of Iowa Southern (June 22, 1989)), JA0855; *id.* at 20 ("This drastic restructuring of section 112 would impose enormous cost[s] … that are especially punishing to the poor and those on fixed income ….") (quoting testimony of Dr. Goodman, Southern Co. Vice President of Research & Envtl. Affairs, Hearing Before the Sen. Comm. on Energy & Nat. Res. (Jan. 24-25, 1990)), JA0860.

EPA refused to consider these disadvantages, asserting that "examining highly localized impacts ... is not required by Section 112(n)(1)(A)." RTC at 90, JA1298. EPA also defended its refusal to consider impacts on coal companies, communities, and workers by citing EPA's projection in 2012 that "coal production for the electric power sector in 2015 would decrease about 1 percent." *Id.* at 92-94, JA1300-02.

But EPA was presented with data showing that it had vastly underestimated EGU retirements. For example, the State of Ohio identified roughly 6 GW of EGU closures *in Ohio alone* resulting from the decision to regulate EGUs under § 112, Comments of Ohio Environmental Protection Agency at 3 & Enclosure (Jan. 15, 2016), EPA-HQ-OAR-2009-0234-20542, JA0932, 0937-41, which is more than EPA predicted for *the entire country*. EPA rejected this evidence in favor of blindly relying on its erroneous 2012 projections. RTC at 76 ("EPA disagrees with the commenter's assertion that the EPA must rely on a consideration of costs that includes data on recent plant closures …."), JA1284. EPA also ignored without explanation the

estimate of 19 GW of EGU closures provided by NERA Economic Consulting, *id.* at 78, JA1286, an estimate that is consistent with the Energy Information Administration's finding of approximately 20 GW of closures and 5.6 GW of conversions from coal to natural gas as a result of EPA's MATS rule. U.S. Energy Information Administration, Today in Energy: EIA electricity generator data show power industry response to EPA mercury limits at 1 (July 7, 2016), http://www.eia.gov/todayinenergy/ detail.php?id=26972, JA2204.

Thus, actual data confirm the numerous comments showing that impacts on coal companies, communities, and workers were far greater than EPA projected, and therefore even more important to consider. Reasoned decisionmaking requires that EPA "consider … important aspect[s] of the problem" and "examine the relevant data," *State Farm*, 463 U.S. at 43, but EPA gave no thought at all to these especially concerning "highly localized impacts" of its decision. RTC at 90, JA1298.

Instead of considering *all* costs of regulating EGUs under § 112, EPA restricted its evaluation in the Rule to the ability of the utility sector to "absorb" compliance costs. *See* 81 Fed. Reg. at 24,424-25, JA0054-55; *supra* p. 20. EPA's sector-wide approach to assessing costs masks the real impacts of § 112 regulation. For example, EPA included States with little or no coal generation in its cost metrics, 81 Fed. Reg. at 24,435, JA0065, diluting the impact of the Rule in coal-generating States. *See also* Murray Comments at 41-46, JA0881-86.

That EPA's approach was unreasonable is further illustrated by EPA's refusal to consider the impact of the MATS rule in the ERCOT market in Texas and on ARIPPA members. In finding the cost of the rule reasonable across the entire power sector, EPA repeatedly generalizes that "many of these sources are able to pass-through compliance costs to ratepayers." 81 Fed. Reg. at 24,436, JA0066; 80 Fed. Reg. at 75,035, JA0011. Indeed, EPA's assumption that compliance costs were recoverable was a key part of its (erroneous) conclusion that overall costs were *reasonable* (i.e., affordable). 81 Fed. Reg. at 24,424-25, JA0054-55. But, as Luminant and other commenters pointed out, that is not true for the competitive ERCOT market, where costs are not passed on through rates and producers alone must bear the compliance costs, Comments of Luminant on EPA's Proposed Supplemental Finding at 8-9 (Jan. 15, 2016), EPA-HQ-OAR-2009-0234-20533, JA0813-14, or for Texas, ninety percent of which "is covered by a single isolated grid with limited connections to external power supplies," *see Texas v. EPA*, 829 F.3d 405, 431 (5th Cir. 2016). EPA's response that it "consider[ed] all expenditures required under MATS whether these costs are borne either by electricity consumers or electricity producers,"[25] is no response at all; it confirms that EPA has given costs in the ERCOT market "no thought at all," *Michigan*, 135 S. Ct. at 2706. EPA's recognition elsewhere of the economic strains on generators in the ERCOT market and Luminant units in particular, 81 Fed. Reg. at

[25] RTC at 67, JA1275; *see also* 81 Fed. Reg. at 24,434, JA0064.

24,433 n.24, JA0063, underscores the arbitrariness of its refusal to "analyze costs to ERCOT independently" when assessing the *reasonableness* of the rule's costs, RTC at 67, JA1275, as well as the fact that its conclusions run counter to the evidence before the Agency (*i.e.*, the acute economic pressures in ERCOT). *State Farm*, 463 U.S. at 43.

The impropriety of EPA's approach in considering only *certain* costs imposed by MATS is further illustrated by EPA's failure to evaluate the cost corresponding to the lost environmental benefits resulting from the forced shutdown of bituminous coal refuse-fired sources operated by ARIPPA members. ARIPPA facilities provide a unique environmental benefit by utilizing state-of-the-art circulating fluidized bed combustion technology to convert coal refuse into energy. Comments of ARIPPA on EPA's Proposed Supplemental Finding at 2-3 (Jan. 14, 2016), EPA-HQ-OAR-2009-0234-20535 ("ARIPPA Comments"), JA0819-20. ARIPPA facilities combust coal refuse from both past and current mining activities, and thereby abate acid mine drainage from coal refuse piles, reclaim existing and idle or abandoned strip mines, and prevent uncontrolled air emissions caused by accidental burning of coal refuse piles, all at no cost to taxpayers.[26] *Id.* at 3, JA0820. By converting coal refuse into

[26] In promulgating MATS, EPA itself recognized these benefits, acknowledging that "[u]nits that burn coal refuse provide multimedia environmental benefits by combining the production of energy with the removal of coal refuse piles and by reclaiming land for productive use. Consequently, because of the unique environmental benefits that coal refuse-fired EGUs provide, these units warrant special consideration …." 76 Fed. Reg. at 25,066, JA0130. Yet, EPA failed to consider the cost of these lost benefits in conducting its supplemental finding analysis.

alternative energy, ARIPPA members are removing one of the principal sources of contamination to surface water and groundwater in coal mining regions of the United States, a long-term environmental benefit estimated to amount to billions of dollars. *Id.* Moreover, in the absence of continued operation of these ARIPPA facilities, the removal and clean-up of the remaining hundreds of millions of tons of coal refuse using traditional methods would perpetuate indefinitely, with the costs fully borne by taxpayers. *Id.*

Due to the unique technical characteristics of circulating fluidized bed technology[27] and the importance of preserving ash characteristics essential to the beneficial reuse of ash in mine reclamation,[28] those ARIPPA circulating fluidized bed units firing bituminous coal refuse cannot satisfy the hydrogen chloride standard (or the SO_2 surrogate) imposed by the MATS rule. Absent a revision to such standard, these plants will be forced to close and the environmental benefits they provide will be eliminated. Although ARIPPA specifically reminded EPA of these critical and

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[27] Because EPA's cost assessment in response to *Michigan* was limited to conventional coal- and oil-fired units, EPA also failed to consider the additional compliance costs associated with the unique technical and operational characteristics inherent in circulating fluidized bed design and operational configuration, including limitations on the technical and economic feasibility of both add-on emission systems and sorbent injection strategies for reducing hydrogen chloride emissions. ARIPPA Comments at 9-18, JA0826-35.

[28] The continued ability to direct ash for beneficial use in mine reclamation, rather than dispose of the ash as a waste material, is not only central to the environmental benefits provided by these units, but also critical to the facilities' continued financial viability.

substantial benefits in its comments, *id.* at 2-4, JA0819-21, EPA failed to acknowledge or respond to these comments. EPA's failure to consider the cost associated with the loss of these benefits as part of its Rule further confirms that EPA's evaluation of the costs imposed by the MATS rule was unreasonable and inconsistent with the Supreme Court's directive in *Michigan*.

At bottom, EPA's conclusion that "the record amply demonstrates that the advantages … for society … outweigh the disadvantages," 81 Fed. Reg. at 24,429, JA0059, depends on its refusal to consider every cost identified in the record other than EPA's carefully selected system-wide "affordability" cost metrics. EPA cannot find advantages outweigh disadvantages unless EPA actually considers *all* of the relevant disadvantages.

CONCLUSION

For the foregoing reasons, the petitions for review should be granted.

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ORAL ARGUMENT SCHEDULED FOR MAY 18, 2017

No. 16-1127 (and consolidated cases)

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

MURRAY ENERGY CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petitions for Review of Final Agency Action of the
United States Environmental Protection Agency
81 Fed. Reg. 24,420 (Apr. 25, 2016)

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MISCELLANEOUS

GLOSSARY OF TERMS

Act	Clean Air Act
Agency	United States Environmental Protection Agency
CAA	Clean Air Act
EGU	Electric Generating Unit
EPA	United States Environmental Protection Agency
HAP	Hazardous Air Pollutant
JA	Joint Appendix
MATS Rule	Mercury and Air Toxics Standards, 77 Fed. Reg. 9304 (Feb. 16, 2012)
NAAQS	National Ambient Air Quality Standards
$PM_{2.5}$	Fine Particulate Matter
RTC	Response to Comments
Standards	Mercury and Air Toxics Standards, 77 Fed. Reg. 9304 (Feb. 16, 2012)
Supplemental Finding	Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units; Final Rule, 81 Fed. Reg. 24,420 (Apr. 25, 2016)

SUMMARY OF ARGUMENT

In *Michigan v. EPA*, the Supreme Court held the Environmental Protection Agency's ("EPA" or "Agency") refusal "to consider whether the cost of its decision [to regulate hazardous air pollutant ("HAP") emissions from coal- and oil-fired electric generating units ("EGUs")] outweighed the benefits" violated the Clean Air Act ("CAA" or "Act"), because it was based on an unreasonable interpretation of §112(n)(1)(A) that deemed costs irrelevant to the decision to regulate power plants. 135 S.Ct. 2699, 2706-12 (2015). But on remand from that decision, EPA has again (1) failed to weigh costs against benefits in its "preferred approach"; (2) improperly relied on the co-benefits of reducing non-targeted pollutants in its "alternative approach"; and (3) ignored alternative control strategies and many of the relevant costs of regulation.

In defense of its preferred approach, EPA argues it need only be "aware" of the costs of regulation and refuses to compare them in any way to benefits. This conflicts directly with *Michigan*, which confirmed that no regulation is "rational" if its costs are entirely disproportionate to its benefits. EPA's preferred approach merely discusses costs in isolation and focuses on whether the industry can absorb them.

EPA's alternative approach weighs costs of regulation against benefits, but it improperly inflates those benefits by relying on the purported benefits of reducing pollutants other than HAPs (which make up over 99 percent of the benefits considered). EPA's argument that the CAA implicitly allows a decision to regulate

HAPs to be driven by the purported benefits of regulating non-HAPs ignores §112(n)(1)'s *explicit* identification of the factors EPA must consider, which focus exclusively on HAPs. EPA also fails to explain how its pursuit of reductions in non-HAP emissions under §112 comports with the CAA provisions governing those pollutants, or how reliance on benefits that it previously found too uncertain to justify direct regulation under those other provisions now supports indirect regulation under §112.

Finally, EPA's decision to ignore alternatives to regulating EGUs under §112 is contrary to the statute's explicit command to determine whether "regulation under this section" is appropriate in light of "alternative control strategies." And its decision to ignore many of the significant costs of its chosen regulatory approach violates *Michigan*'s command to consider "any disadvantage" of regulation. For these reasons, the petitions for review of EPA's supplemental "appropriate and necessary" finding ("Supplemental Finding") should be granted.

RESPONSE TO PURPORTED ERRORS

EPA identified five purported "errors" in Petitioners' statement of the case. Resp. 18-20. EPA's objections are incorrect or otherwise have no effect on the issues.

(1) Contrary to EPA's claim, Resp. 18, the Agency found in previous rulemakings that HAP emissions from EGUs did not pose significant health risks. Pet. Br. 4-5. EPA explicitly found "coal-fired power plants … do not emit mercury in such quantities that they are likely to" exceed levels EPA identified as sufficient to

"protect the public health with an ample margin of safety." 40 Fed. Reg. 48,292, 48,297, 48,298 (Oct. 14, 1975), JA1423, 1424; *see also* 49 Fed. Reg. 50,146, 50,147 (Dec. 26, 1984), JA1426 (reaffirming no-risk finding "even assuming restrictive dispersion conditions and uncontrolled emissions"). These analyses built on EPA's determination in its first mercury regulations that even under worst-case assumptions, EGUs' mercury emissions were two orders of magnitude lower than health-protective levels. EPA, Background Information on Development of National Emission Standards for Hazardous Air Pollutants: Asbestos, Beryllium, and Mercury, APTD-1503, at 76-77 (Mar. 1973), JA1949-50.

(2) EPA appears to dispute whether controls installed for compliance with the Acid Rain Program reduced HAP emissions from EGUs below pre-1990 levels. Resp. 19. In fact, that Program's reductions in HAP emissions are well-documented and significant. *E.g.*, EPA, Acid Rain Program 2004 Progress Report, EPA 430-R-05-012, at 21-22 (Oct. 2005), JA2158-59 (noting "20 percent reduction in [EGUs'] mercury emissions" from Acid Rain Program).

(3) The claimed "error" regarding the 2000 "notice of regulatory finding" is a matter of semantics. Resp. 19. EPA's Response actually confirms Petitioners' point that EPA found it "appropriate and necessary" to regulate *all* HAPs from coal-fired EGUs based solely on purported risks from *mercury* emissions. 65 Fed. Reg. 79,825, 79,830 (Dec. 20, 2000), JA1466. Likewise, EPA previously clarified its 2000 decision

to regulate all HAPs from oil-fired EGUs was based on purported risks from nickel emissions. *See* 70 Fed. Reg. 15,994, 15,996 n.7, 16,007 (Mar. 29, 2005), JA1489, 1500.

(4) EPA's fourth objection does not identify any "error" or inconsistency. Resp. 19-20. Petitioners agree EPA performed additional analyses for its 2012 reaffirmation of the "appropriate and necessary" finding—and those analyses yielded risks that were "relatively small" and "not changed much" from previous assessments. Pet. Br. 13-15.

(5) Petitioners agree EPA did not calculate the disaggregated compliance costs for the final Mercury and Air Toxics Standards Rule's ("MATS Rule" or "Standards") individual standards for mercury, non-mercury metals, and acid gases, Pet. Br. 16; these disaggregated costs were identified in testimony to Congress by an expert economist. *Id.* n.13. However, EPA did present disaggregated costs in its proposed Standards that are consistent with the cited estimates. 76 Fed. Reg. 24,976, 25,075 (May 3, 2011), JA0139. Likewise, the other findings Petitioners described—including the finding that the MATS Rule's reductions in non-mercury metals and acid gases will yield no quantifiable benefits—were correctly attributed to EPA. Pet. Br. 16-17.

ARGUMENT

I. EPA's Preferred Approach Is Unlawful.

A. *Michigan* Requires That EPA Meaningfully Weigh Costs in Relation to Benefits.

In its Response, EPA attacks a straw man. Petitioners do not argue *Michigan* "mandated a *particular* method of weighing benefits against costs (*i.e.*, a formal benefit-cost analysis)" in which all costs and benefits are monetized. Resp. 25; *see Michigan*, 135 S.Ct. at 2711. Indeed, Petitioners *disavowed* that argument. Pet. Br. 29. Rather, Petitioners argue *Michigan* requires EPA to weigh the costs and benefits of regulating EGUs under §112, rather than considering costs in the abstract or in terms of "affordability," when making an "appropriate and necessary" finding. *Id.* EPA's focus on its straw man confirms it has no response to the argument Petitioners made.

In the Supplemental Finding, EPA claimed it was not required to weigh costs against benefits. *See* Legal Memorandum Accompanying the Proposed Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units (EGUs) at 26 (undated), EPA-HQ-OAR-2009-0234-20519 ("Legal Memorandum"), JA0044; 80 Fed. Reg. 75,025, 75,031 (Dec. 1, 2015), JA0007. This conflicts directly with the Supreme Court's holding that "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Michigan*, 135 S.Ct. at 2707. The Court's emphasis on the need to weigh the costs of regulation against the advantages regulation confers

underpins its decision, and it is required by the Act's unique treatment of EGUs in §112. *Id.* at 2708; *see* Pet. Br. 29-33. Even the dissent noted it would be unreasonable to "impose massive costs far in excess of any benefit." *Michigan*, 135 S.Ct. at 2716-17 (Kagan, J., dissenting) (internal quotation marks and citation omitted). EPA has not distinguished any of the cases Petitioners cited showing that any reasonable weighing of costs entails some comparison to benefits. Thus, by evaluating costs only in light of "affordability," EPA has not avoided the possibility of "impos[ing] massive costs far in excess of any benefit" and has violated the Supreme Court's mandate in *Michigan*. *Id.*

Likewise, EPA argues extensively that cost "should not be treated as a predominant or overriding factor" in the appropriate and necessary analysis. Resp. 29; *see generally id.* 29-35. Petitioners never suggested cost should be the "predominant" consideration, although the Supreme Court's decision and the history and context of §112 indicate that it is an important one. Instead, Petitioners argue the costs of regulation must be balanced with benefits, as *Michigan* requires. This does not mean costs must be an "overriding factor"—but it does mean that costs have to at least be weighed against benefits when deciding whether regulation is appropriate.

In its Response, the Agency describes other factors it must consider and expounds at length on how regulatory decisions are made under other provisions of §112 that do not require a threshold "appropriate and necessary" finding. Resp. 32-35. Citing these provisions, EPA claims the "framework and aims" of §112 allow the

Agency to minimize the attention it gives to costs as just one of many factors it must consider, with little heed for *Michigan*. *Id.* 30. Indeed, EPA asserts its statutory obligation to consider costs is fulfilled so long as the Agency is "aware" of them when deciding whether to regulate, *id.* 28 (citing *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1046-47 (D.C. Cir. 1978))—effectively adopting the "Churchill Martini" legal standard for cost consideration, Pet. Br. 34 n.17.

This is not what the Supreme Court directed in *Michigan*. Based on its analysis of the Act's "framework and aims," the Court outlined the role costs have in the "appropriate and necessary" analysis.[1] *Michigan*, 135 S.Ct. at 2708 ("Statutory context reinforces the relevance of cost."). For the purposes of §112(n), the "limits of reasonable interpretation," *id.* at 2711, require that EPA compare the costs against the benefits in order to ensure that regulating HAP emissions from EGUs does not "do[] significantly more harm than good," *id.* at 2707. Further, the Court cautioned against minimizing the role of costs in the "appropriate and necessary" inquiry, noting that "'harmoniz[ing]' the program's treatment of power plants with its treatment of other sources … overlooks the whole point of having a separate provision about power plants: treating power plants *differently* from other stationary sources." *Id.* at 2710.

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[1] For this reason, EPA is not entitled to deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). *See* Resp. 25, 27. This case involves EPA's interpretation of a decision by the Supreme Court, *see Michigan*, 135 S.Ct. at 2712, not its interpretation of an ambiguous statute. The judicial branch does not delegate the job of saying what its decisions mean to executive agencies.

This Court's decision in *Weyerhaeuser* reinforces this analysis. EPA relies on that case to argue that where the Agency is required to consider numerous factors, it may "'relate the various factors [to each other] as it deems necessary'" and need only "pay[] some attention" to each. Resp. 28 (quoting *Weyerhaeuser*, 590 F.2d at 1046). In *Weyerhaeuser*, however , the Court explained EPA enjoyed this kind of discretion only when deciding how to account for certain *secondary* decisional factors such as energy requirements and ancillary environmental impacts. *Weyerhaeuser*, 590 F.2d at 1045-46 (citing 33 U.S.C. §1314(b)(1)(B)). In contrast, when adopting effluent limitations under the Clean Water Act (the issue in *Weyerhaeuser*), EPA was required to weigh costs and benefits "in relation to" one another with "greater attention and rigor." *Id.* That costs and benefits require scrutiny in relation to one another is especially the case here, where the Supreme Court has directed EPA to weigh the costs of §112 regulation against the benefits as an important criterion in deciding whether to regulate EGUs under §112.

Thus, while nothing in *Michigan* requires EPA to conduct a *formal* cost-benefit analysis, the Agency must compare costs and benefits to ensure the two are not "disproportionate." 135 S.Ct. at 2710.

B. EPA's Preferred Approach Does Not Weigh Costs Against Benefits.

The Agency next argues that even though *Michigan* requires only that it be "aware" of costs, EPA's preferred approach nonetheless compared the costs and

benefits of regulating EGUs under §112. But as Petitioners explained, EPA's cost assessment focused narrowly on whether the electric utility industry as a whole could "absorb" the costs of regulating all of the HAPs emitted from EGUs under §112. Pet. Br. 35. In response, EPA simply recites back the cost "analysis" it performed in the Supplemental Finding and claims in an *ipse dixit* that it "weigh[ed] the reasonable cost of the Standards with [previous findings of] significant public health and environmental factors." Resp. 41; *see id.* 36-42. EPA's lengthy recitation only demonstrates how thoroughly divorced its cost assessment was from any comparison to the benefits of regulation.

In its Response, the Agency denies its cost assessment focused on whether the costs of regulation were affordable. Resp. 36. Yet EPA explicitly stated the opposite in the rulemaking, explaining its cost inquiry "focus[es] on whether the power sector can reasonably absorb the cost of compliance with MATS." 80 Fed. Reg. at 75,030, JA0006. Further, a cursory examination of the four metrics EPA used in its "preferred approach" to determine whether costs were "reasonable" reveals all four dealt exclusively with whether the costs of regulation can be absorbed, and each omits any consideration of the benefits. *See* Resp. 36-39. EPA examined annual compliance costs as a share of annual sales and as a share of annual variation in capital and operating expenses; it examined the MATS Rule's effect on electricity prices as a share of annual variation; and it examined whether forced retirements would threaten electric reliability. 81 Fed. Reg. 24,420, 24,424-25 (Apr. 25, 2016), JA0054-55. None

of these metrics says anything about whether the costs of regulation, even if affordable, are worth the advantages they convey. *See Indus. Union Dep't, ALF-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 668 n.4 (1980) (Powell, J., concurring in part and concurring in the judgment) ("The cost of complying with a standard may be 'bearable' and still not reasonably related to the benefits expected.").

Likewise, EPA denies it walled off its evaluation of costs from any comparison to benefits. Resp. 36. But the Agency's own description contradicts that denial:

> *After* determining that the cost of the Standards is reasonable, EPA *then* weighed that conclusion with the significant public health and environmental risks addressed by the Standards and concluded that a consideration of cost did not cause the Agency to alter its prior [appropriate and necessary] finding . . . .

Id. 23 (emphases added); *see also* 80 Fed. Reg. at 75,038, JA0014 (stating—before any discussion of benefits—that "EPA has now evaluated cost" based on its four metrics). In other words, EPA determined the costs of regulating EGUs under §112 were "reasonable" because they could be absorbed by industry and, because they were "reasonable," concluded they were justified by whatever benefits had previously been identified by EPA. This approach cannot be reconciled with *Michigan*.

Rather than assessing the significance of the benefits to be gained from regulating EGUs under §112 and weighing them against the costs, the Agency merely pointed, without further analysis, to "specific public health and environmental hazards that EPA had already determined exist" in its original "appropriate and necessary" finding. Resp. 36. These previous "hazard" findings are a series of platitudes

representing, at best, the "presumed reduction in risk attendant to" reducing HAP emissions generally. Legal Memorandum at 18, JA0036; *see* 80 Fed. Reg. at 75,038, JA0014. Specifically, they consist of findings that: EGUs continue to emit some HAPs, despite the implementation of other parts of the Act; HAPs in sufficient quantities can be harmful to public health or the environment (although not necessarily in the amounts emitted from EGUs); and controls are available to reduce these emissions. Resp. 40-41; 80 Fed. Reg. at 75,038, JA0014. By failing to do any weighing of the costs and benefits of regulation under §112, EPA has failed to fulfill the Court's mandate in *Michigan*.

Finally, as a last-ditch response, EPA argues its preferred approach is lawful because "[t]his Court has upheld less rigorous EPA approaches to considering costs in implementing the CAA." Resp. 41. But aside from the fact that none of EPA's cited cases involve a threshold decision whether regulation is appropriate, none of them actually support EPA's position because each case involved at least some weighing of costs against benefits. For example, in both *U.S. Sugar Corp. v. EPA*, 830 F.3d 579 (D.C. Cir. 2016), and *Lignite Energy Council v. EPA*, 198 F.3d 930 (D.C. Cir. 1999), the Agency made its regulatory decisions after considering the cost-effectiveness of its chosen standard. *See U.S. Sugar Corp.*, 830 F.3d at 616 (upholding beyond-the-floor standard that would only be implemented if cost-effective for sources); *Lignite Energy Council*, 198 F.3d at 933 (citing rule's cost-effectiveness discussion at 62 Fed. Reg. 36,948, 36,958 (July 9, 1997)). Cost-effectiveness provides

a standardized tool for EPA to gauge what emission reductions are being achieved for each dollar of compliance costs—in other words, it evaluates costs in terms of benefits. Likewise, while this Court in *Portland Cement Association v. Train* did not require a formal cost-benefit analysis, its premise for upholding EPA's cost analysis was that the Agency had ensured "that a gross disproportion between achievable reduction in emission and cost of the control technique would not be required." 513 F.2d 506, 508 (D.C. Cir. 1975).[2]

The Supreme Court in *Michigan* instructed that "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." 135 S.Ct. at 2707. EPA's preferred approach, which assesses the costs of regulation in terms of affordability and cuts off any balancing with benefits, leaves open precisely that possibility and is inconsistent with the statute and *Michigan*.

C. EPA Erred by Failing to Separately Assess the Costs and Benefits of Regulating Mercury, Non-Mercury Metals, and Acid Gases.

EPA's error was compounded by its refusal to address what it characterizes as the essential feature of "regulation under this section" (the focus of the §112(n)(1)(A)

[2] Energy Industry Respondent-Intervenors also cite *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291 (D.C. Cir. 2003), in support of EPA's preferred approach. Energy Industry Resp't-Int. Br. 5. But *Consumer Electronics Association* primarily involved a dispute about what the compliance costs of regulation *were*, not whether the rule was justified in light of them. *Id.* at 303. Further, the agency in that case did in fact "weigh[] costs and benefits." *Id.* at 304.

determination)—the requirement for separate regulation of mercury, non-mercury metals, and acid gases, each of which entails distinct costs and benefits. EPA claims (1) this Court's decision in *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), *rev'd*, *Michigan v. EPA*, 135 S.Ct. 2699 (2015), directed it to ignore the separate costs and benefits of these three control mandates, and (2) in any event, this analysis would be impractical. Resp. 42-44. Both responses are incorrect.[3]

First, this Court's decision in *White Stallion* was premised on the assumption EPA could lawfully ignore costs when determining that regulating EGUs under §112 was "appropriate and necessary," and EGUs should be regulated "the same way as other sources." *See* 748 F.3d at 1241, 1244. But the Supreme Court rejected that conclusion, finding "[n]o regulation is 'appropriate' if it does significantly more harm than good," *Michigan*, 135 S.Ct. at 2707, and that EPA's attempt to "'harmonize[]' the program's treatment of power plants with its treatment of other sources … overlooks the whole point of having a separate provision about power plants." *Id.* at 2710. That separate provision, the Court explained, requires EPA to determine whether regulation of power plants "under this section," i.e., under §112, is appropriate. *Id.* To the extent *White Stallion* says (as EPA argues) that "regulation under this section"

[3] To the extent EPA suggests this argument was not sufficiently developed in Petitioners' opening brief, *see* Resp. 42, EPA is wrong. This issue was thoroughly briefed in Argument Sections I.B.3 and III.A of Petitioners' opening brief, and as such is properly before the Court.

means regulation of a substance (e.g., acid gases) that presents no public health hazard at enormous cost, *Michigan* overruled it. EPA's approach here is inconsistent with *Michigan* because it would allow regulation where the costs are wholly disproportionate to the benefits.

Second, EPA is fully capable of separately estimating the costs of its three control mandates. Indeed, it did just that in the proposed MATS Rule, where it estimated annual costs of $3.029 billion for acid gas control, $2.227 billion for mercury control, and $3.249 billion for non-mercury metal control. 76 Fed. Reg. at 25,075, Tbl. 25, JA0139. The assertion now that determining these three figures was "not practical" because "control technologies … target many different hazardous air pollutants" conflicts directly with the record. Resp. 43. EPA's refusal to consider separately the costs and benefits of the three control mandates therefore was not "a technical determination … entitled to deference," *id.* 43. It is a poorly-veiled attempt to avoid facts and analysis that leave no doubt that regulating EGUs under §112 "is [not] even rational, never mind 'appropriate.'" *Michigan*, 135 S.Ct. at 2707.

II. EPA's Alternative Approach Is Unlawful.

A. The Purported Benefits of Regulating Non-HAPs Cannot Justify Regulating HAP Emissions From EGUs Under §112.

EPA claims that because Congress directed EPA in the Utility Study to evaluate the public health risks from any HAP emissions from EGUs remaining after imposition of other provisions of the Act, Congress must have intended to authorize

EPA to base its decision to regulate HAPs from EGUs under §112 on reductions in non-HAPs that might result from such regulation. Resp. 46-47; Legal Memorandum at 24-25, JA0042-43. This assertion makes no sense and is contradicted by the language of the statute.

Under §112(n)(1), the decision whether to regulate power plants focuses exclusively on addressing HAP emissions, not on reductions in non-HAPs. Thus, the statute's plain text directs the Agency to examine in the Utility Study "the hazards to public health reasonably anticipated to occur as a result of emissions [from EGUs]… of *pollutants listed under subsection (b)*," i.e. HAPs. CAA §112(n)(1)(A) (emphasis added). Congress then required that the "appropriate and necessary" finding be based on "the results of the [Utility] study"—i.e., on the hazards to public health from the HAP emissions identified in the Utility Study. *Id.* That Congress directed EPA to limit the Utility Study to evaluation of those HAP emissions from EGUs remaining "after imposition of the requirements" of the CAA, *id.*, does not expand the basis for the §112(n) regulatory decision to include non-HAP emissions; it merely specifies the HAPs on which EPA's "hazard" analysis and §112(n) regulatory decision must be based.

As the Supreme Court in *Michigan* made clear, the purpose of the §112(n)(1) "appropriate and necessary" finding is for EPA to answer the following question: Are the benefits of reducing HAPs worth the costs of regulating them? *See* 135 S.Ct at 2710. EPA's answer is: The benefits of reducing *non-HAPs* are worth the costs of

regulating HAPs. Put simply, EPA did not answer the question Congress asked. The Agency's invocation of the Utility Study as a blank check to rely on ancillary reductions in non-HAPs is a non-sequitur. The statutory language makes clear that reducing non-HAPs like fine particulate matter ("$PM_{2.5}$") to levels below the applicable national ambient air quality standard ("NAAQS") is irrelevant to the "appropriate and necessary" inquiry.

The statute is neither "ambiguous" nor "silen[t]" on whether EPA is precluded from considering co-benefits. Resp. 47, 51. Section 112(n)(1) explicitly identifies the specific factors that EPA must consider when making the "appropriate and necessary" finding, and all of these factors address hazards to public health from EGU *HAP* emissions, not non-HAPs like sulfur dioxide or $PM_{2.5}$.

As Petitioners explained in their opening brief, §112(n)(1) requires EPA to conduct three studies: the Utility Study; a second study under §112(n)(1)(B) to evaluate the "rate and mass" of EGU mercury emissions, "the health and environmental effects of such emissions," and the cost of available control technologies for mercury ("Mercury Study"); and a third study under §112(n)(1)(C) on "the threshold level of mercury exposure below which adverse human health effects are not expected to occur." Pet. Br. 32-33, 43-44. Those studies all focus on the hazards to public health caused by remaining HAP emissions from EGUs and the costs of available HAP control technologies, which EPA must take into account when making its "appropriate and necessary" finding.

By contrast, there is nothing in §112(n)(1) that gives EPA even implicit authority to consider health risks from non-HAPs in deciding whether to regulate. To the contrary, Congress' focus on the health risks from EGUs' remaining HAP emissions and the costs of controlling them *negates* any implication that EPA can base its finding on non-HAP emissions. In this regard, EPA misreads the Supreme Court's application, in *Michigan*, of its earlier decision in *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001).

In *American Trucking*, the Court emphasized EPA could not consider cost when setting NAAQS under §109(b) at levels "requisite to protect the public health" with an "adequate margin of safety." CAA §109(b). The Court in *Michigan* explained *American Trucking* "establishes the modest principle that where the Clean Air Act expressly directs EPA to regulate on the basis of a factor that on its face does not include cost, the Act normally should not be read as implicitly allowing the Agency to consider cost anyway." *Michigan*, 135 S.Ct. at 2709. Similarly, in this case, given Congress' single-minded focus in §112(n)(1) on the health hazards from EGU HAP emissions, there is *no* explicit or implicit authority for EPA to consider non-HAP co-benefits. *American Trucking* therefore supports the conclusion that EPA is precluded from considering co-benefits when it makes its "appropriate and necessary" finding.

EPA also fails to distinguish similar cases in which this Court rejected the Agency's attempts to rely on factors other than those specified by Congress when deciding whether and how to regulate. *See* Pet. Br. 45-47 (citing *Am. Petroleum Inst. v.*

EPA, 52 F.3d 1113 (D.C. Cir. 1995) ("*API*"); *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995)). With respect to *API*, the Agency merely asserts it "is not arguing that a broad grant of statutory authority allows it to regulate pollutants beyond those targeted by the relevant statutory provision." Resp. 51. But that is *precisely* what EPA is doing. Just as the Agency in *API* justified its reformulated gasoline requirements by pointing to ancillary "global warming benefits" not targeted by the relevant statute, EPA here justifies its decision to regulate HAP emissions from EGUs by pointing to the co-benefits of reducing non-targeted pollutants like $PM_{2.5}$ (which make up over 99 percent of the cited benefits). 52 F.3d at 1116. As to *Ethyl Corp.*, EPA asserts it is not "relying on a factor other than those specified by Congress when deciding how to regulate." Resp. 51. But EPA's co-benefits approach does precisely that: as described above, *supra* pp. 15-17, Congress directed EPA to base the "appropriate and necessary" inquiry on hazards associated with HAP, not non-HAP, emissions.

EPA's reliance on legislative history is also off-point. EPA cites a 1989 report by the Senate Committee on Environment and Public Works addressing an earlier version of §112, which purportedly envisions that EPA may consider non-HAP co-benefits when setting emission standards under §112(d)(2). Resp. 46-47. But choosing among potential emission standards differs from *the initial decision to regulate* that EPA is required to undertake under §112(n)(1)(A)—a distinction the Supreme Court emphasized in *Michigan*. 135 S.Ct. at 2706, 2709. Under the terms of §112(n)(1)(A), that initial decision must be based on "the results of the [Utility

S]tudy," that is, on the hazards to public health from any remaining HAP emissions from EGUs after imposition of the other provisions of the CAA. That EPA might consider non-HAP co-benefits in choosing among potential standard levels once the initial decision to regulate is made has no bearing on whether it is "appropriate" to regulate HAP emissions from EGUs in the first place.

EPA's reliance on *U.S. Sugar Corp.* is similarly misplaced. That case involved EPA's refusal to promulgate more lenient health-based emissions standards under §112(d)(4) for hydrogen chloride emissions from industrial boilers rather than technology-based standards under §112(d)(2). In support of its refusal to promulgate health-based standards, EPA considered "reductions in emissions of other pollutants, also known as 'co-benefits,' achieved through enforcement of the [technology-based standards]." 830 F.3d at 624. But here again, EPA overlooks the critical distinction between EPA's selection of alternative standards for source categories under §112(d) and its initial decision to regulate power plants under §112(n)(1)(A).

Further, in *U.S. Sugar* the Court determined EPA was not foreclosed from relying on co-benefits because the text of §112(d)(4) "does not specify the factors" EPA must consider when setting health-based standards. *Id.* at 626. By contrast, as discussed above, *supra* pp. 15-17, Congress in §112(n)(1)(A) foreclosed EPA from relying on non-HAP risks when determining whether it is "appropriate and necessary" to regulate HAP emissions from EGUs.

B. EPA's Guidance on Preparing Economic Analyses for Other Purposes Does Not Support EPA's Consideration of Non-HAP Co-Benefits.

EPA argues it is reasonable to consider non-HAP co-benefits when making its "appropriate" finding under §112(n)(1)(A) because it "routinely considers 'ancillary' consequences" when performing benefit-cost analyses for other purposes. Resp. 51. EPA notes its Guidelines for Preparing Economic Analyses ("Guidelines") state that all monetized benefits and costs, including "'ancillary (or co-) benefits and costs,'" should be included in a typical benefit-cost analysis. *Id.* 53 (quoting Guidelines at 11-2 (Dec. 17, 2010, updated May 2014), EPA-HQ-OAR-2009-0234-20503, JA0759) (emphasis omitted). Similarly, EPA observes the Office of Management and Budget's Circular A-4 (which provides guidance to federal agencies on how to implement Executive Order 12866) states that a standard benefit-cost analysis should consider ancillary benefits. *Id.* 54.

EPA neglects to mention these guidelines were developed for conducting cost-benefit analyses under *other* authorities lacking the pollutant-specific focus of §112. *See* Guidelines at Ch.2, JA0731-35 (listing authorities). In particular, the Guidelines primarily address cost-benefit analyses under Executive Order 12866, which broadly requires "[a]n assessment of the potential costs and benefits of the regulatory action." Exec. Order 12866 §6(a)(3)(B), 58 Fed. Reg. 51,735, 51,741 (Oct. 4, 1993), JA1452. Although it may be appropriate for EPA to include ancillary benefits in benefit-cost analyses conducted for these broad purposes, these guidelines do not expand the

scope of the §112(n)(1)(A) initial regulatory determination, which Congress limited to HAP-related benefits.

Indeed, when read in the context of the "appropriate and necessary" analysis §112(n)(1)(A) requires, EPA's Guidelines confirm the Agency cannot base a decision to regulate HAP emissions from EGUs on non-HAP emission benefits. The Guidelines state "[a]n economic analysis of a policy or regulation compares the current state of the world, the *baseline scenario*, to the expected state of the world with the proposed policy or regulation in effect, the *policy scenario*." Guidelines at 5-1 (emphasis in original), JA0736. Importantly, one of the "guiding principles" when specifying the baseline is to "[c]learly specify the current and future state of relevant economic variables, the environmental problem that the regulation addresses and the regulatory approach being considered[.]" *Id.* at 5-2, JA0737.

Where a statute prohibits an agency from considering specific economic factors, those factors are not "relevant economic variables" under "the regulatory approach being considered." *Id.* Congress has done so here by specifying that EPA must consider HAP costs and benefits when making its "appropriate and necessary" finding.

EPA tries to dismiss this self-evident conclusion by claiming Petitioners quote these passages out of context. Resp. 53-54 n.11. In fact, it is EPA that fails to acknowledge the context and significance of the Guidelines here. The Guidelines make clear the "the current and future state of relevant economic variables" are

guiding principles for an economic analysis that compares the baseline, "current state of the world" and "the expected state of the world" with the proposed regulation. Guidelines at 5-1, 5-2, JA0736, 0737. In other words, it is essential that the scope of the baseline correspond to the policy scenario, since the results of the cost-benefit analysis are "measured as the differences between these two scenarios." *Id.* at 5-1, JA0736. Thus, the ancillary co-benefits Congress prohibited EPA from considering are not "relevant economic variables" under the Guidelines and must be excluded when EPA undertakes the "appropriate and necessary" under §112(n)(1)(A).

C. EPA's Reliance on Co-Benefits Conflicts With Other CAA Programs.

1. Congress did not intend for EPA to use §112 as an end-run around other CAA programs.

EPA offers nothing to refute Petitioners' detailed showing that resting the "appropriate and necessary" finding on reductions in non-HAP emissions is an illegitimate end-run around both the NAAQS program and the Title IV Acid Rain Program, Pet. Br. 47–49, other than the blanket assertion that "it is not," Resp. 56. As a result, EPA offers no explanation for why Congress would have intended for EPA to use §112 as an "end run around the restrictions that would otherwise … give [EPA] less control" over non-HAP emissions in the NAAQS program, and to reject the judgments and compromises of Congress in the Acid Rain Program specifically setting limits on sulfur dioxide emissions from these very same sources. Tr. of Oral

Arg. at 59–61, *Michigan v. EPA*, 135 S.Ct. 2699 (2015) (No. 14-46).[4] Thus, EPA has "relied on [a] factor[] which Congress has not intended it to consider" in determining whether it is appropriate to regulate EGUs under §112. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

2. EPA fails to address its prior determination that available evidence does not support $PM_{2.5}$ reductions beyond those already required by the NAAQS.

EPA maintains reducing $PM_{2.5}$ below the concentration of 12 micrograms per cubic meter ("$\mu g/m^3$") it set as the NAAQS in 2013 produces "real" health benefits. Resp. 56. As support, it notes the available scientific evidence cannot establish a specific concentration of $PM_{2.5}$ in the ambient air "below which health risk reductions are not achieved." *Id.* 57; *see also* 81 Fed. Reg. at 24,440, JA0070 ("[T]here is no evidence of a $PM_{2.5}$ concentration below which health effects would not occur.").

EPA fails to address Petitioners' main argument that, because EPA in 2013 determined any health benefits from reducing concentrations of $PM_{2.5}$ below 12 $\mu g/m^3$ were too uncertain to justify regulation under the NAAQS program, EPA cannot now assert the health benefits from such lower concentrations have become so substantial (supposedly worth $37-$89 billion each year) that they justify HAP regulation, without explaining why it currently has confidence in the existence of such

[4] Similarly, EPA's other arguments ignore the Acid Rain Program (which is specific to EGUs) and the purpose behind the §112(n)(1) provision. This distinguishes this case from *U.S. Sugar*, which specifically dealt with small boilers exempted from both the Acid Rain Program and §112(n)(1).

benefits when in 2013 it did not. Pet. Br. 51-55. Although EPA may choose to ignore Petitioners' argument, it cannot avoid the fact that EPA failed to identify any new scientific information that would refute its 2013 determination that it lacked confidence in the existence of health benefits below the NAAQS. And EPA's reliance on a double negative (that "there is no evidence of a $PM_{2.5}$ concentration below which health effects would not occur") fails to affirmatively demonstrate the existence of any such benefits. Resp. 57 (quoting 81 Fed. Reg. at 24,440, JA0070). In short, EPA has not shown $PM_{2.5}$ concentrations below the NAAQS provide any reliable health benefits (much less benefits of $37-$89 billion per year). For that reason alone, it cannot rely on $PM_{2.5}$ co-benefits as support for its "affirmative and necessary" finding.

D. EPA Never Made an Appropriate Finding That Was Properly Limited to the Relevant HAP Benefits.

Finally, EPA fails to respond to Petitioners' argument that the Agency's refusal to exclude non-HAP co-benefits from its benefit-cost analysis renders that analysis invalid. Pet. Br. 42, 55-57. As Petitioners acknowledged, EPA relied on various benefits from reducing HAP emissions it was unable to monetize. *Id.* 55-57. But EPA never weighed the relevant benefits it is authorized to consider (that is, benefits from reducing HAP emissions) against the costs of the MATS Rule. *See supra* pp.5-14. And EPA does not now argue non-monetized benefits from reducing HAPs outweigh the costs.

Rather than respond to that key point, EPA simply lists benefits it could not quantify or monetize. Resp. 59. That is a non sequitur. In a proper "appropriate and necessary" inquiry, EPA must limit the scope of its benefit-cost analysis to the legally relevant benefits and costs Congress authorized it to consider, and it must explain why those benefits justify the enormous costs of regulating HAP emissions from EGUs under §112. EPA has not done the former; and it likely cannot do the latter.

III. EPA Must Consider All Relevant Costs and Disadvantages in Light of Alternative Control Strategies.

A. EPA Wrongly Refused to Consider Alternative Control Strategies.

1. EPA's view of "alternative control strategies" is wrong and ignores the obligation to consider disadvantages.

EPA does not dispute that the specific alternative control strategies the Agency was asked to consider—including §111 or relying on State regulation under §116 and §112(*l*)—"would avoid many of the disadvantages" of using §112. Pet. Br. 58. These avoidable disadvantages are costs EPA must consider. *See Michigan*, 135 S.Ct. at 2707 (stating EPA must consider "any disadvantage"). Simply put, if EPA has alternatives to achieve the benefits it seeks at less cost, EPA must consider them. EPA's refusal to do so represents an "artificial narrowing of option[s]" "antithetical to reasoned decisionmaking." *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 817 (D.C. Cir. 1983) (internal quotation marks and citation omitted).

In this regard, the statute provides EPA must determine if regulating EGUs "under this section" (i.e., under §112) is "appropriate and necessary after considering

the results" of a study that is to "develop and describe" "alternative control strategies." CAA §112(n)(1)(A). EPA argues that "alternative control strategies" is limited to "types of control technologies," rather than "different regulatory frameworks." Resp. 61–62 (emphasis omitted). But it is implausible that Congress intended its direction to EPA (to determine whether "regulation under this section" is appropriate after considering "alternative control strategies") to mean something at odds with this plain language—i.e., that EPA was instead to "develop" air toxics *control technologies* "within 3 years." CAA §112(n)(1)(A). In contrast to EPA's counter-textual argument, Congress often directs agencies to develop *regulatory strategies* and 3 years is ample time for such a task.

Statutory context likewise refutes EPA's reading because §112 repeatedly uses "strategy" and "strategies" to refer to regulatory options. CAA §112(k)(3)(A) ("prepare" "comprehensive strategy to control emissions"); *id.* §112(k)(4) ("encourage and support areawide strategies developed by State … agencies"); *id.* §112(n)(5) ("develop and implement" "control strategy for emissions"). Indeed, §112(n)(5) calls for EPA to consider a "control strategy" under which EPA and the States work together to regulate under §111, illustrating that "alternative control strategies"

include §111 and similar options like relying on and encouraging States to use their authority preserved by §116.[5]

Moreover, EPA explained to Congress in 1990 that one of the purposes of the provision that became §112(n)(1) was to "allow[] the needed flexibility to identify and address the most significant toxic chemicals from utilities without mandating expensive controls that may be unnecessary." Letter from William K. Reilly, Adm'r, EPA, to Members of the Senate (Jan. 26, 1990), JA1866; *see also* Pet. Br. 59; *id.* 6–7 & n.5 (citing extensive legislative history discussed in Comments of Murray Energy Corp. at 14-29 (Jan. 15, 2016), EPA-HQ-OAR-2009-0234-20536 ("Murray Comments"), JA0854-69). The critical "needed flexibility" is afforded only by turning to more flexible alternative control strategies that EPA is required by statute to identify. EPA's refusal to even consider them frustrates a core purpose of §112(n)(1).[6]

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[5] EPA's claim that it read "strategies" to mean "technologies" in the 1998 study without subsequent objection from Congress, Resp. 62, is immaterial post-enactment legislative history. *See Continental Air Lines, Inc. v. DOT*, 843 F.2d 1444, 1447, n.3 (D.C. Cir. 1988). Besides, Congress did in fact respond by requesting an analysis of alternative control strategies from the U.S. Energy Information Administration. *See* U.S. Energy Info. Admin., Analysis of Alternative Mercury Control Strategies, SR-OIAF/2005-01, at 1 (Jan. 2005), https://www.eia.gov/oiaf/servicerpt/mercury/index.html, JA2096.

[6] Another core purpose of §112(n)(1) was for EPA to consider alternatives that would not conflict with the flexibility of the Title IV Acid Rain Program for regulating EGU emissions of sulfur dioxide. EPA's claim that "there is no record evidence that a conflict exists," Resp. 62, is plainly false. *See* Pet'rs' Br. 6–7, 59 (citing Murray

Finally, *White Stallion* does not absolve EPA from assessing the costs of §112 in light of less costly and more flexible alternative control strategies. *See* Resp. 63–64. The discussion EPA cites addresses "the appropriate mechanism for regulating … under §112 after the 'appropriate and necessary' determination was made," not the options EPA is required to consider beforehand. *White Stallion*, 748 F.3d at 1244.

2. EPA did not reasonably consider and reject alternatives.

After arguing it need not consider alternatives, EPA asserts it did "consider[]"—but "reasonably rejected"—the alternative control strategies of using §111 or relying on State regulation preserved by §116 and encouraged by §112(*l*).[7] Resp. 66. However, EPA effectively concedes it "rejected considering §111 as an alternative strategy" based exclusively on the claim that there was no "clear framework for developing standards" under §111, Pet. Br. 22, and it "refus[ed] 'to evaluate the potential for state action'" based on its interpretation that deferring to

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Comments); *see also id.* 47–49 (detailing "concerns that §112(d) standards would undo the efficiency of the Title IV program by mandating uniform controls of acid gases so as to eliminate the flexibility, freedom of choice, and efficiency that are the core goals of Title IV"). Also, the statement EPA refers to as "a single statement by one Representative," Resp. 62, was not: it outlined the "sense of the conferees." 136 CONG. REC. 35,013 (Oct. 26, 1990), JA1916.

[7] EPA conflates §112(k)(4), a directive that EPA encourage State and local actions to regulate smaller "area" sources, with §112(*l*), the program that calls for EPA to encourage and support State participation in an "optional program … for the review of high-risk point sources" and for EPA to "establish and maintain an air toxics clearinghouse and center to provide technical information and assistance to State and local agencies" in regulating all stationary sources of HAPs. *See* Resp. 61; CAA §112(*l*).

state regulation would be in conflict with the statute. *Id.* 23; Resp. 65. As a result, nowhere in the record has EPA assessed the cost of using §112 to regulate EGUs relative to these alternatives.

The claim that §111 is not a "clear regulatory alternative framework" is absurd. EPA has used §111 and its implementing regulations to regulate stationary sources for decades. *See* 40 C.F.R. Part 60.

EPA's justification for refusing to consider the alternative of relying on state regulation is also flawed. EPA reasons by negative implication that the direction in §112(n)(1) that EPA must consider the "imposition of the requirements" of the Act means Congress has forbidden EPA from considering actions by States preserved by §116. Again, Congress expressly directed that EPA consider "alternative control strategies." Moreover, the very same section of the Act directs EPA to, among other things, "encourage and support … strategies developed by State or local air pollution control agencies" to use the retained authority under §116 to address HAP emissions, CAA §112(k)(4), and to give States "technical information and assistance," *id.* §112(*l*)(3). Surely EPA is not implicitly prohibited from considering State and local emission reduction "strategies" when Congress explicitly identifies, strongly endorses, and orders EPA to support this method of advancing §112's objectives.

EPA asserts considering the obvious alternative of relying on State actions "would not serve Congress's goal" for "prompt, permanent, and ongoing reductions" of HAP emissions. Resp. 65. EPA once again ignores Congress's express instruction

in §112(n)—i.e., reducing such EGU emissions must be found "appropriate and necessary" under §112—as well as Congress's explicit statement of goals and purposes. CAA §101(a)(3) ("[A]ir pollution prevention … and air pollution control at its source is the primary responsibility of States and local governments."). Consideration of State and local actions to address EGU emissions entirely comports with these explicit objectives of the Act. EPA has not offered any reason to suppose that Congress would prohibit the Agency from considering what would happen if it does not regulate EGUs under §112, or that Congress would force EPA to consider only a hypothetical alternative world in which no alternatives for regulating HAP emissions from EGUs exist.

B. EPA Concedes It Must Consider All Relevant Costs and Disadvantages, But Then Fails to Do So.

EPA does not dispute Petitioners' argument that *Michigan*, §112(n)(1), and reasoned decisionmaking demand that EPA consider "any disadvantage" of using §112 and "*all* of the relevant costs." Pet. Br. 64 (quoting *Michigan*, 135 S.Ct. at 2707; *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 737 (D.C. Cir. 2016) (Kavanaugh, J., dissenting)). The only question is whether EPA met this obligation. It did not. Indeed, EPA does not deny it ignored many costs and disadvantages, taking issue only with whether the Agency improperly failed to consider "certain costs" specifically discussed in its brief. Resp. 60, 67.

1. EPA does not dispute it ignored the costs of §112(f).

Michigan squarely held that EPA "must consider cost—*including, most importantly, cost of compliance*—before deciding whether regulation is appropriate and necessary." 135 S.Ct. at 2711 (emphasis added). One such "cost of compliance" is the potential compliance costs associated with §112(f)—a second stage of regulation under §112. If EPA interprets §112 as requiring that EGUs be regulated the same as other source categories, such that this second stage is required,[8] the "cost of compliance" would not be just the potential costs associated with the first stage of §112 regulation (i.e., §112(d)). EPA, however, refuses to clarify whether §112(f) review is required for EGUs, and it refused to consider these potential costs at all based entirely on the fact that the initial threshold §112(f) analysis of residual risk—if applicable—was not yet due. EPA, Response to Comments (RTC) for Supplemental Finding that it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units at 35 (Apr. 2016), EPA-HQ-OAR-2009-0234-20578 ("RTC"), JA1243; Resp. 67. Uncertainty is not a valid excuse, however. At the time of a §112(n)(1) determination, both the cost of first round §112(d) regulation and the cost of second round §112(f) regulation may be uncertain. EPA tried, but failed, to persuade the Supreme Court in *Michigan* that, for this reason, the

[8] Petitioners maintain that if this Court were to uphold the Supplemental Finding, then it would be unlawful for EPA to impose on EGUs in the future additional compliance costs that were not accounted for in the "appropriate and necessary" determination required by *Michigan*.

§112(n)(1) determination "need not consider cost when first deciding *whether* to regulate power plants because it can consider cost later when deciding *how much* to regulate them." *Michigan*, 135 S.Ct. at 2709. Further, EPA misses the mark when it argues that it need not consider §112(f) compliance costs because those costs could in theory end up being zero dollars. Resp. 67. While EPA might have lawfully determined that §112(f) compliance costs are *likely* zero based on a reasoned analysis, *Michigan* does not permit EPA to entirely avoid consideration of these compliance costs based on the possibility those costs *could be* zero.

2. EPA does not dispute it ignored power plant layoffs.

Even though EPA admits regulating EGUs under §112 caused many power plants to be shut down, EPA does not—and could not—deny it refused to consider the resulting layoffs of workers. *See* RTC at 90, JA1298 ("[E]xamining highly localized impacts … is outside of the scope of the cost consideration performed in the proposed and final supplemental findings"). Instead, EPA changes the subject by arguing it considered *other* "localized impacts" in the form of "retail price impacts at a regional level" and "the availability of generation capacity in 32 modeling regions."[9]

[9] The Resource Adequacy and Reliability study EPA quotes as finding "'little overall impact'" or "'only small impacts at the regional level,'" Resp. 68, was explicitly limited to resource adequacy and reliability; it did not examine or discuss any other impacts. *See* Resource Adequacy and Reliability in the IPM Projections for the MATS Rule at 1 (undated), EPA-HQ-OAR-2009-0234-19997, JA0384.

Resp. 68. This is no defense for failing to consider layoffs EPA predicted would result from its §112 program.

3. EPA does not dispute it ignored coal industry impacts.

While EPA does not directly defend its refusal to consider the impacts of regulating EGUs under §112 on the coal industry and coal miners, the Agency obliquely defends its earlier justification that it could refuse to consider these impacts based exclusively on its initial erroneous projection of only a "1 percent" decrease in "coal production for the electric power sector." RTC at 92-94, JA1300-02; Resp. 68–69. But reasoned decisionmaking requires agencies to consider all of the "relevant data," *State Farm*, 463 U.S. at 43, including data cited by commenters showing EPA's early projection dramatically understated the impacts of its decision on the coal industry. *See* Pet. Br. 66. EPA claims it can exclude data that was not "available" "when EPA should have considered cost in the appropriate and necessary finding" (i.e., in 2000). Resp. 69. Yet EPA is relying on the demonstrably erroneous projections EPA made "when the Standards were promulgated" *12 years later*. *Id.* If EPA's inaccurate projection in 2012 is "relevant data," then the actual evidence of the consequences of its decision is no less "relevant." The actual evidence showing much larger impacts underscores the irrationality of EPA's refusal to consider the costs and disadvantages for the coal industry and its miners.

4. EPA does not dispute it ignored hardest hit consumers.

EPA responds to the assertion that it failed to consider the "localized impacts" on "consumers" of electricity, Pet. Br. 65, by pointing to regional analyses of "retail prices" and "availability of generation capacity." Resp. 68. But even if the lights do not go out and the price increases are single-digit percentage rate hikes, EPA's regional analysis does not address the most affected consumers, including low income families and electricity-intensive manufacturers that can ill afford even small price increases. EPA cannot refuse to consider these hardest hit consumers just because EPA believes most consumers are more modestly affected. EPA must give "at least some attention" to the impacts of price increases on low income families and electricity-intensive manufacturers. *See Michigan*, 135 S.Ct. at 2707.

5. EPA does not dispute it ignored unique costs in ERCOT.

EPA does not dispute it refused to "analyze costs to ERCOT independently," RTC at 67, JA1275, even though Texas's competitive ERCOT market is indisputably unique. EPA further concedes its assumption that costs would be passed through to consumers does not apply to ERCOT. Resp. 69. EPA's only defense is that two of its "metrics" did not "assum[e] all costs would be passed on to consumers." *Id.* But that is not the case. Under both its "capital expenditure" and "percentage of revenue" metrics, EPA *did* assume that "many of these sources are able to pass-through compliance costs to ratepayers." 81 Fed. Reg. at 24,436, JA0066; *see also id.* at 24,435, JA0065 (explaining EPA's "comparison of revenues to costs" assumed "a

significant share of operating expenditures may ultimately be borne by consumers"). In ERCOT, the price of electricity, and therefore revenue, is set by market forces, not by regulated rates. Therefore, operators in Texas are not necessarily operating "with the expectation that they will recover their costs (*i.e.*, expenditures) in addition to a profit," *id.*, as EPA assumed. Because *all* of EPA's costs metrics assumed sharing costs with customers through rate adjustments, a condition not true in ERCOT, EPA's ultimate conclusion that the costs of regulation were "reasonable" is infected with this error and must be set aside.[10]

6. EPA does not dispute it ignored the environmental benefits lost by shutting down ARIPPA's coal-refuse boilers.

EPA completely sidesteps ARIPPA's assertion that EPA failed to evaluate the cost corresponding to the lost environmental benefits resulting from the forced shutdown of ARIPPA's bituminous coal refuse-fired sources. Instead, EPA simply observes that certain coal refuse-fired sources are among the best-performing sources for acid gas HAPs, and then concludes "ARIPPA's claim of forced closures due to the Standards is belied by the record." Resp. 70. This argument is meritless.

Although the pool of "best-performing sources" for acid gases includes certain coal refuse-fired sources, these sources generally combust *anthracite* coal refuse.

[10] Another of EPA's core assumptions—the "interconnectedness of the electricity grid," RTC at 50, JA1258—is also not true for ERCOT. *See Texas v. EPA*, 829 F.3d 405, 431 (5th Cir. 2016) ("In its electrical grid, as in so many things, Texas stands alone. . . . [N]early 90% of Texas is covered by a single isolated grid with limited connections to external power supplies.").

Memorandum from Jeffrey Cole, RTI Int'l, to Bill Maxwell, EPA (Dec. 16, 2011) ("Coal Acid Gases" appended spreadsheet), EPA-HQ-OAR-2009-0234-20132, JA0636. The only two *bituminous* coal refuse-fired sources that met the standard have materially different characteristics than the conventional bituminous coal refuse-fired sources operated by ARIPPA, *see* Comments of ARIPPA at 10-11 (Jan. 14, 2016), EPA-HQ-OAR-2009-0234-20535, JA0827-28, which EPA failed to consider. Indeed, ARIPPA's conventional bituminous coal refuse-fired sources *cannot* satisfy the acid gas limit EPA ultimately adopted due to unique equipment configurations, design features, and the importance of preserving ash characteristics essential to the beneficial reuse of ash in mine reclamation. *Id.* at 9-17, JA0826-34. These plants will be forced to close and the environmental benefits they provide will be eliminated. Because EPA did not consider the cost of the lost environmental benefits, EPA's evaluation was unreasonable.

CONCLUSION

For the foregoing reasons, the petitions for review should be granted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a), (f), and (g) of the Federal Rules of Appellate Procedure and Circuit Rules 32(e)(1) and 32(e)(2)(C), I hereby certify that the foregoing final form Reply Brief of State and Industry Petitioners contains 8,915 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit of 9,000 words as established by the Court in its Order of October 14, 2016. I also certify that this brief complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft 2010 with 14-point Garamond font.

Dated: March 24, 2017

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CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of March, 2017, a copy of the foregoing final form Reply Brief of State and Industry Petitioners was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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