14-1112 & 14-1151

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

IN RE: MURRAY ENERGY CORPORATION,
Petitioner

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

EMERGENCY RENEWED PETITION FOR EXTRAORDINARY WRIT BY INTERVENOR PEABODY ENERGY CORPORATION

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August 13, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties, Intervenors, and *Amici*. The parties in this case are Murray Energy Corporation (Petitioner); U.S. Environmental Protection Agency (Respondent); and Regina A. McCarthy, Administrator, U.S. Environmental Protection Agency (Respondent); the State of West Virginia (Intervenor); the State of Alabama (Intervenor); the State of Alaska (Intervenor); the State of Arkansas (Intervenor); the State of Indiana (Intervenor); the State of Kansas (Intervenor); the Commonwealth of Kentucky (Intervenor); the State of Louisiana (Intervenor); the State of Nebraska (Intervenor); the State of Ohio (Intervenor); the State of Oklahoma (Intervenor); the State of South Dakota (Intervenor); the State of Wisconsin (Intervenor); the State of Wyoming (Intervenor); National Federation of Independent Business (Intervenor); Utility Air Regulatory Group (Intervenor); Peabody Energy Corporation (Intervenor); the City of New York (Intervenor); the Commonwealth of Massachusetts (Intervenor); the District of Columbia (Intervenor); Environmental Defense Fund (Intervenor); Natural Resources Defense Council (Intervenor); Sierra Club (Intervenor); the State of California (Intervenor); the State of Connecticut (Intervenor); the State of Delaware (Intervenor); the State of Maine (Intervenor); the State of Maryland (Intervenor); the State of New Mexico (Intervenor); the State of New York (Intervenor); the

State of Oregon (Intervenor); the State of Rhode Island (Intervenor); the State of Vermont (Intervenor); and the State of Washington (Intervenor). Amici include the State of South Carolina; National Mining Association; American Coalition for Clean Coal Electricity; American Chemistry Council; American Coatings Association, Inc.; American Fuel & Petrochemical Manufacturers; American Iron and Steel Institute; the State of New Hampshire; Chamber of Commerce of the United States of America; Clean Wisconsin; Council for Industrial Boiler Owners; Michigan Environmental Council; Independent Petroleum Association of America; Ohio Environmental Council; Metals Service Center Institute; Calpine Corporation; National Association of Manufacturers; Jody Freeman; and Richard J. Lazarus.

B. Rulings Under Review. The Petition relates to EPA's final rule styled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, issued Aug. 3, 2015 (to be codified at 40 C.F.R. pt. 60).

C. Related Cases: This Court has previously issued an opinion in this case, and in *West Virginia v. EPA*, Nos. 14-1112, 14-1146, 14-1151 (D.C. Cir.) *In re: West Virginia, et al.*, No. 15-1277 (filed Aug. 13, 2015) also is related.*

* Petitioner Peabody has filed this submission as a renewed writ, believing that to be the procedurally proper course, but does not oppose having the new writ submitted by the State Attorneys General consolidated with this proceeding and is

authorized to say that the State Attorneys General likewise do not oppose such consolidation. *See* Emergency Motion to Consolidate and For Expedited Treatment, *In re: West Virginia, et al.*, No. 15-1277, ECF 1567767 (filed Aug. 13, 2015).

Dated: August 13 , 2015 /s/ Tristan L. Duncan

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Peabody Energy Corporation ("Peabody") provides the following disclosure:

Peabody is a publicly-traded company on the New York Stock Exchange ("NYSE") under the symbol "BTU." Peabody has no parent corporation and no publicly held corporation owns more than 10% of Peabody's outstanding shares.

Dated: August 13, 2015 /s/ Tristan L. Duncan

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GLOSSARY

CO_2	Carbon dioxide
EPA	United States Environmental Protection Agency
Final Rule	*Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, issued Aug. 3, 2015 (to be codified at 40 C.F.R. pt. 60).
GHGs	Greenhouse Gases
Peabody	Peabody Energy Corporation
Section 111	42 U.S.C. § 7411
Section 111(b)	42 U.S.C. § 7411(b)
Section 111(d)	42 U.S.C. § 7411(d)
Section 111(h)	42 U.S.C. § 7411(h)
Section 112	42 U.S.C. § 7412
Section 307(b)(1)	42 U.S.C. § 7607(b)(1)
Waxman-Markey bill	H.R. 2454, 111th Cong.

EMERGENCY RENEWED PETITION FOR EXTRAORDINARY WRIT

INTRODUCTION

On June 9, 2015, this Court denied a previous writ in this case, explaining that, "[a]fter EPA issues a final rule, parties with standing will be able to challenge that rule in a pre-enforcement suit, as well as to seek a stay of the rule pending judicial review." *In re Murray Energy Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015). On Aug. 3, 2015, EPA issued the Final Rule.[1] Therefore, this Petition is now ripe for review.[2] Peabody has filed this submission as a renewed writ and does not oppose having the new writ filed by State Attorneys General consolidated with this proceeding, as further discussed in the Related Cases section on pages ii-iii above.

On its face, Section 111(d) prohibits exactly what EPA seeks to do in the Final Rule: to regulate coal-fueled power plants *both* under Section 111(d) *and* as a source category under Section 112's Hazardous Air Pollutants (HAP) program. The so-called "Section 112 Exclusion" provides

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[1] Although the Final Rule has not yet been published in the Federal Register, this Petition is still ripe for the reasons discussed herein.

[2] On Aug. 6, 2015, Peabody filed an application with EPA asking for an immediate stay of the Rule, pursuant to EPA's authority under 5 U.S.C. § 705. EPA did not respond to Peabody's request for relief within the timeframe requested by Peabody. Counsel for Peabody contacted EPA by telephone on Aug. 13, 2015 to notify it of this motion in advance of filing.

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-fueled plants already are regulated under Section 112, Section 111(d) expressly prohibits their double regulation here. Despite EPA's prior representations that it was open to comments on its legal rationale, the Final Rule recites virtually the same arguments that EPA previously raised before this Court. Indeed, EPA effectively concedes that, if Peabody's interpretation of the Section 112 Exclusion is correct, EPA lacks the power to adopt the Final Rule under Section 111(d). (Final Rule 263).

This Court should not wait to address the critical threshold question of EPA's statutory authority, when so much hangs in the balance and irreparable harm is occurring now. To be sure, once the Final Rule is published in the Federal Register, aggrieved parties will file petitions for review, together with stay motions. But this Petition is necessary now because there may well be a substantial delay in publication. News reports indicate that EPA may hold off publication until Dec. 2015.[3] EPA has

[3] *See* InsideEPA, EPA Said To Target Early August for ESPS Release (Jul. 13, 2015) (reporting that the final rules "are unlikely to appear in the Federal Register—which would start the 60-day clock for filing legal

denied those reports. However, as this Court is aware, even in an ordinary case there can be a significant lag between promulgation of a final rule and its publication in the Federal Register. And this is no ordinary case. It is extraordinary by any measure. The Final Rule alone (not counting technical support documents) runs to 1,560 pages. With significant rules like this one, the delay can be much longer. For example, EPA issued a proposed Section 111(b) rule on Sept. 20, 2013, but it was not published in the Federal Register until Jan. 8, 2014. *See* 79 Fed. Reg. 1430 (Jan. 8, 2014). Similarly, the FCC released the 2010 Net Neutrality rule on Dec. 21, 2010, but it was not published in the Federal Register until Sept. 23, 2011.[4] Thus, ordinary course here can easily mean a delay of months.

This Petition is therefore necessary in light of the unmeasurable risk that there will be significant delay in the Final Rule's Federal Register publication. If (on the other hand) EPA promptly publishes the Final Rule, the ensuing petitions for review and motions for stay can simply be

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challenges—until after the United Nations climate talks in Paris in December.").

[4] *See In the Matter of Preserving the Open Internet, Broadband Industry Practices: Report and Order*, No. 09-919, GN Dkt. No. 09-191, WC Dkt. No. 07-52 (Dec. 21, 2010); *Preserving the Open Internet*, 76 Fed. Reg. 59,192 (Sept. 23, 2011).

consolidated into this proceeding, and Petitioners will propose a workable plan for managing and briefing the legal challenges to the Final Rule.

Moreover, no purpose is now served by withholding prompt judicial review. EPA already has had ample opportunity to address the objections to its legal authority during the notice and comment period (and it ignored those objections). No change in the Final Rule will occur between now and publication. Further, the Final Rule directs States to file plans or detailed "initial submittals" by Sept. 6, 2016. That is barely a year away and an eye-blink in the context of the multi-year planning horizon of energy suppliers, utilities, and private industry. Compliance efforts will thus begin while the Rule is being litigated. Moreover, the scale of the required effort ensures that compliance costs will not be the run-of-the-mill expenses typically associated with interstitial rule-making. Quite the reverse. The changes wrought by the Final Rule are unprecedented in their magnitude and resemble those arising from landmark legislation rather than from agency rules. Ironically, EPA touts the Final Rule as creating cap-and-trade systems, when a bill to do just that was rejected by Congress in 2009-2010.

The Rule has caused and will continue to cause immediate and irreparable harm, which will only intensify in the coming months, while

judicial review is pending. A stay of the Final Rule is warranted now. No purpose would be served by waiting for publication.

JURISDICTION AND STANDING

This Court has jurisdiction to review nationally applicable EPA final actions under Clean Air Act § 307(b)(1). "A long progression of cases" confirms this Court's authority to stay agency action pending judicial review, where this Court would ultimately have appellate jurisdiction over the agency's rule. *Sampson v. Murray*, 415 U.S. 61, 73 (1974); *see also* 5 U.S.C. § 705; *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966); *In re Tennant*, 359 F.3d 523, 531 (D.C. Cir. 2004) (Roberts, J.). Peabody has standing because the Final Rule will cause it imminent and irreparable injury for the reasons adduced in the accompanying Declaration of Bryan A. Galli ("Galli Decl."), attached as Exhibit A.

STATEMENT OF RELIEF SOUGHT

Peabody seeks a stay of the Final Rule and a suspension of all deadlines therein pending the completion of judicial review.

STATEMENT OF ISSUE PRESENTED

Whether the Final Rule should be stayed because it exceeds EPA's legal authority and will cause irreparable injury, and because the public interest and balance of equities also favor a stay.

STATEMENT OF THE CASE AND FACTS

The Final Rule seeks to restructure the energy industry in the United States and to compel a drastic reduction in the use of coal, traditionally the most reliable and affordable source of electricity. The Final Rule is more draconian than the proposed rule, seeking a 32% (rather than 30%) reduction in power-plant CO_2 emissions by 2030. (Tellingly, nine States that filed comments challenging the proposed rule wound up with stricter limits under the Final Rule, compared with only one State supporting the plan – Rhode Island, whose goal changed by only 1%.) The Final Rule directs States by Sept. 6, 2016 to file plans (or detailed "initial submittals") and establishes onerous power-plant CO_2 emission rates for States to follow – all of which will result in consumers having to pay substantially more for electricity. The fixed date of Sept. 6 is extremely unusual, if not unprecedented, because it does not depend on when the Final Rule is published in the Federal Register. Judicial review of a fixed compliance deadline barely one year away should not be held hostage by an uncertain publication date.

The Final Rule contains an interim 2022 compliance date, but the far-reaching changes needed to implement the rule must begin immediately. The Final Rule stresses that EPA seeks "to promote early action" (Final Rule 39), based on "EPA's conclusion that it was essential . . . that utilities and

states establish the path towards emissions reductions as early as possible." (*Id.* at 73). "The final guidelines include provisions to encourage early actions." (*Id.* at 42).

Given long lead times for energy planning, private industry will be forced to begin implementing the Rule *now*. (*See* Galli Decl., ¶¶ 12-21). This accelerated decision-making process will create significant and irreparable injury – not merely when the Rule's compliance deadlines begin, but immediately, during the pendency of judicial review. From the day before the rule was announced to the close of the markets the day after the announcement, Peabody's public shares and bonds lost more than $90 million in value, demonstrating the powerful, immediate and irreparable damage that the Final Rule is now imposing. *Id.* at ¶ 28. And the harm will not be confined to coal producers and utilities; the attached declaration from the head of the National Black Chamber of Commerce shows that the Final Rule will impose enormous costs (on the order of $565 billion), increase consumer retail electric rates by 12-17%, and inflict disproportionate harm on minorities. (*See* Declaration of Harry C. Alford, attached as Exhibit B). The Final Rule will increase black poverty numbers by 23% and Hispanic poverty by 26%; reduce average black annual household income by $455 and Hispanic income by $515; and lead to the loss of 7 million African-

American and 12 million Hispanic jobs. (*See id.*). Senior citizens and those on fixed incomes are also at risk; a senior advocacy group warns that "[m]ore than 70% of the elderly are living on fixed incomes that do not keep pace with inflation, and causing a critical necessity like their electric bill to spike 20% to 30% as CPP will do is flat out unconscionable."[5]

REASONS FOR GRANTING THE PETITION

This Court outlined the standards for an extraordinary writ in *Murray Energy*, 788 F.3d at 335. The familiar four factors governing requests for stay are: (1) likelihood of success on the merits; (2) irreparable harm; (3) risk of harm to others; and (4) the public interest. *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). "A stay may be granted with either a high probability of success and some injury, or vice versa." *Cuomo v. U.S. Nuclear Reg. Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam).

This Court has previously stayed much less disruptive and less obviously flawed EPA rules, *e.g.*, *EME Homer City Generation, L.P. v. EPA*, Nos. 11-1302, *et al.* (D.C. Cir. Dec. 30, 2011); *Michigan v. EPA*, No.

[5] 60-Plus Ass'n, "Seniors Feel Pain as EPA Finalizes 'Cruel Power Plan'" (visited Aug. 4, 2015), available at http://60plus.org/seniors-feel-pain-as-epa-finalizes-cruel-power-plan/.

98-1497, 1999 U.S. App. LEXIS 38833, at *10 (D.C. Cir. May 25, 1999). A stay is urgently needed here.

I. The Final Rule Exceeds EPA's Legal Authority.

The Final Rule contains many legal flaws, but the Section 112 Exclusion (which has already been briefed and argued to this Court) provides a clear and ample basis for a stay. EPA's breathtaking exercise of power rests on its novel reinterpretation of a narrow and obscure provision, Section 111(d), whose plain meaning *prohibits* rather than authorizes the Final Rule. EPA has *never before* used its reinterpretation of the Section 112 Exclusion to adopt *any* regulation (let alone one as sweeping as the Final Rule) for a source category it was already regulating under Section 112. Reading Section 111(d) as supporting the Final Rule would render that provision "unrecognizable to the Congress that designed it." *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*").

Chevron does not apply, and EPA is not entitled to deference even if its legal authority were ambiguous. "This is hardly an ordinary case." *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 159 (2000). 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 v. Burwell*, __ U.S. __, No. 14-

114, 2015 WL 2473448, at *8 (Jun. 25, 2015) (quoting *UARG*, 134 S. Ct. at 2444). Indeed, in the one instance in the 1990 Clean Air Act amendments where Congress *did* intend for EPA to address a major question regarding power plant regulation, it *expressly delegated* that authority to EPA. *See* 42 U.S.C. § 7412(n)(1)(A). 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. *King*, 2015 WL 2473448, at *8 (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006). The Final Rule is literally an impermissible "power" grab. Not even FERC or the Cabinet-level Department of Energy, much less EPA, has been delegated power by Congress to assert authority over intrastate electricity generation and distribution. *See* Federal Power Act, 16 U.S.C § 824(a); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983).

A. The Final Rule Flies In The Face Of An Express Statutory Prohibition.

The Supreme Court recognized the plain meaning of the Section 112 Exclusion in *AEP v. Connecticut*, 131 S. Ct. 2527 (2011): "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§

7408–7410, or the 'hazardous air pollutants' program, § 7412. *See* § 7411(d)(1)." *Id.* at 2537 n.7; *see also New Jersey v. EPA*, 517 F. 3d 574, 583 (D.C. Cir. 2008) ("under EPA's own interpretation of the section, it cannot be used to regulate sources listed under section 112"). Because coal-fueled power plants are sources regulated under Section 112, EPA has no authority to regulate them under Section 111(d).

In 1990, EPA officials testified before Congress that imposing double regulation on existing sources, *even for different pollutants*, would be "ridiculous."[6] Since its 1990 amendment, Section 111(d) has been used for only one rule, involving municipal landfills, and there the Clinton Administration EPA noted that Section 111(d) does not permit standards for emissions that are "emitted from a source category that is actually being regulated under section 112"[7] – *i.e.*, precisely the situation here.

EPA's new-found interpretation would trigger a sea change in the way Section 111(d) has always been understood. EPA would turn Section 111(d)

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[6] Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearings Before the S. Cmte. on Energy and Natural Res. 101st Cong. 603 (1990).

[7] *See* EPA, Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines, Pub. No. EPA-453/R-94-021, at 1-6 (1995) ("1995 EPA Landfill Memo"), available at http://www.epa.gov/ttn/atw/landfill/bidfl.pdf.

into one of the Clean Air Act's most powerful provisions and render most of its other provisions surplusage. EPA's new-found interpretation of Section 111(d) would have rendered the proposed 2009 Waxman-Markey cap-and-trade bill unnecessary as well. The Final Rule describes Section 111(d) as a "gap-filling" provision. (Final Rule 250). It is not. As explained by Sen. David Durenberger, a leading Senate architect of the 1990 Amendments, Section 111(d) was considered to be "some obscure, never-used section of the law."[8] By EPA's own count, it has used Section 111(d) to regulate only four pollutants and five sources[9] — and none remotely on the scale of CO_2. All these situations involve unique, localized pollutants, such as sulfuric acid, emitted from distinctive sources, like a sulfuric acid plant. None of them concerned a ubiquitous substance like CO_2, benign in itself, emitted from sources across the nation and indeed the globe, rather than from discrete local sources. Further, EPA has never before adopted a Section

[8] Clean Air Act Amendments of 1987: Hearings on S. 300, S. 321, S. 1351, and S. 1384 Before the Subcmte. on Envtl. Prot. of the S. Cmte. on Env't and Public Works, 100th Cong. 13 (1987).

[9] 79 Fed. Reg. at 34,844 ("Over the last forty years, under CAA section 111(d), the agency has regulated four pollutants from five source categories (i.e., sulfuric acid plants (acid mist), phosphate fertilizer plants (fluorides), primary aluminum plants (fluorides), Kraft pulp plants (total reduced sulfur), and municipal solid waste landfills (landfill gases)).").

111(d) rule like this one, which holds existing sources to a stricter standard than new sources (Final Rule 638), even though the reverse has been invariably true in the past (because new sources can more readily adopt new technologies without the need for costly retrofits). Section 111(d) authorizes EPA to adopt "standards of performance," but the Final Rule is actually a standard of *nonperformance;* it says that the best system of emissions reduction is simply to use coal generation less, or not at all. Every other Section 111(d) rule has involved a technological means of reducing emissions from a source. The Final Rule is an energy policy – a shift from coal to renewables – masquerading as an emissions limit.

In short, Section 111(d) is far too thin a reed to support the dramatic change that EPA seeks to impose. Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). As the Supreme Court previously admonished EPA, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *UARG*, 134 S. Ct. at 2444.

B. EPA's "Two Versions of Section 111(d)" Theory Distorts The Legislative Record And Triggers A Separation Of Powers Violation.

In the Final Rule, EPA flip-flops on its theory that Congress enacted two "versions" of Section 111(d) in 1990, one in a substantive House amendment and the other in a conforming Senate amendment. In May 1990, the House adopted a substantive amendment changing Section 111(d) to bar regulation under that provision for any source category (like coal-fueled power plants) already regulated under Section 112. This amendment followed an April 1990 Senate amendment that was simply a clerical or "conforming" one updating a statutory cross-reference in the previous version of Section 111(d) by deleting the text "(1)(A)," to reflect other proposed changes to the statute. The Legal Memo accompanying the proposed rule contended that "[t]he two versions conflict with each other and thus render the Section 112 Exclusion ambiguous."[10] Now, EPA contends that the House amendment is ambiguous, the Senate amendment is clear, but the two do not conflict. (Final Rule 251-70). The agency's latest gymnastics cannot save its legal rationale.

Even under EPA's view that there are two "versions" of Section 111(d), its job would be to reconcile them by applying both prohibitions

[10] Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units ("Proposed Rule Legal Memo"), at 23, available at http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule-legal-memorandum.

simultaneously, *see Brown & Williamson*, 529 U.S. at 133, not by throwing the substantive amendment into the trashcan, as the Final Rule effectively does. It is easy to harmonize the two "versions" by applying both prohibitions simultaneously: EPA should be prohibited from setting a Section 111(d) standard *either* for source categories regulated under Section 112 *or* for pollutants regulated under Section 112. Any other approach would raise grave constitutional difficulties. *Chevron* does not allow an agency to choose which of two competing "versions" of a statute to make legally operative; that is an exercise of lawmaking power. *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.").

Moreover, EPA's "two versions" theory is wrong. It presupposes that in 1990 the House Office of Law Revision Counsel mistakenly failed to turn the conforming amendment into a second version of Section 111(d) and that the U.S. Code has been wrong ever since. The theory is contrary to the position the Clinton EPA took in 1995, 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." (1995 EPA Landfill Memo at 1-5).

Indeed, the conforming Senate amendment was *not* an independent version of Section 111(d) at all, but simply deleted six characters, four of which were parentheses. It cannot bear the weight of EPA's 1,560-page Final Rule. The conforming amendment was a scrivener's provision, *not a separate "version" of Section 111(d)*, as the legislative record makes clear. Congress placed the substantive amendment in § 108 of Public Law 101-549 (the 1990 amendments), as part of a substantive provision occupying five pages of the Statutes at Large (104 Stat. 2,465-2,469 (1990)), which rewrote Section 111 to mirror the new source-category focus and structure of Section 112. In contrast, Congress placed the conforming amendment some 107 pages later, in § 302 of Public Law 101-549, a short section entitled "Conforming Amendments," which contained a potpourri of eight small clerical changes to six different parts of the Clean Air Act. If there were any ambiguity as to Congress' intent (and there is not) the 1990 Conference Report indicated that the "Senate recedes to the House" in relevant respects.[11] Thus, the amendments do not have equal weight or significance.

[11] 136 Cong. Rec. 36,065 (1990) (Chafee-Baucus Statement of Senate Managers), reprinted in *A Legislative History of the Clean Air Act Amendments of 1990* (1998), Volume I, Book 2 at 885 (emphasis added), excerpts available at

The House amendment was substantive, while the Senate amendment was not, and in conference the Senate receded to the House. The Senate amendment was subordinate in every respect.

The Office of Law Revision Counsel properly concluded that, once the substantive amendment in § 108 was executed, the conforming amendment in § 302 was mooted because it referred to language that no longer existed (there was no "112(b)(1)(A)" in the post-1990 version of Section 112). Nor was it necessary to "strik[e] '112(b)(1)(A)'" as the conforming amendment sought to do, in order to conform Section 111 to the revised Section 112. The substantive amendment had already accomplished that. The substantive amendment controls.

The Supreme Court has repeatedly distinguished between substantive and conforming (or "clerical") amendments. *See Dir. of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 323 (2001) (treating "conforming amendment" as nonsubstantive); *CBS, Inc. v. FCC*, 453 U.S. 367, 381–82 (1981) (same). This Court has done the same. *American Petroleum Institute v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013) (disregarding mistake in renumbering statute and correcting cross-reference where it conflicted with

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http://docs.house.gov/meetings/IF/IF03/20140619/102346/HHRG-113-IF03-20140619-SD011.pdf.

substantive provision). In fact, EPA's own Respondents' brief in this case acknowledged that a conforming amendment should be disregarded where it is "obviously in error," citing 2008 amendments to 15 U.S.C. § 2081(b)(1), which involved (as EPA described it) an instance where the "section amended had been repealed." (ECF 1541205, at 48 n.23). That is exactly the situation here.

Substantive amendments routinely moot conforming ones, and EPA's approach has never previously been accepted.[12] The U.S. Code would be turned upside down if moot conforming amendments caused prior versions of substantively amended statutory provisions to spring back to life.

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[12] *See*, *e.g.*, Revisor's Note, 5 U.S.C. app. 3 § 12; Revisor's Note, 8 U.S.C. § 1324b; Revisor's Note, 10 U.S.C. § 869; Revisor's Note, 10 U.S.C. § 1074a; Revisor's Note, 10 U.S.C. § 1407; Revisor's Note, 10 U.S.C. § 2306a; Revisor's Note, 10 U.S.C. § 2533b; Revisor's Note, 11 U.S.C. § 101; Revisor's Note, 12 U.S.C. § 1787; Revisor's Note, 12 U.S.C. § 4520; Revisor's Note, 14 U.S.C. ch. 17 Front Matter; Revisor's Note, 15 U.S.C. § 1060; Revisor's Note, 16 U.S.C. § 230f; Revisor's Note, 18 U.S.C. § 1956; Revisor's Note, 18 U.S.C. § 2327; Revisor's Note, 20 U.S.C. § 1226c; Revisor's Note, 20 U.S.C. § 1232; Revisor's Note, 20 U.S.C. § 4014; Revisor's Note, 21 U.S.C. § 355; Revisor's Note, 22 U.S.C. § 2577; Revisor's Note, 22 U.S.C. § 3723; Revisor's Note, 23 U.S.C. § 104; Revisor's Note, 26 U.S.C. § 105; Revisor's Note, 26 U.S.C. § 219; Revisor's Note, 26 U.S.C. § 613A; Revisor's Note, 26 U.S.C. § 4973; Revisor's Note, 26 U.S.C. § 6427; Revisor's Note, 29 U.S.C. § 1053; Revisor's Note, 33 U.S.C. § 2736; Revisor's Note, 39 U.S.C. § 410; Revisor's Note, 40 U.S.C. § 11501; Revisor's Note, 42 U.S.C. § 218; Revisor's Note, 42 U.S.C. § 300ff–28; Revisor's Note, 42 U.S.C. § 3025; Revisor's Note, 49 U.S.C. § 47115.

C. EPA's Textual Distortions Of Section 111(d) Do Not Withstand Scrutiny.

In its Legal Memorandum accompanying the Proposed Rule, EPA acknowledged that "a literal" application of Section 111(d) would likely preclude its proposal. (Proposed Rule Legal Memo 26). EPA stated: "As 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." (*Id.* at 22).

Undeterred, in the Final Rule, EPA switches gears (as it did before this Court earlier in this case) and now offers a fanciful reinterpretation of Section 111(d) in an attempt to label it "ambiguous." Final Rule 258. This attempt fails. EPA's reinterpretation cannot trigger *Chevron* deference, even if *Chevron* applied here (which it does not).

EPA contends Section 111(d) is "ambiguous" because of the phrases "a source category" and "regulated under Section 112." (*Id.* at 262). EPA acknowledges "one possible reading" of these phrases is "to preclude the regulation of CO_2 from power plants under CAA section 111(d) because power plants have been regulated for (HAP) under CAA Section 112." (*Id.* at 262-63). EPA admits that "[t]his is the interpretation that the EPA applied

to the House amendment in connection with the CAMR rule in 2005." (*Id.* at 263). However, EPA now rejects its prior interpretation.

EPA's view of Section 111(d) was correct under the Clinton Administration in 1995, correct in connection with the CAMR rule in 2005, and correct in the 2014 Legal Memorandum as to the plain meaning of the Section 112 Exclusion. And EPA is wrong today. Its suggestion of ambiguity cannot be squared with the text and structure of Section 111(d). The statute refers to "a source category which is regulated under section [112]" – *not* to "a pollutant which is regulated under section [112]." EPA seeks to rewrite the statute to suit its policy preferences.[13]

EPA complains that the plain meaning of the Section 112 Exclusion would bar the agency from regulating non-HAP emissions from source categories regulated under Section 112. But that is virtue, not a vice. That result is a natural consequence of Congress' decision in 1990 to rewrite

[13] 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 HAPs because that same phrase is also modified by the 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.

Section 111(d) to mirror the "source category" structure of the newly amended Section 112. In 1990, Congress fundamentally expanded the scope of what constitutes a HAP (in Section 112(b)) and required regulation under Section 112 by "source category" (in Section 112(c)). The ordinary reading of the Section 112 Exclusion is better (not worse) because it aligns Section 111(d) with the "source category" focus of post-1990 Section 112.

EPA says the plain meaning of Section 111(d) would create a "gap" in the Clean Air Act. (Final Rule 268). But that supposed concern has never previously posed an issue; never before has EPA attempted to adopt a Section 111(d) standard for a source category it was already regulating under Section 112. At stake here is *duplication* (regulation of the same source category under both Section 111(d) and Section 112), not a regulatory "gap." There is no "gap" in EPA's authority; for example, the agency is already regulating greenhouse gas emissions from existing and new major sources, including power plants, under the agency's permitting (or "PSD") program involved in *UARG*. Even if there were a "gap," it would have to be filled by Congress, not by an independent agency that is only a creature of statute and lacks any "implied" or "inherent" authority.

EPA errs in imputing to the 1990 Congress a monolithic intention to ensure that the agency is authorized to regulate every conceivable emission

under whatever section of the Clean Air Act the agency chooses, regardless of statutory overlaps. The Supreme Court has already rejected that very imputation. It made clear in *UARG* that EPA is *not* automatically entitled to regulate *all forms* of greenhouse gas emissions from any source just because the agency has the authority to regulate CO_2 from cars and trucks. 134 S. Ct. at 2440-41. EPA construes the 1990 amendments to favor more regulation above all other concerns. That construction ignores the necessary policy trade-offs that inevitably accompany legislation. As the Supreme Court has instructed, "no legislation pursues its purposes at all costs."[14] "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."[15] EPA therefore lacks legal authority to adopt the Final Rule.

II. The Final Rule Threatens Irreparable Injury.

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[14] *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (internal quotation marks and citation omitted).

[15] *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam).

Absent a stay, Petitioner faces irreparable harm.[16] The Final Rule is aimed squarely at coal. Press reports have stated that "[t]he U.S.' largest coal producer, Peabody Energy Corporation stands to lose the most as the newly-proposed rules will harm local consumption of coal."[17] (*See also* Galli Decl., ¶28 (noting $90 million decline in value)).

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[16] An "enduring restraint on the manner in which a business is conducted" constitutes irreparable harm. *Chamber of Commerce v. Reich*, 897 F. Supp. 570, 584 (D.D.C. 2005), *rev'd on other grounds*, 74 F.3d 1322 (D.C. Cir. 1996). "[L]oss of profits which could never be recaptured" is irreparable harm. *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J. concurring) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs") (emphasis in original); *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010) (financial loss was irreparable harm); *Brendsel v. Office of Federal Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66 (D.D.C. 2004) (argument that economic losses are not irreparable harm "is of no avail . . . where the plaintiff will be unable to sue to recover any monetary damages against [federal agencies]"). Forcing a facility to retire before the end of its useful life also constitutes irreparable harm. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[17] "How Peabody Energy Corporation Has Responded To EPA's New Carbon Rules," Bidness Etc., Aug. 4, 2015 (available at http://www.bidnessetc.com/49291-how-peabody-energy-corporation-has-responded-to-epas-new-carbon-rules/); *see also* "Only One Loser In Obama's Clean Power Plan," Forbes, Aug. 4, 2015 (available at http://www.forbes.com/sites/jamesconca/2015/08/04/only-one-loser-in-obamas-clean-power-plan/) ("The only big loser in the U.S. from these rules will be coal *producers*.") (emphasis in original).

The Final Rule will force coal-fueled power plants to close (or to lock in the closure process) before judicial review is complete. EPA expects that the Final Rule will cause 15GW to 17GW of electricity generation to retire in 2016. (*Id.* at ¶ 17). For example, EPA expects its plan will cause the 2016 closure of the Big Brown plant in Fairfield, Texas and the 2016 partial closure of two units at the Monticello plant in Mount Pleasant, Texas, to which Peabody supplies coal. (*Id.* at ¶¶ 18-19). On July 9, 2015, Minnesota Power announced it will indefinitely suspend its Taconite Harbor Energy Center plant in third quarter 2016, to which Peabody also supplies coal. (*Id.* at ¶¶ 14-15). Because Peabody and its utility customers must make future planning and investment decisions for existing plants and resources on a multi-year time horizon, irreversible closure decisions will be made years before actual closure and before judicial review is complete. (*Id.* at ¶¶ 12-13). In fact, the proposed rule (let alone the Final) caused Sunflower Electric Power Corp. and Mid-Kansas Electric Co. to take costly steps to comply. (*Id.* at ¶ 13). These illustrative impacts are likely an underestimate based on experience. (*Id.* at ¶ 22). The New York Times reported that "[t]he rule will probably lead to the closing of hundreds of coal-fired power

plants."[18] These decisions will harm employees, consumers, and entire communities. (*Id.* at ¶ 20). Even EPA admits its "analysis indicates that there may be some additional job losses in sectors related to coal extraction and generation that are attributable to implementation of this rule." (Final Rule 1140).[19]

The Mercury and Air Toxics ("MATS") rule illustrates the irreparable harm that will occur absent a stay. Although *Michigan v. EPA*, 135 S. Ct. 2699 (2015), rejected EPA's refusal to consider costs before deciding to impose the MATS rule, EPA subsequently announced the decision was not important because the majority of plants had already complied or were locked into decisions to comply. (Galli Decl., ¶¶ 24-25).

In this case, power plants that begin to shut down and States that begin to implement the Final Rule will essentially lock in EPA's policy

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[18] "5 Questions About Obama's Climate Change Plan," N.Y. TIMES, Aug. 3, 2015 (available at http://www.nytimes.com/2015/08/04/us/politics/5-questions-about-obamas-climate-change-plan.html).

[19] The Final Rule's Regulatory Impact Analysis ("RIA") acknowledges that retail electricity rates will rise (at 3-35), the electrical sector will lose tens of thousands of full-time job-years (at 6-24 to 6-25 (Tables 6-4 & 6-5)), and there will be ripple effects in other sectors of the economy (at 5-3). EPA, RIA for the Clean Power Plan Final Rule (Aug. 2015), available at http://www.epa.gov/airquality/cpp/cpp-final-rule-ria.pdf.

preferences, even if the Rule is ultimately invalidated. 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.).

III. The Remaining Factors Favor a Stay.

A stay will merely preserve the status quo while this Court considers the lawfulness of the Final Rule. Electric power markets will continue business as usual, with no injury as a result of the Court's stay order. EPA can hardly claim there is any particular urgency to its regulatory actions during the period necessary for judicial review. EPA has not quantified *any* environmental benefit from the Final Rule, let alone one that would occur while judicial review is pending. In fact, EPA has waited years to regulate power plant CO_2 emissions and has already allowed its deadlines to slip numerous times.[20]

Also relevant to the stay calculus is the unprecedented nature of EPA's action. Its legal theory is completely novel and represents a stark

[20] *See* Settlement Agreement ¶¶ 1–4, EPA-HQ-OGC-2010-1057-0002 (settlement obligating EPA to adopt Section 111(d) standards by May 26, 2012).

change in the agency's interpretation of the Section 112 Exclusion. And the Final Rule is strikingly different from traditional pollution regulations:

- CO_2 is unlike familiar pollutants with localized impacts and documented human health effects. We are all CO_2 emitters, and atmospheric CO_2 is the intermingled result of all human activity and Mother Nature. Although EPA tries to cast this regulation in traditional air emissions terms, it is anything but. CO_2 is different in kind from traditional air emissions because *it is not unique to the regulated source*. Congress rejected cap-and-trade legislation partly out of concern for disproportionate adverse impacts on coal-reliant States. Now, EPA is forcing coal-reliant consumers, communities, regions, businesses and utilities to bear the burden for a stated objective that is global in nature.

- The Final Rule's impact is far more severe and discriminatory than that of ordinary regulation. As Secretary of State John Kerry described U.S. policy regarding coal-fueled power plants: "We're going to take a bunch of them out of commission."[21] This deliberate targeting is qualitatively different from other programs. The transportation sector accounts for 27%

[21] Coral Davenport, *Strange Climate Event: Warmth Toward U.S.*, N.Y. TIMES (Dec. 11, 2014), available at http://www.nytimes.com/2014/12/12/world/strange-climate-event-warmth-toward-the-us.html?_r=3.

of total GHG emissions, barely less than 31% from the entire electric power industry,[22] and yet transportation does not face the same treatment. Although the government regulates cars, it does not embark on a "war" against the automobile. Never before has a regulation been accompanied with a governmental pronouncement that it intends to extinguish an entire industry *for conduct in which we all engage*. EPA has arbitrarily singled out coal-fueled plants for shutdown and extinction, for emissions produced by Mother Nature and virtually every human activity on the planet.

- Worse, EPA does not even claim that the Final Rule will have any measureable impact on climate. In fact, the EPA 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*."[23]

- State participation in federal programs is "in the nature of a contract," with the key question being "whether the State voluntarily and

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[22] RIA for the Clean Power Plan Final Rule, p. 2-25, Table 2-15.

[23] U.S. House Energy Commerce Comm. Press Release, Pollution vs. Energy: Lacking Proper Authority, EPA Can't Get Carbon Message Straight (Jul. 23, 2014), *available at* http://energycommerce.house.gov/press-release/pollution-vs-energy-lacking-proper-authority-epa-can%E2%80%99t-get-carbon-message-straight (emphasis added).

knowingly accepts the terms of the 'contract.'" *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (internal quotation marks and citations omitted). The Final Rule 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 costly implementation plans to regulate power plants' conventional pollutants like NO_2, SO_2, and particulates, that EPA would do an about-face and seek to phase out those power plants altogether.

These features of the Final Rule are not merely striking; they in fact raise serious constitutional questions,[24] which provides yet another reason

[24] Under our Federalism, the federal government may not compel the States to implement federal regulatory programs, making "a 'balancing' analysis" "inappropriate." *Printz v. United States*, 521 U.S. 898, 932 (1997). Even when some States agree to expand federal power, structural principles of federalism prevent such collusion. *New York v. United States*, 505 U.S. 144, 181-82 (1992). 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 Final Rule will force States to adopt policies that will raise energy costs and prove deeply unpopular, while cloaking those policies in the Emperor's garb of state "choice" – even though in fact the polices are compelled by EPA. In addition, regulations that single out a few to bear a burden that ought to be borne by all, *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998) (plurality opinion), or that impose targeted burdens that simply go "too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), trigger just compensation obligations. Courts avoid statutory constructions triggering

that EPA is not entitled to *Chevron* deference. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'r*, 531 U.S. 159, 174 (2001).

The public has a substantial interest "in having legal questions decided on the merits, as correctly and expeditiously as possible," rather than through administrative fiat. *WMATA*, 559 F.2d at 843. Absent a stay, the Final Rule will trigger costly and irreversible decisions by States and private industry. EPA should not be permitted to circumvent timely judicial review in imposing such vast burdens. Indeed, the possibility that fundamentally important agency action might permanently evade judicial review that is meaningful enough to make a difference would risk impairment of the judicial function and raise separation of powers concerns.

CONCLUSION

The Petition should be granted, the Final Rule should be stayed, and all deadlines in it suspended pending the completion of judicial review. To ensure the least amount of harm while permitting this Court sufficient time to consider this request, Peabody seeks a stay by Tuesday, September 8, 2015, approximately one year before state plans must be submitted.

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potential duties to compensate, especially when Congress has not authorized such a result. *Bell Atl. Tel. Cos. v FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared with 14-point Times Roman type and contains 6,827 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), on the basis of a count made by the word processing system used to prepare the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, August 13, 2015, I filed the above document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

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