ORAL ARGUMENT ON APRIL 16, 2015

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

STATE OF WEST VIRGINIA, et al., Petitioners, **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** Respondent,	No. 14-1146

FINAL BRIEF FOR STATE INTERVENORS IN SUPPORT OF RESPONDENT

KAMALA D. HARRIS
Attorney General of California
RAISSA LERNER
Deputy Attorney General
California Department of Justice
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612

MAURA HEALEY
Attorney General of Massachusetts
MELISSA A. HOFFER
TURNER SMITH
Assistant Attorneys General
Environmental Protection Division
One Ashburton Place
Boston, MA 02108

ERIC T. SCHNEIDERMAN
Attorney General of New York
BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
BETHANY A. DAVIS NOLL
Assistant Solicitor General
MICHAEL J. MYERS
MORGAN A. COSTELLO
BRIAN LUSIGNAN
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2400

March 4, 2015 *Additional Counsel on Signature Pages*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1)(A), the undersigned State, District, and City Intervenors-Respondents adopt the certificate as to parties, rulings, and related cases in respondent EPA's brief.

/s/ Morgan A. Costello
MORGAN A. COSTELLO

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GLOSSARY

Act	Clean Air Act
AEP	American Electric Power
CRS	Congressional Research Service
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
NGO Br.	Brief of the Natural Resources Defense Council, Environmental Defense Fund, and Sierra Club, as Intervenors In Support of Respondent

PRELIMINARY STATEMENT

Petitioners West Virginia, et al., oppose the Environmental Protection Agency's proposal to regulate carbon dioxide emissions from existing fossil-fueled power plants under section 111(d) of the Clean Air Act, 79 Fed. Reg. 34,830 (June 18, 2014) ("Proposed Rule"). But rather than filing a petition for review after EPA completes the rulemaking process pursuant to section 307(d) of the Act, Petitioners filed suit after EPA published the Proposed Rule, invoking a 2010 settlement agreement with the undersigned states, district, and city (State Intervenors) in which EPA agreed to nothing more than a schedule for rulemaking. The Court lacks jurisdiction and this petition should be dismissed. The time to challenge the settlement agreement has long passed, and the time to challenge the final rule has not yet come. Even if this Court had jurisdiction, which it does not, Petitioners' argument that the settlement agreement is unlawful because section 111(d) prohibits EPA from completing the rulemaking process on the Proposed Rule is meritless.

STATUTES AND REGULATIONS

The applicable statutes and regulations are in EPA's addendum.

STATEMENT OF THE CASE

State Intervenors adopt EPA's Statement of the Case and add the following:

The Clean Air Act provides a comprehensive program for controlling air pollution from existing stationary sources, including regulation of: (1) criteria pollutants under the National Ambient Air Quality Standards ("NAAQS") of sections 108 & 110, 42 U.S.C. §§ 7408, 7410; (2) certain sources of listed hazardous air pollutants under section 112, *id.* § 7412; and (3) other emissions that endanger public health and welfare, but that are not regulated under the other two provisions, under section 111(d), *id.* § 7411(d). These provisions collectively "establish[] a comprehensive program for controlling and improving the nation's air quality." *See Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (internal quotation omitted).

<u>The 2010 Settlement Agreement</u>

Eleven states, the District of Columbia, and New York City (State Intervenors here), and three non-governmental organizations (Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund) brought a lawsuit in 2006 alleging that EPA was required to set

emissions standards and guidelines under sections 111(b) and 111(d), respectively, for carbon dioxide emissions from new and existing fossil-fuel power plants.[1] *New York v. EPA*, D.C. Cir. No. 06-1322. After this Court remanded the matter to EPA for further consideration in light of *Massachusetts v. EPA*, 549 U.S. 497 (2007), those petitioners and EPA entered into a settlement agreement in December 2010. For existing power plants, EPA agreed to propose by September 30, 2011 a rule under section 111(d) that would include guidelines for greenhouse gas emissions, and to take final action on the proposed rule by May 26, 2012. After publishing notice of the proposed settlement pursuant to section 113(g) of the Act and taking public comment, *see* 75 Fed. Reg. 82,392 (Dec. 30, 2010), EPA signed the settlement agreement on March 2, 2011. *See* Modification Agreement at 1 (JA-24).

Under the agreement, the sole relief for EPA's noncompliance was for the parties to file an appropriate motion, petition, or civil action to compel EPA to take action responding to this Court's remand order in

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[1] Section 111(b) mandates standards for new and modified sources, and section 111(d) mandates standards for existing sources if those standards "would apply if [the existing sources] were a new source." 42 U.S.C. § 7411(b), (d).

New York v. EPA. Agreement, ¶7 (JA-4-5). Although EPA did not comply with the schedule in the settlement agreement, no party to the agreement sought relief.

EPA's Proposed Rule and This Litigation

In June 2014, more than two years after the date by which EPA was to have taken final action under the settlement agreement, EPA issued the Proposed Rule to regulate greenhouse gas emissions from fossil-fueled power plants under section 111(d) as part of President Obama's Climate Action Plan. *See* 79 Fed. Reg. 34,830. Petitioners commenced this lawsuit in August 2014 ostensibly seeking to invalidate the settlement agreement, but in reality seeking to stop EPA from finalizing the Proposed Rule, contending that EPA's promulgation of emission standards for hazardous air pollutants from power plants in 2012, *see* 77 Fed. Reg. 9,304 (Feb. 16, 2012), bars it from regulating non-hazardous air pollutants (such as carbon dioxide) from those same sources under section 111(d).

SUMMARY OF ARGUMENT

The petition is jurisdictionally deficient on numerous grounds. State Petitioners discuss two such deficiencies here: (i) Petitioners lack third-party standing to challenge the settlement agreement because they are not parties to the agreement or third-party beneficiaries of it, and (ii) the petition is untimely, because any grounds for Petitioners' claim existed, at the latest, in April 2012, when EPA published notice of finalization of the settlement agreement in the Federal Register. On the merits, Petitioners' argument that the settlement agreement is unlawful because section 111(d) of the Act prohibits EPA from regulating carbon dioxide from existing power plants is contrary to section 111(d)'s text and to the Act's purpose, structure, and history.

ARGUMENT

I. THE PETITION IS JURISDICTIONALLY DEFECTIVE AND SHOULD BE DISMISSED

A. Petitioners Lack Standing to Challenge the Settlement Agreement.

Petitioners have no Article III standing to bring this lawsuit. *See* EPA Br. 11-22. In addition, Petitioners do not have third-party standing to challenge the settlement agreement as they are not parties to or third-party beneficiaries of it. The Supreme Court recently re-affirmed

the "'fundamental restriction'" on federal judicial authority "that '[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). Third-party standing, sometimes described as an element of prudential standing, is a "threshold, jurisdictional concept." *Deutsche Bank Nat'l Trust Co. v. Fed. Deposit Ins. Corp.*, 717 F.3d 189, 194 & nn.4&5 (D.C. Cir. 2013).

This principle applies in contract law, which Petitioners cite in interpreting the settlement agreement. Pet.Br. 57. "Ordinarily, only a party (actual or alleged) to a contract can challenge its validity." *Falconbridge U.S., Inc. v. Bank One Illinois, N.A.*, 227 F.3d 928, 930 (7th Cir 2000); *see Williams v. Eggleston*, 170 U.S. 304, 309 (1898). A litigant seeking to assert a right under a contract must either be a party to, or intended third-party beneficiary of, the contract. *See Deutsche Bank Nat'l Trust Co.*, 717 F.3d at 194. Here, Petitioners are not parties to the settlement agreement, and have not alleged they are intended third-party beneficiaries of it (in fact, they claim EPA's action contemplated by the settlement agreement harms them). Therefore,

they lack standing to challenge the agreement's validity. *See*, *e.g.*, *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 249 (7th Cir. 1992) (court is unaware "of any cases finding standing for a non-settling party because a settlement is allegedly illegal or against public policy"); *Ope Shipping Ltd. v. Allstate Ins. Co., Inc.*, 687 F.2d 639, 642-43 (2d Cir. 1982) (non-party to contract cannot seek to invalidate it).

B. Petitioners Are Too Late to Challenge the Agreement and Too Early to Challenge the Rule.

Even if Petitioners had standing, their petition is untimely. Petitioners are too late to challenge the settlement agreement and too early to seek judicial review of any final rule that EPA may issue setting emission guidelines for greenhouse gases from existing fossil-fuel power plants.

A settlement agreement that merely establishes a schedule for rulemaking without pre-judging whether any regulation will be promulgated does not constitute final agency action and cannot be challenged under section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1). *See* EPA Br. 22-25. Even assuming that such a settlement agreement could ever be challenged under section 307(b)(1), Petitioners' challenge is time barred. That provision requires a petition for review to be filed

within sixty days of publication of the challenged action, unless "such petition is based solely on grounds arising after" the sixtieth day. As Petitioners acknowledge, the settlement agreement became final on March 2, 2011. *See* Pet.Br. 53. Under Petitioners' theory, EPA lost its ability to regulate carbon dioxide from existing power plants under section 111(d) on February 16, 2012, when it promulgated emission standards for hazardous air pollutants from power plants under section 112. *See* 77 Fed. Reg. 9,304. EPA announced finalization of the settlement agreement in the Federal Register in April 2012, two months after it issued its section 112 rule. *See* EPA Br. 27 (citing 77 Fed. Reg. 22,392, 22,404 (Apr. 13, 2012) (JA-331)). Yet Petitioners did not file this action until August 2014, more than two years later.

Petitioners argue nonetheless that their claim did not ripen until June 2014, when EPA issued a draft legal memorandum as part of its rulemaking package for the Proposed Rule. Pet.Br. 55-56. Petitioners cannot rely on statements in a *draft* legal memorandum upon which the agency is soliciting comments to establish that its claim is ripe for judicial decision. *See* EPA Br. 28-30; *cf. Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 129 (D.C. Cir. 2012) (party's challenge

to longstanding EPA interpretation ripened after EPA issued *final* rule subjecting challenger to regulation for first time).[2] Further, the purported basis for Petitioners' claim (that a section 111(d) rule for carbon dioxide is prohibited by the section 112 rule for mercury) ripened in April 2012, not when EPA issued the draft legal memorandum.

Petitioners argue that review of the Proposed Rule is necessary now because they are already experiencing "hardship" due to actions that they have taken voluntarily in anticipation of the Proposed Rule's finalization. Pet.Br. 56-57. That argument is meritless. As EPA correctly explains, *see* EPA Br. 19-21, neither the settlement agreement nor the Proposed Rule requires Petitioners to undertake these actions. Thus, Petitioners' voluntary, anticipatory actions do not constitute a cognizable injury permitting suit before the rule's finalization. Moreover, neither the settlement agreement nor the Proposed Rule is the proximate cause of many of the examples of the energy and

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[2] The challenged aspect of the interpretation in the Proposed Rule—that regulating hazardous air pollutants from power plants under section 112 does not preclude EPA from subsequently regulating non-hazardous air pollutants from those sources under section 111(d)—is longstanding. *See* EPA Br. 51-52, Amicus Br. of Inst. of Policy Integrity 5-22; 70 Fed. Reg. 15,994, 16,031-32 (Mar. 29, 2005).

environmental planning efforts that Petitioners cite, *see* Pet.Br. 20-22; indeed, many of these actions are simply extensions of longstanding state efforts to evaluate and plan for electricity generation that is consistent with protecting public health and the environment. Petitioners cannot rely on their alleged planning actions to circumvent the ordinary rule that courts may review only final agency action.

II. PETITIONERS' CHALLENGE TO THE SETTLEMENT AGREEMENT FAILS ON THE MERITS

As a threshold matter, Petitioners cannot show that the settlement agreement is unlawful because the only action EPA committed to taking was to propose and "take final action" with respect to a rule. Assuming EPA takes final action, a court cannot determine its legality before knowing what it is.

Moreover, in light of statutory context, history, and purpose, Petitioners cannot show that section 111(d) prohibits EPA from finalizing a rule that regulates carbon dioxide from existing power plants. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). Petitioners also fail to account for the fact that two different versions of section 111(d) were enacted into law in 1990, one of which plainly contradicts Petitioners' position.

A. Congress Enacted Two Different Versions of Section 111(d).

Understanding Petitioners' arguments requires some background knowledge of statutory history and context. As enacted in 1970, section 111(d)(1) required state plans to address "any air pollutant which is not included on a list published under Section 7408(a)," *i.e.*, pollutants listed for the establishment of NAAQS, "or 7412(b)(1)(A) of this title," *i.e.*, pollutants listed for the establishment of hazardous air pollutant standards. *See* 42 U.S.C. § 7411(d) (West 1977). Section 111(d)'s cross-reference to "7412(b)(1)(A)" thus mandated section 111(d) regulation of air pollutants that were not otherwise covered by the hazardous pollutants program.

In 1990, after EPA's delays in regulating hazardous air pollutants "proved to be disappointing," *Sierra Club v. EPA*, 353 F.3d 976, 979-80 (D.C. Cir. 2004), Congress extensively amended section 112. Congress itself listed 189 hazardous air pollutants to be regulated; it then directed EPA to list categories of major sources and area sources for each of these pollutants and to establish emission standards for each source category. 42 U.S.C. §§ 7412(b)(1), (c)(1), (d)(1). Congress enacted

the list of 189 hazardous air pollutants into law as § 7412(b), thereby eliminating the former § 7412(b)(1)(A).

Both chambers of Congress then amended section 111(d)'s cross-reference to § 7412(b)(1)(A). But the Senate and House enacted different language and did not reconcile their amendments in conference. The Senate replaced the cross-reference to § 7412(b)(1)(A) with a reference to that section's replacement, § 7412(b): it thus requires section 111(d) standards for existing sources for "any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or section 112(b)." Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990) (amendment underlined).

The House amendment replaced the section 112 cross-reference with different language: it requires section 111(d) standards for existing sources for "any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or emitted from a source category which is regulated under section 112 of this title." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990) (amendment underlined). Both the Senate and House amendments were signed into law by the President and appear in the

Statutes at Large, but only the House amendment appears in the U.S. Code.

B. The House Amendment Maintains Section 111(d)'s Role in the Act's Comprehensive Regulatory Scheme.

The text of the 1990 House amendment, properly read in light of the statutory purpose, structure and legislative history, preserves section 111(d)'s function to regulate emissions of air pollutants that are not being regulated under the NAAQS or hazardous air pollutants programs. Petitioners argue that at the same time Congress strengthened section 112, it *sub silentio* curtailed EPA's section 111(d) authority to regulate dangerous pollutants that are not curbed under section 112. Petitioners are wrong. Petitioners' argument is based solely on the House amendment. But their reading of that amendment is not compelled, and thus they cannot show that EPA's proposed reading of the provision is impermissible. *See Chevron*, 467 U.S. at 842-43.

EPA provides several examples of alternative literal readings of the House amendment to Petitioners' interpretation. *See* EPA Br. 35-

38.[3] Moreover, the phrase "which is regulated under section 7412" could reasonably be read to modify both "any air pollutant" and "a source category." *See Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 980 (1986) (statutory language ambiguous where phrase could be read to modify either of two possible objects). Thus, the amendment could refer to those emissions subject to section 112 emission standards because (a) the *pollutant* is "regulated under section 7412"—i.e., listed as a hazardous air pollutant, and (b) the *source category* for that pollutant is "regulated under section 7412"—*i.e.*, listed as a source category subject to section 112 regulation. Read this way, the House amendment is a shorthand way of cross-referencing section 112 to clarify that section 111(d) only precludes regulation of power plants' emissions of a hazardous air pollutant (*e.g.*, mercury) only if those emissions are actually regulated under section 112. This construction would not bar standards for non-hazardous air pollutants (such as carbon dioxide) without section 112

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[3] Petitioners' reliance on *Lamie v. United States Trustee*, 540 U.S. 526, 535 (2004), is misplaced. The Court there held that a "missing conjunction ['or'] neither alters the text's substance nor obscures its meaning," reasoning that "[t]his is not a case where a 'not' is missing or where an 'or' inadvertently substitutes for an 'and.'" That is not the case here. *See* EPA Br. 35-38.

emission standards.[4] Additionally, the word "regulated" should be read in context to mean that the source category is regulated with respect to the specific pollutant in question, not whether the source is regulated under section 112 *at all*. *See* NGO Br. 12-13. Because section 112 regulates only hazardous air pollutants, the House amendment excludes only hazardous air pollutants actually regulated under section 112.

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2441 (2014). Here, exceptions to EPA's mandatory duty under section 111(d) to regulate "any air pollutant" should be strictly construed in order "to preserve the primary operation of the provision." *See Commissioner v. Clark*, 489 U.S. 726, 739 (1989). That construction furthers the Act's principal purpose to "protect and enhance the quality of the Nation's air resources," 42 U.S.C. § 7401(b)(1). The textually

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[4] Indeed, under this reading, the House amendment would authorize even section 111(d) standards for listed hazardous air pollutants, so long as they are emitted from sources that are not regulated under section 112 for those pollutants.

ambiguous House amendment accordingly should not be unreasonably read in a way that would dramatically limit EPA's longstanding authority to regulate non-hazardous pollutants under section 111(d).

Petitioners' interpretation would create a large gap in the Act's comprehensive coverage of emissions from stationary sources. Sources that emit hazardous air pollutants also emit numerous other harmful pollutants, including carbon dioxide. Under Petitioners' reading of section 111(d), EPA would have to choose between using *either* section 112 to address dangers associated with power plants' hazardous air pollutants like mercury *or* section 111(d) to address the "serious and well recognized" climate-change harms caused by power plants' carbon dioxide emissions. *See Massachusetts*, 549 U.S. at 521; 79 Fed. Reg. at 34,833. More broadly, Petitioners' interpretation would disable a vital tool for achieving cost-effective carbon dioxide emissions reductions from many other types of sources as well, since the other large stationary sources of greenhouse gases—e.g., oil and gas production facilities, petroleum refineries, and chemical plants—are regulated under section 112 for their hazardous emissions, as required by the statute. Petitioners' interpretation also would preclude EPA from using

section 111(d) to limit other harmful pollutants, such as sulfuric acid mist and fluoride compounds.[5] Given that more than 100 source categories emit hazardous pollutants regulated under section 112, Petitioners' contention that their interpretation would result in a "minor" gap in the Act's coverage is unpersuasive.

Nothing in the legislative history of the 1990 amendments suggests that Congress intended such a radical result when it replaced section 111(d)'s cross-reference to the hazardous-air-pollutant program. Indeed, when the Congressional Research Service ("CRS"), a department of the Library of Congress, compiled the legislative history of the 1990 amendments, it transcribed the amended Act by including both the House and Senate amendments to section 111(d), noting that the amendments were "duplicative" and simply used "different language [to] change the reference to section 112." *A Legislative History*

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[5] For example, EPA regulates methane and non-methane organic compounds from landfills under section 111(d) while regulating emissions of vinyl chloride, ethyl benzene, toluene, and benzene from those same sources under section 112, 61 Fed. Reg. 9,905 (Mar. 12, 1996) & 40 C.F.R. pt. 63, subpt. AAAA; and regulates fluorides from phosphate fertilizer plants under section 111(d) and hydrogen fluoride and other pollutants from those sources under section 112, 42 Fed. Reg. 12,022 (Mar. 1, 1977) & 40 C.F.R. pt. 63, subpt. BB.

of the Clean Air Act Amendments of 1990, Vol. 1, at 46 & n.1 (1993) (JA-56). As this Court has explained, "one must be cautious" not to read "too many nuances into the exact wording of the House and Senate bills" because "it is not clear that the legislators attached such precise meaning to the differences." *Rettig v. Pension Benefit Guarantee Corp.*, 744 F.2d 133, 145 (D.C. Cir. 1984) (citing CRS analysis of two differently-worded amendments). This Court should thus reject the "anomalous effect" of Petitioners' reading of section 111(d), which would force EPA to select only one set of harmful pollutants to regulate based "simply on the fortuity that [these pollutants] share[] a source." *Desert Citizens Against Pollution v. EPA*, 699 F.3d 524, 527-28 (D.C. Cir. 2012).

The gap in regulation resulting from Petitioners' interpretation also would undermine the function of section 111(d) that the Supreme Court recognized in *American Elec. Power v. Connecticut*, namely to "provide[] a means to seek limits on emissions of carbon dioxide from domestic power plants." 131 S. Ct. 2527, 2437-38 (2011) (*AEP*). Petitioners' argument is fundamentally at odds with the Court's holding that EPA's authority to regulate carbon dioxide from existing power

plants under section 111(d) displaced the States' federal common law claims. It is also inconsistent with the position that industry took in that case—including at oral argument, which took place after EPA had proposed to regulate mercury and other hazardous pollutants from power plants under section 112—that EPA had authority to regulate existing power plants under section 111(d). *See* EPA Br. 34 n.19.

Petitioners nonetheless claim the Supreme Court adopted their view, relying on a footnote in *AEP* in which the Court made passing reference to section 111(d) as it appears in the U.S. Code. Pet.Br. 23. Instead, the *AEP* footnote must be read in accord with the Court's holding that section 111(d) authorizes regulating carbon dioxide from existing power plants. Indeed, by stating that the exclusions to section 111(d) regulation apply when "stationary sources of *the pollutant in question* are regulated under the national ambient air quality standards program, §§ 7408-7410, or the 'hazardous air pollutants' program, § 7412." 131 S. Ct. 2527, 2537 n.7 (2008), the Court suggested that both exclusions are *pollutant*-specific, not source-specific.

Petitioners untenably assert that their interpretation of the House amendment should prevail because of Congressional intent to avoid

"double-regulation" of sources. This argument is not supported by any legislative history[6] and, as this Court has noted, silence in legislative history accompanying a subtle legislative change indicates that Congress did not intend to alter significantly the preexisting scheme. *United States v. Neville*, 82 F.3d 1101, 1105 (D.C. Cir. 1996). As the Supreme Court has stated, Congress "does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

Other amendments to the Act in 1990 that reference section 111(d) show that Congress intended to retain that section's role to regulate emissions not regulated under the NAAQS or hazardous air pollutants programs. For example, in section 112(d)(7), Congress explicitly provided that EPA's regulation of emissions under section 112

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[6] Rather than pointing to any actual legislative history, Petitioners rely exclusively on the regulatory preamble to EPA's Clean Air Mercury Rule, 70 Fed. Reg. at 16,031, which was vacated by this Court in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). *See* Pet.Br. 33. Regardless, EPA was referring in that rulemaking to a desire by the House "to avoid duplicative regulation of *HAP* [*i.e., hazardous air pollutants*] for a particular source category," and was not defining as "duplicative" the regulation of *different* emissions from the same sources. 70 Fed. Reg. at 16,032 (emphasis added).

must not impair section 111 requirements for different emissions from the same sources:

> No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section [111] of this title, part C or D of this subchapter, or other authority of this chapter or standard issued under State authority.

42 U.S.C. § 7412(d)(7). Petitioners' argument that section 112 regulation of power plants precludes regulation of their emissions under section 111(d) directly conflicts with this provision. *See also* 42 U.S.C. § 7412(c)(1) (directing EPA to keep its lists of source categories "consistent" between sections 111 and 112).

The House may have intended to preserve section 111(d)'s prohibition on "double regulation" of the *same* pollutants from the same source categories under different programs, but Congress expressed no intent to newly prohibit regulation of *different* pollutants from the same source category under different programs. And in fact there are numerous instances in the Act where the same source category is

regulated under multiple programs for different pollutants. *See* NGO Br. 6-7.

C. The Senate Amendment to Section 111(d) Also Defeats Petitioners' Interpretation of the Statute.

Even if the House amendment could be read as Petitioners urge, the Senate amendment to section 111(d) unambiguously preserved the section's longstanding function to regulate emissions that are not otherwise regulated under the NAAQS or the hazardous air pollutants programs. Recognizing this, Petitioners advance several arguments why the Court should ignore the Senate amendment, none of which has merit.

First, Petitioners mistakenly assert that the Court may disregard the Senate amendment in the Statutes as Large as "extraneous" because "there is no inconsistency with the U.S. Code." Pet.Br. 41. However, the text of the Statutes at Large, which contains the bill actually passed by Congress and signed by the President and contains both amendments, and the language of the U.S. Code, which contains only the House amendment, are facially different. Further, Petitioners do not dispute that the Senate amendment, if given effect, would yield a different result than their interpretation of the House amendment, as

several Petitioners acknowledged in prior litigation before this Court. *See* Joint Brief of State Respondent-Intervenors, *New Jersey v. EPA*, No. 05-1097, 2007 WL 3231261, at *25 (D.C. Cir. Aug. 3, 2007) ("interpreting § 111(d) required EPA to address two different and conflicting amendments to § 111(d) contained in legislation signed by the President") (JA-230). Thus, the Statutes at Large, which contains both House and Senate amendments, governs. *See United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) (although the U.S. Code establishes "prima facie the laws of the United States," it "cannot prevail over the Statutes at Large when the two are inconsistent").[7]

Second, as EPA explains, the fact the Senate amendment appeared in the final bill as a "conforming amendment" does not entitle it to less weight than the House amendment. *See* EPA Br. 41 (citing *Burgess v. United States*, 553 U.S. 124, 135 (2008)).

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[7] Petitioners' reliance on the Office of Law Revision Counsel's entry of only the House amendment into U.S. Code is misplaced. The codifier's omission, without the approval of Congress or the President, of the Senate amendment from the U.S. Code "should be given no weight." *Welden*, 377 U.S. at 98 n.4.

Third, the legislative history contradicts Petitioners' contention that the Senate amendment was a "scrivener's error." After the House amended the Senate's bill and deleted the Senate's seven "Conforming Amendments" (including the revision to section 111(d)), the Conference Committee added the Senate's conforming amendments back into the final bill. *Compare* S. 1630, 101st Cong. (as passed by House, May 23, 1990) *with* Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990).

Because both amendments were enacted into law and assuming the two amendments are inconsistent (as Petitioners claim), EPA must be given the opportunity to consider both and to try to harmonize them when it promulgates a final rule. *See Citizens to Save Spencer Co. v. EPA*, 600 F.2d 844, 872 (D.C. Cir. 1979) (where Congress "drew upon two bills originating in different Houses and containing provisions that, when combined, were inconsistent in respects never reconciled in conference . . . it was the greater wisdom for [EPA] to devise a middle course . . . to give maximum possible effect to both."). EPA's proposed interpretation here, which allows for continued regulation under section 111(d) of non-hazardous air pollutants from sources regulated under section 112, is consistent with Congressional intent and EPA's historic

regulation under section 111(d). *See* Proposed Rule, Legal Memorandum 26-27 (JA-397-398). Indeed, EPA's interpretation of section 111(d) was endorsed by several of the Petitioners who intervened on EPA's side in *New Jersey*. *See* Joint Brief of State Respondent-Intervenors, No. 05-1097, 2007 WL 3231261, at *25 ("EPA developed a reasoned way to reconcile the conflicting language and the Court should defer to EPA's interpretation") (JA-230).

CONCLUSION

For the reasons described above, the petition should be dismissed or denied.

Dated: March 4, 2015

Respectfully submitted,

FOR THE STATE OF NEW YORK

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

By: /s/ Morgan A. Costello[8]
BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
BETHANY A. DAVIS NOLL
Assistant Solicitor General
MICHAEL J. MYERS
MORGAN A. COSTELLO
BRIAN LUSIGNAN
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2392

[8] Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), counsel hereby represents that the other parties listed in the signature blocks have consented to the filing of this brief.

FOR THE STATE OF CALIFORNIA

KAMALA D. HARRIS
ATTORNEY GENERAL
RAISSA LERNER
Deputy Attorney General
1515 Clay Street
Oakland, CA 94612
(510) 622-2100

FOR THE STATE OF CONNECTICUT

GEORGE JEPSEN
ATTORNEY GENERAL
KIMBERLY P. MASSICOTTE
SCOTT N. KOSCHWITZ
Assistant Attorneys General
Office of the Attorney General
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250

FOR THE STATE OF DELAWARE

MATTHEW P. DENN
ATTORNEY GENERAL
VALERIE M. EDGE
Deputy Attorney General
Delaware Department of Justice
102 West Water Street, 3d Floor
Dover, DE 19904
(302) 739-4636

FOR THE STATE OF MAINE

JANET T. MILLS
ATTORNEY GENERAL
GERALD D. REID
Natural Resources Division Chief
6 State House Station
Augusta, ME 04333
(207) 626-8800

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
ATTORNEY GENERAL
MELISSA A. HOFFER
TURNER SMITH
Assistant Attorneys General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108-1518
(617) 763-2322

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
ATTORNEY GENERAL
TANNIS FOX
Assistant Attorney General
Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
(505) 827-6000

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
ATTORNEY GENERAL
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

FOR THE STATE OF RHODE ISLAND

PETER KILMARTIN
ATTORNEY GENERAL
GREGORY S. SCHULTZ
Assistant Attorney General
Rhode Island Department of Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400

FOR THE STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL
THEA SCHWARTZ
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-2359

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
ATTORNEY GENERAL
LESLIE R. SEFFERN
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-4613

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
ATTORNEY GENERAL
AMY MCDONNELL
General Counsel
District Department of Environment
Office of the Attorney General
441 4th Street, NW
Washington, DC 20001
(202) 727-3400

FOR THE CITY OF NEW YORK

ZACHARY W. CARTER
CORPORATION COUNSEL
CARRIE NOTEBOOM
Senior Counsel
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2319

CERTIFICATE OF COMPLIANCE

I hereby certify that the Final Brief for State Intervenors in Support of Respondent, dated March 4, 2015, complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure, this Court's Circuit Rules, and this Court's briefing order issued on November 4, 2014, which limited the briefs for State and NGO Intervenors in Support of Respondent to a total of 8,750 words. I certify that this brief contains 4,729 words, as counted by the Microsoft Word software used to produce this brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), and that when combined with the word court of the NGO Intervenors-Respondents, the total does not exceed 8,750 words.

/s/ Morgan A. Costello
MORGAN A. COSTELLO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Final Brief for State Intervenors in Support of Respondent was filed on March 4, 2015 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Morgan A. Costello
MORGAN A. COSTELLO