ORAL ARGUMENT HELD 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

REPLY IN SUPPORT OF ALTERNATIVE MOTION FOR A STAY OF THE MANDATE

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SUMMARY

EPA's opposition is without merit because it entirely misconstrues the alternative request by Murray Energy in the pending petitions for rehearing and petitions for rehearing *en banc*. Moreover, EPA's argument that judicial economy would not be served by avoiding a "do-over" of the extensively briefed and argued question of EPA's legal authority under Section 111(d) in light of the clear Section 112 prohibition is simply wrong.

ARGUMENT

I. MURRAY ENERGY PROPOSES AN ALTERNATIVE TO REHEARING, NOT A STAY OF THE MANDATE IF REHEARING IS DENIED.

Murray Energy properly sought rehearing of the important precedential decision denying the petitions on procedural grounds, and in the alternative proposed that the Court allow the passage of time to obviate the need for rehearing. *See* Pet. for Reh'g . . . or in the Alternative, Motion for a Stay of the Mandate, No. 14-1112 (July 24, 2015) ("Rather than reconsidering the threshold issues, the panel could stay the mandate in these related cases . . . until the final rule is published in the Federal Register . . . ."). Murray Energy does not ask, as EPA asserts, for the Court to "stay the mandate in these cases if it denies the petitions for rehearing." EPA Opp. at 2. If rehearing is denied, then and only then would Murray Energy have occasion to file a motion of the sort EPA purports to oppose. Murray Energy has filed no such motion.[1]

1. EPA's opposition to a hypothetical motion to a stay of the mandate after a denial of rehearing that Murray Energy has not filed depends upon the claim

At this time, all that Murray Energy requests is that the Court consider continuing the automatic stay of the mandate pending adjudication of the rehearing petitions, in lieu of adjudicating those petitions.

II. EPA'S PREEMPTIVE OPPOSITION TO CONSOLIDATION IS ERRONEOUS.

In opposing the alternative request, EPA oddly claims that the interests of judicial economy would not be served. EPA ignores the significant investment of judicial, federal, state, and private efforts in litigating the threshold issue of whether EPA has any authority to regulate power plant emissions at all under Section 111(d). The Section 112 exclusion issue was exhaustively briefed and argued before this panel. The briefs on this threshold issue were extensive, with the relevant argument sections alone running over 300 pages. Over one hour of oral argument was spent on this threshold issue. And the interests of stakeholders were well represented before the panel. The briefs represented the positions of 27 States, two of the largest coal companies, representatives of utilities and small businesses, a wide range of interested trade associations, and various environmental and policy organizations.

As a result, it is unsurprising that the discussion of the crucial threshold issue in the preamble to the final rule — which runs 5,328 words — identifies no interpretation of the Section 112 exclusion or legal justification thereof not

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that the panel found a "lack of jurisdiction," EPA Opp. at 4, but the panel's decision did not dismiss the petitions for lack of jurisdiction.

already raised in the briefs before this panel.[2] In fact, EPA now agrees with petitioners that two interpretations put forward by EPA in this litigation are unreasonable because they would violate fundamental principles of statutory interpretation. Final Rule at 260–61, Attach. A at 9. EPA also formally abandons its longstanding view that the language in the United States Code unambiguously precludes regulating any emissions from Section 112 source categories under Section 111(d). Final Rule at 262–66, Attach. A at 10–12. To support this reversal, EPA puts forward precisely the same arguments, in nearly the same words, as the arguments already presented to this panel.[3] EPA even adopts and incorporates as an alternative argument the very same discussion and legal conclusion challenged as a final action in this case. Final Rule at 266 n.294, Attach. A at 12 n.294 ("[T]he proper resolution of a conflict between the two amendments would be the analysis and conclusion discussed in the Proposed Rule's legal memorandum . . . .").

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2. The discussion is on pages 244 to 270 of the prepublication signed final rule. For the convenience of the Court, Attachment A reprints the discussion.

3. *E.g.*, *compare* Final Rule at 267, Attach. A at 13 ("the phrase 'regulated under section 112' refers only to the regulation of HAP emissions"), *with* Final Brief for Respondent EPA ("EPA Brief"), No. 14-1146 at 40 ("the ambiguous term 'regulated' can, on its own, be reasonably interpreted as hazardous-pollutant specific"); *compare* EPA Brief 49 (Section 111(d) fills program "gap") *with* Final Rule 250 Attach. A at 3 ("section 111(d) is designed to regulate pollutants . . . that fall in the gap"); *compare* EPA Brief 45 ("legislative history of the 1990 Amendments . . . sought to expand EPA's regulatory authority") *with* Final Rule 268, Attach. A at 14 ("Congress's intent in the 1990 CAA Amendments was to expand the EPA's regulatory authority").

Requiring presentation of the threshold issue of EPA's authority under Section 111(d) to regulate emissions from coal-fired power plants to a new panel after so much time and effort has already been expended to exhaustively brief and argue the issue before this panel would unnecessarily waste judicial resources. A new panel would be starting from scratch and would have to do all of the work that this panel has done again. The efficiencies that will result from avoiding this result are obvious. EPA's assertion that the efficiencies are somehow "illusory" because the Court ultimately did not get to the merits of EPA's authority under Section 111(d) ignores what actually took place in this litigation, and fails to appropriately value this Court's resources and the significant investment of those resources to date. EPA Opp. at 4.

EPA's preferred course is apparently to throw out all the briefs and start fresh, but this would "result in duplicative briefing and delay in resolving a threshold regulatory issue" — a result EPA has in other instances appropriately urged this Court to avoid. EPA Filing in *White Stallion Energy Center, LLC v. EPA*, No. 12-1100, Doc. 1379989 at 8 (D.C. Cir. Apr. 15, 2014). In EPA's own words, "challenges [that] . . .present . . . threshold issues for judicial review . . . should be resolved sooner, rather than later" because "[i]t furthers judicial efficiency for the Court to consider and resolve challenges to . . . threshold issues before . . . it considers challenges to specific emission standards, inasmuch as resolution of the former could potentially moot the latter." *Id.* at 7 n.3. Moreover, "[i]t is . . . in EPA's interest . . . to learn sooner rather than later" the legality of its chosen course of action. EPA Filing in *Ass'n of Battery*

Recyclers, Inc. v. EPA, No. 12-1129, Doc. 1386924 at 4 (D.C. Cir. Aug. 1, 2012).

By simply waiting until these cases can be consolidated with challenges to the final rule, this Court can more expeditiously and efficiently resolve the threshold issue of EPA's authority under Section 111(d). This approach would also allow the Court to vacate the panel's opinion on key procedural issues that is the subject of pending petitions for rehearing, further saving judicial resources because this Court would not have to resolve those pending petitions.

EPA is correct that, in addition to the threshold issue on EPA's legal authority, there will also be other novel "legal interpretations" relating to other important issues and an "underlying administrative record, none of which were before the Court in these cases." EPA Opp. at 4. EPA assumes that the panel could not sever and decide the threshold legal authority question, leaving the rest of the challenges to be assigned to a panel once the other issues are briefed. And even if this panel were to decide to keep the case together with every single challenge to the final rule briefed, argued, and decided *en masse*, that would not in any way reduce or eliminate the efficiencies of not having to needlessly start over on the question of EPA's fundamental authority to regulate coal-fired power plants at all under Section 111(d). This very specific question does not depend on the details of the final rule, or on understanding changes made in the final rule, or on new theories of EPA's purported legal authority, or on an administrative record beyond the existence of the final rule itself. It is clear that EPA believes it has the authority under Section 111(d) to

proceed, and it has not identified some new theory to explain that purported authority. Moreover, if the panel retains the entire case, the panel could proceed expeditiously on the already-briefed Section 112 exclusion issue, resolving that threshold issue far faster than if the case were assigned to a new panel that required new briefs and argument.

Even though the alternative Murray Energy proposes is simply a matter of common sense in light of these unique circumstances, EPA mischaracterizes the suggestion as an effort to "exploit" "improper filings." EPA Opp. at 6. Yet EPA had ample opportunity and did in fact brief procedural objections that could have ended these cases before they were assigned to a merits panel. After considering EPA's initial procedural briefs, this Court declined to dismiss or deny the cases and instead ordered full briefing and argument on the merits. Murray Energy reasonably notes that, rather than considering the petitions for rehearing before it right now, the Court could alternatively avoid wasting the extensive efforts undertaken by the panel and the parties with the passage of a little time. That is all Murray Energy's "alternative" seeks to do. Doing so in this case is especially proper because of the urgent need to expeditiously resolve the underlying merits issue.

CONCLUSION

As an alternative to considering the petitions for rehearing at this time, this Court could instead wait until publication of the final rule in the Federal Register and consolidate these cases with challenges thereto.

Dated: August 14, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing REPLY IN SUPPORT OF ALTERNATIVE MOTION FOR A STAY OF THE MANDATE complies with the page volume limitations of Rule 27(d)(2) of the Federal Rules of Appellate Procedure because it does not exceed 10 pages, excluding the parts exempted by Rule 32.

/s/ *Geoffrey K. Barnes*

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ATTACHMENT A

EPA Discussion of the Section 112 Exclusion in Final Rule Preamble

B. CAA Section 112 Exclusion to CAA Section 111(d) Authority

CAA section 111(d) contains an exclusion that limits the regulation under CAA section 111(d) of air pollutants that are regulated under CAA section 112. 42 U.S.C. 7411(d)(1)(A)(i). This "Section 112 Exclusion" in CAA section 111(d) was the subject of a significant number of comments based on two differing amendments to this exclusion enacted in the 1990 CAA Amendments. As discussed in more detail below, the House and the Senate each initially passed different amendments to the Section 112 Exclusion and both amendments were ultimately passed by both houses and signed into law. In 2005, in connection with the Clean Air Mercury Rule (CAMR), the EPA discussed the agency's interpretation of the Section 112 Exclusion in light of these two differing amendments and concluded that the two amendments were in conflict and that the provision should be read as follows to give both amendments meaning: where a source category has been regulated under CAA section 112, a CAA section 111(d) standard of performance cannot be established to address any HAP listed under CAA section 112(b) that may be emitted from that particular source category. See 70 FR 15994, 16029-32 (March 29, 2005).

In June 2014, the EPA presented this previous interpretation as part of the proposal and requested comment on it. The EPA received numerous comments on its previous interpretation, including comments on the proper interpretation and effect of each of the two differing amendments, and whether the Section 112 Exclusion should be read to mean that the EPA's regulation of HAP from power plants under CAA section 112 bars the EPA from establishing CAA section 111(d) regulations covering CO_2 emissions from power plants. In particular, many comments focused on two specific issues. First, some commenters -- including some industry and state commenters that had previously endorsed the EPA's interpretation of the Section 112 Exclusion in other contexts [287] -- argued that the EPA's 2005 interpretation was in error because it allowed the regulation of certain

[287] For example, in the CAMR litigation (State of New Jersey v. EPA, No. 05-1097 (D.C. Cir.), the joint brief filed by a group of intervenors and an amicus (including six states and the West Virginia Department of Environmental Protection, and Utility Air Regulatory Group and nine other industry entities) stated that the EPA had interpreted section 111(d) in light of the two different amendments and that the EPA's interpretation was "a reasoned way to reconcile the conflicting language and the Court should defer to the EPA's interpretation." Joint Brief of State Respondent-Intervenors, Industry Respondent-Intervernors, and State Amicus, filed May 18, 2007, at 25.

pollutants from source categories under CAA section 111(d) when those source categories were also regulated for different pollutants under CAA section 112. Second, some commenters argued that the EPA's previous interpretation of the House amendment (as originally represented in 2005 at 70 FR at 16029-30) was in error because it improperly read that amendment as focusing on whether a source category was regulated under CAA section 112 rather than on whether the air pollutant was regulated under CAA section 112, and that improper reading lead to an interpretation that was inconsistent with the structure and purpose of the CAA.

In light of the comments, the EPA has reconsidered its previous interpretation of the Section 112 Exclusion and, in particular, considered whether the exclusion precludes the regulation under CAA section 111(d) of CO_2 from power plants given that power plants are regulated for certain HAP under CAA section 112. On this issue, the EPA has concluded that the two differing amendments are not properly read as conflicting. Instead, the House amendment and the Senate Amendment should each be read to mean the same in the context presented by this rule: that the Section 112 Exclusion does not bar the regulation under CAA section 111(d) of non-HAP from a source category, regardless of whether that source category is subject to standards for HAP under CAA section 112. In reaching this conclusion, the EPA has revised its previous interpretation of the House amendment, as discussed below.

1. Structure of the CAA and Pre-1990 Section 112 Exclusion

The Clean Air Act sets out a comprehensive scheme for air pollution control, addressing three general categories of pollutants emitted from stationary sources: (1) criteria pollutants (which are addressed in sections 108-110); (2) hazardous pollutants (which are addressed under section 112); and (3) "pollutants that are (or may be) harmful to public health or welfare but are not or cannot be controlled under sections 108-110 or 112." 40 FR 53340 (Nov. 17, 1975).

Six "criteria" pollutants are regulated under sections 108-110. These are pollutants that the Administrator has concluded "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;" "the presence of which in the ambient air results from numerous and diverse mobile or stationary sources;" and for which the Administrator has issued, or plans to issue, "air quality criteria. 42 U.S.C. §7408(a)(1). Once the EPA issues air quality criteria for such pollutants, the Administrator must propose primary National Ambient Air Quality Standards (NAAQS) for them, set at levels "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. § 7409(a)-(b). States must then adopt plans for implementing NAAQS. 42 U.S.C. § 7410.

Hazardous air pollutants (HAP) are regulated under CAA section 112 and include the pollutants listed by Congress in section 112(b)(1) and other pollutants that the EPA lists under sections 112(b)(2) and (b)(3). CAA section 112 further provides that the EPA will publish and revise a list of "major" and "area" source categories of HAP, and then establish emissions standards for (HAP) emitted by sources within each listed category. 42 U.S.C. § 7412(c)(1) & (2).

CAA section 111, 42 U.S.C. § 7411, is the third part of the CAA's structure for regulating stationary sources. Section 111 has two main components. First, section 111(b) requires the EPA to promulgate federal "standards of performance" addressing *new* stationary sources 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). Once the EPA has set *new* source standards addressing emissions of a particular pollutant under CAA section 111(b), CAA section 111(d) provides that the EPA will promulgate regulations requiring states to establish standards of performance for *existing* stationary sources of the same pollutant. 42 U.S.C. § 7411(d)(1).

Together, the criteria pollutant/NAAQS provisions in sections 108-110, the hazardous air pollutant provisions in section 112, and performance standard provisions in section 111 constitute a comprehensive scheme to regulate air pollutants with "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. No. 91-1196, at 20 (1970).[288]

The specific role of CAA section 111(d) in this structure can be seen in CAA subsection 111(d)(1)(A)(i), which provides that regulation under CAA section 111(d) is intended to cover pollutants that are not regulated under either the criteria pollutant/NAAQS provisions or the HAP regulated under section 112. Prior to 1990, this limitation was laid out in plain language, which stated that CAA section 111(d) regulation applied to "any air pollutant... for which air quality criteria have not been issued or which is not included on a list published under section [108(a)] or [112(b)(1)(A)]." This plain language demonstrated that section 111(d) is designed to regulate pollutants from existing sources that fall in the gap not covered by the criteria pollutant provisions or the hazardous air pollutant provisions.

This gap-filling purpose can be seen in the early legislative history of the CAA. As originally enacted in the 1970 CAA, the precursor to CAA section 111 (which was originally section 114) was described as

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[288] In subsequent CAA amendments, Congress has maintained this three-part scheme, but supplemented it with the Preservation of Significant Deterioration (PSD) program, the Acid Rain Program and the Regional Haze program.

covering pollutants that would not be controlled by the criteria pollutant provisions or the hazardous air pollutant provisions. See S. Committee Rep. to accompany S. 4358 (Sept. 17, 1970), 1970 CAA Legis. Hist. at 420 ("It should be noted that the emission standards for pollutants which cannot be considered hazardous (as defined in section 115 [which later became section 112]) could be established under section 114 [later, section 111]. Thus, there should be no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare."); Statement by S. Muskie, S. Debate on S. 4358 (Sept. 21, 1970), 1970 CAA Legis. Hist. at 227 ("[T]he bill [in section 114] provides the Secretary with the authority to set emission standards for selected pollutants which cannot be controlled through the ambient air quality standards and which are not hazardous substances.").

2. The 1990 Amendments to the Section 112 Exclusion

The Act was amended extensively in 1990. Among other things, Congress sought to accelerate the EPA's regulation of hazardous pollutants under section 112. To that end, Congress established a lengthy list of HAP; set criteria for listing "source categories" of such pollutants; and required the EPA to establish standards for each listed source category's hazardous pollutant emissions. 42 U.S.C. § 7412(b), (c) and (d). In the course of overhauling the regulation of (HAP) under section 112, Congress needed to edit section 111(d)'s reference to section 112(b)(1)(A), which was to be eliminated as part of the revisions to section 112.

To address the obsolete cross-reference to section 7412(b)(1)(A), Congress passed two differing amendments – one from the Senate and one from the House – that were never reconciled in conference. The Senate amendment replaced the cross reference to old section 112(b)(1)(A) with a cross-reference to new section 112. Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). The House amendment replaced the cross-reference with the phrase "emitted from a source category which is regulated under section [112]." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990).[289] Both amendments were

[289] Originally, when the House bill to amend the CAA was introduced in January 1989, it focused on amendments to control HAP. Of particular note, the amendments to section 112 included a provision that excluded regulation under section 112 of "[a]ny air pollutant which is included on the list under section 108(a), or which is regulated for a source category under section 111(d)." H.R. 4, § 2 (Jan. 3, 1989), 1990 CAA Legist. Hist. at 4046. In other words, the Section 112 Exclusion in section 111(d) that was ultimately contained in the House amendment was originally crafted as what might be called a "Section 111(d) Exclusion" in

enacted into law, and thus both are part of the current CAA. To determine how this provision is properly applied in light of the two differing amendments, we first look at the Senate amendment, then at the House amendment, then discuss how the two amendments are properly read together.

3. The Senate Amendment is Clear and Unambiguous

Unlike the ambiguous amendment to CAA section 111(d) in the House amendment (discussed below), the Senate amendment is straightforward and unambiguous. It maintained the pre-1990 meaning of the Section 112 Exclusion by simply substituting "section 112(b)" for the prior cross-reference to "section 112(b)(1)(A)." Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). So amended, section 111(d) mandates that the EPA require states to submit plans establishing standards for "any air pollutant . . . which is not included on a list published under section [108(a)] or section [112(b)]." Thus, the Section 112 Exclusion resulting from the Senate amendment would preclude section 111(d) regulation of HAP emission but would not preclude section 111(d) regulation of CO_2 emissions from power plants notwithstanding that power plants are also regulated for HAP under CAA section 112.

Some commenters have argued that the Senate amendment should be given no effect, because only the House amendment is shown in the U.S. Code, and because the Senate amendments appeared under the heading "conforming amendments," and for various other reasons. The EPA disagrees. The Senate amendment, like the House

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section 112. This is significant because the "source category" phrasing in the original January 1989 text with respect to section 111(d) makes sense, whereas the "source category" phrasing in the 1990 House amendment does not. When referring to the scope of what is regulated under section 111(d), it makes sense to frame that scope with respect to source categories, because section 111 regulation begins with the identification of source categories under section 111(b)(1)(A). By contrast, regulation under section 112 begins with the identification of HAP under section 112(b); the listing of source categories under section 112(c) is secondary to the listing of HAP. From this history, and in light of this difference between the scope of what is regulated in sections 111 and 112, it is reasonable to conclude that the "source category" phrasing is a legacy from the original 1989 bill—that is, when converting the 1989 text into the Section 112 Exclusion that we see in the 1990 House amendment, the legislative drafters continued to use phrasing based on "source category" notwithstanding that this phrasing created a mismatch with the way that the scope of section 112 regulation is determined.

amendment, was enacted into law as part of the 1990 CAA amendments, and must be given effect.

First, that the U.S. Code only reflects the House amendment does not change the fact that both amendments were signed into law as part of the 1990 Amendments, as shown in the Statutes at Large. Pub. L. No. 101-549, §§ 108(g) and 302(a), 104 Stat. 2399, 2467, 2574 (1990). Where there is a conflict between the U.S. Code and the Statutes at Large, the latter controls. See 1 U.S.C. §§ 112 & 204(a); Stephan v. United States, 319 U.S. 423, 426 (1943) ("the Code cannot prevail over the Statutes at Large when the two are inconsistent"); Five Flags Pipe Line Co. v. Dep't of Transp., 854 F.2d 1438, 1440 (D.C. Cir. 1988) ("[W]here the language of the Statutes at Large conflicts with the language in the United States Code that has not been enacted into positive law, the language of the Statutes at Large controls.").

Second, the "conforming" label is irrelevant. A "conforming" amendment may be either substantive or non-substantive. Burgess v. United States, 553 U.S. 124, 135 (2008). And while the House Amendment contains more words, it also qualifies as a "conforming amendment" under the definition in the Senate Legislative Drafting Manual, Section 126(b)(2) (defining "conforming amendments" as those "necessitated by the substantive amendments of provisions of the bill"). Here, both the House and Senate amendments were "necessitated by" Congress' revisions to section 112 in the 1990 CAA Amendment, which included the deletion of old section 112(b)(1)(A). Thus, the House's amendment is no less "conforming" than the Senate's, and the heading under which it was enacted ("Miscellaneous Guidance") does not suggest any more importance than "Conforming Amendments." In any event, courts gives full effect to conforming amendments, see Washington Hosp. Ctr. v. Bowen, 795 F.2d 139, 149 (D.C. Cir. 1986), and so neither the Senate Amendment nor the House amendment can be ignored.

Third, the legislative history of the Senate amendment supports the conclusion that the substitution of the updated cross-reference was not a mindless, ministerial decision, but reflected a decision to choose an update of the cross reference instead of the text that was inserted into the Section 112 Exclusion by the House amendment. In mid-1989, the House and Senate introduced identical bills (H.R. 3030 and S. 1490, respectively) to provide for "miscellaneous" changes to the CAA. In both the Senate and House bills as they were introduced in mid-1989, the Section 112 Exclusion was to be amended by taking out "or 112(b)(1)(A)" and inserting "or emitted from a source category which is regulated under section 112." H.R. 3030, as introduced, 101st Cong. § 108 (Jul. 27, 1989); S. 1490, as introduced, 101st Cong. § 108 (Aug. 3, 1989). See 1990 CAA Legis. Hist. at 3857 (noting that H.R. 3030 and S.1490, as introduced, were the same). Although S. 1490 was identical to H.R. 3030 when they were introduced, the Senate reported

a vastly different bill (S.1630) at the end of 1989. See S. 1630, as reported (Dec. 20, 1989), 1990 CAA Legis. Hist. at 7906. As reported and eventually passed, S. 1630 did not contain the text in the House amendment ("or emitted from a source category which is regulated under section 112") and instead contained the substitution of cross references (changing "section 112(b)(1)(A)" to "section 112(b)"). *See* S. 1630, as reported, 101st Cong. § 305, 1990 CAA Legis. Hist. at 8153; S. 1630, as passed, § 305 (Apr. 3, 1990), 1990 CAA Legis. Hist. at 4534. Though the EPA is not aware of any statements in the legislative history that expressly explain the Senate's intent in making these changes to the Senate bill, the sequence itself supports the conclusion that the Senate's substitution reflects a decision to retain the pre-1990 approach of using a cross-reference to 112(b) to define the scope of the Section 112 Exclusion. Whether the difference in approach between the final Senate amendment in S.1630 and the House amendment in H.R. 3030 creates a substantive difference or are simply two different means of achieving the same end depends on what interpretation one gives to the text in the House amendment, which we turn to next.

4. The House amendment

a. The House amendment is ambiguous. Before looking at the specific text of the House amendment, it is helpful to review some principles of statutory interpretation. First, statutory interpretation begins with the text, but does not end there. As the D.C. Circuit Court has explained, "[t]he literal language of a provision taken out of context cannot provide conclusive proof of congressional intent." Bell Atlantic Telephone Cos. v. F.C.C., 131 F.3d 1044, 1047 (D.C. Cir. 1977). See King v. Burwell, 2015 U.S. LEXIS 4248, *19("[O]ftentimes the 'meaning-or ambiguity-of certain words or phrases may only become evident when placed in context.' Brown & Williamson, 529 U. S., at 132, 120 S. Ct. 1291, 146 L. Ed. 2d 121. So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Id., at 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (internal quotation marks omitted). Our duty, after all, is 'to construe statutes, not isolated provisions.' Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson, 559 U. S. 280, 290, 130 S. Ct. 1396, 176 L. Ed. 2d 225 (2010) (internal quotation marks omitted)."). In addition, statutes should not be given a "hyperliteral" reading that is contrary to established canons of statutory construction and common sense. See RadLAX Gateway Hotel v. Amalgamated Bank, 132 S.Ct. 2065, 20, 2070-71 (2012), 2070-71 (2012).

Further, a proper reading of statutory text "must employ all the tools of statutory interpretation, including text, structure, purpose, and legislative history." Loving v. I.R.S., 742 F.3d 1013, 1016 (D.C. Cir. 2014) (internal quotation omitted). See, also, Robinson v. Shell Oil

Co., 519 U.S. 337, 341 (1997) (statutory interpretation involves consideration of "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). Moreover, one principle of statutory construction that has particular application here is that provisions in a statute should be read to be consistent, rather than conflicting, if possible. This principle was discussed in the recent case of Scialabba v. Cuellar De Osorio, 134 S. Ct. 2191, 2214 concurring opinion by Chief Justice Roberts and Justice Scalia), 2219-2220 (dissent by Justices Sotomayor, Breyer and Thomas)(2014). As Justice Sotomayor wrote (at 134 S. Ct. at 2220):

> "We do not lightly presume that Congress has legislated in self-contradicting terms. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory. . . . [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously"). . . . Thus, time and again we have stressed our duty to "fit, if possible, all parts [of a statute] into [a] harmonious whole." FTC v. Mandel Brothers, Inc., 359 U.S. 385, 389, 79 S. Ct. 818, 3 L. Ed. 2d 893 (1959); see also Morton v. Mancari, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974) (when two provisions "are capable of co-existence, it is the duty of the courts . . . to regard each as effective"). In reviewing an agency's construction of a statute, courts "must," we have emphasized, "interpret the statute 'as a . . . coherent regulatory scheme'" rather than an internally inconsistent muddle, at war with itself and defective from the day it was written. Brown & Williamson, 529 U.S., at 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121.

As amended by the House, CAA section 111(d)(1)(A)(i) limits CAA section 111(d) to any air pollutant "for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title . . ." This statutory text is ambiguous and subject to numerous possible readings.

First, the text of the House-amended version of CAA section 111(d) could be read literally as authorizing the regulation of any pollutant that is not a criteria pollutant. This reading arises if one focuses on the use of "or" to join the three clauses:

> The Administrator shall prescribe regulations . . . under which each State shall submit to the Administrator a plan which establishes standards of performance for any existing source for any air pollutant [1] for which air

> quality criteria have not been issued or [2] which is not included on a list published under section 7408(a) of this title or [3] emitted from a source category which is regulated under section 7412 of this title . . . .

42 U.S.C. § 7411(d)(1) (emphasis and internal numbering added). Because the text contains the conjunction "or" rather than "and" between the three clauses, a literal reading could read the three clauses as alternatives, rather than requirements to be imposed simultaneously. In other words, a literal reading of the language of section 111(d) provides that the Administrator may require states to establish standards for an air pollutant so long as *either* air quality criteria have not been established for that pollutant, *or* one of the remaining criteria is met. If this reading were applied to determine whether the EPA may promulgate section 111(d) regulations for CO_2 from power plants, the result would be that CO_2 from power plants coule be regulated under section 111(b) because air quality criteria have not been issued for CO_2 and therefore whether CO_2 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 limitation covering (HAP) that are regulated under CAA section 112 and thus is contrary to both the CAA's comprehensive scheme created by the three sets of provisions (under which CAA section 111 is not intended to duplicate the regulation of pollutants regulated under section112) and the principle of statutory construction that text should not be construed such that a provision does not have effect.

A second reading of CAA section 111(d) as revised by the House amendment focuses on the lack of a negative before the third clause. That is, unlike the first and second clauses that each contain negative phrases (either "has not been issued" or "which is not included"), the third clause does not. One could presume that the negative from the second clause was intended to carry over, implicitly inserting another "which is not" before "emitted from a source category which is regulated under section [112]." But that is a presumption, and not the plain language of the statute. The text as amended by the House says that the EPA "shall" prescribe regulations for "any air pollutant . . . emitted from a source category which is regulated under section [112]." 42 U.S.C. § 7411(d)(1). Thus, CAA section 111(d)(1)(A)(i) could be read as providing for the regulation of emissions of pollutants if they are emitted from a source category that is regulated under CAA section 112. Like the first reading discussed above, this reading would authorize the regulation of CO_2 emissions from existing power plants under CAA section 111(d). But, this second reading is not reasonable because it would provide for the regulation of a source's HAP emissions under CAA section 111(d) when those same emissions were also subject to standards under CAA section 112. Thus, this reading

would be contrary to Congress's intent that CAA section 111(d) regulation fill the gap between the other programs by covering pollutants that the other programs do not, but not duplicate the regulation of pollutants that the other programs cover.

If one does presume that the "which is not" phrase is intended to carry over to the third clause, then CAA section 111(d) regulation under the House amendment would be limited to "any air pollutant...which is not... emitted from a source category which is regulated under section [112]." Even with this presumption, however, the House amendment contains further ambiguities with respect to the phrases "a source category" and "regulated under section 112," and how those phrases are used within the structure of the provision limiting what air pollutants may be regulated under CAA section 111(d).

The phrase "regulated under section 112" is ambiguous. As the Supreme Court has explained in the context of other statutes using a variation of the word "regulate," an agency must consider what is being regulated. See Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 366 (2002) (It is necessary to "pars[e] . . . the 'what'" of the term "regulates."); UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 363 (1999) (the term "'regulates insurance' . . . requires interpretation, for [its] meaning is not plain."). Here, one possible reading is that the phase modifies the words "a source category" without regard to what pollutants are regulated under section 112, which then presents the issue of what meaning to give to the phrase "a source category."

Under this reading, and assuming the phrase "a source category" is read to mean the particular source category, the House amendment would preclude the regulation under CAA section 111(d) of a specific source category for any pollutant if that source category has been regulated for any HAP under CAA section 112.[290] The effect of this reading would be 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. This is the interpretation that the EPA applied to the House amendment in connection with the CAMR rule in 2005, when looking at the question of whether HAP can be

[290] "A source category" could also be interpreted to mean "any source category." Under this interpretation, CAA 111(d) regulation would be limited to air pollutants that are not emitted by any source category for which the EPA has issued standards for HAP under CAA section 112. This interpretation is not reasonable because it would effectively read CAA 111(d) out of the statute. Given the extensive list of source categories regulated under CAA 112 and the breadth of pollutants emitted by those categories collectively, literally all air pollutants would be barred from CAA 111(d) regulation under this interpretation.

regulated under CAA section 111(d) for a source category that is not regulated for HAP under section 112, and some commentors have advocated for this interpretation here. But, after considering all of the comments and reconsidering this interpretation, the EPA has concluded that this interpretation of the House amendment is not a reasonable reading because it would disrupt the comprehensive scheme for regulating existing sources created by the three sets of provisions covering criteria pollutants, (HAP) and the other pollutants that fall outside of those two programs and frustrate the role that section 111 is intended to play.[291] Specifically, under this interpretation, the EPA could not regulate a source category's emissions of HAP under CAA section 112, and then promulgate regulations for other pollutants from that source category under CAA section 111(d).[292] There is no reason to conclude that the House amendment was intended to abandon the existing structure and relationship between the three programs in this way. Indeed, Congress expressly provided that regulation under CAA section 112 was not to "diminish or replace the requirements of" the EPA's regulation of non-hazardous pollutants under section 7411. See 42 U.S.C. § 7412(d)(7). Further, consistent with CAA section 112's direction that EPA list "all categories and subcategories of major sources and area [aka, non-major] sources" of HAP and then establish CAA section 112 standards for those categories and subcategories, 42 U.S.C. §§ 7412(c)(1) and (c)(2), the EPA has listed and regulated over 140 categories of sources under CAA section 112. Thus, this reading would eviscerate the EPA's authority under section 111(d) and prevent it from serving as the gap-filling provision within the comprehensive scheme of the CAA as Congress intended.[293] In short, it is not reasonable to interpret the

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[291] In assessing any interpretation of section 111(d), EPA must consider how the three main programs set forth in the CAA work together. See UARG, 134 S. Ct. at 2442 ("reasonable statutory interpretation must account for . . . the broader context of the statute as a whole") (quotation omitted).

[292] Supporters of this interpretation have noted that the EPA could regulate power plants under both CAA section 111(d) and CAA section 112 if it regulated under section 111(d) first, before the Section 112 Exclusion is triggered. But that argument actually further demonstrates another reason why this interpretation is unreasonable. There is no basis for concluding that Congress intended to mandate that section 111(d) regulation occur first, nor is there any logical reason why the need to regulate under section 111(d) should be dependent on the timing of such regulation in relation to CAA 112 regulation of that source category.

[293] Some commenters have stated that EPA could choose to regulate both HAP and non-HAP under section 111(d), and thus could

Section 112 Exclusion in section 111(d) to mean that the existence of CAA section 112 standards covering hazardous pollutants from a source category would entirely eliminate regulation of non-hazardous emissions from that source category under section 111(d).[294]

b. The EPA's Interpretation of the House Amendment. Having concluded that the interpretations discussed above are not reasonable, the EPA now turns to what it has concluded is the best, and sole

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regulate HAP without creating a gap. But this presumes that Congress intended EPA to have the choice of declining to regulate a section 112-listed source category for HAP under section 112, which is inconsistent with the mandatory language in section 112. See, e.g., section 112(d)(1) ("The Administrator shall promulgate regulations establishing emissions standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in accordance with the schedules provided in subsections (c) and (e) of this section."). Moreover, given the prescriptive language that Congress added into section 112 concerning how to set standards for HAP, see section 112(d)(2) and (d)(3), it is unreasonable to conclude that Congress intended that the EPA could simply choose to ignore the provisions in section 112 and instead regulate HAP for a section 112 listed source category under section 111(d).

Further, some supporters of this interpretation have suggested that EPA could regulate CO2 under section 112. But this suggestion fails to consider that sources emitting HAP are major sources if they emit 10 tons of any HAP. See CAA section 112(a)(1). Thus, if CO2 were regulated as a HAP, and because emissions of CO2 tend to be many times greater than emissions of other pollutants, a huge number of smaller sources would become regulated for the first time under the CAA.

[294] Even if one were to determine that this interpretation were the proper reading of the House amendment that would not be the end of the analysis. Instead, that reading would create a conflict between the Senate amendment and the House amendment that would need to be resolved. In that event, the proper resolution of a conflict between the two amendments would be the analysis and conclusion discussed in the Proposed Rule's legal memorandum (discussing EPA's analysis in the CAMR rule at 70 FR 15994, 16029-32): The two amendments must be read together so as to give some effect to each amendment and they are properly read together to provide that, where a source category is regulated under section 112, the EPA may not establish regulations covering the HAP emissions from that source category under section 111(d).

reasonable, interpretation of the House amendment as it applies to the issue here.

The EPA's interpretation of the House amendment as applied to the issue presented in this rule is that the Section 112 Exclusion excludes the regulation of HAP under CAA section 112 if the source category at issue is regulated under CAA section 112, but does not exclude the regulation of other pollutants, regardless of whether that source category is subject to CAA section 112 standards. This interpretation reads the phrase "regulated under section 112" as modifying the words "source category" (as does the interpretation discussed above) but also recognizes that the phrase "regulated under section 112" refers only to the regulation of HAP emissions. In other words, the EPA's interpretation recognizes that source categories "regulated under section 112" are not regulated by CAA section 112 with respect to all pollutants, but only with respect to HAP. Thus, it is reasonable to interpret the House amendment of the Section 112 Exclusion as only excluding the regulation of HAP emissions under CAA section 111(d) and only when that source category is regulated under CAA section 112. We note that this interpretation of the House amendment alone is the same as the 2005 CAMR interpretation of the two amendments combined: where a source category has been regulated under CAA section 112, a CAA section 111(d) standard of performance cannot be established to address any HAP listed under CAA section 112(b) that may be emitted from that particular source category. See 70 FR 15994, 16029-30 (March 29, 2005).

There are a number of reasons why the EPA's interpretation is reasonable and avoids the issues discussed above.

First, the EPA's interpretation reads the House amendment to the Section 112 Exclusion as determining the scope of what air pollutants are to be regulated under CAA section 111(d), as opposed to creating a wholesale exclusion for source categories. The other text in subsections 111(d)(1)(A)(i) and (ii) modify the phrase "any air pollutant." Thus, reading the Section 112 Exclusion to also address the question of what air pollutants may be regulated under CAA section 111(d) is consistent with the overall structure and focus of CAA section 111(d)(1)(A).

Second, the EPA's interpretation furthers – rather than undermines – the purpose of CAA section 111(d) within the longstanding structure of the CAA. That is, this interpretation supports the comprehensive structure for regulating various pollutants from existing sources under the criteria pollutant/NAAQS program under sections 108-110, the HAP program under section 112, and other pollutants under section 111(d), and avoids creating a gap in that structure. See King v. Burwell, 2015 U.S. LEXIS 4248, *28 (2015)("A provision that may seem ambiguous in isolation is often clarified by the remainder of the

statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (quoting United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U. S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988)")

Third, by avoiding the creation of gaps in the statutory structure, the EPA's interpretation is consistent with the legislative history demonstrating that Congress's intent in the 1990 CAA Amendments was to expand the EPA's regulatory authority across the board, compelling the agency to regulate more pollutants, under more programs, more quickly.[295] Conversely, the EPA is aware of no statement in the legislative history indicating that Congress simultaneously sought to restrict the EPA's authority under CAA section 111(d) or to create gaps in the comprehensive structure of the statute. If Congress had intended this amendment to make such a change, one would expect to see some indication of that in the legislative history.

Fourth, when applied in the context of this rule, the EPA's interpretation of the House amendment is consistent with the Senate amendment. Thus, this interpretation avoids creating a conflict within the statute. See discussion above of Scialabba, 134 S. Ct. 2191 at 2220 (citing and quoting, among other authorities, A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory. . . . [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously")).

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[295] See S. Rep. No. 101-228 at 133 ("There is now a broad consensus that the program to regulate hazardous air pollutants . . . should be restructured to provide the EPA with authority to regulate industrial and area sources of air pollution . . . in the near term"), reprinted in 5 A Legislative History of the Clean Air Act Amendments of 1990 ("Legis. Hist.") 8338, 8473 (Comm. Print 1993); S. Rep. No. 101-228 at 14 ("The bill gives significant authority to the Administrator in order to overcome the deficiencies in [the NAAQS program]") & 123 ("Experience with the mobile source provisions in Title II of the Act has shown that the enforcement authorities . . . need to be strengthened and broadened . . ."), reprinted in 5 Legis. Hist. at 8354, 8463; H.R. Rep. No. 101-952 at 336-36, 340, 345 & 347 (discussing enhancements to Act's motor vehicle provisions, the EPA's new authority to promulgate chemical accident prevention regulations, the enactment of the Title V permit program, and enhancements to the EPA's enforcement authority), reprinted in 5 Legis. Hist. at 1786, 1790, 1795, & 1997.

In sum, when this interpretation of the House amendment is applied in the context of this rule, the result is that the EPA may promulgate CAA section 111(d) regulations covering carbon dioxide emissions from existing power plants notwithstanding that power plants are regulated for their HAP emissions under CAA section 112.

5. The Two Amendments Are Easily Reconciled And Can Be Given Full Effect

Given that both the House and Senate amendments should be read individually as having the same meaning in the context presented in this rule, giving each amendment full effect is straight-forward: the Section 112 Exclusion in section 111(d) does not foreclose the regulation of non-HAP from a source category regardless of whether that source category is also regulated under CAA section 112. As applied here, the EPA has the authority to promulgate CAA section 111(d) regulations for CO_2 from power plants notwithstanding that power plants are regulated for HAP under CAA section 112.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY IN SUPPORT OF ALTERNATIVE MOTION FOR A STAY OF THE MANDATE has been served electronically by Murray Energy Corporation through the Court's CM/ECF system on all ECF registered counsel.

Dated: August 14, 2015

/s/ *Geoffrey K. Barnes*

Geoffrey K. Barnes