ORAL ARGUMENT NOT YET SCHEDULED

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

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| AMERICAN LUNG ASSOCIATION and AMERICAN PUBLIC HEALTH ASSOCIATION<br><br>Petitioners,<br><br>v.<br><br>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANDREW R. WHEELER, ADMINISTRATOR, United States Environmental Protection Agency,<br><br>Respondents. | Case No. 19-1140<br>(and consolidated cases 19-1165, 19-1166, 19-1173, 19-1175, 19-1176, 19-1177, 19-1179, 19-1185, 19-1186, 19-1187, 19-1188, 19-1189) |

**PETITIONER WESTMORELAND MINING HOLDINGS LLC'S OPPOSITION TO MOTIONS FOR ABEYANCE**

Pursuant to Federal Rule of Appellate Procedure 27(a)(3), Westmoreland Mining Holdings LLC opposes the motions for abeyance filed by both the Environmental and Public Health Petitioners and by the State and Municipal Petitioners. Westmoreland Mining Holdings LLC has filed its own petition for review challenging EPA's authority to impose additional regulatory burdens under Section 111(d) of the Clean Air Act on sources that are currently subject to regulation under the Act's Section 112 national emission standard program. There is no justification for delaying judicial determination of this controversy, especially given the nature of the core legal controversy at issue and its history.

## ARGUMENTS IN OPPOSITION TO MOTION

### I. Congress Expressly Precluded Section 111(d) Regulation of Sources that Are Subjected to the Section 112 Program.

Originally the purpose of the Section 111(d) program was to provide a State centered approach to regulating existing sources of non-criteria emissions that were not extremely hazardous to health. 42 U.S.C. § 1857c-6(b) & (d) (1976) (program for State centered regulation of existing sources of emissions that "cause[] or contribute[] to the endangerment of public health or welfare"). Meanwhile, the original Clean Air Act only granted the Federal government authority to directly regulate existing sources of non-criteria emissions that are extremely hazardous to health. 42 U.S.C. § 1857c-7 (1976) (program for direct Federal regulation of existing sources of emissions that "cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness").

In 1990, Congress dramatically eliminated restrictions on federal authority to regulate existing sources of non-criteria emissions under the Section 112 program—largely eliminating the need for the Section 111(d) program. *Compare* 42 U.S.C. § 1857c-7 (1976) (limiting direct Federal regulation to non-criteria emissions which "cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness"), *with* 42 U.S.C. § 7412(b)(1) (requiring direct Federal regulation of non-criteria emissions that "present, or may present . . . a threat of adverse human health effects . . . or adverse environmental effects").

Following the 1990 amendments, Congress unambiguously intended for *all* potentially harmful non-criteria emissions from the categories of sources subjected to Section 112 to be covered by that program. Indeed, Congress broadly defined the sweep of substances covered under Section 112 so as not to leave any gap to be addressed under Section 111(d) for sources that are subjected to Section 112. *Compare* 42 U.S.C. § 7411 (providing for regulation of emissions that "cause[] or contribute[] to the endangerment of public health or welfare"), *with* 42 U.S.C. § 7412(b)(1) (requiring direct Federal regulation of non-criteria emissions that "present, or may present . . . a threat of adverse human health effects . . . or adverse environmental effects"); *compare also* 42 U.S.C. § 7602(h) (defining welfare for purposes of Section 111), *with* 42 U.S.C. § 7412(a)(7) (defining adverse environmental affect for purposes of Section 112). This broad expansion of direct federal authority and the scope of the Section 112 program effectively eliminated the original purpose of the Section 111(d) program.

So Congress sensibly decided that, going forward, once a category of sources was subjected to the expanded and comprehensive Section 112 program then EPA may no longer impose further regulatory burdens on such sources using the Section 111(d) program. 42 U.S.C. § 7411(d) (precluding regulation of emissions "from a source category which is regulated under section 112"); Pub. L. 101–549, § 108(g), 104 Stat. 2,399, 2,467 (1990). In addition, Congress eliminated the previously enacted restriction on using Section 111(d) to regulate emissions of substances that were addressed by the Section 112 program, which now was required to address *all* potentially harmful non-criteria emissions.

These changes to the scope of Section 111(d) were enacted in Section 108(g) of the 1990 Amendments under the subheading "Regulation of Existing Sources":

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

Pub. L. 101–549, § 108(g), 104 Stat. 2,399, 2,467 (1990). This common-sense revision of the scope of the Section 111(d) program was originally proposed by the Administration and was paired in its introduction and every subsequent version of the bill with another provision addressing power plants, Section 112(n)(1). Together, these provisions gave EPA a choice of whether to regulate all non-criteria emissions from existing power plants going forward either under the national Section 112 program or the State centered Section 111(d) program.

While the two changes in Section 108(g) to the scope of the Section 111(d) program were originally contained in the Administration bill and first passed in the House, the two changes were agreed to by the Senate in conference. While the conference agreement would be typically reflected in a conference report, in this case the agreement is reported in a Statement of Senate Managers that was contemporaneously prepared and printed in the Congressional Record.[1]

[1] The Statement of Senate Managers was prepared and printed in the Congressional Record because "[d]ue to time constraints" there was not "a particularly useful statement of managers" in the conference report and so "[t]o help rectify this problem" the senate managers "prepared a detailed explanation of five important titles" "in the form of a traditional statement of managers." 136 Cong. Rec. 36007, 36065 (Oct. 27, 1990). While the Statement

The Statement of Senate Managers records the results of the conference of the Senate and House over Section 108 of the 1990 amendments and *expressly* reports the agreement by the Senate conferees to the enactment of the amendment in Section 108(g) of the 1990 Amendments to Section 111(d) of the Act:

> Section 108—Miscellaneous Provisions . . .
>
> *Senate amendment*. . . .
>
> *House amendment*. . . . [T]he House amendment contains provisions . . . for amending section 111 of the Clean Air Act relating to new *and existing* stationary sources . . . .
>
> *Conference agreement.* The Senate recedes to the House except . . . with respect to the requirement regarding judicial review of reports . . . . and with respect to transportation planning . . . .

136 Cong. Rec. 36007, 36067 (Oct. 27, 1990) (emphasis added). This report of the agreement at conference refers specifically to Section 108(g) which was the only provision "amending section 111 of the Clean Air Act relating to . . . existing stationary sources," and which was also expressly described in a subheading as an amendment relating to "Regulation of Existing Sources." Thus, the Statement of Senate Managers *specifically* acknowledges that changes to Section 111(d) that were first passed by the House were agreed to by the Senate conferees to be included in the conference report which was then approved by both the House and Senate and signed by the President.

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of Senate Managers was not "reviewed or approved by all of the conferees" it was a "best effort to provide the agency and the courts with the guidance that they will need in the course of implementing and interpreting this complex act," and Senator Chafee sought and obtained unanimous consent to print the Statement of Senate Managers into the Congressional Record. *Id.*

As a result of the enactment of Section 108(g) of the 1990 Amendments, EPA cannot use Section 111(d) to promulgate new regulations for any emissions "from a source category which is regulated under section 112." *See* 42 U.S.C. § 7411(d). Today coal power plants are a source category listed and regulated under Section 112 of the Clean Air Act. Thus, unless and until EPA reverses the listing and regulation of coal power plants under the Section 112 program, EPA cannot promulgate regulations for coal power plants under Section 112.

## II. Vast Amounts of Executive, Judicial, and Private Resources Have Been Devoted to EPA's Unlawful Efforts to Use Section 111(d) to Regulate Coal Power Plants Even Though They Are Regulated Under Section 112.

This case involves EPA's renewed attempt to use Section 111(d) to regulate emissions "from a source category which is regulated under section 112," even though Congress prohibited EPA from doing so. *See* 42 U.S.C. § 7411(d). Despite this unambiguous and sensible statutory limitation on EPA's authority, EPA has spent *over half a decade* attempting to do what Congress forbid based largely on alleged ambiguity arising out of a superfluous amendment purporting to update a cross reference in Section 111(d) that Congress excised from the law.

Untold resources have been expended simply because among other trivial drafting imprecisions the 1990 Amendments include the following:

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

Pub. L. 101–549, § 302(a), 104 Stat. 2,399, 2,574 (1990).

This provision is a common place update to a cross reference, nothing more and nothing less. And since the cross reference itself was stricken from the law by Section 108(g), this provision is a superfluous scrivener's amendment. It was included in the final bill in error or because it was understood to have no effect, since the assumption in bill drafting is amendments in bills are executed in order. Either way, the mere inclusion of a conforming cross reference update does not undermine the separate decision by Congress to entirely eliminate the cross reference and insert a new and distinct limitation on EPA's authority in its place in Section 108(g).

The argument that has been advanced is, in essence, that Congress failed to reconcile a substantive difference between the House bill and the Senate bill in Conference. But the Statement of Senate Managers in the Congressional Record leaves no doubt that both branches of Congress agreed to substantively amend the scope of Section 111(d) as provided in Section 108(g). As reflected in its subheading and text, Section 108(g) contains a material change to existing law concerning the scope of EPA's authority to regulate under Section 111(d). The Senate managers' statement in the Congressional Record demonstrates that they recognized the House bill contained this material change to EPA's authority and agreed on behalf of the Senate to its inclusion in the Conference Report where it was then approved by both chambers and signed by the President.

On the other side of the ledger, there is no indication in the legislative history that any member of Congress was even aware Section 302 of the bill contained a scrivener's amendment to update the cross reference in Section 111 that was

deleted by Congress from the Act in Section 108(g). Rather, the Statement of Senate Managers indicates that it was understood that the House had addressed an issue that was not addressed at all in the Senate bill, and that the Senate conferees and the Senate agreed to include Section 108(g)'s changes to EPA's authority under Section 111(d) as a part of the 1990 Amendments. In other words, the historical record shows that the Senate conferees weighed including *no provision* on the issue or *including Section 108(g)*, and the choice was to include Section 108(g).

Unsurprisingly, the Law Revision Counsel—the legislative agency charged with executing amendments and producing the United States Code which runs into this sort of issue on a fairly regular basis—had no trouble executing the substantive changes to the scope of the Section 111(d) program and ignoring the superfluous cross reference update. 42 U.S.C. § 7411, Amendments, 1990, Subsec. (d)(1)(A)(i) (2012) ("Subsec. (d)(1)(A)(i). Pub. L. 101–549, §302(a), which directed the substitution of '7412(b)' for '7412(b)(1)(A)', could not be executed, because of the prior amendment by Pub. L. 101–549, §108(g), see below. Pub. L. 101–549, §108(g), substituted 'or emitted from a source category which is regulated under section 7412 of this title' for 'or 7412(b)(1)(A).'").

Not long after the 1990 Amendments were enacted and codified, EPA likewise examined Section 302(a) and concluded that it was a just an error.[2]

[2] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AIR EMISSIONS FROM MUNICIPAL SOLID WASTE LANDFILLS – BACKGROUND INFORMATION FOR FINAL STANDARDS AND GUIDELINES, at 1-5 (December 1995) ("Section 11(d)(1)(A) was twice amended by the 1990 Clean Air Act Amendments . . .

When reexamining the issue in 2004 and 2005 EPA again concluded that Section 302(a) "is a drafting error and therefore should not be considered." 70 Fed. Reg. 15994, 16031 (Mar. 29, 2005). Yet EPA stated that it would "attempt to give effect to" Section 302(a) even though it was a "drafting error." *Contra Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336–37 (D.C. Cir. 2013). The "effect" EPA proposed "giving" Section 302(a) in 2005 was to permit EPA to regulate substances that were not listed under Section 112(b) "from a source category that is regulated under section 112" in spite of Section 108(g) of the 1990 Amendments.

Given the expansive scope of emissions EPA must list under Section 112(b), this throwaway concession to a drafting error should have been lost to history. Instead, EPA later turned to this convoluted statutory argument as the basis for an enormous regulatory program seeking to transform the American economy. Shortly after EPA finalized this sweeping regulation that squarely transgressed a clear statutory limit on its authority, the Supreme Court of the United States issued an equally extraordinary stay of EPA regulation pending judicial review. Order, *Murray Energy v. EPA*, No. 15A778 (U.S., Feb. 9, 2016). Undeterred, EPA continued to defend its authority in a brief before this Court, largely relying

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Title 42 of the U.S. Code adopts the amendment of section 108(g) with the explanation that section 302(a) could not be executed because of the prior amendment by section 108(g). EPA also believes that section 108(g) is the correct amendment because the Clean Air Act Amendments revised 112 to include regulation of source categories in addition to regulation of listed hazardous air pollutants, and section 108(g) thus conforms to other amendments of section 112.").

on a belated claim of statutory ambiguity apart from the Section 302(a) issue. *See* Respondent EPA's Final Brief at 76–98, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. April 22, 2016).

While EPA has now retreated on most of its other exuberant legal positions and repealed the original rule, EPA has promulgated a replacement rule that once again exceeds its authority to regulate under Section 111(d) by regulating emissions from a source category that is regulated under Section 112 of the Act. Accordingly, Westmoreland and others have petitioned to review EPA's rule on the basis that it exceeds EPA's legal authority in this and other respects.

## III. The Record Contains No New Arguments in EPA's Defense.

The prohibition on using Section 111(d) to regulate sources that are already subject to Section 112 regulations has now already been briefed and argued before this Court twice. Neither EPA nor any other party has provided any new argument in this record that was not already fully briefed during prior litigation.

In the record under review, EPA addressed the fact that it was attempting once again to use Section 111(d) to regulate emissions from a source category regulated under Section 112 with just the following two sentences:

> The EPA's position is that the "Section 112 Exclusion" in section 111(d) does not bar the regulation of GHGs from power plants notwithstanding that power plants are regulated for HAP under section 112. The basis for the EPA's position on this issue has been stated in the preamble to the CPP (see 80 Fed. Reg. 64662, 64710-64715 (Oct. 23, 2015)) and in the EPA's brief in the CPP litigation (State of West Virginia v. EPA, No 15-1363 (D.C. Circuit), Document # 1609995, filed April 22, 2016, at 76-98)

*See EPA's Responses to Public Comments on the EPA's Proposed Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units*, at 12 (June 2019), EPA-HQ-OAR-2017-0355-26741. The materials cited by EPA as fully detailing EPA's position include five pages in the Federal Register from 2015, and 22 pages of EPA's 2016 brief in *West Virginia v. EPA*, No. 15-1363. This material, in turn, incorporates and adopts eight pages from a memorandum that accompanied the proposed Clean Power Plan in 2014. *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* at 20-27 (June 18, 2014), EPA-HQ-OAR-2013-0602-0419.

In each document setting forward its position on the issue, EPA asserts that it is attempting, somehow, to give effect to Section 302(a). *E.g.*, 80 Fed. Reg. 64662, 64714 n.294 (Oct. 23, 2015). This is the exact argument presented to this Court in 2016. And the issue stands entirely on EPA's reiteration by reference of its arguments in support of the Clean Power Plan because no other arguments in EPA's favor were raised in comments in the proceeding under review here.

## IV. Further Delay of Judicial Determination of the Controversy Is Unwarranted and Inappropriate.

Enough is enough. The time has come for this Court to say whether EPA can require States to regulate emissions under Section 111(d) from a source category that is being regulated directly by EPA under Section 112. There is no sense in any further delay of the resolution of this fully ripe controversy over this threshold issue, and the coal industry should not have to continue to litigate this issue over, and over, and over again without *any* judicial resolution.

Further, once the choice Congress intended to put to EPA is unclouded—whether to regulate sources entirely under Section 112 or under Section 111(d)—then EPA can finally make a considered decision on which program is better. As it stands, EPA has never reasonably weighed these alternatives against each other in connection with its obligation to decide whether to use Section 112 to regulate power plants. *See* 42 U.S.C. § 7412(n)(1). A decision in this case can help EPA reach a reasonable final decision in light of the costs and benefits of these very different regulatory alternatives.

For several years, the environmental, state, and local petitioners in this case have agreed that this Court expeditiously reach a decision on EPA's threshold authority under the Section 111(d) program. Yet now they move to place the petitions for review filed by Westmoreland and others that will finally settle the issue into an indefinite abeyance pending EPA's decision of other regulatory matters and petitions for reconsideration.

Whatever the reasons behind the abrupt departure from prior insistence on an expeditious resolution may be, this Court ought to decline such calls for delay of the controversy over whether EPA can use Section 111(d) *at all* for source categories that are already regulated under Section 112.

## CONCLUSION

The petitions challenging EPA's authority should be briefed, argued, and decided expeditiously rather than placed into abeyance.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The motion complies with the word limit in Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 3112 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f).

This motion complies with the typographic requirements of Federal Rule of Appellate Procedure 32(a) because it is typeset in proportionally spaced 14 point Calisto MT type.

*/s/ Robert D. Cheren*
Robert D. Cheren

September 30, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Motion to Intervene and accompanying certificates have been filed using the Court's CM/ECF system.

*/s/ Robert D. Cheren*
Robert D. Cheren

September 30, 2019