IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA ex rel. E. Scott Pruitt, *et al.*, Appellants, v. GINA MCCARTHY, *et al.*, Appellees.	Case No. 15-5066

APPELLANTS' MOTION FOR INJUNCTION PENDING APPEAL

Federal courts play a critical supervisory role in the administrative state, retaining the authority to exercise equitable discretion to stop federal agencies from engaging in *ultra vires* activities that harm states and the public. EPA's current plan to restructure the United States' energy economy through "plant-to-plug" regulation under Section 111(d) of the Clean Air Act is a textbook example of *ultra vires* activity, as the Act expressly withholds from EPA authority to regulate power plants under Section 111(d) under these circumstances. The district court's decision to defer review of that action to future litigation in the District of Columbia Circuit abrogates its obligation to exercise jurisdiction conferred by 28 U.S.C. § 1331. Absent an injunction pending appeal, Oklahoma will be forced to restructure its electric system in order to "keep the lights on," harming the citizens of Oklahoma, and to continue making unrecoverable expenditures of public resources.[1]

[1] Counsel for Appellees represented that Appellees oppose the relief sought in this motion.

STATEMENT OF FACTS

On June 18, 2014, Defendants U.S. Environmental Protection Agency and Administrator Gina McCarthy ("EPA") proposed a rule to regulate greenhouse gas emissions from existing fossil-fuel-fired power plants pursuant to Section 111(d) (the "EPA Power Plan"). 79 Fed. Reg. 34,830 (June 18, 2014). Under what EPA calls a "plant to plug approach,"[2] the EPA Power Plan aims to reduce carbon-dioxide emissions from the power sector by 30 percent by 2030, relative to 2005 levels, by requiring states to overhaul their "production, distribution and use of electricity." *Id.* at 34,832/3. In the case of Oklahoma, EPA proposed to require that power plants slash emissions by 33 percent in 2020 and 35.5 percent in 2030.

Reducing emissions by 33 percent over five years is a monumental undertaking. Coal currently accounts for over 35 percent of electricity generated within Oklahoma, and EPA has acknowledged that improvements at individual power plants are incapable of achieving anywhere near that magnitude of reductions. 79 Fed. Reg. at 34,861/1 (assuming that efficiency measures could reduce emissions by 6 percent). Accordingly, the EPA Power Plan forces the State of Oklahoma to undertake substantial legislative, regulatory, planning, and other activities to ensure that the EPA Power Plan will not jeopardize the reliability of electric service throughout the State. *See* Declaration of Brandy Wreath, Director, Public Utility Division, Oklahoma Corporation Commission, at ¶¶ 2–14 ("Wreath Decl.") (Ex. A.).

Because the EPA Power Plan requires its goals to be met at a breakneck pace, and constructing and integrating new capacity is a years-long process, Oklahoma has no choice but to begin carrying out EPA's commands before EPA finalizes the Plan. Wreath Decl. ¶¶ 12–15. The Oklahoma Corporation Commission, the State's chief utility regulator, is cur-

[2] EPA Fact Sheet (June 2, 2014), *available at* http://www2.epa.gov/sites/production/files/2014-05/documents/20140602fs-plan-flexibilty.pdf.

rently hard at work to ensure that the EPA Power Plan does not cause interruptions of electric service in Oklahoma or unacceptably undermine reliability or affordability. Wreath Decl. ¶¶ 2, 13–14. Due to the EPA Power Plan, simply maintaining electric service across the State of Oklahoma is forcing the State to make substantial expenditures of time, effort, money, and resources. Wreath Decl. ¶ 2.

But EPA's proposal is *ultra vires* no matter its particulars because any regulation of coal-fired power plants under Section 111(d) is expressly barred by the Clean Air Act. In this respect, Section 111(d) of the Clean Air Act provides that EPA may not require standards of performance for existing sources that are part of "a source category which is regulated under section [112, 42 U.S.C. § 7412]." Power plants are part of "a source category which is regulated under" Section 112 through EPA's Mercury and Air Toxics Standard, a 2012 rule that resulted in the retirement of 4,700 megawatts of coal-fired generating capacity and required tens of billions of dollars in investments for the remaining facilities to achieve compliance. EPA, MATS Rule RIA 6A-8, ES-2 (2011).[3] As a result, under what EPA has acknowledged is the "literal reading" of Section 111(d), *see* 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004), regulation of power plants under Section 111(d) is barred by the Clean Air Act.[4]

Oklahoma and other parties have spent the better part of a year attempting to obtain judicial relief to enforce this fundamental threshold limitation on EPA's authority. Recognizing that the District of Columbia Circuit has authority to review final agency actions and that it could deem resolution of this legal question to be appropriate in aid of its future jurisdiction or in light of the definitiveness of EPA's Power Plan proposal, Oklahoma participated

[3] *Available at* http://www.epa.gov/ttnecas1/regdata/RIAs/matsriafinal.pdf.

[4] Although the Supreme Court held that EPA's refusal to consider costs in promulgating the Mercury and Air Toxics Standard was unreasonable, *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the Supreme Court did not vacate the Rule, and it remains binding law.

in *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015), seeking relief in the D.C. Circuit. Unlike a district court, the D.C. Circuit does not have original jurisdiction over controversies concerning federal law, *see* 28 U.S.C. § 1331, and it determined that neither the All Writs Act nor the Clean Air Act conveyed jurisdiction over the suit.

Lacking any other meaningful and adequate opportunity for relief, Oklahoma filed this suit and moved for a preliminary injunction on July 1. No. 15-369 (N.D. Okla. filed July 1, 2015), ECF Nos. 2, 5. The district court requested supplemental briefing on jurisdiction and denied the preliminary injunction as moot on July 2. ECF No. 9. Oklahoma submitted supplemental briefing and renewed its preliminary injunction motion. ECF Nos. 22, 24. On July 17, the district court dismissed this action for lack of subject matter jurisdiction and denied Oklahoma's preliminary injunction motion as moot. ECF No. 28 (Ex. C). Oklahoma appealed on July 20 and moved the district court pursuant to Federal Rule of Civil Procedure 62(c) for an injunction pending appeal. ECF Nos. 30, 31. The district court denied the motion for injunction pending appeal on July 22, finding that Rule 62(c) relief was unavailable because it had not issued an order granting, dissolving, or denying an injunction. ECF No. 34, at 2 (Ex. D). The district court also declined to grant the injunction because it would "alter the status quo," in light of the court's determination that it lacked jurisdiction. *Id.*

LEGAL STANDARD

Federal Rule of Appellate Procedure 8(a)(2) authorizes the Court to issue an order granting an injunction while an appeal of a final judgment denying an injunction is pending. A party seeking an injunction pending appeal must demonstrate: (1) that the movant is likely to succeed on the merits of its appeal; (2) that the movant will be irreparably injured absent an injunction; (3) that issuance of the injunction will not substantially injure the other parties interested in the proceeding; and (4) that the public interest will not be harmed by issuance

of the injunction. *See Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001); *see also* Cir. R. 8.1. The movant must first seek an injunction in the district court and this court reviews the district court's decision to determine whether it abused its discretion and whether the movant has demonstrated a clear and unequivocal right to relief. *See Homans*, 264 F.3d at 143.

ARGUMENT

I. Oklahoma Is Likely To Succeed on the Merits of the Appeal and on the Merits of This Suit[5]

A. The District Court's Decision Denying an Injunction Pending Appeal Is an Abuse of Discretion

The district court's decision denying Oklahoma's motion for injunction pending appeal is an abuse of discretion because it is predicated on two errors of law: the district court's erroneous findings that it did not enter an order denying an injunction or that it lacked authority to enter an injunction in light of its prior decision dismissing the action for lack of subject matter jurisdiction.

"[A]n abuse of discretion…occurs when the district court commits an error of law." *Flood v. ClearOne Commc'ns, Inc.*, 618 F.3d 1110, 1117 (10th Cir. 2010) (quotation marks omitted); *see also Koon v. United States*, 518 U.S. 81, 100 (1996) (same). Here, the district court's decision that it did not enter an order granting, dissolving, or denying an injunction is flatly wrong. The district court issued two orders denying preliminary injunctions, No. 15-369 (N.D. Okla. filed July 1, 2015), ECF Nos. 9, 28, and these orders merged into the final judgment. *See Allen v. Zavaras*, 416 F. App'x 784, 785 (10th Cir. 2011) (citing *Atomic Oil Co. of Okla. v. Bardahl Oil Co.*, 419 F.2d 1097, 1102 n.9 (10th Cir. 1969)). Consequently, the court's

[5] Because the district court's dismissal was based on its erroneous decision that it lacked subject matter jurisdiction, Circuit Rule 8.1's requirement that the moving party must explain the basis for the district court's and the court of appeals' jurisdiction is addressed in this section.

final judgment constituted an order denying an injunction within the meaning of Rule 62(c). Similarly, the Federal Reporter is replete with decisions entering motions for injunction pending appeal where the district court's decision was based on a purported absence of subject matter jurisdiction. *See Pentax Corp. v. Myhra*, 61 F.3d 731 (9th Cir. 1995), *as amended*, 72 F.3d 708; *Jensen v. IRS*, 835 F.2d 196 (9th Cir. 1987); *Laurenzo v. Miss. High Sch. Activities Ass'n*, 708 F.2d 1038 (5th Cir. 1983); *LaRouche v. Kezer*, 20 F.3d 68 (2d Cir. 1994); *Armstrong v. Bd. of Educ.*, 323 F.2d 333 (5th Cir. 1963); *see also Peak Med. Okla. No. 5, Inc. v. Sebelius*, No. 10-597, 2010 WL 4809319 (N.D. Okla. Nov. 18, 2010) (noting an absence of direct Tenth Circuit precedent but granting motion for injunction pending appeal after dismissing action for lack of subject matter jurisdiction). The authority to issue such injunctions is part of the federal courts' jurisdiction to determine their own jurisdiction and is authorized by Federal Rule of Civil Procedure 62, Federal Rule of Appellate Procedure 8, and, as necessary to protect a court's appellate jurisdiction, the All Writs Act, 28 U.S.C. § 1651(a).

B. Oklahoma Is Likely To Succeed on the Merits of the Appeal Because the District Court Had Jurisdiction Under 28 U.S.C. § 1331

The district court's judgment that it lacks subject matter jurisdiction misses the forest for the trees. Oklahoma invokes the district court's federal question jurisdiction under 28 U.S.C. § 1331 by challenging Defendants' implementation of the Clean Air Act. But the district court does not even mention Section 1331, instead confusing the Clean Air Act's creation of a procedural mechanism for review of final agency actions with Section 1331 jurisdiction under federal law. Oklahoma is likely to prevail before this Court, with the district court's decision confirming the necessity for this court to clarify yet again the scope of federal question jurisdiction. *See Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005).

Oklahoma's Complaint invokes federal question jurisdiction because it is a "civil action[] arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

Specifically, Oklahoma alleges that EPA is violating the express command of its enabling act (the Clean Air Act) and attempting to exercise power that Congress expressly withheld by acting to regulate sources under Section 111(d) that are already regulated under Section 112 of the Act. Complaint at 3, 5–6, 16; *see also U.S. Dep't of Interior v. Fed. Labor Relations Auth.*, 1 F.3d 1059, 1061 (10th Cir. 1993) (construing *Leedom v. Kyne*, 358 U.S. 184, 185–89 (1958), as authorizing jurisdiction and a cause of action under these circumstances).

Nothing more is required to support federal question subject matter jurisdiction. "[W]here the complaint…is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court…*must* entertain the suit." *Bell v. Hood*, 327 U.S. 678, 681–82 (1946) (emphasis added). *Accord Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 643 (2002) ("[T]he district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the…laws of the United States are given one construction and will be defeated if they are given another.") (quotation omitted); *Simmat*, 413 F.3d at 1231 (holding that prisoner's claim "easily meets the basic requirements of federal question jurisdiction" where he plainly alleged Eighth Amendment violation).

Indeed, federal courts regularly entertain such claims, including in cases involving questions of EPA's statutory authority. For example, *Central Hudson Gas & Electric Corp. v. EPA*, 587 F.2d 549, 553, 555–56, 559 (2d Cir. 1978), reversed a district court decision declining to consider—well before any final agency action—whether EPA had statutory authority to regulate particular power plants' water discharges. Citing the legal nature of the question and the fact that EPA's proposed permits would cause utilities to incur hundreds of millions of dollars in capital and operating costs, all of which would be passed on to consumers, the court identified the utilities' challenge as "one of the rare cases in which a district court appropriately 'interrupts' agency action on the ground that the agency is acting outside

its statutory authority." *Id.* at 555. This was so despite a Clean Water Act statutory review provision (analogous to that of the Clean Air Act) placing review of final decisions issuing or denying permits in the courts of appeals. The Second Circuit recognized that this provision would only kick in "once the EPA's action has run its full course," rendering earlier review "desirable" to avoid unnecessary "waste and delay": "If an administrative agency conducts proceedings over which it lacks jurisdiction, and the courts ultimately declare the proceedings a nullity, then the loss of time and expense to both the government and the defending party can be substantial." *Id.* at 556–57.[6]

Rather than follow these precedents and take Section 1331 on its own terms, the district court concluded that it did not have jurisdiction for two reasons: (1) because Oklahoma putative failed to identify a "'clear and mandatory' duty" allegedly violated by EPA's actions; and (2) because Oklahoma will, at some future time, have a right to judicial review in the D.C. Circuit. Order of Dismissal at 8–9, No. 15-369 (N.D. Okla. filed July 17, 2015), ECF No. 28 ("Order") (Ex. C). Both miss the mark.

First, identification of a "clear and mandatory" duty has nothing to do with jurisdiction, *see Simmat*, 413 F.3d at 1231–32, but instead concerns the availability of relief (i.e., stating a proper cause of action). In any case, Section 111(d)'s statutory bar on regulating sources that are already subject to Section 112 regulation is an express limitation of Defendants' delegated powers, and constitutes, as Circuit law requires, "a facially clear and mandato-

[6] *See also Champion Int'l Corp. v. EPA*, 850 F.2d 182, 185–86 (4th Cir. 1988) (district court had authority to entertain the suit under *Leedom* to determine "whether EPA had exceeded its delegated authority" under the Clean Water Act); *Friends of Crystal River v. EPA*, 35 F.3d 1073 (6th Cir. 1994) (affirming injunction barring EPA's transfer of permitting authority to a state, prior to "final" issuance of permit); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1327–28 (D.C. Cir. 1995) (entertaining *Leedom* action against Department of Labor); *R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 42–43 (1st Cir. 2002) (entertaining *Leedom* action against OSHA).

ry directive on the issue." *Dep't of Interior*, 1 F.3d at 1062. Even if the "interplay of §§ 7411 and 7412" is "complex," *see* Order at 8, that does not deprive Oklahoma of an entitlement to relief, *cf. Riverside Irrigation Dist. v. Stipo*, 658 F.2d 762, 768 (10th Cir. 1981) (providing relief where statutory question was far more complex), much less justify abdicating jurisdiction.

Second, the district court's suggestion that eventual review of a final rule in the D.C. Circuit precludes the exercise of jurisdiction under 28 U.S.C. § 1331 over non-final action is similarly mistaken. Again, this goes to availability of review, not jurisdiction. *Simmat*, *supra* (concerning analogous matter of exhaustion of remedies). Even taken on those terms, it is also directly contrary to the Supreme Court's decision in *Board of Governors of Federal Reserve System v. MCorp Financial, Inc.*, which rejected the contention "that a statutory provision that provide[s] for judicial review implie[s], by its silence, a preclusion of review of the contested determination." 502 U.S. 32, 44 (1991). *MCorp's* rule governs because the Clean Air Act's judicial review provision, Clean Air Act § 307, 42 U.S.C. § 7607(b), provides for review of certain "final" actions in the D.C. Circuit but is silent on district courts' equitable authority to decide cases or controversies under the Act that are *not* final actions where they concern a proceeding that is outside EPA's statutory authorization under its enabling statute.

C. Oklahoma Is Likely To Succeed on the Merits of This Action Because Defendants' Action Is Plainly *Ultra Vires*

"When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1173 (D.C. Cir. 2003) (quotation omitted). It is therefore black-letter law that "a plaintiff may secure judicial review [under Section 1331] when an agency exceeds the scope of its delegated authority or violates a clear statutory mandate." *Lundeen v. Mineta*, 291 F.3d 300, 312 (5th Cir. 2002) (quotation omitted). *See also Stipo*, 658 F.2d at 768. In order to obtain equitable relief in such a suit, Oklahoma must prove that: (1) Defendants' actions exceed their statutory authority un-

der their enabling act as a pure matter of law; and (2) without immediate judicial review, Oklahoma will be left with no "meaningful" or "adequate" remedy to enforce Congress's limitation on the reach of the agency's authority. *MCorp*, 502 U.S. at 43–44. Oklahoma is likely to prevail on each of these showings.

1. The EPA Power Plan Is *Ultra Vires*

There is no clearer example of *ultra vires* action than when an administrative agency takes an action that is expressly foreclosed by the literal reading of its enabling statute. In the case of Clean Air Act Section 111(d), Congress unambiguously barred EPA from regulating industrial sources under Section 111(d) that are already regulated under Section 112 of the Act. But that is precisely what the EPA Power Plan proposes. As a result, EPA is squandering public resources and forcing Oklahoma to do the same in service of a proceeding that can never result in a valid order.[7]

Section 111(d) of the Clean Air Act states that EPA may not require states to issue "standards of performance for any existing source for any air pollutant…emitted from a source category which is regulated under section [112]." 42 U.S.C. § 7411(d)(1)(A)(i). The Supreme Court recognized the plain meaning of the Section 112 exclusion in *AEP v. Connecticut*, 131 S. Ct. 2527 (2011), finding that "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408–7410, or the 'hazardous air pollutants' program, § 7412. *See* § 7411(d)(1)." *Id.* at 2537 n.7. EPA promulgated Section 112 regulations for electric utility generating units—that is, power plants—in 2012. EPA therefore lacks authority to require Section 111(d) emissions standards for power plants—full stop.

[7] Oklahoma also alleged in its complaint that the EPA Power Plan was *ultra vires* for several other reasons and expects to press those other arguments on appeal.

In fact, EPA likewise has recognized for years that "a literal reading" of the language codified at 42 U.S.C. § 7411(d)(1) mandates "that a standard of performance under section 111(d) cannot be established for any air pollutant—HAP and non-HAP—emitted from a source category regulated under section 112."[8] 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005). *Accord* EPA, Air Emissions From Municipal Solid Waste Landfills – Background Information For Final Standards And Guidelines 1-6 (1995)[9] (explaining that the Section 112 exclusion applies "if the designated air pollutant is…emitted from a source category regulated under section 112"); Final Brief of Respondent at 105, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097) ("[A] literal reading of this provision could bar section 111 standards for any pollutant, hazardous or not, emitted from a source category that is regulated under section 112."); 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004) ("A literal reading…is that a standard of performance under CAA section 111(d) cannot be established for any air pollutant that is emitted from a source category regulated under section 112."); EPA, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units 26 (2014) ("EPA Legal Memorandum")[10] ("[A] literal reading of that language would mean that the EPA could not regulate any air pollutant from a source category regulated under section 112.").

Of course, where the "literal reading" of the text is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).[11] And that

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[8] "HAP" refers to "hazardous air pollutants."

[9] *Available at* http://www.epa.gov/ttn/atw/landfill/bidfl.pdf.

[10] *Available at* http://goo.gl/SpwI32.

[11] The *Chevron* framework would not apply here even if the statutory question involved statutory silence or ambiguity. First, the statutory question is one "of deep 'economic and political significance,'" such that, "had Congress wished to assign that question to an agency, it

should be the end of the matter here: the Clean Air Act unambiguously withholds authority from EPA to require states to establish Section 111(d) performance standards for a source category, like power plants, that is regulated under Section 112.

EPA's primary defense to the plain language of the Act is to assert that there is an ambiguity in the Statutes at Large concerning Section 111(d), based on two portions of the 1990 Clean Air Act Amendments that EPA claims conflict. *E.g.*, EPA Legal Memorandum 22–23. The first is a substantive amendment to Section 111(d) (the "House Amendment"). Before 1990, the Section 112 exclusion prohibited EPA from requiring States to regulate under Section 111(d) any air pollutant "included on a list published under…112(b)(1)(A)." 42 U.S.C. § 7411(d) (1989). This meant that if EPA had listed a pollutant under Section 112, the agency could not regulate that pollutant under Section 111(d). In order "to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112," 70 Fed. Reg. at 16,031, the House Amendment provides:

> strik[e] "or 112(b)(1)(A)" and insert[] "or emitted from a source category which is regulated under section 112."

Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990).

The second amendment (the "Senate Amendment") appears in a list of "Conforming Amendments" that make clerical changes to the Act. Conforming amendments are "amendment[s] of a provision of law that [are] necessitated by the substantive amendments or provisions of the bill." Legislative Drafting Manual, Office of the Legislative Counsel,

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surely would have done so expressly." *King v. Burwell*, 135 S. Ct. 2480, 2489, (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (construing EPA's authority under the Clean Air Act)). Second, it is "especially unlikely" that Congress would have delegated that question to EPA, which has "no expertise" in regulating electricity production and transmission. *King*, 135 S. Ct. at 2489 (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006)).

United States Senate 28 (1997) ("Senate Manual"). Consistent with this description, the Senate Amendment merely updated the cross-reference in the Section 112 exclusion. It states:

> strik[e] "112(b)(1)(A)" and insert[] in lieu thereof "112(b)".

Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). This clerical update was necessitated by the fact that substantive amendments expanding the Section 112 regime—broadening the definition of "hazardous air pollutant" and changing the program's focus to source categories—had renumbered and restructured Section 112(b).

As an initial matter, there is no true conflict between the amendments. Amendments are executed in the order of their appearance, Manual on Drafting Style, House Legislative Counsel 42 (1995); Senate Manual 33,[12] and the House Amendment appears first in the 1990 Act, striking the reference to "112(b)(1)(A)." Accordingly, the Senate Amendment fails to have any effect, because it is no longer necessary to "strik[e] '112(b)(1)(A)'" to conform the Section 112 exclusion to the revised Section 112.[13] *See* Revisor's Note, 42 U.S.C. § 7411 (Senate Amendment "could not be executed, because of the prior [House] amendment"). The U.S. Code provision, in other words, fully enacts both amendments.

In any case, the U.S. Code provision is also consistent with Congress's intent in enacting both amendments, which address different aspects of the scope of EPA's authority. The House Amendment added a limitation to the scope of Section 111(d): where a category

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[12] *See also* Donald Hirsch, Drafting Federal Law § 2.2.3, p.13 (U.S. House Office of Legislative Counsel, 2d ed. 1989); Lawrence E. Filson & Sandra L. Strokoff, The Legislative Drafter's Desk Reference § 14.4, p.191 (CQ Press, 2d ed. 2008). The Supreme Court recognizes these treatises as authoritative on legislative drafting. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60–61 & n.4 (2004); *id.* at 71 (Scalia, J., dissenting).

[13] The failure of a subsequent amendment to have any effect, due to changes made by an earlier amendment in the same legislation, is not at all unusual. Oklahoma is aware of more than 30 other instances—including dozens in Title 42 alone—in which an amendment to the U.S. Code failed to have any effect due to an earlier amendment. Petitioner's Opening Brief at 31–32 n.9, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. filed Mar. 9, 2015).

of sources is regulated under Section 112, Section 111(d) cannot be used to impose additional performance standards on that source category. The purpose was to ensure that existing source categories regulated under Section 112—which the 1990 Act substantially revised to focus on source categories rather than pollutants—would not face additional costly regulation under Section 111. *See* 70 Fed. Reg. at 16,031 (discussing legislative history and concluding that the House Amendment sought to avoid "duplicative or overlapping regulation").

The Senate Amendment had a different focus, seeking to maintain the pre-1990 prohibition on using Section 111(d) to regulate emissions of hazardous air pollutants from existing sources regulated under Section 112. Failure to retain that limitation would have allowed EPA to undo Congress's considered decision to regulate only certain sources of hazardous air pollutants: the 1990 Act requires EPA to regulate all major sources of hazardous air pollutants, but only those area sources representing 90 percent of area source emissions, thereby sparing many smaller sources from the stringent Section 112 regime.[14] 42 U.S.C. § 7412(c)(3). In other words, the Senate Amendment restrains EPA from circumventing this limitation by simultaneously regulating the same emissions under both Section 112 and 111(d) and thereby burdening all sources, even the ones Congress exempted from regulation.

Thus, by blocking both double regulation and circumvention of the Section 112(c)(3) area-source limitation, the U.S. Code provision achieves Congress's intent underlying both amendments and constitutes a statutory limitation on EPA's authority. But even if there were a conflict, an agency or court "must read [allegedly conflicting] statutes to give effect to each if [it] can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259,

[14] "Major" sources emit or have the potential to emit above a statutorily prescribed threshold of hazardous air pollutants; "area" sources are those that fall below this threshold. 42 U.S.C. § 7412(a)(1)–(2).

267 (1981). Thus, even assuming *arguendo* that there is a potential conflict, EPA's interpretation must be rejected because it deprives the House Amendment of any effect.

In sum, an administrative agency cannot manufacture ambiguity to expand its interpretative license and ability to pursue its policy goals. The Section 112 exclusion is an express limitation on EPA's authority, and the agency should not be permitted to read it out of the statute. The statute means what it says, EPA cannot require states to issue performance standards for source categories already subject to Section 112 regulation, and any attempt by EPA to subject power plants to Section 111(d) regulation is therefore *ultra vires*.

2. Immediate Review Is Necessary To Provide Oklahoma with Meaningful and Adequate Relief and To Stop Irreparable Harm[15]

EPA's Power Plan, even as a regulatory proposal, is a bell that cannot be unrung. The Power Plan injures Oklahoma's sovereign interests by forcing the state to engage in regulatory activity that is necessary to keep the lights on, impairing the functioning of existing state law. Oklahoma will also soon suffer additional injury as it and its utilities are forced to make irreversible decisions affecting future investments in energy resources within the State. The Power Plan injures Oklahoma's pecuniary interests by forcing the state to expend substantial resources that will be unrecoverable when Oklahoma or another party ultimately succeeds in invalidating the Plan. It injures the citizens of Oklahoma by diverting state resources to coping with the *ultra vires* EPA Power Plan. For these reasons, judicial review upon finalization of the EPA Power Plan does not provide meaningful and adequate relief.

Oklahoma law charges the Oklahoma Corporation Commission with regulating electric distribution by balancing the need for low-cost electricity with reliability, the protection

[15] As the irreparable harm Oklahoma is suffering constitutes part of the reason why immediate review is necessary to provide Oklahoma with immediate relief, this discussion satisfies 10th Circuit Rule 8.1's requirement that Oklahoma address the question of irreparable harm.

of state economic welfare, and other relevant considerations. *See, e.g.*, Okla. Admin. Code § 165:35-41-2. The Commission is currently hard at work to ensure that the EPA Power Plan does not cause interruptions of electric service in Oklahoma or unacceptably undermine reliability or affordability. Wreath Decl. ¶¶ 2–6, 9–14. Other components of Oklahoma's government, including the Secretary of Energy and Environment, are also currently laboring to carry out the Plan's dictates. Wreath Decl. ¶ 3. In short, due to the EPA Power Plan, simply maintaining electric service across the State of Oklahoma—which the State requires to exercise its police power and other core functions and which is essential to the health and welfare of its citizens—is forcing the State to make substantial expenditures of time, effort, money, and resources. Wreath Decl. ¶ 2.

Decisions that Oklahoma makes to cope with the EPA Power Plan now will be permanent and irreversible. The combination of the Plan's aggressive deadlines and the long lead-time required to bring new infrastructure online is forcing regulatory and investment decisions with long-term impacts to be made *now*. *See* Wreath Decl. ¶¶ 7, 12–15. Decisions made in the coming months to shutter existing coal-fired facilities, to authorize new natural gas and renewable capacity, and to expand grid capacity to replace lost capacity all involve irreversible aspects. And that is the point of the EPA Power Plan: to change the facts on the ground before any court has the opportunity to review Defendants' "final" action.

By forcing Oklahoma to act now to meet new federal requirements that supersede existing state law, the EPA Power Plan irreparably harms Oklahoma by preventing it from effecting state law for the benefit of its citizens. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., joined by Thomas & Alito, JJ., concurring in denial of application to vacate stay entered by circuit court) (state irreparably harmed where it is prevented "from effectuating statutes enacted by representatives of its

people") (quotation omitted); *Maryland v. King*, 133 S. Ct. 1, 3 (Roberts, Circuit Justice 2012); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 98 S. Ct. 359, 363 (Rehnquist, Circuit Justice 1977); *Aid for Women v. Foulston*, 441 F.3d 1101, 1119 (10th Cir. 2006) (citing *Orrin W. Fox* favorably and noting state's strong interest in effecting its laws).

Similarly, being forced to divert state resources from productive purposes to addressing the EPA Power Plan injures Oklahoma. "Directing a priority expenditure from the state treasury 'may derange the operations of government, and thereby cause serious detriment to the public.'" *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 112 S. Ct. 1, 3 (Scalia, Circuit Justice 1991) (quoting *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870)).

Finally, Oklahoma is being irreparably harmed because it cannot recover damages or other penalties from EPA to compensate it for the massive expenditure of resources that it is currently undertaking. Economic costs that are unrecoverable by an award of monetary damages constitute irreparable harm. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Sovereign immunity, which EPA enjoys, is a recognized example of unrecoverable damages constituting irreparable injury. *See Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.").

The fact that Oklahoma will have the opportunity to obtain judicial review of a final action in the District of Columbia Circuit does not, contrary to the district court's erroneous conclusion, make this harm reparable. As both the Second and Seventh Circuits have recognized, delaying judicial review of *ultra vires* action until after final agency action unnecessarily compounds the irreparable injury suffered therefrom. *See Central Hudson*, 587 F.2d at 556 (judicial review prior to finality is desirable because "[i]f an administrative agency conducts pro-

ceedings over which it lacks jurisdiction, and the courts ultimately declare the proceedings a nullity, then the loss of time and expense to both the government and the defending party can be substantial"); *PepsiCo, Inc. v. FTC*, 472 F.2d 179, 187 (2d Cir. 1972) (Friendly, C.J.) (pre-final judicial review of *ultra vires* action prevents "enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry"). *See also Jewel Cos., Inc. v. FTC*, 432 F.2d 1155, 1157–60 (7th Cir. 1970). Indeed, this irreparable harm would be compounded because, upon finalization of the rule, Oklahoma must dramatically increase the amount of unrecoverable state resources that will have to be expended in an effort to accommodate the negative effects that the EPA Power Plan will have on Oklahoma and its residents, as state agencies begin the time-consuming work of evaluating and responding to the rule's terms and regulated parties pull the trigger on investment decisions. *See* Declaration of Fairo Mitchell, Energy and Water Policy Director, Public Utility Division, Oklahoma Corporation Commission, ¶¶ 3–7, 9–12 (Ex. B.).

II. Issuance of an Injunction Will Not Injure EPA

An injunction would not harm EPA because it would do no more than preserve the *status quo* that has existed from the dawn of electricity generation in the United States, allowing Oklahoma to continue to exercise its traditional policy discretion over utilities and the State's electric system. EPA, having waited almost a decade since the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), authorized EPA to consider regulation of greenhouse gases under certain provisions of the Clean Air Act, cannot claim that there is any particular urgency to its regulatory actions during the few months necessary for this Court to consider and rule on the appeal. Indeed, EPA has already allowed its deadlines regarding its Power Plan to slip numerous times, *see* Settlement Agreement ¶¶ 1–4, EPA-HQ-

OGC-2010-1057-0002 (obligating EPA to sign a final rule concerning Section 111(d) standards by May 26, 2012), amounting to several years' delay.

III. The Public Interest Favors Issuance of the Injunction

The public has a substantial interest "in having legal questions decided on the merits, as correctly and expeditiously as possible," rather than through administrative fiat. *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Absent an injunction, EPA will continue to force the states to adopt burdensome laws and regulations that cannot be easily repealed, to make decisions that cannot be reversed, and to make expenditures that cannot be recouped, even if the EPA Power Plan is ultimately vacated. The public should not have to bear that burden. Moreover, the EPA Power Plan demands that states reorganize their energy economies from top to bottom, forcing them to abandon affordable fossil-fuel-fired generation in favor of new renewable capacity, to regulate electricity consumption, and to cede their traditional policymaking authority over electricity markets and utilities to federal regulators. In this instance, "[t]he injury against which a court would protect is not merely the expense to the plaintiff of defending in the administrative proceeding…but…the enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry." *PepsiCo, Inc. v. FTC*, 472 F.2d 179, 187 (2d Cir. 1972) (Friendly, C.J.). In such circumstances, when "an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law," injunctive relief is appropriate. *Id.*

CONCLUSION

For these reasons, the Court should enjoin Defendants from implementing, enforcing, or giving any effect to the EPA Power Plan, 79 Fed. Reg. 34,830 (June 18, 2014), or other regulation concerning electric utility generating units under the authority of Clean Air Act Section 111(d), 42 U.S.C. § 7411(d), during the pendency of this appeal.

Dated: July 24, 2015

Respectfully submitted,

/s/ David B. Rivkin, Jr.
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CERTIFICATE OF COMPLIANCE

I hereby certify that no privacy redactions are required with regard to the foregoing. I further certify that, on July 24, 2015, I scanned the foregoing and all exhibits thereto for viruses using the current online edition of VirusTotal, and, according to that program, they are free of viruses.

By: David B. Rivkin, Jr.
David B. Rivkin, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the Court's ECF system. Service was accomplished on the following by the ECF system:

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By: David B. Rivkin, Jr.
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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

v.

GINA MCCARTHY, et al.,

Defendants.

Declaration of Brandy Wreath

Pursuant to 28 U.S.C. § 1746, I, Brandy Wreath, declare and state that the following is true and correct and is based on my own personal knowledge.

1. I am the Director of the Public Utility Division (the "Division") of the Oklahoma Corporation Commission ("OCC"), a position I have held since 2012. In this position, I am responsible for administering and enforcing the State's regulation of public utilities, including electric utilities, and for advising the OCC on matters relating to the regulation of electric utilities and electric service. A primary responsibility of the Division is assuring reliable utility service at the lowest reasonable cost. Division staff investigates and makes recommendations on matters such as establishment of rates or rate adjustments, changes in terms of services, and transfers of utility ownership.

2. The OCC is currently expending substantial resources—in terms of money, personnel, effort, and administrative focus—to comply with EPA's proposed regulations for existing power plants under Section 111(d) of the Clean Air Act (the "EPA Power Plan").

3. OCC staff participates in meetings regularly to coordinate regulatory responses to the EPA Power Plan with other components of the Oklahoma government, including the Oklahoma Secretary of Energy and Environment, and the Oklahoma Department of Environmental Quality. This coordination is necessary because the EPA

Power Plan touches practically every aspect of electricity production, distribution, and consumption and therefore reaches across agency jurisdictional boundaries. As far as I am aware, this required degree of coordination to accommodate a federal rule affecting the utility sector is unique, and it is, with respect to the activities required of OCC, unprecedented.

4. OCC staff participates in stakeholder meetings regularly with persons and entities affected by the EPA Power Plan, including utilities and groups representing energy consumers.

5. OCC staff is working continuously with the Southwest Power Pool ("SPP"), which is the regional transmission organization for Oklahoma and surrounding states, to evaluate the actions necessary to accommodate the EPA Power Plan, to plan infrastructure projects that will be necessary to accommodate the EPA Power Plan, and to coordinate other activities respecting the EPA Power Plan. Currently, three full time equivalent Division employees spend all or nearly all of their time working with the SPP on these activities in addition to the other transmission related issues.

6. Oklahoma utilities are engaged currently in planning to accommodate the EPA Power Plan, and the Division is working closely with them to ensure that their contemplated actions satisfy Oklahoma law, are properly coordinated with other actions affecting power supply and delivery, satisfy all relevant reliability requirements, and provide good value to ratepayers. Oklahoma utilities, as well as other power suppliers to Oklahoma consumers, are contemplating and making decisions currently regarding infrastructure changes necessary to respond to the EPA Power Plan that will be difficult or impossible to reverse once these decisions have been made.

7. Compliance with EPA environmental plans has already been a topic of at least one recovery hearing before the OCC. Recovery hearings determine which expenditures utilities may charge to ratepayers. Recovery hearings generally involve numerous intervenors—including environmental organizations—and weeks-long

hearings before an Administrative Law Judge. Months of work, in terms of person-hours, is required to prepare for this type of hearing. OCC's fees for outside experts alone amount to hundreds of thousands of dollars for these types of hearings.

8. Any OCC rule or order that reflect measures to accommodate the EPA Power Plan will impose costs on the Division for years to come, due to its monitoring and enforcement roles.

9. Numerous OCC personnel and outside contractors are currently involved in activities regarding the EPA Power Plan. This includes multiple in-house experts with expertise in accounting, economics, financial analysis, and law. I personally spend numerous hours per week working on matters relating to the EPA Power Plan. The time that OCC personnel spend on matters relating to the EPA Power Plan is time that they are unable to devote to other agency priorities; as a result, OCC has been unable to devote the manpower that it would like to other priorities.

10. At the same time, being aware that the manpower necessary to accommodate the EPA Power Plan will balloon in coming months, OCC has assigned personnel to complete tasks that would be due in those months ahead of schedule. This too limits the OCC's ability to address other responsibilities.

11. Division staff has attended and will continue to attend numerous conferences regarding the EPA Power Plan so that the OCC is best able to meet the challenges of the EPA Power Plan. This comes at a cost to the OCC, in terms of employee time and travel expenses.

12. Although EPA has yet to issue a final rule, OCC has no choice but to begin activities now to accommodate the EPA Power Plan. This is due to the EPA Power Plan's aggressive and unrealistic deadlines, the extent of the activities that will be required to accommodate the EPA Power Plan, the long lead time required to make and execute decisions regarding electric infrastructure, and the magnitude of the changes.

13. For example, determining the need for additional or new transmission capacity is a years-long process involving numerous stakeholders, and once that need is identified, another six to eight years is typically required for major projects to reach completion and be integrated into the grid.

14. If the OCC were not taking such actions at this time to prepare for the proposed EPA Power Plan, it would not be able to accommodate anything like the proposed EPA Power Plan anywhere close to the proposed schedule.

15. The same is true of the utilities regulated by the OCC. Currently they are engaged in planning and other activities, as well as making investment decisions, to attempt to comply with or accommodate the EPA Power Plan.

16. Uncertainty relating to the EPA Power Plan has complicated the planning and execution of infrastructure projects. For example, the EPA Power Plan places investments in transmission capacity at risk because plant retirements due to the EPA Power Plan may render that capacity unnecessary. Similarly, the EPA Power Plan has made power plant owners reluctant to perform upgrades at this time, due to the risk that those plants may have to be retired to accommodate the EPA Power Plan.

17. The Division is concerned deeply about the EPA Power Plan's impact on the health and welfare of Oklahoma residents. The EPA Power Plan's heavy emphasis on natural gas comes at the expense of fuel diversity, and lack of diversity increases the risk and impact of supply disruptions and price volatility. As part of its public mission, the OCC is attempting to address this issue, which EPA has so far ignored.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 29th day of June, 2015.

Brandy Wreath

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,

Plaintiffs,

v.

GINA MCCARTHY, et al.,

Defendants.

Declaration of Fairo Mitchell

Pursuant to 28 U.S.C. § 1746, I, Fairo Mitchell, declare and state that the following is true and correct to, and is based upon my own personal knowledge.

1. I am the Energy and Water Policy Director of the Public Utility Division (the "PUD") of the Oklahoma Corporation Commission ("OCC"), a position I have held since 2013. In this position, I help manage the day-to-day activities of PUD to ensure that PUD Staff assists the Commission in the State's regulation of public utilities, including electric utilities, and I advise the OCC on matters relating to the regulation of electric utilities and electric service. A primary responsibility of the Division is assuring reliable utility service at the lowest reasonable cost. Division staff investigates and makes recommendations on matters such as establishment of rates or rate adjustments, changes in terms of services, and transfers of utility ownership.

2. On June 29, 2015, Brandy Wreath, Director of PUD, made a declaration in support of Plaintiffs' motion for preliminary injunction in the above-captioned matter. I reviewed his declaration and I am providing this declaration to support Mr. Wreath's June 29 declaration by explaining how a decision by EPA to finalize its proposed regulations for existing power plants under Section 111(d) of the Clean Air Act (the

"EPA Power Plan") would impact the PUD and the residents of Oklahoma that the OCC serves.

3. In Mr. Wreath's June 29 declaration, he explained that PUD staff was spending significant unrecoverable resources to prepare for the imposition of the EPA Power Plan, among other matters. PUD's expenditure of resources will increase substantially and immediately following finalization of the Clean Power Plan and will hamper the PUD's ability to engage in other activities that would benefit Oklahoma and its residents.

4. The most significant drain on the PUD's resources following the EPA's decision to finalize its Power Plan will be in the form of recovery hearings. In my experience, utilities file for recovery hearings shortly after the issuance of major EPA Clean Air Act rules, rather than at the conclusion of litigation over the rule. I believe that multiple requests for recovery hearings will filed following the finalization of the EPA Power Plan, due to the magnitude of the work that will be necessary to comply with it.

5. These cases will primarily be of two types. First, utilities are likely to seek preapproval for projects that they undertake to comply with the Clean Power Plan. Second, utilities are likely to file rate case, which would allow them to include in their rate base the costs of projects that they are undertaking or have undertaken to comply with the Clean Power Plan.

6. In conjunction with the recovery hearings, the Commission is likely to commence a Notice of Inquiry related to the Clean Power Plan. The Notice of Inquiry is a public process where the Commission holds hearings on the impact of the EPA Power Plan in order to gather input from consumers and other stakeholders, to clarify the considerations that must be addressed in the upcoming cost recovery hearings, and to consider and respond to dozens (if not hundreds) of stakeholder comments. Conducting a Notice of Inquiry is a resource-intensive process that would likely require diverting multiple PUD employees over several months from their current priorities.

7. Addressing multiple cost recovery hearings will be even more resource-intensive. As Mr. Wreath stated in his June 29 declaration, cost recovery hearings generally involve numerous intervenors—including environmental organizations—and weeks-long hearings before an Administrative Law Judge. Months of work, in terms of person-hours, are required to prepare for and conduct this type of hearing. Managing these cost recovery hearings will have significant ramifications on the PUD and on Oklahoma's citizens.

8. From a financial perspective, the PUD does not have sufficient financial resources in its current budget to conduct these in-depth proceedings. In the past, the PUD's fees for outside experts alone amounted to hundreds of thousands of dollars for each such hearing, and the utilities' fees often exceeded that amount. As PUD does not have the resources, it will be necessary to assess these costs to the utilities in each recovery hearing and require that those utilities pay outside experts to assist the Commission in resolving these matters. The ultimate burden of these assessments will fall on Oklahoma residents, as utilities that are subject to these assessments have the right under Oklahoma law to pass them on to their ratepayers.

9. The financial impact of these cost recovery hearings on Oklahoma's residents cannot be undone simply if the EPA Power Plan is ultimately set aside in litigation. Because of the complexity of compliance and the short compliance time frame which EPA has proposed, utilities will need to begin work immediately following the EPA Power Plan's issuance. Even if the EPA Power Plan is ultimately struck down in court, the utilities are entitled under Oklahoma law to cost recovery for these actions, creating a significant risk that Oklahoma's residents will bear additional costs to comply with a rule that was unlawful from the beginning.

10. In addition to the resources consumed by a Notice of Inquiry and recovery hearings, finalization of the EPA Power Plan will cause the PUD to incur significant expenses to understand the Clean Power Plan issues, which is necessary to make sound

recommendations to the Commissioners that should help them take the precise actions needed to best maintain affordable and reliable energy. As stated in Mr. Wreath's June 29 declaration, PUD is using its best efforts to assess these issues now, but finalization of the details of the Plan will cause the PUD to increase the resources that it devotes to these activities significantly. In my experience, the magnitude of the Clean Power Plan will cause PUD to double the amount of time it spends on matters relating to the EPA Power Plan. In addition to staff-level resources, I expect to spend 80-100 percent of my time on EPA Power Plan matters. Additionally, Mr. Wreath believes that he will spend 30-40 percent of his time on EPA Power Plan-related matters in the aftermath of EPA's finalization.

11. In addition, the OCC will have to increase its collaboration with the Southwest Power Pool ("SPP"), the regional transmission organization, to determine the effects and required mitigation associated with the EPA Power Plan. Based on my experience with previous rules affecting power generation and transmission, SPP will also have to continue expending resources to continue its efforts to study the effects of the final rule and the changes necessary to address those effects. These expenses will be passed on to ratepayers.

12. Moreover, due to the interstate and interconnected nature of the electric system, Oklahoma receives power not only from power plants located in its state, but also from those in SPP states and beyond. Accordingly, given the possibility that the states in SPP and SPP itself may respond to a final EPA Power Plan by accelerating their efforts to address generation issues, the PUD will be required to work with Oklahoma utilities on an expedited and possibly inadequate timetable to ensure the replacement of electric generation capacity meets the need of Oklahoma residents for continued reliable electric service.

13. Taken as a whole, the EPA Power Plan will greatly deplete the resources and personnel resources that are available to the PUD to perform its other statutory

duties. For example, through proactive regulatory processes directed toward its "Lifeline" program, the OCC has annually saved Oklahoma residents more than $75 million per year by investigating waste, fraud and abuse in telecommunications services funded by the federal Lifeline Fund. To maintain these savings PUD will need to continue its ongoing investigations, but the PUD expects that it will not be able to do so at the same time that it is required to fulfill its mandatory statutory duties in the recovery hearings related to the EPA Power Plan. Similarly, the PUD expects that it will be impossible to maintain the current scope of review in other contested matters before the hearing, such as fuel prudency reviews, but instead the PUD will be able to complete only the obligations assigned to it by Oklahoma law in response to the EPA Power Plan.

14. For these reasons and for the reasons discussed in Mr. Wreath's June 29 declaration, PUD is deeply concerned about the EPA Power Plan's impact on the health and welfare of Oklahoma residents.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 15 day of July, 2014.

Fairo Mitchell

Exhibit C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma, and OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY,	)	
Plaintiffs,	)	
v.	)	**Case No. 15-CV-0369-CVE-FHM**
GINA MCCARTHY, in her official capacity as Administrator of the U.S. Environmental Protection Agency, and U.S. ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendants.	)	

OPINION AND ORDER

On July 1, 2015, plaintiffs the State of Oklahoma and the Oklahoma Department of Environmental Quality (ODEQ) filed this case alleging that the United States Environmental Protection Agency (EPA) is acting outside of its authority by proposing rules to regulate emissions from coal-fired power plants. The Court directed plaintiffs to file a brief on this issues of "whether this Court has jurisdiction to hear a challenge to a proposed rule by the EPA and whether judicial review provision of the Clean Air Act (CAA) precludes this Court from exercising jurisdiction over plaintiffs' claims." Dkt. # 9, at 2. Plaintiffs have filed a response (Dkt. # 21) to the Court's order, and they also ask the Court to expedite the briefing schedule. The Court has reviewed plaintiffs' response and finds that further briefing from any party is unnecessary, because plaintiffs have failed to establish that the Court has subject matter jurisdiction over this case.

I.

On June 18, 2014, the EPA proposed "emission guidelines for states to follow in developing plans to address greenhouse gas emissions from existing fossil fuel-fired electric generating units." Carbon Pollution Emission Guidelines for Existing Stationery Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830-01 (proposed June 18, 2014). The EPA asserts that it has authority under 42 U.S.C. § 7411(d) to propose emission guidelines "for states to follow in developing plans to address greenhouse gas emissions from existing fossil-fuel fired electric generating units." Id. at 34832. The proposed rule provides that states would have to begin meeting interim carbon dioxide emission standards in 2020 and compliance in full with the proposed regulation would have to be achieved by 2030, but the EPA was also soliciting comments on "less stringent" emission performance levels with a five year compliance period. Id. at 34838-39. According to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), over two million comments to the proposed regulation have been received by the EPA and the EPA plans to issue a final rule this summer. In re Murray Energy Corp., ___ F.3d. ___, 2015 WL 3555931, *1 (June 9, 2015).

Also noted by the D.C. Circuit was that numerous parties, including the State of Oklahoma, "are champing at the bit to challenge EPA's anticipated rule restricting carbon dioxide emissions from existing power plants." Id. Even though the EPA has not issued a final rule, the States of West Virginia, Alabama, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and Wyoming filed a case seeking relief under the All Writs Act, 28 U.S.C. § 1651. In particular, the petitioners asked the D.C. Circuit "to review the legality of a proposed EPA rule so as to prevent EPA from issuing a final rule." Id. Under 42 U.S.C. § 7607(b)(1), a

petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, [or] any standard of performance or requirement under section 7411" must be filed in the D.C. Circuit. The D.C. Circuit determined that it lacked the authority to hear the petitioners' challenge to a proposed EPA rule, even though the petitioners claimed that they were currently incurring expenses to prepare for implementation of a final rule. Id. at *2 ("But courts have never reviewed *proposed* rules, notwithstanding the costs that parties may routinely incur in preparing for anticipated final rules."). The All Writs Act did not provide a mechanism to circumvent this well-established rule of judicial review, and the D.C. Circuit denied the petitions for review and for writ of prohibition. Id. at *4.

The State of Oklahoma and the ODEQ filed this case on July 1, 2015, less than a month after the D.C. Circuit issued its decision in Murray. Plaintiffs seek declaratory and injunctive relief on the theory that defendants Gina McCarthy, Administrator of the EPA, and the EPA are acting ultra vires by proposing a rule pursuant to § 7411(d). According to plaintiffs, the EPA has already promulgated emission standards for coal-fired power plants pursuant to 42 U.S.C. § 7412 and the EPA gave up its authority to regulate the same emission source under § 7411. Dkt. # 2, at 6. Plaintiffs argue that complying with the proposed emission standards "without plunging the states' electric supply system into chaos and threatening continuity of electric service will require wholesale restructuring of states' electrical sectors." Id. at 9. Plaintiffs claim that the proposed emission standards are currently causing irreparable harm to Oklahoma, because it takes a substantial amount of time to construct new facilities and integrate those facilities into the power grid and Oklahoma will be unable to comply with the emission standards if it waits for the

promulgation of a final rule. Id. at 12-14. Plaintiffs seek declaratory and permanent injunctive relief to enjoin defendants from regulating coal-fired power plants under § 7411(d) of the Clean Air Act, and they also request the issuance of a preliminary injunction to prevent the EPA from taking any action to enact a final rule.

II.

Plaintiffs argue that the proposed emission standards, if adopted as a final rule, would constitute an ultra vires action that would violate numerous constitutional rights of the plaintiffs. They also contend that they are suffering immediate harm from the proposed emission standards because they will be forced to take immediate and costly steps to comply with the proposed emission standards. Before reaching the merits of plaintiffs' arguments, the Court has directed plaintiffs to establish that this Court has subject matter jurisdiction over plaintiffs' claims. Dkt. # 9. Plaintiffs' jurisdictional argument begins with the straightforward assertion that federal courts have jurisdiction to hear claims arising under the Constitution or laws of the United States and that federal courts have the equitable authority to enjoin unconstitutional actions by federal administrative agencies in some circumstances. Dkt. # 21, at 8-10. These issues are not in dispute, but what is less clear is if plaintiffs have a claim that can be adjudicated by this Court before issuance of a final rule by the EPA and if judicial review in this Court is prohibited by the CAA.

Plaintiffs challenge the EPA's authority to propose the disputed emission standards under § 7411(d) of the CAA. The CAA has a judicial review provision providing that a "petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title . . . or final action taken"

must be filed in the D.C. Circuit. 42 U.S.C. § 7607(b). This provision has been interpreted to permit review only of any "final" agency action. Nat'l Environmental Development Ass'n Clean Air Project v. EPA, 752 F.3d 999, 1006 (D.C. Cir. 2014). In order to constitute a final agency action, the agency action must "(1) 'mark the consummation of the agency's decisionmaking process,' and (2) be one by which rights or obligations have been determined, or from which legal consequences will flow.'" Id. In the context of a regulation proposed by the EPA, the EPA's action is considered "final" only if the "'EPA has rendered its last word on the matter' in question." Whitman v. American Trucking Associations, 531 U.S. 457, 478 (2001). Judicial review of proposed rules is generally not permitted, because challenges to proposed rules tend to be speculative in nature and judicial review of final rules "is likely to stand on much surer footing . . . ." Fed. Express Corp. v. Mineta, 373 F.3d 112, 119 (D.C. Cir. 2004).

In this case, the D.C. Circuit has already determined that the proposed emission standards do not constitute a final rule that is subject to judicial review under the CAA. Murray Energy Corp., 2015 WL 3555931, at *1-2. Plaintiffs claim that the EPA has acted outside of its authority by proposing emission standards for coal-fired power plants under § 7411(d) and that the mere proposal of the emission standards constitutes an ultra vires agency action. Plaintiffs' claims are not predicated on a statutory basis, such as the Administrative Procedures Act or the CAA, but plaintiffs apparently intend to assert a non-statutory claim under the ultra vires doctrine. This type of claim can in certain circumstances provide a basis for a federal court to consider a challenge to an agency action, but this type of review is "quite narrow" and it is available only to "determine whether the agency has acted 'ultra vires'--that is, whether it has 'exceeded its statutory authority." Mittleman v. Postal Regulatory Comm'n, 757 F.3d 300, 307 (D.C. Cir. 2014). The ultra vires rule must be

applied in conjunction with other jurisdictional principles. An argument that a federal agency engaged in an ultra vires action does not by itself give rise to exception to the general rule that only final agency actions are subject to judicial review. See Teamsters Local Union No. 455 v. NLRB, 765 F.3d 1198, 1201 (10th Cir. 2014) (finding that it was appropriate to exercise jurisdiction over National Labor Relations Act claim under an ultra vires theory because the finality requirement was satisfied). The ultra vires rule also does not provide district courts jurisdiction over matters that are exclusively within the jurisdiction of the federal circuit courts of appeals pursuant to a federal statute. Quivira Mining Co. v. EPA, 728 F.2d 477, 484 (10th Cir. 1984).

Plaintiffs rely heavily on the Supreme Court's decision in Leedom v. Kyne, 358 U.S. 184 (1958), to support their argument that this Court has jurisdiction to hear a non-statutory challenge to an alleged ultra vires agency action. Dkt. # 21, at 11-12. Leedom arose out of a labor election dispute between an unincorporated labor association and the National Labor Relations Board (NLRB) concerning the NLRB's certification of a collective bargaining agent for a group of employees that included professional and non-professional employees without a valid majority vote of all professional employees. Leedom, 358 U.S. at 185. The president of the association brought suit in federal district court, and the NLRB argued that the district court lacked jurisdiction over the case. Id. at 186. The district court exercised jurisdiction over the case and entered judgment in favor of the association, and the D.C. Circuit affirmed the district court's decision. Id. at 187. The Supreme Court took the case to clarify when federal courts had jurisdiction over this specific type of dispute, because in a prior decision the Supreme Court had found that an NLRB certification order was not a final order triggering a right to judicial review under the National Labor Relations Act. Id. The NLRB's action in certifying the collective bargaining agent violated a specific

provision of the National Labor Relations Act, and the Supreme Court determined that the NLRB had attempted to exercise power not provided to it under the National Labor Relations Act. Denying federal jurisdiction under the circumstances would result in the "sacrifice or obliteration of a right" which Congress had granted to certain employees, because the certification orders would never be subject to review as a final agency order. Id. at 190. Under these limited circumstances, the district court had jurisdiction to hear a dispute concerning a non-final agency action for which judicial review would have otherwise been wholly prohibited.

The D.C. Circuit has crafted a three part test to determine when the Leedom exception to the finality requirement applies. First, the statutory preclusion of judicial review must be implied rather than express. Nyunt v. Chairman, Broadcasting Bd. of Governors, 589 F.3d 445, 449 (D.C. Cir. 2009). Second, there must be no alternative procedure available for review of the claim. Id. Third and finally, the agency's actions must plainly be "in excess of its delegated powers and contrary to a specific prohibition in the statute that is 'clear and mandatory.'" Id. An essential component of the Leedom decision was that barring judicial review would have wholly deprived the plaintiff of any right to judicial review of his claim that the agency acted in excess of its authority. Nat'l Air Traffic Controllers Ass'n AFL-CIO v. Federal Serv. Impasses Panel, 437 F.3d 1256, 1263 (D.C. Cir. 2006). The Tenth Circuit has emphasized that the Leedom exception is "very limited" in scope and it is to "invoked only in exceptional circumstances." United States Dep't of Interior v. Federal Labor Relations Authority, 1 F.3d 1059, 1061 (10th Cir. 1993); see also Newport News Shipbuilding and Dry Dock Co. v. NLRB, 633 F.2d 1079, 1081 (4th Cir. 1980) ("Jurisdiction is appropriate [under Leedom] only when there is a 'strong and clear' demonstration that a 'clear, specific and mandatory provision of the Act' has been violated."). Leedom also does not provide an exception

to any statutory requirement that judicial review is permitted only in a federal court of appeals if such review was or will be available. Quivira Mining Co., 728 F.2d at 484.

Plaintiffs have not shown that this case involves any exceptional circumstances that would warrant immediate judicial intervention under Leedom. As was made clear by the D.C. Circuit in Murray, any party seeking to challenge the proposed emission standards will have a right to judicial review if the emission standards are adopted as a final rule. Murray Energy Corp., 2015 WL 3555931 at *2 ("After the EPA issues a final rule, parties with standing will be able to challenge that rule in a pre-enforcement suit, as well as to seek a stay of the rule pending judicial review"). Unlike Leedom, this is a case where the judicial review sought by plaintiff is simply premature, rather than wholly prohibited by statute, and plaintiffs will have a forum to challenge the emission standards before they take effect. Plaintiffs claim that immediate judicial review is necessary to prevent irreparable harm, because judicial review of a final administrative rule is a lengthy process and plaintiffs are currently incurring costs to comply with the requirements of the proposed emission standards. Plaintiffs' claims are exaggerated. The D.C. Circuit noted that the EPA is expected to announce a final rule this summer, and there is no reason to believe that plaintiffs will have to wait for long before renewing proceedings in the D.C. Circuit if they intend to challenge the final rule. Plaintiffs can request a stay of any final rule issued by the EPA to avoid incurring costs while litigation is pending. The Court also finds that plaintiffs' argument concerning the EPA's authority to promulgate emission standards for coal-fired power plants pursuant to § 7411(d) simply highlights the complex nature of the CAA's regulatory and administrative scheme, and this is not the type of alleged violation of a "clear and mandatory" duty for which review is appropriate under Leedom. Instead, plaintiffs' argument is based on the complex interplay of §§ 7411 and 7412, and these issues

of administrative authority to enact regulations under the CAA are precisely the kinds of issues reserved for judicial review proceedings before the D.C. Circuit. The Court finds that it does not have jurisdiction to hear this case under Leedom, because plaintiffs will have a right to judicial review and plaintiffs have not identified a "clear and mandatory" duty allegedly violated by defendants' actions.

The Court has determined that Leedom's limited exception to the finality requirement is not applicable, and plaintiffs must comply with the general rule that only final agency actions are subject to judicial review. The D.C. Circuit has already determined that the proposed emission standards are not a final agency action, and that court has denied a petition to review the proposed emission standards before they become a final rule. Murray Energy Corp., 2015 WL 3555931, at *1-2. Even if the Court found that it would not be premature to exercise jurisdiction over this case, plaintiffs have failed to show that jurisdictional review provision of the CAA would permit this Court to exercise jurisdiction over the case. Plaintiffs do not dispute that the EPA asserts that it has the authority to propose the Power Plan under § 7411(d), and a challenge to any "standard of performance or requirement under section 7411" must be filed in the D.C. Circuit. The ultimate issue of whether the EPA has the authority to promulgate the disputed emission standards pursuant to § 7411(d) must be decided by the court with exclusive jurisdiction over these matters, and that court is the D.C. Circuit. See Missouri v. United States, 109 F.3d 440, 441-42 (8th Cir. 1997) (Section 7607(b) broadly divests district courts of jurisdiction to hear challenges to EPA actions that fall within the scope of 7607(b), even if framed solely as constitutional challenges to the Clean Air Act); Natural Resources Defense Council, Inc. v. Thomas, 689 F. Supp. 246, 260 (S.D.N.Y. 1988) (matters of statutory interpretation concerning the authority of the EPA are reserved for the courts

of appeal, and federal district courts lack jurisdiction to hear claims concerning EPA's authority to act under § 7412).

Plaintiffs have not shown that this Court has subject matter jurisdiction to hear their claims concerning the proposed emission standards for coal-fired power plants and, upon issuance of a final rule, plaintiffs will have a forum in which they can seek judicial review of the emission standards. The Court finds no exceptional circumstances that would warrant judicial intervention at this time, and plaintiff's claims should be dismissed for lack of subject matter jurisdiction.

IT IS THEREFORE ORDERED that plaintiff's complaint (Dkt. # 2) is **dismissed for lack of jurisdiction**. A separate judgment of dismissal is entered herewith.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Amend Briefing Schedule (Dkt. # 22) and Plaintiffs' Renewed Motion for Preliminary Injunction and Motion to Expedite Proceedings to Provide Relief by August 7 (Dkt. # 24) are **moot**.

DATED this 17th day of July, 2015.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE

Exhibit D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma, and OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY,	)	
Plaintiffs,	)	
v.	)	**Case No. 15-CV-0369-CVE-FHM**
GINA MCCARTHY, in her official capacity as Administrator of the U.S. Environmental Protection Agency, and U.S. ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendants.	)	

ORDER

This matter comes on for consideration of plaintiffs' Motion for Injunction Pending Appeal (Dkt. # 31). Plaintiffs filed this case seeking, inter alia, preliminary and permanent injunctive relief to enjoin the United States Environmental Protection Agency (EPA) from proceeding with the rulemaking process for new emission standards for coal-fired power plants, and plaintiffs refer to the proposed rule to which they object as the "Power Plan." On July 17, 2015, the Court entered an order dismissing this case for lack of jurisdiction, and the Court found that plaintiffs' motions for a preliminary injunction (Dkt. ## 5, 24) were moot. Dkt. # 28. Plaintiffs have filed a notice of appeal. Dkt. # 30.

Plaintiffs ask the Court to enter an injunction pending appeal to "enjoin Defendants from implementing, enforcing, or giving any effective [sic] to the EPA Power Plan . . . ." Dkt. # 31, at 3. Plaintiffs state the Court is authorized to enter such an injunction under Federal Rule of Appellate

Procedure 62(c). There is no Rule 62(c) in the Federal Rules of Appellate Procedure, but plaintiffs could be referring to Federal Rule of Civil Procedure 62(c). Rule 62(c) provides that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights."

In this case, the Court has not entered an order granting, dissolving, or denying an injunction, and Rule 62(c) is inapplicable. Instead, the Court has found that it lacked jurisdiction to hear plaintiffs' claims, and plaintiffs' motions for preliminary injunction (Dkt. ## 5, 24) were found to be moot. Even if the Court could consider the merits of plaintiffs' motion (Dkt. # 31), the motion would be denied because plaintiffs seek relief that would alter the status quo between the parties. The purpose of issuing an injunction under Rule 62(c) is to preserve the status quo, and Rule 62(c) does not "restore jurisdiction to the district court to adjudicate anew the merits of the case." Mayweathers v. Newland, 258 F.3d 930, 935 (9th Cir. 2001). Any action taken under Rule 62(c) may not "materially alter the status of the case on appeal." Idaho v. Coeur D'Alene Tribe, 2014 WL 4700210, *1 (D. Idaho. Sep. 18, 2014). The rule to which plaintiffs object is not a final rule issued by the EPA, and plaintiffs currently have no legal obligation to take any action with respect to the proposed rule. The relief plaintiffs seek is effectively the same relief sought in the complaint, and granting plaintiffs' motion for injunction pending appeal would clearly alter the status quo. Plaintiffs' request for an injunction pending appeal is simply an attempt to reurge their motions for preliminary injunction that were previously found moot, and the Court lacks the authority to grant this type of relief under Rule 62(c).

IT IS THEREFORE ORDERED that plaintiffs' Motion for Injunction Pending Appeal (Dkt. # 31) is **denied**.

DATED this 22nd day of July, 2015.

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE