ORAL ARGUMENT NOT YET SCHEDULED

No. 14-1146

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

STATE OF WEST VIRGINIA, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review

BRIEF FOR RESPONDENT EPA

JOHN C. CRUDEN
Assistant Attorney General

s/ Amanda Shafer Berman
AMANDA SHAFER BERMAN
BRIAN H. LYNK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1950 (phone)
E mail: amanda.berman@usdoj.gov

Of Counsel:

Elliott Zenick
Scott Jordan
United States Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

January 23, 2015

Certificate as to Parties, Rulings, and Related Cases

Pursuant to Circuit Rules 28(a)(1)(A) and 21(d), Respondent the United States Environmental Protection Agency states as follows:

Parties and Amici:

All parties appearing in this Court are listed by Petitioners, except:

Amici for Petitioners: The American Chemistry Council; the American Coatings Ass'n; the American Fuel and Petrochemical Manufacturers; the American Iron and Steel Institute; the Chamber of Commerce; the Council of Industrial Boiler Owners; the Independent Petroleum Ass'n of America; the Metals Service Center Institute; and the Pacific Legal Foundation.

Amicus for Respondent: The Institute for Policy Integrity at New York University School of Law.

Rulings under Review:

Petitioners purport to challenge a settlement agreement executed in 2010 and finalized by EPA on March 2, 2011, but ask the Court enjoin EPA from finalizing the following proposed rule: *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34, 380 (June 18, 2014).

Related Cases:

This case is related to, and has been designated by the Court for argument on the same day as, the following two consolidated cases:

(1) Murray Energy Corp. v. EPA, No. 14-1112 (D.C. Cir. filed June 18, 2014) (petition for extraordinary writ to "prohibit" ongoing rulemaking); and

(2) Murray Energy Corp. v. EPA, No. 14-1151 (D.C. Cir. filed Aug. 15, 2014) (challenging proposed rule *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,380 (June 18, 2014)).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

FEDERAL REGISTER

LEGISLATIVE HISTORY

TREATISES

ELECTRONIC DATABASES

*Authorities chiefly relied on are marked with asterisks.

GLOSSARY

CO_2	Carbon dioxide
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards

Jurisdiction and Standing

As explained in Arguments I through V below, Petitioners lack standing and the Court lacks jurisdiction over this challenge to a 2010 settlement agreement.

Statement of Issues

1. Whether Petitioners lack Article III standing to seek declaratory and injunctive relief in connection with a settlement agreement that sets rulemaking deadlines but does not limit EPA's discretion over the final rulemaking action;

2. Whether the Court also lacks jurisdiction because the settlement itself is not a final action, because the challenge to the settlement is both moot and untimely, and because the pendency of an ongoing rulemaking that will consider the same legal questions renders the asserted dispute unripe for review; and

3. Whether Petitioners' interpretation of 42 U.S.C. § 7411(d) as barring EPA from addressing harmful carbon dioxide ("CO_2") emissions from existing power plants because EPA previously regulated, under 42 U.S.C. § 7412, different pollutants emitted by these plants is the only permissible interpretation of that text.

Statutes and Regulations

All relevant statutes and regulations are set forth in Respondent's Statutory Addendum.

Statement of the Case

Greenhouse gas pollution threatens Americans' welfare by causing "damaging and long-lasting changes in our climate that can have a range of severe negative effects on human health and the environment." 79 Fed. Reg. 34,830, 34,833 (June 18, 2014) ("Proposed Rule"). Fossil fuel-fired power plants are "by far, the largest emitters" of greenhouse gases – primarily CO_2 – among U.S. stationary sources. Id. Last year, EPA took a historic step towards addressing those emissions, proposing that states submit plans for achieving CO_2 emissions goals under section 111(d) of the Clean Air Act ("Act"), 42 U.S.C. § 7411(d). Id. at 34,832-35.

Petitioners seek to stop this ongoing rulemaking. To avoid the requirement that a rule be final before judicial review occurs, they purport to challenge an obsolete 2010 settlement agreement wherein EPA agreed to propose a rule addressing power plant greenhouse gas emissions by mid-2011, arguing that EPA's regulation of power plants' *hazardous* pollutant emissions in 2012 rendered that prior agreement unlawful.

The premise of Petitioners' suit is wrong; the Proposed Rule is not the result of that settlement agreement, but rather part of an Administration initiative to address the most critical environmental problem of our time. Petitioners are also wrong on the merits; section 7411(d) need not be read to have the illogical result of barring regulation of CO_2 because power plants' emissions of *other* pollutants have been regulated under section 7412. Above all, Petitioners are wrong to think that they can preempt a rulemaking. This Court has never so allowed, and it should not do so now.

Background

I. THE CLEAN AIR ACT

The Act was enacted in 1970 to "[r]espond[] to the growing perception of air pollution as a serious national problem." Ala. Power Co. v. Costle, 636 F.2d 323, 346 (D.C. Cir. 1979). It sets out a comprehensive scheme for air pollution control, "address[ing] three general categories of pollutants emitted from stationary sources": (1) criteria pollutants; (2) hazardous pollutants; and (3) "pollutants that are (or may be) harmful to public health or welfare but are not" hazardous or criteria pollutants "or cannot be controlled under" those programs. 40 Fed. Reg. 53,340 (Nov. 17, 1975).

Pollutants in the first category (criteria pollutants) are regulated under the National Ambient Air Quality Standards (NAAQS) program. See 42 U.S.C. §§ 7408 & 7410. Pollutants in the second category (hazardous pollutants) are regulated under 42 U.S.C. § 7412. Other harmful pollutants not regulated under the NAAQS or hazardous pollutant programs fall into the third category, and are subject to regulation under 42 U.S.C. § 7411. Together, these three programs establish a comprehensive scheme for protecting the nation's air quality and public health and welfare.

The section 7411 program has two main components. First, section 7411(b) requires EPA to promulgate federal "standards of performance" addressing *new* stationary sources that cause or contribute significantly to "air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Once EPA has set new source standards addressing emissions of a

particular pollutant under section 7411(b), section 7411(d) obligates EPA to promulgate regulations requiring *states* to establish standards of performance for existing stationary sources of the same pollutant. 42 U.S.C. § 7411(d)(1). If a state fails to submit a satisfactory plan, EPA is authorized to prescribe a plan for the state, and also to enforce plans where states fail to do so. Id. § 7411(d)(2).

II. THE 1990 AMENDMENTS

The Act was amended extensively in 1990. Among other things, Congress wanted to address EPA's slow progress in regulating hazardous air pollutants under section 7412. See New Jersey v. EPA, 517 F.3d 574, 578 (D.C. Cir. 2008) (prior to 1990, "EPA listed only eight [hazardous pollutants]" and "addressed only a limited selection of possible pollution sources"). To that end, Congress established a comprehensive list of hazardous air pollutants; set criteria for listing different "source categories" of such pollutants; and required EPA to "establish[] emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation." 42 U.S.C. § 7412(a), (b)(1) & (2), & (d)(1). These changes were intended to "eliminate[] much of EPA's discretion" in regulating hazardous pollutant emissions. 517 F.3d at 578.

In the course of overhauling the regulation of hazardous air pollutants under section 7412, Congress also edited section 7411(d), which cross-referenced a provision of old section 7412 that was to be eliminated. Specifically, the pre-1990 version of section 7411(d) obligated EPA to require standards of performance:

> for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section [7408(a)] or [7412(b)(1)(A)] . . . .

42 U.S.C. § 7411(d)(1) (1988); Pub. L. No. 91-604, 84 Stat. 1676, 1684 (1970).

To address the obsolete cross-reference to section 7412(b)(1)(A), Congress passed two differing amendments – one from the House and one from the Senate – that were never reconciled in conference. The House amendment replaced the cross-reference with the phrase "emitted from a source category which is regulated under section [7412]." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990). The Senate amendment replaced the same text with a simple cross-reference to new section 7412. Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). Both amendments were included in the Statutes at Large, which supersedes the U.S. Code if there is a conflict. 1 U.S.C. §§ 112 & 204(a); Five Flags Pipe Line Co. v. Dep't of Transp., 854 F.2d 1438, 1440 (D.C. Cir. 1988).

III. THE 2010 SETTLEMENT AGREEMENT

In New York v. EPA, D.C. Cir. No. 06-1322 (ECF No. 1068502), states and environmental groups petitioned for judicial review of a final rule issued under 42 U.S.C. § 7411, contending that the rule should have included standards of performance for greenhouse gas emissions from power plants. Following Massachusetts v. EPA, 549 U.S. 497, 558 (2007) (holding that greenhouse gases are "air pollutants" as defined in the Act), this Court granted EPA's requested remand for

further consideration of the issues related to greenhouse gas emissions in light of that decision. ECF No. 1068502, September 24, 2007 Order (Case No. 06-1322).

After the remand, EPA executed a settlement agreement in December 2010 with the New York v. EPA petitioners ("Settlement Agreement" or "Agreement"). EPA agreed, *inter alia*, to sign "a proposed rule under [Clean Air Act] section 111(d) that includes emissions guidelines" for greenhouse gases for existing electric utility steam generating units ("power plants") by July 26, 2011. Agreement ¶ 2 (JA XX). EPA further agreed that, *if* it separately elected to finalize standards of performance for new and modified sources, and after considering any comments, it would take final action with respect to the proposed rule by May 26, 2012. Id. ¶ 4 (JA XX). The Agreement was modified in June 2011, changing the date by which EPA was to sign a proposed rule addressing greenhouse gas emissions from existing power plants to September 30, 2011. JA XX ("Modification Agreement").

In the Settlement Agreement, EPA preserved all discretion accorded to it by the Act and general principles of administrative law, see Agreement ¶ 9 (JA XX), including the discretion to withdraw the proposed guidelines for existing power plants. The deadlines set forth in the Agreement were not strictly enforceable. The sole remedy provided in the event EPA did not take action by the deadlines was for the other settling parties to file a motion or petition, or initiate a new action, seeking to compel EPA to take action in response to this Court's remand order in New York v. EPA, No. 06-1322 (ECF No. 1068502). Agreement ¶ 7 (JA XX).

Prior to finalizing its entry into the Settlement Agreement, EPA published the Agreement in the Federal Register for public comment, as required by 42 U.S.C. § 7413(g). See 75 Fed. Reg. 82,392 (Dec. 30, 2010) (notice soliciting comments). EPA did not receive any comments questioning its authority to conduct a section 7411(d) rulemaking for power plants as a consequence of having listed them as a source category regulated under section 7412 (infra Section IV). Petitioners submitted no comments at all. After considering the comments it did receive, EPA finalized the Agreement on March 2, 2011. See Modification Agreement at 1 (JA XX) (noting date Agreement was finalized); 77 Fed. Reg. 22,392, 22,404 (Apr. 13, 2012) (publicly announcing finalization).

EPA did *not* issue a proposed or final rule under section 7411(d) concerning greenhouse gas emissions from existing power plants by the deadlines in the Settlement Agreement. The other parties to the Agreement did not seek relief.

IV. THE MATS RULE

In 2000, EPA found, under 42 U.S.C. § 7412(n)(1)(A), "that regulation of [hazardous pollutant] emissions from coal- and oil-fired [power plants] under section 112 of the [Act] is appropriate and necessary," and added those power plants to the section 7412(c) list of source categories. 65 Fed. Reg. 79,825, 79,826-30 (Dec. 20, 2000). EPA promulgated a final rule regulating power plants' emissions of mercury and other hazardous pollutants in 2012. 77 Fed. Reg. 9304 (Feb. 16, 2012) ("MATS Rule"). This Court upheld the MATS Rule in White Stallion Energy Center, LLC v.

EPA, 748 F.3d 1222 (D.C. Cir. 2014). The Supreme Court has granted certiorari to address one issue raised by that decision. See Michigan v. EPA, 135 S. Ct. 702 (U.S. Nov. 25, 2014) (No. 14-46).

The MATS Rule regulates only coal and oil-fired plants; thus, it does not cover all of the power plants addressed by the Proposed Rule, which covers natural gas-fired plants as well. Compare 77 Fed. Reg. 9304 with 79 Fed. Reg. at 34,855.

V. THE PROPOSED RULE

Independent of the Settlement Agreement, and over a year after EPA was supposed to have taken any *final* action under that Agreement, the President announced his "Climate Action Plan," wherein he directed EPA to work expeditiously to promulgate CO_2 emission standards for fossil fuel-fired power plants. In accordance with the President's directive, EPA proposed performance standards for new power plants on January 8, 2014.[1] 79 Fed. Reg. 1430. On June 18, 2014, EPA proposed rate-based emissions guidelines for states to follow in developing state plans to address CO_2 emissions from existing power plants under 42 U.S.C. § 7411(d).[2] 79 Fed. Reg. at 34,830-34. Petitioners challenge the latter proposal.

[1] EPA proposed CO_2 standards for new power plants in 2012, but withdrew the proposal after taking comment. 77 Fed. Reg. 22,392 (Apr. 13, 2012); 79 Fed. Reg. 1352 (Jan. 8, 2014).

[2] EPA also proposed standards for modified and reconstructed sources. 79 Fed. Reg. 34,959 (June 18, 2014).

The Proposed Rule has two main elements: (1) state-specific emission rate-based CO_2 goals, to be achieved collectively by all of a state's regulated coal- and natural gas-fired sources; and (2) guidelines for the development, submission, and implementation of state plans. 79 Fed. Reg. at 34,833. While the proposal lays out individualized CO_2 goals for each state, it does not prescribe how a state should meet its goal. Id. Rather, each state would have the flexibility to design a program that reflects its circumstances and energy and environmental policy objectives. Id.

EPA solicited comments on all aspects of the Proposed Rule. 79 Fed. Reg. at 34,830. The comment period closed on December 1, 2014. See 79 Fed. Reg. 57,492 (Sept. 25, 2014). More than two million comments were submitted, and EPA is currently reviewing those comments. EPA intends to take final action later this year.[3]

Summary of Argument

No matter how urgent Petitioners believe their concerns regarding EPA's legal authority to be, they have chosen both the wrong context and the wrong time in which to raise them. First, their challenge to the Settlement Agreement is not justiciable because the Agreement does not "injure" Petitioners in any way that could give rise to Article III standing. The Agreement sets dates for rulemaking, but does not limit EPA's discretion concerning what final action to take, alter any applicable

[3] EPA Fact Sheet: Clean Power Plan and Carbon Pollution Standards Key Dates, at http://www2.epa.gov/carbon-pollution-standards/fact-sheet-clean-power-plan-carbon-pollution-standards-key-dates (JA XX).

rulemaking procedures, or purport to make any change in a regulatory program. Nor does the Agreement, standing alone, impose obligations on Petitioners or any other entity. This Court has long held that non-settlors lack Article III standing to seek judicial review for the purpose of blocking or setting aside such settlements.

Second, for related reasons, the Settlement Agreement cannot be considered a "final agency action." It does not determine the rights or obligations of, or impose legal consequences on, any non-party to the Agreement. Rather, legal consequences could be imposed only if EPA promulgates a final regulation following notice and comment, which would then be reviewable in this Court.

Third, any challenge concerning the Settlement Agreement has become moot. EPA already has published the "proposed" rule that was due under the Agreement, and the Agreement does not require final *promulgated* standards because EPA retains its discretion to decide what final action to take.

Fourth, the Act requires that petitions for review be brought within sixty days after the relevant Federal Register publication, which in this case occurred on April 23, 2012. Petitioners waited more than two years after that date to file this case, and that time limit is jurisdictional.

Finally, because EPA is currently in the midst of a notice-and-comment rulemaking process in which it will evaluate and respond to comments on the very issue Petitioners would have this Court prematurely decide, this petition is not "fit" for a judicial decision and must be dismissed as unripe.

If this Court reaches the merits, it should conclude that Petitioners' interpretation of section 7411(d) as barring regulation of all pollutants under that section once a source category has been regulated in regard to hazardous pollutants under section 7412 is not the only way to read the convoluted text at issue. That text – which includes both the House's and Senate's 1990 amendments – is ambiguous and can be read multiple ways, allowing for reasonable Agency interpretation. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984). One reasonable interpretation is that EPA may regulate, under section 7411(d), any pollutant that is not a "hazardous" or "criteria" pollutant regulated elsewhere under the Act. Unlike Petitioners' contrary reading, such an interpretation of section 7411(d) would be consistent with the statutory context and legislative history. Thus, the Court cannot conclude at this preliminary stage of the rulemaking process that Petitioners' reading of section 7411(d) is the only permissible reading.

Argument

I. PETITIONERS LACK ARTICLE III STANDING.

A. EPA's Entry Into the Settlement Agreement Caused No Injury.

"The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013). "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent [referred to as "injury-in-fact"]; fairly traceable to the

challenged action; and redressable by a favorable ruling." Id. at 1147 (internal quotation and citations omitted). "[A]llegations of *possible* future injury are not sufficient." Id. (emphasis in original; internal quotation omitted).

The Settlement Agreement contains no provision that could credibly be deemed to cause "concrete, particularized, and actual or imminent" injury to Petitioners or any other entity. To begin with, although the Agreement set a schedule for EPA to conduct rulemakings pursuant to section 7411, it does not limit EPA's administrative discretion in deciding, at the end of that rulemaking process: (1) whether to promulgate final standards; and (2) if EPA does so promulgate, what the form or content of the final standards should be.

For example, while Paragraphs 1 and 2 of the Settlement Agreement established deadlines for "*proposed* rule[s] [under sections 7411(b) and (d), respectively] that include[] standards of performance for GHGs," Paragraphs 3 and 4 do *not* similarly state that EPA "shall promulgate" such standards by the identified dates. Agreement ¶¶ 1-4 (JA XX). Instead, the latter paragraphs provide only that EPA "will sign . . . a final rule [by each respective date] that *takes final action with respect to* the proposed rule[s] described in [Paragraphs 1 and 2, respectively]." Id. ¶¶ 3, 4 (JA XX) (emphasis added).[4] Paragraph 11 further states that, "[e]xcept as expressly provided

[4] The Act distinguishes "proposed rules" from "promulgated" regulations in its general rulemaking provision, 42 U.S.C. § 7607(d), which expressly applies to rules issued under section 7411. Compare id. § 7607(d)(3), with id. § 7607(d)(6)(A)(ii), (B). Judicial review, in turn, is authorized (in relevant part) for action "*promulgating* . . . any

herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the [Act] or by general principles of administrative law." Agreement ¶ 11 (JA XX). Thus, the Agreement sets rulemaking deadlines but does not limit EPA's discretion, after considering the comments on a proposed rule, to make a final decision *not* to promulgate it.

Additionally, EPA's obligation under Paragraph 4 to "take final action" under section 7411(d) is conditional – it only arises "*if* EPA finalizes standards of performance for GHGs [for new and modified sources] pursuant to Paragraph 3." Agreement ¶ 4 (JA XX) (emphasis added). Thus, not only does EPA retain its discretion regarding what final action to take, it need not take final action under section 7411(d) *at all* unless it promulgates standards under section 7411(b).

The Agreement, moreover, contains no provision that purports to alter notice and comment requirements or any other procedures applicable to EPA rulemaking under the Act or other authority. Nor does it prescribe any other change in any regulatory program. Rather, it does nothing more than set deadlines for the rulemakings referred to in Paragraphs 1 through 4, with EPA retaining its administrative discretion regarding the substance of final action as shown above.

---

standard of performance or requirement under [42 U.S.C. § 7411]." Id. § 7607(b)(1) (emphasis added).

Under both longstanding and recent decisions of this Court, non-settling parties lack standing to seek judicial review of settlements that set schedules for federal agency rulemaking without limiting the agency's administrative discretion concerning the substance of final action. Just two years ago, the Court considered this question in Defenders of Wildlife v. Perciasepe, 714 F.3d 1317 (D.C. Cir. 2013), where non-settlors asserted standing to oppose a consent decree establishing a schedule for rulemaking "pertaining to revisions to . . . Effluent Guidelines under the Clean Water Act." Id. at 1321. Using language essentially identical to that employed by the Settlement Agreement here, the consent decree in Perciasepe established a deadline for "a notice of proposed rulemaking pertaining to [such] revisions," followed by a second deadline for "a decision *taking final action* following notice and comment rulemaking pertaining to [such] revisions." Id. (emphasis added). The consent decree also mirrored this Agreement by expressly providing that it did not "limit or modify the discretion accorded EPA by the Clean Water Act or by general principles of administrative law." Id. at 1322. This Court concluded that the non-settlors lacked standing. Id. at 1323-26. In particular, the Court observed that the consent decree "merely requires that EPA conduct a rulemaking and then decide whether to promulgate a new rule – the content of which is not in any way dictated by the consent decree – using a specific timeline." Id. at 1324. The Court explained that such an agreement cannot "injure" any third party, because "Article III standing requires more than the *possibility* of potentially adverse regulation." Id. at 1324-25

(emphasis added) (citing Nat'l Ass'n of Home Builders ("NAHB") v. EPA, 667 F.3d 6, 13 (D.C. Cir. 2011)) (other citations omitted).

Perciasepe is consistent with earlier cases likewise holding that third parties lacked standing to bring suits attempting to prevent federal agencies from agreeing to negotiated rulemaking schedules. See Alternative Research & Dev. Found. v. Veneman, 262 F.3d 406, 411 (D.C. Cir. 2001) (non-settling party's rights not impaired by stipulation of dismissal requiring U.S. Department of Agriculture to conduct rulemaking, because it "will not be precluded from participating in the rulemaking and, if USDA decides to issue a final rule, [it] is not precluded from challenging that rule"); In re Endangered Species Act Section 4 Deadline Litig. – MDL No. 2165, 704 F.3d 972, 976-79 (D.C. Cir. 2013) (no standing to oppose consent decree); Envt'l Defense v. EPA, 329 F. Supp. 2d 55, 67-69 (D.D.C. 2004) (same); cf. Ctr. for Biological Diversity v. EPA, 274 F.R.D. 305, 309-12 (D.D.C. 2011) (aircraft engine manufacturers lacked standing to intervene in lawsuit to compel agency action relating to regulation of greenhouse gas air emissions). Indeed, "[i]t has never been supposed that one party . . . could preclude other parties from settling their own disputes and thereby withdrawing from litigation." Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. 501, 528-29 (1986).

This Court has found it appropriate, however, to reach the merits of such a claim in the highly unusual circumstance – not present here – of a proposed settlement that expressly purported to limit EPA's discretion to decide *not* to regulate.

See Natural Res. Def. Council ("NRDC") v. Costle, 561 F.2d 904, 908-10 (D.C. Cir. 1977). In Perciasepe, the Court found Costle distinguishable because the settlement agreement in Costle, unlike the consent decree in Perciasepe, "permitted EPA to decline to issue any new rule . . . only if it met certain requirements set forth in the agreement and 'promptly submit[ted] a statement under oath to the parties explaining and justifying the exclusion,'" which was then subject to district court enforcement proceedings if NRDC disagreed with EPA's explanation. Perciasepe, 714 F.3d at 1325 (quoting Costle, 561 F.2d at 909); see also 714 F.3d at 1326 (stipulated dismissal in Alternative Research did not resemble Costle settlement because the stipulated dismissal "d[id] not bind the agency in its rulemaking"). Because of these distinctions, the Court in Perciasepe concluded that Costle "does not dictate the outcome here." Id. at 1325. The Court further observed that Costle did not address standing "and therefore has no precedential effect on th[at] jurisdictional question." Id.

As shown above, the Settlement Agreement here mirrors the provisions of the consent decree in Perciasepe and the stipulated dismissal in Alternative Research by referring only to deadlines to "take final action" at the conclusion of the rulemaking schedules, thus preserving EPA's administrative discretion. Agreement ¶¶ 3-4 (JA XX). Such language "does not *require* EPA to promulgate" standards under section 7411, but instead merely requires EPA to meet a rulemaking schedule "and then *decide* whether to promulgate a new rule." Perciasepe, 714 F.3d at 1324 (emphasis added). Moreover, the Agreement does not even require a "final action" under section

7411(d) unless EPA, in its discretion, "finalizes standards" under section 7411(b). Agreement ¶ 4 (JA XX). That the Agreement "prescribes a date by which regulation *could* occur does not establish Article III standing." Perciasepe, 714 F.3d at 1325 (emphasis added); accord Alternative Research, 262 F.3d at 411. Finally, because the Settlement Agreement contains no provision purporting to limit notice and comment requirements or otherwise alter any statutory procedures governing rulemaking, Petitioners "[are] not . . . precluded from participating in the rulemaking and, if [EPA] decides to issue a final rule, . . . [are] not precluded from challenging that rule." Alternative Research, 262 F.3d at 411; Envt'l Defense, 329 F. Supp. 2d at 68 (same).[5]

Petitioners cite cases from other circuits where courts considered the merits of objections to a settlement or affirmed an order preliminarily enjoining implementation of a settlement. E.g., Pet.Br. 25, 27 n.4. But each of those settlements included provisions that immediately altered existing regulatory programs, unlike here.[6] Petitioners identify *no* authority recognizing a non-settlor's standing to attempt to block a settlement that merely establishes a rulemaking schedule.

---

[5] In contrast, granting the declaratory and injunctive relief Petitioners seek *would* impair the procedural rights of other stakeholders by preventing EPA from considering their comments and making a final decision that takes their comments into account.

[6] See Conserv. Nw. v. Sherman, 715 F.3d 1181, 1185-88 (9th Cir. 2013) (consent decree altered the "Survey and Manage Standard" of the Northwest Forest Plan without prior notice and comment); Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236, 245-46 (3d Cir. 2011) (settlement imposed immediately effective moratorium on oil and gas drilling in the Allegheny National Forest until completion of forest-wide environmental impact statement).

B. Petitioners' Claims Of Injury From Publication Of The Proposed Rule Are Insufficient.

Petitioners do not identify any "injury" that allegedly resulted directly from EPA's entry into the Settlement Agreement. Rather, Petitioners assert that they were injured by EPA's publication of the Proposed Rule because they "expended substantial state resources as a direct result of the proposal, including thousands of hours of employee time." Pet.Br. 26. Petitioners then assert that the Settlement Agreement was at least a "substantial factor" that "motivated" EPA to issue the proposal and that this alleged injury therefore is traceable to the Agreement. Pet.Br. 26-27. Petitioners also claim a second injury resulting from the "obligation to submit a State Plan after the [Proposed Rule] is final." Pet.Br. 28.[7] Neither of these claims establishes Article III standing.

Addressing Petitioners' second asserted injury first, the "obligation" to submit a State Plan after final standards are promulgated is only hypothetical. As even Petitioners acknowledge, it could only arise "*after* the Section 111(d) rule is final," Pet.Br. 28 (emphasis added) – in other words, it will only become an "obligation" if and when EPA *promulgates* a final rule. Speculation about possible future government action cannot meet the requirement of "concrete, particularized, and actual or imminent" injury. See Clapper, 133 S. Ct. at 1147-50; NAHB, 667 F.3d at 13. Moreover, despite Petitioners' belief that promulgation of the Proposed Rule is

[7] Petitioners do not allege any "procedural injury." See Perciasepe, 714 F.3d at 1323.

inevitable, recent experience demonstrates that EPA does not always finalize its rulemaking proposals. See, e.g., 79 Fed. Reg. 1352 and 79 Fed. Reg. 1430 (Jan. 8, 2014) (withdrawing proposed rule addressing CO_2 emissions from new power plants and publishing a new proposal based on a different legal theory).

Petitioners' other asserted injury – the staff time and resources expended in advance preparation for meeting possible future state planning requirements – cannot be considered "traceable" to any EPA action because neither the Settlement Agreement nor the Proposed Rule *requires* any state to conduct such efforts. Rather, only a final rule promulgating the proposal could require such action by states.[8] To the extent Petitioners have voluntarily undertaken such efforts, their asserted injury is "self-inflicted" and, as such, "not fairly traceable to the challenged government conduct." Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 177 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 2880 (2013) (where final rule permitted but did not "force" or "require" manufacturers to use new alternative fuel, majority held that petroleum refiners and importers did not have Article III standing based on the alleged costs and liabilities associated with that fuel); cf. NAHB, 667 F.3d at 12 (organizational staff

[8] The Administrator's statements *encouraging* advance planning (Pet.Br. 20) are not the same as a promulgated regulation imposing a binding deadline for submitting state plans, and no provision of the Agreement imposes such a deadline. See Perciasepe, 714 F.3d at 1325 n.7 (claimant "has the burden to establish that the consent decree – not EPA's throat-clearing – will cause the injury of which it complains").

time and money expended in response to Clean Water Act jurisdictional determination did not constitute injury-in-fact).[9]

This Court has acknowledged that *promulgated* air rules may cause an Article III "injury" by increasing a state's burden of developing an approvable plan or otherwise meeting implementation requirements; but, consistent with separation-of-powers principles, the Court has never suggested that a "proposed" rule could do so. E.g., West Virginia v. EPA, 362 F.3d 861, 868 (D.C. Cir. 2004) (states had standing to seek review of EPA's promulgated "NO_X SIP Call" rule, which "direct[ed] each state to revise its SIP in accordance with EPA's NO_X emissions budget"); Nat'l Ass'n of Clean Air Agencies v. EPA, 489 F.3d 1221, 1226-28 (D.C. Cir. 2007) (recognizing standing to challenge promulgated rule); Oklahoma Dep't of Envtl. Quality ("ODEQ") v. EPA, 740 F.3d 185, 189-90 (D.C. Cir. 2014) (same)[10]; compare with Alternative Research, 262 F.3d at 411 ("the initiation of a rulemaking" pursuant to settlement did not cause injury); Las Brisas Energy Ctr., LLC v. EPA, No. 12-1248 &

[9] Petitioners explain at length their concern that the Proposed Rule, if promulgated, would require planning efforts that a number of states believe cannot be achieved within the deadlines EPA has proposed. Pet.Br. 16-22. EPA sought rulemaking comments regarding, *inter alia*, the adequacy of the proposed planning deadlines, and many of the comments expressed that same concern. Thus, in addition to deciding as a threshold matter whether to promulgate the Proposed Rule, EPA will have to decide whether to make any changes to the planning deadlines in light of these comments.

[10] Tozzi v. U.S. Dep't of Health & Human Servs., 271 F.3d 301 (D.C. Cir. 2001) (Pet.Br. 27, 29), also involved a genuinely final agency action taken after notice and comment, not a proposal. 271 F.3d at 306-07.

consolidated cases (Order dated Dec. 13, 2012) (dismissing challenges to April 2012 proposed section 7411(b) rule on jurisdictional grounds) (Attach. A).

In Massachusetts, the Supreme Court likewise recognized a state's standing to challenge EPA's *final* action denying a rulemaking petition. See 549 U.S. at 526. The Court acknowledged a "special solicitude" in its standing analysis for a challenge brought by a state; it reasoned that Congress had "ordered EPA to protect [states] by prescribing standards applicable to the emission of any air pollutant . . . which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," and, importantly, that Congress also "recognized a concomitant procedural right to challenge the rejection of [the state's] rulemaking petition as arbitrary and capricious." Id. at 519-20 (citing 42 U.S.C. §§ 7521(a)(1), 7607(b)(1)) (internal quotation omitted). The petition here, in contrast to Massachusetts, was filed in the midst of an *ongoing* rulemaking process, and essentially asks the judiciary to assume the administrative function Congress delegated to EPA by deciding issues that are the ongoing subject of public comments when EPA has yet to respond to those comments and has neither denied a rulemaking petition, nor promulgated a regulation. Unlike in Massachusetts, the Act supports no "procedural right" to a judicial order thwarting this statutory process. Such a claim, whether brought by states, regulated entities or other stakeholders, is not justiciable.

C. Petitioners Fail to Show Redressability.

Petitioners also fail to explain how their alleged injuries would be redressed

if the Court "h[e]ld 'unlawful' and 'set aside' the settlement agreement's Section [74]11(d) provisions." Pet.Br. 59 (quoting 5 U.S.C. § 706(2)(A)). The Agreement contains no provisions that purport to "determine" whether power plants should be subject to promulgated standards of performance for CO_2 emissions, and EPA's schedule for completing the rulemaking process was not derived from the Agreement. Indeed, the Proposed Rule was issued as part of the "Climate Action Plan," a major initiative by the current administration to address climate change. See 79 Fed. Reg. at 34,833/3 (identifying Climate Action Plan as impetus for Proposed Rule). EPA would have taken the step of proposing a section 7411(d) rule for power plants pursuant to the Act and the Climate Action Plan whether or not this Agreement existed, or were vacated.

II. THE SETTLEMENT AGREEMENT IS NOT A "FINAL ACTION."

Section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1), governs judicial review of EPA's nationally applicable air regulations and is an exclusive remedy. See id. § 7607(e); ODEQ, 740 F.3d at 191. It lists specific, nationally applicable actions that are subject to judicial review – including action "*promulgating* . . . any standard of performance or requirement under [42 U.S.C. § 7411]" – along with "any other nationally applicable regulations *promulgated*, or *final action* taken, by the Administrator under this chapter." 42 U.S.C. § 7607(b)(1) (emphasis added).

"[T]he phrase 'final action' . . . bears the same meaning in [section 7607(b)(1)] that it does under the Administrative Procedure Act" and, accordingly, is subject to

the familiar standard articulated in Bennett v. Spear, 520 U.S. 154 (1997), to determine whether EPA actions taken under the Act are "final." Whitman v. American Trucking Ass'ns, 531 U.S. 457, 478 (2001); see, e.g., Nat'l Envtl. Dev. Ass'n's Clean Air Project ("NEDA-CAP") v. EPA, 686 F.3d 803, 808-09 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 983 (2013). "As a general matter, two conditions must be satisfied for action to be considered 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process . . . it must not be of a merely tentative or interlocutive nature." Bennett, 520 U.S. at 177-78 (internal citation omitted). "And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Id. (internal citation omitted); see also Devon Energy Corp. v. Kempthorne, 551 F.3d 1030, 1040-41 (D.C. Cir. 2008) (action must impose "legal," not just "practical" consequences, and the change in legal rights must be "certain") (internal quotations and citations omitted).

The Settlement Agreement does not meet either of Bennett's criteria because, as shown above, it does not resolve what the final outcome of the rulemaking process will be and does not "determine" any "rights or obligations" of or impose any "legal consequences" on Petitioners or any other non-settling entity.[11] In short, the Agreement has no legally binding effect on any non-settlor that could render it a

[11] Petitioners here do not argue that the Proposed Rule is a separate "final action." See Pet.Br. 52-54.

"final action." See Ass'n of Irritated Residents v. EPA, 494 F.3d 1027, 1034 (D.C. Cir. 2007) (consent agreement was not a "rule" subject to judicial review, as it did not "bind" EPA to a "substantive interpretation of the statute"); see also NEDA-CAP, 686 F.3d at 809 (preamble statements describing anticipated future implementation plans for revised NAAQS did not "impose[] definite requirements upon states or regulated industries" and thus were not final action).

That the Settlement Agreement went through notice and comment under 42 U.S.C. § 7413(g) does not, by itself, establish finality. Pet.Br. 52-53 (citing Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 162 (1967)).[12] In NEDA-CAP, for example, this Court held that a preamble statement concerning future implementation of a NAAQS was not reviewable although EPA had published the statement in the Federal Register following notice and comment. 686 F.3d at 808-09. Here, even if the Agreement represented the "consummation of EPA's decisionmaking" concerning whether and how to settle the threatened litigation regarding the timing of its response to the remand in New York v. EPA, Pet.Br. 53, that is not the *relevant* decisionmaking process in this case,[13] because Petitioners' claim is focused exclusively

[12] Toilet Goods did not address whether a settlement agreement is judicially reviewable after going through notice and comment. Rather, the Court found that when a *regulation* is published following notice and comment, it represents the culmination of the rulemaking process – a point no one here contests. Id. at 162.

[13] If Petitioners' view were correct, then *every* rulemaking settlement could constitute "final agency action," potentially subjecting the federal courts to a flood of collateral litigation challenging such settlements and leaving the United States with no effective

on the scope of EPA's regulatory authority, not on the timeframe in which the rulemaking will be conducted. EPA has *not* concluded its process for deciding questions concerning its regulatory authority, as its solicitation of public comments on that very issue clearly demonstrates.

Petitioners' other cases are readily distinguishable. Pet.Br. 52-53. Makins v. District of Columbia, 277 F.3d 544 (D.C. Cir. 2002), was a suit brought to *enforce* a settlement agreement against a *settling* party. Id. at 545-47. The remaining cases involved settlements that imposed *immediate* legal consequences (not just hypothetical future legal consequences) on non-settlors. See United States v. Carpenter, 526 F.3d 1237, 1238-42 (9th Cir. 2008) (settlement authorized road repairs near federal wilderness area, thus allegedly impairing nearby residents' interest in preserving that area); Exec. Business Media, Inc. v. U.S. Dept. of Def., 3 F.3d 759, 761-64 (4th Cir. 1993) (business competitor challenged settlement that authorized contract award without going through competitive bidding).

III. PETITIONERS' CHALLENGE TO THE AGREEMENT IS MOOT.

For several reasons, this petition should be considered moot. See generally Daimler Trucks North Am. LLC v. EPA, 745 F.3d 1212, 1216 (D.C. Cir. 2013) (A case is moot "if events have so transpired that the decision will neither presently

---

means of settling suits alleging that it has failed to respond to a judicial remand or meet a statutory deadline for final regulatory action. Such an outcome is untenable and would be contrary to Firefighters. See 478 U.S. at 428-29.

affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.") (internal quotation and citation omitted); Util. Air Reg. Group ("UARG") v. EPA, 744 F.3d 741, 749-50 (D.C. Cir. 2014). First, the deadlines in the Settlement Agreement have long since passed. The Agreement called for EPA to take final action with respect to its proposal under section 7411(d) – only if it elected to promulgate standards for power plants under section 7411(b) – by May 2012. Agreement ¶ 4 (JA XX); Modification Agreement ¶ 2 (JA XX). EPA took no such action by that deadline, and the settling parties have not pursued the limited remedy that the Agreement authorizes in the event of breach, which is to "file an appropriate motion or petition . . . seeking to compel EPA to take action responding to the Remand Order" in New York v. EPA, No. 06-1322. Agreement ¶ 7 (JA XX).[14]

Second, EPA has *already* published the section 7411(d) proposal, which is the only step EPA was *required* to take under the Settlement Agreement, since (1) the obligation to take final action under section 7411(d) was conditional on whether EPA promulgated section 7411(b) standards; and (2) EPA retained its discretion to make a

[14] The Agreement contains no specific performance remedy, and it is not enforceable in Court. Id. ¶ 7. Petitioners' contrary arguments concerning the Agreement's "enforceability" (Pet.Br. 27 & n.4, 57-58) fail to address its language limiting the remedy for breach and rely on cases that did not involve similar contractual language. See, e.g., Am. Sec. Vanlines, Inc. v. Gallagher, 782 F.2d 1056, 1059 (D.C. Cir. 1986); Vill. of Kaktovik v. Watt, 689 F.2d 222, 228-30 (D.C. Cir. 1982); Minard Run, 670 F.3d at 247 n.4; see also Marks v. United States, 24 Cl. Ct. 310, 319 (Cl. Ct. 1991) ("[P]arties to a contract are free to limit remedies in accordance with their desire . . . at the time the contract is executed . . . .").

final decision *not* to promulgate section 7411(d) standards. Granting judicial relief now would not "un-do" EPA's publication of the proposal.

IV. THIS PETITION IS UNTIMELY.

A petition under 42 U.S.C. § 7607(b)(1) "shall be filed within sixty days from the date notice of [a final] promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day," then it "shall be filed within sixty days after such grounds arise." Id.; see Utah v. EPA, 750 F.3d 1182, 1184 (10th Cir. 2014) ("grounds" means "a sufficient legal basis for granting the relief sought") (internal quotation and citation omitted). These time limits are jurisdictional. E.g., Med. Waste Inst. & Energy Recovery Council v. EPA, 645 F.3d 420, 427 (D.C. Cir. 2011); ODEQ, 740 F.3d at 191.[15]

Assuming that EPA's entry into the Settlement Agreement on March 2, 2011, did not immediately trigger the sixty-day filing period, as EPA did not publish a Federal Register notice at that time, that period began to run no later than April 3, 2012, when EPA published a Federal Register notice stating that it had "finalized" the Agreement. 77 Fed. Reg. at 22,404. On that date, the claims and arguments that Petitioners seek to assert in this case were available to them, because by then EPA: (1) had promulgated a final rule regulating power plants under section 7412,[16] which

[15] But see Clean Water Action Council of Ne. Wis., Inc. v. EPA, 765 F.3d 749, 751 (7th Cir. 2014).

[16] 77 Fed. Reg. 9304.

according to Petitioners "prohibits EPA from requiring States to regulate [the same source category] under Section [74]11(d)," Pet.Br. 30; and (2) had *subsequently* announced in the Federal Register its finalization of the settlement setting deadlines for a section 7411(d) rulemaking for power plants. Thus, the legal dispute Petitioners wish to raise now already had crystallized, at the latest, by April 3, 2012, making the "arising after" exception inapplicable to this petition.

V. THE PENDENCY OF AN ONGOING RULEMAKING PROCESS RENDERS THIS PETITION UNRIPE FOR JUDICIAL REVIEW.

Petitioners claim that this case became "fit for judicial decision" in June 2014 when EPA published the Proposed Rule and accompanying Legal Memorandum. Pet.Br. 55. EPA published those documents, however, for the specific purpose of obtaining public comments to help inform a rulemaking decision it has *not yet made*.

In assessing the ripeness of a case, this Court "focus[es] on two aspects: the 'fitness of the issues for judicial decision' and the extent to which withholding a decision will cause 'hardship to the parties.'" Am. Petroleum Inst. ("API") v. EPA, 683 F.3d 382, 387 (D.C. Cir. 2012) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)). "The fitness requirement is primarily meant to protect the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interest in avoiding unnecessary adjudication and in deciding issues in a concrete setting." API, 683 F.3d at 387 (internal quotation omitted).

To uphold these interests, the Court determines fitness by evaluating not just

whether an issue is "purely legal," but also "whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." Id. (internal quotation omitted). "[E]ven purely legal issues may be unfit for review," and "a claim is not ripe . . . if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Atlantic States Legal Found. v. EPA, 325 F.3d 281, 284 (D.C. Cir. 2003) (internal quotation omitted). "Courts decline to review tentative agency positions because," among other consequences, "the integrity of the administrative process is threatened by piecemeal review of the substantive underpinnings of a rule, and judicial economy is disserved because judicial review might prove unnecessary if persons seeking such review are able to convince the agency to alter a tentative position." API, 683 F.3d at 387 (quotation omitted).

Reviewing the merits of this case, at this time, would lead the Court into the very pitfalls against which it warned in API. The legal analyses EPA set forth in the Legal Memorandum accompanying its Proposed Rule preamble are quite obviously "tentative," notwithstanding Petitioners' characterization of that document. Pet.Br. 55-56. The preamble made clear that EPA "solicits comment on all aspects of its legal interpretations, *including the discussion in the Legal Memorandum*." 79 Fed. Reg. at 34,853/2 (emphasis added). EPA also sought "public comment on all aspects of this proposal" including technical as well as legal issues. Id. at 34,835/2. The legal positions presented to this Court in Petitioners' brief have also been presented to EPA in the rulemaking; and many other stakeholders – often expressing *different*, and

in some cases diametrically opposed legal interpretations – have presented their comments as well. EPA had not yet had the opportunity, however, to complete its evaluation of these comments and determine what final action to take.

Importantly, the Act *requires* EPA to evaluate and respond to any significant written or oral comments on the proposal when taking final action. 42 U.S.C. § 7607(d)(6)(A)(ii). Indeed, if EPA attempted to treat the Legal Memorandum as a document that conclusively decided the legal issues of concern to Petitioners for purposes of this rulemaking, it would be subject to reversal for failure to respond to comments. See Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 950 (D.C. Cir. 2004). Thus, to say that EPA's legal interpretations are currently "tentative" is not an exercise in self-serving labelling; it is an accurate description of a rulemaking process that the Act *mandates* EPA follow before it decides whether to promulgate standards.

Furthermore, even if Petitioners' showing of "hardship" were sufficient to meet the second element of the ripeness test,[17] it could not overcome the demonstrable unfitness of the case for review at this time. "Although both the fitness and hardship prongs encompass a number of considerations, a dispute is not ripe if it is not fit . . . and . . . it is not fit if it does not involve final agency action." Holistic

[17] As discussed above, Petitioners have not demonstrated an "injury-in-fact" sufficient to establish Article III standing. Supra Argument I.A, B.

Candlers and Consumers Ass'n v. Food & Drug Admin., 664 F.3d 940, 943 n.4 (D.C. Cir. 2012) (internal citations omitted).

Because fitness is so plainly lacking when a claimant seeks judicial review of a legal dispute that may be mooted by the outcome of a pending notice and comment rulemaking process, this Court historically has found such claims unripe. See, e.g., API, 683 F.3d at 386; Atlantic States, 325 F.3d at 284; UARG v. EPA, 320 F.3d 272, 278-79 (D.C. Cir. 2003); Action on Smoking & Health v. Dep't of Labor, 28 F.3d 162, 165 (D.C. Cir. 1994). More recently, when confronted with petitions seeking review of the April 2012 proposed section 7411(b) rule, the Court summarily dismissed the petitions because the "proposed rule [was] not final agency action subject to judicial review." Las Brisas (Order dated Dec. 13, 2012) (Attach. A). EPA then withdrew the proposal, which only confirms that further judicial review at that time would have been a wasteful use of the Court's resources. See 79 Fed. Reg. at 1352.

Petitioners ask the Court to ignore the lessons of Las Brisas and exacerbate the premature intrusion of judicial review into the administrative rulemaking process by hearing this case now, when it would be more prudent to wait until EPA makes a final rulemaking decision. The Court should decline their request, and dismiss the petition.

VI. PETITIONERS' CHALLENGE FAILS ON THE MERITS.

Petitioners argue that, in 1990, Congress impaled EPA on the horns of a dilemma: EPA can regulate a source category's "hazardous" pollutant emissions under section 7412 of the Act, *or* it can regulate other dangerous emissions from the source category under section 7411(d), but not both. If correct, EPA would have to pick one set of health and environmental issues to address, while ignoring another.

Petitioners believe this pick-your-poison approach to regulation is mandated by a "literal reading" of section 7411(d) as set forth in the U.S. Code. Pet.Br. 23. But that convoluted text can be read "literally" multiple ways, leading to opposite conclusions regarding the scope of EPA's authority, and is replete with ambiguous terms. The textual ambiguity is compounded by the fact that two amendments to the relevant text were enacted into law in 1990, at least one of which would unquestionably allow EPA to regulate CO_2 emissions from existing power plants.

To prevail here, Petitioners must show that *no* reading of section 7411(d) other than the one they advance could possibly be reasonable. See Chevron, 467 U.S. at 837. They cannot. Given the many ambiguities in the text, along with supporting legislative history and statutory context, EPA could reasonably conclude that it has the authority to address power plant emissions of CO_2 under section 7411(d) so long as it has not regulated power plants' emissions of CO_2 under section 7412. Thus, if it reaches the merits, the Court's inquiry should end with the conclusion that Petitioners have not cornered the market on the meaning of section 7411(d).

A. The Text of § 7411(d) Does not Mandate Petitioners' Reading.

Section 7411(d) is a grammatical mess. Overburdened with dependent clauses and lacking in punctuation, the relevant *sentence* from the U.S. Code reads as follows:

> The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source . . .

42 U.S.C. § 7411(d)(1).

Petitioners argue that this text (reflecting the House Amendment alone) is only capable of a single interpretation and *must* be read as barring regulation of any source category previously regulated under 42 U.S.C. § 7412, even if in regard to *different* pollutants. Because EPA regulated emissions of certain hazardous pollutants from certain coal- and oil-fired power plants in its 2012 MATS Rule,[18] the argument continues, EPA cannot now promulgate a section 7411(d) rule addressing power plant emissions of CO_2 – or any other nonhazardous pollutant from any fossil-fuel fired power plants (including natural gas-fired plants not regulated under MATS). This reading of section 7411(d) would largely eviscerate EPA's authority under that

[18] Most of the State Petitioners are also challenging the legality of MATS, and that case is pending in the Supreme Court. Michigan v. EPA, S. Ct. No. 14-46 (cert. granted Nov. 25, 2014).

provision, as 146 source categories have been regulated in regard to their hazardous emissions under section 7412.

Even if Petitioner's convoluted take on section 7411(d) is *a* possible interpretation of that text, it is hardly the *only* possible interpretation.[19] Rather, the text of 42 U.S.C. § 7411(d) lends itself to multiple "literal" readings and is rife with ambiguous terms. The existence of two different amendments to section 7411(d) in the Statutes at Large further complicates the task of interpreting that provision. Thus,

[19] Petitioners and amici claim that the Supreme Court has read the text as they do. Pet.Br. 23; Br. of Amici Trade Ass'ns et al. ("Trade Amici") at 8, 13. It has not. In a footnote in Am. Elec. Power Co. ("AEP") v. Connecticut, the Court stated: "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program," essentially paraphrasing section 7411(d) as set forth in the U.S. Code. 131 S. Ct. 2527, 2537 n.7 (2011). But Petitioners' argument here was not raised or briefed in AEP. The actual holding in AEP – issued *after* EPA had already proposed the MATS Rule – was that section 7411 "speaks directly to emissions of [CO_2] from the defendants' plants," and therefore preempts state law nuisance claims. Id. at 2537. That holding undercuts Petitioners' position. Indeed, at oral argument in AEP – a month *after* the MATS proposal – counsel for industry petitioners (now counsel for Trade Amici) assured the Court that EPA could regulate greenhouse gas emissions under section 7411(d). Transcript, 2011 WL 1480855, at *16-17 ("We believe that the EPA can consider, as it's undertaking to do, regulating existing . . . sources under section 111 of the Clean Air Act, and that's the process that's engaged in now. . . . Obviously, at the close of that process there could be APA challenges on a variety of grounds, but we do believe that they have the authority to consider standards under section 111."). Likewise, industry petitioners averred in their brief that "EPA may . . . require States to submit plans to control" greenhouse gases under 42 U.S.C. § 7411(d). Brief for Pet's, No. 10-174, 2011 WL 334707, at *6-7. All of this demonstrates that Petitioners' reliance on the AEP footnote is misplaced.

42 U.S.C. § 7411(d) can be interpreted a number of ways, and Petitioner's way is the *least* consistent with legislative history and statutory context.

1. There are multiple "literal" readings of 42 U.S.C. § 7411(d).

In addition to Petitioners' proposed reading of section 7411(d), which emphasizes certain portions of the text in order to reach a certain conclusion, there are at least two other "literal"[20] readings of that text that would compel an opposite conclusion. The existence of multiple contradictory ways to read the same text shows that the text is neither plain nor unambiguous.

First, because Congress used the conjunction "or" rather than "and," the string of qualifying clauses set forth in subsection (d)(1)(A)(i) could be read as alternatives, rather than requirements to be imposed simultaneously. Numbering these clauses and highlighting the conjunctive term "or," the provision reads:

> The Administrator shall prescribe regulations . . . under which each State shall submit to the Administrator a plan which establishes standards of performance for any existing source for any air pollutant **[1]** for which air quality criteria have not been issued **or [2]** which is not included on a list published under section 7408(a) of this title **or [3]** emitted from a source category which is regulated under section 7412 of this title . . . .

[20] Petitioners conflate "literal" with "unambiguous." But "literal" means "involving the ordinary or usual meaning of a word," or "giving the meaning of each individual word," while "unambiguous" means "clearly expressed or understood." Merriam-Webster Dictionary, available at http://www.merriam-webster.com/. A text can be read so as to give ordinary meaning to each word, but that does not mean it is clear.

42 U.S.C. § 7411(d)(1). Giving the term "or" its ordinary meaning,[21] section 7411(d) literally provides that the Administrator may require states to establish standards for an air pollutant so long as *either* air quality criteria have not been established for that pollutant, *or* one of the other remaining criteria is met. See Reiter v. Sonotone Corp., 442 U.S. 330, 338 (1979) (rejecting a "construction [that] would have us ignore the disjunctive 'or'"). No air quality criteria have been issued for CO_2, and CO_2 is not listed under Section 7408(a). Thus, under this "literal" reading, section 7411(d)(1) poses no bar to regulation of CO_2 emissions.[22]

Petitioners argue that "'when an exclusion clause contains multiple disjunctive subsections, the exclusion applies if any one of the multiple conditions is met." Pet.Br. 37-38 (internal quotation omitted). As discussed below, it is debatable whether the relevant text should be considered an "exclusion clause." And unlike Petitioners' example of a landlord seeking a tenant "who is not a smoker or a pet

[21] Merriam Webster defines "or" as "a function word [used] to indicate an alternative <coffee *or* tea> <sink *or* swim>". At http://www.merriam-webster.com/dictionary/or.

[22] Trade Amici criticize this as a "new position" concocted by "litigation counsel," and argue that EPA must be tied to the "reasoning supplied by the [agency] itself in its rulemaking." Trade Amici at 12-13. But the rulemaking is ongoing; there is no final "agency reasoning" until EPA issues a final rule supplying such. Trade Amici are simply wrong to suggest that EPA may not revisit its interpretation of section 7411(d) in the context of an *ongoing* rulemaking.

owner or married" (id. at 38),[23] the text at issue is not one clause with three direct objects, but rather a string of three clauses, each with its own internal grammatical structure. The disjunctive "or" plays a different role in that context.

Next, although Petitioners want to read 42 U.S.C. 7411(d) "literally," they ignore that the third clause differs from the first two in that it does not contain a negative. Rather, Petitioners presume that the negative from the second clause was intended to carry over, and would implicitly rewrite the statute as follows:

> [EPA must require states to submit plans establishing standards for] for any existing source for any air pollutant (i) for which air quality criteria *have not* been issued or *which is not* included on a list published under section 7408(a) of this title or [*which is not*] emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source . . . . . .

42 U.S.C. § 7411(d)(1) (emphasis added). Without the addition of the bracketed language, the text can be read to say that, once EPA has regulated a source category under section 7411(b), it must require states to establish standards for that source category under section 7411(d) if that source category *is* regulated under section 7412 – the exact opposite of what Petitioners argue. See 42 U.S.C. § 7411(d)(1) (EPA must

[23] In fact, Petitioners' example would be more correctly written as: The landlord advertised for a tenant who is not a smoker, a pet owner, or married. See Strunk & White, The Elements of Style, p.3 (The Penguin Press, 2003).

require state standards for "any air pollutant . . . emitted from a source category which is regulated under section 7412").[24]

All of these "literal" readings (including Petitioners') must be considered in light of the structure, history, and purpose of the Act, as well as common sense, and EPA may conclude that none of them are reasonable in light thereof. The point here is simply that there is more than one way to read the convoluted – and ambiguous – text of section 7411(d), and EPA must have the opportunity to consider all of them.

2. 42 U.S.C. § 7411(d) is replete with ambiguous terminology.

In addition to being subject to multiple literal readings, section 7411(d) contains ambiguous terminology, which EPA must have the opportunity to interpret.

For example, the clause "emitted from a source category which is regulated under section 7412" modifies the phrase "any air pollutant." 42 U.S.C. § 7411(d). As the Supreme Court recently noted, the phrase "any air pollutant" is routinely given a "context-appropriate meaning." Util. Air Regulatory Group v. EPA ("UARG"), 134 S. Ct. 2427, 2439 (2014). Here, context suggests that the phrase "any air pollutant" "emitted from a source category which is regulated under section 7412" should be

[24] Petitioners argue that this reading would render third clause superfluous. Pet.Br. 37. But that clause would then reinforce that EPA must comprehensively address all harmful pollutants a regulated source category emits, regulating hazardous pollutants under section 7412 and other dangerous pollutants under section 7411. This would be consistent with 42 U.S.C. § 7412 (c)(1), which instructs EPA to list source categories consistently as between sections 7411 and 7412.

understood as referring only to any *hazardous* air pollutants, since hazardous pollutants are what the section 7412 program addresses.

Furthermore, the phrase "which is regulated under section 7412" could be reasonably interpreted as modifying both the immediately-preceding term "source category" *and* the further antecedent term "air pollutant." "As enemies of the dangling participle well know, the English language does not always force a writer to specify [to what] . . . a modifying phrase relates." Young v. Cmty. Nutrition Inst., 476 U.S. 974, 980-81 (1986) (concluding that FDA's interpretation of a complex provision therefore gets Chevron deference). So interpreted, regulation under section 7411(d) would be barred only where the subject source category is already regulated under section 7412 *for the same pollutant EPA seeks to regulate under section 7411(d).*

Moreover, as pointed out by commenters,[25] the ambiguous term "regulated" can, on its own, be reasonably interpreted as hazardous-pollutant specific. As the Supreme Court has explained, when interpreting that term, an agency must consider *what* is being regulated. See Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 366 (2002) (It is necessary to "pars[e] . . . the 'what'" of the term "regulates."); UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 363 (1999) (the term "'regulates insurance' . . . requires interpretation, for [its] meaning is not plain.") Here, the

[25] See, e.g., Environmental Defense Fund's Comments at 88 (JA XX) ("A source category is 'regulated' under section 112 not in the abstract, but with respect to particular pollutants.").

"what" being "regulated under section 7412" is a source category's emission of one or more specific hazardous pollutants. Thus, EPA could reasonably conclude that it is only precluded from regulating sources in regard to a particular pollutant under section 7411(d) if those sources are already "regulated under section 7412" *with respect to that same (hazardous) pollutant*. This is again precisely the sort of "reasonable, context-appropriate meaning" that the Supreme Court has directed EPA to give such ambiguous statutory terms. UARG, 134 S. Ct. at 2440.

3. The Senate Amendment compounds the ambiguity.

Contrary to Petitioners' argument, it is also appropriate to consider that two competing amendments to section 7411(d) were enacted into law in 1990 in the same public law. Unlike the ambiguous House text, the Senate's amendment is straightforward. If implemented alone, it authorizes regulation:

> for any existing source for any air pollutant for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) or section 7412(b) . . .

See Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). This text would undisputedly allow regulation of a source category under section 7411(d) so long as *the same pollutant* is not regulated under section 7412. The Senate's clear intent in this regard must be considered when interpreting section 7411(d).

Petitioners' primary argument for ignoring the Senate amendment is that it was placed under the heading "Conforming Amendments." Pet.Br. 41-44. But the Supreme Court has cautioned that parties should not "place[] more weight on the

'Conforming Amendments' caption than it can bear," as that heading does not mean that the provision is not "substantive." Burgess v. United States, 553 U.S. 124, 135 (2008). This Court has acted accordingly.[26] Washington Hosp. Ctr. v. Bowen, 795 F.2d 139, 149 (D.C. Cir. 1986) (giving full effect to a "conforming" amendment, intended to conform one part of the statute to significant structural changes in another part, because "Congress has directly expressed its intentions").

Moreover, Petitioners' premise that the House amendment is "substantive" while the Senate amendment is "conforming" is a fallacy. As noted in Burgess, "conforming" amendments may be "substantive" in nature. 553 U.S. at 135. And based on the Petitioners' own definition of "conforming amendments" as "amendments . . . necessitated by the substantive amendments of provisions of the bill," see Pet.Br. 42 (citing Senate Legislative Drafting Manual § 126(b)(2)), the House amendment also qualifies as "conforming." Section 7411(d) was amended because it cross-referenced a soon-to-be nonexistent provision of section 7412, and the text replaced by both houses was that cross-reference alone. Thus, like the Senate

[26] Petitioners cite Am. Petroleum Inst. v. SEC, 714 F.3d 1329, 1336 (D.C. Cir. 2013), as suggesting otherwise. Pet.Br. 44. It does not. In that case, the Court rejected the assertion that Congress' failure to update a statutory cross-reference when enacting the 2010 Dodd-Frank Wall Street Reform Act suggested that Congress might have also forgotten to add a cross-reference into another provision. 714 F.d at 1336-37. Thus, the Court did not ignore a conforming amendment; rather, it refused to act based on a non-existent conforming amendment. Further, it reminded the petitioners of the "basic interpretive canon that a statute should be construed so that effect is given to all its provisions." Id. at 1334 (internal quotation omitted).

amendment, the House amendment was also "necessitated by the substantive amendments of provisions of the bill." Id. Moreover, the heading under which the House amendment was enacted – "Miscellaneous Guidance" – no more indicates substantive import than the Senate's "Conforming Amendments" heading.

Petitioners also assert that the Senate amendment was a mere "clerical error." Pet.Br. 41. The legislative history indicates otherwise. First, a Senate bill introduced in mid-1989 contained the same text to replace the obsolete cross-reference as the House bill. S. 1490 § 108 (July 27, 1989). But that text was removed in late 1989, and the new bill provided that "112(b)(1)(A)" should be changed to "112(b)." S.1630, as reported (Dec. 20, 1989). Later in the process, the House deleted the Senate amendment, but it was added back into the final bill in conference. Compare S. 1630, 101st Cong. (passed by the House on May 23, 1990) with Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). This history strongly indicates that the Senate consciously chose not to adopt the House's language.

Petitioner's suggestion that the Court should give weight to the fact that the House's Office of Law Revision Counsel did not execute the Senate amendment when publishing the U.S. Code (Pet.Br. 46) is also misguided. That office does not make law. On its website, the Office describes its job as simply to "prepare[] and publish[] the United States Code."[27] It has no authority to decide between competing

[27] At http://uscode.house.gov/about/info.shtml.

amendments to a provision that may have significantly different implications for the meaning of the text, and its mechanical decisions not to execute one amendment where it is functionally impossible to incorporate both into the U.S. Code are entitled to "no weight." United States v. Weldon, 377 U.S. 95, 98 n.4 (1964).[28]

Rather, if dueling amendments to a bill may have meaningfully different results, they should be interpreted – first by the agency to which administration of the statute has been delegated, subject to judicial review – to reconcile them if possible. See Citizens to Save Spencer Cnty. v. EPA, 600 F.2d 844, 872 (D.C. 1979) (where Congress "drew upon two bills originating in different Houses and containing provisions that, when combined, were inconsistent in respects never reconciled in conference . . . it was the greater wisdom for [EPA] to devise a middle course."); see also Scialabba v. Cuellar de Osorio. 134 S. Ct. 2191, 2203 (2014) (where "internal

[28] Petitioners claim to have identified twelve instances where the Office addressed competing amendments to the same bill. Pet.Br. 43 & n.10. In eleven of those examples, the amendments were either duplicative (e.g., Revisor's Note, 11 U.S.C. § 101 (amendment substituting a period for a semicolon could not be executed because another amendment had already done so)); very different in scope (e.g., Revisor's Note, 26 U.S.C. § 1201 (one amendment replaced a cross-reference but the other deleted the subparagraph)); or there was an obvious error (e.g., Revisor's Note, 21 U.S.C. § 355 (language amended did not exist)). The remaining instance is distinguishable because while two amendments deleted the same text, only one of those amendments replaced the deleted text, so there was no conflict. See Revisor's Note, 42 U.S.C. § 9874. Indeed, instances in which competing amendments have meaningfully different implications that require reconciliation will necessarily be rare, and courts can address the question of how to interpret the statute in such rare instances without creating "disruptive result[s]." Pet.Br. 48.

tension" in provision "makes possible alternative reasonable constructions, . . . Chevron dictates that a court defer to the agency's . . . expert judgment about which interpretation fits best with, and makes the most sense of, the statutory scheme.") (Kagan, J, plurality); id. at 2228 ("before concluding that Congress has legislated in conflicting and unintelligible terms," "traditional tools of statutory construction" should be used to "allow [the provision] to function as a coherent whole") (Sotomayor, J. dissenting).

Petitioners argue that, if the Senate amendment is given effect, the two amendments should be interpreted "additively," so as to exclude from regulation under section 7411(d) all source categories previously regulated under section 7412 (per Petitioners' reading of the House amendment), *and* all hazardous pollutants (per the Senate amendment). See Pet.Br. 48-50. This even more restrictive interpretation of section 7411(d) is no reasonable "middle course" (Spencer Cnty., 600 F.2d at 872), and it does not "fit[] best with, and make[] the most sense of, the statutory scheme" (Scialabba, 134 S. Ct. at 2203), as it would leave a huge gap in the Act's coverage of harmful pollutants. Furthermore, it belies Petitioners' assertion that section 7411(d) can only be read one way.

Here, EPA is still in the middle of the rulemaking process; it has not yet determined how best to reconcile the House and Senate amendments and otherwise interpret the ambiguous language in section 7411(d). But it is at least plausible that EPA could reach a reasonable final conclusion that the statute allows it to regulate

CO_2 emissions from power plants, whether because the House amendment should be interpreted as having the same effect as the Senate amendment, or because the two amendments can be reconciled, or for some other reason. Separation of powers principles require that EPA be given that chance.

B. The Legislative History Does Not Support Petitioners' Reading.

As discussed above,[29] in 1970 Congress provided comprehensive coverage of three groups of harmful pollutants (criteria, hazardous, and other) under three different programs (the NAAQS program, the section 7412 program, and the section 7411(d) program). There is not a scintilla of evidence in the legislative history supporting Petitioners' proposition that, in 1990, Congress intended to strip EPA of most of its authority to regulate under the third of those programs. To the contrary, Congress consistently expressed its desire to expand EPA's authority under the Act.

1. Congress sought to broaden EPA's authority in 1990, not narrow it.

The legislative history of the 1990 Amendments is replete with language indicating that Congress sought to expand EPA's regulatory authority, compelling the Agency to regulate more pollutants, under more programs, more quickly

Expediting the regulation of hazardous pollutants under section 7412 was a key focus. See S. Rep. No. 101-228 at 133 ("There is now a broad consensus that the program to regulate hazardous air pollutants . . . should be restructured to provide

[29] *Supra* p. 3.

EPA with authority to regulate industrial and area sources of air pollution . . . in the near term"), reprinted in 5 A Legislative History of the Clean Air Act Amendments of 1990 ("Legis. Hist.") 8338, 8473 (Comm. Print 1993). But Congress also enhanced EPA's authority under other programs, such as the NAAQS, Title V, and mobile source programs, and established new programs, such as the stratospheric ozone, chemical accident prevention, and acid rain programs. See H.R. Rep. No. 101-952 at 335, reprinted in 5 Legis. Hist. at 1785 (summarizing bill as "includ[ing] provisions addressing attainment and maintenance of ambient air quality standards, mobile sources of air pollution, toxic air pollution, acid rain, permits, enforcement, stratospheric ozone protection, miscellaneous provisions, and clean air research.").[30]

In contrast, the standards of performance program was *not* a focal point of the 1990 Amendments. There is no mention of it in the Conference Committee's summary of the bill. See id. And Petitioners have not identified a single statement in the legislative history showing Congressional intent to change – let alone dramatically reduce – the scope of section 7411(d). Petitioners would have the Court conclude that Congress made a major change to the existing source performance standards program *sub silentio*. But Congressional silence merits an opposite conclusion. See United States v. Neville, 82 F.3d 1101, 1105 (D.C. Cir. 1996).

[30] See also S. Rep. No. 101-228 at 14 & 123, reprinted in 5 Legis. Hist. at 8354, 8463; H.R. Rep. No. 101-952 at 336, 340, 345 & 347, reprinted in 5 Legis. Hist. at 1786, 1790, 1795, & 1997.

2. The legislative history is far more consistent with an intent to preserve the scope of section 7411(d) – or to broaden it.

Given Congress' pervasive expression of its desire to have EPA address the emission of *more* pollutants, through *more* programs, than ever before, coupled with the absence of any evidence of an intent to reduce the scope of section 7411(d), the legislative history of the 1990 Amendments strongly suggests that both houses simply sought to edit section 7411(d) to reflect the structural changes made to section 7412; i.e., EPA's new mandate to list and regulate *source categories* of hazardous pollutants Congress itself had identified. See S. Rep. No. 101-228 at 133 (under restructured hazardous pollutant program, EPA should regulate "source categories of air pollutants (rather than the pollutants)"), reprinted at 5 Legis. Hist. at 8473.

Viewed in this context, the House's insertion of the phrase "or emitted from a source category which is regulated under section 7412" in lieu of a bare cross-reference to new section 7412 makes sense -- not because the House was trying to bar regulation of entire source categories in regard to all pollutants under section 7411(d), but because it was trying to reflect the fact that regulation under section 7412 would no longer proceed on a pollutant-by-pollutant basis, but instead on a source category-by-source category basis. Indeed, analyzing the 1990 Amendments shortly after enactment, the Congressional Research Service characterized the House and Senate's dueling edits to section 7411(d) as "duplicative" amendments that simply "change the reference to section 112" using "different language." 1 Legis. Hist. at 46 n.1.

Moreover, even if the Senate Amendment were considered subsidiary to the House Amendment as Petitioners argue, it is nonetheless "the most telling evidence of congressional intent." CBS, Inc. v. FCC, 453 U.S. 367, 381 (1981) (discussing import of contemporaneous conforming amendment). It is affirmative evidence supporting the conclusion that the 101st Congress, as a whole, did not intend to dramatically reduce the scope of section 7411(d). Petitioners, in contrast, have no such affirmative evidence supporting their contrary view of Congress' intent.

3. Congress was not seeking to avoid "double regulation," and none results from regulating different pollutants under different programs.

Lacking historical evidence of – let alone explanation for – Congress' supposed desire to scale back section 7411(d), Petitioners theorize that Congress sought to avoid "double regulation." Pet.Br. 33. But no "double regulation" results from authorizing EPA to address *hazardous pollutants* emitted from a source under section 7412, and *non-hazardous pollutants* emitted from the source under section 7411(d).

Nor is there any evidence that Congress was preoccupied with eliminating any "double regulation" of source categories regulated under section 7412. To the contrary, Congress authorized states to require sources already regulated under section 7412 or other national standards to impose additional, *more stringent* state controls. 42 U.S.C. § 7416. Congress also expressly addressed the potential burdens on power plants from being subject to regulation under section 7412 *and* under other programs by prescribing a higher standard for regulation under section 7412. See 42 U.S.C. §

7412(n)(1)(A) (EPA must conclude that regulation of power plants is "appropriate and necessary" after studying the hazards remaining *despite* the imposition of other programs). See also 42 U.S.C. § 7412(d)(7) ("[n]o emission standard or other requirement promulgated under [section 7412] shall be interpreted . . . to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title"). Thus, Congress knew and intended that power plants might be subject to multiple regulatory programs.

Instead of avoiding "double regulation,"[31] Petitioners' interpretation of section 7411(d) would open a yawning gap up in the Act's regulatory regime, leaving pollutants that are undisputedly dangerous, but not "hazardous" as defined in section 7412, outside of EPA's reach. That result is entirely inconsistent with the legislative history and goals of both the Act and the 1990 Amendments.

C. The Statutory Context Does Not Support Petitioners' Theory.

As the Supreme Court recently reminded EPA, a "reasonable statutory interpretation must account for both the specific context in which . . . language is used, and the broader context of the statute as a whole." UARG, 134 S. Ct. at 2442 (quotation omitted). Petitioners' reading of section 7411(d) accounts for neither.

[31] Even under Petitioners' reading, double regulation is permissible under sections 7411(d) and 7412 so long as EPA regulates under section 7411(d) first.

First, Petitioners' interpretation is inconsistent with 42 U.S.C. § 7412(d)(7), which provides that "no emission standard or other requirement promulgated under this section shall be interpreted . . . to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 . . . ." This language reflects a clear intent that the section 7411 and 7412 programs are to operate additively, so as to address the full spectrum of dangerous emissions from a source. Under Petitioner's reading, section 7412 standards for hazardous pollutants would, in fact, effectively "diminish" (by eliminating) regulation of non-hazardous emissions from the subject source category under 7411(d). That result cannot be squared with the text of section 7412(d)(7).

Furthermore, Petitioners' interpretation of section 7411(d) is inconsistent with the broader scheme of the Act. As discussed above, supra p. 3, section 7411(d) was designed to work in tandem with the NAAQS and hazardous pollutant programs such that, together, the three programs comprehensively cover the full range of dangerous emissions from stationary sources. But under Petitioner's reading, there would be a gaping hole in that coverage, which would leave sources' emissions of certain dangerous pollutants outside the Act's scope. Such a result is entirely inconsistent with the comprehensive scheme designed by Congress in 1970 as well as the Act's purpose: to protect "public health and welfare." 42 U.S.C. § 7401(b)(1).

D. EPA Has Never Adopted Petitioner's Interpretation of § 7411(d).

Petitioners argue that EPA has previously read section 7411(d) as they do, and is doing an "about face." Pet.Br. 36. As proof, Petitioners point to statements made by EPA in the context of a 2005 Rule ("the Mercury Rule"), Pet.Br. 8-9, that was vacated by this Court in New Jersey v. EPA, 517 F.3d 574 (2008).[32] But Petitioners are attempting to spin hay into gold, ignoring context and mischaracterizing EPA's statements while omitting mention of their own inconsistent position in that litigation.

To be clear, EPA has never reached the conclusion that Petitioners advance here: that 7411(d) should be read as barring regulation of *all* pollutants under that subsection where a source category has previously been regulated in regard to *hazardous* pollutants under section 7412. Rather, EPA's conclusion regarding how to interpret section 7411(d) in the Mercury Rule was the same as the interpretation EPA proposed in the Legal Memorandum accompanying the Proposed Rule at issue here: i.e., that section 7411(d) only bars regulation in regard to a source category's emissions

[32] Petitioners incorrectly characterize New Jersey as vacating the section 7411(d) portion of the Mercury Rule "because it violated the Section 112 Exclusion." Pet.Br. 37. The Court only stated that, having concluded that EPA improperly de-listed power plants under section 7412, "under EPA's own interpretation" EPA could not regulate under 7411. 517 F.3d at 583. As explained above, EPA's conclusion in the Mercury Rule was only that it could not regulate a source category's *hazardous pollutant emissions* under both sections, and only hazardous air pollutants were at issue in New Jersey. See id. at 137 ("Before the court are petitions for review of two final rules . . . regarding the emission of hazardous air pollutants.")

of *hazardous pollutants* regulated under section 7412. *Compare* 70 Fed. Reg. 15,994, 16,029-32 (Mar. 29, 2005), *with* Mem. at 21-27 (JA XX-XX).

Critically, the question raised in the Mercury Rule, and addressed in briefing in New Jersey v. EPA, was a different one: whether section 7411(d) bars regulation of emissions of a pollutant only *listed* as hazardous under section 7412, as opposed to actually *regulated* under that section. EPA concluded that Congress intended the latter. 70 Fed. Reg. at 16,032. On the path to reaching that conclusion, EPA "note[d]" that "*a* literal reading"[33] of the House Amendment "is that a standard of performance under section 111(d) cannot be established for any air pollutant – [hazardous] and non-[hazardous] – emitted from a source category regulated under section 112." 70 Fed. Reg. at 16,031 (emphasis added). But it concluded that such an interpretation of section 7411(d) was not the best interpretation, not only because of the Senate amendment, but also because:

> Such a reading would be inconsistent with the general thrust of the 1990 amendments which, on balance, reflects Congress' desire to require EPA to regulate more substances, not to eliminate EPA's ability to regulate large categories of pollutants like non-[hazardous pollutants]. . . . We do not believe that Congress sought to eliminate regulation for a large category of sources in the 1990 Amendments and our proposed interpretation of the two amendments to section 111(d) avoids this result.

70 Fed. Reg. at 16,032.

[33] "Literal" does not mean unambiguous, supra n.20, and thus EPA's use of "literal" does not mean that EPA believed that this was the only possible way to read the House amendment. To the contrary, EPA stated that it was "interpret[ing]" that amendment. 70 Fed. Reg. at 16,031.

EPA may or may not reaffirm the conclusion it reached in the context of the Mercury Rule, and even if it does, EPA may refine its thinking about how the House and Senate amendments should be interpreted. Contrary to Petitioners' suggestion, there is nothing inappropriate about that. Indeed, that is exactly what an agency is supposed to do through the rulemaking process.

While condemning EPA for revisiting its prior analysis of the House and Senate amendments, Petitioners fail to mention that, in their own brief in the Mercury Rule litigation, they *agreed* with EPA that section 7411(d) is ambiguous and that EPA can reasonably read it as barring regulation only in regard to hazardous pollutants actually regulated under section 7412. Joint Brief of State Respondent-Intervenors, New Jersey v. EPA, No. 05-1097, 2007 WL 3231261, at *25 (D.C. Cir. Aug. 3, 2007) (JA XX) ("EPA developed a reasoned way to reconcile the conflicting language and the Court should defer to EPA's interpretation.").[34] That position is obviously inconsistent with Petitioners' argument here.

Petitioners – like EPA – may reasonably reconsider an issue when it is presented in a different context. But the fact that some of them previously adopted an opposite interpretation of the relevant text undermines their claim that the *only possible reading* of section 7411(d) is the one they currently advance, and therefore EPA

[34] The parties that filed this brief included Petitioners Alabama, Nebraska, West Virginia, and Wyoming.

should be prohibited from considering alternatives. Rather, EPA must be left to "develop a reasonable interpretation [of the statutory] provisions" (Whitman, 531 U.S. at 486) in regard to the question posed here: whether regulation of a source category's hazardous pollutant emission under section 7412 bars regulation of that source category's non-hazardous emissions under section 7411(d). Only then can EPA's interpretation be fairly subjected to judicial scrutiny, in accordance with the principles set forth in Chevron, to determine whether that interpretation is reasonable.

Conclusion

The Court should dismiss or deny the Petition for Review.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

s/ Amanda Shafer Berman
AMANDA SHAFER BERMAN
BRIAN H. LYNK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1950 (phone)
E mail: amanda.berman@usdoj.gov

January 23, 2015

Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because, as counted by the word count feature of Microsoft Office Word, it contains 13,948 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1); and

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) because it was prepared using Microsoft Office Word 2013 in a proportionally spaced typeface, Garamond, in 14 pt. font.

/s/ Amanda Shafer Berman
Amanda Shafer Berman
Counsel for Respondent EPA

Dated: January 23, 2015

Certificate of Service

I certify that the Brief of Respondent EPA was electronically filed today with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, and that, pursuant to Circuit Rule 31(b), five paper copies of the brief were delivered to the Court by hand.

I further certify that a copy of the foregoing Brief of Respondent EPA was today served electronically through the court's CM/ECF system on all registered counsel for Petitioners, Intervenors and Amici.

/s/ Amanda Shafer Berman
Counsel for Respondent

Dated: January 23, 2015

Attachment A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1248 **September Term, 2012**

EPA-77FR22392

Filed On: December 13, 2012

Las Brisas Energy Center, LLC,

Petitioner

v.

Environmental Protection Agency and Lisa Perez Jackson,

Respondents

Conservation Law Foundation, et al.,
Intervenors

Consolidated with 12-1251, 12-1252, 12-1253, 12-1254, 12-1257

BEFORE: Rogers, Garland, and Brown, Circuit Judges

O R D E R

Upon consideration of the motions to dismiss, the oppositions thereto, and the replies; and the motion for declaratory relief, the oppositions thereto, and the replies, it is

ORDERED that the motions to dismiss be granted. The challenged proposed rule is not final agency action subject to judicial review. See 42 U.S.C. § 7607(b)(1); Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (holding that final agency action "must mark the consummation of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow") (internal quotations omitted). It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1248 September Term, 2012

FURTHER ORDERED that the motion for declaratory relief be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam