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October 15, 2014

EPA Docket Center
US EPA, Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OAR-2013-0603

Dear Sirs:

The National Mining Association (NMA) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA's) proposed Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units ("Modified/Reconstructed Source Rule"),¹ issued pursuant to Section 111(b) of the Clean Air Act.² NMA continues to believe that the CAA is ill-suited for addressing climate change and emissions of greenhouse gases ("GHGs"), and that the proposed action will result in needlessly wasteful regulation at extremely high costs, with little or no resulting societal benefit.

NMA also believes that the proposed Modified/Reconstructed Source Rule is deeply flawed legally and that it lacks an adequate record basis. First, EPA claims in the preamble to the companion Section 111(d) existing source emission guidelines proposal³ that Modified/Reconstructed Source Rule can serve as the necessary predicate rule under Section 111(b) that authorizes EPA to issue the existing source emission guidelines. Not so. EPA states in the preamble to the proposed Modified/Reconstructed Source Rule that it intends to continue to treat modified and reconstructed sources as existing sources subject to the Section 111(d) standards. But under the plain language of the Clean Air Act, the categories of "new sources" and "existing sources" are mutually exclusive. Thus, because the Modified/Reconstructed Source Rule purports to treat such sources as existing sources, the rule cannot serve as the new source performance standard that the CAA requires for issuance of an existing source emission guideline.

¹ 79 Fed. Reg. 34,960 (June 18, 2014).

² 42 U.S.C. § 7411(b).

³ 79 Fed. Reg. 34,830 (June 18, 2014).

Second, because the two categories are mutually exclusive, EPA cannot promulgate a Modified/Reconstructed Source Rule that subjects such sources to *both* a new source standard under Section 111(b) and an existing source emission guideline under Section 111(d). Thus, to the extent that the proposed rule would continue to apply to a modified or reconstructed source any Section 111(d) standard that is in effect at the time of the modification or reconstruction, it is invalid. In addition, under the proper construction of Section 111(d), source categories that are regulated under Section 112 of the Clean Air Act⁴, such as coal-fired EGUs, may not be regulated under Section 111(d). For this reason too, any purported regulation of modified and reconstructed sources under the proposed existing source emission guidelines is a legal nullity.

Third, even if EPA complies with the Clean Air Act and treats modified and reconstructed sources as new sources only, the standards it has proposed for these sources violate the Act's commonsense regulatory structure. The Clean Air Act logically provides that the stringency of emissions standards for a source category will be directly related to the newness of an emitting unit: while a new facility can be designed, sited and equipped to minimize emissions, existing facilities are locked into design and siting decisions that have already been made and equipment that has already been installed. According to this logic, modified and reconstructed sources should be subject to intermediate standards that are less stringent than those for new sources and more stringent than those for existing sources. Yet, EPA's proposed rules would stand this regulatory structure on its head, subjecting existing sources to standards that are far more stringent than those proposed for modified and reconstructed sources or even new sources in some States. EPA's proposal departs from the statute's plain terms – by treating modified and reconstructed sources as both new *and* existing sources, subject to both Section 111(b) and 111(d) standards – simply to counter the perverse incentive to modify for the sole purpose of escaping regulation under EPA's extreme Section 111(d) standards which these rules create.

Fourth, there is simply no record basis for EPA's assumption that all modified sources can achieve a carbon dioxide emission level that is two percent lower than the source's best demonstrated historical performance level from 2002 to the date of the modification. EPA even admits its concern that "as a result of implementation of state plans, the additional 2 percent efficiency improvement may be unachievable for a substantial number of sources that make efficiency improvements as part of a CAA § 111(d) plan."⁵ In fact, NMA believes that this problem extends far beyond those sources that make improvements to comply with a Section 111(d) plan. The additional emission reductions that any particular source can achieve when making a modification depend on a number of facility-specific factors.

For these reasons and we well as those contained in the specific comments that accompany this letter, we urge EPA not to finalize a rule that makes a blanket determination about what any specific facility can achieve.

⁴ 42 U.S.C. § 7412.

⁵ 79 Fed. Reg. 34,988 (June 18, 2014).

Sincerely,

A handwritten signature in black ink that reads "Bruce Watzman". The signature is written in a cursive style with a large, prominent initial "B".

Bruce Watzman

United States Environmental Protection Agency

**Proposed Carbon Pollution Standards for Modified and
Reconstructed Stationary Sources: Electric Utility Generating Units**

79 Fed. Reg. 34,960 (June 18, 2014)

Docket ID No. EPA-HQ-OAR-2013-0603

COMMENTS OF THE NATIONAL MINING ASSOCIATION

October 15, 2014

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INTERESTS OF THE NATIONAL MINING ASSOCIATION

The National Mining Association is a national trade association of mining and mineral processing companies whose membership includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. It is not hyperbole to conclude that the mining industry will be one of the sectors of the economy most affected by the establishment of a standard of performance for CO₂.

Nonfuel minerals and metals mining and processing will also be directly and profoundly affected by the proposed and future GHG standards of performance because these industries are highly energy-intensive. Spending on energy and electricity by both the nonferrous metals manufacturing and metal mining sectors represents up to 30 percent of their total costs. These companies are highly sensitive to increased costs that this and further GHG regulation may create. At the same time, they do not have the ability to pass increased energy costs on to customers because metals and minerals prices are largely set in international markets, often on commodities exchanges, reflecting international supply and demand. Thus, U.S. GHG regulation, where it is not matched by foreign regulation, will create a tremendous competitive disadvantage for domestic companies, leading to the migration of jobs, economic development and emissions overseas.

Mining is the foundation of all the trappings of modern life and a significant contributor to the American economy. Thus, the impacts of this and future GHG standards of performance on the mining industry need to be closely scrutinized.

Everyday items that Americans take for granted, as well as manufactured goods vital to our national security, would not exist without mined materials. Telephones are made from as many as 42 different minerals, including aluminum, beryllium, coal, copper, gold, iron, limestone, silica, silver, talc and wollastonite. A television requires 35 different minerals, and more than 30 minerals are needed to make a computer. A military jet requires many critical minerals including titanium, nickel, cobalt and tantalum.

As EPA is aware, coal is a critical component of the nation's energy portfolio. Nearly 40 percent of U.S. electricity is derived from coal combustion. Furthermore, coal can provide substantial amounts of transportation fuels and syngas to displace significant amounts of imports of crude oil, refined products and natural gas. Notably, coal is by far the nation's most abundant source of energy, constituting 94 percent of the nation's fossil fuel resources. The U.S. has nearly 261 billion tons of recoverable coal reserves, according to the Energy Information Administration, which is a 240-year supply at current rates of use.

The mining industry is also a major source of jobs and economic development in the United States. The U.S. coal mining industry directly employs nearly 120,000 people in 23 states. For each coal mining job, an additional 3.5 jobs are created elsewhere in the economy. Additionally, about 300,000 people work directly in minerals mining throughout the United States. Employment in industries supporting mining, including manufacturing, engineering and environmental and geological consulting, accounts for nearly 1.6 million jobs. The average miner makes over \$71,000 per year in salary, not

including overtime, bonuses and benefits. These are often the highest paying jobs in the community if not some of the highest paying statewide.

With its proposal EPA risks the hundreds of billions of dollars the mining industry contributes to the national economy each year. Mining of coal, metals and minerals provides more than \$232 billion annually in direct and indirect economic impact. Also, according to federal statistics, the value added by major industries that consume raw materials translated into an estimated \$2.39 trillion to U.S. GDP in 2012 and approximately \$100 billion in coal based electricity generation.

SPECIFIC COMMENTS

Because EPA proposes to continue to treat modified and reconstructed sources as existing sources after their modification or reconstruction, EPA's Modified/Reconstructed Source Rule cannot serve as the necessary predicate rule authorizing regulation of existing sources under § 111(d).

In the Modified/Reconstructed Source Proposal and the simultaneously-published existing source emission guidelines, EPA unlawfully tries to have its cake and eat it too. First, EPA claims in the proposed existing source emission guidelines that any final Modified/Reconstructed Source Rule can serve as the “new source performance standard” that will serve as the predicate Section 111(b) rule authorizing EPA’s issuance of emission guidelines applicable to existing sources in coal-fired power category.⁶ At the very same time, however, EPA states that sources that are modified or reconstructed *will continue to be treated as existing sources* subject to any then-

⁶ 79 Fed. Reg. 34,852 (June 18, 2014) (“The EPA intends to complete two CAA section 111(b) rulemakings regulating CO2 from new fossil fuel-fired EGUs and from modified and reconstructed fossil fuel-fired EGUs before it finalizes this rulemaking, and either of those section 111(b) rulemakings will provide the requisite predicate for this rulemaking.”)

applicable standard issued under Section 111(d).⁷ In other words, EPA will treat such modified or reconstructed sources as both “new sources” and “existing sources” simultaneously.

The Act does not permit this, as the two categories – “new” sources and “existing” sources – are mutually exclusive under the plain language of the statute. “New source” is very clearly defined as “any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.”⁸ “Existing source” is also equally clearly defined, as “any stationary source *other than a new source*.”⁹ Simply, a source can be one or the other, new or existing. It cannot be both simultaneously under the plain terms of the statute.

Ordinarily, once an existing source is modified, it would become a “new source” by virtue of the language in § 111(a)(1) that deems modified sources to be new sources. Under EPA’s longstanding regulations, the same would ordinarily be true of any reconstructed source.¹⁰ In the proposed Modified/Reconstructed Source Rule, however, EPA clearly states its intent to continue treating sources that modify or reconstruct as *existing sources* that remain subject to any § 111(d) standard that is then in effect. EPA is quite explicit:

⁷ 79 Fed. Reg. 39,463 (June 18, 2014) (“all existing sources that become modified or reconstructed sources and which are subject to a CAA section 111(d) plan at the time of the modification or reconstruction, will remain in the CAA section 111(d) plan and remain subject to any applicable regulatory requirements in the plan, in addition to being subject to regulatory requirements under CAA section 111(b).”).

⁸ 42 U.S.C. § 7411(a)(2).

⁹ *Id.* at § 7411(a)(6) (emphasis added).

¹⁰ See 79 Fed. Reg. 34,963 & n.8 (June 18, 2014) (citing 40 C.F.R. part 60 subpart A).

[A]ll existing sources that become modified or reconstructed sources and which are subject to a CAA section 111(d) plan at the time of the modification or reconstruction, will remain in the CAA section 111(d) plan and remain subject to any applicable regulatory requirements in the plan, in addition to being subject to regulatory requirements under CAA section 111(b).¹¹

Because of the mutual exclusivity of the “new source” and “existing source” definitions, EPA cannot have it both ways. If EPA intends to continue to subject sources that modify or reconstruct to the CAA section 111(d) plan, it *must* be because EPA considers modified and reconstructed sources to be *existing* sources for some reason. In that event, the Modified/Reconstructed Source Rule must regulate *existing* sources, rather than *new* sources.

Section 111(d)(1)(A) only authorizes EPA to issue existing source emission guidelines for “any existing source for any pollutant . . . to which a standard of performance would apply *if such source were a new source*.”¹² But while EPA points to the Modified/Reconstructed Source Rule as satisfying this requirement and thus authorizing the § 111(d) rule, it cannot do so *if* EPA insists that modified and reconstructed sources remain subject to that § 111(d) rule, because then those sources are necessarily *existing* sources and therefore cannot be *new* sources.¹³

Thus, because EPA insists in the Modified/Reconstructed Source Rule on treating modified and reconstructed sources as existing sources that remain subject to

¹¹ 79 Fed. Reg. 39,463 (June 18, 2014).

¹² 42 U.S.C. §7411(d)(1)(A) (emphasis added).

¹³ In NMA’s earlier-filed comments on EPA’s proposed New Source Performance Standards for GHG emissions from EGUs, we showed that *that* rule cannot serve as the predicate rule for EPA’s proposed existing source emission guidelines because the “best system of emission reduction” EPA identified in that rule for coal-fired plants – carbon capture and storage (“CCS”) – has not in fact been adequately demonstrated. See Comments of the National Mining Association on EPA’s Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Generating Units, Docket ID No. EPA-HQ-OAR-2013-0495-9319 (submitted May 8, 2014).

any applicable § 111(d) standard, the Modified/Reconstructed Source Rule *cannot* serve as the predicate rule that authorizes EPA’s issuance of the very same § 111(d) standard. Given the fatal flaws in the previously-proposed NSPS for EGUs and that rule’s certain failure upon judicial review and the fact that the Modified/Reconstructed Source Rule cannot be a new source rule since it regulates sources that continue to be treated as existing sources, EPA lacks any authority to issue the § 111(d) emission guidelines.

EPA may choose to treat modified and reconstructed sources as new sources subject to a Section 111(b) standard, but it then cannot also subject those sources to the Section 111(d) emission guidelines for existing sources.

As noted previously, under a plain reading of the statute and EPA’s longstanding regulations implementing the statute, an existing source that modifies or reconstructs loses its character as an existing source by virtue of that change and *automatically* becomes a new source. EPA therefore may – indeed, it *must* – treat modified and reconstructed sources as “new sources” rather than as “existing sources.”

Under this plain reading of the Act, then, EPA’s proposed Modified/Reconstructed Source Rule is a § 111(b) standard that regulates “new sources.” This has consequences. For the purposes of the present proposed rule, the most important is that EPA may not continue to subject a modified or reconstructed source to regulation under an emission guideline, such as the proposed Clean Power Plan, issued under § 111(d). Such emission guidelines, by definition, apply only to *existing sources*, a category that necessarily excludes modified and reconstructed sources since both are *new* sources according to the statute and EPA’s regulations. Accordingly, the provisions of the Modified/Reconstructed Source Rule that purport to

subject sources that modify or reconstruct to regulation under any applicable § 111(d) rule then in effect, *in addition to* the standards that apply directly under the Modified/Reconstructed Source Rule, are unlawful.

A source that has undertaken a modification or reconstruction is subject to the standards set forth in the Modified/Reconstructed Source Rule, and *only* such standards. Moreover, an existing source has a choice under the statute: it may choose not to modify or reconstruct, in which case it remains subject to any applicable emission guideline issued pursuant to § 111(d); or it may choose to modify or reconstruct, thereby exempting itself from regulation under the § 111(d) emission guideline but immediately subjecting itself to regulation under the existing new source performance standard applicable to modified and reconstructed sources. EPA has no authority under the statute to deprive sources of that statutory choice.

EPA is barred from subjecting modified and reconstructed sources within the fossil fuel-fired EGU category to regulation under CAA § 111(d) because such sources are regulated under CAA § 112 pursuant to EPA's Mercury and Air Toxics Standards.

To the extent that EPA seeks to regulate modified and reconstructed sources under a § 111(d) standard such as the proposed Clean Power Plan notwithstanding their modification or reconstruction, the language of § 111(d) presents a further, insurmountable obstacle. Properly construed, § 111(d) bars regulation under that section of any existing source of a pollutant if that source is a member of a source category regulated under § 112, governing the regulation of sources of hazardous air pollutants.¹⁴ Because coal-fired EGUs have been subject to regulation under § 112

¹⁴ 42 U.S.C. § 7411(d) (2006).

since EPA's promulgation of the Mercury and Air Toxics Standards¹⁵ in 2012, regulation of emissions of *any pollutant* by existing sources in that category pursuant to § 111(d) is expressly prohibited by statute. This means that EPA may not subject modified or reconstructed coal-fired EGUs to regulation under the Clean Power Plan or otherwise under § 111(d). We note that this prohibition does not bar regulation of modified and reconstructed coal-fired EGUs under § 111(b), as that provision contains no similar bar based on regulation under § 112. Thus, this prohibition will not result in modified or reconstructed EGUs escaping regulation.

Section 111(d) as passed contains conflicting amendments, one of which bars regulation of existing sources of any pollutant if that source is part of a category regulated under § 112.

Before the 1990 Amendments to the Clean Air Act, § 111(d) barred EPA from regulating under that section "*any air pollutant . . . included on a list published under . . . [§] 112(b)(1)(A).*"¹⁶ Put another way, it barred regulation under § 111(d) of hazardous air pollutants listed for regulation under § 112, and no more.

Two very different provisions in the 1990 Amendments purported to alter that pre-1990 language. The first provision, drafted in the House, replaced the cross-reference to "112(b)(1)(A)" with the language that now appears in the U.S. Code. That provision forbids EPA from regulating emissions of "*any pollutant . . . from a source category which is regulated under section 112.*"¹⁷ It thus worked a major change on § 111(d): whereas previously the section merely barred regulation pursuant to it of *pollutants* regulated under § 112 (*i.e.*, hazardous air pollutants), now it barred regulation

¹⁵ See 40 C.F.R. Parts 60 and 63, as amended by 77 Fed. Reg. 9304 (February 16, 2012).

¹⁶ 42 U.S.C. §7411(d) (1987) (emphasis added).

¹⁷ Pub. L. No. 101-549, § 108, 104 Stat. 2399 (1990) (emphasis added).

of *any air pollutant* from a source, as long as that source was part of a source category regulated under § 112. Under the House version, the bar thus changed from a pollutant-specific bar on regulation to a source-specific bar.

The second provision, drafted in the Senate, is very different: it simply struck “[112](b)(1)(A)” and inserted “in lieu thereof “[112](b).”¹⁸ In other words, it continued the pre-amendment language of § 111(d), retaining the prior version’s pollutant-specific bar on regulation under § 111(d). Rushing to file its conference report after an all-night meeting, the House-Senate Conference Committee included *both* amendments in the version of the 1990 Amendments that was ultimately passed by both houses of Congress and signed into law by the President.

Reconciling the two can be accomplished by employing traditional rules of construction applicable to statutory amendments. Applying those rules, the House provision controls.

EPA’s construction of the 1990 amendments to the Clean Air Act is invalid.

EPA itself has candidly acknowledged that its Clean Power Plan may be invalid under a “literal reading” of § 111(d) as published in the United States Code, which reflects the House provision.¹⁹ Importantly, by statute the U.S. Code “establish[es] *prima facie* the laws of the United States.”²⁰ Thus, according to the U.S. Code, the House provision is the effective one. More importantly, the Supreme Court has also acknowledged this. In *American Electric Power Co. v. Connecticut*, the Court observed that, once EPA lists a category of new sources under § 111(b), it must then issue rules

¹⁸ *Id.* at § 302(a).

¹⁹ Legal Memo at 26.

²⁰ 1 U.S.C. §204(a) (2006).

under § 111(d) for existing sources within the same category.²¹ Yet, the Court noted a strict “exception” to § 111(d)’s coverage:

EPA may not employ § [111](d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ [108-110], or the “hazardous air pollutants” program, § [112]. See § [112](d)(1).²²

Simply put, the Supreme Court construes the statute *exactly the way the House provision reads*.²³ EPA’s proposed Clean Power Plan thus runs counter to Supreme Court precedent. In no uncertain terms, the Court has said that EPA may not use § 111(d) to regulate *any* emissions, no matter the pollutant, from sources in a category that is already regulated under § 112.

The Senate provision is a conforming amendment that has no effect in light of the substantive amendment effected by the House provision.

To evade the plain language of § 111(d)—and Supreme Court precedent—EPA claims that the conflict between the House provision and the Senate provision makes the Section’s explicit limitations ambiguous. Not so. The 1990 Senate amendment was a purely clerical modification. As such, it was rendered moot by the substantive House amendment. Inclusion of the Senate amendment in the final version of the 1990 CAA Amendments was, thus, a simple case of scrivener’s error, something not uncommon in

²¹ 131 S. Ct. 2527, 2537 (2011).

²² *Id.* at 2537 n.7 (emphasis added).

²³ This limitation does not undermine the Court’s opinions in *American Electric Power* or in *UARG* that nuisance suits are preempted because of, or PSD regulation is less necessary on account of, EPA’s authority under § 111. First, EPA’s authority under § 111(b) for new, modified, and reconstructed sources is unaffected by this limitation; it applies only to § 111(d). Second, even so limited, EPA may *still* regulate emissions from a source category under § 111(d) so long as it determines *not* to regulate emissions from that source category under § 112. Rather, the statute reflects Congress’ determination to put EPA to a choice between the two regulatory regimes for existing sources in a category.

modern legislation.²⁴ Congress and the courts have made clear that such drafting errors are not to be given substantive effect.²⁵ Consistent with that rule, EPA may not interpret § 111(d) to give effect to the Senate’s clerical amendment.

The purely *clerical* nature of the Senate amendment is evident in a comparison with the House amendment, which offers *substantive* change to the prior version of § 111(d). In contrast to the Senate amendment, the House amendment significantly and deliberately alters the scope of § 111(d). Prior to the House amendment, EPA could, pursuant to § 111(d), regulate certain emissions from source categories regulated under § 112.²⁶ The House amendment fundamentally altered this arrangement: it expressly precludes EPA from using § 111(d) to regulate *any* emissions, no matter the pollutant, from source categories regulated under § 112.²⁷ The substantive quality of the House amendment is confirmed by its placement amidst a series of other obviously substantive amendments in the Statutes at Large.²⁸

The Senate amendment shares none of these characteristics. Instead, it bears the marks of a purely technical or clerical change. The Senate amendment changes neither the scope nor the effect of § 111(d); instead, its sole function is to update the language of § 111(d) to reflect changes made by other provisions of the 1990 Amendments. A few of those provisions replaced § 112(b)(1)(A) – the subsection cross-referenced in § 111(d) – with §§ 112(b)(1), 112(b)(2), and 112(b)(3). The Senate

²⁴ See, e.g., *Am. Petroleum Inst. v. S.E.C.*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013) (“The Dodd-Frank Act is an enormous and complex statute, and it contains other scrivener’s errors—for example, the same section now has two subsections numbered 9(j).”).

²⁵ See *infra* notes 30 & 32, and accompanying text.

²⁶ See 42 U.S.C. § 7411(d) (1987).

²⁷ Pub. L. No. 101-549, § 108, 104 Stat. 2399 (1990).

²⁸ See *Beecham v. United States*, 511 U.S. 368, 371 (1994) (“That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.”).

amendment confirms those changes by “striking” § 111(d)’s cross-reference to § 112(b)(1)(A) “and inserting in lieu thereof ‘[112](b).’”²⁹

The purely *ministerial* nature of the Senate amendment is confirmed by Congress’s placement of the amendment among other amendments expressly designated as “Conforming Amendments.” Conforming amendments are, by definition, non-substantive. They are:

amendment[s] of a provision of law that [are] necessitated by the substantive amendments or provisions of the bill. The designation includes amendments, such as amendments to the table of contents, that formerly may have been designated as clerical amendments.”³⁰

Congress’s decision to label the Senate amendment as a “conforming amendment,” and to lump the amendment with a host of other conforming amendments, conclusively demonstrates that the Senate amendment was a clerical revision, not intended to affect the substance of § 111(d).

A longstanding rule of legislative draftsmanship dictates that conforming amendments be applied *after* substantive amendments. Applying that rule to § 111(d) renders the Senate amendment superfluous. The House’s substantive amendment effects a substantive change: it *eliminates* the statutory cross-reference that the Senate’s conforming amendment was intended to update, replacing that cross-reference with an entirely new substantive limitation on EPA’s authority. After applying the House amendment to the prior version of § 111(d), there is no need—or way—to

²⁹ Pub. L. No. 101-549, § 302(a).

³⁰ Senate Legislative Drafting Manual § 126(b)(2)(A); see, e.g., *I.N.S. v. Stevic*, 467 U.S. 407, 428 (1984) (“The amendment . . . was explicitly recognized to be a mere conforming amendment, added ‘for the sake of clarity,’ and was plainly not intended to change the standard.”); *Dir. of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 323 (2001) (conforming amendment was “merely . . . technical,” rather than substantive).

apply the Senate amendment (there being no cross-reference in need of updating at that point). Simply stated, the Senate amendment is moot, which is why the U.S. Code notes that the Senate’s clerical change “could not be executed.”³¹ From this language, it is obvious that inclusion of the Senate amendment in the final version of the 1990 Amendments was a mistake. EPA has acknowledged as much. In 2005, it described the Senate amendment as “a drafting error” that “should not be considered.”³²

EPA nevertheless insists it *must* give effect to the Senate amendment on the ground that federal agencies are obligated to give substantive effect to all language in the Statutes at Large.³³ EPA does not attempt to square its reading with the judicial and legislative precedents that preclude giving effect to drafting errors.³⁴ Nor does EPA suggest a principled means of distinguishing between the Senate amendment and the

³¹ Revisor’s Note, 42 U.S.C. § 7411.

³² 70 Fed. Reg. 15,993, 16,031 (Mar. 29, 2005). Note that this reading meshes with longstanding judicial and legislative practice. In *Chickasaw Nation v. United States*, for example, the Supreme Court concluded that “a failure to delete an inappropriate cross-reference” in a statute was “simply a drafting mistake” that “d[id] not warrant rewriting the remainder of the statute’s language.” 534 U.S. 84, 90-91 (2001); *see also* *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 (1993) (unanimous court disregarded placement of quotation marks in statute when, after reviewing in detail the statute’s “structure, language, and subject matter,” it concluded that the statute’s “true meaning” was “clear beyond question,” and that “the placement of the quotation marks in the [statute] was a simple scrivener’s error, a mistake made by someone unfamiliar with the law’s object and design”). In the same vein, circuit courts across the country have held that, where a mistake in renumbering a statute and correcting a cross-reference conflicts with the statute’s substantive provisions, the mistake should be treated as “the result of a scrivener’s erro[r]” and not construed as “creating an ambiguity.” *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013); *see also* *United States v. Coatoam*, 245 F.3d 553, 557 (6th Cir. 2001) (declining to give effect to erroneous statutory cross-reference); *In re Chateaugay Corp.*, 89 F.3d 942, 954 (2d Cir. 1996) (same); *King v. Hous. Auth.*, 670 F.2d 952, 954 n.4 (11th Cir. 1982) (same). So too, on the dozens of occasions where simultaneously-enacted substantive and conforming amendments have applied to the same statutory language, the Office of the Revisor of Statutes has unfailingly refused to give effect to the conforming amendment. *See, e.g.*, Revisor’s Note, 7 U.S.C. § 2018; Revisor’s Note, 10 U.S.C. § 18237; Revisor’s Note, 16 U.S.C. § 5953; Revisor’s Note, 21 U.S.C. § 860; Revisor’s Note, 21 U.S.C. § 886a; Revisor’s Note, 22 U.S.C. § 2577; Revisor’s Note, 26 U.S.C. § 219; Revisor’s Note, 29 U.S.C. § 1053; Revisor’s Note, 31 U.S.C. § 5131; Revisor’s Note, 38 U.S.C. § 3015; Revisor’s Note, 40 U.S.C. § 11501; Revisor’s Note, 42 U.S.C. § 2991b-1; Revisor’s Note, 42 U.S.C. § 297e; Revisor’s Note, 49 U.S.C. § 47115. Indeed, even though such errors are relatively common in complicated pieces of legislation, there does not appear to be a single instance of a court or Congress giving effect to one.

³³ Legal Memo 26.

³⁴ *See supra* notes 30-32 and accompanying text.

hundreds of other drafting errors interspersed throughout the U.S. Code.³⁵ Although no court or agency has ever given effect to such errors, EPA's logic would require courts and agencies to do so for each of the *hundreds* of erroneous clerical amendments heretofore denied effect.

It is manifestly unreasonable for an agency to construe an obvious drafting error to require wholesale reinterpretation of the U.S. Code. This is especially true when all available legislative and judicial precedents compel the opposite reading of the statute. Consistent with the history of the 1990 Amendments and every applicable legislative and judicial precedent, EPA must treat the Senate amendment as a "scrivener's error" and deny it substantive effect. This is what Courts have done and will do in this instance. The House amendment *alone* has substantive effect, and it expressly precludes regulation of coal-fired power plants under § 111(d) because they are now regulated under § 112. Thus, EPA may not regulate modified or reconstructed coal-fired EGUs under the proposed Clean Power Plan or under any other § 111(d) regulation.

If EPA gives effect to the Senate amendment, it must nevertheless give effect to the House amendment as well.

Even if EPA erroneously persists in attempting to give effect to both the House and Senate amendments, the existence of the House amendment explicitly forecloses adoption of the proposed Clean Power Plan or any other § 111(d) regulation that would purport to regulate modified or reconstructed coal-fired EGUs.³⁶ Put another way, § 111(d) cannot provide a statutory basis for regulating existing coal-fired EGUs, including modified and reconstructed EGUs, unless EPA demonstrates both that the

³⁵ See *infra* note 37 and accompanying text.

³⁶ Pub. L. No. 101-549, § 108.

Senate amendment *must* be given effect (which, as we have shown, cannot be done, because that amendment is a scrivener's error), *and* that giving effect to the Senate amendment makes it *impossible* to give full effect at the same time to the House amendment's plain language. EPA has not made this showing, and it cannot make this showing, because the two amendments can be harmonized in way that gives full effect *to both*.

EPA's attempt at making such a showing³⁷ is unavailing. As several scholars have observed, the limitations in the House and Senate amendments are entirely compatible with one another.³⁸ The House amendment forbids EPA from regulating, under § 111(d), any pollutants emitted from sources in a source category already regulated under § 112³⁹; the Senate amendment forbids EPA from regulating, under § 111(d), any hazardous air pollutants, whether or not they are emitted from a source in a category regulated under § 112.⁴⁰ Nothing in either restriction on EPA's authority forecloses full enforcement of the other. Rather, EPA may give maximum effect to both limitations – that is, it may harmonize them – by reading the two amendments as *jointly* prohibiting EPA from regulating under § 111(d) any hazardous air pollutants already

³⁷ Legal Memo 25-26 (citing arguments made in preamble to *Revision of December 2000 Regulatory Finding of the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the Section 112(c) List*, 70 Fed. Reg. 15,994, 16,029-32 (Mar. 29, 2005)).

³⁸ See, e.g., William J. Haun, *The Clean Air Act as an Obstacle to the Environmental Protection Agency's Anticipated Attempt to Regulate Greenhouse Gas Emissions from Existing Power Plants*, THE FEDERALIST SOC'Y (Mar. 2013); Brian H. Potts, *The President's Climate Plan for Power Plants Won't Significantly Lower Emissions*, 31 YALE J. REG. ONLINE 1, 9 (Aug. 22, 2013).

³⁹ Pub. L. No. 101-549, § 108.

⁴⁰ *Id.* at § 302(a).

regulated under § 112, *as well as* any emissions of any pollutants from a source in “a source category which is regulated under § 112.”⁴¹

Not only is such a construction reasonable, it is mandatory. A venerable maxim of statutory construction requires courts and agencies to give effect, whenever possible, to all of the language in a statute.⁴² Because it is possible to give concurrent effect to all of the language in the House and Senate amendments, EPA must do so. Of course, giving effect to the House amendment’s express terms renders the proposed Clean Power Plan invalid, since that proposed rule purports to regulate, under § 111(d), emissions of pollutants from sources (coal-fired EGUs) in a source category (the category of coal- and oil-fired EGUs) already regulated under § 112 by virtue of the Mercury and Air Toxics Standards.

Rather than adopt such a straightforward reading of the two amendments, EPA offers its own, novel interpretation of § 111(d), asserting that § 111(d) prohibits regulation of “any [hazardous air pollutants] listed under section 112(b) that may be emitted from a particular source category . . . regulated under section 112.”⁴³ Somewhat remarkably, EPA’s interpretation ignores the explicit limitations set out in *both* of the amendments it purports to construe. Contrary to the House’s substantive amendment—which explicitly bars any regulation under § 111(d) of any existing sources already regulated under § 112—EPA’s interpretation would allow such regulation if it concerns air pollutants not covered by § 112. And contrary to the Senate’s conforming

⁴¹ 42 U.S.C. § 7411(d).

⁴² *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *United States v. Menasche*, 348 U.S. 528, 538 (1955); *Ward v. Race Horse*, 163 U.S. 504, 508 (1896).

⁴³ Legal Memo 26.

amendment—which would, if given effect, forbid regulation under § 111(d) of any hazardous air pollutant—EPA’s reading would permit such regulation if the hazardous air pollutant is emitted from an existing source not regulated by § 112. All that remains after EPA’s exercise in statutory transmogrification is a version of § 111(d) that is substantially less restrictive than what is prescribed by either the House or Senate amendments, a version on which no house of Congress has ever voted.

EPA misconstrues the express limitations in the House and Senate amendments as somehow negating each other. But, as the Supreme Court very recently made clear, “an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”⁴⁴ This is especially so when those clear statutory terms are readily reconciled with each other. Because it is possible to read § 111(d) in a way that gives maximum effect to *both* the House and Senate amendments, EPA must do so. And the unambiguous effect of such a reading is to *prohibit* EPA from regulating, under § 111(d), emissions of any air pollutant from sources in a category that is already regulated under § 112, as well as any air pollutant that is regulated under § 112, no matter the source. That includes modified and reconstructed coal-fired EGUs.

Any conflict between the House and Senate amendments does not create the sort of ambiguity that would warrant *Chevron* deference to EPA’s proposed interpretation.

Even if the House and Senate amendments render § 111(d) ambiguous, EPA cannot regulate existing coal-fired EGUs under § 111(d). To justify its proposed Clean Power Plan, EPA has adopted an interpretation of § 111(d) that departs substantially from § 111(d)’s text. For that reason, the validity of EPA’s interpretation of § 111(d)

⁴⁴ *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2446 (2014).

hinges on its receiving the substantial deference afforded under *Chevron*, but such deference will not be given here.

Not every statutory ambiguity gives rise to *Chevron* deference. As Chief Justice Roberts made clear just this past Term, “Direct conflict [between statutory provisions] is not ambiguity, and the resolution of such a conflict is not a statutory construction but legislative choice. *Chevron* is not a license for an agency to repair a statute that does not make sense.”⁴⁵ Rather, *Chevron* deference is appropriate only when it is clear Congress meant for the alleged ambiguity in the statute to “be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”⁴⁶ In other words, *Chevron* deference only applies where there is intent to delegate to the agency the authority to interpret.

Here, there is no evidence that Congress intended to create ambiguity for EPA to interpret. Rather, as EPA itself has noted, inclusion of the Senate amendment was an inadvertent “drafting error.”⁴⁷ A drafting error cannot supply a basis for affording *Chevron* deference, since, by definition, a mistake conveys no congressional intent at all.⁴⁸ Without *Chevron* deference, EPA’s interpretation of § 111(d), which concededly contradicts the statute’s plain language, cannot survive.

⁴⁵ *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2214 (2014) (Roberts, C.J., concurring).

⁴⁶ *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996); see also *Am. Bar Ass’n v. F.T.C.*, 430 F.3d 457, 469 (D.C. Cir. 2005) (“The deference mandated by *Chevron* comes into play . . . only if the reviewing court finds an implicit delegation of authority to the agency.”).

⁴⁷ 70 Fed. Reg. 15,993, 16,031 (Mar. 29, 2005).

⁴⁸ See *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1043-44 (D.C. Cir. 2001) (“Lest it obtain a license to rewrite the statute, however, we do not give an agency alleging a scrivener’s error the benefit of *Chevron* step two deference, by which the court credits any reasonable construction of an ambiguous statute.”).

Cases like *National Association of Home Builders v. Defenders of Wildlife*⁴⁹ and *Citizens to Save Spencer County v. EPA*⁵⁰ are not to the contrary. *National Association of Homebuilders* involved separate statutes addressing separate problems through “seemingly categorical—and, at first glance, irreconcilable—legislative commands.”⁵¹ The Court ultimately deferred to an agency interpretation reconciling the two statutes, largely because of the interpretive canon disfavoring repeal by implication.⁵² That canon is not applicable in these circumstances, so neither is the deference afforded under *National Association of Homebuilders*.

Similarly, *Spencer County* involved two distinct sections of the Clean Air Act that appeared to set out different effective dates affecting construction of major pollution-emitting facilities.⁵³ Not only has the D.C. Circuit subsequently cabined that decision⁵⁴, but *Spencer County*, like *National Association of Homebuilders*, addressed circumstances fundamentally dissimilar to those surrounding § 111(d). With § 111(d), two provisions in a single public law purport to address, in vastly different ways, the very same language in a single subsection of a statute. Those facts bear little resemblance to the facts in *National Association of Homebuilders* and *Spencer County*, both of which involved ambiguities created by *different* sections of the U.S. Code.

There is, in short, no basis for affording EPA’s interpretation of § 111(d) *Chevron* deference. Without such deference, EPA’s interpretation of § 111(d) cannot be

⁴⁹ 551 U.S. 644 (2007).

⁵⁰ 600 F.2d 844 (D.C. Cir. 1979).

⁵¹ 551 U.S. at 661.

⁵² *Id.* at 662-69.

⁵³ 600 F.2d at 852-53.

⁵⁴ See *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 n.11 (D.C. Cir. 1987) (“The decision in *Spencer County* is not only extremely limited, but the narrow exception that it purports to recognize has never been accepted by any other panel of this court.”).

sustained, as it is manifestly contrary to the statute’s express terms. It is also a plainly unreasonable attempt to harmonize the two competing provisions, as we now explain.

EPA’s reading of § 111(d) is not entitled to *Chevron* deference because it is unreasonable.

Even if Congress did intend EPA to interpret the alleged ambiguity in § 111(d), EPA has not earned *Chevron* deference here because its interpretation is unreasonable. “Under the second step of *Chevron*, [courts] will only defer to [an agency’s] interpretations if they are reasonable and consistent with statutory purpose.”⁵⁵

EPA’s construction of § 111 contravenes even EPA’s own stated understanding of Congress’s intent in passing the 1990 Amendments to the Clean Air Act. As EPA concedes, a central purpose of the 1990 Amendments was “to change the focus of section 111(d) by seeking to preclude [§ 111(d)] regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112,” so as to avoid “duplicative or overlapping regulation.”⁵⁶ As the Proposed Rule illustrates, EPA’s present reading of § 111(d) contravenes that aim.

Section 111(d)’s prohibition on double-regulation of existing sources is part of a carefully-calibrated approach to regulating emissions from stationary sources. That approach logically avoids subjecting existing sources to both new national standards for emissions under § 112 and new state-by-state standards under § 111. Unlike *new* sources, which may be regulated under both §§ 111 and 112, the imposition of additional regulatory burdens on *existing* sources raises the specter of creating

⁵⁵ *GTE Serv. Corp. v. F.C.C.*, 205 F.3d 416, 422 (D.C. Cir. 2000); see also *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986) (agency interpretation “may certainly stand” where it “is consistent with congressional purpose”).

⁵⁶ 70 Fed. Reg. 15,993, 16,031 (Mar. 29, 2005).

stranded assets and lost investments. In short, double regulation of existing sources can lead to crippling inequities. The problems presented by double regulation are evident in EPA's proposed Clean Power Plan, which promises to lead to the premature closure of many coal-fired EGUs notwithstanding their significant recent investments on extraordinarily costly pollution control systems designed to bring those EGUs into compliance with other statutory and regulatory provisions.

By requiring that regulation of existing sources occur *either* under § 112 *or* under § 111(d), but not both, Congress determined that requiring certain existing source categories to comply with two independent regulatory regimes could transform assets into liabilities. Just two years ago, EPA issued the 2012 Mercury and Air Toxics Standards pursuant to § 112, imposing new hazardous air pollutant control requirements on coal-fired power plants, which will cost those plants more than \$9 billion annually.⁵⁷ Yet, in order to meet the drastic emission reduction goals that EPA has set in the proposed Clean Power Plan for many States, many of these plants will have to be shuttered, despite their recent massive investments in pollution controls required by the Mercury and Air Toxics Standards. Others have made similar investments in pollution controls to comply with regional haze requirements and other statutory and regulatory provisions. EPA's construction of the statute, which will make these investments pointless through premature closures, simply defies all sense of reason and fairness, and is plainly contrary to congressional intent.

⁵⁷ EPA, *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards* 3-13 (Dec. 2011), available at <http://www.epa.gov/ttn/ecas/regdata/RIAs/matsriafinal.pdf>.

Because it runs directly contrary to statutory text and congressional intent, EPA's interpretation of § 111(d) is manifestly unreasonable, and thus cannot survive even if accorded *Chevron* deference. Accordingly, there is no statutory basis for the proposed Clean Power Plan or for EPA's proposal to regulate modified and reconstructed coal-fired EGUs under § 111(d). EPA must abandon such efforts.

EPA's Proposed Rule establishing New Source Performance Standards (NSPS) for modified and reconstructed sources violates the commonsense regulatory structure of the Clean Air Act.

In its proposed rules, EPA has created a topsy turvy regulatory regime in which the proposed emission reduction goals for existing source emission guidelines would be *far more stringent* than the proposed goals for modified/reconstructed sources and even, in many States, new sources. Ordinarily, one would expect the NSPS for a source category to be the most stringent regulation issued under Section 111, since new sources presumably can install the most current, state-of-the-art technology to reduce their emissions of a pollutant and can make the siting, design, and other decisions necessary to facilitate the installation and operation of such technologies. Standards applicable to modified and reconstructed sources should ordinarily be subject to the next most stringent standards, as sources undergoing such modifications or reconstructions are in a position to make *some* technological or operational changes to lower their emissions. Existing source emission guidelines issued under Section 111(d) *should be* lowest on the ladder. As the Act suggests, such sources generally have limited remaining useful lives and are subject to other factors significantly limiting their ability to reduce emissions absent a modification or reconstruction. This appears to have been Congress' intent in subjecting new and modified sources to strict, EPA-

guided regulation under Section 111(b), while subjecting existing sources to more relaxed, State-guided regulation under Section 111(d).

EPA departs wildly from this commonsense regime, and in the process creates perverse incentives for sources to be modified or reconstructed for the express purpose of escaping regulation under the extraordinarily stringent proposed existing source emission guidelines and finding refuge under the more lenient standard proposed for modified and reconstructed sources. As discussed above, EPA attempts to deal with this significant problem with regulatory sleight-of-hand: it states that sources that modify or reconstruct will be subject both to the modified/reconstructed source standard *as well as* any Section 111(d) standard then in effect.

That the regulations EPA has proposed create perverse incentives for existing sources to modify or reconstruct is no fault of the sources in the category. Rather, it is a consequence of EPA's egregious overreach in proposing an existing source standard that is far more stringent than either the modified/reconstructed source proposal or, in many cases, the proposed NSPS. EPA cannot lawfully resolve this problem by subjecting modified and reconstructed sources to Section 111(d) standards, as the clear import of Section 111(a) and EPA's regulations is that such sources are new sources subject only to Section 111(b).

There is no record basis for EPA's assumption that all modified sources can achieve a GHG emission level 2 percent lower than the source's best demonstrated historical performance from 2002 to the date of the modification.

In its proposed Modified/Reconstructed Source Rule, EPA proposes to require modified coal-fired EGUs "to meet a unit-specific emission limit determined by the

source's best demonstrated historical performance (in the years from 2002 to the time of the modification) *with an additional 2 percent emission reduction.*"⁵⁸ EPA states that it has "determined that this standard can be met through a combination of best operating practices and equipment upgrades."⁵⁹ Apparently recognizing that many (if not most) units will already have undertaken to make the equipment upgrades and to implement the best operating practices that this standard contemplates, EPA offers what it sees as a limitation: "modified facilities would not have to meet an emission standard more stringent than the corresponding standard for reconstructed EGUs."⁶⁰ In other words, EPA *assumes* that all coal-fired EGUs can obtain the level of emissions achievable by a facility undergoing a complete reconstruction, even if those EGUs have already undertaken the equipment upgrades and implemented the best operating practices contemplated by the standard. This is patently unreasonable.

EPA tacitly admits the unreasonableness of its proposal when it admits that it is "concerned that, as a result of implementation of state plans, the additional 2 percent efficiency improvement may be unachievable for a substantial number of sources that make efficiency improvements as part of a CAA § 111(d) plan. Specifically, we are concerned that where a state imposes efficiency improvements on a source, or where a source undertakes efficiency improvements to comply with the state plan, *it will have already attained the maximum level of efficiency improvement that is achievable for that unit. As a result, the source would be unable to undertake additional improvements to meet the highest level of efficiency plus the additional 2 percent reduction (based on*

⁵⁸ 79 Fed. Reg. 34,964 (June 18, 2014) (emphasis added).

⁵⁹ *Id.*

⁶⁰ *Id.*

equipment upgrades) that we are considering. We recognize that in some states, CAA section 111(d) plans may require no or limited efficiency improvements on a specific unit.”⁶¹ We note that this concern *should* extend to EGUs that undertake efficiency improvements *for any reason* – whether to comply with a § 111(d) plan or for some other purpose, and no matter *when* undertaken.

As a consequence, it is unreasonable for EPA to assume that *any* specific level of emission reduction can be achieved across the board by EGUs that undertake a modification. The level of additional emission reductions, if any, that can be obtained from a source undergoing a modification can only be determined on a case-by-case basis, depending on: (1) the current level of heat-rate efficiency at which the unit operates; (2) the nature of the modification being undertaken; (3) the nature of previous modifications made and the emission reductions achieved during such earlier modifications; (4) the cost and burden of obtaining additional emission reductions relative to the amount of additional emission reductions achievable; and (5) the effect of such additional reduction-related requirements on the continuing ability of the unit to provide a reliable source of power.

Rather than specifying any across-the-board numeric emission reduction goal to be obtained by EGUs undertaking a modification, EPA should instead adopt a standard that allows for a determination, on a case-by-case basis, of what emission reductions are possible and reasonable after consideration of the above five factors.

⁶¹ 79 Fed. Reg. at 34,988 (June 18, 2014).

CONCLUSION

The proposed Modified/Reconstructed Source Rule is wasteful, unnecessary, and deeply flawed. We suspect that one of EPA's primary purposes in proposing it is to serve as a backup predecessor rule for EPA's proposed § 111(d) rule in the event a court strikes down EPA's proposed NSPS. But the Modified/Reconstructed Source Rule cannot serve that purpose so long as EPA treats modified and reconstructed sources as existing sources subject to that rule, as the statute expressly forbids such treatment. Moreover, EPA lacks authority to regulate modified and existing coal-fired EGUs under § 111(d) because those sources are already regulated under § 112. Properly read, the statute prohibits such dual regulation of existing sources in a category as would occur if EPA finalizes this regulation.

For all of the reasons above the proposed regulations must be withdrawn.