



Energy and Environment Legal Institute
Legal Analysis:

**EPA's Clean Power Plan Is a Paper Tiger
and Uses a Strategy Relying
on Empty Threats Against Utilities,
Governors and State Legislators**

EPA's Clean Power Plan is a Paper Tiger

Executive Director's Introduction

Lawyers representing a client are allowed to stretch the truth. This has a name; it's called "puffery."¹ Puffing is defined as "exaggerated, vague, or loosely optimistic statements about something that are deemed so immaterial and unworthy of reliance that they cannot rationally serve as the basis for decision-making. Fear-mongering about EPA's proposed Clean Power Plan by "legal authorities" representing EPA, Tom Steyer, Michael Bloomberg, the Sierra Club and the NRDC, a large eastern law firm, are part of a strategy to scare electric power companies into scaring Governors and State legislatures into supporting the EPA plan with what amounts to mere puffery. Least you think an accusation of fear-mongering is itself puffery, E&E Legal has obtained government records documenting the strategy and will release a report on this shortly. In the meantime, as State legislatures wrestle with how to respond to EPA's proposed regulations, it becomes important to discount the puffery, expose it as hyperbole and set the record straight.

E&E Legal has one client – rational, sensible environmental and energy policy. We don't represent hydrocarbon interests, climate skeptics, utilities, regulators, legislators, climate alarmists, politicians or the opposing forces of the Koch brothers on the one hand or the Steyer/Bloomberg axis on the other. We are a non-partisan legal institute that favors free markets and responsible regulation and take a balanced view of both policy and law.

I have asked David W. Schnare, our General Counsel, to discuss EPA's strategy with regard to the Clean Power Plan, one of the most important regulatory actions EPA has ever proposed. He is well suited to the task. Dr. Schnare has a Ph.D. in environmental management and is a practicing attorney who has argued before several federal appellate courts of appeal and is a member of the U.S. Supreme Court bar, having been on SCOTUS briefs representing EPA and other clients. He is a thirty-three year veteran of the U.S. Environmental Protection Agency and served as both a regulator and an enforcement attorney. He ended his career at EPA as an attorney enforcing the Clean Air Act, including a detail to the Department of Justice, litigating against coal-fired power plant companies that had violated Clean Air Act regulations. Dr. Schnare was named as a 30(b)(6) witness for EPA as the government's expert on the history of the Clean Air Act and while at EPA maintained the compendium of legal jurisprudence of the Office of Civil Enforcement. He chose the title of this Legal Analysis for the reasons he explains below.

Craig Richardson
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The EPA Paper Tiger

I. The Clean Power Plan Scare Strategy

In early 2009, weeks after President Obama's inauguration and well before Lisa Jackson was confirmed as the U.S. Environmental Protection Agency's Administrator, a large eastern law firm, the Natural Resources Defense Council, and Bob Sussman, former EPA Deputy Administrator and Team Leader of the Obama-Biden transition project², working with a Georgetown Law School professor, laid out their "war on coal."³ This was to be the realization of the President's January 17, 2008, promise that "If someone wants to build a new coal-fired power plant they can, but it will bankrupt them."⁴

EPA's war on coal-fired power plants takes the form of three proposed regulations: (i) standards for new power plants (under CAA §111(b)); (ii) regulations for existing power plants, the "Clean Power Plan" rule (under CAA §111(d); and, (iii) standards for modified and reconstructed power plants (under CAA § 111(b)).⁵ Each is open to legal attack and without question all will be litigated. The most controversial, and most open to legal challenge, however, is the Clean Power Plan, followed closely by the regulations for new power plants. Currently, EPA intends to issue them jointly in mid-July, 2015.

The Clean Power Plan requires states to reduce carbon dioxide (CO₂) through a combination of four "blocks": (1) improving efficiency at existing coal-fired power plants by 6 percent; (2) operating natural gas fired power plants at 70 percent capacity utilization rather than the current 43 percent; (3) expanding the use of wind, solar, or other low- or zero-emitting alternatives such as nuclear power; and, (4) increasing energy efficiency in homes and businesses by 1.5 percent.⁶

State's responses to the Clean Power Plan have generally been negative. For example, even in Virginia with a Governor having strong support for the White House war on coal has commented on EPA's proposal as one that does not give the States the flexibility needed to achieve the Plan's goals and which is patently impossible to achieve.⁷ The Virginia legislature is now debating "wait and see" bills that would forestall activity on a SIP until the legal challenges have determined what, if any portions of the rule are legal.⁸ It is this "wait and see" strategy that the axis of EPA and politically motivated climate alarmists are trying to combat.

With respect to states who wish to "wait and see," EPA and its axis members have developed a strategy to scare states in to implementing the Clean Power Plan, using brutal administrative means supposedly available under the CAA §111 State Implementation Plan (SIP) regulatory structure. Under that structure EPA establishes a standard of emissions reductions and the States have the latitude to formulate a plan that will reach compliance with the standard. If a state does not submit a plan, or if the plan is simply insufficient, EPA claims it has two tools to force the States to do better. First, it would direct the U.S. Department of Transportation to withhold highway funds until such time that an acceptable implementation plan is in place⁹; and

second, EPA would prepare a Federal Implementation Plan (FIP) to take the place of the missing SIP.¹⁰ These threats have been used before and generally cause shock and awe sufficient to scare states into developing a SIP, even when it is in their interests not to do so.

EPA is using the Steyer/Bloomberg axis coalition to spread fear. A member of this axis is Bob Sussman, Obama-Biden Transition Team leader for EPA and now engaged in puffery as a *sub rosa* spokesman for the Obama administration. His one-off threat from EPA and the climate alarmism axis is relatively standard. They reformulate the “wait and see” approach as “just say no” and then hold the gun to the state’s head. We note, Sussman thinks the gun is loaded. It is not. Sussman states:

There is a school of thought that I call the Just Say No school, which is that states are better off if they don't submit implementation plans and they let EPA impose FIPs. I think that is dangerous thinking. I think that is likely to backfire on states because when they see the EPA's FIP, they will probably say, gee, we could have done a much better job if we had utilized the discretion that EPA is giving us under the Clean Power Plan.¹¹

Actually, the “wait and see” approach states are taking is not dangerous thinking, reflects the legal weaknesses of the EPA proposal and would put even greater pressure on EPA to radically alter its proposal. Indeed, Sussman suggests that this is already happening.

I think EPA is going back to the drawing board on the state goals. I think that means that EPA is also going back to the drawing board on the building blocks, the four building blocks, because those are the drivers of the state goals, and I think we're going to see significant changes in those areas.¹²

It is difficult to think that EPA will do more than superficial changes to the proposal. Although EPA Office of General Counsel staff attorneys have cautioned the political leadership that they are on weak ground,¹³ the Agency has hired climate alarmists into positions of power¹⁴ and they have no interest in undermining the core of this rule. Unless EPA drops Blocks 2, 3 and 4, they remain on weak legal ground. Further, even Block 1, as currently proposed, is unlikely to stand up to fair judicial review; and, the entire basis for the proposal is suspect. The following sections take up these various legal weaknesses. It is on that basis that the Clean Power Plan can be labeled a paper tiger.

Before taking up the legal infirmities of the various EPA proposals, it pays to show why the scare tactics are a paper tiger.

II. EPA can no longer threaten to withhold Highway Funds

Under the Clean Air Act, if the EPA Administrator finds that a State has not submitted a state implementation plan, or failed to make a submission that satisfies the minimum criteria, she may impose a prohibition on the approval of any highway projects, other than those needed to resolve a demonstrated safety problem.¹⁵ At least, that was the law as enacted in 1970. EPA first used this authority in 1980 in

an effort to force the Colorado legislature to pass legislation for an auto emission control plan.¹⁶ The EPA-climate alarmist axis uses this authority as a threat against the states. Under this authority, EPA would withhold highway funding until either a SIP or a FIP was in place. This would take no less than 18 months. Although this authority remains in the Clean Air Act, it is no longer valid and any threat to use it is empty.

In the landmark “Obamacare” case, the Supreme Court drew a line in the sand that limits the use of these “gun to the head”¹⁷ threats. Formally, the case is titled *NFIB v. Sebelius*. It was a controversial decision, but on this issue there was a strong judicial consensus. Seven of the nine justices agreed that the Affordable Care Act violated the Constitution by threatening States with loss of existing Medicare funding if they decline to adopt a Medicare expansion program. The Court held that the federal government engages in unconstitutional coercion if a statute “take the form of threats to terminate other significant independent grants.”¹⁸ The decision established a three prong test of unconstitutional coercion. Unlawful coercion exists if: (i) the withholding of funds is a “gun to the head” and not “relatively mild”¹⁹; (ii) it is a “post acceptance or ‘retroactive’ condition” of a grant under an existing program²⁰; and, (iii) the existing program from which funds would be withheld is “different in kind,” compared to a newly proposed program.²¹

Any EPA attempt to withhold federal highway funds unless states file SIPs fully in compliance with the Clean Power Plan violates all three prongs of the *NFIB* test. Like the Medicare program, the Federal government pays states 90 percent of new highway construction under its grant program, roughly \$50 Billion in 2010.²² It is the third largest federal grant to States (after Medicaid and education spending), comprising about 10 percent of States’ total operating budget²³ and about 25 percent of an average state’s total transportation budget.²⁴

Highway funding is not conditioned on compliance with the Clean Air Act. It is a stand alone program first initiated under 1966 Highway Safety Act. The Clean Air Act, and its highway fund coercion, came into being in 1970. Compliance with the Clean Power Plan is a wholly new program that will not take effect before 2016. Conditioning highway funding on compliance with a new program is unequivocally a post-acceptance retroactive condition to the long-established highway funding program.

Finally, control of emissions from stationary CO₂ sources as required under the Clean Power Plant is different in kind from programs in any manner associated with transportation. The Clean Air Act regulates stationary sources under Title I of the Act. It regulates mobile sources that use highways under Title II of the Act. They are entirely separate programs different in kind and not degree. Both, however are even more different in kind than the highway funding program.

Thus, after *NFIB v. Sebelius*, any threat to withhold highway funds in order to coerce development of a SIP is an empty threat. EPA’s remaining threat to impose a FIP is equally empty.

III. A FIP would be no worse than a SIP

Section 111 authorizes only the establishment of emission standards that can be met at *individual* new and existing sources of certain air pollutants, and with virtually no exceptions, EPA has implemented it in this manner since its enactment as part of the Clean Air Act Amendments of 1970. But rather than propose emission standards that are achievable by existing fossil fuel-fired power plants, the Section 111(d) proposal overrides state prerogatives by forcing them to

prioritize natural gas-fired generation over coal-fired generation, and non-fossil-fuel generation over fossil-fueled generation. In this way, the Section 111(d) proposal departs from Section 111(d)'s proper scope by imposing a national energy and resource-planning policy, in violation of states' traditional role in making their individual energy policies.

Section 111(d)'s text is clear: it authorizes EPA to establish a procedure under which states will submit to it a plan that "establishes standards of performance *for any existing source . . .*" C.A.A. § 111(d)(1)(A), 42 U.S.C. § 7411(d)(1)(A) (emphasis added). The first "building block" from which EPA derives its proposed "state goals" would require application of "Best Available Control Technology" (BACT) in the form of heat-rate efficiency improvements. This block is an "inside-the-fenceline" measure authorized by Section 111(d). EPA has long interpreted BACT as required only for pollutants that the source itself emits.²⁵ Thus, building Blocks 2, 3 and 4 do not fall within EPA's regulatory authority under the Clean Air Act, but perhaps Block 1 does. Even in the case of efficiency improvements, however, there is a good case that EPA is overstepping its authority under Block 1.

The actual effort to increase efficiency would take the form of a finding that BACT for these plants would include a six percent increase in power plant production efficiency. Such a BACT determination would be implemented through revision of the coal-fired plants' Clean Air Act permits, regardless as to whether require through a FIP or SIP. There are problems with attempting to impose such BACT, both legal and practical.

First, the Supreme Court held that EPA may not "force . . . energy efficiency" improvements on facilities under the Prevention of Significant Deterioration program."²⁶ Thus, on its face the Clean Power Plan Block 1 is *ultra vires*.

Second, the Supreme Court concluded, "BACT is based on 'control technology' for the applicant's 'proposed facility,' § 7475(a)(4); therefore, it has long been held that BACT cannot be used to order a fundamental redesign of the facility."²⁷ According to the nation's premier coal-fired boiler engineering firm, Babcock and Wilcox, to obtain a six percent increase in efficiency would require a fundamental redesign, clearly something the Supreme Court has prohibited. Further, if an engineer could find a cost-efficient way to increase power generation efficiency in an existing plant by this amount, the power plant management would have already put it into place.

Nor is an increase in efficiency a "control technology."²⁸

Whether under a FIP or a SIP, BACT can be no more than a control technology that is cost-efficient and practically possible. The end result of BACT in under this rule would be the same level of control whether under a FIP or a SIP. It would not be a requirement for an increase in efficiency.

IV. The Clean Power Plan Regulation is barred by the Clean Air Act itself

Murray Energy Corporation, joined by several states, has asked the U.S. Court of Appeals for the District of Columbia Circuit to grant a writ of prohibition against EPA declaring the proposed rule for existing stationary source electric generating units is *ultra vires*, *i.e.* a prohibited act under the Clean Air Act.²⁹ For the reasons given at length in Appendix A, it is. EPA claims otherwise and has stated unequivocally that they have the power to interpret the Clean Air Act as they have, under the *Chevron* doctrine, and that they have done so. Final briefs on this matter are due in March, 2015. In the meantime, the states, utilities and utility customers must proceed under an unreasonably short schedule to determine what steps must be taken to comply with the law – a costly set of planning activities with the effect of having to make engineering decisions long before any Clean Power Plan would actually take effect. This is known as anticipatory regulation. It is costly, it limits the economic freedom of states, utilities and customers to make investment decisions, and these constitute irreversible harms that can only be remedied if EPA withdraws the proposal until such time the Court determines whether the proposed rule is or is not legally authorized under the Clean Air Act.

Anticipatory regulation has legal consequences on the regulated industry and on others inexorably tied to the directly regulated industry. In order for a State to prepare a plan under the proposed rule, the states will be forced to reach agreements with companies who must therefore make production and investment decisions associated with the plan. This fact is evidence of the legal consequences of the anticipatory regulatory effect, and fully provides legal standing to seek immediate judicial relief, as requested by Murray Energy Corporation. This fact is also the basis for the scare tactics used by the alarmist axis supporting EPA.

Sometimes the simplest legal argument is the strongest and it is likely that this is the case at hand. Discussed at length in Appendix A in all its legal minutia, a plain reading of the act demonstrates that EPA may not use Clean Air Act Section 111(d) as it has proposed. In order to prevent sources from being subject to multiple costly layers of regulation that could harm their economic competitiveness, the Clean Air Act **prohibits** EPA from requiring states to submit Section 111(d) plans for source categories that are regulated under Section 112 of the Act. The Section 111(d) proposal would violate this prohibition by establishing Section 111(d) standards for fossil-fuel fired power plants which have been regulated under Section 112 of the Act since 2012. This is the primary legal question at issue in the Murray Energy litigation. When the Court upholds Murray's argument, as it has done in the past, the entire rule must be struck. This is why states are sensibly enacting "wait and see" legislation that puts off expenditure of state funds until the legal matter is settled.

V. The Proposal Lacks a Lawful New-Source Standard Predicate

In order for EPA to require states to submit Section 111(d) plans to control emissions from existing sources in a particular industrial categories, EPA must first have established lawful standards under Section 111(b) for new sources in that category. Because EPA has failed to

establish such standards for fossil fuel-fired power plants and its existing regulatory proposal is unlawful, EPA may not finalize any Section 111(d) proposal until it has rectified this issue.

Section 111(d) provides that Section 111(d) is appropriate to regulate only “existing source[s] for any air pollutant . . . to which a standard of performance under this section would apply if such existing source were a new source” C.A.A. § 111(d)(1)(A)(ii), 42 U.S.C. §7412(d)(1)(A)(ii). The Section 111(d) proposal concedes the plain language of this provision: that a lawful Section 111(b) rulemaking is a “requisite predicate” for a Section 111(d) rule. 79 Fed. Reg. at 34,852.

The Section 111(d) proposal identifies two pending 111(b) proposals as providing this predicate: the proposed rule regulating carbon dioxide emissions from *new* power plants, proposed in January 2014, and the proposed rule regulating such emissions from *modified and reconstructed* power plants, proposed in June 2014. But neither of these proposals have been finalized and they, too, are in trouble. In particular, the new source proposal would require application of “Carbon Capture and Storage” (CCS) to prevent emissions of some CO₂ from reaching the atmosphere. EPA has received over a million comments on that proposal and sources within EPA have admitted the basis for claiming CCS is available is non-existent. It appears EPA will be forced to fall back on its proposal for modified and reconstructed power plants in order to claim it has met the legal predicate for the 111(d) proposed regulation.

Both the “new plant” and the “modified and reconstructed plant” proposed rules are also unlawful, however, and therefore cannot provide the requisite predicate for the 111(d) proposal. The new-source proposal is unlawful because it violates express restrictions on Section 111(b) rulemakings imposed by the Energy Policy Act of 2005 by inappropriately considering certain government-subsidized projects in the Section 111 standard-setting process.³⁰ The modified-source proposal is unlawful because there is no authority under Section 111(b) to issue a regulation covering only modified sources, which the Clean Air Act treats as “new” sources without exception.³¹ These defects preclude EPA from promulgating Section 111(d) standards until such time (if ever) that it adopts lawful Section 111(b) standards.

Once again, a “wait and see” approach by states makes sense as it prevents the costs and missteps certain to accrue under anticipatory regulatory pressure from the scare strategy. Thus, the “wait and see” approach provides an opportunity to rely on the Courts to sort out all three of the regulatory proposals, those for “new,” “modified and reconstructed” and “existing” power plants.

VI. The Section 111(d) Proposal Constitutes an Unlawful Reorganization of State Energy Economies

This section explains why Clean Power Plan Blocks 2, 3 and 4 are impermissible under the Clean Air Act.

Section 111 authorizes only the establishment of emission standards that can be met at *individual* new and existing sources of certain air pollutants, and with virtually no exceptions. EPA has implemented it in this manner since its enactment as part of the Clean Air Act Amendments of 1970, and the Supreme Court has held that “accordingly EPA acknowledges BACT may not be used to require ‘reductions in [some other] facility’s demand for energy from the electric grid.’”³² But rather than propose emission standards that are achievable by existing fossil fuel-fired power plants, the Section 111(d) proposal overrides state prerogatives by forcing them to prioritize natural gas-fired generation over coal-fired generation, and non-fossil-fuel generation over fossil-fueled generation. In this way, the Section 111(d) proposal departs from Section 111(d)’s proper scope by imposing a national energy and resource-planning policy, in violation of states’ traditional role in making their individual energy policies.

Section 111(d)’s text is clear: it authorizes EPA to establish a procedure under which states will submit to it a plan that “establishes standards of performance *for any existing source . . .*” C.A.A. § 111(d)(1)(A), 42 U.S.C. § 7411(d)(1)(A) (emphasis added). Only the first “building block” qualifies under this language.

The other three “building blocks,” which constitute nearly all of the GHG emission rate improvements under the Section 111(d) proposal, envision the reorganization of substantially every aspect of a state’s power sector. Through these measures, the proposal requires the substantial redispatch of coal-fired electric generation to natural gas-fired generation, without regard to the nature of state resources or the legal and technical difficulties with accomplishing this goal (block 2). The Section 111(d) proposal likewise requires the deployment of new renewable or nuclear energy to replace existing fossil fuel-generated power (block 3). Finally, the proposal requires that states actually *limit* the consumption of electricity through increased deployment of demand-side reduction and end-use energy efficiency measures (block 4).

Although the Section 111(d) proposal purports to provides states with “flexibility” by not requiring any particular combination of these “building blocks,” the binding Block 1 emission goals it has proposed are sufficiently stringent that states will be unable to meet them without going beyond the traditional, inside-the-fenceline first block and significantly altering their energy and resource policies.

But these policy choices are not EPA’s to make. States—not EPA—are responsible for managing their energy resources through such measures as choosing what type of fuels or resources should be used to generate electricity and whether the limitation of energy consumption is a desirable policy. In turn, EPA and the states are collectively responsible for managing states’ air quality resources by limiting emissions from industrial sources of air pollutants where appropriate. The Section 111(d) proposal aggrandizes EPA’s authority beyond the statutory limits of the Clean Air Act by arrogating the role of national energy regulator with no statutory authorization.

There is no precedent in EPA’s regulations under Section 111(d), or indeed in any pervious Clean Air Act program, for this power grab. Instead, the Section 111(d) proposal purports to

locate its authority solely in the Clean Air Act's definition of "standard of performance." Specifically, the Act defines "standard of performance" as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the *best system of emission reduction* which . . . the Administrator determines has been adequately demonstrated." C.A.A. § 7411(a)(1), 42 U.S.C. § 7411(a)(1) (emphasis added).

Given that the Clean Air Act does not define the term "system of emission reduction," EPA argues that "system" is a broad, unconstrained term equivalent to any "set of things working together as parts of a mechanism or interconnecting network." Proposal, 79 Fed. Reg. at 34,885. On this basis, the agency asserts that Section 111 affords it unconstrained authority to formulate standards based on "*anything* that reduces the emissions of affected sources," *id.* at 34,886 (emphasis added). Under this view, EPA's authority is essentially unlimited; it could mandate that states prohibit the use of air conditioners in hospitals during times of peak energy usage or dim the lights in police stations, firehouses or even school rooms.

In this regard, the Section 111(d) proposal violates the core tenet of administrative law that "[t]he definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities."³³ Rather, statutory terms must be construed in light of the text of the provision as a whole, its context, its purpose, and relevant precedent and authority. *Id.* Furthermore, agencies cannot ground a claim to regulatory power on the absence of express prohibition.³⁴ The ostensibly open-ended "definitional possibilities" of the word "system" cannot support EPA's attempt to override states' policy choices and impose energy and natural-resource policy on them.

VII. The Proposal Abrogates States' Primary Legal Authority under Section 111(d)

Congress intended Section 111(d) to be a state-driven process, rather than be the subject of federal command-and-control dictate. The Section 111(d) proposal is unlawful because it abrogates states' right under Section 111(d) to state-driven emission standards.

Section 111(d) grants states the prerogative of "submit[ting] to the Administrator a plan which . . . establishes standards of performance for . . . existing source[s] . . ." C.A.A. § 7411(d)(1)(A), 42 U.S.C. § 7411(d)(1)(A). In so doing, Congress unquestionably intended for states to be the regulators exercising discretion in establishing plant-level emission standards, specifically authorizing states to consider such factors as the remaining useful life of a given source in the standard-setting process. *See id.* In contrast, Congress limited EPA's role to a subsidiary procedural role "prescrib[ing] regulations which shall establish a *procedure*" for plan submission and determining whether a state's submitted plan is satisfactory. *See id.*; *see also* C.A.A. § 111(d)(2), 42 U.S.C. § 7411(d)(2).

The proposal exceeds the proper scope of EPA's authority by proposing binding, inflexible emission rate limits in the *aggregate* for a state's *entire power sector*. Pursuant to the Section 111(d) proposal, once these "goals" are finalized, states will have no authority to change them,

despite Section 111(d)'s express grant of authority to the states to consider factors such as the remaining useful life of sources in establishing standards. EPA does not and cannot identify anything in Section 111(d) or elsewhere in the text of the Clean Air Act that authorizes it to displace states' legal authority to establish stationary sources' emission standards. As a result, the Section 111(d) proposal cannot be reconciled with EPA's limited statutory authority and the statutory rights specifically afforded to states.

VIII. The Proposal Suffers Other Legal Infirmities

There are other serious legal flaws that undermine the proposal. First, EPA's attempt to impose a *de facto* national energy policy is in direct conflict with the Federal Power Act, which carefully reserves to the states their traditional authority to oversee their retail energy markets. See 16 U.S.C. § 824(b)(1). The D.C. Circuit has very recently enforced this limitation on the federal government's authority, finding 'FERC may not regulate end-use energy demand, authority over which is reserved to the states.'³⁵ It is simply not credible for EPA to assert that, even though the federal agency that is actually tasked with overseeing interstate energy markets cannot engage in demand-side regulation, the federal pollution control agency is *sub silentio* empowered to do so by Section 111(d).

Second, Block 2 would require combined cycle natural gas plants to operate at 70 percent capacity utilization. The national average for capacity utilization at combined cycle gas power plants in 2012 was 46 percent, so we're talking about a substantial change to get these plants operating 70% of the time. Moreover, most States participate in multistate, regional transmission grids. On these systems, an independent grid operator decides which power plants to use at any given moment, based on "economic dispatch" principles. Via FERC-approved tariff agreements, these independent grid operators are legally bound to act pursuant to certain conditions, including affordability and reliability concerns. EPA could not interject itself into this process even if it wanted to. It does not regulate these grid operators.

Further, while EPA can, has capped the level of capacity use on a power plant, it cannot set a floor for minimum production.³⁶ Utilities offer their power to the grid operators. The grid operators decide which power sources to use. They generally seek "base load" generation that operates at some known capacity. Beyond that, they pick up or drop capacity as is necessary and available. This is a highly dynamic process with generation being added and dropped quite literally on a minute by minute basis, especially if highly variable wind or solar power is on the grid.

Third, Blocks 3 and 4 mandate States to regulate renewable energy and electricity demand. This EPA may not do absent a direct beneficial incentive to the State, typically in the form of money, something they have not done and do not have the resources to do. As the Supreme Court explains,

Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when "pressure turns into compulsion," the legislation runs

contrary to our system of federalism. "[T]he Constitution simply does not give Congress the authority to require the States to regulate." That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.³⁷

For these reasons, Blocks 2, 3 and 4 are merely paper tigers. EPA has no authority to use them in a FIP and cannot demand them in a SIP without paying the States to do them.

IX. Conclusion

EPA has attempted to skirt the law under its proposed Clean Power Plan and even under its proposed rules for new and modified power plants. It has joined an axis of political power to pressure utilities, Governors and State Legislatures into attempting anticipatory compliance on a rule certain to be significantly revised and certain to be held *ultra vires*. States that wish to use a "wait and see" approach that will preserve state funds for higher purposes are on solid legal and policy ground. The Clean Power Plan and the fear-mongering associated therewith is no more than a paper tiger swathed in puffery. Both may be rejected out of hand.

Appendix A Why the Clean Power Plan Exceeds Clean Air Act Authority

The Proposal Violates Section 111(d)'s Bar on Regulating Sources that are also Regulated under Section 112 of the Act

In order to prevent sources from being subject to multiple costly layers of regulation that could harm their economic competitiveness, the Clean Air Act prohibits EPA from requiring states to submit Section 111(d) plans for source categories that are regulated under Section 112 of the Act. The Section 111(d) proposal would violate this prohibition by establishing Section 111(d) standards for fossil-fuel fired power plants, which have been regulated under Section 112 of the Act since 2012.

Section 112 of the Clean Air Act empowers the agency to regulate “hazardous air pollutants.” In 2012, the agency promulgated regulations under this section that limit the emission of mercury and other substances from fossil fuel-fired power plants. 77 Fed. Reg. 9,304 (Feb. 16, 2012); *see generally White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (upholding rule). According to EPA, the Section 112 Rule for electric utilities will impose \$9.6 billion annually in costs on electric utilities, *see* 77 Fed. Reg. at 9,413; independent experts peg that figure at \$10.4 billion in 2015, rising to \$11.9 billion by 2030. NERA Economic Consulting, *An Economic Impact Analysis of EPA’s Mercury and Air Toxic Standards Rule*, at 2, Fig. 1 (Mar. 1, 2012).

Section 111(d), in turn, authorizes EPA to require that states submit Section 111(d) plans only for “existing source[s] for any air pollutant . . . which is not . . . emitted from a source category which is regulated under section 7412.” C.A.A. § 111(d)(1)(A)(i), 42 U.S.C. § 7411(d)(1)(A)(i) (the “prohibition”). As described above, fossil fuel-fired power plants are regulated under Section 112 of the Act, and it is eminently reasonable that Congress would want to avoid the situation that those sources currently face: \$7.5 billion in annual costs from Section 111(d) regulations in 2020, rising to \$8.8 billion in 2030, *see* Proposal, 79 Fed. Reg. at 34,839-40 & Tables 1 & 2, to compound the over \$10 billion that they are currently bearing under Section 112.

The Section 111(d) proposal’s attempt to deal with this plain limitation of the Clean Air Act is unreasonable. The Section 111(d) proposal asserts that the prohibition described above only bars it from using Section 111(d) to regulate the emission of a *hazardous* air pollutant (i.e., one listed under Section 112) from a source category that is regulated under Section 112. EPA derives this interpretation from a purported harmonization of allegedly conflicting amendments to Section 111(d) made by the House and the Senate in the Clean Air Act Amendments of 1990, whereby the Senate erroneously included a “Conforming Amendment” that the codifier of the United States Code determined “could not be executed.”

Prior to the 1990 Amendments to the Clean Air Act, Section 111(d) barred EPA from regulating under that section “*any air pollutant* . . . included on a list published under . . . [§] 112(b)(1)(A).”³⁸ Thus, EPA could not regulate under Section 111(d) a hazardous air pollutant,

such as chlorine, it already regulated under Section 112. This provision of the Act was amended in 1990, but the amendment passed by the U.S. House of Representatives differed significantly from that passed by the U.S. Senate.

The House provision 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, under Section 111(d), emissions of “any pollutant . . . *from a source category which is regulated under section 112.*”³⁹ It thus worked a major change on Section 111(d): whereas previously the section merely barred regulation of *pollutants* regulated under Section 112 (*i.e.*, hazardous air pollutants), as amended it barred regulation of *any air pollutant* from a source, as long as that source was part of a source category regulated under Section 112. Under the House version, the bar on Section 111(d) regulation thus changed from a *pollutant*-specific bar to a *source category*-specific bar. The provision passed by the Senate, meanwhile, merely replaced “[112](b)(1)(A)” with “in lieu thereof ‘[112](b).’”⁴⁰ In other words, it appears to have been intended to reflect the pre-amendment language of Section 111(d), retaining the prior version’s pollutant-specific bar on regulation under Section 111(d).

Rushing to file its conference report after an all-night meeting, the House-Senate Conference Committee failed to reconcile the two conflicting amendments; instead, it included *both* in the final version of the 1990 Amendments that was passed by Congress and signed into law by the President. Nevertheless, the House amendment controls. According to federal statute, the Supreme Court, and longstanding rules of legislative draftsmanship, the House amendment published in the United States Code is *prima facie* evidence of the law of the United States.⁴¹ Because that amendment extends the prohibition against double regulation under Section 111(d) from “air pollutants” to “source categories” regulated under Section 112, EPA is prohibited from regulating modified or reconstructed coal-fired facilities under Section 111(d) because they are presently regulated under Section 112.

EPA itself has acknowledged that its Clean Power Plan may be invalid under a “literal reading” of Section 111(d) as published in the United States Code, which reflects the House provision.⁴² This acknowledgement does not go far enough. According to federal statute, the United States Code “establish[es] *prima facie* the laws of the United States.”⁴³ Since the House amendment is the one published in the United States Code, it is *prima facie* the law of the United States. The Supreme Court similarly concluded, in *American Electric Power Co. v. Connecticut*,⁴⁴ that the House construction is the correct one. In that case, the Court noted an “exception” to Section 111(d)’s coverage:

EPA may not employ § [111](d) if existing stationary sources of the pollutant in question are regulated under . . . *the “hazardous air pollutants” program, § [112].* See § [112](d)(1).⁴⁵

The Supreme Court thus has also concluded that a source may not simultaneously be regulated under Section 112 and Section 111(d).⁴⁶ In no uncertain terms, the Court has said that EPA may not use Section 111(d) to regulate *any* emissions, no matter the pollutant, from sources

in a category that is already regulated under Section 112. EPA's proposed Clean Power Plan thus runs afoul of clearly stated Supreme Court precedent.

EPA's claim that the conflict between the House provision and the Senate provision creates ambiguity that the Agency may interpret is without merit. Even if the Supreme Court had not already decided the matter conclusively in *American Electric Power*, the rules of legislative amendment construction establish the House amendment as binding law. One longstanding rule of legislative draftsmanship and interpretation dictates that, in cases of conflict, clerical amendments be applied *after* substantive amendments.⁴⁷ The 1990 Senate amendment was a purely clerical modification. As such, it is 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 modern legislation.⁴⁸ Congress and the courts have made clear that such drafting errors are not to be given substantive effect.⁴⁹ Consistent with that rule, EPA may not interpret Section 111(d) to give effect to the Senate's clerical amendment.

The House amendment to Section 111(d) significantly and deliberately altered the scope of Section 111(d). Prior to the House amendment, EPA could regulate under Section 111(d) emissions of non-hazardous pollutants from source categories already regulated under Section 112.⁵⁰ The House amendment fundamentally changed this arrangement, expressly precluding EPA from regulating *any* emissions under Section 111(d) from source categories regulated under Section 112.⁵¹ 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.⁵²

The Senate amendment shares none of these characteristics. Unlike the House amendment, it purported to change neither the scope nor the effect of Section 111(d). Instead, it was intended merely to update the language of Section 111(d) to reflect changes made by other provisions of the 1990 Amendments. Some of these other provisions replaced Section 112(b)(1)(A) – the subsection cross-referenced in § 111(d) – with Sections 112(b)(1), 112(b)(2), and 112(b)(3). The Senate amendment confirms those changes by “striking” Section 111(d)'s cross-reference to § 112(b)(1)(A) and inserting “in lieu thereof ‘[112](b).’”⁵³ The purely *ministerial* nature of the Senate amendment is confirmed by 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.”⁵⁴

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

Applying the rule that substantive amendments must be applied before conforming amendments renders the Senate amendment to Section 111(d) superfluous. The House's substantive amendment, applied first, effects a substantive change to the section: 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 Section 111(d), there is no need—or way—to apply the Senate amendment (there being no cross-reference in need of updating at that point). The House amendment thus renders the Senate amendment moot and without effect. For this reason, the United States Code notes that the Senate's clerical amendment “could not be executed,”⁵⁵ and EPA too has described the Senate amendment as “a drafting error” that “should not be considered.”⁵⁶

Nevertheless, EPA now insists it *must* give effect to the Senate amendment on grounds that federal agencies are obligated to give substantive effect to all language in the Statutes at Large.⁵⁷ EPA does not attempt to square its reading with the judicial and legislative precedents that preclude giving effect to drafting errors.⁵⁸ Nor does EPA suggest a principled means of distinguishing between the Senate amendment and the hundreds of other drafting errors interspersed throughout the U.S. Code.⁵⁹ 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 existing legislative and judicial precedents compel the opposite reading of the statute.⁶⁰ Consistent with the history of the 1990 Amendments and every applicable legislative and judicial precedent, EPA must treat the Senate amendment as a mere “scrivener's error” and deny it substantive effect. The House amendment *alone* has substantive effect, and it expressly precludes regulation of coal-fired power plants under Section 111(d) because they are now regulated under Section 112. Thus, EPA may not regulate modified or reconstructed coal-fired EGUs under the proposed Clean Power Plan or under any other Section 111(d) regulation.

Even if the Senate amendment were not rendered moot by the House amendment, as EPA seems to believe, it would need to be read together with the House amendment in a way that gives effect to both, since it is a maxim of statutory construction that courts and agencies give effect, whenever possible, to *all* of the language in a statute.⁶¹ For Section 111(d) to provide a statutory basis for regulating existing coal-fired EGUs, including modified and reconstructed EGUs, EPA must not only demonstrate that the Senate amendment *must* be given effect—which we have shown cannot be done—but must also show that the Senate and House amendments are irreconcilable. EPA's attempt to make this showing⁶² fails, because the two amendments can easily be harmonized in way that gives full effect *to both*.

As several scholars have observed, the limitations in the House and Senate amendments are entirely compatible with one another.⁶³ The House amendment prohibits EPA from regulating under Section 111(d) any pollutants emitted from sources in a source category already

regulated under Section 112,⁶⁴ while the Senate amendment forbids EPA from regulating under Section 111(d) any hazardous air pollutants subject to regulation under Section 112, regardless of whether they are emitted from a source in a category regulated under Section 112.⁶⁵ The two amendments may be harmonized by interpreting them together as prohibiting the EPA from regulating under Section 111(d) both hazardous air pollutants already regulated under Section 112, *and* the emissions of any pollutants from sources already regulated under § 112.⁶⁶ This construction, this harmonization, of the two amendments is not only reasonable, it is mandatory. Because it is possible in this way to give concurrent effect to *all* of the language in the House and Senate amendments, EPA must do so. Doing so renders the proposed Clean Power Plan rule invalid, because that proposed rule would regulate under Section 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 Section 112 through the Mercury and Air Toxics Standards.

Perhaps because of this dramatic consequence, EPA has sought to avoid this harmonized reading of the House and Senate amendments, proposing its own novel interpretation of Section 111(d) instead. EPA interprets Section 111(d) to prohibit regulation of “any [hazardous air pollutants] listed under section 112(b) that may be emitted from a particular source category . . . regulated under section 112.”⁶⁷ This interpretation flatly 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 permit such regulation if it concerns air pollutants not covered by Section 112.

Meanwhile, in contradiction to the Senate’s conforming amendment, which forbids regulating hazardous air pollutants under Section 111(d), EPA’s reading would permit such regulation if the hazardous air pollutant is emitted from an existing source not regulated by Section 112. As the Supreme Court has made clear, “an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”⁶⁸ EPA’s proffered interpretation is effectively an impermissible legislative revision carried out by an administrative agency that has produced a new Section 111(d) that is substantially less restrictive than either the House or Senate intended.

Because it is possible to read Section 111(d) in a way that gives maximum effect to *both* the House and Senate amendments, EPA must do so. The unambiguous effect of such a reading is to *prohibit* EPA from regulating under Section 111(d) emissions of any air pollutant from sources in a category that is already regulated under Section 112, as well as any air pollutant that is already regulated under Section 112, whatever the source. Thus, Section 111(d) prohibits EPA from regulating existing coal-fired EGUs as existing sources under that section.

Even if the House and Senate amendments render Section 111(d) ambiguous, EPA cannot regulate existing coal-fired EGUs under that section. 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) hinges on its receiving the substantial deference afforded under *Chevron*, but such deference will not be given here. *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.”⁶⁹ 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.⁷⁰

In other words, *Chevron* deference *only* applies where there is congressional intent to delegate interpretive authority to the agency. Here, there is no evidence that Congress intended to create ambiguity for EPA to interpret. Rather, inclusion of the Senate amendment was an inadvertent “drafting error,” as EPA has noted.⁷¹ A drafting error is not an ambiguity justifying *Chevron* deference, because Congress must intend the ambiguity and an error is by definition unintentional.⁷² Without *Chevron* deference, EPA’s interpretation of Section 111(d) cannot survive.

Cases cited by EPA, *National Association of Home Builders v. Defenders of Wildlife*⁷³ and *Citizens to Save Spencer County v. EPA*⁷⁴, do not contradict this conclusion. *National Association of Homebuilders* involved separate statutes addressing separate problems through “seemingly categorical— and, at first glance, irreconcilable—legislative commands.”⁷⁵ The Court ultimately deferred to an agency interpretation reconciling the two statutes, largely because of the interpretive canon disfavoring repeal by implication.⁷⁶ 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.⁷⁷ Like *National Association of Homebuilders*, *Spencer County* addressed circumstances fundamentally dissimilar to those surrounding Section 111(d). *National Association of Homebuilders* and *Spencer County* addressed ambiguities created by different sections of the U.S. Code. In the case of Section 111(d), two provisions in a single public law purport to address in very different ways the same language in a single subsection of a statute. Moreover, the D.C. Circuit has acknowledged the singular, limited nature of the *Spencer County* decision.⁷⁸

There is no basis for affording EPA’s interpretation of Section 111(d) *Chevron* deference. Without such deference, EPA’s interpretation cannot be sustained, since it contradicts the statute’s express terms.

Even if Congress did intend for EPA to interpret the alleged ambiguity in Section 111(d), EPA’s proposed interpretation is unreasonable and therefore not entitled to deference under *Chevron*. Courts are to defer to an agency’s “interpretations [only] if they are reasonable and consistent with statutory purpose.”⁷⁹ EPA’s construction of Section 111(d) in the present proposal contradicts its own, prior stated understanding of Congress’s intent in passing the 1990 Amendments to the Clean Air Act. EPA has stated that 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.”⁸⁰ Section 111(d)’s prohibition on double-regulation of existing sources reflects Congress’s carefully-calibrated approach to regulating emissions from stationary sources. This approach logically seeks to avoid subjecting existing sources to both new national standards for emissions under Section 112 and new state-by-state standards under Section 111. Unlike *new* sources, which may be regulated under both Sections 111 and 112, imposing additional regulatory burdens on *existing* sources threatens to strand assets and squander significant investments, causing crippling inequities.

The problems presented by double regulation are evident in EPA’s proposed Clean Power Plan which would cause the premature closure of many coal-fired EGUs that recently made large investments in extraordinarily costly pollution control systems designed to bring those EGUs into compliance with other statutory provisions. 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. According to EPA itself, these standards will cost those plants more than \$9 billion annually.⁸¹ Despite their recent massive investments in pollution controls required by the Mercury and Air Toxics Standards, many of these plants will have to be shuttered in order to meet the drastic emission reduction goals that EPA has set in the proposed Clean Power Plan for many States. Other plants making similar investments in pollution controls to comply with regional haze requirements and other statutory and regulatory provisions will also be shut down if EPA finalizes its Proposed Rule without substantial revisions. EPA’s construction of the statute thus defies reason and fairness and plainly contradicts congressional intent. EPA’s interpretation of Section 111(d) is therefore unreasonable and for this reason not entitled to Chevron deference. EPA is thus prohibited from regulating modified and reconstructed coal-fired EGUs under Section 111(d) and it should abandon its effort to do so.

In summary, EPA’s “interpretation” of the Clean Air Act §111(d) provisions and authorities are plainly unreasonable and contradictory to the clear deregulatory thrust of this aspect of Section 111(d).

NOTES:

Executive Director's Introduction

¹ See, e.g., *VNA Plus, Inc. v. Apria Healthcare Group, Inc.*, 29 F. Supp. 2d 1253, 1265-66 (D.Kan. 1998) ("Puffing and other expressions of opinion common, are permitted, and should be expected. Those in the marketplace should recognize and discount such representations when deciding whether to go through with a transaction.")

The Clean Power Plan Scare Strategy

² See, https://www.opensecrets.org/revolving/rev_summary.php?id=11237.

³ E&E Legal, "Improper Collusion Between Environmental Pressure Groups and the Environmental Protection Agency As Revealed by Freedom of Information Act Requests – Interim Report" September 2014, p. 32. Available at: <http://eelegal.org/wp-content/uploads/2014/09/EE-Legal-FOIA-Collusion-Report-9-15-2014.pdf>. Last retrieved 1/29/2015.

⁴ Available at: <http://www.youtube.com/watch?v=DpTlhyMa-Nw>. Last retrieved 1/29/2015.

⁵ See, EPA "Regulatory Actions" <http://www2.epa.gov/carbon-pollution-standards/regulatory-actions>. Last retrieved 1/29/2015.

⁶ See, EPA "Understanding State Goals under the Clean Power Plan" <http://blog.epa.gov/epaconnect/2014/06/understanding-state-goals-under-the-clean-power-plan/>. Last retrieved 1/29/2015.

⁷ Governor McAuliffe "Virginia Submits Comments on EPA's Clean Power Plan" <https://governor.virginia.gov/newsroom/newsarticle?articleId=7263>; and see, Virginia DEQ, "Comments on EPA-HQ-OAR-2013-0602" (Nov. 14, 2014), <http://www.deq.virginia.gov/Portals/0/DEQ/Air/Planning/vacommentstoepa.pdf>

⁸ Virginia General Assembly, Senate Bill No. 1202, A bill to establish conditions on the authority of state agencies to prepare or submit a state implementation plan with respect to the Environmental Protection Agency's carbon pollution emission guidelines for existing electric utility generating plants; see <http://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+SB1202>.

⁹ Authorized under 42 U.S.C. § 7509(b)(1).

¹⁰ Authorized under 42 U.S.C. § 7410(c).

¹¹ See, E&E News "Former EPA policy counsel Sussman says agency 'back to the drawing board' on power plan targets, building blocks." <http://www.eenews.net/tv/videos/1932/transcript>. (Note: E&E News is not associated with E&E Legal.)

¹² *Id.*

¹³ Personal and quite private communications between former colleagues, a staple of the Washington D.C. "inside the beltway" community. Similar exchanges between former political appointees and current senior bureaucratic management confirm this point and such communications are not limited to Mr. Sussman, but to others from former administrations as well.

¹⁴ See note 3, *supra*.

¹⁵ See 42 U.S.C. § 7509(b)(1).

¹⁶ EPA, “EPA Imposes first federal funding limitations to spur auto inspection programs”
<http://www2.epa.gov/aboutepa/epa-imposes-first-federal-funding-limitations-spur-auto-inspection-programs>.

¹⁷ *NFIB v. Sebelius*, 132 S.Ct. 2566, 2604 (2012) (“Congress has chosen is much more than “relatively mild encouragement”—it is a gun to the head.”)

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 2606.

²¹ *Id.* at 2605.

²² *Budget of the U.S. Government, Fiscal Year 2011, Analytical Perspectives* (Washington: Government Printing Office, 2010), Table 33-1.

²³ See, e.g., Virginia’s operating budget. <http://dpb.virginia.gov/budget/budget.cfm>.

²⁴ See, e.g. Virginia’s highway budget. http://www.virginiadot.org/about/vdot_budget.asp.

²⁵ See, 44 Fed. Reg. 51947 (1979).

²⁶ *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2448 (2014) (citing to *Sierra Club v. EPA*, 499 F. 3d 653, 654-655 (CA7 2007) and *In re Pennsauken Cty., N. J., Resource Recovery Facility*, 2 E. A. D. 667, 673 (EAB 1988).

²⁷ *Id.*

²⁸ Notably, EPA has not allowed engineering efficiencies such as replacement of existing burners with low NOx burners to be considered “control technology.”

The Clean Power Plan Regulation is barred by the Clean Air Act itself

²⁹ *Murray Energy Corp. v. EPA*, No. 14-1112 & 14-1151 (D.C. Cir.).

³⁰ See generally Comments of the Competitive Enterprise Institute on Clear Air Act § 111(b) Carbon Pollution Standards (May 9, 2014).

³¹ See C.A.A. § 111(a)(1), 42 U.S.C. § 7411(a)(1) (“The term ‘new source’ means any stationary source, the construction or modification of which is commenced after” proposal or finalization, whichever is earlier, of Section 111 standards).

³² *Util. Air Regulatory Group v. EPA*, 134 S. Ct. at, 2448.

³³ *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

³⁴ *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995).

³⁵ *Electric Power Supply Ass’n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014).

³⁶ In its coal-fired power plant enforcement initiative, EPA settled many cases in a manner that restricted use of a plant’s capacity to some level below the actual capacity. In like measure, many facilities have come to EPA seeking continuation of a permit based on a cap on emissions from that facility. Never has EPA required a minimum level of production (hence emissions). That decision is entirely left to the plant operator.

³⁷ *NFIB v. Sebelius*, 132 S.Ct. at 2602 (Citing to *New York v. United States*, 505 U.S. 144, 178 (1992)).

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

³⁹ Pub. L. No. 101-549, § 108, 104 Stat. 2399 (1990) (emphasis added).

⁴⁰ *Id.* at § 302(a).

⁴¹ 1 U.S.C. §204(a) (2006) (providing that “the Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States . . .”).

⁴² Legal Memo at 26.

⁴³ 1 U.S.C. §204(a) (2006).

⁴⁴ 131 S. Ct. 2527 (2011).

⁴⁵ *Id.* at 2537 n.7 (emphasis added).

⁴⁶ 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.

⁴⁷ See 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).

⁴⁸ See *infra* note 20 and accompanying text.

⁴⁹ *Id.*

⁵⁰ See 42 U.S.C. § 7411(d) (1987).

⁵¹ Pub. L. No. 101-549, § 108, 104 Stat. 2399 (1990).

⁵² 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.”).

⁵³ Pub. L. No. 101-549, § 302(a).

⁵⁴ Senate Legislative Drafting Manual § 126(b)(2)(A).

⁵⁵ Revisor’s Note, 42 U.S.C. § 7411.

⁵⁶ 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 unflinchingly 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.

⁵⁷ Legal Memo 26.

⁵⁸ See *supra* note 20 and accompanying text.

⁵⁹ See *supra* note 20 and accompanying text.

⁶⁰ See *supra* note 20 and accompanying text.

⁶¹ *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).

⁶² 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)).

⁶³ 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).

⁶⁴ Pub. L. No. 101-549, § 108.

⁶⁵ *Id.* at § 302(a).

⁶⁶ 42 U.S.C. § 7411(d).

⁶⁷ Legal Memo 26.

⁶⁸ *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2446 (2014).

⁶⁹ *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.”).

⁷⁰ *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2214 (2014) (Roberts, C.J., concurring).

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

⁷² 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.”).

⁷³ 551 U.S. 644 (2007).

⁷⁴ 600 F.2d 844 (D.C. Cir. 1979).

⁷⁵ 551 U.S. at 661.

⁷⁶ *Id.* at 662-69.

⁷⁷ 600 F.2d at 852-53.

⁷⁸ 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.”).

⁷⁹ *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”).

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

⁸¹ 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>.