

## THE “DRAFTING ERROR” THAT COULD DERAIL THE CLEAN POWER PLAN

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## I. INTRODUCTION

The past decade has witnessed a marked shift in scientists' and policymakers' attention to the anthropogenic causes of global climate change. "[T]he generation of [greenhouse gases] through the combustion of fossil fuels" during the production of electricity contributes significantly to greenhouse gas emissions and has been cited as one of the principal causes of global climate change.<sup>1</sup> Greenhouse gas emissions increased an unprecedented 70% between 1970 and 2004,<sup>2</sup> and "[w]orld coal production increased one and a half times as much from 2003 to 2007 as it did over the previous twenty-three years."<sup>3</sup> Nearly half of the electric power in the United States comes from coal, and "[b]ecause coal has the highest carbon content of any fossil fuel, burning coal to produce electricity generates more carbon emissions per unit of energy" when compared to oil and natural gas.<sup>4</sup> In March 2015, atmospheric carbon dioxide levels climbed to over 400 parts per million, the highest recorded level since tracking began nearly four decades ago.<sup>5</sup>

Unsurprisingly, the scientific community, environmental organizations, many state and local governments, and private citizens have pressured the federal government to regulate greenhouse gas emissions in light of the increasingly manifest changes that the buildup of air pollutants from those emissions has caused. State governments eager to combat the problem generally have responded more quickly; for example, Oregon began setting emissions reduction goals as early as 2007 and in 2008 promulgated a mandatory greenhouse gas emissions reporting program.<sup>6</sup> The federal response has been pointedly sluggish, partly because until 2007, the Environmental Protection Agency (EPA) "denied that it had the authority to regulate [greenhouse gas emissions] under the [Clean Air Act, 42 U.S.C. §§ 7401–7671q]."<sup>7</sup> The Supreme Court's landmark holding in

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1. Robert L. Glicksman, *Coal-Fired Power Plants, Greenhouse Gases, and State Statutory Substantial Endangerment Provisions: Climate Change Comes to Kansas*, 56 U. KAN. L. REV. 517, 524 (2008).

2. *Id.* at 525.

3. Patrick Charles McGinley, *Climate Change and the War on Coal: Exploring the Dark Side*, 13 VT. J. ENVTL. L. 255, 259 (2011).

4. Glicksman, *supra* note 1, at 527–28. Nonetheless, the use of coal to produce electricity has declined in recent years. See James M. Van Nostrand, *An Energy and Sustainability Roadmap for West Virginia*, 115 W. VA. L. REV. 879, 880 n.1 (2013).

5. Angela Fritz, *Global Average CO<sub>2</sub> Skyrockets Past Significant Benchmark, NOAA Says*, WASH. POST, May 6, 2015, <http://www.washingtonpost.com/blogs/capital-weather-gang/wp/2015/05/06/global-average-co2-skyrockets-past-significant-benchmark-noaa-says/>.

6. See OR. ADMIN. R. 340-215 (2011). For a general discussion of states' efforts to mitigate climate change, see Robert B. McKinstry, Jr. et al., *The New Climate World: Achieving Economic Efficiency in a Federal System for Greenhouse Gas Control Through State Planning Combined with Federal Programs*, 34 N.C. J. INT'L L. & COM. REG. 767, 777–78 (2009).

7. Glicksman, *supra* note 1, at 529.

*Massachusetts v. EPA*<sup>8</sup> that greenhouse gases, including carbon dioxide, fall within the Clean Air Act’s definition of “air pollutant” opened the door for a federal solution to combating climate change. An early federal attempt to address greenhouse gases was the 2009 American Clean Energy and Security Act, which passed the House of Representatives but did not reach the Senate.<sup>9</sup>

In June 2014, EPA issued a proposed rule aimed at regulating existing fossil-fuel-fired power plants under section 111(d) of the Clean Air Act.<sup>10</sup> The proposal alone generated backlash from the coal industry and from coal-dependent states seeking to block the final promulgation of the rule. When EPA refused to withdraw the proposed rule, twelve states filed suit, claiming that EPA’s attempt to regulate greenhouse gas emissions from coal-fired power plants under section 111(d) is unlawful under the plain language of the statute.<sup>11</sup> Interpretation of section 111(d) is complicated by a “drafting error” from the 1990 amendments to the Clean Air Act that allowed two arguably irreconcilable versions of the statute to be included in the final bill signed by President Bush.<sup>12</sup> Nonetheless, EPA proceeded with the finalization of its rule, which was signed on August 3, 2015, by EPA Administrator Gina McCarthy.<sup>13</sup>

This Note offers section 111(d) as an illustration of the significance of careful legislative drafting and the implementation consequences of such oversights during the drafting process. Part II sets forth the regulatory background to the dispute, including a discussion of a number of pending regulatory initiatives applicable to coal-fired sources. Part III begins by detailing the settlement that required EPA to develop a rule targeting greenhouse gases and moves to the litigation challenging EPA’s authority under the proposed and final rules. Part IV articulates the mechanics of section 111(d) and discusses each side’s interpretation. Finally, Part V

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8. 549 U.S. 497, 532 (2007).

9. H.R. 2454, 111th Cong. (2009); see also Andrés Acebo, *Borrowing from Our Children: The Congressional Failure to Respond to Climate Change*, 36 SETON HALL LEGIS. J. 191, 193 (2012).

10. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60) [hereinafter Proposed Rule]. The rule was issued in accordance with President Obama’s “Clean Power Plan.” See Memorandum of June 25, 2013: Power Sector Carbon Pollution Standards, 78 Fed. Reg. 39,535 (July 1, 2013).

11. Petition for Review, *West Virginia v. EPA*, 788 F.3d 330 (D.C. Cir. 2015) (No. 14-1146); see also Letter from Patrick Morrisey, Attorney Gen., W.Va., to Gina McCarthy, Adm’r, EPA (Jun. 6, 2014), <http://www.ago.wv.gov/publicresources/epa/Documents/Exh.%20B%20-%20Letter%20to%20EPA%20from%20WV.pdf>.

12. See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990); *id.* § 302(a), 104 Stat. at 2574.

13. Press Release, EPA, Obama Administration Takes Historic Action on Climate Change (Aug. 3, 2015), <http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceac8525735900400c27/c5df9981993c6df785257e96004d4f14!OpenDocument>.

offers a view on the interpretation the Court should adopt and some of the legal and practical implications of that interpretation.

## II. REGULATION OF COAL-FIRED POWER GENERATION FACILITIES

### A. *National Ambient Air Quality Standards*

Emissions of air pollutants from stationary sources, such as power generation facilities, are governed primarily by subchapter I of the Clean Air Act<sup>14</sup> and its corresponding rulemakings, with some sources subject to additional programs such as those mandated under subchapters IV and V. Although the Act places the burden for guaranteeing air quality on states,<sup>15</sup> the standards that states are required to implement are set at the federal level.<sup>16</sup> The national ambient air quality standards (NAAQS) program is directed at six designated “criteria” pollutants—carbon monoxide, ozone, nitrogen dioxide, sulfur dioxide, particulate matter, and lead—that have been determined to “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare” and that come from “numerous or diverse mobile or stationary sources.”<sup>17</sup> Emissions from fossil-fuel-fired power plants include several of those pollutants.<sup>18</sup>

EPA has issued and periodically revises non-binding air quality criteria that discuss health effects of criteria pollutants, and the agency also publishes information about air-pollution control techniques for those pollutants.<sup>19</sup> EPA then promulgates primary and secondary standards for criteria pollutants aimed at protecting the public health and welfare.<sup>20</sup> Using those standards as the basis for regulation, states then develop and submit for EPA approval a “state implementation plan” (SIP) that details the methods by which the state expects to achieve the standards.<sup>21</sup> Thus, the federal standards represent only the appropriate levels that must be reached but do not prescribe a particular method for reducing emissions.

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14. 42 U.S.C. §§ 7401–7431, 7470–7479, 7491–7492, 7501–7515 (2012).

15. *See id.* §§ 7407, 7410.

16. *See id.* §§ 7408, 7409. States are also permitted to require more stringent regulations if they so choose. *Id.* § 7416.

17. *Id.* § 7408(a).

18. *See* McGinley, *supra* note 3, at 277.

19. 42 U.S.C. § 7408.

20. *See id.* § 7409.

21. *Id.* § 7410(a).

### B. Hazardous Air Pollutants

The standards governing hazardous air pollutants, because of the substantial risk those substances pose to human health, are set at the federal level and implemented by the states, much like NAAQS. Power generation facilities were specifically singled out to be regulated under section 112 after a finding that such regulation was “appropriate and necessary.”<sup>22</sup> Within the statutory text is a list of 189 hazardous pollutants that EPA is required to consider in developing a list of categories and subcategories that are major sources of the listed pollutants.<sup>23</sup> EPA then establishes standards for each category and subcategory based on the maximum achievable control technology (MACT).<sup>24</sup> The controls used can be implemented at the point of discharge (smokestack controls), in work practices or operational methodology, or with some combination of those options.<sup>25</sup> If application of MACT is not sufficient to guarantee safe exposure to the pollutant, a health-based standard will supersede the technology-based standard.<sup>26</sup>

### C. New Source Performance Standards

Although inapplicable to the existing stationary sources affected under this particular rulemaking, new source performance standards (NSPS) are nonetheless critical to an understanding of the rule’s implementation. In contrast to NAAQS, which are region- and pollutant-based, NSPS begin with a list of stationary source categories that “cause[] or contribute[] significantly to[] air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>27</sup> EPA then develops standards of performance for new sources within a particular category based on the best available demonstrated technology (BADT), which includes consideration of technological and economic feasibility.<sup>28</sup> These standards are then implemented by states as part of the SIP.<sup>29</sup> NSPS are not limited to criteria

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22. See *id.* § 7412(n)(1). EPA made this finding in 2000. See Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825 (Dec. 20, 2000); see also *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (holding that EPA improperly failed to consider costs in making this finding and remanding the matter to the D.C. Circuit for further resolution).

23. 42 U.S.C. § 7412(b)(1), (c).

24. *Id.* § 7412(d).

25. *Id.*

26. *Id.* § 7412(f).

27. *Id.* § 7411(b).

28. *Id.* § 7411(a), (b).

29. *Id.* § 7411(c).

pollutants and thus can be used to regulate pollutants that are not covered by other parts of the Clean Air Act.

Section 111(d), the mechanism by which EPA has chosen to regulate carbon dioxide emissions from existing power generation facilities, is the NSPS counterpart for existing sources. It applies only when EPA has issued standards of performance for a particular pollutant under section 111(b) for new sources.<sup>30</sup> If EPA has established NSPS for a particular non-criteria pollutant,<sup>31</sup> it must institute a procedure under which each state shall submit a plan establishing standards of performance for that pollutant applicable to existing sources.<sup>32</sup> The carbon emissions rule, as discussed in the following subpart, provides guidance to states in reducing carbon dioxide emissions for existing sources.

#### *D. Regulation Under the Final Rule*

Section 111(d) functions similarly to the NAAQS program. First, EPA establishes national standards of performance that reflect its calculation of the emission reductions that can be achieved through use of the “best system of emission reduction” that has been adequately demonstrated (BSER).<sup>33</sup> The emission guidelines represent the minimum stringency of emission levels that a state must include in a plan that must be submitted to and approved by EPA.<sup>34</sup> The agency has calculated two BSER goals for each state, setting the maximum allowable output of carbon dioxide per net megawatt-hour (MWh) from the affected sources.<sup>35</sup> The interim goal, which is slightly higher than the final goal for each state, will apply during the “phase-in period” beginning in 2022.<sup>36</sup> The final goal must be met by 2030.<sup>37</sup> EPA estimates that the required controls will reduce carbon dioxide emissions by 30% of 2005 levels by 2030.<sup>38</sup> Nonetheless, “coal and natural gas would remain the two leading sources of electricity generation in the

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30. *See id.* § 7411(d)(1).

31. The section 111(b) rule addressing coal-fired power generation facilities was finalized in October 2015. *See* Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98).

32. 42 U.S.C. § 7411(d)(1).

33. *See id.* § 7411(a)(1).

34. *See id.* § 7411(d)(1).

35. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,961–62 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereinafter Final Rule]. MWh is a typical unit of energy for measuring power output. The final rule also set mass-based goals for each state, which reflect the maximum amount of emissions measured in short tons of carbon dioxide. *Id.* at 64,962–63.

36. *Id.* at 64,708.

37. *Id.*

38. Proposed Rule, *supra* note 10, 79 Fed. Reg. at 34,832.

[United States], with each providing more than [30%] of the projected generation.”<sup>39</sup>

BSER is designed for source categories—as opposed to specific pollutants and regions like NAAQS—and allows for cost–benefit analysis considering “technical feasibility, costs, size of emission reductions[,] and . . . whether the system promotes the implementation and further development of technology.”<sup>40</sup> The measures used to determine BSER under the rule are built upon three “building blocks”: (1) efficiency improvements at affected coal-fired steam sources;<sup>41</sup> (2) generation shifts among affected sources;<sup>42</sup> and (3) renewable generating capacity.<sup>43</sup> The guidelines are intended to be somewhat flexible, allowing states to use any control measure or combination of measures to meet the federal emission limitation.<sup>44</sup> The necessary reductions cannot possibly be met through use of heat-rate improvements alone; some decrease in generation at higher-emitting facilities is required in order to satisfy EPA’s target goals, as is evidenced by the inclusion of building blocks (2) and (3) in the BSER calculation.

Because each state’s plan for implementing the regulations must be submitted by September 2016,<sup>45</sup> and implementation must begin in 2020,<sup>46</sup> state agencies and affected generation facilities are already dedicating resources to determining how the BSER goal will be achieved.<sup>47</sup> A unique aspect of EPA’s proposal is that it intends to “continue progress already underway” in several states to reduce greenhouse gas emissions; the building blocks are based upon strategies already in use by those states that have been proactive in tackling the issue.<sup>48</sup> EPA has observed that

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39. *Id.*

40. *Id.* at 34,834, 34,835.

41. Final Rule, *supra* note 35, 80 Fed. Reg. at 64,787–95.

42. *Id.* at 64,795–803.

43. *Id.* at 64,803–11. The proposed rule also included demand-side energy efficiency programs within the BSER. See Proposed Rule, *supra* note 10, 79 Fed. Reg. at 34,836. EPA removed demand-side programs from the BSER in the final rule but nonetheless continues to advocate for the use of such measures. See Final Rule, *supra* note 35, 80 Fed. Reg. at 64,673–74.

44. Proposed Rule, *supra* note 10, 79 Fed. Reg. at 34,835.

45. Final Rule, *supra* note 35, 80 Fed. Reg. at 64,708–09. The Supreme Court recently issued an order staying EPA’s enforcement of the final rule until the D.C. Circuit issues a ruling about its legality, so this date is certain to change. *West Virginia v. EPA*, No. 15A773, 2016 WL 502947, at \*1 (S. Ct. Feb. 9, 2016).

46. *Id.*

47. See, e.g., Emergency Petition for Extraordinary Writ, *In re West Virginia*, No. 15-1277 (D.C. Cir. Aug. 13, 2015) (requesting writ of mandamus to stay application of final rule in light of states’ affidavits that implementation must begin immediately); Scott Finn, *10 Things To Know About the Clean Power Plan and West Virginia*, W. VA. PUB. BROADCASTING (Aug. 14, 2015), <http://wvpublic.org/post/10-things-know-about-clean-power-plan-and-west-virginia> (detailing an interview with Randy Huffman, Secretary of the West Virginia Department of Environmental Protection).

48. Proposed Rule, *supra* note 10, 79 Fed. Reg. at 34,832.

“currently 10 states have market-based [“cap-and-trade”] emission programs, 38 states have renewable portfolio [alternative source] standards or goals, and utilities in 47 states run demand-side energy efficiency programs.”<sup>49</sup> The rule thus impacts some states more than others,<sup>50</sup> but it encourages all states to implement controls gradually, over at least a ten-year period.

### III. FACTUAL BACKGROUND

In 2006, EPA revised its NSPS governing criteria pollutants emitted from electric utility steam generating units.<sup>51</sup> In its response to comments received from the public directing it to promulgate NSPS for carbon dioxide emissions, EPA stated that it did not “have the authority to . . . regulate [carbon dioxide] or other greenhouse gases that contribute to global climate change” under section 111<sup>52</sup> and refused to initiate a rulemaking. Unconvinced by EPA’s conclusion, a group of ten states, the District of Columbia, the City of New York, and several environmental organizations challenged the rule, seeking to compel EPA to develop standards of performance for greenhouse gases emitted from fossil-fueled power generation facilities.<sup>53</sup> After the Supreme Court determined that greenhouse gases satisfied the Clean Air Act’s definition of “air pollutant” in *Massachusetts v. EPA*,<sup>54</sup> the D.C. Circuit in September 2007 remanded the rule to EPA “for further proceedings in light of” the Supreme Court’s decision.<sup>55</sup>

Rather than include greenhouse gases in the prior rulemaking, EPA executed a settlement agreement with the parties in December 2010 that required it to address greenhouse gas emissions in separate rulemakings for new and existing sources under section 111 by July 26, 2011; the date was later modified to September 30, 2011.<sup>56</sup> The proposed rulemakings were

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49. *Id.* at 34,835.

50. See James Conca, *Only One Loser in Obama’s Clean Power Plan*, FORBES (Aug. 4, 2015, 6:45 AM), <http://www.forbes.com/sites/jamesconca/2015/08/04/only-one-loser-in-obamas-clean-power-plan/>.

51. See Standards of Performance for Electric Utility Steam Generating Units, 71 Fed. Reg. 9866 (Feb. 27, 2006) (codified at 40 C.F.R. pt. 60).

52. *Id.* at 9869.

53. Petition for Review, *New York v. EPA*, No. 06-1322 (D.C. Cir. Sept. 13, 2006). The matter was held in abeyance pending the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

54. 549 U.S. at 532.

55. Order, *New York v. EPA*, No. 06-1322 (D.C. Cir. Sept. 24, 2007).

56. U.S. ENVTL. PROT. AGENCY, EPA-HQ-OGC-2010-1057-0036, Modification to Settlement Agreement (2011), [http://www2.epa.gov/sites/production/files/2013-09/documents/20110613\\_ghgsettlementmod.pdf](http://www2.epa.gov/sites/production/files/2013-09/documents/20110613_ghgsettlementmod.pdf).



eventually published in the Federal Register in 2014.<sup>57</sup> Following the release of the existing source rule in June 2014, West Virginia, Alabama, Indiana, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Dakota, South Carolina, Wyoming, and Kentucky filed a petition in the D.C. Circuit on August 1, 2014, seeking the court’s review of the settlement agreement regarding the rule applicable to existing sources pursuant to section 307(b)(1) of the Clean Air Act.<sup>58</sup> The petitioners alleged that they “will be forced to undertake burdensome measures in the coming months to meet the demands of the unlawful [existing source] rule that EPA committed to proposing and then finalizing under the settlement agreement” and asked the court to vacate the agreement and enjoin EPA from either continuing with the comment period for the proposed rule or issuing a final rule.<sup>59</sup> Although the D.C. Circuit heard argument on the merits of the dispute, it based its ruling on only the jurisdictional question and dismissed the states’ petition as untimely in June 2015.<sup>60</sup> Both the state and industry petitioners have indicated their intent to re-file the suit once the final rule is published in the Federal Register.<sup>61</sup>

The following part details the contentions of the state petitioners and EPA regarding the language of section 111(d) and EPA’s authority for promulgating a rulemaking addressing greenhouse gas emissions from existing fossil fuel-fired power generation facilities. EPA’s basis for promulgating rules applicable only to new and modified sources under section 111(b) was not challenged in this case.

#### IV. HISTORY AND INTERPRETATION OF SECTION 111(D)

Section 111(d) of the Clean Air Act “establishes a process for setting standards for pollutants from existing sources that are not regulated under the programs . . . that address hazardous and criteria pollutants.”<sup>62</sup> Since its addition to the Act in 1970, the provision has been used to regulate only

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57. See Proposed Rule, *supra* note 10, 79 Fed. Reg. 34,830; Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1430 (proposed Jan. 8, 2014) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98).

58. Petition for Review, *supra* note 11, at 1–2; see also 42 U.S.C. § 7607(b)(1) (2012). Five of the twelve states were among the top ten producers of carbon dioxide emissions from coal-fired power plants in 2004. See Glicksman, *supra* note 1, at 528.

59. Petition for Review, *supra* note 11, at 4.

60. See *West Virginia v. EPA*, 788 F.3d 330 (D.C. Cir. 2015).

61. See Press Release, Office of the W. Va. Attorney Gen. Patrick Morrissey, Attorney General Patrick Morrissey Responds to D.C. Circuit Court’s Clean Power Plan Ruling, (June 9, 2015), <http://www.ago.wv.gov/pressroom/2015/Pages/Attorney-General-Patrick-Morrissey-Responds-to-D.C.-Circuit-Court’s-Clean-Power-Plan-Ruling.aspx>.

62. Alice Kaswan, *Controlling Power Plants: The Co-Pollutant Implications of EPA’s Clean Air Act § 111(d) Options for Greenhouse Gases*, 32 VA. ENVTL. L.J. 173, 179 (2014) (citing 42 U.S.C. § 7411(d)(1)(A)(i) (2012)).

“four pollutants from five source categories.”<sup>63</sup> Section 111(d), as presented in the United States Code, is currently applicable to air pollutants “for which air quality criteria have not been issued or which [are] not included on a list published under [section 108(a)] or emitted from a source category which is regulated under [section 112]” but “to which a standard of performance under this section would apply if such existing source were a new source.”<sup>64</sup> As part of this process, EPA is directed to issue binding federal guidelines that serve as a “starting point” for states to “develop implementation plans that . . . will impose performance standards at least as stringent as the federal guidelines.”<sup>65</sup>

Section 111, like many other provisions of the Act, was modified by the 1990 amendments.<sup>66</sup> Under the 1977 version of the Act, section 111(d)(1) could not be applied to any pollutant included on a list of “hazardous air pollutants” published by EPA under the authority of section 112(b)(1)(A).<sup>67</sup> In 1990 section 112 was rewritten in its entirety and converted from a health-based regulatory scheme to a scheme primarily based upon technology, thereby increasing appreciably its effectiveness.<sup>68</sup> Congress also listed 189 hazardous pollutants for which emissions standards were to be set, thus increasing by many times the number of hazardous air pollutants that EPA had listed for action.<sup>69</sup> In light of these substantial amendments to section 112, the Senate and the House of Representatives chose to modify section 111(d) in distinct ways. The Senate version of the bill simply removed the reference to section 112(b)(1)(A) and inserted in lieu thereof a reference to section 112(b), the location of the list of pollutants in the newly amended section 112.<sup>70</sup> The language in the House version, by contrast, excluded the regulation of pollutants under section 111(d) that are “emitted from a source category which is regulated under section 112.”<sup>71</sup> The technical change in the Senate amendment did not substantively alter the previous version of the statute, but the effect of the language in the House amendment would appear to

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63. Proposed Rule, *supra* note 10, 79 Fed. Reg. at 34,844.

64. 42 U.S.C. § 7411(d)(1) (2012).

65. Kaswan, *supra* note 62, at 180; *see also* Proposed Rule, *supra* note 10, 79 Fed. Reg. at 34,844.

66. *See generally* Clean Air Act Amendments of 1989, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

67. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.

68. *See* Clean Air Act Amendments of 1989, sec. 301, § 112, 104 Stat. at 2531-74 (codified at 42 U.S.C. § 7412); *see also* The Honorable Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1748-52, 1772-77 (1991).

69. *See* Clean Air Act Amendments of 1989, sec. 301, § 112, 104 Stat. at 2531-74 (codified at 42 U.S.C. § 7412).

70. *See id.*, sec. 302, § 111(d)(1), 104 Stat. at 2574 (codified at 42 U.S.C. § 7411 (2012)).

71. *Id.*, sec. 108(f), § 111(d)(1)(A)(i), 104 Stat. at 2467 (codified at 42 U.S.C. § 7411(f)(1) (2012)).

leave a large gap in the Act: if an existing source belongs to a source category that is regulated under section 112, then its emissions of hazardous pollutants included on the list in section 112 could be regulated, but its emissions of other pollutants, which would otherwise be covered by section 111(d), could not be regulated.

By what is undoubtedly a clerical oversight, the version of the bill that emerged from the conference committee and was eventually signed into law included both provisions. The House amendment, as a substantive change, was included in section 108 of title I.<sup>72</sup> The Senate amendment, as a conforming change, was included in section 302 of title III.<sup>73</sup> Although both provisions are included in the Statutes at Large, only the House version became part of the U.S. Code.<sup>74</sup> The discrepancy has never been decisively resolved, in part because section 111(d) has been so rarely employed, although in a prior rulemaking during the Bush Administration EPA referred to the Senate amendment as a “drafting error” that “should not be considered.”<sup>75</sup>

#### A. *Petitioners’ Interpretation of Section 111(d)*

The state petitioners contend that EPA’s carbon emissions rule for existing sources is unlawful under the plain text of section 111(d) as it appears in the U.S. Code.<sup>76</sup> Under this reading, a section 111(d) standard of performance cannot be established “for any air pollutant” that is “emitted from a source category which is regulated under [section 112].”<sup>77</sup> EPA issued in 2000 a finding<sup>78</sup> that regulation of fossil-fuel-fired power plants under section 112 was “appropriate and necessary” and reaffirmed that

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72. *Id.*

73. *Id.* at 2574.

74. See 42 U.S.C. § 7411 note (Amendments) (“Subsec. (d)(1)(A)(i). Pub. L. 101-549, § 302(a), which directed the substitution of ‘7412(b)’ for ‘7412(b)(1)(A)’, could not be executed, because of the prior amendment by Pub. L. 101-549, § 108(g) . . . . Pub. L. 101-549, § 108(g), substituted ‘or emitted from a source category which is regulated under section 7412 of this title’ for ‘or 7412(b)(1)(A).’”).

75. Revision of December 2000 Regulatory Finding on 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, 16,031 (Mar. 29, 2005) (codified at 40 C.F.R. pt. 63). The rulemaking, which sought to regulate mercury emissions from fossil-fuel-fired sources under section 111(d) instead of section 112, was eventually vacated. See *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008).

76. See Brief for Petitioners at 31, *West Virginia v. EPA*, 788 F.3d 330 (D.C. Cir. 2015) (No. 14-1146).

77. 42 U.S.C. § 7411(d)(1) (2012).

78. Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825 (Dec. 20, 2000).

finding in 2012.<sup>79</sup> Therefore, because these facilities are to be regulated as sources of hazardous air pollutants and subject to section 112, EPA is precluded from establishing federal guidelines governing non-hazardous air pollutants, such as greenhouse gases, under section 111(d).

Admittedly, this approach creates “a minor regulatory gap between [s]ection 112 and [s]ection 111(d)” because it strips EPA of the authority to regulate a number of non-hazardous air pollutants from some of the most dangerous sources: those that emit hazardous air pollutants.<sup>80</sup> Although states are still free to regulate in the area without binding federal requirements—as did Oregon with greenhouse gas emissions<sup>81</sup>—the political pressure against such regulation is often too great for meaningful legislation at the state level.<sup>82</sup>

The state petitioners, however, assert that the “regulatory gap” was in fact a purposeful act of Congress. In their view, “EPA had a choice between regulating [hazardous air pollutants] emitted from existing power plants under the national standards of [s]ection 112 or all emissions from those power plants under the state-by-state standards of [s]ection 111(d).”<sup>83</sup> The agency’s “decision in 2012 to regulate power plants under [s]ection 112 thus signaled [its] apparent intent to legally disable itself from regulating existing power plants under [s]ection 111(d).”<sup>84</sup>

This perception is consistent with a literal interpretation of the statute as it appears in the U.S. Code. In 2005, for example, EPA attempted to remove fossil-fuel-fired power generation facilities from the sources to be regulated under section 112 and regulate mercury emissions from those facilities through section 111(d).<sup>85</sup> In that rulemaking, EPA acknowledged that “a literal reading of [the House amendment] is that a standard of performance under section 111(d) cannot be established for *any* air pollutant . . . emitted from a source category regulated under section 112.”<sup>86</sup> Thus, it sought to regulate power generation facilities only under section 111, an approach that was struck down in *New Jersey v. EPA* because the agency had not made the required findings to de-list a source

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79. National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units, 77 Fed. Reg. 9304, 9310 (Feb. 16, 2012) (codified at 40 C.F.R. pts. 60, 63).

80. Brief for Petitioners, *supra* note 76, at 34.

81. See OR. ADMIN. R. 340-215 (2011).

82. See McGinley, *supra* note 3, at 258 (“The modern coal and power industries . . . have no difficulty being heard by public policy decision-makers.”).

83. Brief for Petitioners, *supra* note 76, at 33.

84. *Id.* at 15.

85. See Revision of December 2000 Regulatory Finding on 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, 16,032 (Mar. 29, 2005) (codified at 40 C.F.R. pt. 63).

86. *Id.* at 16,031 (emphasis added).

category under the statute.<sup>87</sup> As a result, fossil-fuel-fired power generation facilities remained on the list of regulated source categories in section 112, thereby prohibiting regulation under section 111.<sup>88</sup>

*B. EPA’s Interpretation of Section 111(d)*

Prior to the release of the final rule, EPA contended that the conflicting amendments to section 111(d) that appear in the Statutes at Large “render[ed the provision] ambiguous” and allowed the agency to “reasonably construe [section 111(d)] to authorize the regulation of” greenhouse gases.<sup>89</sup> This argument is based upon the doctrine of administrative deference, under which a reviewing court will evaluate only the reasonableness of the administering agency’s interpretation of an ambiguous statutory provision.<sup>90</sup> EPA’s argument depended on its assumption that the conflicting versions of section 111(d) create an “implicit delegation” of authority to the agency to resolve the issue in the absence of clear direction from Congress.<sup>91</sup>

To the extent that EPA’s revised interpretation of the statute appearing in its final rule does not follow logically from the statute’s plain text, the agency implicitly continues to rely on *Chevron* deference. In the preamble to the final rulemaking, EPA “conclude[s] that the two differing amendments are not properly read as conflicting,”<sup>92</sup> which differs from its previously advocated position, but the agency nonetheless maintains its interpretation that its rule is lawful. EPA interprets section 111(d) to preclude the promulgation of a standard of performance to address any hazardous air pollutant that is emitted from a source category regulated under section 112.<sup>93</sup> The agency argues that a literal interpretation of the text as it appears in the U.S. Code is unreasonable because the result

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87. See *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008).

88. *Id.* (“Because coal-fired EGUs are listed sources under section 112, regulation of existing coal-fired EGUs’ mercury emissions under section 111 is prohibited, effectively invalidating [the proposed section 111(d) rulemaking’s] regulatory approach.”).

89. EPA, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Elec. Util. Generating Units 23 (2014), <http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf> [hereinafter EPA, Legal Memorandum]; see also Final Brief for Respondent EPA at 33–45, *West Virginia v. EPA*, 788 F.3d 330 (D.C. Cir. 2015) (No. 14-1146).

90. See *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 845 (1984).

91. See *id.* at 844.

92. Final Rule, *supra* note 35, 80 Fed. Reg. at 64,711.

93. *Id.* (“[T]he House amendment and the Senate [a]mendment should each be read to mean . . . that the [s]ection 112 Exclusion does not bar the regulation under CAA section 111(d) of non-HAP from a source category, regardless of whether that source category is subject to standards for HAP under CAA section 112.”); EPA, Legal Memorandum, *supra* note 89, at 26; see also Final Brief for Respondent EPA, *supra* note 89, at 51.

“would be inconsistent with” the spirit of the 1990 amendments to regulate more pollutants and “the fact that . . . EPA has historically regulated non-hazardous air pollutants under section 111(d), even where those air pollutants were emitted from a source category actually regulated under section 112.”<sup>94</sup> This reading permits EPA to regulate greenhouse gas emissions from fossil-fuel-fired power generation facilities because greenhouse gas pollutants do not appear on the section 112(b) list of hazardous air pollutants.<sup>95</sup> In support of its position that its interpretation is reasonable, EPA alleges that “the text as presented in the U.S. Code could be read to exclude virtually every pollutant from regulation under [s]ection 111(d), because it would be difficult to identify any pollutant that is not emitted from at least one source category that is regulated under [section] 112.”<sup>96</sup>

In reaching its interpretation, EPA reasons that the “regulated under section 112” language in the statute applies to source categories regulated under the HAP program, but also applies only to hazardous pollutants because the section 112 HAP program is not meant to apply to all pollutants.<sup>97</sup> This reading, EPA avers, makes it “reasonable to interpret the House amendment . . . as only excluding the regulation of HAP emissions under CAA section 111(d) and only when that source category is regulated under CAA section 112.”<sup>98</sup> In effect, the agency’s “interpretation reads the House amendment . . . as determining the scope of what air pollutants are to be regulated under CAA section 111(d), as opposed to creating a wholesale exclusion for source categories.”<sup>99</sup>

This interpretation, which corresponds to the text of the Senate amendment, is consistent with the manner in which section 111(d) was employed prior to the 1990 amendments.<sup>100</sup> More specifically, under the previous text, the prohibition against regulation applied only to particular pollutants rather than entire source categories regulated under section

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94. EPA, Legal Memorandum, *supra* note 89, at 26–27 (citing Revision of December 2000 Regulatory Finding on 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, 16,031–32 (Mar. 29, 2005) (codified at 40 C.F.R. pt. 63)).

95. *See id.* at 27; *see also* 42 U.S.C. § 7412(b).

96. *See* EPA, Legal Memorandum, *supra* note 89, at 22–23 n.22.

97. Final Rule, *supra* note 35, 80 Fed. Reg. at 64,714.

98. *Id.*

99. *Id.* at 64,715.

100. *See* 42 U.S.C. § 7411(d) (1980) (amended 1990); *see also* Final Rule, *supra* note 35, 80 Fed. Reg. at 64,711 (Prior to the 1990 amendments, the statute “demonstrated that section 111(d) is designed to regulate pollutants from existing sources that fall in the gap not covered by the criteria pollutant provisions or the hazardous air pollutant provisions.”).

112.<sup>101</sup> That only particular pollutants would be excluded makes sense after considering that the NAAQS, HAP, and the section 111 performance standards programs “constitute a comprehensive scheme to regulate air pollutants with ‘no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare.’”<sup>102</sup> Moreover, EPA continued to interpret section 111(d) in this fashion despite the textual change in the 1990 amendments. A proposed rulemaking released shortly after the 1990 amendments became effective is illustrative: “[A] designated pollutant [under section 111] is one that may cause or contribute to [the] endangerment of public health or welfare but is not ‘hazardous’ within the meaning of section 112 . . . .”<sup>103</sup> EPA reaffirmed this approach in a related document developed during the Clinton administration, even while assuming that the text of the House amendment was the exclusive text of section 111.<sup>104</sup>

## V. THE SIGNIFICANCE OF THE “CORRECT” INTERPRETATION

### A. *Deciphering the “Correct” Interpretation*

Existing scholarship and the traditional sources to which courts generally look for guidance provide few clues to aid in elucidating the “correct” meaning of section 111(d) after the 1990 amendments. It is virtually undeniable that the plain text of section 111(d), as it appears in the U.S. Code, renders the rule unlawful because the carbon dioxide emissions for which it establishes standards of performance are emitted by fossil-fuel-fired power generation facilities, a source category regulated under Section 112<sup>105</sup>: state plans must “establish[] standards of performance for any existing source for any air pollutant . . . which is not . . . emitted from a source category which is regulated under [section 112].”<sup>106</sup>

However, section 111(d) is located in title 42 of the U.S. Code, which is a “non-positive law” title, meaning that it has never been enacted as a

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101. See Final Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae in Support of Respondent at 5, *West Virginia v. EPA*, 788 F.3d 330 (D.C. Cir. 2015) (No. 14-1146).

102. Final Rule, *supra* note 35, 80 Fed. Reg. at 64,711 (quoting S. REP. NO. 91-1196, at 20 (1970)).

103. Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 56 Fed. Reg. 24,468, 24,469 (proposed May 30, 1991) (codified at 40 C.F.R. pts. 51, 52, 60).

104. See EMISSION STANDARDS DIV., U.S. ENVTL. PROT. AGENCY, EPA-453/R-94-021, AIR EMISSIONS FROM MUNICIPAL SOLID WASTE LANDFILLS – BACKGROUND INFORMATION FOR FINAL STANDARDS AND GUIDELINES 1-5 to 1-6 (1995), <http://www3.epa.gov/ttn/atw/landfill/bidfl.pdf>.

105. See 42 U.S.C. § 7411(d)(1) (2012); see also EPA, Legal Memorandum, *supra* note 89, at 22.

106. 42 U.S.C. § 7411(d)(1).

federal statute but is merely “an editorial compilation” of individually passed federal statutes.<sup>107</sup> For titles considered “positive law,” the version appearing in the U.S. Code “constitute[s] legal evidence of the law” as enacted by Congress.<sup>108</sup> For titles considered “non-positive law,” however, the version in the U.S. Code is only “prima facie evidence of the law.”<sup>109</sup> Normally, this distinction does not matter, except that “[s]tatutory text appearing in a non-positive law title may be rebutted by showing that the wording in the underlying statute is different.”<sup>110</sup> Because “[t]he text of the law appearing in the Statutes at Large prevails over the text of the law appearing in a non-positive law title” of the U.S. Code, section 111(d) legally contains both the Senate and the House amendments.<sup>111</sup> Therefore, it is technically improper to disregard entirely the Senate amendment as the petitioners have done in making their assertion that EPA’s carbon emissions rule is unlawful.

Given that the amendment was relatively minor when compared to the changes to other provisions of the Clean Air Act, the legislative history of the 1990 amendments seldom mentions section 111(d). In fact, the initial bill introduced in the House indicates that its primary purpose was “[t]o amend the Clean Air Act to control hazardous air pollutants.”<sup>112</sup> The language in the proposed section 112(b)(2)(B)(i) is illustrative: “Any air pollutant which is included on the list under section 108(a), or which is regulated for a source category under section 111(d) may not be added to the list” of hazardous air pollutants.<sup>113</sup> Although this provision was not included on the final bill enacted into law, it is consistent with the House amendment to section 111(d) because it demonstrates that the House intended that the pollutants regulated under section 111 and section 112 would not overlap. The House amendment seems to assume that power generation facilities would be regulated primarily under section 112 because of their potential to emit many hazardous air pollutants, as evidenced by the specific provision for electric utility steam generating units codified as section 112(n)(1)(A).<sup>114</sup> EPA itself has averred that “[i]t is

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107. Office of the Law Revision Counsel, *Positive Law Codification*, U.S. CODE, <http://uscode.house.gov/codification/legislation.shtml> (last visited Feb. 15, 2015).

108. *Id.* For example, Title 10 of the U.S. Code is a positive law title because the entire title has been enacted by Congress in a single bill. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*; see also *Five Flags Pipe Line Co. v. DOT*, 854 F.2d 1438, 1440 (D.C. Cir. 1988) (“[W]here the language of the Statutes at Large conflicts with the language in the United States Code that has not been enacted into positive law, the language of the Statutes at Large controls.”); Clean Air Act Amendments of 1989, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

112. H.R. 4, 101st Cong. (1989).

113. *Id.*

114. See Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired



hard to conceive that Congress would have adopted section 112(n)(1)(A), yet retained the Senate amendment to section 111(d).<sup>115</sup> Nonetheless, section 112(n)(1)(A) does not expressly limit EPA’s authority under section 111 to promulgate standards of performance with regard to pollutants classified as non-hazardous.

The D.C. Circuit has interpreted section 112(n)(1)(A) to mandate that fossil-fuel-fired power generation facilities be regulated under section 112, as long as EPA made the finding required under that provision.<sup>116</sup> *New Jersey v. EPA* involved a challenge to EPA’s rulemakings attempting to remove coal- and oil-fired power plants from regulation under section 112 and establish standards of performance for those facilities regarding mercury emissions under section 111.<sup>117</sup> Presumably because none of the litigants argued otherwise, the court used only the language from the U.S. Code version of section 111(d) when it stated: “Because coal-fired [power plants] are listed sources under section 112, regulation of existing coal-fired [power plants’] mercury emissions under section 111 is prohibited.”<sup>118</sup> In order for EPA to receive deference in light of the clear language in section 112(n), according to the court, “it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.”<sup>119</sup> The language in section 112(n)(1)(A) does not, in and of itself, suggest that standards under section 112 are the exclusive mechanism for regulating fossil-fuel-fired power generation facilities.

The Supreme Court in *Massachusetts v. EPA*<sup>120</sup> took a decidedly more liberal approach that cut in favor of regulation under multiple provisions of the Act. Although its holding dealt specifically with mobile sources of greenhouse gases,<sup>121</sup> the Court appeared to sanction the regulation of greenhouse gas emissions from other sources by including those emissions “well within the Clean Air Act’s capacious definition of ‘air pollutant.’”<sup>122</sup> The Court went far beyond simply stating that EPA was *authorized* to regulate greenhouse gas emissions by asserting that “EPA can avoid taking further action [to regulate greenhouse gas emissions] *only if* it determines

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Electric Utility Steam Generating Units from the Section 112(c) List, 70 Fed. Reg. 15,994, 16,030 (Mar. 29, 2005) (codified at 40 C.F.R. pt. 63).

115. *Id.* at 16,031; *see also* 42 U.S.C. § 7412(n)(1)(A) (2012).

116. *See New Jersey v. EPA*, 517 F.3d 574, 579 (D.C. Cir. 2008); *see also supra* note 22.

117. *New Jersey v. EPA*, 517 F.3d at 577.

118. *Id.* at 578.

119. *Id.* at 582 (quoting *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)).

120. 549 U.S. 497 (2007).

121. *See id.* at 532.

122. *Id.*; *see also* Glicksman, *supra* note 1, at 530 (“The Court’s holding [in *Massachusetts v. EPA*] nevertheless almost assuredly supports the conclusion that the [Clean Air Act] authorizes EPA to regulate [greenhouse gas] emissions from stationary sources . . .”).

that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”<sup>123</sup> EPA’s explanation that it was “unwise” to issue mandatory standards regulating vehicular greenhouse gas emissions<sup>124</sup> was criticized as unreasonable; the Court essentially ordered that EPA issue the standards unless “the scientific uncertainty [was] so profound that it preclude[d] EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming . . . . The statutory question is whether sufficient information exists to make an endangerment finding.”<sup>125</sup> Justice Scalia condemned this approach, stating that “[t]he reasons EPA gave are surely considerations executive agencies *regularly* take into account . . . when deciding whether to consider entering a new field.”<sup>126</sup>

Scalia’s dissent in *Massachusetts v. EPA* partially explains the majority’s holding in *Utility Air Regulatory Group v. EPA*,<sup>127</sup> the most recent decision dealing with EPA’s regulation of greenhouse gases under the Clean Air Act. The holding in *Massachusetts v. EPA* would allow greenhouse gases to be addressed in any part of the Act that included a definition of “air pollutant,” bringing a very large number of sources under the purview of programs designed to deal with few sources.<sup>128</sup> Instead, the Supreme Court held that “the term ‘air pollutant’ was intended by Congress to have different meanings” for the Act as a whole and for “operative” provisions within the Act.<sup>129</sup> The implication of this decision is that depending on the particular section of the Act, EPA may or may not have authority to regulate greenhouse gases under that program. Indeed, Justice Breyer pointed out that the decision “drains the Act of its flexibility and chips away at our decision in [*Massachusetts v. EPA*]” by “read[ing]

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123. *Massachusetts v. EPA*, 549 U.S. at 533 (emphasis added).

124. *Id.* at 511.

125. *Id.* at 534. EPA made its endangerment finding in 2009. See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

126. *Massachusetts v. EPA*, 549 U.S. at 552 (Scalia, J., dissenting). Justice Scalia felt it improper that an agency’s reasons for deferring judgment aside from “scientific uncertainty” were precluded. See *id.* at 550–51.

127. 134 S. Ct. 2427 (2014).

128. See Matthew R. Oakes, *Questioning the Use of Structure to Interpret Statutory Intent: A Critique of Utility Air Regulatory Group v. EPA*, 124 YALE L.J. F. 56, 58 (2014); see also *Util. Air Regulatory Grp.*, 134 S. Ct. at 2436 (“Under EPA’s view, once greenhouse gases became regulated under any part of the Act, the PSD and Title V permitting requirements would apply to all stationary sources with the potential to emit greenhouse gases in excess of the statutory thresholds . . .”).

129. Oakes, *supra* note 128, at 58; see *Util. Air. Regulatory Grp.*, 134 S. Ct. at 2439.

greenhouse gases out” of a significant Clean Air Act program intended to regulate large stationary sources of air pollutants.<sup>130</sup>

Although these three decisions do not shed much light on the “correct” interpretation of section 111(d), they do stand for the proposition that EPA has the authority to regulate greenhouse gas emissions under the Clean Air Act. This in itself is “a significant victory” for EPA that signals the Court’s acceptance of federal regulation of pollutants that contribute to global climate change.<sup>131</sup> In fact, in ruling that the Act “displace[s] any federal common law right to seek abatement of carbon[ ]dioxide emissions from fossil-fuel[-]fired power plants,” the Court virtually sanctioned the regulation of those pollutants under section 111.<sup>132</sup> Nonetheless, the Court also acknowledged that “EPA may not employ [section 111(d)] if existing stationary sources of the pollutant in question are regulated under . . . the ‘hazardous air pollutants’ program.”<sup>133</sup> Although an interpretation of section 111(d) was not essential to the outcome, the Court’s statement seems to indicate that the Supreme Court, like the D.C. Circuit, followed only the version of section 111(d) in the U.S. Code, which parallels the language from the House amendment.

The Supreme Court’s recent decision in *Michigan v. EPA*<sup>134</sup> adds another complex element to the litigation challenging the section 111(d) rule. The Court held that EPA improperly failed to consider costs in finding that regulation of power plants under section 112 is “appropriate and necessary”<sup>135</sup> and remanded the matter to the D.C. Circuit without explicitly vacating the rule. Upon remand, the D.C. Circuit permitted EPA to continue to enforce its mercury standards as it completes its cost analysis, which is projected to be available in April 2016.<sup>136</sup> Despite an objection from states opposed to the rule that EPA had no authority to issue the standards absent an “appropriate and necessary” finding, the Supreme Court did not step in to modify the D.C. Circuit’s decision.<sup>137</sup> Because “the ‘appropriate and necessary’ standard . . . governs the initial decision to regulate”<sup>138</sup> however, EPA’s consideration of costs in making that finding could lead the agency to conclude that regulating power plants under

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130. *Util. Air. Regulatory Grp.*, 134 S. Ct. at 2454 (Breyer, J., concurring in part and dissenting in part).

131. Oakes, *supra* note 128, at 56.

132. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

133. *Id.* at 2537 n.7.

134. 135 S. Ct. 2699 (2015).

135. *See id.* at 2712; *see also supra* note 22.

136. Lyle Denniston, *EPA’s Mercury Pollution Rule Remains in Effect*, SCOTUSBLOG (March 3, 2016, 10:57 AM), <http://www.scotusblog.com/2016/03/epas-mercury-pollution-rule-remains-in-effect/#more-239417>.

137. *Id.*

138. *Michigan v. EPA*, 135 S. Ct. at 2709.

section 112 is no longer “appropriate and necessary.” The section 112 rule would then be not only superfluous but also unlawful, since its authority comes from the “appropriate and necessary” finding. Without a section 112 rule governing power plants, the prohibition in section 111(d) that is the heart of the *West Virginia v. EPA* litigation is not triggered.

Because EPA reads no conflict between the section 111(d) and section 112 rules, the order in which the rules are released is immaterial to the agency. It is unclear whether regulating hazardous air pollutants under section 112 that are emitted from a source category addressed by a section 111(d) rule is contrary to the statutory language of section 111(d) because the statute does not discuss whether a rule promulgated under the authority of section 112 invalidates an existing section 111(d) rule governing that source category. A savings provision does exist to prevent section 112 emissions standards from overriding more stringent emissions standards promulgated under other authority, including section 111.<sup>139</sup> This language suggests that at a minimum, rules promulgated under sections 111 and 112 can exist simultaneously.<sup>140</sup> EPA has in the past issued rules for both sections 111(d) and 112, first regulating emissions from a particular source category under section 111(d) and subsequently regulating that source category under section 112.<sup>141</sup> Both rules remain in effect<sup>142</sup> and have not been challenged under the language contained in section 112(d)(7). This suggests that publishing a section 111(d) rule first, in the absence of a section 112 rule addressing the same sources, is permissible under the statute. There is no evidence within the text of the section 112 exclusion itself to suggest that a section 112 rule cannot be promulgated *after* a section 111(d) rule. However, assuming that the purpose of the section 112 exclusion is to prevent dual regulation of source categories under section

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139. See 42 U.S.C. § 7412(d)(7) (2012) (“No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to [section 111] . . .”).

140. See *NRDC v. EPA*, 749 F.3d 1055, 1059 (D.C. Cir. 2014) (“EPA suggests that [s]ection 112(d)(7) is simply a savings clause that makes clear that [s]ection 112 does not supersede the requirements of other, more restrictive provisions of the [CAA].”); Final Brief of Industry Intervenors at 2, *id.* (Nos. 10-1371, 10-1378, 13-1112) (“This provision only forbids EPA from supplanting standards set under *other* CAA provisions with a [section] 112(d) standard that may be less stringent.”). *But see* Final Brief of Respondents at 18, *id.* (Nos. 10-1371, 10-1378, 13-1112) (listing section 111(b) new source performance standards as potentially covered by section 112(d)(7) but making no mention of section 111(d) existing source standards).

141. Specifically, EPA issued section 111(d) standards for existing sources governing municipal solid waste landfills in 1996, Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 61 Fed. Reg. 9905 (Mar. 12, 1996) (codified at 40 C.F.R. pts. 51, 52, 60), and Section 112 standards governing the same sources in 2003, National Emission Standards for Hazardous Air Pollutants: Municipal Solid Waste Landfills, 68 Fed. Reg. 2227 (Jan. 16, 2003) (codified at 40 C.F.R. pt. 63).

142. The section 111(d) rule is codified at 40 C.F.R. pt. 60, subpt. Cc (2015), and the section 112 rule is codified at 40 C.F.R. pt. 63, subpt. AAAA (2015).

111(d) and the more stringent section 112 program, it would make sense that a section 111(d) rule and a section 112 rule covering the same source category—even if addressing different pollutants—cannot exist simultaneously. A section 112 rule governing emissions from a particular source category would therefore invalidate a preexisting section 111(d) rule governing pollutants emitted from that same source category.

More likely than not, the text of section 111(d) should be read as EPA reads it; that is, EPA cannot use section 111(d) to address hazardous air pollutants specifically listed under section 112 for source categories that are listed under section 112.<sup>143</sup> The likely intended meaning of the statute as amended focuses on more aggressively regulating a larger number of pollutants under the section 112 program while avoiding duplicative regulation of those pollutants for certain source categories under section 111(d).<sup>144</sup> Therefore, EPA reads the statute to preclude regulation of any air pollutant under section 111(d) that is already regulated under section 112.<sup>145</sup> Such a reading may be facially misguided, but it makes sense in light of the legislative history, which makes no mention of the regulatory gap created by a literal reading of the House amendment. That silence suggests that the House did not intend to significantly modify the operation of section 111(d) by making the textual change.<sup>146</sup> The Senate amendment prohibits the regulation under section 111(d) of any pollutant that is included on the list of hazardous air pollutants in section 112(b).<sup>147</sup> The House amendment prohibits the regulation under section 111(d) of any pollutant that is emitted from a source category that is regulated under Section 112.<sup>148</sup> The change essentially leaves a slew of pollutants—those that were not included on the list of hazardous air pollutants but are nonetheless emitted from a source category that also emits hazardous air pollutants—unregulated under the Act. Because these pollutants were previously able to be regulated under section 111, the change represents a substantial alteration in the scope of the provision. Common sense dictates that if the House had intended to make such a drastic modification, it would have explained its reasoning in the legislative history.

This is, however, simply not what the statute says, and “the court’s function [in interpreting a statute] is [not] to ascertain the intention of the

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143. See Final Rule, *supra* note 35, 80 Fed. Reg. at 64,711 n.289.

144. *Id.*; see also Final Brief for Respondent EPA, *supra* note 89, at 47; Waxman, *supra* note 68, at 1774–75.

145. EPA, Legal Memorandum, *supra* note 89, at 51.

146. See Final Rule, *supra* note 35, 80 Fed. Reg. at 64,714 (“There is no reason to conclude that the House amendment was intended to abandon the existing structure and relationship between the [NAAQS, HAP, and section 111 performance standards] programs in this way.”).

147. See Clean Air Act Amendments of 1989, Pub. L. No. 101-549, sec. 302, § 111, 104 Stat. 2399, 2574 (1990) (codified at 42 U.S.C. § 7411 (2012)).

148. See *id.* at 2467.

legislature with respect to the matter in issue.”<sup>149</sup> Allowing *Chevron* deference to control in this instance—thus concluding that the statute is “ambiguous” because it contains two different versions of the same subsection—releases the doctrine from its moorings in agency expertise and provides for an impermissible delegation of both legislative and judicial power. *Chevron* deference is intended to address situations in which Congress lacks the requisite knowledge to regulate effectively and delegates its power to an administrative agency;<sup>150</sup> for example, allowing EPA to determine the BSER to be applied to existing stationary sources. The Supreme Court expressly repudiated EPA’s attempt to adjust statutory terms to suit practical realities in *Utility Air Regulatory Group*.<sup>151</sup> EPA, in the rulemaking challenged in that case, had modified a numerical threshold that had been set by statute. Although the Court’s ruling did not require statutory interpretation, it nonetheless made clear that administrative power “necessarily includes both authority and responsibility to resolve some questions left open by Congress”—after all, this is why *Chevron* deference exists—but does not allow for “revis[ion of] clear statutory terms.”<sup>152</sup>

“[T]he power to interpret and apply the law” is a “core function[]” of the judiciary<sup>153</sup> that need not be unnecessarily usurped by the *Chevron* doctrine. The court can, of course, disallow an agency’s attempt to interpret a statute favorably by holding that the language is unambiguous, but the court is still faced with the obstacle that “[u]nacted intentions or wishes cannot be given effect as law.”<sup>154</sup> Instead, the court must rely on “the benevolent presumption . . . that the legislature is made up of reasonable men pursuing reasonable purposes reasonably”<sup>155</sup> who mean what they say in the legislation that is passed and signed into law by the executive. This is a basic tenet of the textualist approach to statutory interpretation: “Congress, the argument goes, will be more careful in drafting statutes if it knows that courts will faithfully apply the statutory text that Congress writes.”<sup>156</sup> Even a textualist, however, would not allow an “absurd”

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149. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

150. See Robert L. Glicksman, *Balancing Mandate and Discretion in the Institutional Design of Federal Climate Change Policy*, 102 NW. U. L. REV. COLLOQUY 196 (2008).

151. See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014).

152. *Id.*

153. Gregory S. Walston, *Reexamining the Implications of Expanding Constitutional Liberty: How the Supreme Court Misconstrued the Religious Freedom Restoration Act in City of Boerne v. Flores*, 21 T. JEFFERSON L. REV. 23, 32 (1999).

154. HART & SACKS, *supra* note 149, at 1375.

155. *Id.* at 1148.

156. Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 323 (2001).

interpretation caused by a legislative drafting error to determine the meaning of the statute.<sup>157</sup>

The section 111(d) issue presented by the differing amendments to the statute is more than a mere “scrivener’s error,” however, even though the conference committee’s failure to reconcile the House and Senate amendments seems miniscule in light of the expansive amendments to the CAA in 1990. That is, to read section 111(d) to allow the regulation of any air pollutant not listed under the HAP program emitted from a source category that is listed under section 112 is meaningfully distinguishable from reading “partly” as “party” or even reading “winning party” as “losing party” in a fee-shifting statute.<sup>158</sup> The best solution here, then, is to attempt to read the provisions in such a way as to be compatible and urge Congress to take action in more clearly defining the scope of section 111(d). The Supreme Court, however, appears more likely to follow EPA’s reasoning given its recent strategy in interpreting the meaning of “an Exchange established by the State” as used in the Affordable Care Act.<sup>159</sup> The petitioners urged an interpretation of the statutory language that would make those purchasing health insurance on a Federal Exchange ineligible for tax credits and thus likely outside the Act’s coverage requirement.<sup>160</sup> Because this interpretation was at odds with the general statutory purpose to increase the number of insured, the Court refused to adopt a literal reading of the language, finding instead that its objective was to interpret the language consistent with congressional intent “to improve health insurance markets, not to destroy them.”<sup>161</sup> Had the Court not held that tax credits applied to individuals who purchased insurance from a Federal Exchange, the statute would effectively have caused the same “death spiral” the law was initiated to prevent.<sup>162</sup> The controversial method of statutory interpretation utilized in reaching the *King* decision aside,<sup>163</sup> the Court’s reasoning does not apply to section 111(d) because the Clean Air Act consists of various parts designed to work in tandem to reduce air pollution. Nothing in the language of section 111(d) indicates that it is the sole mechanism for regulation of particular pollutants or sources, and its clear language need not be ignored to authorize regulation of greenhouse gases simply because that is the tool EPA has chosen to use.

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157. *Id.* at 333.

158. *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 235 (2012).

159. *King v. Burwell*, 135 S. Ct. 2480, 2492–93 (2015); *see also* 26 U.S.C. § 36B(b)(2)(A) (2012).

160. *See King*, 135 S. Ct. at 2487.

161. *Id.* at 2496.

162. *Id.* at 2493.

163. *See id.* at 2506 (Scalia, J., dissenting); *see also* Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 416–18 (2015).

The language of the Senate amendment precludes regulation under section 111(d) of any air pollutant that is also regulated from the same source category under the HAP program. The language of the House amendment, by contrast, precludes regulation under section 111(d) of *any* air pollutant, regardless of whether it appears on the section 112 list, emitted from a source category regulated under section 112. This distinction is slight, but the effect is that the House amendment precludes regulation of more pollutants from a given source category than does the language of the Senate amendment. Although to read the statute according to the language of the House amendment appears to be at odds with the purpose of the CAA amendments to allow, if not force, EPA to regulate more substances, the Court cannot ignore this language and “arrogate to [itself] the functions of the legislature.”<sup>164</sup> Its previous case law mandates this conclusion, requiring the Court to exercise “a measure of skepticism” when an agency “claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy.’”<sup>165</sup> Congress must clearly delegate authority to an agency if it wishes the agency to decide questions of “vast ‘economic and political significance.’”<sup>166</sup> EPA’s rule seeks to overhaul the American energy economy, despite section 111(d)’s history as a little-used regulatory mechanism. This is exactly the type of situation that mandates close scrutiny by a reviewing court.

### B. Policy Implications

The use of section 111(d) to tackle climate change issues is practical because it permits EPA, states, and industry to use so-called “flexible compliance mechanisms,” in contrast to more stringent and costly technological standards that “lower compliance costs and increase efficiency of regulatory programs.”<sup>167</sup> The design of the proposed standards for carbon dioxide emissions, which are based on BSER “building blocks,” provides opportunities for states to implement guidelines set by EPA at the federal level through “flexible regulatory options” determined through consultation with representatives of industry, government, and public interests.<sup>168</sup> “Ultimately, the most important factor for achieving both [greenhouse gas] and co-pollutant reductions will be the stringency of

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164. HART & SACKS, *supra* note 149, at 1148.

165. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

166. *Id.* (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160).

167. Final Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae in Support of Respondent, *supra* note 101, at 22.

168. *See id.* at 23.



EPA’s [section 111(d)] standards . . . .”<sup>169</sup> Reading the language of the statute to prohibit regulation of many of these clearly harmful—yet not “hazardous”—pollutants may seem unreasonable because “[p]reserving the agency’s ability to use the flexible compliance mechanisms of [s]ection 111(d) is . . . desirable from the perspective of efficiently and effectively reducing harmful air pollution,”<sup>170</sup> but it must be done in the absence of clear direction from Congress about the meaning of the statute. EPA has chosen to regulate greenhouse gases under section 111(d), possibly for the “flexible compliance mechanisms” it provides. This was a conscious decision on the part of the agency, but section 111(d) is certainly not the exclusive mechanism of regulation under the Clean Air Act. If EPA seeks to avoid the gap created by the regulatory scheme in section 111(d), then it may choose to use another method, such as listing greenhouse gases as “hazardous air pollutants” under section 112.

“[C]oal-fired power generation is a logical candidate for emission controls or other regulatory restrictions designed to mitigate climate change” due to coal’s extremely high carbon content relative to other fuel sources.<sup>171</sup> Given the large variety and amount of pollutants emitted by coal-fired power generation facilities, it is unwise, if not foolish, not to impose some regulation of these sources at the federal level. Power plants are, in fact, heavily regulated under other Clean Air Act programs, including the HAP program, leaving little doubt that Congress recognizes the danger posed by pollutants emitted from such facilities. The past has proven that states—especially those heavily dependent on coal production, such as the ones challenging the rule—cannot or will not regulate these facilities on their own. The apprehension that stems from the politicization of any debate about regulation is enough for many states to simply wait for the federal government to establish binding guidelines so that state and local officials can pass the blame.

“To the degree [the proposed rule’s use of section 111(d)] prompts or intensifies systemic shifts in the [national] energy system, . . . those shifts will have distributional economic impacts on affected communities, disrupting livelihoods for some and increasing opportunities for others.”<sup>172</sup>

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169. Kaswan, *supra* note 62, at 178.

170. Final Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae in Support of Respondent, *supra* note 101, at 26.

171. Glicksman, *supra* note 1, at 529.

172. Kaswan, *supra* note 62, at 193; *see also* Annalee Grant, *Some States Still Have Long Road to Clean Power Plan Compliance*, SNL (Aug. 5, 2015, 1:16 PM), [https://www.snl.com/InteractiveX/Article.aspx?cdid=A-33449883-10030&mkt\\_tok=3RkMMJWWf9wsRojvqnAcO%2FhmjTEU5z16O0tXaK2lMI%2F0ER3fOvrPUfGjI4CS8pkMa%2BTFAwTG5toziV8R7DNLm1wy8YQWhPh](https://www.snl.com/InteractiveX/Article.aspx?cdid=A-33449883-10030&mkt_tok=3RkMMJWWf9wsRojvqnAcO%2FhmjTEU5z16O0tXaK2lMI%2F0ER3fOvrPUfGjI4CS8pkMa%2BTFAwTG5toziV8R7DNLm1wy8YQWhPh); Ken Silverstein, *Despite Lawsuits, Even Coal Country Will Comply with the Clean Power Plan*, FORBES, Aug. 17, 2015, <http://www.forbes.com/sites/kensilverstein/2015/08/17/despite-lawsuits-even-coal-country-will-comply-with-the-clean-power-plan/>.

The policy debate that takes place in front of the public always pits the environment against the economy, which does not reach the heart of the issue.<sup>173</sup> The coal industry considers any attempt at stringent regulations an unjustified “war on coal,” and the economic costs to coal-dependent states are not insignificant.<sup>174</sup> Coal producers, rather than develop innovative methods of sustaining coal’s relevance in the modern economy, have instead continued in a losing political fight to persist in old practices, even as coal production declines further and communities suffer from the loss of thousands of jobs.<sup>175</sup>

Still yet, the environmental costs of allowing carbon emissions to continue unregulated are too strong to ignore. “Coal burning is the world’s largest source of carbon dioxide emissions, accounting for [40.3%] of the total.”<sup>176</sup> Despite the industry’s best efforts to disregard the scientific evidence of global climate change, EPA continues to develop data that proves something must be done about the problem.<sup>177</sup> The lack of a congressional consensus in light of scientific uncertainty and political controversy has certainly not spurred action. The initial passage of the Clean Air Act was in some ways a result of the inadequacy of prior responses to public concern about air pollution by “[a]dministrative agencies and states operating under broad statutory delegations.”<sup>178</sup> The first federal substantive legislation regulating air pollution—however ineffective it proved to be—required congressional “hard choices.”<sup>179</sup> The regulation of greenhouse gases will also test public, political, and industrial suggestions about the best way to deal with the problem. The recent rejection of the cap-and-trade legislation, which had at the very least been accepted by industry advocates before being presented to Congress,<sup>180</sup> epitomizes the political branch’s inability to “turn . . . theoretical . . . consensus into policy reality.”<sup>181</sup>

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173. See McGinley, *supra* note 3, at 315–16.

174. See *id.* at 307, 314.

175. See *id.* at 310–11.

176. *Id.* at 261.

177. See U.S. ENVTL. PROT. AGENCY, EPA 430-R-14-003, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2012 (2014), <http://www.epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2014-Main-Text.pdf>.

178. David Schoenbrod, *Environmental Law and Growing Up*, 6 YALE J. ON REG. 357, 359 (1989).

179. *Id.* at 360.

180. Michael A. Livermore & Richard L. Revesz, *Interest Groups and Environmental Policy: Inconsistent Positions and Missed Opportunities*, 45 ENVTL. L. 1, 11 (2015).

181. *Id.* at 14.

## VI. CONCLUSION

The consequences of not regulating carbon dioxide emissions from fossil-fuel-fired power generation facilities must be addressed. The Obama Administration has recognized the problem of global climate change and its roots in emissions of greenhouse gases, including those from power generation facilities.<sup>182</sup> The impetus lies with Congress, however, to solidify the regulatory approach. Because of its inherent flexibility to address air pollutants not regulated by other programs, section 111(d) could very well be the heart of meaningful regulation of non-hazardous pollutants like greenhouse gases in the future. The potential implications of the textual discrepancy in the statute threaten further regulation in the context of uncertainty, which entails continued litigation and opposition from coal-producing states, industry advocates, and other groups. If Congress cannot reach a consensus about the scientifically and economically best way to address carbon pollution, then this presents an opportunity for congressional delegation of that authority to EPA. Such a delegation likely would not reduce opposition and runs the risk of inadequate application of the congressional mandate, which marked the need for the sweeping amendments to the Clean Air Act in 1990. Standards using “cost–benefit analysis and marketable permit systems,” which were once acceptable to industry operators, represent a “missed opportunity” that may never return.<sup>183</sup> But the same “missed opportunity” may also indicate that the recent Congresses see important limits on the legality of regulation of air pollutants through non-traditional economic programs, such as the outside-the-fence measures EPA has included in the section 111(d) rule.<sup>184</sup> In the absence of congressional action, the way a court addresses the language in section 111(d) will undoubtedly define future regulation of greenhouse gases and other significant air pollutants not covered by other Clean Air Act programs.

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182. See Memorandum of June 25, 2013: Power Sector Carbon Pollution Standards, 78 Fed. Reg. 39,535 (July 1, 2013).

183. Livermore & Revesz, *supra* note 180, at 16.

184. See Nathan Richardson, *Playing Without Aces: Offsets and the Limits of Flexibility Under Clean Air Act Climate Policy*, 42 ENVTL. L. 735, 759 (2012).

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