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Via [Http://www.regulations.gov](http://www.regulations.gov)

Thank you for the opportunity to submit comments on the Environmental Protection Agency's (EPA) advance notice of proposed rulemaking (ANPRM)<sup>1</sup> to solicit information on how (or whether) to replace certain aspects of the so-called Clean Power Plan (CPP),<sup>2</sup> which EPA proposes to repeal.<sup>3</sup>

The comment letter is organized as follows. Part I summarizes the letter's main points. Part II briefly discusses the CPP, EPA's statutory reasons for repeal, and the associated limitations the statute places on any possible replacement rule. Part III makes the case for simply repealing the CPP and not replacing it with new carbon dioxide (CO<sub>2</sub>) emission performance guidelines for existing electric generating units (EGUs). Part IV argues that improving power plant thermal efficiency via equipment upgrades and good practices is inconsistent with the understanding of "best system of emission reduction" (BSER) reflected in all previous CAA section 111 standards, which always based BSER on a specific emission-reduction technology. Part V recaps the key points and concludes the comment letter.

### **Part I: Overview of Key Points**

#### 1. The ANPRM is correct that the CPP is unlawful.

- CAA section 111(d) standards are to reflect the "best system of emission reduction" (BSER) that has been "adequately demonstrated."
- BSER measures "must be based on a physical or operational change to a building, structure, facility, or installation at that source."
- Defying that textual, contextual, and traditional understanding, the CPP chiefly based BSER on "measures that the source's owner or operator can implement on behalf of the source" through economic decisions anywhere in the national electricity marketplace.

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<sup>1</sup> EPA, State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, Advance notice of proposed rulemaking, 82 FR 61507-61519, December 28, 2017, <https://www.gpo.gov/fdsys/pkg/FR-2017-12-28/pdf/2017-27793.pdf>

<sup>2</sup> EPA, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, October 23, 2015, 80 FR 64662-64964, <https://www.gpo.gov/fdsys/pkg/FR-2015-10-23/pdf/2015-22842.pdf>

<sup>3</sup> EPA, Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed rule, 82 FR 48035-48049, October 16, 2017, <https://www.gpo.gov/fdsys/pkg/FR-2017-10-16/pdf/2017-22349.pdf>

2. Even if BSER is confined to measures applicable to and at the source, EPA may not lawfully regulate existing EGUs under CAA section 111(d).

- CAA section 111(d) excludes its application to “any air pollutant” regulated under the national ambient air quality standards program—the so-called NAAQS exclusion—or from a “source category regulated under CAA section 112”—the so-called Section 112 Exclusion.
- Coal- and oil-fueled power plants have been regulated under section 112 since 2012, and natural gas combustion turbines since 2004.
- Hence, the CPP, which regulates CO<sub>2</sub> emissions from existing power plants, is unlawful under the very provision that purportedly authorizes it.

3. Contrary to the proposed CPP and its accompanying legal memorandum, the two versions of the Section 112 Exclusion in the Statutes at Large do not create “ambiguity” allowing EPA to reconcile the texts.

- The version in the U.S Code was passed by the House. As noted, it prohibits CAA section 111(d) regulation of any source category regulated under CAA section 112. The Senate version prohibits CAA section 111(d) regulation of any air pollutant “listed [as a hazardous air pollutant (HAP)] under CAA section 112(b).”
- Claiming the two versions make the statute “ambiguous,” the Obama EPA proposed to interpret the statute to mean that CAA section 111(d) may not regulate HAPs that are actually regulated (not merely listed) under CAA section 112. Since CO<sub>2</sub> is not regulated as a HAP, the CPP concluded, CAA section 111(d) may regulate CO<sub>2</sub> emissions from existing EGUs.
- However, the Senate-passed version is invalid. It would bar EPA from using CAA section 111(d) to regulate any HAP listed under CAA section 112(b). However, CAA section 112(n)(1)(A) gives EPA the option to regulate power plant HAP emissions under other statutory authorities, such as CAA section 111(d).
- Thus, as the Bush EPA observed in the Clean Air Mercury Rule, “It is hard to conceive that Congress would have adopted section 112(n)(1)(A), yet retained the Senate amendment to section 111(d).”
- In addition, the House Law Revision Counsel correctly decided that the Senate version, a mere conforming amendment (clerical revision), “could not be executed,” because it updated a cross reference already deleted by the prior House amendment.
- According to the Senate Managers’ memorandum on the 1990 CAA House-Senate conference committee, the Senate “recedes to” (accepts) the House bill’s provisions “amending section 111 of the Clean Air Act relating to new and existing sources.”

4. Contrary to the final CPP, the House-passed version of CAA section 111(d)—the statute as it appears in the U.S. Code—is not itself ambiguous.

- In effect, the CPP argues that because we can imagine alternative meanings that are plainly “unreasonable” and have never been suggested during the previous 40 years, we are now free to pretend the obvious meaning relied on by the Clinton EPA, the Bush EPA, and even the Obama EPA until promulgation of the final CPP is just one of many equally valid possibilities.
- That is a non-sequitur and does not pass the laugh test.

5. Contrary to the final CPP, the Senate-passed version is not “unambiguous.”

- As the Supreme Court has held, “Ambiguity is not a creature of definitional possibilities but of statutory context.” As explained above, the Senate version of the Section 112 Exclusion is inconsistent with its statutory context—CAA section 112(n)(1)(A), the provision in CAA section 112 dealing with EGUs.
- Read as an isolated phrase, “listed under CAA section 112(b)” is not ambiguous. But a phrase need not be ambiguous to be a drafting error. The CPP tacitly admits the Senate version is in error, because its preferred reading of the text substitutes “regulated under CAA section 112” for “listed under CAA section 112(b).”

6. Even if the House and Senate versions are both valid, EPA would still have no authority to regulate existing power plants under CAA section 111(d).

- If, as the CPP assumes, both versions of the Section 112 Exclusion must be “given effect,” then EPA should simply combine them, not mix and match their elements to suit a political agenda. After all, EPA is an administrative agency, not a conference committee.
- Combining the two prohibitions is simple because they are complementary rather than conflicting.
- To wit: EPA may apply CAA section 111(d) neither to source categories regulated under CAA section 112 nor to air pollutants listed under CAA section 112(b).

7. Contrary to the Obama EPA and environmental petitioners, the U.S. Code version of the Section 112 Exclusion does not punch a “gaping hole” in the “structure” of the CAA, nor does it endanger public health.

- There was never a big demand for CAA section 111(d) regulation—EPA has used CAA section 111(d) to regulate a total of four pollutants from five sources, and none more recently than 1996 (until the CPP).
- The post-1990 proliferation of “maximum achievable control technology” (MACT) standards for virtually all industrial sources of 189 air pollutants leaves very little room for additional regulation via less stringent CAA section 111(d) performance standards.
- In addition, most non-HAP sources operating today were built after the start of the CAA section 111(d) program in 1975. As such, those sources are subject to CAA section 111(b) new source performance standards, which typically are more stringent than CAA section 111(d) standards.
- After decades of industrial stock turnover and the expansion of both CAA section 111(b) and CAA section 112 pollution controls, CAA section 111(d) has become an anachronism of a bygone era when many industrial source categories were still uncontrolled.
- If by some improbable chance, scientists find that aging facilities emit some previously unknown form of dangerous air pollution, EPA could classify and regulate it as a HAP.

8. Contrary to the final CPP, the U.S. Code version of the Section 112 Exclusion does not conflict with CAA section 112(d)(7), which prohibits EPA from interpreting MACT standards to “diminish or replace the requirements” of CAA section 111(d) regulations.

- One can only “diminish or replace” requirements that have already been adopted.
- The Section 112 Exclusion applies prospectively to new CAA section 111(d) regulation of CAA section 112 sources, not retroactively to “previously established” CAA section 111(d) rules.

- Excluding *new and additional* CAA section 111(d) regulation of CAA section 112 sources does not diminish or replace anything.

9. It is not the Section 112 Exclusion but CAA section 111(d) regulation of CO<sub>2</sub> that conflicts with the tripartite structure of the CAA.

- As EPA’s 1975 implementing regulation observes, one reason Congress enacted CAA section 111(d) is that some pollutants are “not emitted by ‘numerous or diverse’ sources as required by section 108.” Carbon dioxide is emitted by both numerous *and* diverse mobile *and* stationary sources. It is exactly the type of ubiquitous “air pollutant” Congress did not intend to be addressed by CAA section 111(d).
- Putting the same point somewhat differently, CAA section 111(d) was designed to address air pollutants with “highly localized” effects. For such pollutants, proximity to the source chiefly determines the associated health risks. Whatever the impacts of CO<sub>2</sub> emissions on global climate, or of climate change on particular communities, the potential health and welfare risks are not affected by proximity to the source.
- Carbon dioxide and CAA section 111(d) are a total mismatch.

10. Defining “best system of emission reduction” in terms of operating efficiency is not consistent with the understanding of CAA section 111 reflected in EPA’s historic practice.

- In all previous CAA section 111 rules, BSER is based on a specific emission-reduction technology. It would be ridiculous, for example, to define BSER for primary aluminum plants in terms of incremental efficiency gains rather than in terms of technologies that can actually control fluoride emissions.
- The Obama EPA acknowledged that retrofitting fossil-fuel power plants with carbon capture and storage (CCS) technology is too costly to pass muster as BSER. However, it refused to face the obvious implication of that assessment: There is no “adequately demonstrated” BSER for CO<sub>2</sub> emissions from existing EGUs.
- The absence of a bona fide BSER is another reason CAA section 111(d) may not be used to control CO<sub>2</sub> emissions from existing fossil fuel power plants, and why the agency should simply repeal rather than replace the CPP.

## **Part II: CPP, Repeal Rule, and ANPRM Overview**

The CPP was the Obama administration’s marquee domestic climate policy and regulatory centerpiece of its emission-reduction pledge under the Paris Climate Treaty.<sup>4</sup> Promulgated under section 111(d) of the Clean Air Act (CAA), the CPP established legally-binding “guidelines” requiring states to adopt CO<sub>2</sub> emission performance standards for existing fossil-fuel electric generating units (EGUs). Unlike previous

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<sup>4</sup> UNFCCC Registry, <http://www4.unfccc.int/ndcregistry/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf>

CAA section 111(d) regulations, CPP emission performance goals exceed the capabilities of the vast majority of both existing and new sources.<sup>5</sup>

Imposing unattainable standards on coal and natural gas combined cycle (NGCC) power plants compelled owners and operators, in their capacity as economic decision-makers, to reduce the *average* emission rate of electric power produced in their state or the nation as a whole. CPP compliance options include purchasing power from lower-emitting generators, investing in lower- and zero-emission new generation, buying emission credits (which creates incentives for other actors to over-comply), or simply producing less power (which cedes market share to lower- or non-emitting facilities).<sup>6</sup>

CAA section 111 performance standards are supposed to reflect the “best system of emission reduction” (BSER) that has been “adequately demonstrated” as effective and affordable. The CPP defines BSER as a combination of three building block strategies: (1) Improve the thermal efficiency (heat rate) of coal power plants, (2) shift base load generation from coal to NGCC power plants, and (3) shift generation from fossil fuel EGUs to new renewable EGUs.

BSER as defined in the CPP is unlawful for two interrelated reasons. First, BSER applies to stationary sources, and CAA section 111 defines “stationary source” as “any building, structure, facility, or installation which emits or may emit air pollutants.” In other words, a stationary source is an individual man-made physical object. The CPP, however, imagines “source” to include “owners” and “operators” in their capacity as economic actors in the electricity marketplace.

Second, the CPP tacitly expands “source” to include state power sectors, regional interconnections, and, indeed, the entire “North American electric grid,” which the CPP describes as a “single,” “complex machine.”<sup>7</sup> In this conception, individual fossil-fuel power plants—the actual “sources” under CAA section 111—are just cogs in the machine. By implication, owners and operators are responsible for the emissions performance of the entire “U.S. power system.”<sup>8</sup> However, the power system is not a valid CAA section 111 source. Rather, it is a market process encompassing hundreds of sources, hundreds of non-emitting EGUs that are not sources, and millions of customers who do not produce power.

After reconsidering the statutory text and context of CAA section 111(d) and the agency’s historic practice, the current EPA concludes that BSER refers to actions “limited to emission reduction measures that can be applied to or at an individual stationary source.” Contrary to the legal theory underpinning the CPP, measures deemed to be BSER “must be based on a physical or operational change to a building, structure, facility, or installation at that source, rather than measures that the source’s owner or operator can implement on behalf of the source at another location.”<sup>9</sup>

The ANPRM seeks information on how EPA might replace certain aspects of the CPP consistent with the repeal proposal’s legal assessment that BSER must reflect emission limitations applicable “to or at a

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<sup>5</sup> CPP performance rates for existing coal and natural gas combined cycle (NGCC) power plants are 1,305 lbs. CO<sub>2</sub>/MWh and 771 lbs. CO<sub>2</sub>/MWh, respectively (80 FR 64667). New highly efficient supercritical pulverized coal units using bituminous coal emit nearly 1,720 lbs. CO<sub>2</sub>/MWh, and new NGCC units on average emit 895 lbs. CO<sub>2</sub>/MWh (80 FR 64594, 64618).

<sup>6</sup> 80 FR 64796–97, 64804–06

<sup>7</sup> 80 FR 64725–64726, 64739, 64740, 64768–64769, 64677

<sup>8</sup> The phrase “power system” occurs 49 times in the CPP.

<sup>9</sup> 82 FR 48039

stationary source, at the source-specific level.”<sup>10</sup> For example, the ANPRM provides and solicits information on the costs and efficacy of various equipment upgrades and good practices that may improve the heat rates of individual coal and NGCC power plants.<sup>11</sup> It also solicits information on other measures that may be available for consideration as BSER for fossil fuel EGUs, as well as emission reduction technologies or practices that may not qualify as BSER because they lack broad applicability but may nonetheless be affordable compliance options for individual units.<sup>12</sup>

Although the ANPRM does not discuss whether simply repealing the CPP with no replacement would be the best policy, it does not foreclose that option. The ANPRM also emphasizes that public comment may address issues not identified in the document.<sup>13</sup> We take that as permission to make the case that EPA should repeal without replacing the CPP.

### **Part III: EPA May Not Lawfully Regulate Existing EGUs under CAA Section 111**

#### Proposed CPP’s Interpretation of the Section 112 Exclusion

EPA should not replace the CPP with another CAA section 111(d) regulation because that very provision prohibits EPA from requiring states to establish performance standards for existing EGUs.

CAA section 111(d) requires states to submit plans to establish “standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source.”<sup>14</sup>

That is a mouthful, but the gist is clear. Once EPA promulgates performance standards for new sources in a particular category under CAA section 111(b), states must establish performance standards for the corresponding existing sources—except in two cases. Under the so-called NAAQS Exclusion, states are not required to establish performance standards for “any air pollutant” listed or evaluated for regulation<sup>15</sup> under CAA section 108. Under the so-called Section 112 Exclusion, states are not required to establish performance standards for “any air pollutant . . . emitted from a source category which is regulated under” the CAA section 112 hazardous air pollutant (HAP) program.

EPA has not listed or issued air quality criteria for CO<sub>2</sub> under section 108, so the NAAQS Exclusion does not seem to bar regulation of CO<sub>2</sub> under CAA section 111(d).<sup>16</sup> However, EPA has regulated coal- and

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<sup>10</sup> 82 FR 61510

<sup>11</sup> 82 FR 61513-61516

<sup>12</sup> 82 FR 61516-61517

<sup>13</sup> 82 FR 61510

<sup>14</sup> The text is available at <https://www.gpo.gov/fdsys/pkg/USCODE-2013-title42/html/USCODE-2013-title42-chap85-subchapl-partA-sec7411.htm>

<sup>15</sup> Air quality criteria are documents (reports) that compile and evaluate “the latest scientific knowledge relevant to assessing the health and welfare effects” of air pollutants regulated under the NAAQS program. See EPA, “Air Quality Criteria for Ozone and Related Photochemical Oxidants (Final Report, 2006), <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=149923>

<sup>16</sup> We use the word “seem” because, as discussed below, CO<sub>2</sub> epitomizes the formal characteristics of NAAQS air pollutants, being emitted by the numerous *and* diverse mobile *and* stationary sources.

oil-fired EGUs under CAA section 112 since February 2012<sup>17</sup> and NGCC combustion turbines since March 2004.<sup>18</sup> Thus, the CPP's ostensible statutory basis, CAA section 111(d), actually prohibits the agency from regulating existing power plants.

The Obama EPA, of course, argued that the Section 112 Exclusion does not apply to either CO<sub>2</sub> or existing power plants. On the same day the agency proposed the CPP, it also published a legal memorandum.<sup>19</sup> The memorandum's argument on the Section 112 Exclusion may be summarized as follows:

1. The House and Senate passed different texts amending CAA section 111(d) in the 1990 CAA Amendments. However, the House-Senate conference committee never reconciled the different versions. The House version is the one included in the U.S. Code, but both versions are in the Statutes at Large, hence both are valid law.
2. While the House version prohibits CAA section 111(d) regulation of any air pollutant "emitted from a source category" regulated under CAA section 112, the Senate version prohibits CAA section 111(d) regulation of any air pollutant listed as a hazardous air pollutant (HAP) under CAA section 112(b), whether or not EPA is actually regulating sources of that pollutant under CAA section 112.
3. Since CO<sub>2</sub> is not a HAP, the Senate version does not prohibit 111(d) regulation of CO<sub>2</sub> emissions from existing power plants.
4. Because the two versions "conflict," the law is "ambiguous," so EPA must use its judgment to determine what the provision means.
5. EPA should "give effect" to both versions insofar as possible. In EPA's judgment, the two versions should be combined such that CAA section 111(d) may not regulate any HAP from a source category actually regulated under CAA section 112.
6. Thus, although CAA section 111(d) as it appears in the U.S. Code bars EPA from requiring CO<sub>2</sub> performance standards for existing power plants, a synthesis of the House and Senate versions allows EPA to do so.<sup>20</sup>

The final CPP rule revised the foregoing analysis to claim that the House version is itself "ambiguous" and can be read to authorize 111(d) regulation of existing power plants, whereas the Senate version is "clear and unambiguous."<sup>21</sup> Both the proposed and final CPP are in error. The House amendment may be inelegant but it is not ambiguous, whereas the Senate version is a source of intractable ambiguity when considered in its statutory context. More importantly, there are not two "versions" of CAA section 111(d), because the Senate entry in the Statutes at Large is a drafting error. In addition, even if we

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<sup>17</sup> EPA, National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 FR 9304-9513, February 16, 2012, <https://www.gpo.gov/fdsys/pkg/FR-2012-02-16/pdf/2012-806.pdf>

<sup>18</sup> EPA, National Emission Standards for Hazardous Air Pollutants for Stationary Combustion Turbines; Final Rule, 69 FR 10512-10548, March 5, 2004, <https://www.gpo.gov/fdsys/pkg/FR-2004-03-05/pdf/04-4530.pdf>

<sup>19</sup> EPA, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units, June 2014, <https://archive.epa.gov/epa/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf> (hereafter Proposed CPP Legal Memorandum)

<sup>20</sup> Proposed CPP Legal Memorandum, pp. 20-27

<sup>21</sup> 80 FR 64712-64713

assume both versions must be given effect, their prohibitions are complementary rather than conflicting, so EPA would still be barred from regulating existing power plants under CAA section 111(d).

#### EPA's 2005 Legal Analysis: Inconvenient Information Ignored by the Proposed CPP

The proposed CPP legal memorandum claims to follow<sup>22</sup> the Bush EPA's interpretation of the Section 112 Exclusion as presented in the March 2005 Clean Air Mercury Rule (CAMR).<sup>23</sup> Both documents agree on the following points:

- A "literal" reading of the House amendment bars the application of CAA section 111(d) to any air pollutant emitted from a source category regulated under CAA section 112.
- Nearly all industrial source categories are now regulated under CAA section 112. Hence the Section 112 Exclusion would today bar states from establishing CAA section 111(d) performance standards for virtually all source categories.
- Such a sweeping exclusion "would be inconsistent with the general thrust of the 1990 amendments, which, on balance, reflects Congress's desire to require EPA to regulate more substances, not to eliminate EPA's ability to regulate large categories of pollutants like non-HAP."<sup>24</sup>
- Consequently, EPA should combine elements of the House and Senate versions such that CAA section 111(d) may regulate non-HAP emissions from sources regulated under section 112.

However, there are important differences between the two documents. The CAMR includes information that weakens the CPP's argument and conclusion.

First, the CAMR notes that the two amendments differ in kind. The Senate version of section 111(d) appears in a section of the final Senate bill labelled "conforming amendments." That means the Senate entry in the Statutes at Large is a "non-substantive amendment"—a clerical revision designed to update a textual reference. Although the final House bill also had a section of conforming amendments, the House amendment "does not appear in that section of the bill."<sup>25</sup> The CAMR implies the House amendment is a substantive revision, intended to change legislative policy. As such, it should be given more weight than a mere housekeeping amendment.

Second, whatever may be the "general thrust" of the 1990 Amendments, the House amendment is consistent with Congress's more specific desire to avoid "duplicative or overlapping regulation" of electric utilities.<sup>26</sup>

Third, although the CAMR strives to give effect to both amendments, it also raises doubts about the legal basis of that procedure:

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<sup>22</sup> Proposed CPP Legal Memorandum, p. 26

<sup>23</sup> EPA, 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; Final Rule, 70 FR 16029-16032, March 29, 2005, <https://www.gpo.gov/fdsys/pkg/FR-2005-03-29/pdf/05-6037.pdf>

<sup>24</sup> 70 FR 16032; Proposed CPP Legal Memorandum, p. 26

<sup>25</sup> 80 FR 16030, 16031

<sup>26</sup> 70 FR 16031



Neither we, nor commenters, have identified a canon of statutory construction that addresses the specific situation with which we are now faced, which is how to interpret two different amendments to the exact same statutory provision in a final bill that has been signed by the President. The canon of statutory construction that calls for harmonizing conflicting statutory provisions, where possible, and adopting a reading that gives some effect to both provisions is not controlling here because that canon applies where two provisions of a statute are in conflict, not where two amendments to the same statutory provision are in conflict.<sup>27</sup>

Fourth, and most importantly, the CAMR acknowledges that the Senate amendment “appears” to be a “drafting error and should not be considered.”<sup>28</sup> In a nutshell, the Senate version of CAA section 111(d) is consistent with the Senate version of CAA section 112, which Congress did not enact. In contrast, the House version of CAA section 111(d) is consistent with the House version of CAA section 112, which Congress did enact. Most importantly, the Senate version of CAA section 111(d) is inconsistent with CAA section 112 as enacted.

Here are some of the pertinent details. The House bill for the 1990 CAA Amendments included a section 112(l), “which the conference committee adopted as the provision governing Utility Units (section 112(n)(1)(A)).” That section requires EPA to regulate EGUs as a HAP source category only if the Administrator determines, through a three-year study, that such regulation is “appropriate and necessary” after considering the 1990 CAA’s “imposition” of “other requirements.”<sup>29</sup> EPA might determine, for example, as it did in the CAMR, that regulations promulgated under the Title IV acid deposition program supplemented by CAA section 111 performance standards adequately control HAP emissions from power plants.

The Senate conforming amendment is inconsistent with CAA section 112(n)(1)(A), because when regulating power plant HAP emissions, EPA would no longer have the option to use CAA section 111(d) performance standards instead of CAA section 112(d) maximum achievable control technology (MACT) standards. EPA would have little choice but to determine that MACT regulation of power plants is “appropriate and necessary.” Thus, the CAMR acknowledged: “It is hard to conceive that Congress would have adopted section 112(n)(1)(A), yet retained the Senate amendment to section 111(d).”<sup>30</sup>

Note that the Senate bill’s version of CAA section 112 did not allow EPA to consider other authorities for regulating power plant HAP emissions. Rather, it “required EPA to establish section 112(d) emission standards for Utility Units by a date certain.” That language and the Senate version of the Section 112 Exclusion were compatible. However, the Senate bill’s CAA section 112 language on power plants “was never enacted into law.”<sup>31</sup>

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<sup>27</sup> 70 FR 16031

<sup>28</sup> Ibid.

<sup>29</sup> Text is available at <https://www.gpo.gov/fdsys/pkg/USCODE-2013-title42/html/USCODE-2013-title42-chap85-subchapl-partA-sec7412.htm>

<sup>30</sup> 70 FR 16301

<sup>31</sup> Ibid.

In short, what EPA in 2005 found “hard to conceive” is that Congress meant to repeal—through a conforming amendment, no less—a substantial portion of the regulatory discretion it expressly gave the agency with respect to EGUs under CAA section 112.<sup>32</sup>

### Murray Energy and State Amicus Brief Analyses

On the day EPA published the proposed CPP in the *Federal Register* (June 18, 2014), Murray Energy Corporation, the nation’s largest privately-owned coal company, petitioned the D.C. Circuit Court of Appeals to stop EPA from further work on the rulemaking. Murray argued that EPA’s CAA section 111(d) authority is limited to existing sources not already regulated under CAA section 112. One week later, nine states led by West Virginia filed an amicus brief in support of the petition.<sup>33</sup> In December 2014, Murray Energy submitted a brief urging the Court to halt EPA’s “illegal” rulemaking.<sup>34</sup>

According to the state AGs’ amicus brief, the Senate’s conforming amendment is “clearly” a drafting error “because it sought to make a clerical correction to Section 111(d) rendered unnecessary by a superseding substantive amendment.” Specifically, the Senate amendment attempts to update a cross reference to “112(b)(1)(A)” in the 1977 CAA section 111(d) by replacing it with “112(b).” However, the House amendment eliminated the reference to 112(b)(1)(A), rendering the Senate’s amendment unnecessary and inapplicable.<sup>35</sup>

Murray Energy’s opening brief develops that point in some detail. In the Statutes at Large, the two amendments are labeled SEC. 108(g) and SEC. 302(a). They appear as follows:

#### SEC. 108. MISCELLANEOUS GUIDANCE. . . .

(g) REGULATION OF EXISTING SOURCES.—Section 111(d)(1)(A)(i) of the Clean Air Act (42 U.S.C. 7411(d)(1)(A)(i)) is amended by striking “or 112(b)(1)(A)” and inserting “or emitted from a source category which is regulated under section 112”.

#### SEC. 302. CONFORMING AMENDMENTS.

(a) Section 111(d)(1) of the Clean Air Act is amended by striking “112(b)(1)(A)” and inserting in lieu thereof “112(b)”.

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<sup>32</sup> Although the D.C. Circuit Court of Appeals struck down the CAMR in *New Jersey v. EPA* (2008), EPA’s discretionary authority under CAA section 112(n)(1)(A) was not in dispute. The Court vacated the CAMR because the Bush EPA failed to make the requisite “findings” before “delisting” EGUs as a HAP source category. See *New Jersey v. EPA*, February 8, 2008, slip op. p. 6, [https://www.cadc.uscourts.gov/internet/opinions.nsf/68822E72677ACBCD8525744000470736/\\$file/05-1097a.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/68822E72677ACBCD8525744000470736/$file/05-1097a.pdf)

<sup>33</sup> Brief of West Virginia, et al. in Support of the Petitioner, June 25, 2014, <http://www.globalwarming.org/wp-content/uploads/2014/12/Murray-Energy-Corp-v-EPA-June-25-2014.pdf> (hereafter State Amicus Brief)

<sup>34</sup> Murray Energy Corporation, Petitioner, v. Environmental Protection Agency and Regina A. McCarthy, Opening Brief of Petitioner, December 15, 2014, <http://www.globalwarming.org/wp-content/uploads/2014/12/Murray-Energy-opening-brief-Dec-15-2014.pdf> (Hereafter Murray Energy Opening Brief)

<sup>35</sup> State Amicus Brief, p. 3

Because the House substantive amendment already eliminated what had been CAA section 112(b)(1)(A) in the pre-1990 text, the Senate conforming amendment could not be “executed.” The House Office of Law Revision Counsel explained:

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), see below.<sup>36</sup>

Murray Energy’s brief also challenges the reasonableness of basing a momentous change in public policy on the “superfluous” deletion of “six characters” from a cross-reference:

The legal irrelevance of the conforming amendment here is especially obvious for it would do nothing other than update a reference by deleting the text “(1)(A).” It beggars belief that the superfluous instruction to remove these six characters when the entire reference “112(b)(1)(A)” had already been removed by a substantive amendment with real force and purpose could cloud the meaning of the Clean Air Act, let alone form the basis for a massive regulatory undertaking seeking to utterly transform the nation’s energy system.<sup>37</sup>

The brief further notes that, in 1995, the Clinton Administration EPA unambiguously affirmed the correctness of the House amendment and, thus, of CAA section 111(d) as adopted in the U.S. Code. For readability, we divide the Clinton EPA’s commentary into three paragraphs:

Section 111(d)(1)(A) was twice amended by the 1990 Clean Air Act Amendments. Pub. L. 101-549, section 302(a), directed the substitution of “7412(b)” for “7412(b)(1)(A),” and Pub. L. 101-549, section 108(g), substituted “or emitted from a source category which is regulated under section 7412 of this title” for “or 7412(b)(1)(A).” Title 42 of the U.S. Code adopts the amendment of section 108(g) with the explanation that section 302(a) could not be executed because of the prior amendment by section 108(g). 42 U.S.C. section 7411 (Supp. IV 1993).

The EPA also believes that section 108(g) is the correct amendment because the Clean Air Act Amendments revised section 112 to include regulation of source categories in addition to regulation of listed hazardous air pollutants, and section 108(g) thus conforms to other amendments of section 112. The section not adopted by title 42, 302(a), on the other hand, is a simple substitution of one subsection citation for another, without consideration of other amendments of the section in which it resides, section 112.

Thus EPA agrees that CAA section 111(d)(1)(A) should read “[t]he Administrator shall prescribe regulations which . . . 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>38</sup>

<sup>36</sup> Murray Energy Opening Brief, pp. 30, 48. Office of Law Revision Counsel of the U.S. House of Representatives, 42 USC § 7411, Standards of Performance for New Stationary Sources, <http://uscode.house.gov/>

<sup>37</sup> Murray Energy Opening Brief, p. 50

<sup>38</sup> EPA, [Air Emissions from Municipal Solid Waste Landfills – Background Information for Final Standards](#), 1995, pp. 1, 5-6

Thus, the Clinton EPA concluded that existing sources already regulated under CAA section 112 may not be regulated under CAA section 111(d). Nowhere in the proposed CPP, the accompanying legal memorandum, or the final CPP do we find acknowledgment that in 1995, EPA affirmed the correctness CAA section 111(d) as published in the U.S. Code.

Finally, whereas the proposed CPP claims the existence of two texts in the Statutes at Large renders CAA section 111(d) “ambiguous,”<sup>39</sup> requiring EPA to reconcile the two versions, the State Amicus brief points out that such scrivener’s errors are common in complex modern legislation:

*Amici’s* research has revealed hundreds of clerical errors that have been excluded from the U.S. Code because they “could not be executed,” exactly as occurred here. Of these hundreds of errors, numerous examples involved the precise “drafting error” that occurred here: a clerical amendment rendered moot by substantive amendments, and in each case the clerical amendment was excluded because it “could not be executed.” As this Court observed in *American Petroleum*, these sorts of obvious “scrivener’s errors” are common in modern, complex legislation. 714 F.3d at 1336-37. *Amici* are not aware of a single case giving substantive meaning to these sorts of clerical “drafting errors.”<sup>40</sup>

The brief warns that allowing agencies to invoke *Chevron* deference based on drafting errors in the Statutes at Large will encourage agency power grabs and undermine regulatory predictability:

But if EPA’s novel argument here is accepted, numerous provisions of the U.S. Code would be called into doubt, as clerical errors that have been long excluded from the Code would now be creatively read as grievous ambiguities.<sup>41</sup>

Statement of Senate Managers of the 1990 CAA conference committee: Senate “recedes to” the House.

On December 16, 2014, the House Energy and Commerce (E&C) Committee released a report on legal and other issues regarding the proposed CPP. The report reproduces the Statement of Senate Managers on the House-Senate conference committee that finalized the text of the 1990 CAA Amendments. The pertinent language follows:

SECTION 108-MISCELLANEOUS PROVISIONS. . . . In addition, the House amendment contains provisions for a technology clearinghouse to be established by the Administrator, for amending section 111 of the Clean Air Act relating to new and existing sources, for amending section 302 of the Clean Air Act which contains definitions, to provide a savings clause, to state that reports that are to be submitted to Congress are not subject to judicial review, and for other purposes.

Conference agreement. The Senate recedes to the House except that with respect to the requirement regarding judicial review of reports, the House recedes to the Senate, and with

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<sup>39</sup> 79 FR 34853

<sup>40</sup> State Amicus Brief, p. 17

<sup>41</sup> *Ibid.*, pp. 11-12

respect to transportation planning, the House recedes to the Senate with certain modifications.<sup>42</sup>

So, the Senate Managers state that the Senate “recedes to” provisions in the House bill “amending section 111 of the Clean Air Act relating to new and existing sources.”

Note, too, the Senate Managers do not mention the Senate amendment on CAA section 111(d)—likely because a conforming amendment superseded by a substantive amendment is not important enough to discuss. The E&C Committee report reasonably concludes:

This language [the Senate conforming amendment] was not expressly considered by the conferees because such consideration was unnecessary. The language served as a technical correction, the point of which was to replace a statutory reference that had been rendered obsolete by amendments to section 112 with a reference that would accurately conform to the revised section 112. This technical edit inadvertently remained in the legislation taken up by Congress. Once the substantive House provisions were adopted, this technical edit was rendered non-executable because the reference it replaced no longer existed. Subsequent review by the Office of Law Revision Counsel correctly identified this obsolete provision and corrected it in the U.S. Code.<sup>43</sup>

Even if the Senate amendment were valid law, EPA would still have no authority to regulate power plants under CAA section 111(d).

The CPP purports to “give both amendments meaning” by mixing elements of each.<sup>44</sup> But the resulting interpretation also discards elements of each amendment. EPA’s attempt to reconcile the two texts is highly dubious. After all, EPA is an administrative agency, not a conference committee.

If, as the CPP assumes, both versions must be “given effect,”<sup>45</sup> because both are in the Statutes at Large, then EPA should simply combine them, not edit both to suit a political agenda.

Combining the amendments is simple because their prohibitions are complementary rather than conflicting. The House version of CAA section 111(d) prohibits EPA from requiring states to establish performance standards for *any air pollutant* emitted from a *source category* regulated under CAA section 112. The Senate amendment prohibits EPA from requiring states to establish performance standards for *any air pollutant listed* in CAA section 112(b). If both amendments are valid law, then EPA may apply CAA section 111(d) neither to source categories regulated under CAA section 112 nor to air pollutants listed under CAA section 112(b).

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<sup>42</sup> House Energy and Commerce Committee, *EPA’s Proposed CO<sub>2</sub> Regulations for Existing Power Plants: Critical Issues Raised in Hearings and Oversight*, December 16, 2014, p. 9, <http://www.globalwarming.org/wp-content/uploads/2014/12/House-Energy-Commerce-Oversight-Report-December-2014.pdf> (hereafter House E&C Report)

<sup>43</sup> *Ibid.*, pp. 9-10

<sup>44</sup> 80 FR 64710

<sup>45</sup> 80 FR 64712

Ironically, the Natural Resources Defense Council (NRDC), EarthJustice, the Clean Air Task Force, and other CPP advocates took that position in their lawsuit to overturn the CAMR. They chided the Bush EPA for contriving a conflict between the House- and Senate-passed versions of CAA section 111(d):

EPA fails to refute Environmental Petitioners' argument that the plain statutory reading that most readily "fit[s] all parts into a harmonious whole," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal citation omitted), prohibits EPA from setting §111 standards for pollutants like mercury "emitted from a source category which is regulated under section 112" or included on the §112(b) list of pollutants, as mercury is.<sup>46</sup>

When environmental organizations wanted to subject power plants to MACT standards under CAA section 112(d), they agreed that EGUs as a *source category* are exempt from regulation under CAA section 111(d).

Contrary to the Final CPP, the House amendment is not ambiguous.

The proposed CPP argued that the meaning of the 112 exclusion in CAA section 111(d) is "ambiguous" because House- and Senate-passed "versions conflict with each other."<sup>47</sup> As the accompanying legal memorandum acknowledged, "a literal reading of that language [in the House-passed version] would mean that the EPA could not regulate any air pollutant from a source category regulated under section 112."<sup>48</sup>

In contrast, the final CPP concludes that the House-passed version is itself "ambiguous and subject to numerous possible meanings."<sup>49</sup> Indeed, the final CPP professes to find so much ambiguity in the House-passed version that it can and should be interpreted to allow CAA section 111(d) regulation of sources regulated under CAA section 112.<sup>50</sup> The CPP purports to demonstrate the House amendment's ambiguity in three arguments. Each is strained, none withstands scrutiny.

First, the CPP claims "the text of the House-amended version of CAA section 111(d) could be read literally as authorizing the regulation of any pollutant that is not a criteria pollutant." This reading supposedly arises if we focus on the use of "or" to join three clauses. The CPP quotes the text and inserts numbers in brackets to flag each clause:

The Administrator shall prescribe regulations . . . under which each State shall submit to the Administrator a plan which establishes standards of performance for any existing source for any air pollutant [1] for which air quality criteria have not been issued or [2] which is not included on a list published under section 7408(a) of this title or [3] emitted from a source category which is regulated under section 7412 of this title. . . .<sup>51</sup>

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<sup>46</sup> Final Reply Brief of Environmental Petitioners, State of New Jersey, et al., Petitioners v. Environmental Protection Agency, Respondent, July 23, 2007, p. 13,

<https://www.scribd.com/document/229670753/Environmental-Plaintiffs-Reply-Brief-New-Jersey-v-EPA>

<sup>47</sup> 79 FR 34853

<sup>48</sup> EPA, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines, p. 26

<sup>49</sup> 80 FR 64713

<sup>50</sup> 80 FR 64712-64715

<sup>51</sup> 80 FR 64713

The CPP claims that because the text contains the conjunction “or” rather than “and” between the three clauses, “a literal reading could read the three clauses as alternatives, rather than requirements to be imposed simultaneously.” It is unclear what that sentence means. The CPP attempts to clarify it: “In other words, a literal reading of the language of section 111(d) provides that the Administrator may require states to establish standards for an air pollutant so long as either air quality criteria have not been established for that pollutant, or one of the remaining criteria is met.”<sup>52</sup>

That is pettifoggery. It is obvious that clauses [1] and [2] refer to the first two steps of a NAAQS rulemaking, specified in CAA section 108. The provision requires EPA to “list” health- or welfare endangering air pollutants “from numerous or diverse mobile or stationary sources” and “issue air quality criteria” documents for such pollutants. Whichever of those steps EPA takes triggers the NAAQS Exclusion. The text does not imply, and no administration, court, or petitioner has inferred, that CAA section 111(d) may regulate any pollutant, including those listed under CAA section 108, as long as quality criteria have not been issued.

Contrary to what the CPP suggests, if we substitute “and” for “or” before the second and third clauses, we would not remove ambiguity but confound the three authorities Congress established to regulate stationary sources. The text below revises the statute per the CPP’s suggestion to replace “or” with “and” (emphasis added):

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

As revised above, the text now means EPA may use CAA section 111(d) to regulate any air pollutant *unless* it is *both* subject to NAAQS regulation *and* emitted from a source category regulated under CAA section 112. But that would mean EPA may use CAA section 111(d) to regulate *all* hazardous air pollutants, because EPA does not list or establish air quality criteria for HAPs under CAA section 108. In addition, EPA would be able regulate *any* “criteria” air pollutant under CAA section 111(d) if the pollutant were not emitted by a source category regulated under CAA section 112.

Both results are contrary to the basic structure of CAA Title I, which establishes separate authorities to address criteria air pollutants (CAA sections 107-110), hazardous air pollutants (CAA section 112), and other pollutants (CAA section 111(d)). Thus, the CPP’s claim to find ambiguity in the text because the clauses are joined by “or” rather than “and” is ridiculous. Substituting “and” for “or” mixes up Title I authorities Congress intended to separate. In effect, the CPP argues that because we can imagine a different text that makes no sense, the House-passed version of CAA section 111(d) is “ambiguous.” That is a complete *non sequitur*.

The CPP also contends that “ambiguity results” when we focus “on the lack of negative” before the third clause. The CPP explains:

That is, unlike the first and second clauses that each contain negative phrases (either “has not been issued” or “which is not included”), the third clause does not. One could presume that the

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<sup>52</sup> Ibid.

negative from the second clause was intended to carry over, implicitly inserting another “which is not” before “emitted from a source category which is regulated under section [112].” But that is a presumption, and not the plain language of the statute.<sup>53</sup>

More pettifoggery. Reading the third clause in light of the negative in the second clause is the natural reading of the provision. If we insert a negative before the third clause, we do not make the text clearer, we just make it more ponderous by adding another “which” to the five already contained in the sentence, as can be seen if we revise the text per the CPP’s suggestion (emphasis added):

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

The CPP then contends that because we are free to read the third clause independently of the negative in the second clause, the text can be read to mean that CAA section 111(d) *must be used* to regulate HAPs:

The text as amended by the House says that the EPA “shall” prescribe regulations for “any air pollutant . . . emitted from a source category which is regulated under section [112].” . . . Thus, CAA section 111(d)(1)(A)(i) could be read as providing for the regulation of emissions of pollutants if they are emitted from a source category that is regulated under CAA section 112.<sup>54</sup>

As the CPP acknowledges, “this second reading is not reasonable because it would provide for the regulation of a source’s HAP emissions under CAA section 111(d) when those same emissions were also subject to standards under CAA section 112.” However, that undermines the CPP’s claim that the text is “ambiguous.” Again, just because we can imagine obviously wrong interpretations does not make the text ambiguous. That would only be the case if nonsensical possibilities carry equal weight with the interpretation that the Clinton EPA, the Bush EPA, and even the Obama EPA (when it proposed the CPP) considered the “literal” meaning.

Finally, the CPP argues that the phrase “regulated under section 112” is ambiguous. Does the phrase modify “a source category” without regard to what pollutants are regulated under section 112? Or does “regulated under section 112” refer only to HAPs regulated under that section? If the former, the House-passed version bars EPA from regulating CO<sub>2</sub> emissions from existing power plants. If the latter, the House-passed version is effectively the same as the Senate-passed version, allowing EPA to regulate CO<sub>2</sub> emissions from existing power plants.<sup>55</sup>

Such hand waiving ill-suits an executive agency. The House amendment—the language in the U.S. Code—clearly specifies “a source category regulated under” CAA section 112 and says nothing about “air pollutants” regulated under CAA section 112. The CPP fails to identify any language in the text indicating that *source category* actually means *air pollutant*.

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> 82 FR 64714



Consequently, the CPP is finally driven to claim the text is ambiguous because its natural or obvious meaning is “unreasonable.” Prohibiting CAA section 111(d) regulation of any air pollutant emitted from a source category regulated under section 112 “would eviscerate the EPA’s authority under section 111(d) and prevent it from serving as the gap-filling provision within the comprehensive scheme of the CAA as Congress intended,” the CPP claims.<sup>56</sup>

We examine that argument in the next section of the comment letter. Before doing so, however, we must comment on the CPP’s suggestion that the Senate version of the Section 112 Exclusion more nearly reflects Congress’s intent because the language is “clear and unambiguous” and “straightforward and unambiguous.”<sup>57</sup>

Contrary to the final CPP, the Senate version is ambiguous.

The Senate version requires states to establish performance standards for “any air pollutant . . . which is not included on a list published under section [108(a)] or section [112(b)].”<sup>58</sup> Although that language, viewed in isolation, is “clear” and “straightforward,” the provision is nonetheless ambiguous.

As the Supreme Court has held, “Ambiguity is not a creature of definitional possibilities but of statutory context.”<sup>59</sup> Hence, “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”<sup>60</sup> Hence also, courts and agencies should “fit, if possible, all parts into a harmonious whole.”<sup>61</sup>

The statutory context for the Senate version of the Section 112 Exclusion is, obviously, CAA section 112. As shown above, the Senate version is inconsistent with the very provision of CAA section 112 that deals with EGUs. Read in context, the Senate amendment renders the CAA section 112 ambiguous, if not self-contradictory. Combining the “parts”—CAA section 112(n)(1)(A) and the Senate conforming amendment—would not produce a “harmonious whole.” Rather, the statute would both to allow and prohibit the use of CAA section 111(d) to regulate HAP emissions from EGUs.

Read as an isolated phrase, “listed under CAA section 112(b)” is unambiguous. But a phrase need not be ambiguous to be a drafting error. The CPP tacitly admits the Senate version is in error, because its preferred reading of the text substitutes “regulated under CAA section 112” for “listed under CAA section 112(b).”

In any event, the House amendment fits harmoniously with the special flexibility CAA section 112(n)(1)(A) gives EPA regarding EGUs. When read in context, only the House version is unambiguous.

Contrary to the CPP and environmental petitioners, the U.S. Code version of the Section 112 Exclusion does not punch a “gaping hole” in the “structure” of the CAA, nor does it endanger public health.

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<sup>56</sup> Ibid.

<sup>57</sup> 80 FR 64712

<sup>58</sup> Ibid.

<sup>59</sup> *Brown v. Gardner*, 513 U.S. 115, 118 (1994)

<sup>60</sup> *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)

<sup>61</sup> *Black v. Magnolia Liquor Co.*, 355 U. S. 24, 355 U. S. 26 (1957)

In the CPP litigation, EPA and its allies argue that interpreting the Section 112 Exclusion as applying to source categories would “overthrow” the “structure” of the CAA, endangering public health.

They note, correctly, that the 1970 CAA created a tripartite structure, with sections 107-110 establishing the NAAQS program, section 112 establishing the HAP program, and section 111(d) providing authority to regulate air pollutants not amenable to control under those other sections. As EPA’s brief put it: “Congress designed section [111(d)] to work in tandem with the NAAQS and section [112] programs such that, together, the three programs cover the full range of dangerous emissions from stationary sources.”<sup>62</sup> So far, so good. But the brief then claims:

Under Murray’s reading, there would be a gaping hole in that coverage, leaving sources’ emissions of certain pollutants outside the Act’s scope. Such a result is starkly at odds with the Act’s purpose of protecting “public health and welfare.”<sup>63</sup>

Environmental groups warn of even more dire consequences in their amicus brief. Murray’s reading would exempt all manner of industrial pollutants from section 111(d) regulation, because “Congress intended” that “every large industrial source category” be “subject to regulation under §112 for its hazardous emissions.” Hence, “EPA would largely be deprived of its authority to regulate existing sources’ emissions of dangerous air pollutants not addressed by the NAAQS or HAP programs, such as carbon dioxide, methane, landfill gas, and total reduced sulfur.”<sup>64</sup>

The 1970 CAA envisioned a three-legged stool. But Congress revised and expanded section 112 in the 1990 CAA Amendments. As the environmental *amici* acknowledge, the 1990 CAA requires “every large industrial source category” to be regulated under section 112. Specifically, “Congress listed 189 substances as HAPs and required EPA to list every industrial source category that emits these pollutants and to set source-specific emission standards for each of these source categories.”<sup>65</sup> CAA section 112 MACT standards are typically more stringent than CAA section 111(b) new source performance standards, which are typically more stringent than CAA section 111(d) existing source performance standards. How likely is it that dangerous pollutants from industrial sources are not addressed?

EPA and its allies often claim the agency’s rules have substantial “co-benefits,” because technologies and practices designed to control emissions of pollutant X also reduce emissions of pollutant Y. Indeed, coincidental reductions of non-targeted pollutants account for most of the monetized health benefits in many EPA Regulatory Impact Analyses of recent air regulations.<sup>66</sup> Are we then to suppose that the

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<sup>62</sup> Murray Energy Corporation, Petitioner, v. Environmental Protection Agency, et al., Respondents, Brief for Respondent EPA, February 12, 2015, p. 41, <http://www.globalwarming.org/wp-content/uploads/2015/04/Murray-Energy-EPA-Reply-Brief-Feb-12-2015.pdf> (hereafter Brief for Respondent EPA)

<sup>63</sup> *Ibid.*, p. 58

<sup>64</sup> Murray Energy Corporation, Petitioner, v. Environmental Protection Agency, Brief of the Natural Resources Defense Council, et al., as Amici Curiae in support of respondent, February 12, 2015, p. 28, <http://www.globalwarming.org/wp-content/uploads/2015/04/Murray-Energy-Environmental-Groups-Amicus-Feb-12-2015.pdf>

<sup>65</sup> *Ibid.*, p. 14

<sup>66</sup> Anne E. Smith, Ph.D., An Evaluation of the PM<sub>2.5</sub> Health Benefit Estimates in Regulatory Impact Analyses of Recent Air Regulations, NERA Economic Consulting, Final Report Prepared for the Utility Air Regulatory Group, December 2011, [http://www.nera.com/content/dam/nera/publications/archive2/PUB\\_RIA\\_Critique\\_Final\\_Report\\_1211.pdf](http://www.nera.com/content/dam/nera/publications/archive2/PUB_RIA_Critique_Final_Report_1211.pdf)

dramatic expansion in HAP regulation mandated by the 1990 CAA Amendments would have no important co-benefits in reducing emissions that might otherwise be subject to 111(d)?

During the 45-year period prior to the CPP, EPA used CAA section 111(d) to regulate a total of four pollutants from five sources, including two mentioned above (total reduced sulfur and landfill gas). All those regulations were adopted between 1977 and 1996. There never was a big demand for CAA section 111(d) regulation, and none since 1996—until President Obama looked for “other ways of skinning the cat”<sup>67</sup> after the death of cap-and-trade legislation in the 111<sup>th</sup> Congress.<sup>68</sup> The dearth of CAA section 111(d) rules since 1990 attests to much greater number of “dangerous air pollutants” regulated as HAPs under the 1990 CAA compared to the 1977 CAA and the co-benefits of such regulation.

Note, too, the 112 exclusion does not disturb any *extant* 111(d) regulation, because what it prohibits is the addition of 111(d) regulation to source categories already regulated under section 112, not the addition of 112 regulation to sources regulated under section 111(d).<sup>69</sup> For example, EPA in 1996 required states to adopt existing source performance standards for landfill gas from municipal solid waste landfills.<sup>70</sup> Four years later, the agency established CAA section 112 HAP standards for the same source category.<sup>71</sup> Environmental petitioners somehow forgot about this when they claimed landfill gas is “not addressed” by the HAP program.

The CPP ignores that temporal sequence when, citing CAA section 112(d)(7), it states: “Congress expressly provided that regulation under CAA section 112 was not to ‘diminish or replace the requirements of’ the EPA’s regulation of non-hazardous pollutants under section [111].”<sup>72</sup> One can only “diminish or replace” requirements that have already been adopted. Excluding *additional* CAA section 111(d) regulation of sources already regulated under CAA section 112 does not diminish or replace anything.

Moreover, the Section 112 Exclusion applies only to *existing*, not *new*, facilities. The Section 112 Exclusion does not bar EPA from adopting CAA 111(b) performance standards for new sources regulated under section 112. The rarity of CAA section 111(d) regulations also likely reflects the fact that most non-HAP sources operating today were built after the start of the CAA section 111(d) program in 1975. As such, those sources are subject to CAA section 111(b) new source performance standards, which typically are more stringent than CAA section 111(d) standards. After decades of industrial stock turnover and the proliferation of both CAA section 111(b) and CAA section 112 pollution controls, CAA

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<sup>67</sup> “Cap and trade was just one way of skinning the cat; it was not the only way. It was a means, not an end. And I’m going to be looking for other means to address this problem.” Press Conference by the President, November 3, 2010, <https://obamawhitehouse.archives.gov/the-press-office/2010/11/03/press-conference-president>

<sup>68</sup> Patrick J. Michaels, “IPCC Political-Suicide Pill,” National Review, September 23, 2013, <http://www.nationalreview.com/article/359556/ipcc-political-suicide-pill-patrick-j-michaels>

<sup>69</sup> William Yeatman, “Respectfully Rebutting Professor Revesz on EPA’s Clean Power Plan,” GlobalWarming.Org, March 24, 2015, <http://www.globalwarming.org/2015/03/24/respectfully-rebutting-professor-revesz-on-epas-clean-power-plan/>

<sup>70</sup> Gas collection systems, combustors, open flare systems (EPA, Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 61 FR 9905-9944, March 12, 1996, <http://www.gpo.gov/fdsys/pkg/FR-1996-03-12/pdf/96-5529.pdf>

<sup>71</sup> EPA, Municipal Solid Waste Landfills: National Emission Standards for Hazardous Air Pollutants (NESHAP), <https://www.epa.gov/stationary-sources-air-pollution/municipal-solid-waste-landfills-national-emission-standards>

<sup>72</sup> 82 FR 64714

section 111(d) became an anachronism of a bygone era when many industrial sources were still uncontrolled.

But what if scientists discover some new “dangerous pollutant” from existing sources—would EPA have no recourse if barred from using section 111(d)? In the first place, such pollutants are unlikely to be discovered. As noted, until the CPP, EPA since 1970 had found only four pollutants eligible for regulation under CAA section 111(d), and none more recently than 1996.

In the second place, EPA has the option to fill the “gap” by revising (i.e. expanding) the list of substances it regulates under section 112. The definition of HAPs is capacious, comprehending air pollutants that:

present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise.

In other words, if some not-yet-regulated byproduct from aging industrial facilities presents a threat of adverse human health effects or adverse environmental effects, EPA could classify and regulate it as a HAP. As Murray Energy’s reply brief points out, “No party to this case has identified any pollutant that EPA has found cannot be regulated under new [post-1990] Section 112, but can be regulated under Section 111(d).”<sup>73</sup>

Ironically, it is CAA section 111(d) regulation of CO<sub>2</sub> that conflicts with the CAA’s tripartite structure.

The CPP and environmental petitioners have things backwards. It is not the Section 112 Exclusion but the CPP that conflicts with the tripartite structure of the CAA. As EPA’s 1975 implementing regulation observes, one reason Congress enacted CAA section 111(d) is that some pollutants are “not emitted by ‘numerous or diverse’ sources as required by section 108.”<sup>74</sup> In other words, CAA section 108(a)(1)(b) limits NAAQS regulation to those pollutants whose presence in the ambient air “results from numerous or diverse mobile or stationary sources.” Carbon dioxide is emitted by *both* numerous *and* diverse mobile *and* stationary sources. It is exactly the type of ubiquitous “air pollutant” Congress did not intend to be addressed by CAA section 111(d).<sup>75</sup>

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<sup>73</sup> Murray Energy Corporation, Petitioner, v. Environmental Protection Agency and Regina A. McCarthy, Respondents, Reply Brief of Petitioner, February 26, 2015, p. 36, <http://www.globalwarming.org/wp-content/uploads/2015/04/Murray-reply-brief-2-26-2015.pdf>

<sup>74</sup> EPA, Final Procedures for Implementation of 111(d), November 17, 1975, 40 FR 53340, <https://www.scribd.com/document/225839610/Final-Procedures-for-Implementation-of-111-d-40-FR-53340-Monday-November-17-1975>

<sup>75</sup> If we consider only the structural characteristics of NAAQS pollutants, i.e. their ubiquity due to the number and diversity of sources, CO<sub>2</sub> is the most NAAQS-like of all. Substantively, however, CO<sub>2</sub> is different from every other substance EPA regulates under the CAA. Carbon dioxide is non-toxic at many times ambient levels, is a natural constituent of clean air, helps protect plant life from environmental stresses, boosts agricultural productivity, and is an essential building block of the planetary food chain. See Craig D. and Sherwood B. Idso, The Many Benefits of Atmospheric CO<sub>2</sub> Enrichment, Center for the Study of Carbon Dioxide and Global Change, February 2011, <http://www.co2science.org/education/book/2011/55benefitspressrelease.php>

Putting the point somewhat differently, CAA section 111(d) was designed to address air pollutants with “highly localized” effects.<sup>76</sup> For such pollutants, proximity to the source—the fertilizer plant, the sulfuric acid production unit, the Kraft pulp mill, the primary aluminum plant, the municipal solid waste landfill—chiefly determines the associated health risks. In contrast, CO<sub>2</sub> emissions have no localized effects. Whatever the impacts of CO<sub>2</sub> emissions on global climate, or of climate change on particular communities, the potential health and welfare risks are not affected by proximity to the source. Carbon dioxide and CAA section 111(d) are a total mismatch.

#### **Part IV: Heat Rate Improvement as BSER**

The most detailed and technical portion of the ANPRM<sup>77</sup> is a discussion of various equipment upgrades and good practices that might be used to reduce the heat rate of coal and NGCC power plants. The ANPRM explains the potential of heat-rate improvements to limit CO<sub>2</sub> emissions:

An EGU’s heat rate is the amount of energy input, measured in British thermal units (Btu), required to generate one kilowatt hour (kWh) of electricity. The more efficiently an EGU operates, the lower its heat rate will be. As a result, an EGU with a lower heat rate will consume less fuel per kWh generated and emit lower amounts of GHG and other air pollutants per kWh generated as compared to a less efficient unit.<sup>78</sup>

Improving the thermal efficiency of coal power plants was the first of three “building block” strategies the CPP used to establish BSER and “uniform” (nationwide) emission performance rates for existing coal power plants.<sup>79</sup> Commendably, the ANPRM questions whether “broadly applicable, presumptively approvable emission limitations (even at a subcategorized level)” are “appropriate for GHG emissions from EGUs,” given that “the fleet of U.S. fossil fuel-fired EGUs is varied in terms of size, age, fuel type, fuel usage (e.g. baseload, cycling, etc.) boiler type, etc.”<sup>80</sup>

Accordingly, the ANPRM asks whether EPA should determine “what systems may constitute BSER without defining presumptive emission limits and then allows the States to set unit-by-unit or broader emission standards based on the identified BSER while considering the unique circumstances of the State and the EGU.”<sup>81</sup> That would be preferable to the CPP’s Procrustean bed approach. Uniform heat-rate standards are easily manipulated to rig power markets against fossil fuels.

However, it is doubtful that any variation on the theme of CPP Building Block 1 constitutes a legitimate BSER under CAA section 111(d). Defining BSER in terms of operational efficiency is not consistent with the understanding reflected in EPA’s historic practice. In all previous CAA section 111(d) rules, BSER is based on a specific emission-reduction technology:

- **Scrubbers** (EPA, *Final Guideline Document: Control of Fluoride Emissions from Phosphate Fertilizer Plants*, EPA-450/2-77-005, March 1977, <http://www.globalwarming.org/wp-content/uploads/2014/05/Phosphate-fertilizer.pdf>)

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<sup>76</sup> 40 FR 53342

<sup>77</sup> 82 FR 61513-61516

<sup>78</sup> 82 FR 61513

<sup>79</sup> 80 FR 64674-64675

<sup>80</sup> 80 FR 61513

<sup>81</sup> 80 FR 61511

- **Particle absorbers, mist eliminators** (EPA, *Final Guideline Document: Control of Sulfuric Acid Mist Emissions from Existing Sulfuric Acid Production Units*, EPA-450/2-77-019, September 1977, <http://www.globalwarming.org/wp-content/uploads/2014/05/Sulfuric-Acid-mist.pdf>)
- **Scrubbers, incinerators, washers** (EPA, *Kraft Pulping: Control of TRS [Total Reduced Sulfur] Emissions from Existing Mills*, EPA-450-2-78-003b, March 1979, <http://www.globalwarming.org/wp-content/uploads/2014/05/Kraft-pulping-mills.pdf>)
- **Gas collection hoods** (EPA, *Primary Aluminum Draft Guidelines for Control of Fluoride Emissions from Existing Primary Aluminum Plants*, EPA-450-2-78-049a, February 1979, <http://www.globalwarming.org/wp-content/uploads/2014/05/aluminum.pdf>)
- **Gas collection systems, combustors, open flare systems** (EPA, *Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills*, 61 FR 9905-9944, March 12, 1996, <http://www.gpo.gov/fdsys/pkg/FR-1996-03-12/pdf/96-5529.pdf>).

It would be ridiculous, for example, to define BSER for primary aluminum plants in terms of incremental efficiency gains rather than in terms of technologies that can actually control fluoride emissions. All CAA section 111(b) new source performance standards are also based on specific technologies.

The Obama EPA acknowledged that retrofitting fossil-fuel power plants with carbon capture and storage (CCS) technology is too costly to pass muster as BSER.<sup>82</sup> The ANPR states that “EPA continues to believe that neither CCS nor partial CCS are technologies that can be considered as the BSER for existing fossil fuel-fired EGUs.”<sup>83</sup> However, the Obama EPA refused to face the obvious implication of that assessment: There is no “adequately demonstrated” best system for reducing CO<sub>2</sub> emissions from existing EGUs.

The absence of a bona fide BSER is another reason CAA section 111(d) may not be used to control CO<sub>2</sub> emissions from existing fossil fuel power plants, and why the agency should simply repeal rather than replace the CPP.

## Part V: Conclusion

The CPP is unlawful and should be repealed. As EPA’s repeal proposal argues, CAA section 111 performance standards must reflect emission reduction measures applicable to the source, taking into account cost and each existing facility’s remaining useful life. The CPP chiefly and impermissibly bases performance standards on measures power plant owners and operators must implement outside the source, such as purchasing power from lower-emitting facilities, investing in new non-emitting facilities, or buying emission credits from sources that over-comply.

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<sup>82</sup> 79 FR 34876

<sup>83</sup> 82 FR 61517

The ANPRM solicits information on how EPA might replace the CPP with new regulatory guidelines for states to establish CO<sub>2</sub> performance standards for existing EGUs. The agency should simply repeal the CPP without replacing it.

CAA section 111(d) specifically excludes from regulation “any air pollutant” emitted from a “source category regulated under CAA section 112.” Coal- and oil-fueled power plants have been regulated under section 112 since 2012, and natural gas combustion turbines since 2004. Hence, the CPP, which regulates CO<sub>2</sub> emissions from existing power plants, is unlawful under the very provision that purportedly authorizes it.

The CPP argues that the existence of two texts in the Statutes at Large renders the Section 112 Exclusion ambiguous, that the House-passed (U.S. Code) version is itself ambiguous, and that the Senate version is “unambiguous.” All such claims are false, as explained above.

The Obama EPA and environmental groups warn that heeding the U.S. Code version of the Section 112 Exclusion would punch a “gaping hole” in CAA regulation of stationary sources. In reality, the post-1990 proliferation of both “maximum achievable control technology” (MACT) standards for virtually all industrial sources of 189 specific HAPs and CAA section 111(b) standards for industrial facilities built after the start of the CAA section 111(d) program in 1975 leaves very little room for additional regulation via less stringent CAA section 111(d) performance standards. CAA section 111(d) has become an anachronism of a bygone era when many industrial sources were still uncontrolled.

Ironically, it is CAA section 111(d) regulation of CO<sub>2</sub> that undermines the CAA’s regulatory structure. As EPA’s 1975 implementing regulation explained, Congress enacted CAA section 111(d) to address pollutants that do not result from “numerous or diverse mobile or stationary sources” and have “highly localized effects.” Carbon dioxide emissions have the opposite characteristics. Carbon dioxide is emitted from the most numerous *and* diverse mobile *and* stationary sources, and proximity to the source has no bearing on the potential climate change impacts of CO<sub>2</sub> emissions.

Finally, no variation on the theme of CPP Building Block 1 can make a CPP replacement rule consistent with EPA’s historic practice under CAA section 111. All previous CAA section 111 rules, whether for new or existing sources, based BSER on specific emission control technologies, not on the potential of equipment upgrades and best practices to improve operational efficiency.

EPA should simply acknowledge the reality the Obama EPA refused to face, namely, an adequately demonstrated best system for reducing CO<sub>2</sub> emissions from existing power plants does not exist.

Respectfully submitted,

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