

C O M M E N T S

Here Be Dragons: Legal Threats to EPA's Proposed Existing Source Performance Standards for Electric Generating Units

by Eric Groten

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A 104-page “Legal Memorandum”¹ accompanying the U.S. Environmental Protection Agency’s (EPA’s) proposal of §111(d) Existing Source Performance Standards (ESPS) for Electric Generating Units² under the Clean Air Act (CAA)³ charts the legal waters the Agency will have to traverse if it adopts rules anything like those it proposed. The need for so comprehensive a map arises because EPA proposes a voyage far away from where §111(d) has ever sailed.⁴ But unlike the 16th-century explorers who ignored the dragon warnings at the edges of

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1. U.S. Environmental Protection Agency (EPA), Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units [hereinafter Legal Memo], available at <http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf>.
2. U.S. EPA, Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units, 79 Fed. Reg. 34830 (proposed June 18, 2014). EPA assigns this rule several different names, depending on context, most frequently calling it the “Clean Power Plan.” The name on the birth certificate is an unusual choice, as “carbon” is not an EPA-designated pollutant at all, much less the pollutant for which EPA proposes “guidelines.”
3. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.
4. Although unexplored, the territory is not uncharted: EPA is navigating from a map handed to it by the Natural Resource Defense Council (NRDC) in 2012. See Daniel Lashof et al., *Closing the Power Plant Carbon Pollution Loophole: Smart Ways the Clean Air Act Can Clean Up America’s Biggest Climate Polluters*, NRDC Report No.12-11-A (Mar. 2013), available at <http://www.nrdc.org/air/pollution-standards/files/pollution-standards-report.pdf>; see also Coral Davenport, *Taking Oil Industry Cue, Environmentalists Drew Emissions Blueprint*, N.Y. TIMES (July 6, 2014), http://www.nytimes.com/2014/07/07/us/how-environmentalists-drew-blueprint-for-obama-emissions-rule.html?_r=2. Much of what later appeared as an EPA proposal

their maps, here EPA actually will encounter the identified dangers, which are so great as to reduce to near zero EPA’s prospects for safe crossing to its intended destination.

I. Where Has §111(d) Been?

As the Legal Memo acknowledges, §111(d) has a long but tellingly undistinguished history:

Over the last forty years, under CAA section 111(d), the agency has regulated four pollutants from five source categories (i.e., phosphate fertilizer plants (fluorides) [in 1977], sulfuric acid plants (acid mist) [also in 1977], primary aluminum plants (fluorides) [in 1980], Kraft pulp plants (total reduced sulfur) [in 1979], and municipal solid waste landfills (landfill gases) [in 1996]).⁵

This limited and growingly distant history—consisting of EPA guidelines recommending technology-based limits for a few specific emission points within narrow industry categories that emit an otherwise unregulated pollutant significantly emitted only by one or two industries—is consistent with EPA’s long-expressed understanding of the limited role that §111(d) is to play in CAA regulation.

A. Congress Intended Very Limited Use of §111(d)

In the overall CAA architecture, the ubiquitous pollutants emitted by “numerous or diverse mobile or stationary sources”—a description never more applicable than to greenhouse gases (GHG)—are to be regulated as “criteria pollutants” through development of national ambient air quality standards (NAAQS) under §§108 and 109, the designation of nonattainment areas under §107, and the state

in the *Federal Register* may be found within the pages of NRDC’s policy paper, especially including its legal rationale.

5. Legal Memo, *supra* note 1, at 9-10.

implementation plan (SIP) process generally described in §110 (as elaborated in other parts of Title I of the Act). The U.S. Congress directed the control of hazardous air pollutants (HAPs) by their listing and subsequent regulation under §112, which—as it existed from 1970 to 1990—required EPA to adopt standards for new *and* existing sources of each listed pollutant, “at a level which in [the Administrator’s] judgment provides an ample margin of safety to protect public health”

Congress codified in §111 the technology-forcing elements of the Act—that is, the provisions that require control for control’s sake, as opposed to controls to meet a desired environmental endpoint. Here, Congress required EPA to list a source category if “it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.”⁶ After listing the source category, EPA must adopt “standards of performance” for newly constructed or modified sources within that category that “reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction [(BSER)] which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.”⁷

But it is one thing to prescribe national standards of performance for sources that have not yet been built and whose construction can accommodate emerging design expectations. It is quite another to impose uniform technology-forcing measures on existing sources. For existing sources, §111(d) requires EPA to establish an SIP-like process for setting standards of performance for existing sources in the categories regulated by new source performance standards (NSPS), under which EPA would issue “guidelines” and states would submit source-specific plans that varied from the EPA guidelines as dictated by “other factors.”⁸

As EPA recognized from its beginning, this statutory architecture left for §111(d) a very limited role: technology-forcing of controls on existing sources of pollutants nei-

ther ubiquitous enough to warrant NAAQS attention nor hazardous enough to warrant §112 attention.⁹ EPA understood Congress to be directing the Agency to pass along as “guidelines” to the states the knowledge accumulated from EPA’s development of NSPS—in terms of the capabilities of control technologies for these orphan pollutants—for the states’ use in developing their own rules for analogous existing sources.¹⁰ At the same time, though, they would be merely guidelines, from which variation could be had if the state could show, as to any given source, that the national “standard of performance” did not fit.

B. Emission Guidelines Under §111(d) Have Always Been Based on the Control Technologies Potentially Applicable to “Designated Facilities”

In the rules EPA adopted in 1975 to fulfill its duties under §111(d), the Agency established a general framework under which the adoption of an NSPS for “designated facilities” would be followed by the proposal of “emission guidelines” for “designated pollutants” (defined as any pollutant regulated under the NSPS that are not also covered by either a NAAQS or by §112 regulation).¹¹ The emission guidelines would be mostly informational, documenting for the states’ benefit EPA’s understanding of the health and welfare effects of the “designated pollutants,” a description of the emission controls available, their capabilities, the time frames potentially required for their installation, and so forth.¹²

After final promulgation of these guidelines, each state would then have nine months to either: (1) certify that no designated facilities exist within its jurisdiction; or (2) submit to EPA a state plan to either (a) impose EPA’s emission guideline standards on each of their designated facilities, or (b)

provide for the application of less stringent emissions standards or longer compliance schedules . . . provided that the State demonstrates with respect to each such facility (or class of facilities): (1) Unreasonable costs of control resulting from plant age, location or basic pro-

6. 42 U.S.C. §7411(b)(1).

7. 42 U.S.C. §7411(a)(1).

8. 42 U.S.C. §7411(d)(1) (emphasis added):

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section [108(a)] or emitted from a source category which is regulated under section [112] but (ii) to which a standard of performance under this section would apply if such existing source were a new source Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to *take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.*

9. See 40 Fed. Reg. 53340 (Nov. 17, 1975):

[S]ection 111(d) requires control of existing sources of a pollutant if a standard of performance is established for new sources under section 111(b) and the pollutant is not controlled under sections 108-110 or 112. In general this means that control under section 111(d) is appropriate when the pollutant may cause or contribute to endangerment of public health or welfare but is not known to be “hazardous” within the meaning of section 112 and is not controlled under sections 108-110 because, for example, it is not emitted by “numerous or diverse” sources as required by section 108.

10. See 40 Fed. Reg. at 53343 (“Requiring a technology-based approach [in §111(d)] would also take advantage of the information and expertise available to EPA from its assessment of techniques for control of the same pollutants from the same types of sources under section 111(b) . . .”).

11. *Id.* at 53340 (still codified, largely unchanged, at 40 C.F.R. §60.21).

12. *Id.* at 53346 (then and still codified at 40 C.F.R. §60.22).

cess design; (2) physical impossibility of installing necessary control equipment; or (3) other factors specific to that facility . . .¹³

EPA has once before tried to use §111(d) to establish a cap-and-trade program instead of source-specific limits based on circumstance-adjusted BSER. In the Clean Air Mercury Rule (CAMR), EPA set presumptive mercury emission limits on all coal-fired power plants based on BSER, which it then totaled up to create a national emissions budget.¹⁴ EPA distributed that budget as credits among the states to assign to their existing source populations, which could then trade the credits to allow for optimization of control efforts.

But several things are notable about this use of §111(d). First, the CAMR was vacated by the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit in *New Jersey v. EPA*,¹⁵ and so it remains true that EPA has never (validly) strayed “over the fenceline” when setting §111(d) requirements. Second, even had that approach been validated, it still would have compelled no more than source-by-source compliance with adjusted BSER: The CAMR, in effect, amalgamated the BSER performance of the designated facilities only. Finally, the “other grounds” on which the D.C. Circuit vacated the CAMR was its holding that mercury (a pervasive HAP) should have been regulated under §112, not §111(d). Perhaps a reviewing court will likewise conclude that EPA’s detour into §111 for GHGs misreads the statutory map, which directs EPA instead to use §§108-110 as appropriate to deal with pervasive air pollutants emitted from “numerous and diverse mobile and stationary sources.”¹⁶

II. Where Does EPA Propose to Go With §111(d)?

The pending proposal looks nothing like any of the few §111(d) actions previously taken. The ESPS proposal does not establish model emission limits for the variety of source types it purports to regulate—for example, some variation on the pounds of carbon dioxide per megawatt-hour (lbs CO₂/MWh) limits established for electric generating units (EGUs) in the pending NSPS proposal, customized to the capabilities of the individual source type. Instead, EPA has undertaken to review the present generation mix in each of the 50 states, and to establish for each state the CO₂ intensity of generation that it believes to be achievable by effecting not only decreases in the heat rate of existing designated facilities, but also in displacing existing generation with less GHG-intensive generation and reducing demand. In short, EPA proposes that the “best system of

emission reduction” is to use fuel-burning generation less, or not at all.

The administrative record includes EPA’s analysis of what it believes to be the optimized mix of generation assets for each state. The end result of EPA’s analysis is to assign each state an interim (2020) and a final (2030) “emission performance goal,” which reflects what EPA expects as the statewide average emissions (on a lbs CO₂/MWh basis) from the universe of existing EGUs within each state. By summer of 2016 (a year after the anticipated adoption date), each state must submit a plan showing to EPA’s satisfaction that it has in place a mixture of control requirements, incentives, and so forth demonstrated to ensure that the CO₂ emission rate for all existing EGUs within the submitting state’s jurisdiction will not exceed the CO₂ intensity prescribed for that state by EPA.

In short, EPA now proposes to travel under §111(d) flag far from its home port:

- Never before has EPA used §111(d) for a ubiquitous pollutant. Its scant previous uses over the last 40 years have been directed at obscure pollutants emitted by a few specialized industries (such as fluorides and landfill gases). Recall that §111(d)’s design is to pick up unique, industry-specific pollution problems. As EPA noted in 1975, “[q]uite often health and welfare problems caused by [designated pollutants of the type intended to be covered by §111(d)] are highly localized and thus an extensive procedure, such as the SIPs require, is not justified.”¹⁷ EPA has made CO₂ an orphan solely by its decision to decline to regulate CO₂ under the NAAQS program. Had CO₂ been treated (as it arguably should be) as a criteria pollutant, emitted as it unquestionably is by “numerous or diverse mobile or stationary sources,” it would not be an orphan, waiting to be adopted by §111(d) as a “designated pollutant.”¹⁸
- Never before has EPA successfully used §111(d) to regulate so broad and well-populated a source category. Again, because §111(d) was intended to pick up isolated, industry-specific pollution issues (for example, fluorides from phosphate fertilizer plants, of which there are fewer than 35 scattered around the United States), EPA long ago understood that

13. *Id.* at 53347 (then and still codified at 40 C.F.R. §60.24(f)).

14. See 70 Fed. Reg. 28606 (May 18, 2005).

15. *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), cert. denied sub nom. *Utility Air Reg. Grp. v. New Jersey*, 555 U.S. 1169 (2009).

16. The unsuitability of that process for a global pollutant is the subject of another paper. See Carol E. Dinkins & Eric Groten, *Treatment of Greenhouse Cases Under the Clean Air Act* (LEXIS/NEXIS July 2010).

17. 40 Fed. Reg. at 53342.

18. A petition seeking to compel EPA to treat GHG as a criteria pollutant has been pending at EPA since 2009. See CTR. FOR BIOLOGICAL DIVERSITY, *Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act* (2009), http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf. EPA has taken no action on this petition, and there is no evidence that its proponent(s) have pursued it. No doubt both sides of that transaction fear reaping the whirlwind, and perhaps even the overruling of *Massachusetts v. EPA*, 494 U.S. 497, 37 ELR 20075 (2007), insofar as embarking on a GHG NAAQS no doubt would expose the error in Justice John Paul Stevens’ assumption that “EPA jurisdiction [over GHG] would lead to no such extreme measures” as had precipitated earlier U.S. Supreme Court rulings rejecting grand agency claims of authority absent clear congressional delegation. Yet, it is EPA’s failure to undertake one duty (to use §§108-110 to regulate ubiquitous air contaminants) that leaves it (arguably) free to regulate under §111(d).

“the number of designated facilities per state should be few.”¹⁹

- Never before has EPA set performance standards for a state, as opposed to a source of emissions. Instead, and unsurprisingly, emission guidelines have been issued for actual sources; in fact, they usually prescribe specific standards for specific operations within the designated facilities (for example, five parts per million (ppm) of total reduced sulfur from digester systems used at Kraft pulp mills).
- Never before has EPA required so complex and multidisciplinary an exercise, commanding the consideration and participation not only of each state’s air quality regulators, but also its utility regulators, its local governments, its appropriators, and even its individual citizens. In fact, EPA has long proclaimed its understanding that “[s]ection 111(d) plans will be *much less complex than the SIPs* [submitted under §110].”²⁰
- Most notably, never before has EPA set any technology-based standard that relies on constraining or even prohibiting production from the entire industry as a “system of emission reduction.”

In considering a far less ambitious departure from CAA precedent, the U.S. Supreme Court, in *Utility Air Regulatory Group (UARG) v. EPA*, already has expressed its unwillingness “to stand on the dock and wave goodbye as EPA embarks on [a] multiyear voyage of discovery.”²¹

III. What Dragons Await?

After 40 years of having used §111(d) for isolated air pollution issues, EPA now proposes to use it to direct the nation’s means of producing electricity. Actually, the Agency’s proposal goes a step further: It commands the states to try and do so first. Truly, that is a lot to ask of one obscure subsection in a law comprehensively dedicated to air pollution, in which Congress otherwise has adopted entire titles (for example, Title IV for sulfur dioxide controls) when intending nation-scale regulation of electric utility air emissions. Consider that §111(d) comprises 301 words, compared to Title IV’s 23,725. And the intrusiveness and scope of what EPA wrings out of §111(d) is far greater than that directed by Title IV, ultimately dictating far more than which power plants have to install scrubbers.

As only partially elaborated below, a number of textual and precedential dragons threaten EPA’s enterprise. All will be animated by the Supreme Court’s most recent cautions about the Agency’s bold use of the CAA to take on GHG emissions. In rejecting EPA’s conclusion that the Act compels GHG to be treated as a trigger to its stationary source permitting programs, Justice Antonin Scalia’s majority

opinion in *UARG* warned against finding big programs in small, nondescript packages:

EPA’s interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” . . . we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decision of vast “economic and political significance.” . . . The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text.²²

The power to require emission permits, though intrusive, pales relative to the power to establish energy policy for the nation. As EPA Administrator Gina McCarthy frankly acknowledged in July 2014 testimony before the U.S. Senate, the Agency’s proposal *is* energy policy, not even well-disguised in air quality costume:

And the great thing about this proposal is it really is an investment opportunity. *This is not about pollution control.* It’s about increased efficiency at our plants It’s about investments in renewables and clean energy. It’s about investments in people’s ability to lower their electricity bills by getting good, clean, efficient appliances, homes, rental units.²³

Accordingly, EPA is unlikely to find it easy to slay all of these legal dragons in judicial defense of its recent discovery of so great a power in humble §111(d).

A. Regulation of EGUs Under §112 Preempts Any Regulation Under §111(d)

At least one dragon did not even wait for the ship to cast off. On the day the ESPS proposal hit the *Federal Register*,

22. *UARG*, 134 S. Ct. at 2444 (citations omitted). This was not Justice Scalia’s first warning against finding significant powers in ambiguous CAA language. He did so earlier in *Whitman v. American Trucking*, 531 U.S. 457, 468, 31 ELR 20512 (2001), where—writing for all of his colleagues save Justice Stephen Breyer, and citing the same precedent that he did in *UARG*—Justice Scalia noted that the absence of clear authority for EPA to consider costs in setting NAAQS was fatal to a claim that the Agency was obligated to do so:

Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes. See *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, *supra*, at 159-160. Respondents’ textual arguments ultimately founder upon this principle.

23. *EPA’s Proposed Carbon Pollution Standards for Existing Power Plants: Oversight Hearing Before the S. Comm. on the Environment & Public Works*, 113th Cong. (2014) (statement of Gina McCarthy, Administrator, U.S. EPA) (emphasis added), available at <http://cnsnews.com/news/article/susan-jones/epa-chief-not-about-pollution-controls-investment-strategy>.

19. 40 Fed. Reg. at 53345.

20. *Id.* (emphasis added).

21. *Utility Air Reg. Grp. (UARG) v. EPA*, 134 S. Ct. 2427, 44 ELR 20132 (2014).

Murray Energy Corp. filed a petition for an extraordinary writ in the D.C. Circuit seeking to prohibit EPA from proceeding with the rulemaking.²⁴ Less than two weeks later, nine states, led by West Virginia, filed an amicus brief in support of that petition. Those same states, joined by four more, followed with a D.C. Circuit petition of their own, seeking judicial review not of EPA's act of proposing the rule, but of the Agency's final action in 2010 approving a consent decree by which it had committed to adopting performance standards for EGUs under §111(d).²⁵ The D.C. Circuit has since ordered these cases to be briefed on parallel schedules ending in early March 2015, and then argued before the same panel.

Both Murray Energy and the West Virginia petitioners base the substance of their petitions on a phrase in §111(d)(1)(A) that certainly does appear to prohibit any use of it to regulate EGUs. Extracted in relevant part, the statute extends EPA's authority to "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]"²⁶ Unquestionably, EGUs are a source category regulated under §112,²⁷ and it would seem beyond question that the highlighted language would foreclose the use of §111(d).²⁸ Indeed, in passing on statutory displacement arguments in *American Electric Power Co. (AEP) v. Connecticut*,²⁹ the Supreme Court noted that §111(d) authority is constrained by actions taken under §112: "EPA may not employ §[111](d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§[108-110], or the "hazardous air pollutants" program, §[112]. See §[111](d)(1)."³⁰

EPA's Legal Memo, however, describes §111(d)(1)(A) as "ambiguous," not because the *U.S. Code* is ambiguous on its face, but because the Agency now thinks it is ambiguous

whether the *U.S. Code* actually is the law.³¹ According to EPA, the *U.S. Code*, as quoted above, published an incomplete version of what President George H.W. Bush signed into law in 1990. EPA elaborates on the legislative history to argue that two different versions of the law were enacted (one by each House of Congress), creating an "ambiguity," the resolution of which is deferred to the implementing agency under *Chevron*.³² But as Murray Energy notes in its petition, it may not be up to EPA to look behind the codified statute to find codification errors:

The "Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States." 1 U.S.C. §204(a). That prima facie evidence is displaced only where the U.S. Code is "inconsistent" with the Statutes at Large. See *Stephan v. United States*, 319 U.S. 423, 426 (1943).³³

This is especially true as here, when the uncoded change is a nonsubstantive, conforming amendment of language removed by the substantive amendment. In such cases, the Office of Legislative Counsel inevitably ignores the inconsistent (non)conforming amendments. The end result is exactly what we see in §111(d) as published in the *U.S. Code*.

Even if the two separate sections of the Statutes at Large that amend §111(d) had to be effectuated, they would not yield the result that EPA wishes. Section 108(g) of Public Law No. 101-549, the 1990 CAA Amendments, as published in the Statutes at Large, contains the following provision in the section of the bill directed to amendments to Title I (in which §111 is codified): "(g) Regulation of Existing Sources—section 111(d)(1)(A)(i) of the Clean Air Act . . . is amended by striking 'or 112(b)(1)(A)' and inserting 'or emitted from a source category which is regulated under section 112.'"³⁴ And §302(a) of Public Law No. 101-549, which merely lists conforming amendments related to the adoption of Title III (the overhaul of §112), contains the following: "(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).'"³⁵ This latter change is not included in the statute as published in the *U.S. Code*.

In any event, both sections of Public Law No. 101-549 can be fully incorporated into the Act as amended without any conflict at all. Codifying everything in it, leaving out no change effected by any provision of it, §111(d)(1)(A)(i) would read as follows (paraphrasing the unaffected pre- and postlude):

[EPA shall issue emission guidelines requiring states to adopt] 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 pub-

24. See *Murray Energy Corp. v. EPA*, No. 14-1112 (D.C. Cir. filed June 13, 2014) [hereinafter *Murray Energy Pet.*]. Murray later filed a (slightly) more conventional petition for judicial review under CAA §307, although such petitions usually follow final adoption of the rule at issue. See *Murray Energy Corp. v. EPA*, No. 14-1151 (D.C. Cir. filed Aug. 15, 2014). Both *Murray* cases have since been consolidated.

25. See *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed July 31, 2014) [hereinafter *West Virginia Pet.*].

26. 42 U.S.C. §7411(d)(1) (emphasis added).

27. See *Mercury and Air Toxics (MATS) Rule*, 77 Fed. Reg. 9304 (Feb. 16, 2012). Those rules have been upheld on judicial review, see *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 44 ELR 20088 (D.C. Cir. 2014), although the Supreme Court has granted petitions for certiorari. See *id.*, cert. granted sub nom. *National Mining Assoc. v. EPA*, No. 14-49 (U.S. Nov. 25, 2014), available at http://www.supremecourt.gov/orders/courtorders/112514zr_32q3.pdf. Conceivably, any Supreme Court reversal and subsequent vacatur of these MATS rules could remove arguments based on §112 displacement.

28. EPA's briefing in the *Murray* litigation offers various strained alternatives, none of which did the Agency express in either the Legal Memo that underpins its proposal, or in any of the other rulemakings or rule defenses involving the interpretation of the §112 exclusion. See *Murray Energy Pet.*, EPA Response to Petition, at 28-30 (filed Nov. 3, 2014).

29. *American Elec. Power Co. (AEP) v. Connecticut*, 131 S. Ct. 2527, 41 ELR 20210 (2011).

30. *AEP*, 131 S. Ct. at n.7. The D.C. Circuit also supported §112 preclusion of §111(d) rules, when it found that EPA could not use §111(d) as authority for the CAMR rule given that it had not properly withdrawn §112 regulation of EGUs. See *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008).

31. See Legal Memo, *supra* note 1, at 21-27.

32. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 14 ELR 20507 (1984).

33. *Murray Energy Pet.*, *supra* note 24, at 20.

34. Pub. L. No. 101-549, 104 Stat. 2399, 2467 (1990).

35. *Id.* at 2574.

lished under section 108(a) or section 112(b) or emitted from a source category which is regulated under section 112, but (ii) [for which there is a corresponding NSPS].

The highlighted phrase is what would be added to the *U.S. Code* if all of the changes were fully incorporated (updating the cross-reference to the subsection of §112 where the HAPS list is to be found, post-1990). This creates no conflict at all: Congress simply expanded the list of independent regulatory actions that would displace regulation under §111(d).

The ultimate question here is whether §111(a)(1)(D) precludes regulation based on §112 displacement by pollutant or by source category. EPA opines that the law should favor only pollutant-specific preemption (ignoring §108(g) of the Statutes at Large), because that would preserve a more robust role for §111(d).³⁶ EPA argues that:

The text as presented in the U.S. Code could be read to exclude virtually every pollutant from regulation under section 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 112. We do not need to address this ridiculous result.³⁷

But that result is not at all ridiculous. Recall that by 1990, EPA had spent 20 years of regulatory authority under §111(d) to issue around five technology-based emission guidelines. This would not have evidenced to Congress the importance of retaining ESPS authority, at least in that form.

More importantly, at the same time that Congress was revising §111(d), it also was transferring to §112 the technology-forcing function previously lodged in §111. In fact, Congress dedicated an entire title of the 1990 Amendments (Title III) to this effort. The genesis of Title III is well-known: Overwhelmed by the inability to make the risk-based findings needed to support standards for new and existing sources of HAPs under §112 as that section had been framed since 1970, EPA had by 1990 developed only about the same number of “national emission standards for hazardous air pollutants” (eight) as it had issued guidelines under §111(d) (five). Accordingly, Congress wholly rewrote §112, transforming it into a technology-forcing (“maximum achievable control technology”) model for regulating HAPs, and itself listing (in §112(b)) 188 HAPs for EPA to regulate. Having identified the pollutants of interest and directed their maximum control (from a technology-forcing perspective), it is quite conceivable that Congress was perfectly content to strip §111, and especially §111(d), of much scope.³⁸ But regardless of how one reads the tea leaves of intention, reading the actual words of Public Law No. 101-549 leaves little doubt that is what Congress did.

Whether the *U.S. Code* stands as written (in accordance with 1 U.S.C. §204(a)) or whether a court looks behind it to the Statutes at Large and gives effect to all of its provisions, EPA loses the ability to issue ESPS for EGUs. EPA “wins” only if: (1) a court is willing to find a conflict between two sections of the Statutes at Large where there is none; and (2) it is allowed to ignore the substantive one of those two sections. And even then, given recent Supreme Court squints at *Chevron*, EPA might not get the deference it needs to win.³⁹

Section 112 displacement is the first and fiercest dragon EPA will face, but EPA will have the early upper hand fending it off. Although §112 displacement is the substantive centerpiece of both the Murray Energy and West Virginia petitions filed in response to the ESPS proposal, both petitions face substantial procedural headwinds. Murray Energy’s petitions are direct challenges to EPA’s proposal, yet §307 of the Act allows for judicial review only of final EPA actions.⁴⁰

39. In *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014), a bare plurality of a fractured Court relied on *Chevron* to suggest deference to the implementing agency in resolving conflicts within the immigration statute. But a concurring opinion written by Chief Justice John Roberts, joined by Justice Scalia, saw this not as a matter of interpretation appropriately left to the implementing agency, but as a direct conflict the resolution of which is left to the Court:

To the extent the plurality’s opinion could be read to suggest that deference is warranted because of a direct conflict between these clauses, that is wrong. Courts defer to an agency’s reasonable construction of an ambiguous statute because we presume that Congress intended to assign responsibility to resolve the ambiguity to the agency. *Chevron* . . . at 843-844. But when Congress assigns to an agency the responsibility for deciding whether a particular group should get relief, it does not do so by simultaneously saying that the group should and that it should not. Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice. *Chevron* is not a license for an agency to repair a statute that does not make sense.

Scialabba, 134 S. Ct. at 2214 (Roberts, C.J., concurring). Notably, Justice Samuel Alito agreed with this principle, even though he dissented in the result. *Scialabba*, 134 S. Ct. at 2216 (Alito, J. dissenting) (disagreeing with the plurality opinion that “when two halves of a statute ‘do not easily cohere with each other,’ an agency administering the statute is free to decide which half it will obey”). Accordingly, the Court seems perfectly split on whether *Chevron* applies when an agency alleges a facially irreconcilable conflict within a statute. Regardless, though, here there is none.

40. See, e.g., *Las Brisas v. EPA*, No. 12-1248 (D.C. Cir. order dated Dec. 13, 2012) (dismissing as premature a challenge to EPA’s proposal of MACT standards for new EGUs). The *Las Brisas* case, as with virtually all CAA rule challenges, involved complaints about the content of the rule itself (for example, the record did not suffice to support the level of the standard), and not about whether EPA could promulgate at least some rule on the subject. This may be a useful distinction here, where the argument is that the very issuance of a proposal is itself the action for which judicial review is sought. Section 307(b) can be literally read to support this outcome: “Proposal” necessarily is “an action of the Administrator in promulgating a rule,” and that is what §307(b) makes judicially reviewable. The action is final in the sense that it does not matter what record EPA develops in response to the proposal or how the rule may change in response to comments. The sole issue that these present petitioners bring is that EPA wholly lacks authority to adopt *any* rule on the subject (due to §112 displacement), which is ripe at the moment of proposal. The author is not aware of any case in which it has been determined that this distinction makes a difference. While the notion is appealing that a massive rulemaking effort (diverting substantial resources and immediately imposing planning costs on the states and power sector) can be avoided if demonstrably ultra vires, still it seems unlikely that the D.C. Circuit would open itself to two-bite litigation. Even though the D.C. Circuit panel has invited substantive briefing on the merits of the Murray

36. See Legal Memo, *supra* note 1, at 22-27.

37. *Id.* at 22-23, n.22.

38. Perhaps, it was an easier legislative compromise for this change to be made than to repeal §111(d) altogether. Or perhaps, it was left in the event some future source-pollutant combination might fall into gaps left by new §112, without speculating on the future existence of such a gap.

The West Virginia petitioners, evidently recognizing this barrier, do identify a “final action” that arguably passes muster under §307: They seek review of a 2010 consent decree by which EPA agreed to propose and adopt NSPS for coal-fired power plants, and by averring that the subsequent adoption of EGU standards under §112 (in 2012) and issuance of the ESPS proposal (in 2014) present “grounds arising after” sufficient to overcome the normal statutory obligation to have sought review within 60 days of that 2010 final action.⁴¹ It is not clear, though, how judicial review or even eventual vacatur of that consent decree would necessarily preclude EPA from proceeding with the ESPS rulemaking.

And so, while EPA may be able to set sail under §111(d), we rate very low its prospects for a safe return. One day, it will have to fight off not just the §112 preemption dragon, but many more besides.

B. EPA Cannot Require Reductions Outside the Fenceline

EPA’s obligation under §111(d)(1)(A) is to “establish a standard of performance for any existing source,” with “standard of performance” defined to mean “a standard for emissions of air pollutants which reflects the best system of emission reduction”⁴² EPA’s entire proposal rests on the assumption that the BSER consists of four different building blocks of energy policy, which EPA has applied to the generation mix of each state. The “standard of performance” resulting from this application of BSER is reduced to a single “rate-based emission performance goal” unique to each state to be achieved by 2020, and another (slightly lower) single goal for 2030. The achievement of that goal, however, depends on events and actions “beyond the fenceline” of the “designated facility” (the EGU).

EPA offers two conceptual constructs to justify its decision to assign each state its own “standard of performance.” The first is that all “affected entities”⁴³ within a state compose the “source,” such that, for example, the 853 lbs CO₂/MWh assigned to Texas for 2020 represents the application of the BSER to all affected entities within Texas.⁴⁴ The

second alternative construct is that EPA can be seen as just regulating the covered EGUs, with the amount of emissions allowed from each state’s population of covered EGUs influenced by the availability of alternatives to dispatching them; in other words, the BSER is not to use them as much or even at all.⁴⁵ Both of these constructs struggle not only against statutory language, but against likely incredulity that Congress, in enacting §111(d), intended to deputize EPA as the Energy Policy Agency.

I. EPA Cannot Treat an Entire State or Region as a “Source”

Under §111(d), EPA’s obligation is to establish “standards of performance for any existing source,” and so by definition, the “standard of performance” must be applicable to (“for”) “the existing source.” An “existing source” means any stationary source other than a new source.⁴⁶ And so, any proposed standard of performance necessarily identifies the “stationary source” to which it applies. The “standard of performance” that EPA proposes (for example, 853 lbs CO₂/MWh for Texas) is applicable to the state, and is based on what EPA has determined is achievable by application of BSER (the four building blocks) to the generation mix of that state. Accordingly, in this first construct, the *state* must be the “stationary source.”

include operational improvements and equipment upgrades that the coal-fired steam-generating EGUs in the state may undertake to improve their heat rate (building block 1) and increases in, or retention of, zero- or low-emitting generation, as well as measures to reduce demand for generation, all of which, taken together, displace, or avoid the need for, generation from the affected EGUs (building blocks 2, 3, and 4). All of these measures are components of a “system of emission reduction” for the affected EGUs because they either improve the carbon intensity of the affected EGUs in generating electricity or, because of the integrated nature of the electricity grid and the fungibility of electricity and electricity services, they displace or avoid the need for generation from those sources and thereby reduce the emissions from those sources. Moreover, those measures may be undertaken by the affected EGUs themselves and, in the case of building blocks 2, 3, and 4, they may be required by the states.

45. See, e.g., Legal Memo, *supra* note 1, at 15-16 (emphasis added): For the alternative approach for the BSER, the EPA is identifying the “system of emission reduction” as including, in addition to building block 1, the reduction of affected fossil fuel-fired EGUs’ mass emissions achievable through reductions in generation of specified amounts from those EGUs. Under this approach, the measures in building blocks 2, 3, and 4 would not be components of the system of emission reduction, but instead would serve as bases for quantifying the reduction in emissions resulting from the reduction in generation at affected EGUs. In light of the available sources of replacement generation through the measures in the building blocks, this approach also meets the criteria for being the “best” system because of, among other things, the emission reductions it would achieve, its reasonable cost, its promotion of technological development, as well as the fact that under this approach, the reliability of the electricity system would be maintained. The approach of reduced generation is also “adequately demonstrated” because of the ability of affected EGUs to adjust their own generation, the authority of the state to impose requirements, and the fact that other entities that operate in the various types of markets in the states can be expected to respond to the reduction in generation from the fossil-fuel fired EGUs by undertaking the measures in the building blocks or other actions that would assure reliability.

46. 42 U.S.C. §7411(a)(6).

Energy and West Virginia petitions, allowing the cases to survive motions to dismiss, the justiciability of those claims remains very much in play.

41. See West Virginia Pet., *supra* note 25. Although §307(b)(1) requires petitions for judicial review to be filed within 60 days after the action for which review is sought, it includes an exception if the grounds for review arise after that deadline. In such cases, review must be sought within 60 days of those “grounds-arising-after.”

42. 42 U.S.C. §7411(a)(1).

43. “Affected entities” include not just the fuel-fired EGU population of each state, but any other enterprise whose actions wind up included as part of any state’s plan to achieve the assigned emission performance goal. See 79 Fed. Reg. 34830, 34956 (proposed definition of “affected entity”).

44. See, e.g., Legal Memo, *supra* note 1, at 13-14:

The EPA is proposing two alternative approaches for the “best system of emission reduction . . . adequately demonstrated” for fossil fuel-fired EGUs, each of which is based on methods that have [been] employed for reducing emissions of air pollutants, including, in some cases, CO₂, from these sources. The first identifies the combination of the four building blocks as the BSER. These

This seems rather impossible, given that “states” are wholly distinguished from “stationary sources” in §111: The former is regulator, the latter the subject of regulation. And this state-as-stationary-source construct grinds other statutory gears, as well. “The term ‘stationary source’ means any building, structure, facility, or installation which emits or may emit any air pollutant”⁴⁷ Yes, in the case that serves as the very fount of agency discretion to interpret an ambiguous statute, the Supreme Court upheld EPA’s decision to impute a *plant*-wide meaning to the §302(j) definition of “stationary source,” but not even in EPA’s wildest *Chevron* dreams could this definition be read to comprise an entire *state*. Besides, the §302(j) definition construed in *Chevron* is *broad*er than the one that governs here, as the Supreme Court then noted:

The definition of the term “stationary source” in §111(a)(3) refers to “any building, structure, facility, or installation” which emits air pollution. . . . This definition is applicable only to the NSPS program by the express terms of the statute; the text of the statute does not make this definition applicable to the permit program.⁴⁸

As for the definition that does govern, in §111(a)(3), EPA has long been deprived of the ability to set *plant*-wide NSPS, much less *state*-wide ones. It had tried to do so early in the development of the NSPS program, adopting for the nonferrous smelting industry an NSPS rule that would not be triggered except by plantwide emission increases. The Sierra Club challenged that rule as inconsistent with §111(a)(3).⁴⁹ In that case, *ASARCO, Inc. v. EPA*, “Sierra argue[d] that the Act defines a ‘source’ as an individual facility, as distinguished from a combination of facilities such as a plant, and that the bubble concept must therefore be rejected in toto.”⁵⁰ And “EPA respond[ed] that the ‘broad’ statutory definition of stationary source gives it ‘discretion’ to define a stationary source as either a single facility or a combination of facilities.”⁵¹ The Agency lost:

We find this response unpersuasive. The regulations plainly indicate that EPA has attempted to change the basic unit to which the NSPSs apply from a single building, structure, facility, or installation (the unit prescribed in the statute) to a combination of such units. The agency has no authority to rewrite the statute in this fashion.⁵²

So, EPA may not even define the “stationary source” for §111 purposes as an entire plant, much less as an entire state.

In its 104-page Legal Memo, EPA says not one word about how its decision to treat states as “stationary sources” can be squared with the statute’s definition of “stationary

source.” In fact, there is not one mention of §111(a)(3) or *ASARCO* anywhere in that memorandum.

2. “Don’t Use It” Cannot Rightly Be Called the “Best System of Emission Reduction”

Perhaps the foregoing textual problem is why EPA’s Legal Memo also attempts another justification for the proposed national energy plan. In this alternative, it is “only” each state’s population of fuel-fired EGUs that comprise the regulated “stationary source,” and the BSER is not to run them. According to EPA, the availability of alternative sources of generation or reduced demand allows the designated facilities to be run less. By how much depends on the state’s existing generation mix, and so the BSER (that is, how little the EGU can be run) varies from state to state.

BSER is not statutorily defined, but we know several aspects of its meaning from text. First, it stands for Emission Reduction, not Production Reduction. Second, we know that BSER must take into account the costs of achieving the reduction. Accordingly, BSER necessarily carries with it production neutrality. And, as discussed earlier, it must be “applicable” to an existing stationary source.

We get other indicators from §111 that Congress intends a “standard of performance” to reflect only the capability of control technologies that may be applied to specific emission points at the specific facility under consideration. This is because §111(h)(1) provides the following exception to setting §111 “standards of performance” (with emphasis added):

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best *technological* system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

So, we know that “operational standards” (which might include “use it less” if such a command were otherwise legal) are not “standards of performance,” and so are not the “best system of emission reduction” as that term is used in the definition. Further, the only time “the best *technological* system of emissions reduction” can be commanded in lieu of “standards of performance” (based on BSER) is for addressing sources of fugitive emissions.⁵³ Section 111,

47. 42 U.S.C. §7411(a)(3).

48. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 858-59, 24 ELR 20507 (1984).

49. See *ASARCO, Inc. v. EPA*, 578 F.2d 319, 8 ELR 20277 (D.C. Cir. 1978).

50. *Id.* at 325.

51. *Id.* at 326.

52. *Id.* at 327 (parentheses added for clarity).

53. As noted above, §111(h) allows for design, equipment, work practice, or operational standards only when “it is not feasible to prescribe or enforce a standard of performance,” a circumstance narrowly drawn to address fugitive emission sources:

(2) For the purpose of this subsection, the phrase “not feasible to prescribe or enforce a standard of performance” means any situation in which the Administrator determines that
(A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a

in short, contemplates—consistent with typical air quality control practice—that NSPS and ESPS shall be point-source-specific emission limitations, except for sources of fugitive emissions.⁵⁴

EPA identifies no relevant precedent for treating “don’t run that” as the BSER under §111.⁵⁵ Yet, no matter the source category, it always has been and forever will be true that not running a source of air pollution will reduce its emissions. Would running it less or not at all then be the BSER for a phosphate fertilizer plant? Or a Kraft pulp mill? Or any of the other categories for which EPA has developed §111(d) guidelines? In fact, given that BSER is the objective of NSPS as well, should EPA not explore “you don’t need to build that” as the BSER when establishing any §111(b) NSPS? Unless EPA is willing to claim that the CAA authorizes or perhaps even compels the Agency—in the guise of BSER—to prepare Five-Year Plans for all U.S. industries, it cannot defend the notion that the statute authorizes it to do so here.

Although not presented directly in response to concerns that its claim of authority to direct each state’s generation mix is the slipperiest of slopes, EPA’s Legal Memo does go on at length about how commanding reductions in generation at higher emitting plants is justified by the “interconnected nature” of the nation’s electricity grid: “Central to our BSER determination is the fact that the nation’s electricity needs are being met, and have for many decades been met, through a grid formed by a network connecting groups of EGUs with each other and, ultimately, with the end-users of electricity.”⁵⁶ Elsewhere, EPA opines that it can regulate anywhere in this “system”:

Based on these interpretations, for existing sources in the electric utility industry, we propose that the term “system of emission reduction” is sufficiently broad to include the measures in building blocks 2, 3, and 4 because they are part of the interconnected electricity sector and result in

conveyance would be inconsistent with any Federal, State, or local law, or

(B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

42 U.S.C. §7411(h)(2).

54. EPA’s Legal Memo includes a remarkable analysis purporting to show that the distinction between “best system of emission reduction” and “best technological system of continuous emission reduction” means that BSER does not contemplate use of technology. See Legal Memo, *supra* note 1, at 55-57. This is absurd: If “BSER” was broad enough to allow for consideration of end-of-pipe control technology and anything else besides, there would have been no need to create the exception. EPA knows perfectly well that the point of these provisions (as amended in 1990) was to allow EPA to describe the technology (design, equipment, work practice, or operational standard) to be used to minimize fugitive emissions when it is not possible (due to lack of capture or measurement) to prescribe a point-source-specific numeric emission limitation (“standard of performance”).

55. The closest EPA comes is a mention of the CAMR, and of its municipal waste combustor (MWC) rules. See Legal Memo, *supra* note 1, at 63-64. The irrelevance of the CAMR was addressed above. See *supra* note 15 and accompanying text. And the MWC rule example could not more clearly confirm that the stationary source stops at the fenceline: The only averaging that the cited MWC rule allows is for nitrogen oxide emissions among individual regulated emission points *within the plant*. See 40 C.F.R. §60.33b(d)(1).

56. Legal Memo, *supra* note 1, at 43.

reduced utilization, and therefore reduced emissions, from the higher emitting fossil fuel-fired power plants.⁵⁷

Shockingly, the Legal Memo’s next sentence avers that “[t]his proposed reading is clear as a matter of *Chevron* step 1 because of the breadth of the term, ‘system,’ in the context in which it is found.” Were that correct, then EPA not only can but must be in the business of deciding how much power is needed, how it should be generated, and how much cost increase can be borne. And were that correct, then EPA must undertake the same economic planning for all NSPS for all industries.

All economic endeavors are in their ways as interconnected as electricity generation. Some are obvious, such as oil and gas production and petrochemicals, which are as interconnected by pipeline as power plants and their customers are by wire. Does this mean that EPA is authorized to determine how much natural gas or ethylene each state needs to produce? And it does not take a pipe or wire to make “systems” out of any economic activity: Is EPA authorized to decide that maybe we could pave roads with asphalt so we do not need so much concrete and cement, such that BSER for cement plants is “don’t produce so much.” Or maybe the Agency prefers concrete to asphalt, and would direct the opposite? Is EPA authorized to direct crop rotation so that the nation’s demand for phosphate fertilizer is reduced? Or, even more bold, to tell states they must do so, as EPA does for the power generation business in the ESPS? And what is EPA doing stopping at state lines? The generation system does not stop at state lines, but is governed by regional dispatching authorities to one degree or another across the United States.

Justice Scalia’s recent opinion on EPA’s authority to direct best available control technology (BACT) in case-by-case permitting confirms a judicial willingness to put limits on what the Agency can do under cover of CAA technology-forcing mechanisms. Although *UARG* addressed concerns about BACT rather than BSER, the concepts are similar and the issues the same.⁵⁸ Responding to petitioners who expressed concern that BACT determinations would be used to unduly involve EPA in the nation’s productive capacity, Justice Scalia responded as follows:

[A]ssuming without deciding that BACT may be used to force some improvements in energy efficiency, there are important limitations on BACT that may work to miti-

57. *Id.* at 53-54.

58. EPA makes much of the use of the word “system” in the term “best system of emission reduction” to suggest that it may consider entire economic systems as the subject of regulation under the BSER rubric: “The CAA does not define the term, ‘system,’ and as a result, that term should be given its ordinary, everyday meaning: ‘a set of things working together as parts of a mechanism or interconnecting network; a complex whole.’” Legal Memo, *supra* note 1, at 36. But the word “system” also appears in the definition of BACT. See CAA §169(3) (“The term ‘best available control technology’ means an emission . . . which the permitting authority . . . determines is achievable . . . through application of . . . systems. . . .”). And so if the Act’s reference to “systems” reflects an obligation to consider, when setting a technology-based emission limit, the economic systems in which the subject source operates, then EPA would become obligated to do so not just in setting §111 standards, but in making BACT determinations.

gate petitioners' concerns about "unbounded" regulatory authority. For one, BACT is based on "control technology" for the applicant's "proposed facility," §7475(a)(4); therefore, it has long been held that BACT cannot be used to order a fundamental redesign of the facility. See, e.g., *Sierra Club v. EPA*, 499 F. 3d 653, 654-655 (CA7 2007); . . . For another, EPA has long interpreted BACT as required only for pollutants that the source itself emits, see 44 Fed. Reg. 51947 (1979); accordingly, EPA acknowledges that BACT may not be used to require "reductions in a facility's demand for energy from the electric grid."⁵⁹

Further, says Justice Scalia:

[w]e acknowledge the potential for greenhouse-gas BACT to lead to an unreasonable and unanticipated degree of regulation, and our decision should not be taken as an endorsement of all aspects of EPA's current approach, nor as a free rein for any future regulatory application of BACT in this distinct context. Our narrow holding is that nothing in the statute categorically prohibits EPA from interpreting the BACT provision to apply to greenhouse gases emitted by "anyway" sources.⁶⁰

Now, EPA proposes as BSER all of the abuses foretold for BACT.

C. *The ESPS Cannot Be More Stringent Than or Regulate a Source Different From the Corresponding NSPS, or Precede the Adoption of the NSPS*

The statutory architecture of §111 requires EPA to issue ESPS guidelines derivative of and following the NSPS for each source category, applicable to the same sources, using the same technologies (where feasibly applied to existing sources), but less stringent as necessary to accommodate such "other factors" as the remaining useful life of existing sources. How do we know this? First, the definitions establish that the only difference between a "new" source and an "existing" one is its date of construction or modification.⁶¹ Second, §111(d) tells us that ESPS guidelines apply only to a stationary source to which an NSPS "would apply if such existing source were a new source."⁶² Third, §111(d) specifically "permit[s] the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." These statutory cues leave no doubt that EPA cannot use §111(d) to

create a regulatory regime unhinged from its actions under §111(b).

But the proposed "Clean Power Plan" would be unrecognizable to a visitor from the proposed NSPS for EGUs. The latter sets varying CO₂ emission limits on boilers and combustion turbines, depending on size, fuel, and other factors. Although substantial questions have been raised as to the achievability of those proposed limits, EPA at least made a pretense of establishing them by application of BSER to specific designated facilities. The ESPS guidelines, in contrast, create a through-the-looking-glass regulatory regime, in which: (1) the targeted "stationary source" is the state itself; (2) the BSER is not a control technology applicable to any source, but the avoidance of using certain sources; and (3) the "standards" are not standard at all: under §111(d), EPA is to set national standards and states are supposed to justify departures from them based on individualized source considerations, but here, EPA is setting 50 different standards from the outset.

Most perverse is that the expectations for existing sources are greater than for new ones: existing EGUs will bear the burden of reducing emissions not only by an amount representative of supposed heat-rate improvements available to the source itself, but also by whatever amounts its production could be reduced based on EPA's estimate of how much electricity should be generated from other sources. The net effect is that fully one-half of the "State rate-based emission performance goals" in the ESPS are *more* stringent than the applicable NSPS (of 1,000-1,100 lbs CO₂/MWh). Stepping all the way through the looking glass, EPA further proposes to defy law and logic by regulating certain sources as both new and existing.⁶³

Another problem concerns the timing of the NSPS and ESPS actions. Of course, it is not possible at the time of proposing an ESPS to know what sources will be subject to it unless one already knows the sources subject to the NSPS. And the opportunity to have the ESPS informed by what is learned through development of the NSPS—the *raison d'être* of the ESPS program—is effectively lost if the ESPS proceeds ahead of final adoption of the NSPS. Consequently, EPA historically understood that an NSPS rule must be made final before proceeding to propose existing source guidelines.

EPA has to date only *proposed* an NSPS setting standards of 1,000-1,100 lbs CO₂/MWh for all covered EGUs (which includes almost any fuel-fired, utility-scale EGU built after January 2014).⁶⁴ Because of a number of legal risks associated with that rulemaking,⁶⁵ EPA undoubtedly

59. *UARG v. EPA*, 134 S. Ct. 2427, 2448, 44 ELR 20132 (2014).

60. *Id.* at 28.

61. See 42 U.S.C. §7411(a)(2) ("The term 'new source' means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.") & (6) ("The term 'existing source' means any stationary source other than a new source.").

62. 42 U.S.C. §7411(d)(1)(A)(ii).

63. See 79 Fed. Reg. at 34903 ("The EPA is proposing that an existing source that becomes subject to requirements under CAA section 111(d) will continue to be subject to those requirements even after it undertakes a modification or reconstruction.").

64. See 79 Fed. Reg. 1430 (Jan. 8, 2014).

65. Among the major issues are: (1) the sufficiency of EPA's basis for concluding that carbon capture and sequestration (CCS) is sufficiently proven, especially but not exclusively because the slight evidence it has for that conclusion is drawn from government research projects funded through laws that expressly preclude their use in standard-setting; (2) selection of a BSER

understands that the NSPS might well not survive judicial review. If the NSPS fails, the necessary predicate for §111(d) regulation of existing sources fails with it. Accordingly, EPA has separately proposed a “modified source” NSPS,⁶⁶ which the Agency believes would suffice as predicate for the existing source program even if the “new source” NSPS were vacated.⁶⁷ The modified source NSPS avoids one of the major errors in the new source rule by declining to treat carbon capture and sequestration (CCS) as the BSER, instead allowing for case-by-case evaluation of the modified source’s emissions, with a GHG limit then set based on the ability of the source owner to undertake marginal heat-rate improvements at the time of modification. But this is itself a legally questionable approach to §111(b) standard-setting, which is supposed to be, well, standard.⁶⁸ If the NSPS rules come tumbling down, they will take the ESPS with them.

D. *EPA Needs to Be but Is Not Able to Do What It Asks of the States*

Under §111(d)(2)(A), as with other SIP-based obligations, Congress obligated EPA to act if a state does not: “The Administrator shall have the same authority . . . to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section [110(c)] in the case of failure to submit an implementation plan” Necessarily, then, whatever EPA requires must be something that it can lawfully do if the state does not. That may be tested if the ESPS are adopted as proposed, given reports that at least several states already have expressed plans to leave EPA to execute its own rules.⁶⁹

While EPA certainly could adopt and impose emission limitations on “existing sources,” it has no authority whatsoever to prescribe statewide energy policy, as it is directing the states to do for themselves. EPA cannot identify in the CAA any provision that authorizes it to establish and enforce renewable portfolio standards (RPS), to make dispatch decisions, to provide rebates for programmable ther-

mostats, or to undertake any of the other notions that it has for Blocks 2-4 of its “best system of emission reduction.” Accordingly, those blocks must be outside of the options delegated to EPA by Congress under §111, and it would be impossible for almost every state to meet its target based on coal plant efficiency improvements alone (even assuming that the reductions deemed achievable by EPA in fact are achievable, notwithstanding the remote chance that any utility is today ignoring any economically sensible marginal heat-rate improvements).⁷⁰

E. *EPA’s Requirements Conflict With State and Federal Utility Regulation*

A related problem arises from EPA’s effort to force state utility regulators to do its bidding. The Federal Power Act reserves to the states jurisdiction “over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce.”⁷¹ The Clean Power Plan interjects the federal government (and the wrong federal agency, to boot) into regulatory decisions reserved to the states.

Further, the statutes governing those state regulatory processes typically require consideration only of cost and reliability when approving generation projects and rates, except as may be allowed under specific, legislatively authorized RPS standards. EPA’s assumptions about each state’s capabilities fail to account for the fact that slowing or shuttering perfectly good coal and gas plants and replacing them with windmills and solar arrays generally result in stranded costs for ratepayers to pick up and diminished reliability for ratepayers to suffer. The market, as monitored and managed by the utility regulatory system and system operators, takes care of optimizing the generation mix from these two standpoints. The ESPS can only disturb the intended operation of those regulatory systems.

F. *EPA Lacks the Record Needed to Convince a Court to Bend the Law*

The foregoing discussion identifies only some of the textual dragons that EPA will have to slay in order to save its ESPS. EPA’s normal means of gaining the judicial audience’s sympathy is to plead that what it is doing will save mankind, or at least that EPA’s action is good for mankind. Although the proposed rule reprises the parade of horrors outlined in the 2009 endangerment finding for automotive tailpipe emissions,⁷² nowhere does the Agency explain how or by

(CCS) that cannot be used throughout the United States; (3) EPA’s decision to set one standard for incomparable means of generating electricity; and (4) the lack of any finding of the dangers attributable to EGU contributions to global GHG levels, such that the costs of the rules can be weighed against some measure of their benefits (in fact, EPA concedes that “the proposed rule will result in negligible CO₂ emission changes”). 79 Fed. Reg. 1430, 1433 (Jan. 8, 2014).

66. 79 Fed. Reg. 34960 (June 18, 2014).

67. See Legal Memo, *supra* note 1, at 13 (“either of those section 111(b) rulemakings will provide the requisite predicate for this rulemaking”).

68. The D.C. Circuit has upheld variable standards for EGUs based on the sulfur content of coal burned, *see* *Sierra Club v. Costle*, 657 F.2d 298, 11 ELR 20455 (D.C. Cir. 1981), but it is a far leap from bifurcated standards to a completely individualized post-facto determination of applicable emission limitations.

69. This form of civil disobedience comes with substantially less risk than ignoring other mandates under the CAA. Under §111(d), EPA’s sole recourse is to set the standards itself. Because adoption of existing source plans under §111 is not an element of a state implementation plan under §110 of the Act, EPA does not have available to it the withdrawal of highway funding, imposition of construction bans, and other weapons that it usually uses *pour encourager les autres*.

70. Recognizing that various states are considering inaction, EPA recently announced its intention to propose the terms of a model federal plan at the same time it finalizes the ESPS toward the end of the summer (2015). See U.S. EPA, FACT SHEET: CLEAN POWER PLAN & CARBON POLLUTION STANDARDS KEY DATES (Jan. 7, 2014), available at <http://www2.epa.gov/carbon-pollution-standards/fact-sheet-clean-power-plan-carbon-pollution-standards-key-dates>.

71. 16 U.S.C. §824(b)(1).

72. See 79 Fed. Reg. at 34841-44.

how much the ESPS will change any of those outcomes. Indeed, EPA disclaims the obligation to do so.⁷³

EPA maintains that: (1) having found that power plants' emissions of criteria pollutants endanger public health and welfare, it can (or even must) then regulate any other pollutant from power plants without any attribution of danger from that other pollutant⁷⁴; and (2) in any event, its endangerment finding for GHG emissions from mobile sources suffices to establish endangerment from power plants' emissions of GHG, because the magnitude of GHG from power plants is the same magnitude as that emitted from cars.⁷⁵ These views conflict with constraints imposed by Congress in the unambiguous text of §111, which requires EPA to show that the source category's emissions significantly contribute to an identified danger. Absent such a showing, EPA risks adopting a rule with costs disproportional to benefits, and without the rational basis that EPA acknowledges it must provide to support any rule. It also lacks a basis on which to convince a court that vacating its rules will yield meaningful, measurable adverse environmental consequences.

1. EPA's Endangerment Finding for Cars Does Not Alleviate Its Obligation to Make a Finding of Endangerment From EGUs

The CAA should not be read as allowing EPA to use a finding made for one source-pollutant combination (in this case, GHG emissions from cars) to support regulatory action with respect to another source-pollutant combination (in this case, CO₂ emissions from power plants). The 2009 endangerment finding on which EPA rests its actions for power plants was made under §202. Section 202 compels regulation of tailpipe emissions whenever the Administrator finds that car emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health and welfare." But the CAA includes a variety of other provisions that authorize or even compel regulatory action based on a source-specific finding of endangerment.

Some of the CAA's other endangerment provisions—such as those for non-road engines and fuel additives—require specific studies, and then prescribe quite carefully the rules to be adopted based on the dangers found. By way of another example, §108 compels EPA to develop air quality criteria and ultimately NAAQS based on findings of endangerment. Most notably, of course, the Act also compels the development of NSPS regulations for a source category if, in the Administrator's judgment, that source category "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." The very existence of multiple

authorizations with limitations on and compulsions of regulatory action specific to context compels the conclusion that EPA must make findings specific to the combination of source and pollutant intended to be regulated.

To read the CAA to mean that a singular, abstract finding of danger from GHG allows (or even compels) regulation from any source of GHG emissions would be to read out the rest of the section-specific delegations of power and obligation scattered throughout the Act, each of which is a separate and often quite different delegation of power and authority. This problem is especially pronounced where, as here, the abstract finding on which EPA relies was of simple "contribution" to the identified danger as required by §202 of the Act, not of "significant contribution" as required by §111. Perhaps EPA could make such a finding, but it has not.

2. Absent a Finding of Substantial Danger Specifically Attributable to the Regulated Source Category, the Proposal Lacks a Rational Basis

An agency provides no rational basis for regulation absent a showing that its proposed rules will have a meaningful effect on the dangers it purports to mitigate. Here, EPA declines to show any climate effects from its rules, much less a meaningful one; instead, EPA uses fanciful "social cost of carbon" numbers to tease billions of dollars in net benefits from its takeover of the power industry.⁷⁶ But the NSPS proposal concedes that it will have no effect on atmospheric CO₂, and the ESPS proposal also declines to explain how its adoption will alter future climate.⁷⁷

76. Numerous commenters, including the Texas Commission on Environmental Quality, have documented the errors in the Regulatory Impact Analysis accompanying the rule. *See, e.g.*, Comments by the Texas Commission on Environmental Quality, Regulations.gov Identification No. EPA-HQ-OAR-2013-0602-23305, at p. 6 (Dec. 1, 2014):

[T]he EPA has not provided any data or other evidence that the proposed rule will even have any quantifiable effect on global climate. The EPA discusses at length its [sic] assessment of climate change impacts in the [Regulatory Impact Analysis], e.g., global average temperature, sea level rise, and extreme weather and climate events. . . . However, the EPA has not provided a single quantified effect to any climate parameter to demonstrate that the proposed rule would actually result in any impact on those climate events which the EPA cites as justification for the rule.

77. Although EGUs may contribute a substantial fraction of U.S. GHG emissions, the overall contribution of U.S. EGU emissions to global GHG concentrations is infinitesimal and their purported effect on climate even lower. The Cato Institute provides this analysis:

Using a simple, publically [sic] available, climate model emulator called MAGICC that was in part developed through support of the EPA, we ran the numbers as to how much future temperature rise would be averted by a complete adoption and adherence to the EPA's new carbon dioxide restrictions. The answer? Less than two one-hundredths of a degree Celsius by the year 2100. 0.018°C to be exact.

See Cato Institute, <http://www.cato.org/blog/002degc-temperature-rise-averted-vital-number-missing-epas-numbers-fact-sheet>. This outcome cannot be dismissed simply because it was generated by scientists working for the Cato Institute. It is fully consistent with EPA's own findings in the context of finding endangerment from the other major U.S. emitter—cars—where the Agency's own models found similarly immeasurable effects from its automotive emissions standards. *See* 75 Fed. Reg. at 25496, tbl. III.F.3-1

73. EPA maintains that the sufficiency of the endangerment finding to support action under §111 is addressed in the context of its proposal and adoption of the NSPS. *See* Legal Memo, *supra* note 1, at 28. Accordingly, this section addresses the issue as presented by the NSPS proposal.

74. 79 Fed. Reg. at 1453-54.

75. *See, e.g.*, Legal Memo, *supra* note 1, at 28.

All it provides are estimates of reduced emissions, and *nothing* about how that presumed reduction will change atmospheric GHG concentrations, much less how that (unquantified) change in concentration would mitigate harm. Instead, EPA points to generalized risks such as “climate change”—a risk that exists independent of human activities, regardless of any anthropogenic influence—that EPA believes will result from increased GHG concentrations in the atmosphere. It has not shown how its chosen standards, or any standards governing U.S. power plants, would meaningfully address the climate-related effects it invokes as the basis for regulation. This relieves it from an essential constraint on agency action: that agencies show their chosen level of regulation is the least-restrictive means to achieve stated public health goals.⁷⁸

By requiring that EPA first find that emissions of an individual pollutant from a particular source category endangers the public, Congress set the stage for the Agency to promulgate rules to address proven endangerment, so as to avoid potentially useless regulation. An unsurprising consequence of EPA’s failure to make these prerequisite findings is performance standards that do not mitigate danger.

This failure to link a specific environmental problem to a demonstrated solution also leaves a reviewing court without much incentive to find some way to uphold EPA rules that depend on what can charitably be described as adventuresome statutory readings.

IV. How and When Will These Dragons Be Confronted?

EPA has announced that the ESPS will become final in mid-summer.⁷⁹ At that time, presumably, we will see EPA’s

parries. And if past is prologue, we also will see a final rule not meaningfully different from the proposal.

Given the innumerable petitions for review that will follow, the amount of time needed to coordinate among the parties (to address the D.C. Circuit’s requirements for combined briefing among aligned parties),⁸⁰ the probability of needing to coordinate among the modified source rule and ESPS dockets, the possibility of stay motion proceedings, and so forth, it is easy to see the §307(b) proceedings on this rule taking at least as long as did the challenges to the initial round of EPA GHG control rules (roughly two-and-one-half years from petitions to panel opinion). Applying that guesstimate, at least by the time of D.C. Circuit oral argument (circa mid-2017), the administration defending the rules will be different from the one that promulgated them.

Based on the above challenges (and others left unaddressed due to space constraints),⁸¹ EPA might have a difficult time defending its rules even with a favorable panel, and even if it still is politically committed to defending the rules. If the Agency loses in the D.C. Circuit, it is not certain that EPA would seek Supreme Court review. On the other hand, if the petitioners lose, there is enough at stake to ensure certiorari petitions, and the fact that these proposed rules fairly clearly cross lines against which the *UARG* majority warned, the grant of certiorari seems likely. In any event, that means litigation will leave the ESPS uncertain at least until 2019. If, at the end, EPA has sailed past all the dragons, the states will have no time to do what the rules would require. The odds of safe passage for EPA, however, seem slight.

(estimating 0.006 -0.018°C decrease in global temperature by 2100 in consequence of the EPA/NHTSA rules setting GHG limits on new cars and light-duty trucks). But the main point here is that EPA does not provide an answer to how the climate will differ before and after its rules, whatever that answer may be.

78. The argument is not that EPA must do comparative cost-benefit analyses to justify a proper level of standards. *Cf. Essex Chem. Co. v. Ruckelshaus*, 486 F.2d 427, 3 ELR 20732 (D.C. Cir. 1973) (holding that EPA need not undertake such analyses as a predicate to proposing standards, but must consider such information if presented during the comment process). But where the Agency has not even found that the regulated source category significantly contributes to the identified danger, it has no basis to conclude that regulating that source category will significantly reduce the danger.

79. Mark Drajem, *EPA to Delay U.S. Carbon Rule for Power Plants Until Summer*, BLOOMBERG NEWS (Jan. 7, 2015), <http://www.bloomberg.com/news/2015-01-07/epa-to-delay-carbon-rule-for-new-u-s-power-plants-until-june.html>.

80. As is too often the paradox, the abundance of significant weaknesses in the rule, combined with the number and breadth of interests affected, may make the challenges more challenging. Circuit practice tends to confine all parties on each side to join one brief, maybe two. The end result often reads like the committee work product that it is, without a common voice, reduced to the lowest common denominator, and yet without all points included.

81. Notably left unexplored are the constitutional issues. In part, this is because the statutory case against the ESPS proposal is so strong as to not require constitutional claims to reach the conclusion that the Clean Power Plan almost certainly will not stand.