

C O M M E N T S

Does EPA's §111(d) Proposal Rely on an Unprecedented and Legally Forbidden Approach to Emission Reduction?

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I. Introduction

In June 2014, the U.S. Environmental Protection Agency (EPA) proposed standards under §111(d) of the Clean Air Act (CAA)¹ for state plans to reduce carbon dioxide emissions from existing fossil fuel-fired electric generating units (EGUs).² These standards do not require states to use any particular means of emission reduction. However, their stringency depends in part on EPA's conclusion that states could reduce these emissions not only by measures that directly reduce fossil fuel EGU emissions, but also by making the grid less dependent on fossil fuel through increased energy efficiency and increased reliance on nuclear and renewable generation.

Some claim that this approach abandons a basic principle of CAA regulation without statutory warrant.³ They say that the CAA has always relied on controls on the individual emitting source within the power of the source owner to install, thus preserving owner autonomy and limiting EPA's power. According to critics, EPA has now burst those bounds and made itself the planner of the energy market by claiming the power to dictate not a level of emissions, but rather how energy needs will be met. In resting such a proposal on summary and generic statutory provisions, critics argue, EPA has violated the principle that when the U.S. Congress delegates extensive powers, it does so expressly: It does not "hide elephants in mouseholes."⁴

This Comment argues the contrary—that, in fact, EPA's proposal rests on explicit statutory authority. The rule could and probably would be implemented by long-established

regulatory mechanisms that the U.S. Supreme Court has upheld. Moreover, EPA's approach is neither unprecedented nor unlimited. Since 1970, the CAA has called on states to make policy choices and use their governmental powers in the manner that this rule might require. Indeed, many of the policy choices needed to comply with EPA's proposal would stem from the special characteristics of the electricity market and not from any new EPA initiative. Finally, the structure of the CAA sets limits in general and in particular on how far EPA could push this precedent. I will discuss each point in turn.

II. Direct Legal Support for EPA's Proposal

A. EPA's Proposal Rests on Express Statutory Authority

Many CAA provisions—such as those for controlling emissions from new stationary sources of air pollution, or controlling emissions of hazardous air pollutants, or reducing emissions from motor vehicles—assume, as their language indicates, that installing new controls on the individual source will be the primary method of reduction.⁵

But §111(d) invokes a different statutory mechanism. Under §109, the CAA requires EPA to set national ambient air quality standards (NAAQS) to specify acceptable air

1. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

2. 79 Fed. Reg. 34830 (proposed June 18, 2014).

3. For the arguments against EPA's proposal, see generally Eric Groten, *Here Be Dragons: Legal Threats to EPA's Proposed Existing Source Performance Standards for Electric Generating Units*, 45 ELR 10116 (Feb. 2015).

4. *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468, 31 ELR 20512 (2001).

5. See CAA §§111(a), 112, 202. While many of EPA's programs regulating emissions from motor vehicles establish emissions limits that apply to each individual vehicle model produced, some of these programs establish emissions limits that apply to a manufacturer's entire fleet of vehicles collectively, allowing manufacturers to produce some models above the standard and some models below the standard. For example, EPA determines compliance with its tailpipe emissions standards for nonmethane organic gases and nitrogen oxides based on the average emissions of all of the vehicle models a manufacturer sells rather than the emissions from each individual vehicle model. See 40 C.F.R. pt. 86 (2015).

quality levels.⁶ Since 1970, the Act has called on states (or, if they default, EPA) to devise and carry out state implementation plans (SIPs) to achieve these standards.⁷ Congress in 1970 set *no limits* to the approaches that states or EPA could use. Indeed, as discussed below, it affirmatively called on states to use a wide range of regulatory powers. The current statute expressly contemplates state use of “economic incentives such as fees, marketable permits, and auctions of emission rights” to achieve the necessary emission reductions.⁸ Congress made this comprehensive approach applicable to §111(d) by providing that §111(d) plans shall be generated by a procedure “similar” to that used to devise SIPs.⁹ In other words, §111(d) provides for SIP-like plans to control existing sources of pollutants that are harmful enough to be regulated, but for which no NAAQS exists.

B. EPA’s Rule Could and Probably Would Be Implemented by Established Regulatory Mechanisms Upheld by the Supreme Court

EPA’s proposal takes care not to recommend any single regulatory mechanism for states to use to reduce emissions from existing EGUs. That reticence obscures how conventional those mechanisms could and probably would be. A state could do everything that EPA wants by adopting a cap-and-trade rule for its fossil fuel-fired EGUs that limited their total carbon emissions and allowed them to trade the emissions allowances amongst themselves. Such a rule would impose binding legal obligations only on the owners of fossil fuel-fired EGUs, by commanding them each year to acquire and present to the regulatory authorities enough emissions allowances to cover their carbon emissions. Increased energy conservation and increased use of nuclear and renewables would simply make the cap easier to meet.

Since the late 1990s, EPA has used its CAA SIP power to promulgate cap-and-trade plans identical in structure to the approach outlined above. The 2014 Supreme Court decision in *EPA v. EME Homer City Generation* upheld the most recent such promulgation.¹⁰ Accordingly: (1) there is nothing new about the regulatory mechanisms that would most naturally be used to implement EPA’s proposal; and (2) these mechanisms would not need to depart from the normal practice of imposing all aspects of the compliance obligation on emitting sources.¹¹

III. EPA’s Proposal Is Neither Unprecedented Nor Unlimited

A. Relevant CAA Provisions Have Always Called on States to Exercise Their Policy Powers, Especially for Electricity Generation

1. The General Requirement for States to Use Their Powers

A §111(d) cap-and-trade program would probably differ from earlier cap-and-trade programs in one important respect. While prior programs contemplated compliance by measures within the control of the source owner, like installing scrubbers or buying cleaner fuel, the §111(d) program might rely on new state policies adopted to encourage energy conservation and installation of renewable energy by persons other than those owners. (Of course, many states allow or even require fossil EGU owners to take such steps.)

However, both §111(d) itself and the various SIP provisions call on *states*, not sources, to craft the plans needed to achieve their goals. The same Congress that enacted §111(d) called on states to adopt “transportation and land use controls” as needed to achieve air quality standards,¹² and to establish and administer programs to periodically test the emissions performance of in-use automobiles and require repairs where NAAQS attainment required that.¹³ This language could have required states to exercise comprehensive governmental power to reduce traffic, limit parking, and require all vehicle owners to have their cars tested as a condition of registration. This sweeping grant of SIP powers to EPA provides the historical background against which §111(d) should be interpreted.

In 1974 and 1977, Congress repealed most of EPA’s transportation and land use control authority before it could take effect; nonetheless, the repeal suggests that EPA’s exercise of that authority would have been valid absent subsequent congressional action. Moreover, elements of the transportation control authority still survive, as does the vehicle inspection and maintenance requirement.¹⁴ Congress has never repealed or even weakened §111(d). Its original intent to grant sweeping powers thus remains unaffected.

6. CAA §109.

7. CAA §110.

8. CAA §110 (A)(2)(a).

9. CAA §111(d)(1). The sentence refers expressly to SIPs issued under CAA §110. When Congress enacted §111(d) in 1970, §110 was the only provision that authorized SIPs. However, Congress added several additional SIP provisions when it amended the statute in 1977 and 1990. *See* CAA §§181-192.

10. 134 S. Ct. 1584, 44 ELR 20094 (2014).

11. EPA’s proposal leaves many other avenues of compliance potentially open to states as well, but that can hardly ground a legal objection so long as

one approach is defensible, since states are free to choose among the suggested approaches.

12. Clean Air Act of 1970, Pub. L. No. 91-604, §110(a)(2)(B), 84 Stat. 1676, 1680.

13. *Id.* §110(a)(2)(G), 84 Stat. at 1681.

14. Congress never repealed EPA’s authority to require state auto emissions testing programs where achieving air quality standards required it, though it has refined its application. *See* CAA §§182(a)(2)(B), 182(b)(4), 182(c)(3), & 186(a)(4). Moreover, Congress has reinstituted requirements for states to adopt and implement transportation control measures in the most polluted areas. *See* CAA §§182(c)(5), 182(d)(1).

2. The Particular Case of EGUs

When the CAA was adopted, the price of electricity was generally set by state utility commissions based on cost of service. In many states, that model prevails today. Under that approach, state action would generally be required even when EPA regulates EGUs in the most conventional “put a scrubber in the stack” manner, since a state government entity would have to decide whether to allow cost recovery through a rate increase, the extent of that increase, and how to apportion the increase among different customer classes.

A rate increase changes the framework in which an electric utility conducts its business, and changes it according to the regulatory authority’s best policy judgment. A new EPA emission standard can force a state to exercise that rate review power. That result does not seem meaningfully different in principle from a state decision, taken in response to a §111(d) mandate, to allow utilities to sponsor energy conservation programs if they lack the power to do so, or to change the power purchase rules in favor of renewable power.

3. EPA’s Alternatives if a State Defaults

Opponents of §111(d) regulation sometimes ask what would happen if a state simply failed to adopt energy conservation or renewable energy promotion measures, and in consequence submitted a §111(d) plan that EPA found too undemanding. Would EPA take action to require such state programs, thus invading a traditional area of state regulation? Since EPA has preserved a studied (and complete) silence on this issue, and since there is no logical need for the agency to address it now, the question lies outside the present rulemaking. Indeed, EPA obviously designed the rulemaking to preserve state ability to pick many different roads to the goal that EPA has specified.

But EPA clearly need not invade state regulatory jurisdiction even if it must promulgate a plan. EPA has often promulgated cap-and-trade programs under the CAA SIP provisions to apply in states that failed to submit acceptable NAAQS attainment plans.¹⁵ Promulgating a similar program for a state that did not submit an acceptable §111(d) plan would not set any new precedent and would not *compel* a state to change its regulatory policies. Instead, as with other EPA promulgations, the economic cost of such a plan would encourage states to adopt policies to reduce the cost of source compliance.

B. The CAA Sets Both Generic and Specific Limits on EPA’s Approach

Only §111(d) and the various SIP provisions even arguably grant EPA CAA authority to call on states to change their own policies to reduce emissions. The extent of EPA’s SIP authority is well-established. Accordingly, any regulatory principle used to justify state participation in §111(d) programs would not extend beyond §111(d) itself. Moreover, as EPA’s proposal fully recognizes, in setting the §111(d) targets for a state, EPA must consider cost, energy impacts, technical feasibility, and the remaining useful life of sources.¹⁶ This balancing approach provides states and sources with protection against EPA overreach. The balancing approach also suggests that any control approach that costs more than a certain amount per ton of emissions reduced is unauthorized.

EPA could give that insight concrete effect by incorporating in its cap-and-trade provisions an exit clause stating that the price of allowances under any EPA-promulgated plan would not be allowed to rise above a certain ceiling amount. If it did, EPA would simply issue more allowances until the price came back down again. In that way, the economic impact of the program would be capped at a level defined by the ceiling price.

IV. Conclusion

In short, EPA’s proposal does not “hide an elephant in a mousehole.” The proposed rulemaking contains neither a mousehole nor an elephant. There is no mousehole—no expansion of a narrow provision beyond its natural limits—because Congress designed §111(d) precisely as a provision under which EPA could comprehensively address pollutants that were not subject to NAAQS regulation, and modeled §111(d) on the sweeping authority it had granted EPA to address NAAQS pollutants. There is no elephant—no assertion of sweeping new authority—because implementing EPA’s proposal does not require either the use of any new regulatory tools or a new level of intensity in the use of existing tools.

The CAA expressly calls on states to exercise their regulatory authority to achieve §111(d) goals. EPA has used parallel language in the CAA SIP provisions to promulgate cap-and-trade regulations *identical* in structure to those that could be used to implement §111(d).

EPA proposes to rest the stringency of its program, in part, on state ability to adopt programs to allow sources to comply more easily, and at less expense, with any given set of cap-and-trade requirements. This has sparked claims that EPA has shifted the compliance obligation away from the source to the state government.

But nothing in either §111(d) nor its ancestral SIP provisions requires a source to bear the full cost of compliance, forbidding any state assistance. Moreover, the most likely

15. For example, to ensure prompt compliance with the Clean Air Interstate Rule, EPA promulgated federal implementation plans (FIPs) for 28 states and the District of Columbia, requiring the subject jurisdictions to implement nitrogen oxide (NO_x) and sulfur dioxide (SO₂) cap-and-trade programs. 71 Fed. Reg. 25328 (Apr. 28, 2006). EPA took a similar approach to ensure compliance with the Cross-State Air Pollution Rule and promulgated FIPs for 27 states, again requiring those jurisdictions to implement cap-and-trade programs. 76 Fed. Reg. 48208 (Aug. 8, 2011).

16. See, e.g., 79 Fed. Reg. 34830, at 34836, 34879 (proposed June 18, 2014).

mechanism for §111(d) implementation—a cap-and-trade program—restricts the formal compliance obligation to the regulated sources exclusively.

At the very most, the CAA expresses no clear position on the merits of EPA's approach. Even if this were true, under the standard rules of statutory interpretation, EPA's

approach should prevail unless it is a bad idea on the merits. EPA claims that its approach will allow more emissions reductions, at less cost, than a more legally constricted approach. It is on that proposition, rather than on arguments of legal principle, that the opponents of §111(d) regulation should focus.