

**UNITED STATES OF AMERICA
BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY**

Carbon Pollution Emission Guidelines)
For Existing Stationary Sources:)
Electric Utility Generating Units;)
Proposed Rule)

Docket No. EPA-HQ-OAR-2013-0602

**ANALYSIS OF LEGAL BASIS FOR EPA'S PROPOSED RULE ON CARBON
POLLUTION EMISSION GUIDELINES FOR EXISTING STATIONARY SOURCES**

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I. Introduction and Executive Summary

Inherent in the Constitution is the division of powers between the legislative, executive and judicial branches; a federal agency can take only those actions authorized by statute. The proposed rule violates the clear, unambiguous language of the Clean Air Act (the “CAA”) and the core constitutional principles and precedent under the Tenth Amendment by seeking to usurp the States’ traditional authority over protecting the environment and ensuring a reliable supply of affordable energy for their citizens. In keeping with the bedrock principles of federalism embodied in the Tenth Amendment, Congress has long maintained a “bright line” federal-state divide that reserves to States traditional jurisdiction over electric generation resources within their borders. This “bright line” is reflected in the federal-state balance struck by both the Federal Power Act (“FPA”) and the CAA.

By way of background, Thomas Scott served as a U.S. District Court Judge and U.S. Attorney for the Southern District of Florida. Charles W. Pickering, Sr. served as a U.S. District Court Judge before his appointment to the Fifth Circuit U.S. Court of Appeals. As former members of the federal judiciary, we are sensitive to those instances where federal agencies propose to overstep statutory authority, especially when the proposed action contradicts the framework of cooperative federalism.

Breaking with all prior precedent under Section 111 of the CAA, the Environmental Protection Agency’s (“EPA”) June 18, 2014 proposed rule seeks to establish carbon dioxide (“CO₂”) emission guidelines for existing fossil fuel-fired electric generating units (“EGUs”) under Section 111(d) that cannot be achieved solely by emission control systems implemented by or at the affected stationary source.¹ Rather, the EPA has proposed a so-called “plant to plug” approach of limiting emissions from the entire electric utility sector of the U.S. economy—the collective stationary sources that generate electricity, the transmission and system operators that transmit and distribute electricity, the consumers that use electricity, and even the States that oversee their electric utility systems.

The EPA achieves this approach through its unprecedented and unfounded interpretation of the “best system of emission reduction” (“BSER”), which rests on four “building blocks” designed not only to reduce the CO₂ emission rate of the affected and existing EGUs, but also to reduce the overall demand for electricity. These building blocks would, for example: require redispatch to generating units that emit less CO₂, such as natural gas combined cycle (“NGCC”) generators; increase dependence on zero-emitting resources such as wind, solar and nuclear; and increase energy efficiency programs to reduce overall electricity demand.

Notwithstanding the laudable goal to reduce CO₂ emissions on a national level, such reductions must be achieved in a manner that is authorized by the CAA, is consistent with the principles of federalism embodied in the Tenth Amendment of the U.S. Constitution, and allows

¹ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (June 18, 2014) (“Proposed Rule”).

the States to meet their historic obligation of “keeping the lights on” by ensuring a reliable supply of affordable electricity for their citizens. The proposed rule fails on all accounts.

First, the proposed rule plainly exceeds the limits on the EPA’s authority under Section 111(d) of the CAA. To begin, the text of the statute prevents the EPA from promulgating *any* regulations under Section 111(d) for existing fossil fuel-fired EGUs because they are already “a source category which is regulated under section [112 of the Clean Air Act].”² The EPA has already promulgated a national emission standard under Section 112 for fossil fuel-fired EGUs for certain hazardous air pollutants. Although those Section 112 standards do not relate to carbon dioxide, the CAA clearly precludes stationary sources from being regulated both by the federal government under Section 112 and separately by the States under Section 111(d). The EPA has provided no reasoned basis for ignoring this unambiguous limitation on its authority to promulgate the proposed rule.

Even if Section 111(d) were available to the EPA here—it is not—Section 111(d) does not provide the EPA the authority to regulate EGUs from “plant to plug.” The EPA’s Section 111(d) authority begins and ends at the “plant” (*i.e.*, within the fence-line). The EPA’s regulatory authority simply does not extend beyond the fence-line, and certainly does not extend all the way to the “plug” or anything in between. Section 111(d) empowers the EPA to regulate *only* existing “stationary sources” of air pollution, *i.e.*, “any building, structure, facility, or installation which emits or may emit any air pollutant.”³ The CAA thus limits the EPA’s authority to regulating *plants* that actually emit CO₂. The EPA has no authority to go “beyond the fence-line” of emitting EGUs and broadly regulate non-emitting parties that only distribute or consume electricity.

Second, by attempting to regulate all aspects of the U.S. economy that affect the generation, transmission, distribution, and use of electric energy, the proposed rule violates the core principles of cooperative federalism of the Tenth Amendment by seeking to usurp the States’ traditional authority over protecting the environment and ensuring a reliable supply of affordable energy for their citizens. Since the inception of modern utility regulation, the States—not the federal government—have exercised their historic police powers over electric utility resource planning. In keeping with the bedrock principles of federalism embodied in the Tenth Amendment, Congress has long maintained a “bright line” federal-state divide that reserves to States nearly exclusive jurisdiction over electric generation resources within their borders. This “bright line” is reflected in the federal-state balance struck by both the FPA and the CAA. Indeed, the FPA expressly preserves the States’ traditional authority over the generation of electric energy and its retail distribution in intrastate commerce, while granting the Federal Energy Regulatory Commission (“FERC”) jurisdiction over the wholesale electric power market and the interstate bulk electric transmission system.

The proposed rule, however, ignores this “bright line.” The emissions goals in the proposed rule are derived from the EPA’s determination of the best energy mix for each State—

² 42 U.S.C. § 7411(d)(1)(A)(i).

³ *Id.* § 7411(a)(3).

whether from coal, natural gas, wind, solar, nuclear, hydroelectric or some other fuel source—and the extent to which consumers must be called upon to reduce their demand for electricity. In doing so, the EPA, for the first time, seeks to assert sweeping, resource planning authority by dictating energy policy to the States and effectively requiring the complete restructuring of each State’s electric utility industry—authority that Congress did not grant the EPA in the CAA and authority that Congress in fact has expressly *withheld* from the federal government’s—*i.e.*, FERC’s—jurisdiction. The EPA cannot read the CAA to “bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization,”⁴ and such a clear authorization from Congress is lacking here.

Third, the EPA has failed to adequately address numerous issues in the proposed rule including, among other things, the cost of the proposed rule and its potentially extreme, negative impact on the reliability of the Nation’s electric grid. The proposed rule simply does not consider significant evidence relating to both system reliability and cost, or it fails to adequately explain the EPA’s contrary determinations.

For these reasons, and as explained in greater detail below, the EPA should withdraw the proposed rule. If the EPA proceeds with a Section 111(d) rulemaking for EGUs, it should issue a new proposal limited to emission control measures that are achievable by individual regulated EGUs at a reasonable cost without affecting system reliability, and that do not usurp the States’ resource generation planning and other proper authority.

II. Background

A. The Clean Air Act’s Premise of Cooperative Federalism.

While the CAA is in many ways a complex regime, its foundation rests on three straightforward themes: cooperative federalism, narrowly tailored emission control programs for enumerated purposes, and avoidance of duplicative regulation. And while the EPA has a role in establishing minimum requirements for state programs, States assume the primary implementation role under the CAA, and the statute prohibits duplicative regulation between federal and state authorities.

Congress in the CAA thus “made the States and the Federal Government partners in the struggle against air pollution.”⁵ While noting that “Federal financial assistance and leadership is essential” to coordinating effective efforts to combat air pollution, Congress recognized in the CAA that “air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.”⁶ Congress thus crafted a statute that would leave to States the task of enacting and administering programs to meet federal standards.⁷

⁴ *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (“UARG”).

⁵ *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990).

⁶ 42 U.S.C. § 7401(a)(3), (4).

⁷ *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 289 (1981).

Within the “division of responsibilities” set forth in the CAA,⁸ Congress accordingly assigned to States a primary role in combatting air pollution.

The process for setting, implementing, and enforcing the National Ambient Air Quality Standards (“NAAQS”) typifies this approach.⁹ In Section 109 of the CAA and related provisions, Congress charged the EPA with the threshold task of setting NAAQS for certain pollutants.¹⁰ After the EPA performs that gateway function, however, the States largely take over. The CAA establishes that “[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State.”¹¹ Congress thus assigned to the States the responsibility of preparing and submitting to the EPA plans—known as state implementation plans or “SIPs”—to implement, maintain, and enforce the NAAQS.¹² States are therefore left to prepare plans that address, among many other things, enforceable emission limitations, monitoring systems, enforcement programs, prohibitions on emissions, adequacy of personnel and funding available to implement the plan, and consultation and participation by local political subdivisions affected by the plan.¹³ States devise their own plans to implement requirements of the CAA based on consideration of State and local circumstances,¹⁴ and, as long as the state’s plan provides for attainment and maintenance of the NAAQS and satisfies other requirements of the Act, the EPA may not second-guess the means the State has chosen to achieve those goals.¹⁵ The EPA may step in to take over the States’ plan-preparation responsibility (by promulgating a federal implementation plan, or “FIP”) only if a State fails to make a required plan submission or submits a plan that has not satisfied the minimum criteria of the Act, and then does not timely correct the deficiency.¹⁶

Accordingly, the Supreme Court has emphasized that although the EPA “is plainly charged by the Act with the responsibility for setting the national ambient air standards,” it is “[j]ust as plain[n]” that the EPA is “relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met.”¹⁷ That is the States’ province, and the CAA “gives the [EPA] no authority to question the wisdom of a State’s choices of emission limitations if they are part of a plan which satisfies” the CAA’s standards.¹⁸ “[S]o long as the ultimate effect of a State’s choice of emission limitations is compliance with the national

⁸ *Train v. NRDC*, 421 U.S. 60, 79 (1975).

⁹ *See* 42 U.S.C. §§ 7407-7410.

¹⁰ *See id.* §§ 7408, 7409.

¹¹ *Id.* § 7407(a).

¹² *Id.* § 7410(a)(1).

¹³ *See id.* § 7410(a)(2)(A)-(M).

¹⁴ *See id.* § 7410(a).

¹⁵ *Train*, 421 U.S. at 98; *Union Elec. Co. v. EPA*, 427 U.S. 246, 257 (1976).

¹⁶ 42 U.S.C. § 7410(c)(1).

¹⁷ *Train*, 421 U.S. at 79.

¹⁸ *Id.*

standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.”¹⁹

Congress explicitly carried this regime of cooperative federalism through to CAA Section 111. That section requires the EPA to categorize and list stationary sources that “caus[e], or contribut[e] significantly to, air pollution,” each of which will be subject to “standards of performance.”²⁰ “Standard of performance” is defined as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator [of the EPA] determines has been adequately demonstrated.”²¹

Section 111(b)²² requires the EPA to directly set standards of performance for “new sources” in listed source categories—sources constructed or modified after applicable proposed or final regulations are published.²³ The EPA has done so for dozens of source categories.²⁴ If a State submits an “adequate” “procedure for implementing and enforcing standards of performance for new sources located in such State,” however, the EPA must “delegate” to the State “any authority [the EPA Administrator] has . . . to implement and enforce such standards,”²⁵ though the EPA may still “enforc[e] any applicable standard of performance.”²⁶

Section 111(d) governs *existing* stationary sources—all stationary sources that are not “new sources.”²⁷ In contrast to Section 111(b) (where the EPA sets performance standards and then retains a direct enforcement role even after delegation of implementation and enforcement to a State), where Section 111(d) authorizes regulation, it embraces a federal-state division that gives the States a role that is even more critical than under the NAAQS regime of Section 110.

¹⁹ *Id.*; see also *Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983) (the NAAQS provisions give States “primary responsibility for translating ambient standards into specific rules governing particular pollution sources, given local conditions and needs”); *Virginia v. EPA*, 108 F.3d 1397, 1410 (D.C. Cir. 1997) (citing *Train*, 421 U.S. at 79, when stating that Congress did not give the EPA “authority to choose the control measures or mix of measures states would put in their implementation plans.”). Other sections of the CAA direct the EPA to develop regulations tailored to address major source emissions that could create specific pollution problems not adequately addressed by the NAAQS or a new source performance standard (“NSPS”). These include stringent regulation under Section 112 applicable to source categories that emit “hazardous air pollutants,” regulation under Section 169A of visibility-impairing air pollutants, and regulation under Title IV of emissions that contribute to acid deposition. In each case, Congress carefully delineated the roles of the EPA and the States under the CAA’s construct of cooperative federalism.

²⁰ 42 U.S.C. § 7411(b)(1)(A).

²¹ *Id.* § 7411(a)(1).

²² *Id.* § 7411(b).

²³ See *id.* § 7411(a)(2).

²⁴ See generally 40 C.F.R. pt. 60.

²⁵ 42 U.S.C. § 7411(c)(1).

²⁶ *Id.* § 7411(c)(2).

²⁷ See *id.* § 7411(a)(6).

Section 111(d) directs the States to develop plans which (i) “establish[] standards of performance for any existing source” in a designated source category, and (ii) “provide[] for the implementation and enforcement of such standards of performance,” for submittal to the EPA.²⁸ In preparing, enforcing, and implementing such a plan, States are to consider any systems of emission reduction that the EPA Administrator has determined are “adequately demonstrated,”²⁹ but are also entitled to consider and take into account, “among other factors, the remaining useful life of the existing source” at issue.³⁰ The EPA is assigned the limited role of “establish[ing] a procedure” “under which each State shall submit to the [EPA] ... [its] plan” for the EPA’s review and approval.³¹ If—and only if—a State fails to submit a “satisfactory” plan or fails to enforce its plan, can the EPA step in and impose a plan on a State or enforce a satisfactory plan.³²

B. Recent Legislative and International CO₂ Emission Regulation Efforts

1. The American Clean Energy and Security Act of 2009

As part of an on-going global effort to address concerns over CO₂ emissions, the U.S. House of Representatives passed on June 29, 2009 the “American Clean Energy and Security Act of 2009,” known as “Waxman-Markey” for its primary authors.³³ Waxman-Markey, as originally drafted, would have amended the CAA to establish a nation-wide “cap-and-trade” system to reduce CO₂ emissions from all sectors of the U.S. economy by 20 percent below 2005 levels by 2020.³⁴ Before passage in the House, that proposed 20 percent reduction was relaxed to a 17 percent reduction target³⁵ as a legislative compromise in order to secure support of members from coal-producing states.³⁶ Waxman-Markey’s supporters argued that, without the legislation, the EPA would be able to regulate CO₂ *only* through “point source regulation”—that is, “inside the fence” at individual EGUs.³⁷ The Waxman-Markey supporters feared that CO₂ regulation under existing CAA requirements would result in adverse business impacts, increased

²⁸ *Id.* § 7411(d)(1).

²⁹ *See id.* § 7411(a)(1) (definition of “standard of performance”).

³⁰ *Id.* § 7411(d)(1)(B).

³¹ *Id.* § 7411(d)(1).

³² *Id.* § 7411(d)(2).

³³ American Clean Energy and Security Act of 2009, Roll Vote No. 477 (June 26, 2009) (219 yea – 212 nay, <http://clerk.house.gov/evs/2009/roll477.xml>).

³⁴ American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 311 (discussion draft, Mar. 31, 2009).

³⁵ American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 311 (engrossed in House).

³⁶ Lisa Lerer and Patrick O’Connor, *Key Dem Backs Waxman Climate Bill*, POLITICO.COM, May 14, 2009, <http://www.politico.com/news/stories/0509/22529.html> (“Waxman and Markey eventually got what they wanted: an emphatic yes from Boucher, a coal country Virginian whose backing is critical for the ambitious global warming measure [after] . . . finally agreeing to meet Boucher halfway—at a 17 percent reduction [cap of carbon emissions]—after the chairman held firm for weeks at a 20 percent reduction.”).

³⁷ Louis Peck, *A Veteran of the Climate Wars Reflects on U.S. Failure to Act*, YALE ENV’T 360, Jan. 4, 2011, http://e360.yale.edu/feature/a_veteran_of_the_climate_wars_reflects_on_us_failure_to_act/2356/ (statement of former Rep. Rick Boucher).

unemployment and, ultimately, a “glorious mess” for the U.S. economy.³⁸ In December 2009, while the U.S. Senate was considering this legislation, the United Nations Climate Change Conference met in Copenhagen, Denmark (“COP 15”). Rejecting the Kyoto Protocol’s earlier approach to reducing CO₂ emissions through international treaties, world leaders at COP 15 agreed to a new framework whereby nations would commit to meet CO₂ emissions reduction targets under their respective domestic laws. The United States, consistent with Waxman-Markey, pledged to reduce CO₂ emissions by 2020 below 2005 levels “[i]n the range of 17%”³⁹ U.S. Senate supporters of the Waxman-Markey legislation portrayed COP 15 and the United States’ commitment as “a catalyzing moment” that “sets the stage for a final deal and for Senate passage this spring of major legislation at home.”⁴⁰

But political and public support for Waxman-Markey rapidly disintegrated. Waxman-Markey was unpopular in many Congressional districts and support waned in the U.S. Senate.⁴¹ By late July 2010, the Senate was forced to abandon its efforts to pass CO₂ emissions legislation. And, in the November 2010 mid-term congressional elections, voters provided a stinging rebuke to Waxman-Markey: in what one report called a “bloodbath,”⁴² thirty-two of the legislation’s House supporters were voted out of office.⁴³

2. The Administration’s Effort to Fulfill the COP 15 Pledge, Despite the Failure of Legislative Means.

After the demise of Waxman-Markey, CO₂ emission legislation languished for several years. Then, “the White House turned to the CAA as the primary tool to achieve significant reductions in the power sector.”⁴⁴

³⁸ *Strengths and Weaknesses of Regulating Greenhouse Gas Emissions Using Existing Clean Air Act Authorities*, statement before the H. Subcomm. on Energy and Air Quality, Comm. on Energy and Commerce, 110th Cong., (Apr. 10, 2008) (statement of Rep. John Dingell), *available at* www.gpo.gov/fdsys/pkg/CHRG-110hhrg51574/html/CHRG-110hhrg51574.htm.

³⁹ Letter from Todd Stern, U.S. Special Envoy for Climate Change, U.S. Dep’t of State, to Yvo de Boer, Exec. Sec’y., United Nations Framework Convention on Climate Change (Jan. 28, 2010).

⁴⁰ John M. Broder, *Many Goals Remain Unmet in 5 Nations’ Climate Deal*, N.Y. TIMES, Dec. 18, 2009, at A1 (statement of former Sen. John Kerry).

⁴¹ Lisa Lerner, *Senate Democrats to W.H.: Drop Cap and Trade*, POLITICO.COM, Dec. 27, 2009, <http://www.politico.com/news/stories/1209/30984.html> (“[M]oderate Senate Democrats are urging the White House to give up now on any effort to pass a cap-and-trade bill next year Moderate House Democrats who voted in favor of the cap-and-trade bill just before the July 4 recess came under fire back home”); Katherine Ling and Katie Howell, *Will the Ghost of Cap and Trade Haunt Democrats Tomorrow – and Beyond?*, N.Y. TIMES, Nov. 2, 2010, <http://www.nytimes.com/gwire/2010/11/02/02greenwire-will-the-ghost-of-cap-and-trade-haunt-democrat-85287.html?pagewanted=all> (“In at least a handful of races, Democrats have acknowledged support of the climate bill has hurt their chances for re-election.”).

⁴² Darren Samuelsohn and Robin Bravender, *Democrats’ Day of Reckoning Comes for Climate Vote*, POLITICO.COM, Nov. 3, 2010, <http://www.politico.com/news/stories/1110/44617.html>.

⁴³ Peck, *supra* note 34.

⁴⁴ Robert M. Sussman, *Power Plant Regulations Under The Clean Air Act: A Breakthrough Moment For U.S. Climate Policy?*, 32 VA. ENVTL. L.J. 97, 99 (2014) (Senior Policy Counsel to the EPA Administrator from 2009 to 2013).

In June 2013, the White House announced “The President’s Climate Action Plan,” which reiterated the United States’ pledge at COP 15 for a 17 percent reduction in CO₂ emissions.⁴⁵ In an accompanying memorandum, the EPA was directed to complete by June 2015 standards under CAA Section 111 requiring reductions in CO₂ emissions from existing EGUs.⁴⁶

However, reducing economy-wide CO₂ emissions by 17 percent—the target established in Waxman-Markey—would require EGU point source CO₂ emissions reductions well in excess of 17 percent from 2005 levels.⁴⁷ As one former EPA official explained, “[a] rough calculation shows that . . . power plant emissions would need to be reduced by thirty-one percent to achieve an economy-wide reduction of seventeen percent.”⁴⁸ That commenter went on to note, “[p]lainly, EPA could not achieve reductions in the range of 30% under a source-based approach to defining BSER, creating a powerful impetus for the Obama Administration to adopt [a much broader] systems-based approach[]”⁴⁹ that would reach well beyond the individual EGU.

As pointed out by supporters of Waxman-Markey, and as discussed below, CAA Section 111(d) only authorizes regulations through standards of performance at individual and existing sources that actually emit, or may emit, pollutants into the atmosphere. Thus, in order to achieve the reductions pledged at COP 15 and reiterated in the Climate Action Plan, the EPA needed to formulate a broad new interpretation of CAA Section 111(d) that reaches beyond the fence-line of individual EGUs, and require aggressive reductions from a broader set of entities. But, as the EPA staff admitted at the time, “[t]he legal interpretation [for a broader approach to Section 111(d)] is challenging. This effectively hasn’t been done.”⁵⁰

⁴⁵ EXEC. OFFICE OF THE PRESIDENT, *The President’s Climate Action Plan* 6, June 2013 (“In 2009, President Obama made a commitment to reduce U.S. greenhouse gas emissions in the range of 17 percent below 2005 levels by 2020. The President remains firmly committed to achieving that goal.”)

⁴⁶ Power Sector Carbon Pollution Standards; Memorandum for the Administrator of the Environmental Protection Agency, 78 Fed. Reg. 39,535, 39,535-36 (July 1, 2013).

⁴⁷ On November 12, the United States and China agreed to new, even more aggressive CO₂ emission reductions from the United States. In the agreement, the Administration “announced a target to cut U.S. emissions 26 to 28 percent below 2005 levels by 2025, the first time the president has set a goal beyond the existing 17 percent target by 2020.” David Nakamura and Steven Mufson, *China, U.S. agree to limit greenhouse gases*, WASHINGTON POST, November 12, 2014, available at http://www.washingtonpost.com/business/economy/china-us-agree-to-limit-greenhouse-gases/2014/11/11/9c768504-69e6-11e4-9fb4-a622dae742a2_story.html. (“[T]o meet its target, the United States will need to double the pace of carbon pollution reduction from 1.2 percent per year on average from 2005 to 2020 to 2.3 to 2.8 percent per year between 2020 and 2025.”). Putting aside whether the agreement is enforceable, it nonetheless does not represent the emission goals the Administration and the EPA are now seeking to achieve under *existing law*.

⁴⁸ Sussman, *supra* note 41 at 126, n. 87.

⁴⁹ *Id.* at 126.

⁵⁰ Coral Davenport, *E.P.A. Staff Struggling to Create Pollution Rule*, N.Y. TIMES, Feb. 4, 2014, at A12 (“In marathon meetings and tense all-day drafting sessions, dozens of lawyers, economists and engineers at the Environmental Protection Agency are struggling to create what is certain to be a divisive but potentially historic centerpiece of President Obama’s climate change legacy.”).

C. The EPA Issues Its Proposed Rule.

On June 18, 2014, the EPA published its proposed rule, claiming authority under Section 111(d) of the CAA. The proposed rule aims to reduce CO₂ emissions from the power sector in 2030 by 30 percent, relative to 2005 CO₂ emissions levels. To achieve these reductions, the EPA has proposed for each State interim and final “emission goals,” expressed as pounds of CO₂ emitted per megawatt hour (“lbs/MWh”), that all of the affected EGUs in the State must collectively achieve.⁵¹ These “emission goals” are based on what the EPA claims is the “best system of emission reduction” (“BSER”) that the EPA has ostensibly found to be “adequately demonstrated” while “taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements.”⁵²

The proposed rule follows on the heels of a similar EPA proposal published earlier this year applicable to *new* fossil fuel-fired EGUs.⁵³ There, the Agency proposed a standard of performance of 1,100 lbs/MWh for all new coal-fired electric utility steam generating units and integrated gasification combined cycle units, and a separate standard for new natural gas-fired stationary combustion turbines of 1,000 lbs/MWh for larger units and 1,100 lbs/MWh for smaller units.⁵⁴ The BSER proposed by the EPA for new coal-fired EGUs was based on the application of partial carbon capture and storage (“CCS”) technology, while the BSER for natural gas combustion turbines was based on NGCC technology.⁵⁵

In contrast to the proposed rule for new EGUs (and all prior interpretations of CAA Section 111(d)), the BSER in the proposed rule here is not based on emission reduction systems applied directly to affected EGUs. Rather, the BSER entails: “(1) Reducing the carbon intensity of certain affected EGUs by improving the efficiency of their operations, and (2) addressing affected EGUs’ mass emissions by varying their utilization levels”⁵⁶ (*i.e.*, reducing the demand for electricity from these EGUs). Thus, the EPA considers a broad set of measures that go “beyond the fence-line” of the affected EGUs in order to either shift load from higher CO₂-emitting EGUs to lower CO₂-emitting EGUs, or to reduce the total demand for electricity from EGUs that emit CO₂.

Consequently, the EPA has proposed a BSER that draws on activities that fall into four so-called “building blocks” that the Agency has concluded will reduce CO₂ emissions from existing fossil fuel-fired EGUs. These building blocks consist of:

⁵¹ See Proposed Rule, 79 Fed. Reg. at 34,957-58.

⁵² 42 U.S.C. § 7411(a)(1).

⁵³ See Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1,430 (Jan. 8, 2014) (“Proposed GHG Rule for New Sources”).

⁵⁴ *Id.* at 1,433.

⁵⁵ *Id.* The comment period for the EPA’s Proposed GHG Rule for New Sources closed May 9, 2014, and the EPA is projected to issue its final rule in January 2015.

⁵⁶ Proposed Rule, 79 Fed. Reg. at 34,836.

Building Block 1: Reducing the CO₂ emissions at individual affected coal-fired EGUs through heat rate improvements.

Building Block 2: Reducing emissions from the most carbon-intensive affected EGUs by shifting generation to less carbon-intensive affected EGUs, principally NGCC units.

Building Block 3: Reducing emissions from all affected EGUs by increasing deployment of low- or zero-carbon emitting generating resources and preserving capacity at certain existing nuclear units.

Building Block 4: Reducing emissions from all affected EGUs by implementing demand-side energy efficiency measures to reduce overall levels of generation required.⁵⁷

The EPA describes this as a “plant to plug” approach to regulating CO₂ emissions from the electric utility sector.⁵⁸

The EPA established its interim and final⁵⁹ state-specific emission goals through the application of these four building blocks to each State’s specific electricity supply and demand portfolio.⁶⁰ After obtaining state-by-state data concerning total annual quantities of CO₂ emissions, net electricity generation measured in megawatt-hours, and total electric generating capacity in megawatts based on 2012 data for all affected EGUs, the EPA computed an adjusted average annual CO₂ emission rate for each State using a formula designed to express numerically

⁵⁷ *Id.*

⁵⁸ See EPA Administrator Gina McCarthy, *Remarks Announcing Clean Power Plan, As Prepared*, June 2, 2014 (“To craft state goals, we looked at where states are today, and we followed where they’re going The goals spring from smart and sensible opportunities that states and businesses are taking advantage of right now. From *plant to plug*.”) (emphasis added); see also EPA, *EPA Fact Sheet: Clean Power Plan Flexibility: Flexible Approach to Cutting Carbon Pollution*, June 2, 2014, www2.epa.gov/carbon-pollution-standards/fact-sheet-clean-power-plan-flexibility.

⁵⁹ States will be required to meet the interim goals beginning in 2020 and, following a ten-year compliance period, will be required to meet the final goal by 2030.

⁶⁰ The EPA states in the preamble that it is actually considering two “alternative” BSERs in the proposed rule. One alternative “identifies the combination of the four building blocks as the BSER.” Proposed Rule, 79 Fed. Reg. at 34,852. The other alternative BSER is based on building block 1 plus “the reduction of affected fossil fuel-fired EGUs’ mass emissions achievable through reductions in generation of specified amounts from those EGUs” attributable to the application of building blocks 2 through 4. *Id.* Under this alternative, “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.” *Id.* It is not clear whether there is any practical difference between these two “alternatives,” and they each lead to the same outcome in terms of the emission “goal” prescribed by the EPA. It appears that the second alternative is intended to pay lip service to the fact that standards of performance under Section 111(d) may apply only to stationary sources that “emit[] or may emit any air pollutant” into the atmosphere (a legal impediment to the proposed rule that is discussed in greater detail below) and that, technically speaking, building blocks 2 through 4 cannot be imposed directly on the fossil fuel-fired EGUs that are covered by this proposed rule.

the level of CO₂ reductions that the EPA expects will be achieved through the application of the building blocks in each year. The final CO₂ emission goals range from a low of 215 lbs/MWh for Washington State to a high of 1,783 lbs/MWh in North Dakota, with over half of the final state goals more stringent than the proposed standard of 1,100 lbs/MWh for new coal-fired EGUs.⁶¹

According to the EPA's implementing regulations, once the rule is finalized, each State must submit a plan with "emission standards [that] shall be no less stringent than the corresponding emission guideline(s)" established by the EPA.⁶² If a State does not submit such a plan, or if its plan is insufficient, the EPA will establish a federal plan for each such State under CAA Section 111(d)(2).⁶³

III. Legal Framework

In reviewing an agency's interpretation of a statute, courts are faced with two questions. The first question is whether Congress has directly spoken to the issue presented. If Congress has made its intent clear, a court and an agency must give effect to that intent.⁶⁴ If, however, the statute is silent or ambiguous on the issue, a court must answer a second question: whether the agency's action is based on a permissible construction of the statute.⁶⁵ In all events, courts cannot uphold agency interpretations that are unreasonable.⁶⁶

In evaluating an agency's construction of a statute, courts are suspicious of interpretations that purport to confer on the agency dramatic, newfound power. "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" for example, courts "typically greet its announcement with a measure of skepticism."⁶⁷ Courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"⁶⁸

In addition, Courts are reluctant to interpret a statute in a way that upsets the traditional balance of power between the States and the federal government. The Supreme Court has repeatedly "declined to read federal law as intruding on . . . [a] responsibility" that "our constitutional structure leaves . . . primarily to the States."⁶⁹ The Court has thus established "clear statement" rules that protect States against federal legislation that intrudes on core state

⁶¹ *Id.* at 34,957-58.

⁶² 40 C.F.R. § 60.24(c).

⁶³ *See* 42 U.S.C. § 7411(d)(2).

⁶⁴ *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

⁶⁵ *Id.* at 843.

⁶⁶ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445 n. 29 (1987).

⁶⁷ *UARG*, 134 S. Ct. at 2444 (citations omitted).

⁶⁸ *Id.* (citations omitted).

⁶⁹ *Bond v. United States*, 134 S. Ct. 2077, 2083 (2014).

functions,⁷⁰ and against federal legislation that preempts areas traditionally regulated by the States: “if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”⁷¹ Thus, when Congress has not provided a “clear statement that [it] meant the statute to reach . . . conduct” that States have primary responsibility to oversee, courts will not construe the statute to authorize that action.⁷²

These clear statement principles set a particularly high bar when applied to agency action. The clear statement rules set forth in *Gregory* and other cases rest on the understanding that state interests will be protected in the federal legislative process by the States’ congressional representatives.⁷³ As *Gregory* reasoned, “inasmuch as this Court . . . has left primarily to the political process the protection of the States against intrusive exercises of Congress’ Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.”⁷⁴ “[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which” the Court has “relied to protect states’ interests.”⁷⁵ That rationale counsels heightened judicial vigilance against infringement of state sovereignty by federal agencies—bodies in which States have no formal representation and that are uniquely insulated from Congress’s direct electoral accountability.

Further, when an agency’s construction of a statute implicates serious constitutional questions—such as the principles of federalism embodied in the Tenth Amendment—courts will narrowly construe the agency’s statutory authority so that they can avoid unnecessary constitutional adjudication.⁷⁶ That rule of avoidance trumps any administrative deference that an agency would otherwise enjoy.⁷⁷

Finally, a court will vacate a rule that is contrary to law, arbitrary and capricious, or unsupported by evidence.⁷⁸ An agency rule is arbitrary or capricious if the agency has “relied on factors which Congress has not intended it to consider, entirely failed to consider an important

⁷⁰ See *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140-41 (2004).

⁷¹ *Gregory*, 501 U.S. at 460 (citations and internal quotation marks omitted).

⁷² *Bond*, 134 S. Ct. at 2090; see *Am. Bar Ass’n v. FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005) (“Federal law ‘may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion.’”) (citations omitted).

⁷³ See *Gregory*, 501 U.S. at 463.

⁷⁴ *Id.* at 464.

⁷⁵ *Id.* (citations and internal quotation marks omitted).

⁷⁶ See, e.g., *Pub. Citizen v. DOJ*, 491 U.S. 440, 466-67 (1989); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

⁷⁷ See *DeBartolo*, 485 U.S. at 575-78; *Rural Cellular Ass’n v. FCC*, 685 F.3d 1083, 1090 (D.C. Cir. 2012); *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

⁷⁸ See 5 U.S.C. § 706(2).

aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency.”⁷⁹

IV. Analysis

The EPA’s proposed rule cannot be reconciled with the plain language of the CAA. Section 111(d)’s text makes clear that it does not authorize the EPA to regulate, as a “system” of emission reduction, every element of the U.S. economy that affects the generation, transmission, distribution, and consumption of electricity. That textual conclusion is reinforced by the sweeping impact that the proposed rule would have on the States. If correct, the EPA’s interpretation of Section 111(d) would authorize the Agency to intrude upon authority reserved to the States under the Tenth Amendment, to compel States to enact and enforce programs to implement a federal scheme despite Tenth Amendment anti-commandeering principles, and to defy the established authority of States to govern local electricity generation matters. No reviewing court would condone the EPA’s sprawling new, and novel, interpretation of its Section 111(d) authority. Ultimately, the proposed rule exceeds the bounds of Section 111(d) and fails to adequately consider or address critical issues, and it is thus impossible to conclude that the EPA’s asserted interpretation of the CAA is lawful.

A. The Plain Language of the CAA Provides No Authority for the Proposed Rule.

As explained below, Congress did not authorize the vast new powers that the EPA claims in its self-described “plant to plug” theory of Section 111(d). The EPA touts the proposed rule as offering States “flexible” options to implement extensive CO₂ reductions from existing EGUs. However, the proposal asserts an entirely novel approach under CAA Section 111 that effectively arrogates to the EPA nearly endless authority over the economy. The U.S. Supreme Court recently warned the EPA about such power-grabs, stating that “[w]hen 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 decisions of vast ‘economic and political significance.’”⁸⁰ However, Congress did not assign to the EPA, clearly or otherwise, the powers that the Agency now claims in the proposed rule. What is unambiguously clear—not only from the CAA, but also the FPA and the Constitution—is that Congress intended that the EPA’s authority would remain confined to environmental protection and not be allowed to encroach upon States’ rights over larger policy issues such as electricity generation resource planning and siting, retail electric distribution service, and retail sales.

As a threshold matter, the EPA does not have authority to regulate coal-fired EGUs under Section 111(d). The CAA exempts from Section 111(d) existing source performance standards source categories such as EGUs that are already regulated under Section 112. Coal-fired EGUs are presently regulated under Section 112 of the CAA through the EPA’s recent Mercury and Air

⁷⁹ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁸⁰ *UARG*, 134 S. Ct. at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (“Brown & Williamson”)).

Toxics Standards (“MATS”). Thus, the EPA does not even have jurisdiction to issue regulations on those same sources under Section 111(d).

Even if the EPA could address coal-fired EGUs under Section 111(d), that provision is clear that standards of performance are applicable only to the stationary source that actually emits the pollutant in question; Section 111(d) may not be used as a tool to more broadly regulate that source’s entire sector, including to the point of requiring a reduction in the consumption of the sector’s product, *i.e.*, in this instance, electricity. Section 111(d) is, in fact, a narrow, source-based provision that was designed for States to develop achievable “standards of performance” for individual stationary sources in designated source categories—in this case, EGUs. The definition of “stationary source” is essential to understanding the limits of the EPA’s regulatory authority. Yet, a discussion of the stationary source definition is nowhere to be found in the preamble to the proposed rule or the EPA’s accompanying legal memorandum.⁸¹ Indeed, the definition of stationary source is curiously omitted from the proposed rule’s entire docket of 620 supporting documents.⁸² Instead, the EPA simply comes to the Orwellian conclusion that the definition of “standard of performance” does not constrain the “systems of emission reduction” available under Section 111, “[n]or does the context in which ‘standard of performance’ is found—the provisions of Section 111(d)(1)—add constraints on the things that may constitute such a system.”⁸³

Ignoring Section 111(d)’s clear constraint on stationary sources, the EPA instead cites the Oxford English Dictionary’s definition of “system” as “[a] set of things working together as parts of a mechanism or interconnecting network.”⁸⁴ The EPA explains in its Legal Memorandum that “[t]his definition is broad. It encompasses virtually any ‘set of things’ that reduces emissions.”⁸⁵ Not even what is “best” or “adequately demonstrated” for a source in the designated category constrain the “things” that could be a system of emission reduction under Section 111.⁸⁶ Thus, the EPA adopts an all-things approach in the proposed rule, concluding that the Agency may consider “*anything* that reduces emissions” when setting standards of performance.⁸⁷ In this way, the EPA’s statutory analysis of Section 111 in the proposed rule ignores the crucial stationary source definition, instead latching on the word “system” to conclude that the agency may base performance standards on “any method that reduces the affected sources’ emissions, as

⁸¹ Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units, Docket No. EPA-HQ-OAR-2013-0602-0419 (“Legal Memorandum”).

⁸² Searching for the phrase “building, structure, or installation” in the proposed emission guidelines’ online docket only produces one result, a September 2004 EPA document entitled “Incorporating Emerging and Voluntary Measures in a State Implementation Plan (SIP).” Docket No. EPA-HQ-OAR-2013-0602-0062. However that document does not discuss the phrase in the context of the “stationary source” definition found in CAA Section 111(a)(3).

⁸³ Proposed Rule, 79 Fed. Reg. at 34,886.

⁸⁴ *Id.* at 34,885.

⁸⁵ Legal Memorandum at 51.

⁸⁶ *Id.* at 51-52.

⁸⁷ *Id.* at 52 (emphasis added).

long as that method is a ‘system’ that meets the criteria for being the ‘best’ that is ‘adequately demonstrated.’”⁸⁸

To effectuate this breathtakingly broad “all-things” approach, the proposed rule departs from past EPA actions to concurrently claim vast new jurisdiction in its effort to regulate “beyond the fence-line” of the affected EGUs. Without asserting any change to the EPA’s Subpart B regulations, the proposed rule disregards its existing paradigm of regulating only the “designated facilities,” and directs state plans to instead regulate entities that do not actually emit any pollutants into the atmosphere, such as electric distribution utilities and consumers of electricity.⁸⁹ The EPA places no limits on the term “affected entity” that may be regulated under its proposed rule, and includes in it any “entity with obligations” to fulfill a State’s requirements to reduce CO₂ emissions from the electric utility sector,⁹⁰ encompassing not only EGUs, but also “a private or public third-party entity”⁹¹ Because the EPA does not limit “affected entities” under the proposed rule, the term could literally include any organization, company or person with responsibilities to reduce emissions. Notably, the EPA has issued no NSPS for these “affected entities” beyond EGUs. Thus, the EPA is impermissibly attempting to regulate sources beyond those for which there is a NSPS.

Ultimately, the proposed rule departs from Section 111’s clear statutory language and context to give the EPA regulatory authority over vast areas of the economy—not just on EGUs or their CO₂ emissions—but literally over *anything that could potentially affect the amount of electricity produced* by those EGUs and, thus, the amount of CO₂ they emit. This approach would allow the EPA to base standards of performance on quite literally *any* “thing” that reduces emissions from a sector, including limiting or banning the sale of that sector’s goods or services. Combined with its assertion of “all-entities” jurisdiction, this theory would effectively give the EPA authority under Section 111 to compel any entity to do anything that reduces emissions in a sector so long as the EPA determines that thing is adequately demonstrated. In other words, the proposal addresses emissions not through mandating controls at a specific entity’s designated facility, but instead by regulating the very actions of a far more vast group of affected entities.

The EPA is limited under Section 111(d) to the “plant.” But in the proposed rule the EPA finds new powers in Section 111 to regulate EGU emissions not just at the “plant,” but also at the “plug” and indeed everything in between. In fact, the proposed rule’s proposed guidelines will affect, for example, how people heat or cool their homes or the appliances they buy, to effectively regulate from “plant to person.” Ultimately, the vast authority claimed in the proposed rule sets precedent for even broader regulations, for instance “from well-head to wheel-well,” or in the words of Justice Scalia, “from Frisbees to flatulence.”⁹²

⁸⁸ Proposed Rule, 79 Fed. Reg. at 34,885.

⁸⁹ *Id.* at 34,917.

⁹⁰ *Id.* at 34,956.

⁹¹ *Id.* at 34,917.

⁹² *Mass. v. EPA*, 549 U.S. 497, 558 n. 2 (2007) (Scalia, J., dissenting).

The plain language of the CAA clearly withholds from the EPA the expansive powers necessary for a “plant to plug” approach. The primacy of States over the local production and distribution of electricity reinforces the limited nature of the EPA’s authority. Clearly, the CAA does not confer on the EPA authority over the electricity markets that Congress denied to FERC. To the contrary, the plain language of Section 111(d) authorizes the EPA to issue only guidelines for development of State plans that contain emission performance standards for stationary sources that actually emit pollutants, and specifically directs that States, in developing such plans, are to consider the impact of performance standards on the remaining useful life of individual units as well as “other factors” regarding state and local impacts and concerns. By attempting to regulate the local production, distribution and consumption of electricity, the proposed rule eviscerates the regulatory compact that has been a foundation of utility regulation for over 100 years. Indeed, the EPA’s intrusion into state power over the electricity grid raises substantial Constitutional issues under the Tenth Amendment’s reservation of local regulatory powers to the states.

Ultimately, with the proposed rule, the EPA asks States “to stand on the dock and wave goodbye as the EPA embarks on this multiyear voyage of discovery.”⁹³ Nothing in the CAA or FPA suggests that Congress has authorized the EPA’s journey.

1. Section 111(d) Is Not an Available Tool to Regulate EGUs because this Source Category Is Already Regulated Under Section 112.

The EPA’s proposed rule for EGUs is fatally flawed at the outset because the CAA explicitly bars the EPA from employing Section 111(d) to regulate pollutants emitted from a source category that is already regulated under Section 112. Because emissions from coal-fired EGUs are already regulated under Section 112 pursuant to the MATS Rule, adopting Section 111(d) emission guidelines for this same source category would illegally subject these EGUs to double regulation in violation of the clear terms of the Act. The EPA’s attempt to evade this clear statutory prohibition by contriving “ambiguity” from a purported clerical error that appears nowhere in the U.S. Code is implausible and impermissible.

Section 111(d) states unequivocally and without qualification that its provisions may not be used to regulate any air pollutant “emitted from a source category which is regulated under Section [112] of this title,”⁹⁴ *i.e.*, the “Section 112 Exclusion.”⁹⁵ Coal-fired EGUs, of course, are already regulated under Section 112: the EPA categorized coal-fired EGUs as part of a “source category” under Section 112 in 2000⁹⁶ and imposed significant regulations on these plants in the 2012 MATS Rule.⁹⁷ Accordingly, the coal-fired emissions that the EPA proposes to regulate in

⁹³ *UARG*, 134 S. Ct. at 2446.

⁹⁴ 42 U.S.C. § 7411(d)(1)(A)(i).

⁹⁵ Legal Memorandum at 22.

⁹⁶ *See* EPA Notice of Regulatory Finding, 65 Fed. Reg. 79,825, 79,830 (Dec. 20, 2000).

⁹⁷ *See* Nat’l Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012).

the proposed rule are clearly emissions of an air pollutant “emitted from a source category which is regulated under Section [112].” By the plain terms of the CAA, therefore, this source category cannot be subject to standards of performance under Section 111(d) and the EPA’s analysis must end there.

The EPA itself admits that “a literal reading of that language” means that the Agency “could not regulate any air pollutant from a source category regulated under Section 112,” effectively barring the proposed rule.⁹⁸ This result is in accord with the Supreme Court’s recent observation that the “EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under . . . the ‘hazardous air pollutants [HAPs]’ program, § 7412.”⁹⁹ In an attempt to avoid this fatal flaw, the EPA weaves the illusion of ambiguity into the plain text of Section 111(d) and claims that it still has the authority to require states to regulate CO₂ from a source category (i.e., EGUs) already regulated under Section 112. The EPA is incorrect.

The agency attempts to manufacture this “ambiguity” from a purported drafting error in the 1990 CAA Amendments that was not codified in the U.S. Code, claiming that the U.S. Code “does not accurately reproduce the Section 112 Exclusion as enacted in the 1990 CAA Amendments.”¹⁰⁰ This is not correct. The 1990 Amendments as they appear in the Statutes at Large included two provisions addressing Section 111(d), one substantive and one clerical. The EPA’s claim that these provisions lead to an ambiguity—and that this “ambiguity” allows the EPA to disregard the plain meaning and intent of the CAA as it appears in the U.S. Code—is flawed for several reasons.

The first provision in the 1990 Amendments, which sets forth Section 111(d) as it appears in the U.S. Code today, substantively amended Section 111(d) to prohibit its use to regulate emissions of any air pollutant “emitted from a source category which is regulated under section [112].”¹⁰¹ In the pre-1990 version of the CAA, the Section 112 Exclusion applied to pollutants “included on a list [of identified HAPs] published under . . . 112(b)(1)(A).”¹⁰² Thus, the substantive amendment directly altered the focus of the Section 112 Exclusion from *pollutants* that could be regulated under Section 112 to *source categories* that are regulated under Section 112.

⁹⁸ Legal Memorandum at 26.

⁹⁹ *Am. Elec. Power Co., Inc. v. Conn.*, 131 S. Ct. 2527, 2537 n.7 (2011). Curiously, the EPA’s Legal Memorandum ignores this plain statement from the Supreme Court where it incorrectly asserts that the holding in *that case* “was premised on the Court’s understanding that section 111, *including section 111(d)*, applies to carbon dioxide emissions from those sources.” Legal Memorandum at 21 (emphasis added). To the contrary, the Court recognized that there is an exception to regulation under Section 111(d) where the source category is already regulated under Section 112.

¹⁰⁰ Legal Memorandum at 23.

¹⁰¹ Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990) (“1990 CAA Amendments”).

¹⁰² 42 U.S.C. § 7411(d)(1988).

By contrast, the second provision appears among a list of purely clerical “Conforming Amendments,” which are used to carry out ministerial changes that are rendered necessary by substantive changes elsewhere in the statute and that have no substantive effect themselves.¹⁰³ This particular conforming amendment simply updated the pre-1990 version’s cross-reference to “section 112(b)(1)(A)” to account for the renumbering of parts of Section 112.¹⁰⁴ Because the first, substantive amendment to Section 111(d) eliminated this cross-reference, the conforming amendment was no longer necessary and “could not be executed” in the U.S. Code.¹⁰⁵

The existence of these provisions in the Statutes at Large therefore does not render Section 111(d) “ambiguous.” The law is clear that the U.S. Code “establish[es] prima facie the laws of the United States,”¹⁰⁶ and the U.S. Code is only displaced where it is “inconsistent” with the Statutes at Large.¹⁰⁷ The EPA claims that the two provisions in the Statutes at Large, applied independently to the pre-1990 CAA, create two separate, inconsistent versions of Section 111(d), and that the EPA must give effect to both versions.¹⁰⁸ This is simply false: the Statutes at Large do not reflect two separate versions of Section 111(d) because the basic rules of legislative drafting require that substantive and conforming amendments be applied *one after the other* rather than independently. Applying the provisions properly in this order yields the single version of Section 111(d) that is currently embodied in the U.S. Code and, as the legislative history explains, the technical conforming amendment simply cannot be executed—a common occurrence in complex legislation,¹⁰⁹ and one that has never led a court to give effect to the vestigial conforming amendment over the substantive amendment that renders it moot. Where a mistake in renumbering a statute and correcting a cross-reference conflicts with a substantive provision of the statute, the mistake should not be treated as “creating an ambiguity.”¹¹⁰ Indeed,

¹⁰³ See Senate Legislative Drafting Manual § 126(b)(2)(A).

¹⁰⁴ 1990 CAA Amendments § 302(a), 104 Stat. 2399 (1990) (accounting for changes to § 112 by “striking ‘[112](b)(1)(A) and inserting in lieu thereof ‘[112](b)’”).

¹⁰⁵ Revisor’s Note, 42 U.S.C. § 7411.

¹⁰⁶ 1 U.S.C. § 204(a).

¹⁰⁷ *Stephan v. United States*, 319 U.S. 423, 426 (1943).

¹⁰⁸ Legal Memorandum at 24-27.

¹⁰⁹ See, e.g., Revisor’s Note, 5 U.S.C. app. 3 § 12; Revisor’s Note, 7 U.S.C. § 2018; Revisor’s Note, 8 U.S.C. § 1324b; Revisor’s Note, 10 U.S.C. § 869; Revisor’s Note, 10 U.S.C. § 1074a; Revisor’s Note, 10 U.S.C. § 1407; Revisor’s Note, 10 U.S.C. § 2306a; Revisor’s Note, 10 U.S.C. § 2533b; Revisor’s Note, 11 U.S.C. § 101; Revisor’s Note, 12 U.S.C. § 1787; Revisor’s Note, 12 U.S.C. § 4520; Revisor’s Note, 14 U.S.C. ch. 17 Front Matter; Revisor’s Note, 15 U.S.C. § 1060; Revisor’s Note, 15 U.S.C. § 2081; Revisor’s Note, 16 U.S.C. § 230f; Revisor’s Note, 18 U.S.C. § 1956; Revisor’s Note, 18 U.S.C. 2327; Revisor’s Note, 20 U.S.C. § 1226c; Revisor’s Note, 20 U.S.C. § 1232; Revisor’s Note, 20 U.S.C. § 4014; Revisor’s Note, 21 U.S.C. § 355; Revisor’s Note, 22 U.S.C. § 2577; Revisor’s Note, 22 U.S.C. § 3651; Revisor’s Note, 22 U.S.C. § 3723; Revisor’s Note, 26 U.S.C. § 105; Revisor’s Note, 26 U.S.C. § 219; Revisor’s Note, 26 U.S.C. § 613A; Revisor’s Note, 26 U.S.C. § 1201; Revisor’s Note, 26 U.S.C. § 4973; Revisor’s Note, 26 U.S.C. § 6427; Revisor’s Note, 29 U.S.C. § 1053; Revisor’s Note, 33 U.S.C. § 2736; Revisor’s Note, 37 U.S.C. § 414; Revisor’s Note, 38 U.S.C. § 3015; Revisor’s Note, 39 U.S.C. § 410; Revisor’s Note, 40 U.S.C. § 11501; Revisor’s Note, 42 U.S.C. § 218; Revisor’s Note, 42 U.S.C. § 300ff-28; Revisor’s Note, 42 U.S.C. § 3025; Revisor’s Note, 42 U.S.C. § 5776; Revisor’s Note, 49 U.S.C. § 47115.

¹¹⁰ *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013).

in a previous rulemaking examining the Section 112 Exclusion, the EPA itself recognized that the conforming amendment to Section 111(d) “is a drafting error and therefore should not be considered.”¹¹¹ That the EPA now attempts to base an entire proposed rule on what it has admitted is an “error” represents a serious lack of reasoned decision-making.

Furthermore, the plain language of Section 111(d) as it appears in the U.S. Code does not lead to a “ridiculous result” as the EPA claims:¹¹² it is unsurprising and entirely reasonable that Congress would protect existing sources from double regulation under Sections 111(d) and 112 in the 1990 CAA Amendments. Prior to 1990, Section 112 was a little-used program “under which only a few standards were developed.”¹¹³ From 1970 to 1990, the EPA acted to list and promulgate emission standards for only seven HAPs under Section 112.¹¹⁴ With the 1990 CAA Amendments, Congress expanded Section 112 to become a comprehensive regulatory scheme of technology-based standards for nearly 200 HAPs explicitly listed in the statute, and anticipated that this new scheme would reach 200-250 major source categories.¹¹⁵ Moreover, Congress explicitly addressed regulation of EGUs in Section 112(n), calling for the EPA to regulate that source category’s HAP emissions under Section 112 to the extent “appropriate and necessary.”¹¹⁶ Facing this dramatic expansion of the Section 112 program and the costs it would impose, Congress limited the universe of sources that could be regulated under Section 111(d) in recognition of the fairness and reliance concerns that are implicated by imposing emission control requirements on existing sources. For example, the EPA estimates the MATS Rule will cost affected coal-fired EGUs more than \$9 billion per year to install expensive new pollution controls for a number of air pollutants.¹¹⁷ It is reasonable to believe that Congress would want to avoid subjecting these units to even further costly regulations under Section 111(d) after having so extensively regulated them under Section 112.

Further supporting this conclusion is the fact that the 1990 CAA Amendments deliberately shifted the focus of the Section 112 Exclusion in Section 111(d) from listed pollutants to specific source categories because those Amendments also *shifted the focus of Section 112 itself* from listed pollutants to specific source categories. Prior to 1990, Section 112 directed the EPA to “publish . . . a list which includes each hazardous air pollutant for which he intends to establish an emission standard,” and then to “prescribe an emission standard *for such pollutant*.”¹¹⁸ These standards were not tailored to individual source categories and were

¹¹¹ Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the Section 112(c) List, 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005).

¹¹² Legal Memorandum at 23 n.22.

¹¹³ EPA, “Summary of the Clean Air Act,” *available at* <http://www2.epa.gov/laws-regulations/summary-clean-air-act>.

¹¹⁴ H.R. REP. NO. 101-490, 101st Cong., 2d Sess., at 151 (1990).

¹¹⁵ S. REP. NO. 101-228, 101st Cong., 1st Sess., at 148 (1990).

¹¹⁶ 42 U.S.C. § 7412(n)(1)(A).

¹¹⁷ *See* EPA, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards at 3-13 (Dec. 2011), *available at* <http://www.epa.gov/ttn/ecas/regdata/RIAs/matsriafinal.pdf>.

¹¹⁸ 42 U.S.C. § 7412(b)(1) (1988) (emphasis added).

implemented through a general prohibition on emitting HAPs “from *any* stationary source in violation of such standard.”¹¹⁹ In other words, Section 112 established standards for pollutants “included on a list [of identified HAPs] published under section . . . [112](b)(1)(A),” and the Section 112 Exclusion in Section 111(d) as it existed prior to 1990 reflected that regulatory approach.¹²⁰

But under the version of Section 112 adopted in 1990, Congress provided the list of HAPs and directed the EPA to first “publish . . . a list of all *categories and subcategories* of major sources and area sources” of HAPs and then “promulgate regulations establishing emission standards *for each category or subcategory*.”¹²¹ Under this new approach, Section 112 standards “apply to sources in a category . . . rather than to pollutants individually.”¹²² The new emphasis on technology-based standards tailored to specific source categories represents a fundamental change in Section 112’s regulatory approach. Once Section 112 was altered to establish standards for any “*source category* which is regulated under section [112],” Congress amended the Section 112 Exclusion in Section 111(d) accordingly to reflect that approach.¹²³ Thus, Congress’s choice of language in Section 111(d) of the U.S. Code was clearly intentional and served a reasonable purpose.

In any event, even if one treats the technical conforming amendment as a substantive provision and not as a drafting error, the EPA’s proposed rule would still be unlawful. The EPA claims that the Statutes at Large contain two competing versions of the Section 112 Exclusion: one (embodied in the U.S. Code) that prohibits the use of Section 111(d) to regulate emissions from any source category regulated under Section 112, and one (supposedly created by the ineffective conforming amendment) that prohibits the use of Section 111(d) to regulate emissions of any HAP, regardless of its source.¹²⁴

Yet these two versions are simply not inconsistent: the EPA can readily apply *both* together without reducing the scope of either. Indeed, the EPA must “give effect, if possible, to every word Congress used.”¹²⁵ This is not a situation like that in *Citizens to Save Spencer County v. EPA*, in which the U.S. Code contained two deadlines for the same action that were mutually exclusive on their face, requiring the Agency to “pursue a middle course” not found in either provision.¹²⁶ Here, the two “versions” of Section 111(d) the EPA has set forth can be reconciled by allowing both to trigger the Section 112 Exclusion. If the EPA is correct that the Statutes at Large include two versions of Section 111(d), then the only plausible reading of that provision is that the EPA is prohibited from using Section 111(d) to regulate *either* any

¹¹⁹ *Id.* § 7412(c)(1) (1988) (emphasis added).

¹²⁰ *Id.* § 7411(d)(1) (1988).

¹²¹ *Id.* § 7412(c)(1), (d)(1) (emphasis added).

¹²² S. REP. NO. 101-228, 101st Cong., 1st Sess., at 148 (1990).

¹²³ 42 U.S.C. § 7411(d)(1)(A)(i) (emphasis added).

¹²⁴ *See* Legal Memorandum at 24-25.

¹²⁵ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

¹²⁶ *Citizens to Save Spencer Cty. v. EPA*, 600 F.2d 844, 871 (D.C. Cir. 1979).

emissions from any source category regulated under Section 112 *or* any HAP emissions from any source. *Neither reading is mutually exclusive of the other and, therefore, no ambiguity exists.* Thus, even giving effect to the clerical error in the 1990 CAA Amendments *still* renders the proposed rule illegal.

Rather than give effect to both “versions” of Section 111(d) that it has found in the Statutes at Large, the EPA is proposing to apply a new “interpretation” of Section 111(d) that is narrower than either version of the Section 112 Exemption alone and entirely inconsistent with the plain language of the U.S. Code. The EPA’s proposed approach ignores the statutory text rather than interpreting it. Under the EPA’s approach, the Agency would be barred only from using Section 111(d) to regulate emissions of “any HAP listed under section 112(b)” from a “source category [that] is regulated under section 112.”¹²⁷ By attempting to “give some effect to both amendments,” the EPA has failed to give effect to either.¹²⁸ Contrary to the substantive amendment to Section 111(d), the proposed approach would allow the EPA to use Section 111(d) to regulate source categories already regulated under Section 112 so long as the standards are for pollutants that are not listed under Section 112. And contrary to the conforming amendment, the proposed approach would allow the EPA to use Section 111(d) to regulate emissions of HAPs already listed under Section 112 so long as the source category being regulated is not already subject to Section 112 standards. This interpretation leads to the bizarre outcome that the sum of two statutory prohibitions actually prohibits less activity than either would alone. Even if there is a conflict within the Statutes at Large, that conflict “gives no license to a court or agency to indulge in unrestrained and fanciful flights of constructional imagination to arrive at artful but artificially consistent interpretations.”¹²⁹

Because coal-fired EGUs are already regulated as a source category pursuant to Section 112 under the MATS Rule, the EPA is prohibited from simultaneously regulating the same source category under Section 111(d). The EPA must withdraw the proposed rule.

2. The Proposed Rule Would Regulate Sources Not Subject to a New Source Performance Standard Under Section 111(b).

The proposed rule is also flawed because it purports to establish emission standards under Section 111 for entities other than existing fossil fuel-fired EGUs. Section 111(d) authorizes regulation only of sources “to which a standard of performance . . . would apply if such existing source were a new source.”¹³⁰ Section 111 further provides that standards of performance may be imposed on only “stationary sources” of air pollutants, *i.e.*, “any building, structure, facility, or installation which emits or may emit any air pollutant.”¹³¹ Yet the proposed rule would require States to regulate far beyond these bounds.

¹²⁷ Legal Memorandum at 26.

¹²⁸ *Id.*

¹²⁹ *Citizens to Save Spencer Cty.*, 600 F.2d at 870.

¹³⁰ 42 U.S.C. § 7411(d)(1)(A)(ii).

¹³¹ *Id.* § 7411(a)(3).

As defined in the EPA's January 8, 2014 NSPS proposal for GHG emissions from new EGUs, the sources appropriate for inclusion in these proposed rules are electric utility steam generating units, integrated gasification combined cycle ("IGCC") units, and stationary combustion turbines that meet certain capacity and operational criteria.¹³² These are the only entities upon which the EPA is empowered under Section 111(b) to impose regulations. Yet under the EPA's Section 111(d) proposal, State plans must include emission standards that impose "requirement[s] applicable to *any affected entity* other than an affected source that has the effect of reducing utilization of one or more affected sources."¹³³ Further, the EPA defines "affected entity" to include any "entity with obligations under this subpart for the purpose of meeting the emissions performance goal requirements in these emission guidelines."¹³⁴

With this circular definition, the EPA expands its emission guidelines to encompass *literally any entity* that the regulatory authority believes could contribute to reducing the demand for electricity from fossil fuel-fired EGUs. The "building blocks" that the EPA has chosen as its BSER will include owners and operators of renewable energy generators, entities that do not generate electricity but only distribute it to end-use customers, large industrial consumers and even residential consumers of electricity. The proposed rule would therefore dramatically expand the universe of regulated entities beyond the limited class of existing electric utility boilers, IGCC units, and stationary combustion turbines that would be regulated under the proposed NSPS. Indeed, under the EPA's proposal, it appears that the States themselves are affected entities potentially subject to compliance requirements. As noted above, the EPA proposes to define an affected entity as any "entity with obligations under this subpart," and the agency states in no uncertain terms that its proposed interim and final goals would establish "binding emission guidelines for state plans."¹³⁵

The EPA's expansive new reading is plainly impermissible under Section 111(d). No language in that provision authorizes the EPA (or even the States) to impose obligations on any "affected entity" other than existing sources in a regulated source category.¹³⁶ The EPA must

¹³² See Proposed GHG Rule for New Sources, 79 Fed. Reg. at 1502, proposed 40 C.F.R. § 60.46Da(a); *id.* at 1506, proposed 40 C.F.R. § 60.4305(c); *id.* at 1511, proposed 40 C.F.R. § 60.5509(a).

¹³³ Proposed Rule, 79 Fed. Reg. at 34,956 (proposed 40 C.F.R. § 60.5820) (emphasis added).

¹³⁴ *Id.*

¹³⁵ *Id.* at 34,892.

¹³⁶ In order to effectuate this expanded regulatory authority, "the EPA is proposing to authorize states either to submit plans that hold the affected EGUs fully and solely responsible for achieving the emission performance level, or to submit plans that rely in part on measures imposed on entities other than affected EGUs to achieve at least part of that level, as well as on measures imposed on affected EGUs to achieve the balance of that level." 79 Fed. Reg. at 34,901. While Section 111(d) "would certainly *allow* state plans to require the affected EGUs to be the sole entities legally responsible for achieving the emission performance level" prescribed in the proposed rule, *id.* at 34,901 (emphasis added), the plain language of Section 111(d) prevents the EPA from *requiring* States to submit plans that place regulatory obligations on parties other than fossil fuel-fired EGUs. More significantly, in the event that the EPA were to promulgate a federal plan for a State under Section 111(d)(2)(A), that federal plan *cannot* impose any compliance obligations on parties other than fossil fuel-fired EGUs. Consequently, whether through federal plans or through state plans that do not rely on measures imposed on entities other than affected EGUs, the proposed rule will improperly hold affected EGUs to compliance burdens that are beyond their ability to meet.

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withdraw its proposed rule because it depends on States imposing regulatory obligations under Section 111 on facilities other than existing fossil fuel-fired EGUs.

3. Even if Section 111(d) Were an Available Regulatory Tool, It Would Not Provide the Authority the EPA Asserts Here.

Setting aside these threshold issues, the proposed rule is also unlawful because it is based on emission reduction measures that far exceed the regulatory scope of Section 111 and impose obligations beyond the fence-line of regulated sources. In an apparent effort to meet the nation's COP 15 pledge of reducing CO₂ emissions by 17 percent on an economy-wide basis, the EPA has proposed a misguided “building block” approach that is designed to reduce CO₂ emissions by 30 percent from the entire electric utility sector. But that approach disregards the most fundamental requirement of Section 111: that its standards regulate the emissions performance of (and are achievable by) individual sources based on measures that can be incorporated into the design or operation of the source itself. This basic focus on individual sources is evident in the statute itself and has been a characteristic feature of *every* Section 111 rulemaking from the CAA's inception through the present. Section 111 requires that standard-setting begins and ends at the individual source in the category being regulated, and the fact that inside the fence-line reductions will not be sufficient in order to meet the nation's COP 15 commitment certainly does not authorize the EPA to ignore this clear limitation in the statute.

The proposed rule strays far outside the bounds of Section 111 and the fence-line of individual sources. Of the four “building blocks” that make up the EPA's proposed BSER, only building block 1 (heat rate improvements at coal-fired EGUs) falls within the scope of measures contemplated in Section 111. Thus, only building block 1 could serve as the basis for emission guidelines under Section 111(d). The others—shifting generation from coal-fired units to NGCC units, displacing generation from affected EGUs with generation from renewable energy generators, and reducing electricity demand through energy efficiency measures—all require measures that go beyond the fence-line of individual affected EGUs and are not within the control of individual source owners and operators. Indeed, the proposed rule goes so far as to impose regulatory obligations on a broad swath of unspecified “affected entities” beyond the

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In this way, the proposed rule is in direct conflict with the holding in *American Petroleum Inst. v. EPA*, in which the D.C. Circuit vacated portions of the EPA's renewable fuels standards because the EPA had ignored the clear limits on its authority under the CAA in order to press a “technology forcing” regulatory regime—in that case, a rule requiring refiners to blend more cellulosic biofuel than was projected to be made available in the market. In addition to holding that the EPA had violated the language of the statute in making its aggressive projections of fuel availability, the D.C. Circuit found fault with the rule because compliance by the regulated entities—*i.e.*, the refiners and marketers of transportation fuel—was dependent on the actions of others in making such fuel available. *See Am. Petroleum Inst. v. EPA*, 706 F.3d 474, 479-80 (D.C. Cir. 2013) (noting that “[a]part from their role as captive consumers, the refiners are in no position to ensure, or even contribute to, growth in the cellulosic biofuel industry.”). The proposed rule here suffers from the same fatal flaw. Fossil fuel-fired EGUs—the only parties that may be subject to regulation under Section 111(d)—are in no position to ensure or even contribute to the reductions in demand for electricity from their units that would be required to comply with the emission standards.

fossil fuel-fired EGUs that are the source category for this rule, many of which do not emit any CO₂ into the atmosphere.

It is also clear that the EPA has no authority under Section 111 to itself impose building blocks 2 through 4 directly on States or on non-emitting entities within the States—either as components of BSER for a NSPS under Section 111(b) or as part of a federal plan under Section 111(d)(2). The EPA, for example, cannot rely on Section 111(b) to require an electric utility to increase its utilization of NGCC units to 70 percent, or an electricity distributor to acquire 15 percent of its power from renewable sources, or consumers to reduce their use of electricity by 10 percent. There is likewise no authority in the statute that would allow the EPA to achieve these ends indirectly by including them in its BSER for regulations under Section 111(d).

The EPA's overly broad approach in the proposed rule flows partly from its unprecedented and unreasonable redefinition of what constitutes a "system of emission reduction." Under Section 111, a standard of performance must reflect "the degree of emission limitation achievable through the application of the best *system of emission reduction*" that has been adequately demonstrated for sources in the regulated category.¹³⁷ According to the EPA, because the specific word "system" is not defined in the Act, the Agency has free rein to instead use its abstract dictionary definition: "a *set of things* working together as parts of a mechanism or interconnecting network; a complex whole."¹³⁸ Devoid of any statutory context, the EPA applies this definition to conclude that a "system of emission reduction" can be "virtually any 'set of things' that reduce emissions" and includes "*anything that reduces emissions*, ranging from add-on controls . . . to measures that replace production or generation at the affected sources."¹³⁹ The EPA even claims that it may require "reduced utilization" of a source as part of a "system of emission reduction," and conceivably the complete shut-down of regulated sources.¹⁴⁰

This is a stunning departure from the plain meaning of Section 111, which has been read over its 44-year history to authorize only standards of performance that limit a source's rate of emissions based on methods incorporated into the design or operation of a source itself.¹⁴¹ Even where non-technological measures have been considered to be a "system of emission reduction," such as the use of low-sulfur coal in coal-fired boilers, those measures have still been limited to changes at the source that are within the control of the source owner or operator.¹⁴² The

¹³⁷ 42 U.S.C. § 7411(a)(1) (emphasis added).

¹³⁸ Legal Memorandum at 51 (emphasis added) (quoting *Oxford English Dictionary of English* (3rd ed.) (published 2010, online version 2013), <http://www.oxfordreference.com.mutex.gmu.edu/view/10.1093/acref/9780199571123.001.0001/acref-9780199571123>).

¹³⁹ *Id.* at 51-52 (emphasis added).

¹⁴⁰ *See* Proposed Rule, 79 Fed. Reg. at 34,889; Legal Memorandum at 79.

¹⁴¹ *See generally* 40 C.F.R. pt. 60.

¹⁴² Indeed, the EPA has never before read BSER so broadly so as to allow the Agency to regulate non-emitters of pollutants. Even where the EPA has stretched the limits of its authority in determining BSER—such as the development of a cap-and-trade program for mercury emissions from fossil fuel-fired EGUs, *see* Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005) ("CAMR") *vacated on other grounds by New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. (Cont'd on next page)

unbounded regulatory authority that the EPA's new approach would grant the Agency is patently inconsistent with the statute and unreasonable. It would allow the EPA to effectively require any "affected entity" to implement any "set of things" that the Agency believes would potentially have the effect of reducing the operation of sources in a source category and hence emissions from that category, no matter how far removed the required actions are from the source itself.

In the context of EGUs, these measures could include anything from limiting operations, to shutting down regulated sources or other affected entities altogether, to regulating how individuals use electricity or consume other goods and services. Applying this broad approach to other source categories—as this rulemaking implies the EPA is likely to attempt—leads to similarly unreasonable outcomes. For example, if the EPA were to apply a "beyond the source" approach to GHG standards of performance and emission guidelines for the gasoline refining industry, it might require refiners to "redispatch" fuel production from their facilities to less-utilized existing biofuel facilities, or it might require states to invest in constructing new biofuel facilities. Under this approach, the EPA could even use regulating refineries as a pretext to take other economy-wide measures that reduce the demand for gasoline. Increased motor vehicle fuel efficiency standards, efforts to promote electric vehicles and natural gas-fueled vehicles, and investments in mass transit systems are each a "set of things" that the EPA might consider a "system of emission reduction" for gasoline refineries. The Agency could even require businesses to make greater use of telecommuting in order to encourage their employees to drive less. Taken to its logical extreme, the EPA's unprecedented and expansive construction of BSER could empower the Agency to impose limits (or indeed outright bans) on any good or service that the Agency concludes results in harmful emissions into the atmosphere. Under this view, the EPA could reach into every corner of the American economy.

The EPA claims that nothing in the language or context of Section 111 limits the admittedly "broad" definition of "system" that the Agency has developed.¹⁴³ This conclusion, however, is not supported by the statute's plain language or context, or by the EPA's past rulemakings under Section 111.

First, on its face, Section 111 authorizes the EPA and the States to promulgate standards that regulate the performance only of individual stationary sources. The title of this section alone reveals its focus: Section 111 is titled "standards of performance for new stationary sources," while Section 111(d) is titled "standards of performance for existing sources; remaining useful

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2008), *cert. denied sub nom. Util. Air Reg. Grp. v. New Jersey*, 555 U.S. 1169 (2009)—the Agency has limited its control "system" to measures that the regulated stationary source could implement. In the mercury rule, for example, the numeric standards for mercury emissions that formed the cap were determined using only pollution control measures that the emitting sources themselves would implement (e.g. scrubbers that control both SO₂ and mercury). *See* 70 Fed. Reg. at 28,617. That rule did not require or envision any regulations that would be imposed on non-emitting entities to reduce the demand for power from the affected EGUs and thereby reduce the emission of mercury. The EPA likewise did not include any "beyond the fence-line" measures in its determination of BSER for its Proposed GHG Rule for New Sources.

¹⁴³ Legal Memorandum at 51-52.

life of source.”¹⁴⁴ Section 111(d) explicitly directs States and the EPA to consider the “remaining useful life” of existing sources when applying any standard of performance, further indicating that Section 111 is focused on what individual sources can do to improve their emissions performance (and at what cost).¹⁴⁵ The stationary sources that may be regulated under Section 111 are narrowly confined to individual “building[s], structure[s], facilit[ies], or installation[s]” that actually “emit[] or may emit any air pollutant.”¹⁴⁶ Section 111(d) does not empower the EPA to regulate a combination of these sources,¹⁴⁷ and it certainly does not authorize the regulation of other entities that do not emit the pollutant.

The EPA’s erroneous reading of BSER conflates the two operative phrases of Section 111(d) that describe its authority. The Agency may require each State to promulgate a state plan that (1) “establishes standards of performance” for (2) “any existing source for any air pollutant.” On its face, the term “best system of emission reduction” relates only to the “standard of performance” and the scope of the pollution control measures that may be imposed *on the regulated stationary source*. While the definition of BSER may give the EPA latitude with respect to the forms of pollution controls that can be imposed directly on the emitting source, it does *not* mean that the EPA has any latitude with respect to whether controls can be imposed on entities that do not emit pollutants. And nothing in Section 111(d) empowers the EPA to “apply” the BSER to an entire sector of the economy (here, the electricity sector)—from the producers of a product all the way down to the consumers—in order to determine a standard of performance or emission guideline. Because Section 111 standards of performance apply to individual sources, the BSER must also be applied to those individual sources in order to determine the standard of performance.

The statute also makes clear that any standard of performance under Section 111 must be “achievable” by the individual sources to which it applies based on the application of an “adequately demonstrated” system of emission reduction that improves the emissions performance of that source.¹⁴⁸ The achievability requirement demonstrates that a system of emission reduction cannot go beyond the fence-line of a source. A standard is not “achievable” for a source if the source must rely on the conduct of some other entity in order to comply with the standard. For example, a standard of performance for coal-fired EGUs that is based on a “system” of reducing the EGU’s operations by increasing generation at NGCC units and renewables and discouraging electricity consumption would not be achievable for individual coal-fired EGUs. Each source would have no control over whether additional NGCC capacity is available when the source is called upon to operate, or whether new renewable sources will be developed, or whether demand-side efficiency measures will actually drive consumers to use less

¹⁴⁴ 42 U.S.C. §§ 7411, 7411(d).

¹⁴⁵ *Id.* § 7411(d)(1).

¹⁴⁶ *Id.* § 7411(a)(3).

¹⁴⁷ *See ASARCO Inc. v. EPA*, 578 F.2d 319, 327 (D.C. Cir. 1978) (“EPA has attempted to change the basic unit to which the [Section 111 standards] 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.”).

¹⁴⁸ 42 U.S.C. § 7411(a)(1).

electricity. A standard of performance is also not “achievable” if it can be met only by reducing utilization of the source. Section 111 may only be used to regulate the source’s *performance*, *i.e.*, the amount of a certain pollutant that the source emits at a particular level of operations. An achievable standard can be based only on inside the fence-line measures that limit a source’s rate of emissions.

Section 111(h) also directly contradicts the EPA’s broad view of the “systems” on which a standard of performance may be based. Section 111(h) authorizes the EPA to promulgate a design, equipment, work practice, or operational standard in the event that “it is not feasible to prescribe or enforce a standard of performance,” and clarifies the precise situations in which a standard of performance is “not feasible.”¹⁴⁹ One of these situations is that the regulated pollutant “cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant.”¹⁵⁰ Thus, Section 111(h) clearly equates a “standard of performance” (and thus, the use of a “system of emission reduction”) with the use of a “conveyance” at the source. If the EPA’s definition of “system” were permissible, then the lack of any available pollution control “conveyance” would not make it infeasible to prescribe a standard of performance.

Second, the Subpart B regulations under which the EPA has issued the proposed rule shares Section 111’s exclusive focus on standards that are achievable by individual existing sources. The text of Section 111(d)(1) imposes only one duty on the EPA: to “establish a procedure” under which each State will submit a plan establishing standards of performance for certain existing sources.¹⁵¹ The EPA fulfilled this duty nearly 40 years ago by promulgating Subpart B, which directs the EPA to publish a “guideline document containing information pertinent to control of the designated pollutant form [*sic*] *designated facilities* [i.e., existing sources subject to regulation under Section 111(d)].”¹⁵² As with Section 111, emission guidelines for existing sources under Subpart B must “reflect[] the application of the [BSER] (considering the cost of such reduction) that has been adequately demonstrated *for designated facilities*.”¹⁵³ Also, echoing Section 111’s statutory command to consider the “remaining useful life” of regulated existing sources, Subpart B notes that States may tailor standards of performance for individual designated facilities to account for “[u]nreasonable cost of control resulting from plant age, location, or basic process design,” “physical impossibility of installing necessary control equipment,” or “other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable.”¹⁵⁴ This state discretion reflects Subpart B’s focus on what individual existing sources can achieve within their fence-lines.

¹⁴⁹ *Id.* § 7411(h)(1).

¹⁵⁰ *Id.* § 7411(h)(2)(A).

¹⁵¹ *Id.* § 7411(d)(1).

¹⁵² 40 C.F.R. § 60.22(a) (emphasis added); *see id.* § 60.21(b) (defining “designated facility”).

¹⁵³ *Id.* § 60.22(b)(5) (emphasis added).

¹⁵⁴ *Id.* § 60.24(f).

Subpart B also specifies that compliance with performance standards promulgated by States under Section 111(d) must be shown through a series of “increments of progress,” which are “steps to achieve compliance which must be *taken by an owner or operator of a designated facility*.”¹⁵⁵ These increments of progress include awarding contracts, initiating “on-site construction or installation,” and completing “on-site construction or installation” of “emission control equipment or process change[s].”¹⁵⁶ Thus, Subpart B makes clear that compliance with Section 111(d) standards of performance is achieved through on-site measures taken by the “owner or operator” of regulated sources. Building blocks 2 through 4 cannot be undertaken by the “owner or operator” of “designated” coal-fired EGUs.

Third, the EPA’s longstanding and consistent “at-the-source” approach to rulemaking under Section 111 discredits the Agency’s novel claim that a “system of emission reduction” may include beyond the fence-line measures or a forced reduction in the demand for the source’s product. In the 44-year history of the modern CAA, the EPA has undertaken an “at-the-source” analysis of BSER for *every single standard of performance or emission guideline* that it has promulgated. For example, the EPA’s NSPS for beverage can surface coating facilities was based on the use of the “best available waterborne coatings”—a process change incorporated into the operation of the coating facilities themselves.¹⁵⁷ Nowhere in that rulemaking did the EPA consider the types of broad beyond the fence-line measures that it has proposed for existing EGUs here, such as limiting the number of beverage cans coated per year, replacing canned beverages with bottled beverages, or reducing the overall demand for beverages. This at-the-source approach has continued to the present day: in a proposed NSPS rulemaking on June 30, 2014, *less than two weeks* after the proposal of these emission guidelines, the EPA reaffirmed that Section 111 standards of performance “apply to sources” and must be “based on the BSER *achievable at that source*.”¹⁵⁸ Indeed, the EPA did not include reduced electricity consumption or any other beyond the fence-line measure as a component of the BSER in its proposed rule for *new* EGUs, even though that proposed rule addresses the same emissions from the same source category.¹⁵⁹

The EPA’s at-the-source approach to BSER is not limited to new sources. Dating back to the earliest Section 111(d) rulemaking pertaining to phosphate fertilizer plants, kraft pulp mills and aluminum plants, the EPA never suggested that BSER could include a reduction in the amount of fertilizer, pulp or aluminum produced by these sources or consumed by their customers.¹⁶⁰ In fact, in none of the EPA’s rulemakings under Section 111(d) has the Agency

¹⁵⁵ *Id.* § 60.21(h) (emphasis added).

¹⁵⁶ *Id.*

¹⁵⁷ Standards of Performance for New Stationary Sources; Beverage Can Surface Coating Industry, 48 Fed. Reg. 38,728 (Aug. 25, 1983) (promulgating 40 C.F.R. pt. 60 subpt. WW).

¹⁵⁸ Petroleum Refinery Sector Risk Technology Review and New Source Performance Standards, 79 Fed. Reg. 36,880, 36,885 (June 30, 2014) (emphasis added) (also equating BSER with the “best demonstrated technology” for a source).

¹⁵⁹ *See generally* Proposed GHG Rule for New Sources.

¹⁶⁰ *See* Notice of Availability of Draft Guidelines for the Control of Atmospheric Fluoride Emissions from Existing Phosphate Fertilizer Plants, 41 Fed. Reg. 19,585 (May 12, 1976) (guidelines for phosphate fertilizer plants)
(*Cont’d on next page*)

ever considered basing its emission guidelines on reduced utilization of the source or other measures beyond the fence-line of the source.

In support of its new approach, the EPA claims that other previous rulemakings under Section 111(d) have included beyond the fence-line measures and utilization limits in order to reduce emissions. The EPA points out that some of its emission guidelines for waste incineration units have included provisions concerning emission rate averaging, tradable emission credits, and waste management plans.¹⁶¹ However, these provisions are irrelevant. The emission guidelines for solid waste incineration units were promulgated under both Section 111(d) and Section 129. Unlike Section 111(d), Section 129 rejects the BSER concept and requires that standards for existing incineration units must “reflect the *maximum degree of reduction* in emissions . . . achievable for new or existing units in each category” and must “not be less stringent than the average emissions limitation achieved by the best performing 12 percent of units in the category.”¹⁶² Thus, what the EPA may require under Section 129 bears no relation to what measures may reasonably be considered to be a “system of emission reduction” for the purposes of Section 111. Moreover, the emission rate averaging and tradable emission credits that the EPA included in its emission guidelines for municipal waste combustors were merely flexible *compliance* tools and were not used to determine the *standard itself*, as the EPA seeks to do here. Thus, the EPA’s claim that it has utilized beyond the fence-line measures in other rulemakings is in error.

The EPA also points to its short-lived emission guideline for mercury emissions from coal-fired EGUs, known as the CAMR,¹⁶³ as an example of a Section 111(d) standard based on a beyond the fence-line emission trading program.¹⁶⁴ But like the emission guideline for municipal waste combustors described above, CAMR’s trading program was merely a tool for compliance: the actual standards were set based on the application of pollution control technology at individual EGUs. The systems of emission reduction that were used to set CAMR’s emission

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based on “spray cross-flow packed scrubbers”); Notice of Availability of Draft Guidelines for the Control of Sulfuric Acid Mist from Existing Sulfuric Acid Production Units, 41 Fed. Reg. 48,706 (Nov. 4, 1976) (guidelines for sulfuric acid production units based on “fiber mist eliminators”); Notice of Availability of Draft Guidelines for the Control of Total Reduced Sulfur Emissions from Existing Kraft Pulp Mills, 43 Fed. Reg. 7597 (Feb. 23, 1978) (guidelines for kraft pulp mills based on various process controls and two-stage black liquor oxidation system); Notice of Availability of Final Guidelines for the Control of Fluorides Emitted from New Primary Aluminum Plants, 45 Fed. Reg. 26,294 (April 17, 1980) (guidelines for primary aluminum plants based on “effective collection of emissions followed by efficient fluoride removal by dry scrubbers or by wet scrubbers”); Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 61 Fed. Reg. 9905, 9907 (Mar. 12, 1996) (guidelines for municipal solid waste landfills based on: “(1) A well-designed and well-operated gas collection system and (2) a control device capable of reducing [nonmethane organic compounds] in the collected gas by 98 weight-percent”).

¹⁶¹ Legal Memorandum at 63-64.

¹⁶² 42 U.S.C. § 7429(a)(2) (emphasis added).

¹⁶³ See 70 Fed. Reg. 28,606 (May 18, 2005) (CAMR); *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (vacating CAMR).

¹⁶⁴ Legal Memorandum at 63 n.51.

guidelines were (1) the co-benefit mercury reductions of installing scrubbers and selective catalytic reduction systems at individual units under the Clean Air Interstate Rule (“CAIR”) (for the first phase of CAMR) and (2) the installation of mercury-specific pollution control technologies such as activated carbon injection (for the second phase).¹⁶⁵ The EPA never even considered that the BSER could include measures to reduce the overall demand for electricity from those units—even though reducing the demand for power from coal-fired EGUs would result in a reduction in mercury emissions in precisely the same way it would result in a reduction in CO₂ emissions: less demand for power from the unit results in less coal being burned to produce that power, which in turn leads to lower emissions of both CO₂ and mercury.

In light of all these factors, the EPA’s attempt to redefine the term “system of emission reduction” is patently unreasonable because it has no limiting principle.¹⁶⁶ The EPA’s construction of that term to include beyond the fence-line measures—including a reduction in electricity demand from affected EGUs—would allow the EPA to work a vast and unprecedented expansion in the scope of its control over a broad swath of the economy. As the Supreme Court recently held in *Utility Air Regulatory Group v. EPA*, “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’” the Court will “typically greet its announcement with a measure of skepticism.”¹⁶⁷ Allowing the Agency to use Section 111 to require reduced utilization or to impose obligations on entities that do not even emit a regulated pollutant “would bring about an enormous and transformative expansion in the EPA’s regulatory authority without clear congressional authorization”—a prospect the Court resoundingly rejected in *UARG v. EPA*.¹⁶⁸

Accordingly, the EPA must withdraw its proposed rule. Any subsequent rulemaking to establish emission guidelines for CO₂ emissions from existing fossil fuel-fired EGUs must be limited in scope to the at-the-source emission control measures contemplated by Section 111. As described above, the only component of the current proposal that could permissibly support an emission guideline is building block 1. The emission guidelines should be based on modest and operationally feasible heat rate improvements at individual EGUs within the source category, set at a level that is achievable by individual units considering cost and energy impacts. These emission guidelines would be subcategorized by size, type, and class of EGU as appropriate, considering costs of control, physical limitations, geographical limitations, or other factors.¹⁶⁹

¹⁶⁵ CAMR, 70 Fed. Reg. at 28,617-20; *see also id.* at 28,621 (final guideline was “based on the level of Hg emissions reductions that will be achievable by the combined use of co-benefit (CAIR) and Hg-specific controls”).

¹⁶⁶ *See, e.g., Elec. Power Supply Ass’n v. FERC*, 753 F.3d 216, 221 (D.C. Cir. 2014) (stating that FERC’s “rationale, however, has no limiting principle. Without boundaries, §§ 205 and 206 [of the FPA] could be ostensibly authorize FERC to regulate any number of areas, including the steel, fuel, and labor markets. . . . The commission’s authority must be cabined by something sturdier than creative characterizations”) (“*EPSA*”).

¹⁶⁷ *UARG*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 159).

¹⁶⁸ *Id.*

¹⁶⁹ 40 C.F.R. § 60.22(b)(5).

And States would retain the full discretion afforded them by the CAA and by Subpart B to apply less stringent standards to particular facilities or classes of facilities.¹⁷⁰

B. The Proposed Rule Impermissibly Intrudes Upon States' Settled Authority.

The EPA's construction of its authority under Section 111(d) also runs counter to decades of established authority preserving the predominant role of the States in protecting the environment and ensuring a reliable supply of affordable energy for its citizens. Since the earliest days of environmental and utility regulation, Congress, the federal courts, the EPA, and FERC have each, in their respective spheres, respected the States' foundational role—indeed, Congress has repeatedly enacted laws embracing and promoting that role.

In what would be a dramatic departure from a century of settled practice, however, the proposed rule would usurp States' settled authority in these areas and eviscerate the regulatory compact that has long been a foundation of utility regulation. Ignoring the plain language of Section 111(d), the proposed rule would reach deep into the States' core police powers and co-opt them for federal ends. While Section 111 accords with constitutional principles if properly construed, the EPA's current proposed interpretation would compel States to administer a detailed federal regulatory program, to embrace a federally mandated mix of energy sources regardless of local circumstances, to restructure their energy grids, to grapple with an intractable maze of conflicting federal regulatory burdens, and even to enact implementing legislation. Under the proposed rule, States would no longer decide for themselves how to meet federal emissions limitations; the EPA will instead dictate to States what they must do, how they must do it, and even how they must exercise state legislative processes.

As described below, the proposed rule defies the principles embodied in the Tenth Amendment, in the CAA and its scheme of cooperative federalism, and in the “bright-line” federal-state divide over energy matters that Congress has repeatedly reaffirmed in the FPA. Indeed, if Congress did not give FERC—the federal agency with direct statutory authority over the energy industry—the power to regulate the planning and generation of electric power, Congress surely did not intend for the EPA to undertake that task under the guise of emissions standards. If Congress had meant to so substantially infringe state sovereignty, it would have said so clearly—but even the EPA claims only that Congress spoke ambiguously.

In any event, the proposed rule, if enacted, would violate the Tenth Amendment by improperly commandeering the States. It has “always [been] understood” that the Tenth Amendment forbids attempts by “[t]he Federal Government [to] compel the States to enact or administer a federal regulatory program” or to “require the States to govern according to [the Federal Government's] instructions.”¹⁷¹ The proposed rule flouts that prohibition. Many States will be unable to implement the EPA's proposal without changing their laws or extensively coordinating among state agencies. In some States, no regulatory entity has the authority to impose all of the measures the EPA applied to calculate state goals. And many more States

¹⁷⁰ 42 U.S.C. § 7411(d); 40 C.F.R. § 60.24(f).

¹⁷¹ *New York v. United States*, 505 U.S. 144, 166, 188 (1992).

divide across different regulatory bodies the authority to develop, impose, and enforce the measures the EPA has proposed. The proposed rule would thus require States to enact new laws to restructure existing regulatory authorities or to provide new authority or, at the least, to undertake substantial burdens to govern according to the EPA’s instructions. In other words, the EPA would commandeer not just the States’ resources but their own legislative processes, a direct affront to their sovereignty.

By compelling States to adopt statutes to enact and administer a federal regulatory program, the proposed rule would undermine the very accountability concerns that the Tenth Amendment is meant to promote. The Supreme Court has emphasized that “[a]ccountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”¹⁷² The Tenth Amendment, after all, prohibits the federal government from “exercis[ing] power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.”¹⁷³ The proposed rule would force States to enact laws that they may not otherwise enact and govern in ways that they may not otherwise govern—actions for which the electorate will hold them accountable even though the EPA bears the blame.

The EPA has no authority to promulgate the proposed rule, particularly when the impact of the proposed regime on the States is considered. The proposed rule—and its suggested experiment in top-down regulation of both the energy industry and the States themselves—should be abandoned.

1. The Tenth Amendment Prevents Federal Agencies from Commandeering the States or Regulating States Directly.

The Tenth Amendment provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”¹⁷⁴ As that Amendment reflects, the Constitution creates a structure under which the States retain significant authority, while the federal government possesses only the limited powers expressly delegated to it.¹⁷⁵

That structure limits federal authority. As an example: Congress may “regulate interstate commerce directly” because the Constitution grants it that authority.¹⁷⁶ But Congress cannot “compel the States to enact or administer a federal regulatory program” or “regulate state governments’ regulation of interstate commerce.”¹⁷⁷ The Constitution does not grant Congress that power, and instead recognizes that “States are not mere political subdivisions of the United

¹⁷² *Id.* at 169.

¹⁷³ *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

¹⁷⁴ U.S. CONST., amend. X.

¹⁷⁵ *New York*, 505 U.S. at 156; see *Printz v. United States*, 521 U.S. 898, 926 (1997).

¹⁷⁶ *New York*, 505 U.S. at 166; see U.S. CONST. art I, § 8, cl. 3.

¹⁷⁷ *New York*, 505 U.S. at 166, 188.

States,” but are instead co-equal sovereigns.¹⁷⁸ The limited nature of federal power—and the sovereign status of the States—precludes the federal government from commandeering state authority in that way.¹⁷⁹ The law in *New York*—a regulation of States’ exercise of legislative authority over radioactive waste—was unconstitutional under this framework because it sought to “require the States to govern according to Congress’ instructions.”¹⁸⁰

Later cases have reaffirmed these principles. In *Printz*, the Supreme Court rejected Congress’s attempt to require state police officers to enforce federal law, and explained that the Constitution “confers upon Congress the power to regulate individuals, not States.”¹⁸¹ The Court emphasized that States are “no more subject, within their respective spheres, to the general authority than the general authority is subject to them.”¹⁸² And in *Reno v. Condon*, the Court again reaffirmed that Congress may not “control or influence the manner in which States regulat[e] private parties.”¹⁸³ Applying that principle, the Court upheld a law regulating resale and disposal of personal information contained in DMV records. The Court explained that the law “regulate[d] the States as the owners of data bases,” and did not “require the States in their sovereign capacity to regulate their own citizens.”¹⁸⁴ The Court thus distinguished between permissible federal regulation of interstate commerce and impermissible regulation of States in their “sovereign capacity” as “regulat[ors of] their own citizens.”¹⁸⁵

As reflected in these cases, the anti-commandeering doctrine promotes accountability and responsiveness, which would be undercut by federal control over the States’ regulatory power. The ability of a State to “represent . . . its own citizens” defines in critical respects what it means for a State to retain sovereignty.¹⁸⁶ “If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State.”¹⁸⁷ But “when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate,” “[a]ccountability is . . . diminished.”¹⁸⁸ That is, when Congress regulates the regulatory authority of the States—rather than regulating private conduct directly—it distorts constitutionally recognized lines of accountability.

¹⁷⁸ *Id.* at 188.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 162.

¹⁸¹ 521 U.S. at 920 (quoting *New York*, 505 U.S. at 166).

¹⁸² *Id.* at 920-21 (internal quotations and citations omitted).

¹⁸³ 528 U.S. 141, 150 (2000) (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-515 (1988)).

¹⁸⁴ *Id.* at 151.

¹⁸⁵ *Id.*

¹⁸⁶ *Printz*, 521 U.S. at 920.

¹⁸⁷ *Alden v. Maine*, 527 U.S. 706, 751 (1999).

¹⁸⁸ *New York*, 505 U.S. at 169.

While the federal government may not commandeer state authority, it may enact “cooperative federalism” statutes under which the States retain significant authority. For instance, where Congress has the authority to regulate private activity under the Commerce Clause, it may offer States a legitimate, non-compulsory choice of regulating that activity according to federal standards or having state law preempted by federal regulation.¹⁸⁹ In enacting such cooperative federalism statutes, Congress can “allo[w] the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.”¹⁹⁰

2. The “Bright Line” Divide between Federal and State Jurisdiction over the Electric Power System.

In deference to these bedrock principles of federalism embodied in the Tenth Amendment, the regulation of the electric power system is characterized by a “bright line” divide between federal and state authority. As Congress and the Supreme Court have repeatedly recognized, this bright line preserves the preeminent role of the States in planning, siting, and providing generation resources to local customers.¹⁹¹

Electric power service and electric utilities were first developed in the late nineteenth century. Those fledgling electric utilities were largely regulated—when they were regulated at all—by municipalities. It was only in 1907 that the States began regulating this new industry, when New York and Wisconsin became the first two states to enact public utility laws. Between 1907 and 1914, twenty-seven other states enacted similar laws governing public utilities. At that time, most electricity was sold by “vertically integrated” utilities—that is, utilities that owned and operated their own generation plants, transmission lines, and local delivery systems.¹⁹² Thus, most utilities “operated as separate, local monopolies subject to state or local regulation,” and consumers paid a single charge for a “bundle” of services that included both the cost of the electric energy and the cost of its transmission and delivery.¹⁹³ Except for some limited hydroelectric dam licensing and construction fees regulated by FERC’s predecessor, the federal government had virtually no involvement in regulating the electric power industry. Instead, the burgeoning electric industry was regulated almost exclusively by the States and local governments.

¹⁸⁹ *Id.* at 167.

¹⁹⁰ *Hodel*, 452 U.S. at 289.

¹⁹¹ *See, e.g., FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964) (“Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making [the Federal Power Commission] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.”).

¹⁹² *See New York v. FERC*, 535 U.S. 1, 5 (2002).

¹⁹³ *Id.*

In the 1920 Federal Water Power Act (the “1920 Act”), Congress firmly embraced the federal-state divide by establishing the Federal Power Commission (“FPC”),¹⁹⁴ in part, “to provide for the comprehensive control over . . . hydroelectric power.”¹⁹⁵ Congress carefully confined the FPC’s authority to “only . . . fill a hiatus which might otherwise exist in the absence of state regulation” and limited the FPC to “regulat[ing] only in the absence of state regulation.”¹⁹⁶

In a House floor statement that the Supreme Court would later find to “thro[w] [light] upon the meaning of the [later enacted] Federal Power Act,” one member of the committee reported that, in drafting the 1920 Act, “We are earnestly trying not to infringe the rights of the States. If possible we want a bill that can not be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States.”¹⁹⁷ Thus, from the beginning, the generation of power was an area traditionally regulated by the States.

In 1927, the Supreme Court highlighted a gap in state regulatory authority over interstate sales of electric energy (known as the “*Attleboro* gap”) when it emphasized the jurisdictional differences between the federal government and the States regarding the regulation of electricity—States have had and continue to retain the power to govern intrastate affairs, including the generation of electricity and its sale at retail to end users, while the federal government has the power to regulate interstate issues, including the transmission of electricity and wholesale electricity markets. In *Attleboro*, the U.S. Supreme Court rejected an attempt by Rhode Island to regulate rates charged by a Rhode Island generating plant selling electricity to a Massachusetts company, holding that neither sending nor receiving States have jurisdiction to regulate the rates of interstate sales of electricity.¹⁹⁸ The Supreme Court found that the States’ maintained jurisdiction over “business that is essentially local” and that Congress, under the Commerce Clause, had the authority to regulate interstate sales of electricity.¹⁹⁹

The Federal Power Act of 1935 was “a direct result” of *Attleboro* and was “intended to ‘fill the gap’ created by *Attleboro* by establishing exclusive federal jurisdiction over such [interstate] sales.”²⁰⁰ In accordance with the federalism principles animating the 1920 Act, Congress firmly defined the bright line division between federal and state jurisdiction in the FPA when it established that the FPC’s jurisdiction “extend[s] only to those matters which are not

¹⁹⁴ The FPC is the predecessor agency of FERC. See Department of Energy Organization Act, Pub. L. No. 95-91, § 204, 91 Stat. 565 (1977).

¹⁹⁵ *FPC v. Union Elec. Co.*, 381 U.S. 90, 98 (1965).

¹⁹⁶ *FPC v. S. Cal. Edison Co.*, 376 U.S. at 218.

¹⁹⁷ *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 174 (1946) (quoting 56 Cong. Rec. 9810).

¹⁹⁸ *Pub. Utils. Comm’n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927).

¹⁹⁹ *Id.*

²⁰⁰ *New England Power Co. v. N.H.*, 455 U.S. 331, 340 (1982) (citing *United States v. Pub. Utils. Comm’n of Cal.*, 345 U.S. 295, 307-11 (1953)).

subject to regulation by the States.”²⁰¹ Congress also specifically preserved, with few exceptions, the States’ jurisdiction “over facilities used for the generation of electric energy[,] over facilities used in location distribution or only for the transmission of electric energy in interstate commerce, [and] over facilities for the transmission of electric energy consumed wholly by the transmitter.”²⁰²

Congress expressly considered and rejected granting jurisdiction over generation resources to the FPC when drafting the FPA. As written, Section 201(b) of FPA closely follows the House version of the bill, which limited the FPC’s jurisdiction over the traditional State dominion of generation resources. The original Senate bill, on the other hand, contained a reverse provision which would have granted the FPC jurisdiction over state generation resources. This disagreement was ultimately rectified by a House amendment that conformed both versions “with a clarifying phrase added to remove any doubt as to the Commission’s jurisdiction [or lack thereof] over facilities used for the generation and local distribution of electric energy”²⁰³ Congress acted to ensure that there would be no “encroachment upon the authority of the States[,]”²⁰⁴ by “draw[ing]” the FPA “to be a complement to and in no sense a usurpation of State regulatory authority.”²⁰⁵ Indeed, in passing the FPA, Congress was clear that “[t]he limitation on the [FPC’s] jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of Federal authority over State matters.”²⁰⁶

Ever since, federal energy regulators have been entrusted with overseeing “the need for and pricing of electrical power transmitted in interstate commerce,” while States have controlled “th[e] economic aspects of electrical generation”—such as “regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns” that have been the “traditional responsibility” of the States.²⁰⁷

Since it was enacted, the FPA has been amended several times, with FERC taking over the responsibilities of the FPC. FERC is the federal agency that is primarily responsible for the federal regulation of those areas of the electric power industry that are subject to federal jurisdiction. FERC is responsible for regulating: the rates, terms and conditions of transmission of electric energy in interstate commerce by public utilities; wholesale sales rates and services; hydroelectric dam licensing and safety; and natural gas and oil pipeline transportation rates and services. FERC is also responsible for ensuring the reliability of the electric transmission grid

²⁰¹ 16 U.S.C. § 824(a).

²⁰² *Id.* § 824(b)(1). In 1941, the FPC acknowledged that Section 201(b) “defin[ed] the scope of [the FPC’s] regulatory power and jurisdiction,” and that “[t]he object of [Section 201(b)] was to limit the extent of regulation we may exercise in respect of generation or local distribution facilities.” *In the Matter of Hartford Elec. Light Co.*, 2 F.P.C. 359, 366-67 (1941).

²⁰³ H.R. REP. NO. 74-1903, at 74 (1935).

²⁰⁴ S. REP. NO. 74-621, at 18 (1935).

²⁰⁵ H.R. REP. NO. 74-1318, at 8 (1935).

²⁰⁶ S. REP. NO. 74-621, at 18; *see also id.* at 48 (“[T]he policy of Congress [is] . . . not to impair or diminish the powers of any State commission”).

²⁰⁷ *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 205-06 (1983).

and has designated the North American Electric Reliability Corporation (“NERC”) to be responsible for developing and enforcing mandatory electric reliability standards. But, FERC does not have authority over those matters expressly reserved to the States. Indeed, the FPA has always retained the division of federal and state authority that it embodied from the start. This demarcation is clear, most recently, in the Energy Policy Act of 2005 and several recent judicial decisions.

In the 2005 Act, Congress authorized FERC to create an Electric Reliability Organization to help develop and enforce reliability standards for the U.S. bulk power system.²⁰⁸ In doing so, however, Congress preserved the States’ authority over generation by providing that neither FERC nor the Electric Reliability Organization may “order the construction of additional generation or transmission capacity or . . . set and enforce compliance with standards for the adequacy or safety of electric facilities or services.”²⁰⁹ Federal courts have, in turn, recently reaffirmed that the States retain authority over generation.²¹⁰

Congress’ establishment of the bright line divide between federal and state jurisdiction has been repeatedly and consistently upheld by the federal courts. For example, in 1975 the Supreme Court determined in *Chemehuevi* that “Congress did not intend to give the [FPC] licensing jurisdiction with respect to [fossil-fueled] thermal-electric power plants,” and that “there is simply no suggestion in any of the legislative materials that the [FPA] would authorize the [FPC] to license the construction or maintenance of [fossil-fueled] thermal-electric power plants.”²¹¹ FERC itself has recognized that the FPA “explicitly removes from Commission jurisdiction facilities used for the generation of electric energy (except as specifically provided)”—leaving those matters to the States.²¹²

The D.C. Circuit confirmed this allocation of authority between the federal government and the states most recently in *EPSA*. The FERC rule at issue in *EPSA* offered consumers who bought electricity directly in the wholesale market generous incentive payments in exchange for “demand response”—that is, “a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy.”²¹³ The D.C.

²⁰⁸ See generally 16 U.S.C. § 824o.

²⁰⁹ *Id.* § 824o(i)(2).

²¹⁰ See, e.g., *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 479-80 (4th Cir. 2014) (emphasizing the need to preserve “the division of the regulatory field that Congress went to so much trouble to establish” by respecting “Congress’ specific grant of power to the States to regulate production” (internal quotation marks omitted)); *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372, 383, 386 (D.N.J. 2013) (emphasizing that, under the FPA, States “retai[n] . . . authority over the siting and construction of power plants,” and “continu[e] to regulate local utilities’ construction of new power plants, operations, and rates charged for retail service to customers”).

²¹¹ *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 408, 410-11 (1975); see also *N.C. ex rel. Utils. Comm’n v. Carolina Power & Light Co.*, 614 S.E.2d 281, 287 (N.C. 2005) (“Congress . . . intended that the states and their utilities commissions retain their traditional authority over generating facilities and local supply adequacy and reliability”).

²¹² *Middle South Energy, Inc.*, 32 FERC ¶ 61,425, at 61,946 (1985).

²¹³ 18 C.F.R. § 35.28(b)(4).

Circuit recognized that “[r]educing retail consumption—through demand response payments—will lower the wholesale price” of electricity, and that the FPA “task[s] FERC with ensuring ‘all rules and regulations affecting . . . rates’ in connection with the wholesale sale of electric energy are ‘just and reasonable.’”²¹⁴ The court nonetheless held that the rule exceeded FERC’s jurisdiction because allowing FERC to “engage in direct regulation of the retail market whenever the retail market affects the wholesale market . . . would render . . . useless” Congress’s clear intent to retain state authority over retail markets.²¹⁵

The federal energy regulation regime demonstrates, in short, that Congress has long reserved to the States—and withheld from federal agencies—authority over resource planning. As the Supreme Court has explained, the “[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States,”²¹⁶—indeed, “the regulation of utilities is one of the most important . . . functions traditionally associated with the police power of the States.”²¹⁷

3. The Proposed Rule Is Inconsistent with the Scheme of Cooperative Federalism Established in the Clean Air Act.

a. The Proposed Rule Exceeds the EPA’s Authority Under Section 111(d) because It Would Usurp Core State Policymaking Powers.

Section 111(d) embraces the principles of cooperative federalism that undergird the entire CAA. It does so in at least three key respects. First, it permits the federal government—through the EPA—to set the parameters of state action by identifying sources of air pollutants, the techniques available to those sources for reducing air pollution, and the procedure for States to use when they submit to the EPA plans that establish “standards of performance” for those sources.²¹⁸ Second, it leaves the States broad discretion to tailor the source-specific performance standards to their specific circumstances by protecting their ability to consider relevant factors in establishing and applying those standards of performance to specific sources in the source category designated by the EPA. Third, Section 111(d) limits the EPA’s role on review of a state plan to whether that plan is “satisfactory,” *i.e.*, whether the State has considered the statutory factors and followed the procedures for plan submittal. The EPA is *not* authorized to second-guess substantive State decisions.

The proposed rule departs from each of these principles.

First, rather than imposing parameters for state action, the proposed rule usurps state policymaking authority by dictating to States what measures they must implement and what federal standards they must meet. The EPA’s authority under Section 111(d) is limited to

²¹⁴ *EPSA*, 753 F.3d at 221 (quoting 16 U.S.C. § 824d(a)).

²¹⁵ *Id.* at 222.

²¹⁶ *Pac. Gas & Elec. Co.*, 461 U.S. at 205.

²¹⁷ *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983) (“Arkansas Electric”).

²¹⁸ 42 U.S.C. §§ 7411(a)(1), (b)(1)(A).

“establish[ing] a procedure” similar to that provided in CAA Section 110 for submittal of State plans.²¹⁹ By contrast, Congress left it up to the States to develop the plans which “establis[h] standards of performance” and “provid[e] for the implementation and enforcement” of those standards.²²⁰ To be sure, those standards must reflect consideration of any BSER that the EPA determines has been adequately demonstrated.²²¹ But Section 111(d) also directs the State “to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.”²²² Unless a State fails to submit a plan, or submits a plan that fails to establish performance standards for existing sources in the designated source category or otherwise fails to account for other statutory criteria, the EPA’s substantive authority under Section 111(d) ends at identifying the BSER.

The proposed rule does not respect this limited role. The EPA claims that the proposed rule merely “propos[es] emission guidelines for states to follow in developing plans to address greenhouse gas . . . emissions from existing fossil fuel-fired electric generating units” under CAA Section 111(d).²²³ But the rule does not merely propose “emission guidelines” containing “procedures” for States to follow in submitting plans. It instead dictates to States specific numeric emission goals that States have no authority to adjust, and that are based on the EPA’s determination of the “best” mix of electricity generation and energy efficiency resources, as exemplified by the four building blocks: (1) improving the heat rates of their coal-fired generators, on average, by 6 percent; (2) operating their NGCCs so that they run 70 percent of the time (a run rate that the EPA admits²²⁴ only 10 percent of NGCCs meet now); (3) increasing renewable resource penetration by EPA-determined amounts; and (4) increasing energy efficiency programs by EPA-determined amounts.²²⁵ The proposed rule thus calls on States to “substitut[e] generation” at certain sources with generation from sources that the EPA prefers, and to “reduc[e] the amount of generation required” through measures aimed at encouraging lower retail energy consumption.²²⁶ This is not an “emission guidelin[e],”²²⁷ but instead a direct command that the States adopt a particular policy. This is not authorized by Section 111(d) and is a clear Tenth Amendment violation.

While the EPA may have power to identify the “at-the-unit” systems of emission reduction that have been adequately demonstrated for existing fossil fuel-fired EGUs under Section 111(d), the EPA is not authorized to dictate to States how to manage their electric

²¹⁹ *Id.* § 7411(d)(1).

²²⁰ *Id.* § 7411(d)(1)(A), (B).

²²¹ *Id.* § 7411(a)(1).

²²² *Id.* § 7411(d)(1).

²²³ Proposed Rule, 79 Fed. Reg. at 34,832.

²²⁴ *See id.* at 34,857.

²²⁵ *See id.* at 34,851.

²²⁶ *Id.* at 34,836; *see also id.* at 34,852 (noting that these four building blocks “displace, or avoid the need for, generation from” certain EGUs).

²²⁷ *Id.* at 34,832.

generating resources. Under Section 111(d), the EPA may, at most, call on States to submit plans that set feasible, cost-effective performance standards that the existing fossil fuel-fired EGUs in that State can achieve with an adequately demonstrated system of emission reduction, while accounting for the “remaining useful life” of the generator and “other factors,” such as the unit’s necessity in providing reliable energy to consumers and the availability of other resources.²²⁸ The proposed rule exceeds this limit.

Second, the proposed rule disables States from tailoring their policies to their specific circumstances by effectively negating their statutorily preserved authority under the CAA to consider, “among other factors,” the “remaining useful life of the existing source[s]” that would be regulated.²²⁹ Contrary to this requirement, the EPA “proposes that the remaining useful life of affected EGUs, and the other facility-specific factors identified in the existing implementing regulations, should not be considered as a basis for adjusting a state emission performance goal or for relieving a state of its obligation to develop and submit an approvable plan that achieves that goal on time.”²³⁰ But States cannot (and should not) ignore such costs when determining a utility’s revenue requirement and establishing the rates that a utility may charge its customers. Indeed, Congress specifically directed in Section 111(d) that “the Administrator ... *shall* permit the State ... to take into consideration, among other factors, the remaining useful life of the existing source.”²³¹ A component of the rates that utilities may charge includes the “prudently incurred” costs associated with the construction of new generation resources as well as capital improvement projects to existing generation resources (including those required under building block 1 of the proposed rule related to heat rate improvements at coal-fired generating facilities).²³² And, for those units that wish to retire (or are effectively forced to do so as a result of the proposed rule), State commissions must decide whether it is the rate payers or the utility company that must absorb the costs of any stranded capital investments associated with such retirements or abandonments. The proposed rule strips away this state authority by forbidding such costs to be considered in the state plans, contrary to the explicit congressional direction in Section 111(d).

Third, the proposed rule prevents States from exercising their primary policymaking responsibility for developing plans that establish standards of performance. The EPA does not have authority under Section 111(d) to override a state plan establishing a standard of performance because it disagrees with the “factors” that a State deems important or relevant.²³³

²²⁸ 42 U.S.C. § 7411(d)(1)(B).

²²⁹ *Id.*

²³⁰ Proposed Rule, 79 Fed. Reg. at 34,926.

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

²³² Courts have repeatedly found that the States have exclusive authority to determine the reasonableness of a company’s claimed expenses. *See, e.g., Pike Cnty. Light & Power Co. v. Pa Pub. Util. Comm’n*, 465 A.2d 735, 738 (Pa. Commw. Ct. 1983) (citing *Arkansas Electric*, 461 U.S. 375 when stating that “there is nothing in the [Federal Power Act] which preempts the [state commission’s] authority to determine the reasonableness of a utility company’s claimed expenses. In fact, we read the Federal Power Act to expressly preserve that important state authority.”).

²³³ *See* 42 U.S.C. § 7411(d)(2).

For instance, the EPA cannot directly or indirectly override a State’s determination of the mix of electricity generation required to provide the most reliable and efficient power supply needed to serve its citizens. And it certainly cannot require, in the guise of setting performance standards for existing coal generators, significant increases in the use of NGCCs, renewable resources, nuclear resources, and energy efficiency programs. Such resource-planning decisions are reserved to the States. The proposed rule, however, would establish emissions “goals” that States cannot adjust, and that are so stringent that they can be met only by an EPA-mandated approach—an approach that necessarily strips States of their policymaking role and runs afoul of the CAA and the Tenth Amendment.

The EPA dismisses these problems, but its answers are unavailing. Recognizing that Congress has forbidden it from running rough-shod over the States’ prerogatives to make energy policy decisions, the EPA attempts to divert attention from the rigid nature of its proposed rule by repeatedly stating that the States will retain “flexibility” to formulate their own plans to meet the EPA’s goals.²³⁴ This position is untenable, however, because no State could achieve the EPA’s “goals” through on-site technological or operating improvements at facilities within the source category that the EPA is ostensibly trying to regulate—*i.e.*, “existing fossil fuel-fired electric generating units.”²³⁵ Instead, under the proposed rule, the Agency will effectively force States to enact measures “such as dispatch limitations, renewable portfolio standards that require investment in renewable energy resources, [and] demand-side energy efficiency measures.”²³⁶ While the EPA frames these as optional measures,²³⁷ they are the basis for the emission goals established by the EPA and, in practice and in reality, they will be mandatory because States cannot meet the mandated goals without them. Indeed, the proposed rule would essentially require the States to undertake resource planning that may not be in the best interest of that specific State.

For example, the final emission goals for 26 states are all below the level that the EPA has proposed is achievable by new, large NGCCs.²³⁸ As a result, these states would have to rely on building blocks 3 and 4, in addition to building block 2, in order to meet the EPA-imposed emission standard for the state.

Therefore, while the EPA is careful not to dictate explicitly the precise proportions in which each building block must be used in each State,²³⁹ in practice and reality the proposed rule would require any state plan to mandate extensive changes to the ways in which the State’s

²³⁴ See, e.g., Proposed Rule, 79 Fed. Reg. at 34,925; Legal Memorandum at 18, 95.

²³⁵ Proposed Rule, 79 Fed. Reg. at 34,832.

²³⁶ Legal Memorandum at 75-76.

²³⁷ *Id.* at 103.

²³⁸ Compare Proposed Rule, 79 Fed. Reg. at 34,957-58 (listing the proposed final emission reduction goals) with Proposed GHG Rule for New Sources, 79 Fed. Reg. at 1433 (“The proposed emission limits for [new NGCCs] are 1,000 lb CO₂/MWh for larger units and 1,100 lb CO₂/MWh for smaller units.”).

²³⁹ *Id.* at 34,859.

utilities provide electricity to the public.²⁴⁰ To comply with the EPA’s proposed standards, most States will need to either handle dispatch on a state-wide basis or (as the EPA admits) participate in a multistate scheme for dispatching resources. The EPA’s repeated claim of “flexibility” has no substance or merit.

This conclusion is further illustrated by other aspects of the EPA’s own analysis, which shows that, to meet the EPA’s proposed emission standards, States will need to adopt measures that drastically reduce the electricity generated at many EGUs—regardless of whether that is a proper response for a particular State in light of the various “factors” it faces.²⁴¹ For example, the State of Ohio must reduce CO₂ emissions from its fossil fuel-fired EGUs from 1,897 lbs/MWh to 1,338 lbs/MWh.²⁴² Per the EPA’s own calculations, application of building block 1 measures (*i.e.*, heat rate improvements) alone would only reduce the state’s emission rate from 1,897 lbs/MWh to 1,795 lbs/MWh.²⁴³ Therefore, in order to achieve the required reductions, Ohio must adopt measures from building blocks 2, 3, and 4. The EPA’s analysis indicates that the share of renewable energy in Ohio’s portfolio (building block 3) must climb from 1 percent of total net generation (or 1.7 million MWh) to 10.6 percent of net generation (or 13.8 million MWh).²⁴⁴ In addition, another 16.3 million MWh of generation would be “avoided” by implementing demand-side energy efficiency measures (building block 4).²⁴⁵ Indeed, 67 percent of the reductions in CO₂ emissions required for Ohio stems from the expanded use of zero-CO₂-emitting electricity sources and demand-side energy efficiency measures. Another 14 percent of the reductions are attributable to the redispatch to NGCC units (building block 2). According to the EPA’s own analysis, it will be impossible for Ohio to meet the EPA’s CO₂ emissions goals without such drastic measures to restructure its electricity sector.

The proposed rule would vanquish state policymaking authority in other ways as well. For example, many States will be unable to implement the EPA’s proposal without changing their laws or extensively coordinating among state agencies. In some States, no regulatory entity has the authority to impose all of the measures the EPA applied to calculate state goals. And many more States divide across different regulatory bodies the authority to develop, impose, and enforce the measures the EPA has proposed. For instance, most state agencies lacks specific authority either to implement building blocks 2, 3, or 4 or to adopt rules for a cap-and-trade regulatory program to reduce CO₂ emissions. Most state utility regulatory commissions, while also possessing some authority on energy matters, do not have jurisdiction over all electric generating facilities in the State, do not have authority to regulate utility resource planning or dispatch decisions, and lack authority to adopt renewable portfolio standards. To the extent the EPA is even authorized to co-opt State legislators in this manner, these splits of authority will

²⁴⁰ *Cf. id.* at 34,858 (recognizing that the proposed rule may require “invest[ing] in additional natural gas and electric industry infrastructure”).

²⁴¹ 42 U.S.C. § 7411(d)(1)(B).

²⁴² *See* Goal Computation Technical Support Document at 26.

²⁴³ *Id.* at 10.

²⁴⁴ *Id.* at 16.

²⁴⁵ *Id.* at 17.

require significant additional time and coordination, beyond that envisioned by the EPA, to address through new or revised state legislation or regulation, before the State can even begin to develop its Section 111(d) plan.

The proposed rule would also rob States of their authority to determine how to dispatch, operate, and plan for generation resources within their territory because it will effectively force States to participate in multistate schemes to handle energy matters. The EPA admits that, “as a practical matter,” implementing building block 2 will “necessarily occur on an interstate, and not an intrastate, basis.”²⁴⁶ And the EPA expects that such multistate schemes will be in place to “seek solutions such as capacity markets and transmission upgrades, to preserve resource adequacy and ensure the continued reliable operation of the grid.”²⁴⁷ The EPA thus recognizes that, to reduce emissions as the proposed rule would require, States will need to work on a regional basis. Besides raising fundamental questions under the Compact Clause of the Constitution, the proposed rule unlawfully strips States of the ability to manage energy matters on their own.

The proposed rule’s dramatic reinterpretation—indeed, rewriting—of Section 111(d) changes the state of affairs that Congress contemplated, by effectively withdrawing discretion that Congress and the Constitution have specifically reserved to the States. The comprehensive changes that the EPA demands of States will be all-or-nothing propositions that are not susceptible to being applied “flexibly.”

Fourth, applying the EPA’s “plant to plug” approach in the proposed rule to the electricity sector gives States no practical choice but to relinquish to the EPA significant authority over its electric generation resource planning. The proposed emission guidelines are intentionally predicated on measures throughout the electricity sector that inherently cannot be met by the EGU emitting CO₂. Thus, the EPA leaves States with essentially two options: fundamentally alter the 100-year-old utility regulatory system or endanger electricity reliability. On the one hand, the EPA would require States, in order to develop a plan that would be approved by the EPA, to impose regulatory obligations on any affected entity—whether or not heretofore that entity was regulated by the State—necessary to reduce CO₂ emissions from the electricity sector according to the EPA’s requirements. In doing so, those States would necessarily cede to the EPA the power to act as final arbitrator over any emissions reduction measure required of such entities, regardless of whether those actions represent jurisdiction traditionally guaranteed to the States. On the other hand, the EPA could disapprove a State plan and apply the proposal’s emission limits directly at coal-fired EGUs. But because meeting the emission goals without relying on building blocks 2 through 4 would be virtually impossible, many fossil fuel-fired units would be forced to shut down, thereby threatening the State’s ability to ensure an adequate supply of electricity for its citizens. Therefore, the States will have no practical option but to comply with the EPA’s mandates: they will be *forced* to adopt elements of building blocks 2 through 4—either “voluntarily” through a state plan or as negotiated mitigation measures when the EPA imposes a federal plan directly on the affected EGUs that

²⁴⁶ Legal Memorandum at 92.

²⁴⁷ Proposed Rule, 79 Fed. Reg. at 34,888.

proves to be so burdensome that it would cripple the State’s electric power system. In either case, a State would be forced to pass enabling legislation and a regulatory program that would run counter to the interests of the State and its citizens.

b. Federal Energy Law Reinforces that the Proposed Rule Exceeds the EPA’s Statutory Authority Under Section 111(d).

Federal energy law and the history of federal regulation of the electric industry reinforces that Section 111(d) does not authorize the EPA to promulgate the proposed rule. For nearly 100 years, Congress and the federal courts have consistently recognized and reinforced the “bright line” divide between federal and state jurisdiction over the U.S. electric power system.²⁴⁸ But the EPA would read Section 111(d) to eliminate that “bright line” divide, and would confer upon the EPA broad authority over matters long left to the States—authority that Congress has specifically chosen not to confer on FERC, the federal agency directly responsible for the federal regulation of the operation of our nation’s transmission system and wholesale power markets.

For instance, according to the EPA, Section 111(d) would upend the settled federal-state division over electricity generation. The States have long been entrusted with overseeing electricity generation.²⁴⁹ The proposed rule would invade that province and improperly dictate to the States what mix of electric generating resources must be built, maintained, and operated. In light of Congress’s intent that States retain exclusive authority over resource planning, the EPA’s authority under Section 111(d) must be limited to establishing procedural guidance for submission of State plans based on measures that operate within the fence-line of the sources designated for regulation.²⁵⁰ The FPA’s retention of significant authority to the States also supports the conclusion that the EPA lacks authority to override a state plan that is based on “other factors” within the purview of State authority.²⁵¹

Furthermore, the EPA’s proposal flouts the well-settled federal-state division between retail and wholesale electric markets by, for instance, attempting to regulate end-use consumer retail activity under building block 4. The FPA explicitly recognizes the States’ exclusive

²⁴⁸ See, e.g., 16 U.S.C. § 824(b)(1) (recognizing the States’ exclusive authority “over facilities used for the generation of electric energy[,] over facilities used in local distribution or only for the transmission of electric energy in interstate commerce, [and] over facilities for the transmission of electric energy consumed wholly by the transmitter.”); H.R. REP. NO. 74-1318, at 8 (1935) (emphasizing that the FPA “takes no authority from State commissions”); *FPC v. S. Cal. Edison Co.*, 376 U.S. at 215-216 (describing the divide between federal and state jurisdiction established in the FPA as a “bright line”); *Chemehuevi Tribe of Indians*, 420 U.S. at 408 (explaining that “there is simply no suggestion” that the FPA grants FERC jurisdiction over electric generating plants); 16 U.S.C. § 824o(i)(2) (2005 amendment to the FPA incorporating a “savings provision,” preserving state exclusive authority “to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for the adequacy or safety of electric facilities or services”).

²⁴⁹ See *supra* Part IV.B.2.

²⁵⁰ Cf. 40 C.F.R. §§ 60.21(c), 60.22(a), 60.23(a)-(b) (providing that plans must apply to “designated facilities,” meaning facilities within the category of sources that the EPA has listed for regulation, see 40 C.F.R. § 60.21(a), (b)).

²⁵¹ 42 U.S.C. § 7411(d).

authority over retail markets.²⁵² Thus, as the D.C. Circuit recently affirmed in *EPSA*, any attempt by FERC to “regulate the retail market” would “encroach[] on the states’ exclusive jurisdiction” over such markets.²⁵³ And if the FPA does not authorize FERC to regulate retail activities, then Section 111(d) of the CAA certainly cannot be read to authorize the EPA to do so.²⁵⁴ Section 111(d) tasks the EPA with “prescrib[ing] regulations which shall establish a procedure . . . under which each State shall submit to the [EPA] a plan which (A) establishes standards of performance” that reflect the degree of emission limitation achievable through the EPA-selected BSER, and “(B) provides for the implementation and enforcement of such standards of performance.”²⁵⁵ Nothing in that provision purports to delegate to the EPA authority over retail activities solely within the jurisdiction of the States. Yet the proposed rule would regulate retail activities by requiring States to meet emissions goals in part by “reducing the demand for generation” from all “affected fossil fuel-fired EGUs” “through measures that reduce the overall quantity of generation demanded by end-users.”²⁵⁶ Such regulation of retail electric consumption would be improper.

The proposed rule would thus eviscerate the regulatory compact between the federal government and the states undergirding energy regulation for nearly 100 years, further confirming that the proposed rule is improper.

4. Principles of Statutory Interpretation and Constitutional Law Require Rejection of the EPA’s Interpretation of Section 111(d).

As explained above, the EPA lacks authority to promulgate the proposed rule under Section 111(d)’s plain text, and principles of cooperative federalism strongly confirm that conclusion.²⁵⁷ Even if Section 111(d) were ambiguous, however, courts would be required to reject the EPA’s interpretation for three further reasons.

First, the proposed rule cannot satisfy the clear statement rule that applies in this context. Because the EPA’s interpretation of Section 111(d) allows direct federal intrusion into areas traditionally regulated by States, the EPA must establish that Section 111(d) unmistakably provides it with the authority it claims.²⁵⁸ To allow an agency to disrupt the “usual constitutional balance between the States and the Federal Government” in an area traditionally regulated by

²⁵² See 16 U.S.C. § 824(b)(1) (stating that the “provisions of this subchapter shall apply . . . to the sale of electric energy at wholesale in interstate commerce, but . . . shall not apply to any other sale of electric energy”).

²⁵³ *EPSA*, 753 F.3d at 218.

²⁵⁴ See *Brown & Williamson*, 529 U.S. at 133 (explaining that “the meaning of one statute may be affected by other Acts” and that “we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency”).

²⁵⁵ 42 U.S.C. § 7411(d)(1).

²⁵⁶ Proposed Rule, 79 Fed. Reg. at 34,871.

²⁵⁷ See *supra* Part IV.A.

²⁵⁸ See *supra* Part IV.B.

States, a statute must be “abundantly clear” that it “compel[s] the intrusion” into state sovereignty.²⁵⁹

The EPA cannot satisfy those criteria. Under no reasonable interpretation does the CAA make Congress’s intent to allow the EPA to promulgate such a rule “abundantly clear.” “[A]ir pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.”²⁶⁰ Similarly, decisions on generation resource planning have traditionally been regulated by the States as confirmed by Congress in the FPA.²⁶¹ Because States have traditionally regulated air pollution and electricity generation, it is a core state function that cannot be intruded upon without a clear statement from Congress. Section 111(d) does not remotely contain such a clear statement. Indeed, all of Congress’s clear statements in the area of generation resource planning are to the contrary—such regulation has historically been the province of the States.²⁶²

This conclusion is further compelled by the fact that the EPA's proposed rule constitutes federal administrative infringement of state sovereignty. The EPA is insulated from electoral accountability and thus any court would look with particular skepticism upon the radical transformation effected by the proposed rule. Nothing in Section 111(d) can plausibly be read to authorize the dramatic shift in power that the proposed rule would cause, and courts would not defer to the EPA’s construction of Section 111(d). Indeed, to accord *Chevron* deference to the EPA’s interpretation would contravene structural principles of federalism by allowing the EPA—without any accountability to the States whatsoever—to intrude on a core state function.²⁶³

Second, and independently, the proposed rule would “give rise to substantial constitutional questions,” and courts would be required to “construe the statute to avoid” those questions and reject the EPA’s interpretation.²⁶⁴ In particular, the proposed rule would violate—or at least create substantial questions under—the Tenth Amendment because it would require States to enact legislation or exercise authority in particular ways, forcing state legislators to make policy choices that they would not otherwise make. The Tenth Amendment does not allow Congress (much less the EPA) to commandeer the States’ legislative processes in this manner—no matter how clearly Congress might purport to do so. As explained above, “the Constitution

²⁵⁹ *United States v. Cal. Rural Legal Assistance, Inc.*, 722 F.3d 424, 428 (D.C. Cir. 2013) (internal quotations and citations omitted).

²⁶⁰ 42 U.S.C. § 7401(a)(3).

²⁶¹ *See* 16 U.S.C. § 824(b)(1).

²⁶² *See supra* Part IV.B.2.

²⁶³ *See supra* Part IV.B.3.a.

²⁶⁴ *INS v. St. Cyr*, 533 U.S. 289, 300 (2001); *see Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995) (explaining that when an agency rule interprets a statute in such a way that “presents serious constitutional difficulties” such agency “is not entitled to *Chevron* deference with regard to its interpretation of the statute” as long as the statute may be construed in another way “to avoid constitutional difficulties . . . [and] such a construction is not plainly contrary to the intent of Congress.”).

does not empower Congress” to “command . . . state governments to implement legislation enacted by Congress.”²⁶⁵

By forcing States to regulate interstate commerce in particular ways, moreover, the EPA’s interpretation of Section 111(d) distorts accountability for policy outcomes—in conflict with Tenth Amendment anti-commandeering precedents.²⁶⁶ As an example, a facility forced to close because it cannot meet the EPA’s stringent new emissions standards may naturally blame the State, even if the State was acting under federal compulsion. That potential for confusion is heightened by the EPA’s repeated—but empty—promises of flexibility. The EPA should not be allowed to take credit for any perceived benefits of a federal environmental mandate while laying the blame for any ensuing costs on state and local officials.

The proposed rule, in short, creates serious constitutional questions by interpreting Section 111(d) to authorize a federal agency to invade areas of traditional state concern and to commandeer the regulatory powers of the States, along with their personnel and resources, to enact, administer, and enforce a federal regulatory program.²⁶⁷ The canon of constitutional avoidance would compel a reviewing court to reject the EPA’s interpretation of Section 111(d).

Third, and finally, even if the EPA’s proposed interpretation of Section 111(d) were accepted by a court applying the doctrine of constitutional avoidance, and even if the statute contained a sufficiently clear statement of intent to displace traditional state regulation, the proposed rule would be struck down as unconstitutional commandeering. As explained just above, the breadth of the rule’s intrusion into areas of traditional state regulation is so far-reaching that it violates the Tenth Amendment, particularly when viewed in light of the long history of cooperative federalism that it seeks to displace.²⁶⁸

²⁶⁵ *New York*, 505 U.S. at 176; *see Printz*, 521 U.S. at 912 (“[S]tate legislatures are not subject to federal direction.”).

²⁶⁶ *See New York*, 505 U.S. at 169 (“Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”).

²⁶⁷ Furthermore, the proposed rule’s disparate treatment and impact on the many States and their citizens also potentially violates the constitutional protections of Equal Sovereignty and Equal Protection. *See, e.g., Shelby County, Ala. v. Holder*, 133 S.Ct. 2612, 2623-24 (2013) (“Over a hundred years ago, this Court explained that our Nation ‘was and is a union of States, equal in power, dignity and authority’ [T]he fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.”). The proposed rule’s emissions goals—which vary from State-to-State and range from 215 lbs/MWh to 1,783 lbs/MWh—effectively subject the States, the affected EGUs in those States, and their citizens, to wholly disparate treatment. This is particularly evident in the proposed rule’s treatment of energy efficiency in building block 4. While some states have had energy efficiency programs for many years or decades, other states have no such programs in place. Ignoring this fundamental difference between the states, the proposed rule would require each State to further reduce future emissions annually by 1.5 percent between 2020 and 2030. Effectively, this means that States that have previously invested in energy efficiency programs will be subjected to significantly higher *cumulative* energy efficiency requirements than States which have not invested in energy efficiency programs. Moreover, the incremental costs imposed on those States that have previously invested will be significantly higher than that imposed on other states.

²⁶⁸ *See also supra* Part IV.B.3.

C. The Direct Conflict between the Proposed Rule and FERC’s Statutory Authority Under the Federal Power Act Further Reinforces that the Proposed Rule Exceeds the EPA’s Statutory Authority Under Section 111(d).

The EPA’s proposed rule also creates a direct conflict with FERC’s obligations under the FPA to ensure the reliable operation of the nation’s electric system at rates that are just and reasonable, further reinforcing that Section 111(d) does not authorize the proposed rule. Specifically, the EPA’s proposed “re-dispatch” of generation resources, *i.e.*, “carbon dispatch,” under building block 2 would directly conflict with FERC-approved tariffs utilizing a security constrained economic dispatch model, turning the current system on its head and potentially resulting in market disruptions.

The FPA obligates FERC to ensure that “all rules and regulations affecting . . . rates” in connection with the wholesale sale of electricity are “just and reasonable.”²⁶⁹ Similarly, FERC is also obligated to ensure the reliable operation of the nation’s bulk power system.²⁷⁰ In order to meet those conjoined obligations, system operators utilize a security constrained economic dispatch model that, on a simplified basis, dispatches the lowest-cost generation resource available that is capable of meeting both the bulk energy system’s electric generation and reliability needs. This dispatch model is embedded in the market designs underlying the FERC-approved tariffs that govern the energy markets overseen by Regional Transmission Operators (“RTOs”), Independent System Operators, and other system operators.

Building block 2 of the proposed rule advocates carbon dispatch by proposing to replace “generation at the most carbon-intensive affected EGUs,” *i.e.*, coal generation units, “with generation at less carbon-intensive affected fossil fuel-fired EGUs,” *i.e.*, NGCC generation units.²⁷¹ As a result, the EPA’s proposal is a complete restructuring of the FERC-approved energy markets, requiring resources to be dispatched based on a least-emission, rather than a least-cost, basis. As FERC Commissioner Moeller recently explained:

Building block two relates to increasing natural gas generation dispatch up to 70 percent. Assuming this is even operationally possible, as noted in my testimony, this appears to be a fundamental shift from “economic dispatch” to “environmental dispatch” and *has the potential to completely undermine the market principles that underpin dispatch of the system.*²⁷²

²⁶⁹ 16 U.S.C. § 824d(a).

²⁷⁰ *See generally id.* at § 824o.

²⁷¹ Proposed Rule, 79 Fed. Reg. at 34,862; *see also* Legal Memorandum at 68 (“Building block 2 . . . entails substituting generation at higher emitting units (fossil fuel-fired steam generating units) by shifting to generation at lower-emitting affected sources (existing NGCC units) . . .”).

²⁷² *Commissioner Moeller Answers to Additional Questions for the FERC*, from the U.S. House Committee on Energy and Commerce, Subcommittee on Energy and Power, at 5 (August 26, 2014) (emphasis added) (“Moeller Additional Responses”). *See also, e.g., Written Testimony of FERC Commissioner Moeller*, Before the U.S. House Committee on Energy and Commerce, Subcommittee on Energy and Power, *Hearing on FERC Perspective: Questions Concerning EPA’s Proposed Clean Power Plan and Other Grid Reliability Challenges*, at 3 (July 29, 2014) (“For decades we have relied on the concept of ‘economic dispatch’ of electric generation. Simply put, the power plants with the lowest operating cost are called first to generate electricity—with various
(Cont’d on next page)

A state compliance plan that attempts to utilize building block 2’s carbon dispatch approach to meet its emissions goal will require FERC’s approval for any changes to the governing system tariffs and, in particular, will require FERC’s approval for any changes to the dispatch algorithms. The EPA acknowledges that its proposed carbon dispatch model will result in increased costs over the current security constrained economic dispatch model.²⁷³ As a result of those increased costs—and for other reasons—it is entirely possible that FERC will determine that the EPA’s carbon dispatch model is *not* just and reasonable, particularly if it “undermine[s] the market principles that underpin dispatch.” As FERC Commissioner Clark has opined, “[t]o the degree an EPA rule directly attempts to change FERC jurisdictional market dispatch rules, there could be a clear conflict between the Federal Power Act and the Clean Air Act.”²⁷⁴ In the event of such a conflict, States and transmission system operators may not be able to utilize building block 2 to meet the EPA’s emissions goals and therefore may not be able to comply with overall emission goals of the proposed rule.

D. The EPA’s Failure to Adequately Consider or Explain Numerous Issues with the Proposed Rule Would Render Any Final Rule Arbitrary and Capricious.

The EPA fails to adequately address or explain many of its determinations in the proposed rule, including the potential impact of the proposed rule on system reliability and cost. The courts routinely vacate rules that are contrary to law, arbitrary and capricious, or unsupported by evidence.²⁷⁵ An agency rule is arbitrary or capricious if the agency has “relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”²⁷⁶

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reliability requirements and other factors as part of the decision, depending on the structure of various markets. By moving to what is essentially ‘environmental dispatch,’ units will be called to generate primarily based upon the emission profile of the unit.” (“Moeller Testimony”); *Commissioner Clark Answers to Preliminary Questions for the FERC*, U.S. House Committee on Energy and Commerce, Subcommittee on Energy and Power, at 3 (July 29, 2014) (“There has been some speculation that the state and regional carbon compliance plans might envision requesting FERC to authorize the various RTOs to transition away from the security constrained economic dispatch model towards some form of dispatch based on carbon emissions. . . . [C]hanging the fundamental market dispatch algorithms in the ways some have suggested would be a major change, to say the least.”) (“Clark Initial Responses”).

²⁷³ See, e.g., Proposed Rule, 79 Fed. Reg. at 34,865 (“For the scenario reflecting a 70 percent NGCC utilization rate, comparison to the business-as-usual case indicates that the average cost of the CO₂ reductions achieved over the 2020–2029 period was \$30 per metric ton of CO₂.”).

²⁷⁴ *Commissioner Clark Answers to Additional Questions for the FERC*, U.S. House Committee on Energy and Commerce, Subcommittee on Energy and Power, at 5 (August 26, 2014) (emphasis added) (“Clark Additional Responses”).

²⁷⁵ See 5 U.S.C. § 706(2); see also 42 U.S.C. § 7607(d)(9).

²⁷⁶ *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

1. The EPA Has Not Adequately Considered or Explained the Total Cumulative Costs of the Proposed Rule.

Section 111(a) of the CAA permits the EPA to establish a standard of performance “for emissions of air pollutants,” through the application of a BSER, but requires the EPA to consider the “cost of achieving such reduction.”²⁷⁷ Despite that requirement, the EPA fails to adequately articulate and properly consider the total, cumulative costs of the proposed rule in direct violation of the Agency’s obligations set forth in the CAA. The preamble to the proposed rule pays lip service to the mandatory consideration of costs by suggesting “that the annual incremental compliance cost of [the proposed rule] is estimated to be between \$5.5 and \$7.5 billion in 2020 and between \$7.3 and \$8.8 billion (2011\$) in 2030, including the costs associated with monitoring, reporting, and recordkeeping.”²⁷⁸ However, the EPA fails to ever articulate the total, cumulative costs that the EPA estimates will be incurred as a result of the proposed rule. Moreover, based upon the minimal information the EPA has provided, it appears that the EPA grossly underestimates the costs of the proposed rule and simply ignores significant costs that the proposed rule will impose on the public.

According to the proposed rule, the EPA’s annual cost estimates are based only on “the change in electric power generation costs between the base case and the proposed rule . . . includ[ing] cost estimates for demand-side energy efficiency” and “the amortized cost of capital investment, needed new capacity, shifts between or amongst various fuels, deployment of energy efficiency programs, and other actions associated with compliance.”²⁷⁹ The EPA’s estimate therefore does not appear to include the significant additional costs that will be incurred by the asset owners, the states and their ratepayers who will need to absorb the costs of stranded capital investments associated with the retirements and abandonments resulting from the proposed rule, nor does it include the costs of reliability improvements or infrastructure investments needed to ensure a stable electric grid that will be required as a result of the proposed rule.

The EPA’s piecemeal estimates appear to be woefully deficient. For example, an October 2014 study performed by NERA Economic Consulting predicts that compliance costs would total \$366 billion to \$479 billion over 2017 – 2031, with annual compliance costs averaging \$41 billion to \$73 billion.²⁸⁰ This is nearly *ten times* the annual incremental

²⁷⁷ See 42 U.S.C. § 7411(a) (defining “standard of performance”).

²⁷⁸ Proposed Rule, 79 Fed. Reg. 34,934-35. Notably, the first time that EPA clarifies in the proposed rule that the above-listed costs are incremental, rather than cumulative, appears more than 100 pages into the proposed rule. Prior to this clarification, the EPA’s statements on the estimated costs of the proposed rule could reasonably be interpreted as stating that these estimates reflect the *total* expected costs incurred up to those particular dates. See, e.g., *id.* at 34,839 (noting that “[a]ssuming that states comply with the guidelines collaboratively . . . [i]n 2020, total compliance costs of this proposal are approximately \$5.5 billion . . .”).

²⁷⁹ *Id.* at 34,934-35. However, “needed new capacity” and “other actions” does not appear to take into account the significant and measurable costs that will be associated with ensuring system reliability after implementation of the proposed rule.

²⁸⁰ *Potential Energy Impacts of the EPA Proposed Clean Power Plan*, Prepared for American Coalition for Clean Coal Electricity, American Fuel & Petrochemical Manufacturers, Association of American Railroads, American Farm Bureau Federation, Electric Reliability Coordinating Council, Consumer Energy Alliance, and National
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compliance cost suggested by the EPA. This discrepancy is not a simple matter of a reasonable difference of opinion. Rather, it is a product of the EPA putting forth an unsupported and implausibly low-cost estimate to support the proposed rule.

Indeed, the proposed rule would require the retirement of a massive amount of coal generation (which the EPA estimates to be greater than 46 GW on a national level by 2020).²⁸¹ Virtually all of that generation, which represents prudent investments by the owners, will be prematurely retired as a result of the proposed rule (*i.e.*, retired before the end of its useful life). Basic principles of utility regulation and ratemaking lead to the inescapable conclusion that forced retirement of still-useful assets will produce significant stranded costs that ultimately will be borne by electric consumers. The EPA, however, simply wishes this issue away, stating that “the issue of remaining useful life will arise infrequently in the development of state plans to limit CO₂ emissions from affected existing EGUs.”²⁸² Conversely, FERC Commissioner Moeller recently pointed out that utilities, particularly those who have invested in recent improvements to their generation fleets, may have stranded costs as a result of the proposed rule:

[O]ver the past decade a Wisconsin utility has invested—and ratepayers are paying for these investments through their rates—billions of dollars in cleaner technologies that have resulted in dramatic improvements to the emission profile of the utility’s generation fleet. Similarly, a billion dollars was recently spent on scrubbers for a single site in Mississippi. Yet those investments are taken for granted in the EPA’s plan, and may result in consumers paying for utility investments that will not be used. Wisconsin and Mississippi are not alone here, as other states have invested heavily in reducing air emissions over the past few years.²⁸³

Similarly, the EPA’s cost estimate, such as it is, focuses only on generation and energy-related costs attributable to the proposed rule. This overly-narrow approach ignores the fact that significant investment in electric and gas transmission infrastructure will be needed to support the EPA’s vision of a totally remade electric industry. As FERC Chairman LaFleur has noted, “the proposed rule contemplates power supply changes that could require substantial investments

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Mining Association, at 21, (October 2014), available at http://www.americaspower.org/sites/default/files/NERA_CPP%20Report_Final_Oct%202014.pdf.

²⁸¹ See Proposed Rule, 79 Fed. Reg. at 34,933 (stating that an additional 46-49 GW of additional coal-fired EGU retirements will occur by 2020 under the proposed rule’s four building block approach). See also EPA’s IPM Run Results for Option 1-Regional, available at <http://www.epa.gov/airmarkets/powersectormodeling/cleanpowerplan.html> (illustrating that by 2020, approximately 94 GW of coal generation is expected to retire due in part to the proposed rule).

²⁸² Proposed Rule, 79 Fed. Reg. at 34,926.

²⁸³ *Moeller Testimony*, at 5-6.

in additional infrastructure over the multi-year compliance period to ensure reliability, particularly with respect to increased utilization of gas-fired generation.”²⁸⁴

Beyond such obvious gaps in the EPA’s assessment of the costs of the proposed rule, the EPA appears to be unaware of the fact that the proposed rule would engender a fundamental and radical change in the nation’s electric markets. As FERC Commissioner Moeller pointed out, the proposed rule may “undermine the market principles that underpin dispatch of the system.”²⁸⁵ Thus, the EPA cannot have appropriately assessed the cost of the proposed rule unless it considered the impact of the massive prospective changes to the fundamental architecture of the energy markets driven by the very rule the EPA is considering.

Simply put, the EPA has failed to adequately consider the cost of the proposed rule as required by the CAA or to explain its cost calculations. Any final rule issued in the absence of a full and appropriate analysis of this vital and statutorily mandated factor would be arbitrary and capricious.

2. The EPA Has Not Adequately Considered or Explained the Effects of the Proposed Rule on Electric Grid Reliability.

The EPA has not adequately considered or explained its determination that the proposed rule will not affect electric grid reliability. Rather than conduct a sufficient review of reliability issues, the EPA flatly dismisses them. According to the EPA’s Resource Adequacy and Reliability Assessment Technical Support Document (“EPA’s Reliability TSD”), the EPA concludes that: “Although there can be local grid reliability issues in replacing some units, these can be managed within the normal reliability planning and management time frames. . . .”²⁸⁶ The EPA further dismisses reliability issues—and in particular, critical potential shortages of ancillary services²⁸⁷—stating without any support or reasoned basis that they “should be entirely manageable within the normal parameters required for maintaining reliable operation.”²⁸⁸ The EPA simply asserts, without any reasonable support or basis, that the proposed rule will “reduce the amount of electricity that would need to be delivered over the electric grid, generally reducing pressure on the grid and thereby improving electricity system reliability.”²⁸⁹

²⁸⁴ *Written Testimony of FERC Chairman LaFleur*, Before the U.S. House Committee on Energy and Commerce, Subcommittee on Energy and Power, *Hearing on FERC Perspective: Questions Concerning EPA’s Proposed Clean Power Plan and other Grid Reliability Challenges*, at 4 (July 29, 2014) (“LaFleur Testimony”).

²⁸⁵ *Moeller Additional Responses* at 5.

²⁸⁶ EPA’s Reliability TSD at 5.

²⁸⁷ FERC has defined ancillary services as “[t]hose services necessary to support the transmission of electric power from seller to purchaser, given the obligations of control areas and transmitting utilities within those control areas, to maintain reliable operations of the interconnected transmission system.” FERC’s Guide to Market Oversight Glossary, <http://www.ferc.gov/market-oversight/guide/glossary.asp>.

²⁸⁸ EPA’s Reliability TSD at 5.

²⁸⁹ Proposed Rule, 79 Fed. Reg. at 34,885.

The EPA’s dismissal of these serious reliability concerns cannot be explained and would render any final rule arbitrary and capricious. FERC—the federal agency *charged with the reliable operation of our nation’s bulk power system*—has raised significant concerns with the proposed rule²⁹⁰ that the EPA appears to ignore. The EPA claims that it “has met on several occasions” with staff from FERC and the Department of Energy (“DOE”) “to discuss [the EPA’s] approach to the rule and its potential impact on the power system.”²⁹¹ But the EPA does not indicate what, if any, position FERC or DOE staff has taken with respect to these critical issues. This is patently insufficient as assurance that the EPA adequately considered reliability issues. Indeed, FERC Commissioners have acknowledged that the EPA has not requested *any* written advice or analysis from FERC, including on the proposed rule’s effects on electric reliability.²⁹²

While FERC has provided some advice to the EPA in several close-door meetings, most of the FERC Commissioners were not included in those meetings.²⁹³ This suggests that the EPA may have sought to limit advice or analysis that would have been contrary to their intended goals.²⁹⁴ Indeed, in at least one close-door meeting between FERC and the EPA, the EPA did not permit FERC Staff to review documents the EPA had brought to the meeting.²⁹⁵

Moreover, the EPA appears to have ignored critical reliability observations made by FERC Staff in at least one meeting about the proposed rule. According to a memo prepared by the Director of FERC’s Office of Electric Reliability memorializing a conversation between FERC Staff and the EPA, FERC’s Office of Electric Reliability alerted the EPA that FERC “had doubts about the ability to expand the pipeline infrastructure as quickly” as necessary to meet the EPA’s proposed 70 percent utilization rate of NGCCs reflected in building block 2 of the proposed rule, and that the EPA’s reliance on the fact that some NGCC units had previously

²⁹⁰ See, e.g., *Moeller Additional Responses* at 4 (noting that his “biggest concern” is that the EPA could be underestimating the reliability impacts of the proposed rule); *Clark Additional Responses* at 4 (“I have become increasingly concerned that the EPA does not fully appreciate the complexities, difficulties, and costs associated with electric reliability.”).

²⁹¹ Proposed Rule, 79 Fed. Reg. at 34,899.

²⁹² See *Chairman LaFleur Answers to Preliminary Questions for the FERC*, U.S. House Committee on Energy and Commerce, Subcommittee on Energy and Power, at 2 (July 29, 2014) (explaining that the “EPA did not request written advice or analysis regarding the potential impacts of the [proposed rule] on the reliability of the electric grid.”) (“LaFleur Initial Responses”).

²⁹³ *Id.* at 1-2. See also *Clark Initial Responses* at 1 (stating that the “EPA did not consult with me”); *Commissioner Moeller Answers to Preliminary Questions for the FERC*, U.S. House Committee on Energy and Commerce, Subcommittee on Energy and Power, at 1 (July 29, 2014) (stating that he has “had no consultations with EPA on its proposal”) (“Moeller Initial Responses”); *Commissioner Norris Answers to Preliminary Questions for the FERC*, U.S. House Committee on Energy and Commerce, Subcommittee on Energy and Power, at 1 (July 29, 2014) (stating that he has “not consulted with EPA regarding the Proposal”).

²⁹⁴ See also *Clark Additional Responses* at 5 (“I would ask EPA to not ignore the engineers and system planners who are raising red flags about reliability.”).

²⁹⁵ See *Moeller Additional Responses* at 1 (explaining that “[o]ne of my advisors, Robert Ivanauskas, attended one private meeting prior to release of the rule which included Joe Goffman, Janet McCabe, and Chairman Cheryl LaFleur. Although EPA brought some documents to that meeting, EPA decided not to allow FERC to look at those documents.”).

exceeded a 60 percent utilization factor might be misplaced.²⁹⁶ Regarding the “significant increase in renewable generation” reflected in building block 3, FERC staff told the EPA “that it is difficult to get transmission built for such generation when it is remote from loads, *e.g.*, wind farms,” and that there were “unresolved questions about the effects of relying on renewables for 20% or more of net generation.”²⁹⁷ “In particular,” FERC staff pointed out, there are “different views on the issue of ensuring adequate ancillary services.”²⁹⁸

Regarding “infrastructure development” needed to meet the requirements of building blocks 2 and 3, FERC’s Office of Electric Reliability alerted the EPA that such development “could lead to significant costs for new pipelines and transmission” and that the proposed rule would “require extensive and time-consuming engineering analysis of [ancillary service] issues.”²⁹⁹ FERC concluded that point by noting that building new transmission and pipelines to meet the targets of building blocks 2 and 3 “might be costly and difficult to achieve within the timeline of the emissions targets.”³⁰⁰ And, with respect to the heat rate improvements required by building block 1, FERC Staff advised the EPA that the proposed rule assumes heat rate improvements “beyond the levels suggested in a couple of studies” and that “the assumed cost effectiveness of the proposed improvements [is] hard to reconcile.”³⁰¹

Others have raised reliability concerns as well. In a November 2014 analysis of Potential Reliability Impacts of EPA’s Proposed Clean Power Plan,³⁰² NERC warned, among other things, that the proposed rule “introduces potential reliability concerns that are more impactful than prior environmental compliance programs due to the extensive impact to fossil-fired generation.”³⁰³ NERC further cautioned that “[a] number of studies and analyses must be

²⁹⁶ See Mike Bardee Memorandum, *Phone call on EPA’s draft rule for GHG from existing power plants*, at 1 (Apr. 25, 2014), (as attached to *Chairman LaFleur Answers to Additional Questions for the FERC*, U.S. House Committee on Energy and Commerce, Subcommittee on Energy and Power (Aug. 26, 2014)) (“FERC Staff Memo”).

²⁹⁷ *Id.* at 2.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*; see also *Moeller’s Initial Responses* at 5 (stating that he is “skeptical of EPA’s contention that the modeled capacity increases [in natural gas infrastructure] are feasible by 2020.”); *LaFleur Testimony* at 4 (stating that “FERC staff emphasized [to EPA staff] that in light of the EPA’s proposal to rely on increased capacity factors for natural gas fired generation resources, gas pipeline adequacy should be considered from a regional perspective, not just a national perspective, due to existing constraints on the system”); accord *LaFleur Initial Responses* at 8 (stating that “the construction of adequate natural gas infrastructure will be an important factor affecting the implementation of state compliance plans.”).

³⁰¹ FERC Staff Memo at 2.

³⁰² NERC, *Potential Reliability Impacts of EPA’s Proposed Clean Power Plan* (Nov. 2014), available at http://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/Potential_Reliability_Impacts_of_EPA_Proposed_CPP_Final.pdf (“NERC Reliability Review”).

³⁰³ *Id.* at 17. Among its many suggestions, NERC proposes that “[t]he EPA and policy makers should recognize the complexity of the reliability challenges posed by the rule and ensure the rule provides sufficient time for the industry to take the steps needed to significantly change the country’s resource mix and operations without negatively affecting [bulk power system] reliability.” *Id.* at 3.

performed to demonstrate reliability, and industry must closely coordinate with the states to ensure the SIPs are aligned with what is technically achievable within the known time constraints.”³⁰⁴ If NERC, the electric reliability organization determined by FERC to have responsibility for developing and enforcing mandatory reliability standards³⁰⁵ says that more analyses are needed “to demonstrate reliability” that alone demonstrates that the EPA failed to adequately consider the reliability impacts of the proposed rule.

NERC also raises significant concerns about the EPA’s analysis (or lack thereof) of the four building blocks. Most distressing, with respect to building block 3, NERC notes that “grid reliability issues associated with increased variable resources are not directly addressed in the EPA’s proposed Building Blocks.”³⁰⁶ Examining building block 1, NERC cautions that the EPA “creates an inconsistent approach” by failing to consider how building block 1 will “reduce the net output of [coal-fired EGUs], as well as their associated net heat rate efficiency.”³⁰⁷ NERC also cautions that the EPA does not consider several “factors that have profound effects on the process efficiency of a coal-fired EGU.”³⁰⁸ With respect to building block 2, “NERC found a number of reliability concerns regarding increased reliance on natural-gas-fired generation that should be evaluated.”³⁰⁹ Among other things, NERC also raises concerns about the negative effects of reduced fuel diversity caused by the proposed rule, and raises serious questions about the availability of natural gas and natural gas pipeline capacity.³¹⁰ With respect to building block 4, NERC points out that, if the EPA’s assumption “that energy efficiency will grow faster than electricity demand” is not borne out, then “either grid reliability or state CO₂ emissions goals could be compromised.”³¹¹

Similar concerns have been raised by other organizations that have evaluated the impacts of the proposed rule on their service territories. For example, the Southwest Power Pool’s (“SPP”) October 9, 2014, comments to the proposed rule explained that “[u]nless the proposed [rule] is modified significantly, SPP’s transmission system impact evaluation indicates serious, detrimental impacts on the reliable operation of the bulk electric system in the SPP region, introducing the very real possibility of rolling blackouts or cascading outages that will have significant impacts on human health, public safety and economic activity within the region.”³¹² SPP further concluded that “it is clear that the proposed [rule] will impede reliable operation of

³⁰⁴ *Id.* at 27.

³⁰⁵ *See, e.g.* 16 U.S.C. § 824o.

³⁰⁶ NERC Reliability Review at 13.

³⁰⁷ *Id.* at 8.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.* at 9-10.

³¹¹ *Id.* at 14.

³¹² *See* SPP Comment Letter at 6, Docket No. EPA-HQ-OAR-2013-0602-20757, filed on October 9, 2014.

the electric transmission grid in the SPP region, resulting in violations of NERC’s mandatory reliability standards and exposing the power grid to significant interruption or loss of load.”³¹³

Likewise, the Electric Reliability Council of Texas (“ERCOT”) performed an analysis of the proposed rule and warned that the proposed rule, if implemented, “is likely to lead to reduced grid reliability for certain periods and an increase in localized grid challenges.”³¹⁴ Further, ERCOT “anticipates that implementation of the proposed [rule] will have a significant impact on the planning and operation of the ERCOT grid.”³¹⁵ Among other things, “ERCOT estimates that the proposed CO₂ emissions limitations will result in the retirement of between 3,300 MW and 8,700 MW of coal generation capacity, could result in transmission reliability issues due to the loss of generation resources in and around major urban centers, and will strain ERCOT’s ability to integrate new intermittent renewable generation resources.”³¹⁶ Finally, ERCOT also concludes that the proposed rule “will also result in increased energy costs for consumers in the ERCOT region by up to 20% in 2020, without accounting for the costs of transmission upgrades, procurement of additional ancillary services, energy efficiency investments, capital costs of new capacity, and other costs associated with the retirement or decreased operation of coal-fired capacity in ERCOT.”³¹⁷

3. The EPA Has Not Adequately Considered or Explained Numerous Other Issues.

The proposed rule also does not adequately consider or explain numerous other issues and the basis for the EPA’s determinations. Among other things, the proposed rule does not adequately consider, and improperly dismisses the effects of, the CAA’s new source review (“NSR”) program on the cost and achievability of the proposed rule. For example, the EPA acknowledges the potential NSR consequences of building block 1 in the proposed rule, noting that State plans “may impose requirements that require an affected EGU to undertake a physical or operational change to improve the unit’s efficiency that results in an increase in the unit’s dispatch and an increase in the unit’s annual emissions” that “would trigger NSR.”³¹⁸ But despite recognizing the issue, the EPA simply waves off the consequences by asserting that only “a limited number of affected sources would trigger NSR when states implement their plans.”³¹⁹ While very few, if any, of the efficiency projects identified in the Sargent & Lundy report and the GHG Abatement Measures TSD *should* trigger NSR because the projects are *routine*,³²⁰ some

³¹³ *Id.* at 7.

³¹⁴ See ERCOT Analysis of the Impacts of the Clean Power Plan at 1, Nov. 17, 2014, *available at* <http://www.ercot.com/content/news/presentations/2014/ERCOTAnalysis-ImpactsCleanPowerPlan.pdf>.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ Proposed Rule, 79 Fed. Reg. at 34,928.

³¹⁹ *Id.* at 34,929.

³²⁰ See, e.g., *Nat’l Parks Conservation Ass’n v. TVA*, No. 3:01-cv-71, 2010 WL 1291335 (E.D. Tenn. Mar. 31, 2010) (finding economizer and superheater replacements routine); *Pennsylvania v. Allegheny Energy, Inc.*, No. 05-885, 2014 WL 494574 (W.D. Pa. Feb. 6, 2014) (finding superheater, lower slope panel and reheater routine).
(*Cont’d on next page*)

of the EPA enforcement office's recent NSR actions suggest otherwise. As a result of these conflicting precedents, the EPA does not adequately consider or explain its determination that any NSR concerns are "limited."

The proposed rule also does not adequately consider whether it is feasible for multiple building blocks to be implemented at the same time in order to meet the EPA's reduction goals. Based upon the EPA's own assumptions, it is apparent that most if not all states will need to implement most if not all of the EPA's proposed building blocks in order to meet the EPA's proposed emissions goals. However, the EPA has failed to consider whether it is technically feasible to implement the proposed building blocks together. For instance, the increase of variable renewable resources suggested in building block 3 directly conflicts with the suggested increase of NGCC utilization suggested in building block 2. Because variable renewable resources are *intermittent* in nature, *i.e.*, they can only be dispatched when their renewable fuel source is available (when the wind blows or the sun shines, for example) the electric grid must maintain flexible and dispatchable generation resources in sufficient amounts to account for the temporary loss of some or all of those variable renewable resources.³²¹ Substantially increasing variable renewable resources will therefore likely require NGCC plants to *lower* utilization in order to ensure reliability. The EPA does not adequately consider this, or other potential conflicts among its building blocks.

The proposed rule also does not adequately consider or explain the EPA's treatment of nuclear and hydroelectric generation. For instance, the proposed rule's treatment of nuclear units that are currently under construction unfairly penalizes states that have taken steps to invest in zero-emitting resources. The EPA simply does not address or adequately explain why these units should be included in state goals when it admits that "reflecting completion of these units in the goals has a significant impact on the calculated goals for the states in which these units are located. If one or more of the units were not completed as projected, that could have a significant impact on the state's ability to meet the goal."³²² Likewise, the EPA does not adequately explain its decision "to preserve existing nuclear EGUs that might otherwise be retired"³²³ by adding 6 percent to *every* affected states' nuclear generation capacity. Indeed, the EPA makes no attempt to explain how and why it concluded that it was reasonable to add such

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replacements routine); *but see United States v. La. Generating LLC*, No. 09-100, 2012 WL 4107129 (M.D. La. Sept. 19, 2012) (finding that reheater replacements were not routine).

³²¹ *Moeller Additional Responses* at 5 ("[G]iven that non-hydropower renewable resources are intermittent in nature, they will need to be backed up by fast-responding resources, most likely more natural gas units. That will affect state compliance baselines, so it will be difficult to achieve."); *see also Clark Additional Responses* at 10 ("[T]o the degree [the EPA] contemplates a heavy reliance on intermittent sources of energy, I believe it would be unreasonable to assume there will not [need to] be necessary changes [to the transmission system]."); SPP Comment Letter at 9 (explaining that "[w]hile SPP's members will likely dramatically increase their reliance on wind generation . . . to meet carbon emission goals under the proposed [rule], a proportional increase in gas burning generators will be necessary during times when wind resources are not available to maintain reliable energy supplies and minimum required planning reserves.").

³²² Proposed Rule, 79 Fed. Reg. at 34,870.

³²³ *Id.* at 34,870.

capacity in states where there is no indication that there is any nuclear capacity at risk. And, the proposed rule also does not adequately explain why it treats existing nuclear and hydroelectric EGUs dissimilarly with other zero-emitting existing resources, unfairly penalizing States that have invested in nuclear and hydroelectric resources.

V. Conclusion

For the reasons set forth above, the EPA should withdraw the proposed rule and, if it decides to continue with a Section 111(d) rulemaking, issue a new proposal that is consistent with the Agency's limited authority under Section 111(d) of the CAA and that respects the predominant role of the States in ensuring a reliable supply of affordable electricity for their citizens—a role that has been explicitly and repeatedly preserved by Congress and the courts. Any such Section 111(d) rule should be limited to CO₂ emission performance standards that are achievable by a regulated stationary source that is not already subject to such regulation under Section 112.