The Clean Air Act as an Obstacle to the Environmental Protection Agency's Anticipated Attempt to Regulate Greenhouse Gas Emissions from Existing Power Plants

By William J. Haun

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Executive Summary

For roughly two decades, the U.S. Congress has possessed a bipartisan consensus on the regulation of greenhouse gases from industrial sources: It is best to let sleeping dogs lie.[1] Both Democrats and Republicans cited a variety of practical problems that would prevent the Environmental Protection Agency ("EPA" or the "Agency") from using the Clean Air Act ("CAA")—the awkward basis for current greenhouse gas regulation—to regulate emissions from existing "stationary sources" of energy.[2] Nevertheless, President Obama maintains that "America cannot resist this transition,"[3] and the EPA is thus expected to take a step that many believe has not merely prudential, but also legal, problems: to reinterpret Section 111(d), a provision of the CAA previously limited to existing-source emissions of discrete and relatively rare substances, to reach ubiquitous greenhouse gases.[4]

Since the Supreme Court's 2007 decision in *Massachusetts v. EPA*, the EPA has begun regulating greenhouse gases under various provisions in the Act, including by prescribing fuel-efficiency standards for motor vehicles and by requiring control technology for greenhouse gas emissions in some preconstruction permits. Outside environmental groups took advantage of the new uncertainty in how far the EPA could go in regulating greenhouse gases by suing the Agency in 2008. The EPA settled the case in 2010, promising regulation different from past actions: mandating emission reductions from *existing* stationary sources of greenhouse gases,[5] the very subject that has bedeviled Congress for years. Without any new authority from Congress, the EPA is undertaking this new regulatory mission. The EPA, for its part, denies that its interpretation is a stretch, asserting in a 2008 Advance Notice of Proposed Rulemaking ("ANPR") that cap-and-trade is a permissible form of 111(d) regulation.[6] However, there are very strong arguments that the EPA's current interpretation of Section 111(d) is at odds with the controlling statutory language and dilutes that language to fit the Agency's regulatory aims.[7]

The EPA's approach here, on this view, amounts not simply to circumventing the democratic process, but a depreciation of the practical problems this new regulation will pose—problems that the democratic process could address. In the 2008 ANPR, the Department of Energy (among others) noted the "burdensome and intrusive regulatory mechanism unlike any seen before" in the EPA's likely course.[8] The potential breadth of the EPA's efforts may require it to re-construe Section 111(d) to avoid issuing permits and ensuring compliance for all sizes of "stationary sources," which it has already had to do in its Prevention of Significant Deterioration (PSD) permit program.[9]

1 Since the Clean Air Act's 1990 amendments, the U.S. Congress abandoned a variety of attempts to address greenhouse gas ("GHG") emissions through new legislation. They include, but are by no means limited to, the American Clean Energy and Security Act of 2009, America's Climate Security Act of 2007, and the 2003 and 2005 Climate Stewardship Acts.

2 For instance, Rep. John Dingell (D-MI) has warned that using the EPA to regulate carbon dioxide emissions could result in a "glorious mess." *See* Chris Holly, *Dingell: EPA Climate Regulation Would Lead To 'Glorious Mess,' The Energy Daily (IHS)*, Apr. 11, 2008, *available at* http://www.theenergydaily.com/coal/Dingell-EPA-Climate-Regulation-Would-Lead-To-Glorious-Mess_672.html; *see also* George F. Allen & Marlo Lewis, *Finding the Proper Forum for Regulation of U.S. Greenhouse Gas Emissions: The Legal and Economic Implications of* Massachusetts v. EPA, 44 U. Rich. L. Rev. 919, 920 (2010) (arguing "that for economic, legal, and prudential reasons, the CAA is an unsuitable instrument for addressing [greenhouse gas] emissions in the United States").

3 *Inaugural Address by President Barack Obama*, Jan. 21, 2013, *available at* http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama.

4 *See* 77 Fed. Reg. at 22,421-27 (repeatedly announcing EPA's intention to promulgate existing-source greenhouse gas standards under 111(d) "at the appropriate time").

5 *See* Boiler GHG Settlement, Dec. 21, 2010, *available at* http://www.epa.gov/airquality/cps/pdfs/boilerghgsettlement.pdf; *see also* Refinery GHG Settlement, Dec. 21, 2010, *available at* http://www.epa.gov/airquality/cps/pdfs/refineryghgsettlement.pdf.

6 *See* 73 Fed. Reg. 44,354 (July 30, 2008).

7 *See* Part II.C *infra*.

8 73 Fed. Reg. at 44,368 (Comments of the U.S. Dep't of Energy).

9 *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010). The rule sets emissions thresholds for regulation of greenhouse gas emissions. The EPA retains these thresholds (and, in some ways, supplements their measurements) so as to hone in on the largest greenhouse gas emitters. *See* 77 Fed. Reg.

While the Obama Administration has not yet proposed standards for existing power plants, such a move is expected within the year. With the prospect of imminent action, and growing political pressure to coerce unwilling states into unprecedented greenhouse gas regulation,[10] whether the EPA has the authority to take these actions must be explored.

This paper concludes that it does not: In amending Section 111(d) in the Clean Air Act Amendments of 1990, Congress unambiguously provided that the subsection could not be used to set standards for industries that are also regulated under the Clean Air Act's Section 112 air toxics program. Because existing power plants have been regulated under that program since the 2012 Utility maximum achievable control technology ("MACT") Rule,[11] the EPA may not lawfully regulate them under Section 111(d).

The EPA has disputed this limitation since 2005, when it sought to use cap-and-trade to regulate mercury emissions.[12] Some legal commentators have argued that cap-and-trade is within the province of EPA's regulatory authority.[13] But they do not address whether *Congress actually delegated* to the EPA authority to construe Section 111(d) to regulate greenhouse gas emissions of existing stationary sources. While the U.S. Court of Appeals for the D.C. Circuit vacated the EPA's reformulation of power plant regulation on procedural grounds, it did not address the problems posed by the EPA's interpretation of Section 111(d).[14]

This paper will explore the EPA's anticipated efforts to interpret its own authority to reach the goal of regulating of greenhouse gas emissions from existing stationary sources. This initiative raises serious questions of statutory interpretation, practical implementation, and the legitimacy of an administrative agency taking action without delegated authority from Congress. At the outset, a brief history of the EPA's efforts to regulate greenhouse gas, and an outline of what cap-and-trade regulation would look like under Section 111(d), are required to grasp how the statute works.

I. A Brief History of the Clean Air Act and Greenhouse Gas Regulation

A. Greenhouse Gas Regulation Before Massachusetts v. EPA

The Clean Air Act Amendments of 1970[15] essentially established the modern Clean Air Act. The 1970 Amendments built on 1950s and 1960s legislation addressing air pollution, but expanded the

41,051 (July 12, 2012). Nevertheless, expanding the targetable sources of greenhouse gas emitters raises similar questions of how far the EPA could credibly tailor its permitting and still see meaningful greenhouse gas reduction—especially if such tailoring is informed by prioritizing administration and compliance costs over greenhouse gas reduction. *Cf. supra* note 8.

10 *See, e.g.*, Daniel A. Lashof, Starla Yeh, David Doniger, Sheryl Carter & Laurie Johnson, *Closing the Power Plant Carbon Pollution Loophole: Smart Ways the Clean Air Act Can Clean Up America's Biggest Climate Polluters*, Natural Res. Def. Council (Dec. 2012), *available at* http://www.nrdc.org/air/pollution-standards/files/pollution-standards-report.pdf.

11 National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9,304 (Feb. 16, 2012).

12 On March 15, 2005, the EPA issued the "Clean Air Mercury Rule" that provided for the capping and reduction of mercury emissions from coal-powered plants. As mercury was listed as a "hazardous air pollutant" ("HAP") under Section 112 of the Act, the EPA needed to delist mercury from Section 112 to reach it under Section 111(d), as discussed *infra*. *See also* Final Brief of Respondent Envtl. Prot. Agency, New Jersey v. EPA, 517 F.3d 574, 583 (D.C. Cir. 2008), 2007 WL 3231264, at *101-02 (explaining that the 1990 CAA amendments provide language prohibiting a Section 112 HAP from being regulated under Section 111(d) as an existing source). This delisting, vacated on procedural grounds, 517 F.3d at 583, allowed the EPA to fashion a construction of 111(d)'s language that would permit cap-and-trade regulation of existing stationary sources—a position the EPA still maintains. *See supra* note 6; *see also* 73 Fed. Reg. at 44,495 n.253 (noting that "many sources may be subject to standards under both section 111 and 112; however these standards establish requirements for the control of different pollutants."). This is the EPA's current interpretation, though as discussed *infra* it must be an incorrect construction because it dilutes the effect of the U.S. Senate's amended language and renders the House's language a nullity.

13 *See, e.g.*, M. Rhead Enion, *Using Section 111 of the Clean Air Act for Cap-and-Trade of Greenhouse Gas Emissions: Obstacles and Solutions*, 30 UCLA J. Envtl. L. & Pol'y 1, 34-45 (2012).

14 *See* Part II.C *infra*.

15 Pub. L. 91-604.

scope of federal authority in this area to such an extent that they are recognized as the true beginning of the modern regime.

The starting point for understanding the Clean Air Act is the principle of cooperative federalism.[16] The Act "establishes a partnership between EPA and the states for the attainment and maintenance of national air quality goals."[17] "[A]ir pollution prevention . . . and air pollution control at its source is the *primary* responsibility of States and local governments[.]"[18] Stationary sources—for example, power plants—are therefore primarily regulated through state-specific implementation of general federal guidelines, formulated and implemented by the states, with the EPA playing an oversight role after its promulgation of initial guidelines. By contrast, mobile sources—"planes, trains, and automobiles"—are subject to more direct federal regulation, for example in the form of fuel quality standards.

The Clean Air Act accordingly divides national policy into two primary titles: Title I for control of stationary sources of pollution,[19] and Title II for control of mobile sources of pollution.[20] The fundamental control program in Title I of the Act is the national ambient air quality standards ("NAAQS") program, which sets air quality standards at the level "requisite to protect the public health."[21] Because every stationary source of air pollution is local, and decisions about what sources are economically and environmentally desirable implicate state and local concerns, the NAAQS are primarily implemented through state implementation plans. In this regard, Congress "carefully balanced State and national interests by providing for a fair and open process in which State and local governments and the people they represent will be free to carry out the reasoned weighing of environmental and economic goals and needs."[22]

Title I of the Act also includes several other major regulatory programs for stationary sources. For the control of hazardous air pollutants ("HAPs"), Section 112 of the Act provides for the establishment of National Emissions Standards for Hazardous Air Pollutants ("NESHAPs").[23] Section 112 mandates that the EPA regulate most, but not all, emitters of 189 listed hazardous air pollutants.[24]

Additionally, Title I provides for New Source Performance Standards (NSPS) in Section 111. These NSPS regulate emissions from newly constructed or substantially modified stationary sources without reference to existing local air quality.[25] Although the bulk of Section 111 concerns emissions standards for new sources, subsection 111(d) provides the EPA with authority to set standards for certain categories of existing sources. This authority is subject, however, to significant limitations, the details of which are addressed in the bulk of this paper.

B. Massachusetts v. EPA I*ntroduces Greenhouse Gas Regulation to the CAA*

For the first three and a half decades of the Act's existence, it was used to control the emission of substances that directly injure public health and welfare—e.g., those that aggravate asthma, damage crops, or reduce visibility. In 2006, the EPA issued a

16 *See generally* John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 Md. L. Rev. 1183 (1995).

17 Natural Res. Def. Council, Inc. v. Browner, 57 F.3d 1122, 1123 (D.C. Cir. 1995).

18 42 U.S.C. § 7401(a)(3) (emphasis added).

19 42 U.S.C. §§ 7401-7515.

20 42 U.S.C. §§ 7521-7590.

21 42 U.S.C. § 7409(b)(1). This is the level for primary standards; secondary standards are to be set at the level "requisite to protect the public welfare," *id.* § 7409 (b)(2).

22 H.R. Rep. No. 95-294, at 146 (May 12, 1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1225.

23 This program is governed under 42 U.S.C. § 7412. Where a source category is regulated under Section 112, emissions standards for major sources are set at "the maximum degree of reduction in emissions . . . achievable." 42 U.S.C. § 7412(d)(2). This "MACT" (Maximum Achievable Control Technology) standard has become common parlance for the Act's Section 112 air toxics program.

24 The list is codified at 42 U.S.C. § 7412(b)(1), with revision governed by (b)(2)-(3).

25 42 U.S.C. § 7411; 40 C.F.R. Part 60. Under this section, the Administrator is directed to publish a list of categories of all stationary sources which "in his judgment . . . cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A).

final rule setting performance standards for the emission of certain substances from existing power plants.[26] Greenhouse gases were not among them.[27] A coalition of petitioners—comprised of three environmental groups (the Natural Resources Defense Council, the Sierra Club, and the Environmental Defense Fund), eleven states (NY, CA, CT, DE, MA, ME, NM, OR, RI, VT, WA), the District of Columbia, and the City of New York—challenged the EPA's rulemaking on several grounds in the United States Court of Appeals for the District of Columbia Circuit.[28] One of their complaints was the argument that the Clean Air Act obligated the EPA to set standards for greenhouse gas emissions.

In September 2006, the portions of the challenge relating to greenhouse gas emissions were severed from the other challenges and held in abeyance pending the Supreme Court's decision in *Massachusetts v. EPA*.[29] The Court held in 2007 that greenhouse gases fit within the Act's expansive definition of "air pollutant."[30] Although the opinion directly concerns the emission of greenhouse gases from motor vehicles under Title II, since 2007 *Massachusetts* has "spurred a cascading series of greenhouse gas-related rules and regulations,"[31] most notably in the Act's preconstruction permitting program for major stationary sources, such as many power plants and factories. Following the Supreme Court's decision, the D.C. Circuit remanded the power plant challenge to the EPA for further proceedings.

Rather than set its own regulatory agenda, the EPA chose to settle. In December 2010, the EPA entered into a settlement agreement that required it to set standards for greenhouse gas emissions under 111(b) for new and modified power plants and 111(d) for existing power plants by July 26, 2011. It further undertook to establish final rules following public comment, first for new and then for existing plants, by May 26, 2012.[32] The settlement agreement itself announces that the EPA has initially determined "that there are cost-effective control strategies for reducing" greenhouse gas emissions from power plants and that "it would be appropriate for it to concurrently propose performance standards for [greenhouse gas] emissions from new and modified [plants] under [Clean Air Act] section 111(b) . . . and . . . from existing [plants] pursuant to [Clean Air Act] section 111(d)[.]" Unlike other regulatory actions, this settlement agreement was not subject to public notice or comment, and there is therefore no record showing that the Agency's leadership seriously analyzed its legal authority to carry out the settlement. In these respects and others, the settlement appears to be a typical example of "sue and settle" regulation, under which the EPA settles actions—often under a consent decree but sometimes, as in this case, by voluntary settlement without judicial approval—in a way that binds it to significant regulatory commitments without appropriate input from Congress, other federal agencies, and other stakeholders.[33] Resources for the

26 71 Fed. Reg. 9,866 (Feb. 27, 2006).

27 *See id.* at 9,869 (noting commenters' argument that EPA was required to set standards for greenhouse gas emissions but concluding that Agency "does not presently have the authority to set [New Source Performance Standards] to regulate CO_2 or other greenhouse gases that contribute to global climate change").

28 *See* New York v. EPA, No. 06-1322 (D.C. Cir. 2007).

29 549 U.S. 497.

30 *Id.* at 528-29.

31 Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 114 (D.C. Cir. 2012) (per curiam).

32 *See* Boiler GHG Settlement, Dec. 21, 2010, *available at* http://www.epa.gov/airquality/cps/pdfs/boilerghgsettlement.pdf. The Refinery schedule for new EPA rules was slightly different, giving the EPA until December 10, 2011 to sign new GHG rules, and until November 10, 2012 to establish a final rule after soliciting public comment by. *See* Refinery GHG Settlement, Dec. 21, 2010, *available at* http://www.epa.gov/airquality/cps/pdfs/refineryghgsettlement.pdf.

33 *See, e.g.*, Testimony of Roger R. Martella, Jr., Hearing of the Courts, Commercial and Administrative Law Subcommittee of the House Judiciary Committee, "Federal Consent Decree Fairness Act, and the Sunshine for Regulatory Decrees and Settlements Act of 2012" (Feb. 3, 2012) ("[I]n December of 2010 EPA announced a consent decree with several groups committing the agency to propose and finalize the first-ever new source performance standards for greenhouse gases without any prior input from the affected stakeholders."); Testimony of Andrew M. Grossman, *id.*, "The Use and Abuse of Consent Decrees in Federal Rulemaking" (observing generally that "consent decrees (and in some instances, settlement agreements) that bind the federal government to undertake particular future actions present special risks and concerns that are simply not present in litigation between private parties" and that "[w]hen, for reasons of convenience or advantage, public officials attempt

Future observed that the EPA's settlement agreement was "hard to describe as anything other than a victory for the states and environmental plaintiffs."[34]

C. The Use of "Performance Standards" to Regulate Greenhouse Gas Emissions

The EPA's prior attempt to regulate mercury emissions through cap-and-trade highlights how Section 111(d) would theoretically handle a cap-and-trade scheme.[35] Yet Section 111(d)'s characteristics also reveal the scheme's fatal flaws in the context of greenhouse gases and existing stationary sources.

Section 111(d) does not provide for cap-and-trade explicitly, but the EPA would likely consider it a "system of emission reduction," an open-ended term within Section 111.[36] Under Section 111(d), a state would theoretically implement cap-and-trade as part of its "standards of performance for any existing source for any air pollutant" that other CAA sections do not classify as criteria pollutants or HAPs.[37]

The Clean Air Act is an awkward tool with which to regulate greenhouse gases. The greenhouse gas of primary concern is carbon dioxide, which is not an exotic compound produced in a few industrial processes, but is inevitably produced by the combustion of coal, gas or any other fossil fuel. The EPA has (correctly) refrained from suggesting that greenhouse gases[38] are criteria pollutants subject to the NAAQS regime, or classifying them as hazardous air pollutants subject to the NESHAP regime. In light of the December 2010 settlement, it seems unlikely that the EPA will attempt to fit the square peg of greenhouse gases into the Act's round holes through any other means than "performance standards" under Section 111.[39]

In 2012, as required by the settlement agreement, the EPA proposed standards for new plants under Section 111(b) of the Act.[40] The EPA has not yet proposed standards for *existing* plants, but given President Obama's insistence, is widely anticipated to do so in the near future. In doing so, the Agency will likely assert that it has authority under Section 111(d) of the Act. Part II of this paper explains why this assertion is incorrect.

II. Section 111(d) Does Not Authorize Performance Standards for Existing Power Plants

While the EPA asserted in a 2008 Advance Notice of Proposed Rulemaking that cap-and-trade is a permissible form of 111(d) regulation,[41] it will likely rely on its December 2010 settlement as the impetus for any new rules in this regard. Reliance upon the settlement, from the EPA's perspective, affords it the path of least resistance—the EPA will argue that it is

to make policy in private sessions between government officials and (as is often the case) activist groups' attorneys, it is the public interest that often suffers" because it "may not have a seat at the table as the agency reorganizes its agenda by committing to take particular regulatory actions at particular times"). For "sue and settle" tactics generally, see "EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs," U.S. Chamber of Commerce (July 3, 2012).

34 Nathan Richardson, EPA Greenhouse Gas Performance Standards: What the Settlement Agreement Means, Issue Brief 11-02, Feb. 2011, *available at* www.rff.org/RFF/Documents/RFF-IB-11-02.pdf.

35 *Cf. supra* note 12.

36 42 U.S.C. § 7411(a)(1).

37 *Id.* § 7411(d)(1)(a).

38 The EPA has defined greenhouse gases, for purposes of its regulatory activities, as carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, at 31,519 (June 3, 2010).

39 See Richardson, *supra* note 34, at 9 (footnote omitted):

> The agency is unlikely to pursue existing-source GHG regulation under other CAA programs. Issuing a GHG NAAQS is no longer a plausible option, if it ever was. A NAAQS would supersede GHG ESPS. The agency would not spend scarce administrative resources devising an ESPS regulatory program only to junk it in favor of something else. § 115 regulation is similarly unlikely, though it is not mutually exclusive with ESPS. The settlement agreement also reflects a consensus among the agency, many states, and key environmental groups on using the § 111performance standards pathway for GHGs.

Id. at 9.

40 Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22,392 (Apr. 13, 2012).

41 *See supra* note 6.

legally bound to carry out its settlement bargain, lest a court order force it to do so, and is thus immune from "political" concerns over cap-and-trade. Yet this would leave important statutory and separation of powers questions unaddressed.

The EPA's 2010 settlement committed the Agency to rulemaking on a matter that the Congress has repeatedly (and explicitly) failed to address: regulating greenhouse gas emissions from existing stationary energy sources. The EPA cannot bargain with authority it never possessed. It cannot commit itself to doing something it has no power to do. In short, the EPA will use the color of one branch's authority (the judiciary) to sidestep lacking authority from another branch (the legislature) in an effort to inflate the power of its own branch (the executive). As this transgression of separated powers is rather obvious, the EPA will claim instead that Section 111(d) *already* allows the Agency to craft performance standards for existing stationary sources.

But a close analysis of the text of Section 111(d) suggests the EPA misreads its authority. In the 1990 Amendments, Congress expressly barred the EPA from setting Section 111(d) standards for source categories—like power plants—that are regulated under the Act's Section 112 air toxics program.

A. The History of Section 111(d)

The history of Section 111(d) is critical to understanding how and why Congress barred the EPA from duplicative regulation of sources under Sections 111(d) and 112. As originally enacted in 1970, subsection (d)(1) read as follows:

> The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110[42] under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued *or which is not included on a list published under section 108(a) or 112(b)(1)(A)* but (ii) to which a standard of performance under subsection (b) would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.[43]

Accordingly, under the version of this subsection enacted in 1970, the EPA is precluded from using the 111(d) program to set standards for pollutants already regulated under either section 108 (the "criteria pollutants" of the NAAQS regime) or section 112 (the list of "hazardous air pollutants" or HAPs).

In 1990, Congress amended Section 111(d) as part of the Clean Air Act Amendments of 1990. As presented in the current version of the United States Code, 42 U.S.C. § 7411(d)(1) provides that:

> The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance[44] for any *existing source* for any air pollutant (i) for which air criteria have not been issued or which is not included on a list published under section 7408(a) of this title *or emitted from a source category which is regulated under section 7412 of this title*[.]

(Emphases added.) The substitution of "or 112(b)(1)(A)" with "or emitted from a source category which is regulated under section 7412 of this title" originated in the House of Representatives' version of the Amendments. Importantly, it alters the focus of the limitations on the EPA's authority to regulate existing sources of air pollutants under Section 111. From its creation in 1970 until its amendment in 1990, this portion of the Act spoke only in terms of *pollutants* whose emission from existing sources fell outside the scope of Section 111(d)—i.e., those pollutants already subject to regulation under Sections 108 and 112 (the NAAQS and NESHAP regimes). The current text of

42 As codified at 42 U.S.C. § 7410, this section provides a two-stage process: (1) The EPA promulgates national standards; (2) states then submit implementation plans for EPA approval. This assignment of primary responsibility for implementation to the states is in keeping with Congress's finding that "air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3).

43 Pub. L. 91-604 § 4(a); 84 Stat. 1684 (emphasis added).

44 In 1977, Section 111(d)(1) was amended to replace "emission standards" (the 1970 language) with "standards of performance." Pub. L. 95-95 § 109(b)(1); 91 Stat. 699.

the Code keeps the focus on pollutants already regulated under Section 108, but for the first time expands the "carve-out" from 111(d) regulatory authority to include *sources*—i.e., those sources regulated under Section 112. On its face, therefore, Section 111(d) as reflected in the current Code does not provide the EPA with authority to establish performance standards for greenhouse gas emissions from existing power plants, since that source category *is* "regulated under section 7412" of Title 42.[45]

In addition to the amendments to Section 111(d) that are set forth in the U.S. Code, Congress also included a separate conforming amendment striking the term "112(b)(1)(A)" and inserting "112(b)." This provision, which originated in the Senate, maintained Section 111(d)'s preexisting limitation on duplicative regulation of pollutants that are regulated under the Section 112 air toxics program by striking 111(d)(1)'s reference to the former Section 112(b)(1)(A) and replacing it with a reference to that section's current equivalent.

The bill as signed by President George H.W. Bush contained both amendments, each surrounded by brackets, with this footnote: "The amendments . . . appear to be duplicative; both, in different language, change the reference to section 112."[46] The codifier's notes to the executed law state that the Senate amendment "could not be executed," which is why the Code presents only the House version.[47] Neither of these views of the amendments is correct.

B. The 1990 Amendments Plainly Preclude Regulating Power Plants Under 111(d)

A fundamental principle of statutory interpretation is that courts should, to the extent possible, give effect to a law in its entirety.[48] Chief Justice John Marshall made the point well: "It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation."[49] Supplementing this principle is another: Statutes should be construed according to the plain meaning of their text where that meaning is unambiguous.[50] When Section 111(d) is examined, it is clear that its language precludes the regulation of existing stationary sources (such as power plants) for greenhouse gas emissions.

Prior to 1990, the relevant portion of Section 111(d) read: "The Administrator shall prescribe regulations which shall establish a procedure . . . under which each state shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant . . . which is not included on a list published under section 7408(a) *or 112(b)(1)(A)* of this title[.]" (Emphasis added.) The House amendment struck the italicized portion (including the "or") and replaced it with "or emitted from a source category which is regulated under section 112." The Senate amendment also struck the reference to 112(b)(1)(A)—but did not strike the "or"—and replaced it with a reference to 112(b).

As such, the correct plain language of Section 111(d) from the Statutes at Large is that the EPA is prohibited from regulating

> any air pollutant . . . which is not included on a list published under section 7408(a) or *112(b)* [Senate amendment] *or emitted from a source category which is regulated under section 112* [House amendment] of this title[.]

45 40 C.F.R. Part 63 Subpart UUUUU; 77 Fed. Reg. at 9,464.

46 1 Legislative History of the Clean Air Act Amendments of 1990 ("Legislative History"), at 46.

47 *See* 70 Fed. Reg. at 16,030.

48 *See, e.g.*, United States v. Menasche, 348 U.S. 528, 538-39 (1955) ("The cardinal principal of statutory interpretation is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute[.]" (internal quotation marks omitted)).

49 Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819).

50 *See, e.g.*, United States v. Braxtonbrown-Smith, 278 F.3d 1348, 1352 (D.C. Cir. 2002) ("In construing a statute, the court begins with the plain language of the statute. Where the language is clear, that is the end of the judicial inquiry in all but the most extraordinary circumstances." (citation omitted) (internal quotation marks omitted)); Tyler v. Douglas, 280 F.3d 116, 122 (2d Cir. 2001) ("In determining the proper interpretation of a statute, [a] court will look first to the plain language of a statute and interpret it by its ordinary, common meaning. If the statutory terms are unambiguous, . . . review generally ends and the statute is construed according to the plain meaning of its words." (internal quotation marks omitted)).

(Emphases added.) This reading, which fully enacts both amendments, is the correct and valid law. Although it is not reflected in the current text of the United States Code, the Code is only prima facie evidence of the law. Where the Code and the Statutes at Large conflict, the latter must prevail.[51] Here, the text of the Statutes at Large contains both amendments.[52] Moreover, this text of the amendments is the only one that is consistent with Congress's intent in enacting both provisions.[53]

This reading evinces that the two amendments to Section 111(d) place *different* limitations on the scope of EPA's authority; these limitations are motivated by different purposes, address different aspects of EPA's regulatory authority elsewhere in the Act, and are entirely capable of co-existing. As such, statutory construction compels they be read compatibly.[54]

In enacting the House amendment, Congress added a limitation on the reach of 111(d): where a *category of sources* is being regulated under Section 112, Section 111(d) cannot be used to impose additional performance standards on that source category. The purpose of the House amendment is clear. In the 1990 Amendments, Congress changed the broader way that Section 112 operated, switching from a risk-based model to a technology-based one.[55] Under the new approach, pollutant standards under Section 112 must reflect the "maximum achievable control technology," or MACT. Aware that this change would significantly increase compliance burdens, the House intended with its amendment to ensure that existing source categories regulated under Section 112 would not face the prospect of additional costly regulation under Section 111.[56]

Congress' objective in precluding source category regulation is all the more obvious in light of the recent promulgation of new source performance standards for greenhouse gases. The EPA's recently-enacted Utility MACT Rule imposes *$11 billion* in annual compliance costs, the vast majority of which are born by existing power plants.[57] Preventing the EPA from "double-dipping" and imposing billions more in compliance costs on this source category through Section 111(d) is a feature of the 1990 Amendments, not a bug.

In contrast, in enacting the Senate amendment, Congress intended to maintain the pre-1990 prohibition on using Section 111(d) to regulate emissions from existing sources of those *substances* regulated as hazardous pollutants under Section 112. Failing to retain the existing limit on EPA authority to regulate hazardous air pollutants under Section 112 would allow the Agency to undo Congress' considered decision to regulate only certain sources of hazardous air pollutants—the 1990 Amendments require the EPA to regulate all major sources of hazardous air pollutants, but only 90 percent of emissions of area sources.[58]

Thus, in accordance with this reading of Section 111(d), the EPA lacks authority to establish standards of performance for existing sources of air pollutants which

51 Stephan v. United States, 319 U.S. 423, 426 (1943) (per curiam).

52 104 Stat. 2467 (House Amendment), 2574 (Senate Amendment).

53 *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

54 *See* Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 58 (1868) ("[O]ne part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together.").

55 "Prior to 1990, the Clean Air Act required the EPA to set standards for each toxic air pollutant individually, based on its particular health risks. This approach proved difficult and minimally effective at reducing emissions. As a result, when amending the Clean Air Act in 1990, Congress directed the EPA to use a 'technology-based' and performance-based approach to significantly reduce emissions of air toxics from major sources of air pollution, followed by a risk-based approach to address any remaining, or residual, risks." EPA, *Taking Toxics out of the Air* (Aug. 2000), *available at* http://www.epa.gov/oar/oaqps/takingtoxics/p1.html.

56 As further evidence that the House amendments had a deregulatory emphasis and were designed to ease the burden on regulated industries, note that the House amendment to 111(d) took place in the context of the House's replacement of the Senate's draft amendment to Section 112 with regard to power plant regulation. *See* 70 Fed. Reg. at 16,030 (EPA discussion of legislative history of 1990 amendments to Section 112).

57 *See* 77 Fed. Reg. 9,304 (Feb. 16, 2012) (final rule).

58 Pub. L. 101-549 § 301; 104 Stat. 2537; codified at 42 U.S.C. § 7412(c)(3).

are included on a list published under Sections 108(a) or 112(b) (a substance-focused limitation on authority) or which are emitted from source categories regulated under Section 112 (a source-focused limitation). Since power plants are regulated under Section 112,[59] therefore, Section 111(d) does not provide the EPA with authority to establish standards of performance for greenhouse emissions therefrom.

C. Even If Congress's Intent Is Unclear, the Statute as Amended Can Be Read To Give Full Effect to Both Amendments to Section 111(d)

Congress acted with intelligible and distinct intent in 1990 in enacting both the Senate and House amendments to Section 111(d). Yet even if the intent is unclear, courts are compelled by accepted rules of statutory construction to "harmonize" textual provisions "and give meaningful effect to all of the provisions" therein.[60] Here, again, the EPA's interpretation fails in properly applying the harmonization canon.

The EPA will use its 2005 "harmonization" of Section 111(d)'s House and Senate amendments to combine the provisions into an unrecognizable regulation. In 2005, the EPA attempted to delist power plants from the list of sources of hazardous air pollutants subject to regulation under Section 112. Simultaneously, it sought to establish a cap-and-trade program for power plants' mercury emissions under Section 111(d). The EPA based that program on the following interpretation of Section 111(d):

> Where a source category is being regulated under section 112, a section 111(d) standard of performance cannot be established to address any HAP listed under section 112(b) that may be emitted from that particular source category.[61]

That construction suited EPA's purposes in the delisting decision: The delisting decision was a precursor to the Agency's Clean Air Mercury Rule (referenced supra as a precedent for cap-and-trade under Section 111(d)), and because mercury compounds are listed under Section 112(b), EPA's interpretation allowed it to establish Section 111(d) standards of performance for their emission from power plants after the delisting decision. In this way, the EPA did what the harmonization canon works to avoid: only giving "*some* effect to both provisions" rather than giving "*meaningful* effect to all of the provisions."[62] The result is the creation of an unidentifiable, alternative provision from what Congress passed.

The D.C. Circuit vacated the EPA's mercury cap-and-trade program because it held that the EPA's delisting decision proceeded under the incorrect statutory authority.[63] The court did not, however, rule on the EPA's construction of Section 111(d). Now, to carry out its settlement agreement, the EPA will look to use this reformulation of Section 111(d) to put stationary, existing energy sources like power plants regulated under Section 112 in its sights for greenhouse gas regulation.

A proper application of the harmonization canon is the same as in the plain-meaning interpretation of the Clean Air Act: both the Senate and the House amendments limit the reach of Section 111(d). As explained supra, Congress' two amendments to Section 111(d) accomplish separate goals: The amendment originating in the House of Representatives is a deregulatory provision that precludes industries from being hit by the double-punch of Section 112 and Section 111(d); the amendment originating in the Senate preserves Section 112 as the exclusive mechanism for regulating hazardous air pollutants under the Act. These provisions do not conflict in any way. Rather, they complement each other.

In contrast, the EPA weakens both of Congress's Section 111(d) amendments in its construction from the delisting decision. The amendment originating in the House, which Congress intended as a deregulatory provision for industries that were subject to Section 112 regulation, is given no effect at all—under the previous version of Section 111(d) and the Senate Bill, regulation

59 *See* 42 U.S.C. § 7412(n)(1); *see also supra* note 45.

60 New Process Steel, L.P. v. Nat'l Labor Relations Bd., 130 S. Ct. 2635, 2640 (2010).

61 70 Fed. Reg. at 16,031.

62 *New Process Steel*, 130 S. Ct. at 2640 (emphasis added); Cook Inlet Native Ass'n v. Bowen, 810 F.2d 1471, 1474 (9th Cir. 1987) ("The words of a statute should be harmonized internally and with each other *to the extent possible*." (emphasis added)).

63 New Jersey v. EPA, 517 F.3d 574, 579-81, 583 (D.C. Cir. 2008).

of hazardous air pollutants was already precluded for all source categories. Also, the amendment originating in the Senate, which was intended to maintain Section 112 as the exclusive program for hazardous air pollutant regulation from stationary sources, is given diluted effect through a source category limitation imported from the House's amendment.

In other words, the EPA offered a construction that neither retains those limitations (as would the Senate amendment standing alone), nor alters them (as would the House amendment alone), but rather *shrinks* them. This construction is not permissible under either classic statutory construction canons or the administrative law analysis of delegated agency authority.

Under step one of a *Chevron* analysis, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[64] Thus, as long as the intent of the amendments taken individually is clear, and as long as they are capable of simultaneous implementation, "that is the end of the matter." As described supra, and as the EPA recognized in its delisting decision,[65] neither amendment read independently evinces intent to weaken the existing limitations on 111(d). No permissible attempt to harmonize the two can achieve that result.

Finally, even if, under the first step of a *Chevron* analysis, the intent of Congress is not clear, a court will not simply accept an agency's interpretation of its governing statute without further inquiry. Instead, in the second step of *Chevron* analysis, a court must consider "whether the agency's [interpretation] is based on a *permissible* construction of the statute."[66] The interpretation of the two amendments offered by the EPA in 2005 is not permissible, since it weakens the pre-1990 limitations on Section 111(d) and, in so doing, gives meaningful effect to neither amendment.

The EPA's likely response to this analysis would be to emphasize the Agency's entitlement to deference in defining the scope of vague and ambiguous statutes. Here, the EPA could follow the arguments of some commentators that look at the history of Section 111(d) and conclude that the section's language is meant to provide a "gap filler" for incremental cap-and-trade implementation within the CAA amendments.[67]

It is true that "even without express authority to fill a specific statutory gap, circumstances pointing to implicit congressional delegation" may require courts to defer to agencies' interpretations of their governing statutes.[68] But here, there is neither express nor implicit delegation of "gap-filling" authority. The admittedly unusual drafting history here calls not for discretionary administrative decision-making, but rather the traditional exercise of core judicial functions of statutory construction. Failing to exercise *de novo* review over the EPA's interpretation of the statute would be to claim without proof that Congress desired the Agency to resolve what it never could through the transparency of democracy: whether the federal government should enact a cap-and-trade regulatory regime. Yet, as the Supreme Court has confirmed, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[69] In short, two decades of failed Congressional attempts at cap-and-trade do not make it magically manifest in Section 111(d).

D. Alternatively, the House Amendment Can Be Read as Implicitly Repealing the Senate Amendment

There is a third and final possible reading of the statute if the EPA or a court were convinced that Congress did not intend to enact both amendments to Section 111(d) and that the amendments cannot be harmonized: that the amendment originating in the House of Representatives implicitly repeals the Senate amendment. In that case, the plain meaning of Section 111(d), as amended to preclude existing source performance standards for industries regulated

64 *Chevron*, 467 U.S. at 842-43.

65 *See* 70 Fed. Reg. at 16,031 (discussing purpose of amendments viewed individually).

66 467 U.S. at 843 (emphasis added).

67 *See, e.g.*, Robert B. McKinstry, Jr., *The Clean Air Act: A Suitable Tool for Addressing the Challenges of Climate Change*, 41 Envtl. L. Rep. 10,301, 10,305-06 (2011).

68 *See* U.S. v. Mead Corp., 533 U.S. 218, 237 (2001).

69 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

under the Clean Air Act's Section 112 air toxics program—reflected by the U.S. Code only containing the House amendment—would preclude the EPA's anticipated greenhouse gas standards. While this interpretation of the statute and its amendments is not ideal, in that it would not honor the intent of the Senate amendment and would remove an important substance-focused limitation on the Agency's authority under the subsection, it is at least a coherent theory of what Congress intended—and it results in a workable statute. The EPA's response to this argument would likely be that the amendments can be harmonized, but its theory of harmonization must fail for the reasons discussed above. If the amendments are not both honored in full, the House amendment should take precedence over the one that originated in the Senate.

The canon of implied repeal applies where there is "an irreconcilable conflict between the two federal statutes at issue."[70] Although the Supreme Court has suggested that it applies only in the case of "earlier and later statutes [that] are irreconcilable,"[71] there is no case law directly stating that this canon is inapplicable to irreconcilable earlier and later amendments to a single bill.

In this regard, if Congress did not intend both amendments to Section 111(d) in the 1990 Amendments to be enacted, it would have intended the House of Representatives' amendment to control. The 1990 Amendments originated in the Senate, which passed S.1630 on April 3, 1990.[72] This version of S.1630 contained the revised text of Section 112, which removed the old Section 112(b)(1)(A) and replaced it with a new Section 112(b)(1) containing a list of hazardous air pollutants, as explained above.[73] It also contained the conforming amendment to Section 111(d),[74] which—under this interpretation—did nothing more than alter the reference to Section 112 found in Section 111(d) to reflect the new organization of Section 112.

The House, in turn, amended and passed S.1630 on May 23, 1990.[75] The version passed by the house added the House amendment,[76] which removed the (now-obsolete) reference to "112(b)(1)(A)" found in Section 111(d) and replaced it with the phrase "or emitted from a source category which is regulated under Section 112." In so doing, the House amendment effected a substantive change in the limitations imposed on Section 111(d), where the Senate amendment merely altered a reference to conform to changes made elsewhere in the Act. But the House neglected to strike the Senate's "conforming amendment," and the bill was reconciled at conference with the now-obsolete Senate amendment left intact.[77] As between a technical and conforming amendment in a prior version of the legislation, and a substantive amendment designed to alter the scope of Section 111(d), the substantive amendment should be the one that is given full force and effect if the two amendments are irreconcilable.

As such, whether the different amendments to Section 111(d) in the Clean Air Act Amendments of 1990 are complementary, harmonized, or conflict, the common theme is that the EPA cannot promulgate existing source performance standards for source categories that are regulated under Section 112, such as power plants.

III. Conclusion

While the courts will grant the EPA broad deference to determine a permissible reading of Section 111(d), the Agency cannot adopt an interpretation repelled by the statute's text.[78] Here, the controlling Statutes-At-Large text of Section 111(d) precludes the EPA's contorted attempt to reformulate the listing of stationary energy sources so as to include them in a

70 Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 381 (1996) (internal quotation marks omitted).

71 J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 141-42 (internal quotation marks omitted).

72 *See* 3 Legislative History at 4119.

73 *Id.* at 4410.

74 *Id.* at 4534.

75 *See* 2 Legislative History at 1809.

76 *Id.* at 1979.

77 *Compare* 1 Legislative History at 1523 (portion of conference report containing House amendment) *with id.* at 1633 (portion containing Senate amendment).

78 *See, e.g.*, Anderson Bros. Ford v. Valencia, 452 U.S. 205, 219 (1981) (noting that "obvious repugnance to the statute" in question will void an agency's interpretation).

cap-and-trade scheme Congress never authorized. The EPA thus cannot rely on its December 2010 settlement agreement to expand the breadth of its own power, and a court cannot be used to enforce authority that the Agency never had to bargain in the first instance. President Obama may ultimately be right to think that "America cannot resist this transition" to a highly regulated energy sector in the name of "greener" energy. Nevertheless, the Administration will need the authority of Congress to set that transition in motion.

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