

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA



E. SCOTT PRUITT
ATTORNEY GENERAL

OFFICE OF ATTORNEY GENERAL
STATE OF WEST VIRGINIA



PATRICK MORRISEY
ATTORNEY GENERAL

OFFICE OF ATTORNEY GENERAL
STATE OF NEBRASKA



JON BRUNING
ATTORNEY GENERAL

Comment from the Attorneys General of the States of Oklahoma, West Virginia, Nebraska, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota, Utah and Wyoming on Proposed EPA Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units¹

**Docket ID No. EPA–HQ–OAR–2013–0602
submitted at regulations.gov
and via email to: A-and-R-Docket@epa.gov**

On June 18, 2014, EPA proposed emission guidelines for carbon dioxide emissions from existing fossil fuel-fired power plants, invoking its authority under Section 111(d) of the Clean Air Act (“CAA”), 42 U.S.C. § 7411(d). *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014) (hereinafter “Proposal”). EPA’s proposal attempts to use the Clean Air Act to override states’ energy policies and impose a national energy and resource-planning policy that picks winners and losers based solely on EPA’s policy choices, forcing states to favor renewable energy sources and demand-reduction measures over fossil fuel-fired electric production. But the Clean Air Act generally and Section 111(d) specifically do not give EPA that breathtakingly broad authority to reorganize states’ economies. “Congress . . . does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001). Congress did not hide the authority to impose a national energy policy in the “mousehole” of this obscure, little-used provision of the Clean Air Act, which EPA has only invoked five times in 40 years.

The proposed rule has numerous legal defects, each of which provides an independent basis to invalidate the rule in its entirety.

¹ : The States of Georgia, Indiana, Montana, North Dakota, Ohio and Utah, among others, also intend to file additional separate comments that address the proposed rule.

First, the proposed rule is unlawful because EPA has chosen to regulate coal-fired power plants under Section 112 of the Clean Air Act, 42 U.S.C. § 7412. Section 111(d) specifically prohibits EPA from invoking Section 111(d) where the “source category . . . is regulated under section [112]. . . .” 42 U.S.C. § 7411(d)(1)(A)(i). EPA should abandon its cynical attempt to evade this specific prohibition on its authority found in the Clean Air Act’s plain text.

Second, the proposed rule is unlawful because EPA has not finalized Section 111(b) “new source” regulation of carbon dioxide emission from coal-fired power plants, which is legally necessary before any Section 111(d) regulation of those plants. And given that the *proposed* Section 111(b) new source standards are patently unlawful, no such predicate is likely forthcoming.

Third, the proposed rule impermissibly expands EPA’s authority into the management of states’ energy generation and usage. Rather than limiting itself to EPA’s narrow mandate of air pollution control, the proposed rule forces states to abandon their sovereign rights in favor of a national energy consumption policy.

Fourth, the proposed rule includes inflexible mandates that each state *must* achieve, rather than the guidelines and appropriate procedures for states to use in establishing standards of performance for sources under their jurisdiction that are actually authorized by Section 111(d). This attempt to federalize areas of energy policy improperly proposes to negate states’ authority to determine that EPA’s guidelines are inconsistent with factors such as consideration of costs, physical impossibility, energy needs, and the “remaining useful life of the existing source.”

Fifth, in applying these standards of performance, states are limited to emission standards that can actually be achieved by existing industrial sources through source-level, inside-the-fenceline measures. The proposal’s attempt to force states to regulate energy consumption and generation throughout their jurisdictions, in the guise of reducing emissions from fossil fuel-fired power plants, violates Section 111(d)’s plain-text requirement that the performance standards established for existing sources by the states must be limited to measures that apply at existing power plants themselves.

Sixth and finally, even assuming *arguendo* that EPA has authority to impact energy policy decisions under Section 111(d), the proposed rule’s attempt to federalize control over state energy policy is inconsistent with the Federal Power Act. It is unreasonable for EPA to propose regulation under Section 111(d) that would allow precisely the type of federal control over state decision-making that Congress denied to the federal government in the context of the Federal Power Act.

* * *

Given the multitude of legal deficiencies in its proposal, some of which go to the heart of its authority to regulate fossil-fuel-fired power plants under Clean Air Act Section 111(d), EPA should honor the Act’s core statutory limitations on its authority and formally determine that Section 111(d) standards are not appropriate for fossil fuel-fired power plants. If EPA does finalize Section 111(d) standards for fossil-fuel-fired power plants, it should not perpetuate the unlawful act by attempting to reorganize states’ energy economies, but should instead promulgate emission guidelines based on the best system of emission reduction that is actually

achievable at individual facilities, which states could then consider in establishing performance standards to individual power plants in their jurisdictions.

I. The Clean Air Act Unambiguously Prohibits EPA from Regulating Power Plants Under Section 111(d) Now That EPA Has Chosen To Regulate Those Plants Under Section 112

The Clean Air Act prohibits EPA from regulating any emissions from a “source category” under Section 111(d) where the “source category . . . is regulated under section [112]” 42 U.S.C. § 7411(d)(1)(A)(i).² This prohibition is so clear that even EPA admits that the “literal” meaning of this language is that it “c[an] not regulate *any* air pollutant from a source category regulated under section 112.” EPA, *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* at 26 (hereinafter “Legal Memorandum” or “Mem.”) (emphasis added). Or, as the Supreme Court has explained, “EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under . . . the ‘hazardous air pollutants’ program, [Section 112].” *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011). This unambiguous statutory prohibition is grounded in Congress’s understanding that existing sources—unlike new sources—should not be subject to double regulation, under two different regulatory regimes, in light of special concerns such as reliance and sunk costs.

In 2000, EPA took the discretionary step of classifying power plants as part of a “source category” under Section 112. 65 Fed. Reg. 79,825, 79,830 (Dec. 20, 2000). Then, in 2012, EPA imposed one of the most expensive regulations in the agency’s history on these power plants under Section 112. 77 Fed. Reg. 9,304 (Feb. 16, 2012). This regulation, which is commonly known as the Mercury and Air Toxics Standard or the Utility MACT Rule, imposed \$9.6 billion in annual costs on the electric generating industry and nearly \$11 billion in total annual social costs, and will cause the retirement of more than 34 gigawatts of fossil fuel-fired electric generating capacity. *See id.* at 9,413, 9,425; Institute for Energy Research, *Impact of EPA’s Regulatory Assault on Power Plants* (June 12, 2012). Given that existing coal-fired power plants are now extensively regulated under Section 112, what EPA has admitted are the “literal” terms of the Clean Air Act prohibit EPA’s present effort to impose yet more onerous regulations on these same plants under Section 111(d). Mem. at 26.

Indeed, one recent study projects that the Proposal will result in from 46 to 169 additional gigawatts retired unless EPA makes significant corrections. *See* NERA Economic Consulting, on behalf of American Coalition for Clean Coal Electricity et al., *Potential Energy Impacts of the EPA Proposed Clean Power Plan* (October 2014). Specifically, the study projects coal-unit retirements of between 97 and 220 gigawatts, as compared to 51 gigawatts under a baseline

² Several of the commenting states have filed suit to invalidate EPA’s proposal on these grounds.

scenario. *Id.* at 15, Fig. 4. Retirements on this scale are likely to seriously threaten the reliability of our nation’s electric supply. State regulators and industry stakeholders have warned that the proposal will force them to choose between meeting its requirements at the risk of potentially violating FERC reliability mandates, or complying with those mandates at the risk of failure to comply with the proposal. Southwest Power Pool predicts the proposal will increase retirements in its area by 200%, risking “rolling blackouts or cascading outages” with significant economic, health, and safety impacts.³ And the Electric Reliability Council of Texas warns that the proposal “will have a significant impact on the planning and operation of” its grid, forcing the retirement of between 3.3 and 8.7 gigawatts in its region alone—in short, the proposal threatens “a harmful impact on reliability.”⁴ North Dakota officials have expressed concern that FERC may reject on reliability grounds the states’ 111(d) plans, and may even impose significant penalties for any blackouts and similar failures that might result from states’ efforts to meet EPA’s requirements.⁵

FERC Commissioner Moeller has warned that the proposed shift from least-cost to least-emission dispatch priorities “has the potential to completely undermine the market principles that underpin dispatch of the system.”⁶ And the North American Electric Reliability Corporation (“NERC”), the international body specifically tasked by Congress with monitoring reliability, has recently determined that “Essential Reliability Services may be strained by the proposed” rule, and that the rule’s requirements “represent a significant reliability challenge.”⁷ Specifically, NERC observes that, among other factors, “[p]ipeline constraints and growing gas and electric interdependency challenges” and the need for “more transmission and new operating procedures” will limit states’ and utilities’ ability to comply with the proposal while preserving reliability.⁸ And the retirements of coal-fired units due to the proposal will “lessen[] the industry’s diversification of fuel sources.”⁹ Cumulatively, these issues mean the proposal will impair the reliability of the grid, especially under extreme weather conditions such as last winter’s “polar vortex.”¹⁰

³ Southwest Power Pool, Comments on 111(d) Proposal, at 6 (Oct. 9, 2014).

⁴ ERCOT Analysis of the Impacts of the Clean Power Plan, at 1, 10 (Nov. 17, 2014). *See also id.* at 18 (“The proposed CO₂ emissions limitations will result in significant retirement of coal generation capacity, could result in transmission reliability issues due to the loss of fossil fuel-fired generation resources in and around major urban centers, and will strain ERCOT’s ability to integrate new intermittent renewable generation resources.”).

⁵ InsideEPA, “States Face ESPS Dilemma Over Whether To Comply With EPA Or FERC,” Oct. 8, 2014.

⁶ Response of FERC Commissioner Moeller to Additional Questions For the Record from the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Energy and Power, at 5 (Aug. 26, 2014).

⁷ NERC, Potential Reliability Impacts of EPA’s Proposed Clean Power Plan, at 1, 2 (Nov. 2014).

⁸ *Id.* at 2.

⁹ *Id.* at 9; *see also id.* at 19 & Fig. 7 (discussing impact of proposal on retirements).

¹⁰ *See id.*

These retirements are likely to impose significant costs on ordinary citizens throughout the country. The NERA study projects an increase in total consumer energy costs of between \$366 billion and \$479 billion over the period 2017-2031. *Potential Energy Impacts* at 21, Fig. 11. (The cost of natural gas for non-electricity energy services is specifically predicted to increase by between \$15 billion and \$144 billion.) This includes an increase of between 13 and 15 percent in electricity prices for residential customers. *Id.* at 25, Fig. 16. These increases will not be evenly distributed. Although prices are projected to rise in all states, the impact will be heaviest in the West, with Texas projected to suffer as much as a 54% increase in prices across all sectors. *Id.* at 25-26, Figs. 16 & 17.

EPA's only legal justification for departing from the Clean Air Act's "literal" text is based upon what EPA has admitted was "a drafting error," *see* 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005), which was properly excluded from the U.S. Code. Specifically, EPA claims that a single clerical entry in the 1990 Amendments to the Clean Air Act somehow renders the plain text of the Act ambiguous and thus permits EPA to regulate. Mem. at 25-27. This argument cannot withstand scrutiny. The clerical entry upon which EPA bases its entire rule was a non-substantive "conforming amendment," which was erroneously included in the 1990 Amendments to update a cross-reference to Section 112, tracking the rearrangement of that section elsewhere in the Amendments. But the 1990 Amendments also fundamentally altered Section 111(d) and, in doing so, made the "conforming amendment" impossible to execute. In this exact situation—which is common in modern, complex legislation—the uniform practice is to give full meaning and effect to the substantive change in the law, and to ignore the non-substantive "conforming amendment" as a scrivener's error.¹¹ That is exactly what occurred here, as the codifier of the U.S. Code excluded the conforming amendment because it "could not be executed." Revisor's Note, 42 U.S.C. § 7411. Unsurprisingly, EPA has not cited a single decision, from any area of law, giving any meaning to a clerical change that was rendered moot by a substantive amendment. *See* Mem. at 26-27. To the contrary, controlling caselaw provides

¹¹ *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, 23 U.S.C. § 104; 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.

that where a mistake in renumbering a statute and correcting a cross-reference conflicts with a substantive change, the mistake should not be considered when construing the substantive provision. *See, e.g., Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013).

And even if one were to accept EPA's assertion that it must give meaning to an impossible-to-execute clerical amendment, Mem. at 26, the proposed rule would still be unlawful. If the conforming amendment is executed separately from the substantive amendment, two different prohibitions on EPA's Section 111(d) authority would arise. Under one prohibition—in text of the Clean Air Act as reflected in the United States Code—EPA would be prohibited from regulating under Section 111(d) any emissions from any source categories actually regulated under Section 112. Under the “other” prohibition—the one embodied by the conforming amendment—Section 111(d) could not be used to regulate pollutants subject to regulation under Section 112, even if EPA has chosen not to regulate the particular source category at issue. (Given that EPA is not required to regulate all sources of Section 112-regulated hazardous air pollutants under Section 112, 42 U.S.C. § 7412(k)(3)(B)(ii), this category would almost certainly leave some sources of hazardous air pollutants unregulated. Indeed, a special provision of Section 112 permits EPA significant leeway not to regulate power plants at all under Section 112. *Id.* § 7412(n)(1)) Thus, if EPA “give[s] effect, if possible, to every word Congress used,” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), it would be prohibited from invoking Section 111(d) *both* to regulate any source categories actually regulated under Section 112 *and* to regulate any pollutants subject to regulation under Section 112. Accordingly, even if EPA's approach of executing the conforming amendment into a separate “version” of Section 111(d) were permissible—which, to be clear, it is not—this would not salvage the proposed rule.

II. The Proposed Section 111(d) Rule Is Illegal Because EPA Has Not Finalized any Lawful Rule for Equivalent New Sources

Section 111(d) authorizes EPA to prescribe regulations under which States shall establish standards of performance for “any existing source for any pollutant . . . *to which a standard of performance under this section would apply if such source were a new source.*” 42 U.S.C. § 7411(d)(1)(A)(ii) (emphasis added). As EPA has acknowledged since 1975, this provision prohibits EPA from invoking Section 111(d) unless and until it has completed and finalized a lawful rule for “new sources of the same type.” 40 Fed. Reg. 53, 340, 53,340 (Nov. 17, 1975); *see also* 39 Fed. Reg. 36,102, 36,102 (Oct. 7, 1974) (proposed rule) (predicates for use of 111(d) include “[a] standard of performance for affected facilities *has been* promulgated under section 111(b) of the Act”) (emphasis added). Put another way, promulgation of lawful new source performance standards is “a necessary predicate for the regulation of existing sources” under Section 111(d). 79 Fed. Reg. 1,430, 1,496 (Jan. 8, 2014). In the present rulemaking, EPA claims that it will satisfy that “necessary predicate” through two proposed rulemakings, once they are finalized: (1) the proposed new source performance standards for new fossil fuel-fired power plants (“New Source Rule”), 79 Fed. Reg. 1,430 (Jan. 8, 2014); and (2) performance standards for modified and reconstructed fossil fuel-fired power plants (“Modified Source Rule”). *See* Proposal, 79 Fed. Reg. 34,852 (June 18, 2014). EPA's arguments are flawed as a matter of law, and as a result the proposed Section 111(d) rule will be entirely unlawful.

First, the New Source Rule—if finalized in anything like its proposed form—will not be a *lawful* predicate for the proposed Section 111(d) rule. The New Source Rule is based upon EPA’s claim that the “best system of emission reduction” for carbon dioxide emission from coal-fired power plants is partial carbon capture and storage (“CCS”). 79 Fed. Reg. at 1,430. But as 16 States explained in their comment letter to EPA, CCS is not the “best system of emission reduction” because CCS has not been shown to be reasonably reliable, efficient, broadly available, or economically feasible in *any* commercial setting. *See* Letter from Sixteen States to Gina McCarthy, Administrator, EPA at 2-8 (May 9, 2014) (docketed at EPA-HQ-OAR-2013-0495-9505) (hereinafter “States’ Comment Letter”). In addition, as the States also explained, the proposed New Source Rule violates the Energy Policy Act of 2005 because EPA’s claim that CCS technologies have been “adequately demonstrated” is based on government-funded projects that would not be economically viable without government funds; the 2005 Act expressly forbids EPA from relying on these projects when setting standards under Section 111. *See* States’ Comment Letter at 8-9. Finally, the New Source Rule is arbitrary and capricious, as the States’ Comment Letter articulated, because EPA’s justifications for the rule are contrary to the agency’s own predictions. Specifically, EPA’s central rationale for promulgating the proposed New Source Rule—that the proposal will protect public health and address climate change—is entirely eliminated by EPA’s own concession that the proposal “will result in negligible CO₂ emission changes, quantified benefits, and costs by 2022.” 79 Fed. Reg. 1,430, 1,433. *See* States’ Comment Letter at 10-11.

Second, EPA’s fallback attempt to argue the Modified Source Rule could provide the “necessary predicate” for its Section 111(d) proposal when the New Source Rule is held unlawful is a transparent and illegal end-run around Section 111’s text and structure. *See* 79 Fed. Reg. at 34,852. Unsurprisingly, EPA can point to no authority or prior examples to support such an approach, because it is plainly unlawful. Under Section 111(d)’s plain text, the predicate rulemaking must lawfully regulate equivalent “new” sources—not simply equivalent modified or reconstructed sources *only*. *See* 42 U.S.C. § 7411(d)(1)(A)(ii). The term “new source” is not ambiguous in this context. Instead, Section 111(a)(2) of the Act defines it as “any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.” 42 U.S.C. § 7411(a)(2). This statutorily mandated sequence reflects Congress’s understanding that, because regulation of existing sources raises special issues of reliance and sunk costs, regulation of those existing sources should only be implemented after regulation of all new sources (including but not limited to modified sources) has been lawfully finalized. Consistent with this plain text, EPA must first promulgate *lawful* standards of performance for new sources (*including* modified sources), and only thereafter may require the states to regulate equivalent existing sources.

As multiple submitted comments on the modified-source proposal demonstrate, the EPA’s position that Section 111’s ostensible silence as to whether a source that undergoes modifications ceases to be an existing source subject to 111(d) standards allows it to subject sources to *both* the 111(b) modified-source and 111(d) existing-source regimes is unlawful. But such arguments from silence are an “untenable” means of proving agency authority. *See infra* Section III; *see also Aid Ass’n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003). Both the structure of Section 111 and its subsections defining “new” and “existing”

sources make perfectly clear that these are mutually exclusive terms: an “existing” source that undergoes modifications becomes a “modified” source, *which is treated as a “new” source for Section 111’s purposes*, and therefore falls under 111(b) alone. Because EPA may not lawfully issue a Section 111(b) modified source rule that covers only modified sources, let alone impose *both* that rule *and* a 111(d) rule on existing sources that undergo modifications, the modified-source rule will not and cannot provide a lawful predicate for the existing-source rule.

III. Section 111(d) Cannot Be Used To Override State Authority To Manage Power Resources

One of a state’s core police powers is the power to promote the health and economic well-being of its citizens, including through the management of its energy and air quality resources. This sovereign power includes the authority to regulate—or not to regulate—the production and local distribution of electricity to its citizens. In states with significant coal resources, where mining operations are important employers and coal-fired energy can be generated inexpensively, states have authority to do so. Similarly, states that choose to exploit renewable energy resources, whether because those resources are affordable or because their citizens are willing to pay a premium for them, are free to follow that path. The Clean Air Act’s role is limited to ensuring that, whatever path each state chooses, new and modified power plants meet state-of-the-art technology standards and pollution from all sources in a state does not interfere with national air quality goals.

In contrast, under the current Section 111(d) proposal, EPA’s binding emission “goals” applicable to each state would require states to shift electric generation from coal- to gas-fired plants, to increase electric generation from sources other than fossil fuel-fired power plants, and to take measures that reduce electricity consumption or increase energy efficiency at the end-use, consumer level. In this way, the proposal combines a renewable energy portfolio with demand-side control measures to create a *de facto* national energy policy, at the expense of state authority and economic freedom. And there is no limiting principle to EPA’s asserted reach under the proposal. Under EPA’s reading of the Act, the agency could require states to mandate that consumers dim their lights on alternate days, limit home builders to constructing only two-story buildings, or shutter public schools during periods of peak energy usage. Because virtually all human activity in the modern age depends on electricity, regulation of any aspect of that activity could be viewed as affecting electricity production, which in turn affects power plants’ carbon dioxide emissions. EPA’s approach converts the obscure, little-used Section 111(d) into a general enabling act, giving EPA power over the entire grid from generation to light switch. This, in turn, would give EPA plenary authority over much of the national economy.

The putative legal rationale for the Section 111(d) proposal is, primarily, based on EPA’s claim that the statutory term “best system of emission reduction,” and in particular its component term “system,” are ambiguous and constitute a significant delegation of authority to regulate electricity production, transmission, distribution, and consumption in an unprecedented and unlimited manner. *See, e.g.,* Proposal, 79 Fed. Reg. at 34,885-86. But Section 111(d)’s narrow terms do not countenance this unlimited assertion of power.

EPA’s Section 111(d) proposal makes a fundamental error that leads to reversal of agency action on a regular basis: an argument that Congress’s failure to expressly withhold

authority to take some action constitutes a license to do so. But as courts must frequently remind agencies, “[a]mbiguity is a creature not of definitional possibilities but of statutory context.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994). “Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.” *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995); *see also Aid Ass’n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003) (vacating USPS rule limiting non-profit organizations’ use of reduced mailing rates where the Service took the position “that the disputed regulations are permissible because the statute does not expressly foreclose the construction advanced by the agency,” which the court determined to be “entirely untenable under well-established case law”) (collecting cases).

Taken in context, Section 111(d) has rightly been understood as a regulatory backwater, as Congress never intended it to be a major Clean Air Act regulatory program.

According to EPA, in the 44 years since Section 111(d) was first promulgated as part of the Clean Air Amendments of 1970, only *five* source categories have been subject to regulation under Section 111(d). Mem. at 9-10. Some of these source categories contained as few as 31 sources nationwide,¹² and many were not present throughout the country (for example, phosphate fertilizer plants were found in only 17 states, and primary aluminum plants in only 16).¹³ And the only previous 111(d) rule to address common, nationwide sources, the 1996 landfill rule—the only 111(d) rulemaking since 1980—bore projected annual costs of about 1.5% of those of the current proposal.¹⁴ By any relevant metric, the scope of EPA’s current Section 111(d) proposal dwarfs these past measures:

	Annualized Costs	Number of Affected Sources
Current Proposal	\$8.8B (\$2011) ¹⁵	1,228 ¹⁶
1977 Phosphate Fertilizer Rule¹⁷	Not specified	53 ¹⁸

¹² See Table *infra*.

¹³ See *Final Guideline Document: Control of Fluoride Emissions from Existing Phosphate Fertilizer Plants*, EPA-450/2-77-005, § 3.1, at 3-5 to 3-15 (Tables 3-3 to 3-6) (Mar. 1977); *Primary Aluminum: Guidelines for Control of Fluoride Emissions from Existing Primary Aluminum Plants*, EPA-450/2-78-049b, § 3.1.1, at 3-3 to 3-5 (Table 3-1).

¹⁴ See Table *infra*.

¹⁵ Proposal, 79 Fed. Reg. at 34,839, 34,840 (Table 2).

¹⁶ EPA, *Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and Emission Standards for Modified and Reconstructed Power Plants*, at 3-47 (June 2014).

¹⁷ 42 Fed. Reg. 12,022 (Mar. 1, 1977) (“control of atmospheric fluoride emissions from existing phosphate fertilizer plants”).

	Annualized Costs	Number of Affected Sources
1977 Sulfuric Acid Plant Rule ¹⁹	Not specified	251 ²⁰
1979 Kraft Pulp Mill NSPS ²¹	\$200M to \$441M ²² (est. \$790M to \$1.74B in \$2011 ²³)	120 ²⁴
1980 Primary Aluminum Plant Rule ²⁵	Not specified	31 ²⁶
1996 Municipal Solid Waste Landfill Rule ²⁷	\$90 million ²⁸ (est. \$132 million in \$2011 ²⁹)	312 ³⁰

...continued from previous page

¹⁸ See *Final Guideline Document: Control of Fluoride Emissions from Existing Phosphate Fertilizer Plants*, EPA-450/2-77-005, § 3.1, at 3-5 to 3-15 (Tables 3-3 to 3-6) (Mar. 1977).

¹⁹ 42 Fed. Reg. 55,796 (Oct. 18, 1977) (“control of sulfuric acid mist emissions from existing sulfuric acid plants”).

²⁰ See *Final Guideline Document: Control of Sulfuric Acid Mist Emissions from Existing Sulfuric Acid Production Units*, EPA-450/2-77-019, § 2.2.1, at 2-2 (Sept. 1977) (“U.S. production capacity in March 1971 was estimated at 38.6 million short tons and was accounted for by 251 plants.”).

²¹ 44 Fed. Reg. 29,828 (May 22, 1979) (“control of total reduced sulfur (TRS) emissions from existing kraft pulp mills”).

²² See *Kraft Pulping: Control of TRS Emissions from Existing Mills*, EPA-450/2-78-003b, § 8.5, at 8-34 (Table 8-14) (Mar. 1979).

²³ These cost estimates were expressed in \$1976. Calculation obtained at <http://www.dollartimes.com/calculators/inflation.htm>.

²⁴ See *Kraft Pulping: Control of TRS Emissions from Existing Mills*, EPA-450/2-78-003b, § 3.1, at 3-1 (Mar. 1979) (“As of December 1975, there were 56 firms operating about 120 kraft pulping mills in 28 states.”).

²⁵ 45 Fed. Reg. 26,294 (Apr. 17, 1980) (“control [of] fluoride emissions from existing primary aluminum plants”).

²⁶ See *Primary Aluminum: Guidelines for Control of Fluoride Emissions from Existing Primary Aluminum Plants*, EPA-450/2-78-049b, § 3.1.1, at 3-1 (Dec. 1979) (“Primary capacity in the U.S. at the end of 1977 was estimated at 5.19 million short tons and was accounted for by 31 plants.”) (footnotes omitted).

²⁷ 61 Fed. Reg. 9,905 (Mar. 12, 1996) (“The emissions of concern are non-methane organic compounds (NMOC) and methane.”).

²⁸ “The nationwide cost of the EG [emission guidelines, *i.e.*, the existing-source rule under Section 111(d)] would be approximately \$90 million.” 61 Fed. Reg. at 9,916.

The current Section 111(d) proposal would transform this regulatory backwater into the single most intrusive and prominent aspect of the Clean Air Act, by requiring that states formulate plans that change how electricity is generated, supersede traditional state public service commission authority, and affect how consumers use electricity. There is a long history of federal courts invalidating similar attempts by administrative agencies to unmoor limited grants of legislative authority like Section 111(d) from their organic statutes by transforming them into broad mandates that aggrandize agencies' power at the expense of the states and the regulated community. For example, in *Electric Power Supply Association v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), the D.C. Circuit rejected the Federal Energy Regulatory Commission's recent attempt to regulate retail energy demand in the guise of regulating wholesale electric markets, because that regulation would impair states' exclusive right to regulate retail electric markets and lacked any meaningful "limiting principle." *Id.* at 221. The lack of a limiting principle was key, because if this justification for FERC's exercise of its authority prevailed, it could authorize virtually any intrusion on state retail electric market regulatory authority, allowing FERC to arrogate broad authority that Congress did not confer. Notably, the connection between FERC's area of authority (wholesale electricity market) and the challenged regulation (retail energy demand) was considerably more direct than here, and yet the regulation was held to exceed the Commission's statutory authority nonetheless.

Similarly, in *California Independent System Operator Corp. v. FERC* ("CAISO"), 372 F.3d 395, 399 (D.C. Cir. 2004), the D.C. Circuit rejected FERC's attempt to replace the California Independent System Operator Corporation's governing board under its authority to regulate "practice[s]" affecting "rates and charges" in the wholesale electric markets. The court held that the issue is not whether "the word 'practice' is, in some abstract sense, ambiguous, but rather whether, read in context and using the traditional tools of statutory construction, the term 'practice' can encompass the procedures used to select CAISO's board." *Id.* at 400. The court concluded that FERC's construction of "'practice' in this context is . . . a sufficiently poor fit with the apparent meaning of the statute that the statute is not ambiguous on the very question before us." *Id.* at 401 (citing *Brown*, 513 U.S. at 120). In that case, too, the court found the lack of a limiting principle on FERC's assertion of authority critical because of the "staggering" and "drastic implications of [FERC's] overreaching," noting that the agency's reasoning would "apply to its regulation of all other jurisdictional utilities," allowing it "tomorrow without any

...continued from previous page

²⁹The 1996 Landfill Rule did not specify which year's dollars were used in the cost estimate. Assuming \$1995, that translates to \$131 million in \$2011 (calculation obtained at <http://www.dollartimes.com/calculators/inflation.htm>).

³⁰"The EG will require control of approximately 312 existing landfills." 61 Fed. Reg. at 9,914.

further precedent or any further claim of expanded power” to, for instance, remove and replace Duke’s or Dynegy’s boards of directors.³¹

This line of authority unquestionably forbids EPA’s attempts to interpret the Clean Air Act so as to aggrandize its authority to regulate greenhouse gases in a manner untethered to the historic understanding of the Act. In *Utility Air Regulatory Group v. EPA* (“*UARG*”), 134 S. Ct. 2427 (2014), the Court considered EPA’s interpretation of its permitting authority under the Act’s prevention of significant deterioration preconstruction permitting program. EPA interpreted these provisions to include greenhouse gases among those pollutants that trigger an emitting source’s obligation to obtain certain preconstruction and operating permits, thereby massively expanding the permitting provisions’ potential reach beyond anything of which Congress could have conceived at the time it passed the Act. The Court held EPA’s interpretation unreasonable in part “because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.” *Id.* at 2444. “When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.” *Id.* (internal quotation marks and citation omitted). *See also Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (“In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, . . . judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.”) (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)); *Aid Ass’n for Lutherans*, 321 F.3d at 1175 (“Given the extremity of the effect that results from the Postal Service’s interpretation, we would expect to see some indication that Congress intended such an effect, but we find no[ne] in the statute . . .”).

Section 111(d) was never intended to authorize EPA to establish a *de facto* national energy policy. To interpret Section 111(d) in that manner would expand and transform EPA’s regulatory authority in ways that Congress never intended. Indeed, the transformation here is even more extreme than the one that the Supreme Court recently rejected in *UARG*. There, EPA “merely” proposed to rewrite a pre-existing permitting regime to include greenhouse gases, largely (but not solely) in situations where industrial sources would already have to obtain preconstruction or operating permits. But in the case of Section 111(d), the agency proposes to create a new regulatory program from whole cloth that applies without limitation to all fossil fuel-fired power plants and any other source “roped in” by a state or EPA in a manner that constitutes centralized energy and economic reorganization. To say the least, “skepticism” is all the more appropriate in the face of such a sweeping proposal, *UARG*, 134 S. Ct. at 2444. Whatever gaps or ambiguities EPA purports to discover and interpret in the Clean Air Act, the

³¹ Another important consideration in the *CAISO* case was the conflict that this action would cause with other federal statutes, yet another unlawful characteristic of the Section 111(d) proposal that is discussed in detail below. 372 F.3d at 404; *see infra* Section VI.

agency cannot bootstrap them into providing it “an unheralded power to regulate” the states’ energy sectors, *id.*

To make the situation worse for EPA, the sweeping assertion of authority in its Section 111(d) proposal not only violates the Clean Air Act’s text and structure, but also infringes on a traditional area of state authority. As a result, the Section 111(d) proposal implicates black-letter precedent requiring Congress to provide an extremely clear statement of its intent to authorize such an intrusion on the state’s traditional police powers.

Most recently, in *Bond v. United States*, 134 S. Ct. 2077 (2014), the Supreme Court overturned the conviction of a Pennsylvania woman under the implementing legislation for the Chemical Weapons Convention. “Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach.” *Id.* at 2083. This reasoning is not limited to the criminal context, but derives from the broader principle that “it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides’ the ‘usual constitutional balance of federal and state powers.’” *Id.* at 2089 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). In other words, “it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute.” *Id.* at 2090. Finding no “clear statement that Congress meant the statute to reach local criminal conduct,” the court held that the statute did not do so. *Id.*

Similarly, in *American Bar Association v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), the D.C. Circuit held that the FTC could not regulate attorneys under the Gramm-Leach-Bliley Act on the theory that attorneys and their law firms were “financial institutions” because they were “entities engaged in ‘financial activities.’” *Id.* at 466. At *Chevron* step one, the court determined that the statute’s broad definition of “financial institution” was not ambiguous in the manner asserted by the FTC, in part because the court found “it difficult to believe that Congress, by any [latent] ambiguity, intended to undertake the regulation of the profession of law—a profession never before regulated by ‘federal functional regulators’—and never mentioned in the statute.” *Id.* at 469. And at *Chevron* step two, the court determined that, even if the statute were ambiguous in the necessary sense, under *Gregory* and other precedent, Congress had not made the requisite clear statement that it intended to alter the usual constitutional balance by invading areas of traditional state sovereignty. *Id.* at 471-72.

Simply put, Congress has given no clear indication of its intent to authorize EPA to invade state authority to decide energy and resource-planning policy. *Bond* and *American Bar Association* reinforce the fact that under the “usual constitutional balance,” these are areas of traditional state jurisdiction, and that any arguable ambiguity found, for instance, in the breadth of terms such as “system of emission reduction” must be resolved in the states’ favor by reference to the “basic principles of federalism.”

IV. Section 111(d) Limits EPA’s Role in the First Instance to Procedure, Not Substance

Consistent with Congress’s view of Section 111(d) as a limited program for filling a minor regulatory gap for certain minor categories of sources, Section 111(d) limits EPA’s role to one of procedure. EPA may promulgate regulations to establish a “*procedure*” under which

states submit implementation plans that establish standards of performance for existing sources subject to regulation under Section 111(d). But the states, in developing their implementation plans, are the ones on whom Congress conferred authority to actually establish “standards of performance” for existing sources. *See* 42 U.S.C. § 7411(d)(1) (directing EPA to “prescribe regulations which shall establish a *procedure* . . . under which each State shall submit to the Administrator a plan” that establishes standards of performance) (emphasis added). *Compare* § 7411(b)(1)(B) (directing EPA to “establish[] Federal *standards* of performance for new sources” directly) (emphasis added).

EPA promulgated general “implementing regulations” under Section 111(d) in 1975. *State Plans for the Control of Certain Pollutants from Existing Facilities*, 40 Fed. Reg. 53,340 (Nov. 17, 1975), *codified as amended at* 40 C.F.R. §§ 60.22-60.29. Under these regulations, EPA may promulgate “emission guidelines” that reflect EPA’s opinion as to the degree of emission reduction achievable through the “best system of emission reduction” that the agency believes to be “adequately demonstrated” for the regulated existing sources. *See* 40 C.F.R. §§ 60.21(e) (defining “emission guideline”), 60.22(b)(5). But the states are expressly authorized by the Clean Air Act to apply less stringent standards to individual sources or classes of sources. 42 U.S.C. § 7411(d)(1). In so doing, *states*—not the EPA—consider cost, practical achievability, a source’s “remaining useful life,” and other source-specific factors when applying these standards to particular sources. *Id.*; *see also* 40 C.F.R. § 60.24(f).

Only when a state fails to submit a satisfactory implementation plan—that is, one that is unreasonable or fails to comport with the Act’s statutory criteria—is EPA authorized to perform its second function under 111(d)(2): directly prescribing binding standards for sources. *See* 42 U.S.C. § 7411(d)(2); *see also* 40 C.F.R. § 60.27(c)(3). *Cf. Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 494 (2004) (ultimate issue in Prevention of Significant Deterioration program is whether state agency’s determinations are “reasonable, in light of the statutory guides and the state administrative record”).

EPA’s proposal pays lip service to this process while blatantly violating it. The proposal sets a mandatory, binding “goal” for each state, in the form of an emission rate for the state’s entire power sector. Under EPA’s proposal, once these “goals” are finalized, states will have no discretion to alter them. *See, e.g.*, Proposal, 79 Fed. Reg. at 34,835 (“Once the final goals have been promulgated, a state would no longer have an opportunity to request that the EPA adjust its CO₂ goal.”), 34,897-98 (rejecting stakeholder suggestion that states be allowed to quantify levels of emission reduction or otherwise treat EPA’s goals “as advisory rather than binding”), 34,892 (“As promulgated in the final rule following consideration of comments received, the interim and final goals will be binding emission guidelines for state plans.”).

In fact, even if a state can demonstrate that it cannot meet EPA’s projected emission reductions by implementing a particular aspect of the proposed “best system of emission reduction,” EPA will not adjust the state’s “goal” unless the state demonstrates that it cannot realize additional reductions from applying the *other* aspects of that “system” more aggressively, or from “related, comparable measures.” *Id.* at 34,893. The proposal thus violates Congress’s unambiguously expressed intent in Section 111(d).

EPA argues that states will still have the flexibility to apply less stringent standards to individual sources, but this elides the real issue. *See* Proposal, 79 Fed. Reg. at 34,925-26. Given the flexibility afforded to states under Section 111(d)’s plain text, valid state implementation

plans may result in a range of actual state-wide emission rates. As the states exercise their authority to appropriately adjust EPA's "guidelines" for certain sources and classes of sources, the sources across a given state may in the end collectively emit a substance at a greater or lesser rate. And there is nothing unusual about this result, because before now EPA has properly restricted its 111(d) regulations to set guidelines for source emissions—not total state emissions.

EPA attempts to justify this by reference to the statutory definition of "standard of performance" as "a standard for emissions which reflects the *degree* of emission limitation achievable through the application of the best system of emission reduction." 42 U.S.C. § 7411(a)(1) (emphasis added). EPA reads "degree" to mean "portion," and offers the interpretation that "[t]hat 'degree' or portion of the required emission performance level is, in effect, the portion of the state's obligation to limit its affected sources' [aggregate, statewide] emissions that the state has assigned to each particular affected source." Proposal, 79 Fed. Reg. at 34,891. But EPA offers no authority, not even a dictionary citation, for construing "degree" as "portion." And the agency offers no statutory basis for a state's putative obligation to limit its sources' *aggregate* emissions, because there is none whatsoever. States "*establish*" standards of performance "for existing source[s]," thereby setting *those individual sources'* obligations to limit their emissions. The concept of a predetermined aggregate cap under which the *state* parcels out "portions" of *its* limitation obligation has no basis in the implementing regulations or EPA's past practice under 111(d), let alone in the Act itself. EPA's proposal also contradicts itself, as it defines "emission performance level" as "the level of emissions performance for affected entities specified in a state plan." *Id.* at 34,956 (text of proposed rule). That definition describes something already existing under the statute and defined in EPA's regulations: it is precisely the "standard of performance" which the *state* establishes for existing sources under 111(d)(1). But as quoted above, Proposal, 79 Fed. Reg. at 34,891, EPA speaks of sources being "assigned" a portion of a statewide "emission performance level." The agency cannot spin statutory authority for itself out of air simply by multiplying regulatory definitions for terms of its own invention found nowhere in the Act.

In essence, EPA here treats each state as nothing more than a giant source of carbon dioxide, and imposes on each state binding, inflexible emission limits. The so-called "flexibility" offered to states here is no greater than the flexibility a regulated *source* always enjoys under the Clean Air Act, because individual sources can devise alternative methods to reach emission levels prescribed by EPA. *See, e.g.,* 42 U.S.C. § 7411(b)(5), (h) (forbidding EPA to require installation of particular technological systems absent narrowly specified circumstances). But *states* are entitled to flexibility not only in procedural means but also in substantive ends. EPA's proposal reverses this statutory scheme, promoting the agency to the role of setting binding, substantive standards in the first instance and relegating the states to a ministerial, administrative role. In this, EPA claims the authority to strip states of their statutory discretion to take account of their unique circumstances, needs, and interests.

If EPA can ever issue lawful Section 111(d) rules regulating coal-fired power plants—that is, after first having withdrawn its regulation of those power plants under Section 112, and then having issued lawful regulations for new power plants under Section 111(b)—EPA still must adopt a wholly different approach to Section 111(d) regulation than the one it takes in the present proposal. Under this alternative, lawful approach, EPA would analyze the types of projects that could reduce greenhouse gas reduction at existing sources of coal-fired power plants

by reference to Section 111's criteria, which considers such factors as cost and performance in arriving at guidelines about what emission rates are actually achievable as the "best system of emission reduction" for various categories and subcategories of fossil-fuel-fired power plants. EPA has completed some of this work with its first "building block," efficiency improvements at power plants, but even that proposal is flawed because it overestimates the efficiency improvements that are available at individual power plants by considering this matter on a statewide basis. Under this lawful approach, states would then establish and apply standards of performance to existing power plants, drawing on their local knowledge and considering the individual sources and classes of sources within their jurisdictions. This approach would honor the proper roles of the federal and state governments and result in performance standards that are appropriate for and achievable by regulated sources.

V. Section 111(d) Is Limited to Source-Level, Inside-the-Fenceline, Unit-by-Unit Emission Reduction Measures

Section 111(d) unambiguously mandates that, where other statutory prerequisites are satisfied, *see supra* Section II., states must establish standards of performance applicable to *individual sources* of pollutants. *See, e.g.*, 42 U.S.C. § 7411(d)(1)(A) (state plans "establish[] standards of performance *for any existing source . . . to which* a standard of performance under this section would apply if such existing source were a new source") (emphasis added). EPA's proposal radically departs from this approach. The agency proposes to determine that the "best system of emission reduction" for power plants is composed of four "building blocks." *See, e.g.*, Proposal, 79 Fed. Reg. at 34,835. Only the first "building block"—efficiency gains from heat-rate improvements achieved "inside the fenceline" of particular coal plants—is arguably authorized under 111(d). *See id.* at 34,859-62; *but cf. UARG*, 134 S. Ct. at 2448 ("assuming without deciding" that another provision of the Act "may be used to force some improvements in energy efficiency" while stressing that "important limitations" must be observed to guard against "'unbounded' regulatory authority," even where EPA regulates only *inside-the-fenceline* energy efficiency).

The other three "building blocks" envision the reshaping of state resource-planning and energy policy, in the form of shifting generation from coal- to gas-fired plants, shifting generation from fossil fuels altogether to renewable resources, and end-use efficiency measures. *See* Proposal, 79 Fed. Reg. at 34,862-75. And while EPA does not formally require states to employ a precise *mixture* of these "outside-the-fenceline" measures, the state "goals" are stringent enough that they cannot be met by the first "building block" alone. (Indeed, the agency does not suggest that they can be.) Many state "goals" are set well below the rate achievable by even a state-of-the-art gas-fired plant, let alone a coal-fired one. *See id.* at 34,895 (Table 8—Proposed State Goals). These "goals" can only be met by substantial revision of a state's sector-wide approach. The "best system of emission reduction" proposed here is therefore a *de facto* national energy policy.

This type of regulatory adventurism contradicts the Supreme Court's recent decision in *UARG*. There, the Court considered limitations on the scope of EPA's authority in requiring sources to apply "best available control technology" for greenhouse gases under the prevention of significant deterioration preconstruction permitting program. The Court observed that such

“control technology” cannot require “fundamental redesign” of facilities, is “required only for pollutants that the source itself emits,” and “should not require every conceivable change that could result in” improvements. 134 S. Ct. at 2448.

Notably, “performance standards” under Section 111 are closely linked to “best available control technology” by express definition and by statutory context. EPA’s 111(d) proposal exceeds those limitations by requiring “fundamental redesign” not only of individual facilities but of a state’s entire energy sector and by proposing measures far removed from at-the-source emissions.

First, the program-specific definitions of “best available control technology” and “performance standards”—found, respectively, in the prevention of significant deterioration program and in the new- and existing-source performance standards program (i.e., Section 111)—are highly similar. “Best available control technology” is defined as “an *emission limitation* based on the *maximum degree* of reduction . . . *achievable* for [a] facility.” CAA § 169(3), 42 U.S.C. § 7479(3) (emphases added). And “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 . . . has been adequately demonstrated.” 42 U.S.C. § 7411(a)(1) (emphasis added). In other words, both terms are defined by reference to “emission limitation”; the primary difference is that “best available control technology” represents the most stringent limitation achievable, whereas “performance standards” are not defined by maximum possible stringency, but by the “best system . . . adequately demonstrated.” This relationship is confirmed by the fact that the definition of “best available control technology” explicitly links the two phrases: “best available control technology” must be at least as stringent as Section 111 standards. 42 U.S.C. § 7479(3) (“In no event shall application of ‘best available control technology’ result in emissions . . . which will exceed the emissions allowed by any applicable standard established pursuant to” 111). The former is simply intended to be a stricter version of the latter.

Second, the Act’s general definitions of “emission limitation” and “performance standards” are also closely related. “Emission limitation” is defined at CAA § 302(k), 42 U.S.C. § 7602(k) as “a requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement related to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.” And “performance standards” are defined, in the subsection immediately following, as “a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.” CAA § 302(l), 42 U.S.C. § 7602(l). Both terms refer to requirements that cut emissions on a continuous basis, and both are illustrated by the same “including any requirement . . .” phrase. The major difference is that “emission limitation” is given another “including” phrase (“any design, equipment . . .”). In other words, “emission limitations” arguably encompass a broader range of measures than do “performance standards.” And because the definition of “performance standards” only contains the “including” phrase that expressly refers to “the operation or maintenance of a source,” any confining of “emission limitation”—and therefore of “best available control technology,” which, recall, is expressly defined at § 7479(3) as an “emission limitation”—to inside-the-fenceline measures should apply with equal or greater force to “performance standards.”

Third, certain provisions of the 2005 Energy Policy Act confirm that “best available control technology” and Section 111 “performance standards” are linked concepts. Congress restricted EPA’s ability to rely on data from facilities receiving assistance under that Act when it sets either of these types of standards under the Clean Air Act, *see* 42 U.S.C. § 15962(i). (As discussed at Section II *supra*, EPA’s violation of this restriction is one of the reasons why EPA’s proposed New Source Rule is unlawful and will not survive review.) Even when drafting legislation that primarily addressed another subject area (energy policy as opposed to pollution control), Congress was mindful of the close relationship between these two terms.

Fourth, at oral argument in *UARG*, the Solicitor General made this argument in an attempt to prevail: “Section 7411 and the PSD program are not aimed at different problems. They are aimed at the same problem, and you can see that from the statutory text. . . . Congress specifically linked the operation of the Section 7411 standards and the Best Available Control Technology under the PSD program. . . . [O]nce Congress has set a standard under Section 7411, . . . that becomes a floor for the evaluation of Best Available Control Technology.” *UARG*, No. 12-1146, Transcript of Oral Argument at 46-48 (Solicitor General Verrilli, Feb. 24, 2014). On this point, the government was entirely correct. The two address the same problem and take the same form—how else could one set a “floor” for the other?—and should therefore be subject to the same limitations.

EPA’s justifications for not stopping at the fenceline are specious and contrary to the statutory text. *See* Proposal, 70 Fed. Reg. at 34,856. EPA argues that the word “system” in the statutory phrase “best system of emission reduction” is broad enough to encompass these “outside-the-fenceline” measures. *See id.* at 34,885-86 (relying on dictionary definition of “system” as “[a] set of things working together as parts of a mechanism or interconnecting network”).

But Section 111 does not actually grant EPA authority to regulate a “system.” Rather, the statute provides that EPA and the states may set standards for emissions based on “*the application of the best system of emission reduction.*” 42 U.S.C. § 7411(a)(1) (emphasis added). This statutory phrase directs the agency (in the new-source, 111(b) context) or the state (in the existing-source, 111(d) context) to establish standards of performance by applying the “system of emission reduction” *to the individual sources* with the source category being regulated. (In keeping with this, the 111(a) definition section defines “new source” and “stationary source” immediately after defining “standard of performance.” *Id.* § 7411(a)(2), (3).)

The term “standard of performance” itself can only be understood in context of a source-specific limit, as it is defined as “a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance *of a source* to assure continuous emission reduction.” *See* CAA § 302(l), 42 U.S.C. § 7602(l) (emphasis added). Indeed, the meaning of the term “application” in the context of a standard for emissions recurs throughout the Act and can only be understood in the context of an individual source. Considering again Section 169(3) of the Act, defining the “best available control technology” (“BACT”) that must be applied to new or modified sources under the prevention of significant deterioration program, the Act provides that “[i]n no event shall *application of* [BACT] result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to” Sections 111 or 112. 42 U.S.C. § 7479(3) (emphasis added). Similarly, the definition of lowest achievable emission rate (“LAER”) for the nonattainment new source review program provides that “in no event shall the *application of* [LAER] permit a proposed new or modified source to

emit any pollutant in excess of the amount allowable under applicable new source standards of performance.” CAA § 171(3), 42 U.S.C. § 7501(3) (emphasis added). Put another way, whatever the “best system” is, it must be a system that reduces emissions from a *particular source* “to which a standard of performance under this section would apply if such existing source were a new source.” 42 U.S.C. § 7411(d)(1)(A)(ii).

Even if EPA did have authority to regulate a “system,” its proposed regulation here would fail. “The definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.” *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). In the context of emission control, the Clean Air Act displays a consistent and clear pattern of referring to “systems” as source-specific measures.³² “Best system of emission reduction” as used in Section

³² See, e.g., CAA § 110(j), 42 U.S.C. § 7410(j) (conditioning issuance of all permits required under Title I on a showing by the owner or operator of each new or modified stationary source “that the technological *system* of continuous emission reduction *which is to be used at such source* will enable it to comply with the standards of performance which are to apply to such source”) (emphases added); CAA § 111(b)(5), 42 U.S.C. § 7411(b)(5) (providing that, except as authorized under subsection (h), the Administrator may not require “any new or modified source *to install and operate* any particular technological *system* of continuous emission reduction to comply with any new source standard of performance”) (emphases added); CAA § 112(r)(7)(A), 42 U.S.C. § 7412(r)(7)(A) (providing that accidental-release-prevention regulations may “make distinctions between various types, classes, and kinds of facilities, devices and *systems* taking into consideration factors including, but not limited to, the size, location, process, process controls, quantity of substances handled, potency of substances, and response capabilities present *at any stationary source*”) (emphases added); CAA § 169(3), 42 U.S.C. § 7479(3) (defining best available control technology, or BACT, as an “emission limitation based on maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable *for such facility* through application of production processes and available methods, *systems*, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant”) (emphasis added); CAA § 206(a)(2), 42 U.S.C. § 7525(a)(2) (“The Administrator shall test any emission control *system incorporated in a* motor vehicle or motor vehicle engine submitted to him by any person”) (emphasis added); CAA § 206(a)(3)(A), 42 U.S.C. § 7525(a)(3)(A) (Administrator may issue a certificate of conformity only if the manufacturer establishes “that any emission control device, *system*, or element of design *installed on, or incorporated in,* such vehicle or engine conforms to applicable requirements”) (emphases added); CAA § 207(c)(3)(A), 42 U.S.C. § 7541(c)(3)(A) (“The manufacturer shall provide in boldface type on the first page of the written maintenance instructions notice that maintenance, replacement, or repair of the emission control devices and *systems* may be performed by any automotive repair establishment or individual”) (emphasis added); CAA § 402, 42 U.S.C. § 7651a(7) (defining “continuous emission monitoring *system*” as “the *equipment* as required by section 7651k of this title”) (emphases added); CAA § 415, 42 U.S.C. § 7651n(c) (providing that a coal-fired utility’s physical or operational changes

continued on next page...

111 falls within the statute's norm, rather than the exception: "systems" limiting emissions are source-specific unless indicated otherwise. The Section governs the issuance of performance standards, and "standard of performance" is defined at § 7602(l) to mean "a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction." The *only* example given in this definition is expressly source-specific. In the few instances where the Clean Air Act intends the term "system" to refer to a geographically dispersed "set of things," it does so expressly, as in Section 319(a) of the Act, directing the Administrator to "promulgate regulations establishing an air quality monitoring system throughout the United States." 42 U.S.C. § 7619(a).

In this regard, EPA's attempt to take the term "system" out of context is akin to the situation that the Supreme Court faced in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994). There, the Supreme Court rejected the agency's position that its decision to make tariff filing optional for all nondominant long-distance carriers was within its statutory authority to "modify any requirement" under 47 U.S.C. § 203. *Id.* at 225. Despite the seeming breadth of the term "modify," the court determined that the word's plain meaning is to make a *moderate* change, whereas the challenged order made a "radical or fundamental change." *Id.* at 228-29. Instead, by "eliminat[ing a] crucial provision of the statute for 40% of a major sector of the industry," the agency had engaged in "a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934." *Id.* at 231-32. The order "is effectively the introduction of a whole new regime of regulation," *id.* at 234.

By going beyond source-level, inside-the-fenceline measures, EPA's proposal would expand 111(d), and specifically the underlying statutory term "best system of emission reduction," into "a whole new regime of regulation": one that regulates not only pollutant emission by sources, but a state's entire resource and energy sectors.

And notably, courts have in the past rejected a similar attempt by EPA to re-define the fundamental level at which Section 111's "best system of emission reduction" applies by disaggregating that concept from the concept of an individual source as defined by statute. In *ASARCO Inc. v. EPA*, 578 F.2d 319, 326-27 (D.C. Cir. 1978), the D.C. Circuit invalidated EPA regulations interpreting Section 111(a)(3)'s definition of "stationary source" to "allow a plant operator who alters an existing facility in a way that increases its emissions to avoid application of the NSPSs by decreasing emissions from other facilities within the plant." *Id.* at 325. EPA argued that the broad statutory definition gave it "'discretion' to define a stationary source as

...continued from previous page

will not trigger Section 111 applicability where, among other conditions, the unit was inactive for 2 years prior to the 1990 Amendments and "was equipped prior to shutdown with a continuous system of emissions control" that met certain technical standards) (emphases added).

either a single facility or a combination of facilities.” *Id.* at 326. (This type of aggregation is known as the “bubble concept,” *e.g.*, *id.* at 321.)

The court disagreed, holding that the “regulations plainly indicate that *EPA has attempted to change the basic unit to which the NSPSs apply . . .*” *Id.* at 326-27 (emphasis added). (See also *id.* at 322: “The basic controversy in the cases before us concerns the determination of the units to which the NSPSs apply.”).³³ In the current Section 111(d) proposal, EPA takes the even more egregious action of changing the field of regulation from *sources to a state’s entire power sector*. Given that EPA lacks the authority to expand “performance standards” to apply collectively to all regulated facilities at a *single industrial site*, it is not credible to suggest that the “best system of emission reduction” underlying such standards can encompass measures adopted throughout *the state’s entire power sector*.

³³ *ASARCO* does not conflict with the Supreme Court’s decision six years later in *Chevron*, holding that the “bubble concept” was appropriate in the context of the nonattainment new source review program. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Whereas *ASARCO* considered the definition of “stationary source” provided in and for Section 111, *Chevron* construed the *undefined* use of the term “major stationary sources” in § 172(b)(6) of the Act (then codified at 42 U.S.C. § 7502(b)(6), with its post-1990 equivalent now found at § 7502(c)(5)).

Section 172(b)(6), added in the 1977 Amendments as part of a new program addressing areas that failed to attain national ambient air quality standards, required state implementation plans under the NAAQS program to “require permits for the construction and operation of new or modified major stationary sources.” See *Chevron*, 467 U.S. at 849 & n.22 (“The focal point of this controversy is one phrase in that portion of the [1977] Amendments. . . . Specifically, the controversy in these cases involves the meaning of the term ‘major stationary sources’ in § 172(b)(6) of the Act . . .”). The Supreme Court acknowledged the *ASARCO* ruling in three footnotes with no suggestion of disapproval; the two opinions simply construe different terms in different statutory programs. See *id.* at 841 & n.6, 847 n.17, 857 n.29.

The Supreme Court has long maintained that the NSPS and new source review programs have different purposes, with the NSPS program being technology-forcing, and the new source review program being ambient-air-quality focused. See generally *Env’tl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 565 (2007) (holding court of appeals erred in requiring EPA to conform its regulations under prevention of significant deterioration program, which is closely linked to new source review program, with “their NSPS counterparts”). Those different purposes apply directly when considering the unit at which state-of-the-art control technology must be employed, the question decided for the NSPS program in *ASARCO*.

Moreover, the decisional criteria applied in *ASARCO* are consistent with those that the Supreme Court later employed in *Chevron*: the *ASARCO* court expressly noted that EPA is entitled to deference when interpreting the Act, *ASARCO*, 578 F.2d at 325, and described the court’s role as determining whether an interpretation is “sufficiently reasonable,” *id.* at 326 (internal quotation marks omitted). Indeed, *ASARCO* recites as controlling precedent on this point the very same cases which *Chevron* would later follow. Compare *id.* at 326 nn.21, 22 (citing, *inter alia*, *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976), *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975)), with *Chevron*, 467 U.S. at 843 nn.11, 14 (same).

EPA also argues that it bases its proposed “building blocks” on measures that states are already undertaking. Proposal, 79 Fed. Reg. at 34,856. But a state’s exercise of its own policy discretion cannot confer regulatory authority on a federal agency. And EPA expresses concern that, if it limited its proposal to heat-rate improvements achieved inside the fence at individual coal-fired plants, a “rebound effect” would increase operations at these plants and lead to smaller overall reductions. *Id.* at 34,856 & n.93. But the “rebound effect” is nothing new in environmental law. *See, e.g.,* 75 Fed. Reg. 74,152, 74,316-20 (Nov. 30, 2010) (providing detailed discussion of “rebound effect” in fuel-efficiency context). It has never been used as a justification to set state energy policy or otherwise enlarge EPA’s authority, and it cannot bear that weight here. EPA also asserts that its additional, beyond-the-fenceline “building blocks” promise additional emission reductions “by significant amounts and at lower costs” than some strategies within the first, inside-the-fenceline “building block.” Proposal, 79 Fed. Reg. at 34,856. But even assuming this is true, it is only a reason to propose these measures *if* they are within the agency’s power to propose.

EPA hides behind a fig leaf of federalism and flexibility while in effect forcing major changes to the states’ administration of electricity generation and consumption. But the radical nature of its proposal becomes all the more evident when one considers what will occur if a state does not submit an implementation plan, or if EPA finds a submitted plan unsatisfactory. The agency will then prescribe a *federal* implementation plan for that state, as authorized by 42 U.S.C. § 7411(d)(2). This plan would apply the range of “building blocks” to the state. That is to say, it would set binding emission limits for coal- and gas-fired power plants that would switch the way that sources are allowed to dispatch, set renewable portfolio requirements that would force electric utilities and others to develop renewable resources against their will in order to be allowed to continue operating existing coal-fired assets, and set the same type of efficiency standards for consumers of electricity that the D.C. Circuit recently invalidated when FERC attempted to do so. This total federal invasion of a state power sector would remove all pretext and expose the true extent of this proposal’s violation of state authority. While this would provide clarity, such a catastrophe for federalism is antithetical to the Constitution and cannot be justified under any provision of federal law.

VI. EPA’s Proposal Conflicts with the Federal Power Act

The question of what role the federal government and its agencies should play in developing energy policy throughout the country has been considered extensively under the Federal Power Act, Congress’s definitive pronouncement on the subject. And while Congress unquestionably did not intend Section 111 as an energy-policy provision at all, assuming *arguendo* that it were capable of being construed to touch on energy policy issues in some meaningful way, such as what type of resources may be used to generate electricity in different states, how state and regional power grids should dispatch power, retail energy-efficiency measures, and the like, then EPA’s Section 111(d) proposal directly contravenes Congress’s careful decision in the Federal Power Act to preempt only certain aspects of power generation.

If EPA were allowed to capitalize on Section 111(d) to regulate the electric power sector in some manner other than as individual emission sources, then the section “serve[s] the same function” and “relate[s] to the same thing” as the Federal Power Act, and should be interpreted

together with it. See 2B Sutherland, Statutes & Statutory Construction, § 51:3 (7th ed. 2007) (footnotes omitted) (“Statutes are *in pari materia*—pertain to the same subject matter—when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object.”); see also *Erlenbaugh v. United States*, 409 U.S. 239, 245 (1972) (statutes “intended to serve the same function” are construed together); *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-65 (1845) (“The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them . . .”). This interpretive mandate is based on the “assum[ption] that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject.” *Erlenbaugh*, 409 U.S. at 244. It is a “tool of statutory construction [that] allows us to consider all statutes that relate to the same topic; therefore, if a thing in a subsequent statute comes within the reason of a former statute, we transpose the former statute’s meaning to the thing in the subsequent statute.” *United States v. Rodriguez*, 60 F.3d 193, 196 (5th Cir. 1995) (citing *Freeman*).

EPA argues it can use Section 111(d) to address these issues because Congress did not expressly constrain it from doing so. But “[w]here a problem of interpretation was apparently not foreseen by Congress, it is appropriate to consult and be guided by those areas covering the same subject where the expression of legislative intent is clear.” *U.S. v. Stauffer Chem. Co.*, 684 F.2d 1174, 1187 (6th Cir. 1982). In the Federal Power Act, Congress’s intent was clear: it expressly delineated federal and state jurisdiction over the electric industry. In this regard, the Federal Power Act carefully limits federal authority over the sale of electricity to the transmission and sale at wholesale of electric energy in interstate commerce while expressly disclaiming authority over other matters, such as the generation and local distribution and transmission of electricity, which are reserved for their traditional state regulators:

The provisions of this subchapter [*i.e.*, subchapter II of the Federal Power Act] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, *but* except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, *but shall not have jurisdiction*, except as specifically provided in this subchapter and subchapter III of this chapter [*i.e.*, Licensees and public utilities: Procedural and administrative provisions], *over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce*, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

16 U.S.C. § 824(b)(1) (emphases added).³⁴

It defies belief to suggest that Congress established as a background principle in the Federal Power Act that federal authority over intrastate energy production, transmission, and distribution (both in itself and through the corresponding subject of electricity sales) was precluded unless specifically provided elsewhere, only to *sub silentio* grant EPA authority under Section 111(d) of the Clean Air Act to address all these aspects of that industry without establishing any delineation of federal and state jurisdiction. *Cf. Boumediene v. Bush*, 553 U.S. 723, 777 (2008) (“If Congress had envisioned [Detainee Treatment Act] review as coextensive with traditional habeas corpus, it would not have drafted the statute in this manner.”) (noting absence of savings clause in that Act). If Congress had intended to grant EPA regulatory authority under Section 111(d) to address, as such, states’ energy-generation and energy-efficiency policies, it “would not have drafted [Section 111] in th[e] manner” that it did. Instead, it would have laid out a scheme of bifurcated jurisdiction similar to the one it designed in the Federal Power Act. Its total omission of such a scheme shows that it had no such intent.

Congress made a conscious decision in the Federal Power Act not to regulate the generation and distribution of retail electricity precisely because “[t]he FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power but also the regulation of wholesale sales that had been *previously subject* to state regulation.” *New York v. FERC*, 535 U.S. 1, 21 (2002). In other words, even when Congress was unambiguously invading traditional areas of state regulation, it was careful to limit the extent of the invasion through a savings provision. “[A]ware of [that] previous statute[],” *Erlenbaugh*, 409 U.S. at 244, Congress in subsequently enacting the Clean Air Act surely did not expand another agency’s regulatory purview over those areas without limit. *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (“[T]his Court has repeatedly ‘declin[e]d’ to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.”) (second alteration in original) (quoting *United States v. Locke*, 529 U.S. 89, 106 (2000)). The situation here is precisely the opposite. If, in light of EPA’s assertion of authority to address all aspects of the power sector under Section 111, we do *not* read that section in light of the Federal Power Act’s savings clause, we “upset the careful regulatory scheme established by federal law.” *See, e.g., Union Pac. R.R. Co. v. Cal. Pub. Utils. Comm’n*, 346 F.3d 851, 864 n.17 (distinguishing *Locke* where statute in question addresses area that “[p]rior to that time . . . was largely regulated by the states”).

³⁴ *See also id.* 16 U.S.C. § 824(a) (“It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*”) (emphasis added).

The appropriate response when an agency so brazenly reaches beyond its delegated authority is the one given by the court in *CAISO*. There, FERC argued that its statutory authority to address “practice[s] . . . affecting [a] rate” gave it authority to address “the composition of the governing board of a utility and the method of its selection.” 372 F.3d at 399 (second and third alterations in original) (quoting 16 U.S.C. § 824e(a)). The agency relied on the breadth of the statutory term “practice,” and “apparently would have [the court] hold that the existence of an ‘infinite’ of practices supposes that there is also an infinite of acceptable definitions for what constitutes a ‘practice’ to give it the authority to regulate anything done by or connected with a regulated utility We are not biting.” *Id.* at 401 (emphasis added) (quoting *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985)). The court struck down the agency’s interpretation at *Chevron* step one, *id.* at 400, 401.

After concluding that FERC impermissibly stretched the statutory term “practice,” the court confirmed its conclusion by considering “the implications of FERC’s amorphous defining of the term.” *Id.* at 402. “Were we to uphold this theory, the implications would be staggering.” *Id.* at 403. But “we really need reach no . . . parade of horrors,” because

[t]he very act attempted by FERC in this case is quite enough to reveal the drastic implications of its overreaching. . . . Congress has created in Title 15 of the United States Code a Securities and Exchange Commission with extensive powers over corporate regulation. Every state has statutes affecting corporate governance. Presumably the members of the federal and state commissions charged with securities and corporate regulation are chosen with an eye to their expertise in matters corporate. Certainly the legislative bodies have given them powers with a view to that subject matter. The same cannot be said of the legislative empowerment of FERC, nor presumably are its members chosen principally for their expertise in corporate structure.

Id. at 404. The same applies here. Congress created in the Federal Power Act a scheme of extensive (but *carefully delineated*) federal regulatory authority over the energy sector. And the states, of course, have their own statutory and regulatory systems that address those aspects of their energy sectors that Congress has reserved to their jurisdiction. EPA’s legislative empowerment to regulate pollution emissions from stationary sources cannot plausibly be read to cut across this complex scheme of federal and state regulation.

To confirm that EPA is regulating in an area over which it lacks the requisite “legislative empowerment” and “expertise,” one need only look at the reaction to its proposal. Multiple state and federal regulators and stakeholders have expressed grave concern that the proposal—especially because it lacks any formal cooperation with and input from FERC—threatens grave impacts on the reliability and affordability of the nation’s energy supply, particularly in its ability to respond to demand spikes in response to extreme weather events. EPA’s proposal requires states to undergo significant shifts in energy policy, but Congress never intended EPA to be an energy regulator. Congress’s wisdom in that regard is evident from the serious risks posed by EPA’s attempt to act in that area without the necessary authorization and experience.

Taking at face value EPA's baseless assertion that Section 111 empowers it to address a state's energy sector as such, basic principles of statutory interpretation require us to evaluate that assertion in light of the Federal Power Act. But where that Act establishes federal authority over the energy sector, it does so with express, detailed attention to demarcating federal and state jurisdiction. The absence from Section 111 of any such attention confirms that EPA's assertion of authority is not correct.

VII. Conclusion

EPA's proposal violates both the letter and the spirit of the Clean Air Act. It violates the "literal" terms of the Clean Air Act, as EPA has itself conceded. Mem. at 26. It has not been promulgated after the adoption of lawful new source rules under Section 111(b). It departs from statutory authority and regulatory tradition to set energy policy for the states. It departs from the appropriate system of "cooperative federalism" by relegating states to an administrative role in place of their proper substantive one. It treats states as nothing more than giant sources of carbon dioxide emissions. It requires states not only to regulate inside-the-fenceline improvements, but also to make sweeping changes to substantially all aspects of their power sectors. It does all this in the face of an explicit statutory prohibition.

This proposal threatens the states' core interests, the proper functioning of their resource and energy policies, and the very federal structure of our government. The commenting states have an obligation to their citizens to vigorously resist this unlawful proposal. EPA should immediately withdraw the proposal, and if it does not do so, EPA should at the very least ensure that any final Section 111(d) regulations are otherwise stayed until all judicial challenges to those regulations are concluded.

Respectfully,

A handwritten signature in black ink, appearing to read "E. Scott Pruitt", written in a cursive style.

E. SCOTT PRUITT
Oklahoma Attorney General



Patrick Morrisey
West Virginia Attorney General



James D. "Buddy" Caldwell
Louisiana Attorney General



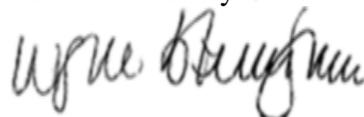
Jon Bruning
Nebraska Attorney General



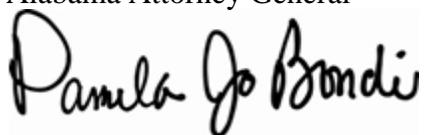
Tim Fox
Montana Attorney General



Luther Strange
Alabama Attorney General



Wayne Stenehjem
North Dakota Attorney General



Pam Bondi
Florida Attorney General



Mike DeWine
Ohio Attorney General



Sam Olens
Georgia Attorney General



Alan Wilson
South Carolina Attorney General



Greg Zoeller
Indiana Attorney General



Marty Jackley
South Dakota Attorney General



Derek Schmidt
Kansas Attorney General



Sean Reyes
Utah Attorney General



Bill Schuette
Michigan Attorney General



Peter K. Michael
Wyoming Attorney General