

## **Dissenting Views on H.R. 2042, “The Ratepayer Protection Act”**

Issued by the EPA on June 2, 2014, the proposed “Clean Power Plan” rule establishes emission guidelines for states to follow in developing plans to control carbon pollution from existing coal-fired and natural gas-fired power plants under section 111(d) of the Clean Air Act.<sup>1</sup>

H.R. 2042 would adversely impact the Clean Power Plan in two very significant ways. First, the bill would suspend implementation of the final Clean Power Plan and would extend all final compliance and submission deadlines by the amount of time needed to complete judicial review. And second, the bill allows governors to effectively exempt their respective states from any requirements of a federal plan to reduce carbon pollution from existing power plants. Under current law, EPA is required to develop and implement a federal section 111(d) plan for any state that fails to submit its own state plan. H.R. 2042 would overturn this existing Clean Air Act requirement as it relates to the Clean Power Plan.

### **EPA ACTIONS ON POWER PLANT EMISSIONS OF CARBON POLLUTION**

Fossil fuel-fired power plants are by far the largest emitters of greenhouse gases from stationary sources in the United States; they are responsible for about one-third of total U.S. greenhouse gas emissions.<sup>2</sup> There are currently no federal limits on their emissions of carbon pollution.

In June 2013, President Obama announced a Climate Action Plan to cut carbon pollution and to prepare for the effects of climate change.<sup>3</sup> As part of that Plan, the President directed EPA to use its existing authority under the Clean Air Act to control carbon pollution from new and existing fossil fuel-fired power plants.<sup>4</sup> President Obama simultaneously issued a Presidential Memorandum on Power Sector Carbon Pollution Standards providing more detailed

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<sup>1</sup> U.S. Environmental Protection Agency, *Carbon Pollution; Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34830 (June 18, 2014) (Proposed Rule) (online at [www.gpo.gov/fdsys/pkg/FR-2014-06-18/pdf/2014-13726.pdf](http://www.gpo.gov/fdsys/pkg/FR-2014-06-18/pdf/2014-13726.pdf)) [hereinafter U.S. Environmental Protection Agency Clean Power Plan].

<sup>2</sup> *Id.* at 34833; U.S. Environmental Protection Agency, *Clean Power Plan, Proposal to Reduce Carbon Pollution from Existing Power Plants*, at 2 (June 2, 2014) (presentation to Congressional Staff) (online at [www2.epa.gov/sites/production/files/2014-05/ghg-chart.png](http://www2.epa.gov/sites/production/files/2014-05/ghg-chart.png)).

<sup>3</sup> Executive Office of the President, *The President’s Climate Action Plan* (June 2013) (online at [www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf](http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf)).

<sup>4</sup> *Id.* at 6.

direction to EPA.<sup>5</sup> It set deadlines of September 20, 2013, for a new proposed rule for new plants; June 1, 2014, and June 1, 2015, for proposed and final rules, respectively, for existing plants; and June 30, 2016, for state submission of plans regulating existing plants.<sup>6</sup> EPA expects to issue its final standards for new, modified and existing sources under Clean Air Act section 111 this summer.<sup>7</sup>

#### A. Clean Air Act Authority

Section 111 of the Clean Air Act directs EPA to set performance standards to control air pollution from new stationary sources. These “new source performance standards” under section 111(b) establish limits on air pollution for sources in a given category (e.g., fossil fuel-fired power plants, oil refineries, pulp and paper plants, etc.) based on what can be achieved through “the best system of emission reduction. . .adequately demonstrated.”<sup>8</sup> In determining the “best system of emission reduction” (BSER), EPA must take into account cost and “any nonair quality health and environmental impact and energy requirements.”<sup>9</sup> Under section 111(b), EPA proposed performance standards for new coal- and natural gas-fired power plants in September 2013.<sup>10</sup>

For existing sources in a category covered by a new stationary source performance standard, section 111 would defer to other Clean Air Act provisions for pollutants that are: (1) covered by a National Ambient Air Quality Standard (NAAQS); or (2) listed as a hazardous air pollutant under section 112.<sup>11</sup> Pollutants from existing sources that are not otherwise regulated under those provisions are addressed under section 111(d). With respect to such pollutants, section 111(d) requires EPA to issue rules directing the states to reduce pollution from existing sources that would have been covered by a section 111(b) standard if they were new sources.

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<sup>5</sup> President Barack Obama, *Presidential Memorandum – Power Sector Carbon Pollution Standards* (June 25, 2013) (online at [www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards](http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards)).

<sup>6</sup> *Id.*

<sup>7</sup> Senate Committee on Environment and Public Works, Testimony of the Honorable Janet McCabe, Assistant Administrator for Air and Radiation, U.S. Environmental Protection Agency, *Hearing on “Examining EPA’s Proposed Carbon Dioxide Emissions Rules from New, Modified, and Existing Power Plants,”* 114th Cong. (Feb. 11, 2015); U.S. Environmental Protection Agency, *Key Dates: Cutting Carbon Pollution from Power Plants* (Jan. 7, 2015) (online at [www2.epa.gov/sites/production/files/2015-01/documents/20150107fs-key-dates.pdf](http://www2.epa.gov/sites/production/files/2015-01/documents/20150107fs-key-dates.pdf))

<sup>8</sup> Clean Air Act §§ 111(a)(1); 111(b).

<sup>9</sup> *Id.* at § 111(a)(1).

<sup>10</sup> U.S. Environmental Protection Agency, *Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units; Proposed Rule*, 79 Fed. Reg. 1430 (Jan. 8, 2014) (online at [www.gpo.gov/fdsys/pkg/FR-2014-01-08/pdf/2013-28668.pdf](http://www.gpo.gov/fdsys/pkg/FR-2014-01-08/pdf/2013-28668.pdf)).

<sup>11</sup> Clean Air Act § 111(d)(1).

Under section 111(d)(1), EPA must establish procedures for states to submit state plans to regulate existing sources that are similar to the procedures and requirements for State Implementation Plans (SIPs) under section 110.

Specifically, the state plans for existing sources must apply a “standard of performance” for emissions of air pollutants that reflects the degree of emission limitation achievable through BSER, as applied to existing sources. Under this provision, EPA determines the BSER and the emission limitation it can achieve. States have considerable flexibility, however, in deciding how to achieve the overall pollution reduction goals for these sources. The state may take into consideration, for example the remaining useful life of the existing source, as well as other factors.

## **B. Proposed Rule for State Plans for Existing Sources**

### **1. *Outreach Process***

In developing this proposal, EPA has engaged in an unprecedented level of outreach for the pre-proposal stage of a rulemaking, and the proposal reflects extensive stakeholder input.<sup>12</sup> Between August 2013 and June 2014, EPA held an overview webinar and four national teleconferences with states and a wide variety of stakeholders; established a mechanism to accept input by e-mail and web (receiving more than 2,000 emails); held 11 public listening sessions across the country that were attended by over 3,300 people; sent consultation letters to 584 tribal leaders; and organized and participated in hundreds of meetings.<sup>13</sup>

Among others, EPA met with state leaders, including governors, environmental commissioners, energy officers, public utility commissioners and air directors; industry leaders and trade association representatives; private, investor-owned, public and cooperative utilities and their associations; Independent System Operators and Regional Transmission Organizations; environmental and environmental justice organizations; religious groups; public health groups, doctors and health care providers; consumer groups; and individual unions, including the United Mine Workers of America, the International Brotherhood of Boilermakers, the International Brotherhood of Electrical Workers, and the AFL-CIO.<sup>14</sup>

EPA indicated that the public submitted over 3.5 million public comments were submitted on the proposed Clean Power Plan before the December 1, 2014 deadline. The Agency will review and address all of the filed comments before finalizing the rule.<sup>15</sup>

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<sup>12</sup> U.S. Environmental Protection Agency Clean Power Plan at 34845.

<sup>13</sup> *Id.* at 34845-34847.

<sup>14</sup> *Id.*

<sup>15</sup> Senate Committee on Environment and Public Works, Testimony of the Honorable Janet McCabe, Assistant Administrator for Air and Radiation, U.S. Environmental Protection Agency, *Hearing on “Examining EPA’s Proposed Carbon Dioxide Emissions Rules from New, Modified, and Existing Power Plants,”* 114th Cong. (Feb. 11, 2015).

## 2. *Proposed Emission Guidelines for State Plans*

The proposed emissions guidelines establish an individual goal for each state, expressed as a carbon intensity target. The carbon intensity target is a rate-based limit, which is expressed as a limit on the total pounds of carbon dioxide emitted from fossil fuel-fired power plants in the state per megawatt hour (MWh) of electricity generated in the state, adjusted to account for the MWh reduced through energy efficiency savings.<sup>16</sup> The individual state carbon intensity goals are produced by applying a consistent national formula to each state's fossil fuel-fired power plants on a statewide basis, inputting state and regional-specific information to produce state goals that are tailored to each state's circumstances.<sup>17</sup> For each state, EPA proposed a final state goal, to be achieved by 2030, and a less stringent interim goal that would apply for the 2020-2029 phase-in period.<sup>18</sup>

EPA developed the standards through several steps. First, EPA identified the "best system of emission reduction . . . adequately demonstrated" for greenhouse gas emissions from fossil fuel-fired power plants.<sup>19</sup> In identifying the BSER, EPA relied heavily on the fact that the power system is an interconnected and integrated system in which the demand for electricity is met through different sources of electricity supply (including energy savings through efficiency).<sup>20</sup> These different sources are constantly substituted for each other, both in the short term, through the dispatch order of various power sources (including demand-side savings), and over time, through investments in various new sources of supply (including efficiency). EPA proposed that the BSER is comprised of four building blocks: (1) making fossil fuel power plants more efficient; (2) using low-emitting power sources more by generating more electricity from existing natural gas combined cycle units; (3) building more zero and low-emitting power sources including renewables and some nuclear units; and (4) using electricity more efficiently through demand-side measures.<sup>21</sup>

For each building block, EPA analyzed the level of application that would be reasonable for the purpose of establishing state goals, taking into account technical feasibility, the quantity of emissions reductions achieved, the costs per metric ton of carbon dioxide, reliability, and other factors.<sup>22</sup> EPA emphasized that it was not identifying the maximum quantity of pollution reduction that could be achieved through each building block, but only identifying a level of

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<sup>16</sup> U.S. Environmental Protection Agency Clean Power Plan at 34892.

<sup>17</sup> *Id.* at 34890-34892.

<sup>18</sup> *Id.* at 34895.

<sup>19</sup> *Id.* at 34835-34837, 34854-34890.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; U.S. Environmental Protection Agency, *Fact Sheet: Clean Power Plan; National Framework for States* (June 2, 2014) (online at [www2.epa.gov/sites/production/files/2014-05/documents/20140602fs-setting-goals.pdf](http://www2.epa.gov/sites/production/files/2014-05/documents/20140602fs-setting-goals.pdf)).

<sup>22</sup> U.S. Environmental Protection Agency Clean Power Plan at 34836, 34858-34875.

application that would be reasonable.<sup>23</sup> For building block 1, EPA estimates that on average, existing coal-fired units can improve their heat rate (efficiency of power production) by 6%.<sup>24</sup> For building block 2, EPA estimates that existing natural gas combined cycle units could be used at up to 70% of their capacity.<sup>25</sup> For building block 3, EPA developed a methodology to estimate the technical and economic renewable energy potential for each state, based on existing levels of renewable generation in each state and region-specific growth factors, as well as estimating the amount of nuclear generating capacity that could be preserved from retirement.<sup>26</sup> For building block 4, EPA estimates, based on the performance achieved by the top 12 states, that it would be reasonable for each state to increase the level of demand-side energy efficiency to achieve an efficiency improvement rate of 1.5% per year.<sup>27</sup>

Next, EPA proposed to determine that the BSER is the combination of all four building blocks, each applied at the identified reasonable level of effort.<sup>28</sup> Applying this BSER to the specific circumstances of each state produces the state goals, expressed as a carbon intensity target for the fossil fuel-fired generation in each state. The state goals vary widely, from a low (most stringent) goal of 228 pounds of carbon dioxide per MWh in Washington, to a high (least stringent) goal of 1,783 pounds of carbon dioxide per MWh in North Dakota.<sup>29</sup>

### 3. *State Flexibilities*

Under EPA's proposal, the basic elements for a state plan to be approvable are: the plan includes enforceable carbon dioxide limits on fossil fuel-fired power plants; any additional measures that would reduce carbon from these sources are also enforceable; and the plan demonstrates that the state will achieve its state goal over the specified time frame.<sup>30</sup> EPA proposed multiple ways to maximize state flexibility in controlling carbon pollution from power plants and achieving the state goals.<sup>31</sup> States and other stakeholders requested these flexibilities in the pre-proposal process.

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<sup>23</sup> *Id.* at 34858-34875, 34893 (emphasis added).

<sup>24</sup> *Id.* at 34859-34862.

<sup>25</sup> *Id.* at 34862-34866.

<sup>26</sup> *Id.* at 34866-34871.

<sup>27</sup> *Id.* at 34871-34875.

<sup>28</sup> *Id.* at 34878-34890.

<sup>29</sup> *Id.* at 34895.

<sup>30</sup> *Id.* at 34837-34838; *see also id.* at 34909-34914 (detailing criteria for approvable state plan).

<sup>31</sup> *Id.* at 34897-34898.

First, EPA proposed that a state could either use its rate-based goal, or could convert that goal (using a proposed formula for the translation) into a mass-based goal, which would cap the total quantity of carbon dioxide emissions from fossil fuel-fired power plants in the state.<sup>32</sup>

Second, EPA proposed that states should have extensive flexibility in their plans in deciding how to achieve their state-wide goals.<sup>33</sup> While EPA used the building blocks to determine what would be a reasonable carbon intensity goal for each state, EPA emphasized that there is no obligation for the states to use the particular control measures, or apply them at the same levels, that EPA identified as the BSER.<sup>34</sup> In the proposal, EPA identified the potential for greater emissions reductions for each of the building blocks compared to the levels at which EPA applied each building block to generate the state goals.<sup>35</sup> EPA also identified other measures that states could employ in addition to measures under the building blocks, including co-firing with natural gas, building new natural gas power plants, and building new nuclear capacity beyond what is already planned.<sup>36</sup> In addition, EPA's proposal permits a state to choose either to place the full compliance obligation on fossil fuel-fired power plants in the state or undertake a "portfolio approach." A portfolio approach would include additional measures, such as state or local demand-side efficiency programs, that would reduce emissions from fossil fuel-fired power plants but would be undertaken by the state or other entities.<sup>37</sup> EPA also proposed that states could choose to achieve their state goals through participation in multi-state approaches, which EPA expects could enhance efficiency and lower costs.<sup>38</sup>

Third, EPA proposed to provide flexibility in the timing both of when states must submit their plans and of when emission reductions would have to be achieved. States must submit their plans by June 2016; however, EPA proposed to allow a one-year extension for states that submit an initial plan but need additional time to complete it and a two-year extension for states participating in multi-state programs.<sup>39</sup> The ten-year phase-in period for achieving the reductions allows for the use of measures, such as energy efficiency, that ramp up over time.<sup>40</sup> States also would not be required to meet their interim goal each year, but rather would be able to meet their goals on average over the 2020-2029 period.<sup>41</sup>

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<sup>32</sup> *Id.* at 34893-34894.

<sup>33</sup> *Id.* at 34837-34838.

<sup>34</sup> *Id.* at 34897.

<sup>35</sup> *Id.* at 34858-34876.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 34897, 34900-34902.

<sup>38</sup> *Id.* at 34833, 34900, 34910.

<sup>39</sup> *Id.* at 34915; U.S. Environmental Protection Agency, *Key Dates: Cutting Carbon Pollution from Power Plants* (Jan. 7, 2015) (online at [www2.epa.gov/sites/production/files/2015-01/documents/20150107fs-key-dates.pdf](http://www2.epa.gov/sites/production/files/2015-01/documents/20150107fs-key-dates.pdf)).

<sup>40</sup> *Id.* at 34838-34839, 34899, 34904-34906.

<sup>41</sup> *Id.* at 34906.

#### 4. *Benefits and Costs of the Proposal*

If the proposed rule is finalized, EPA estimates that in 2030, carbon pollution from the power sector will be reduced by 30% compared to 2005 levels.<sup>42</sup> In addition, this rule will cut pollution that leads to soot and smog by more than 25% in 2030.<sup>43</sup> EPA estimates the climate and public health benefits of these pollution controls will range anywhere between \$55 billion and \$93 billion in 2030, and will help avoid between 2,700 and 6,600 premature deaths and 140,000 and 150,000 asthma attacks in children in 2030 alone.<sup>44</sup> EPA estimates that the benefits of the proposal will outweigh the costs by at least 6 to 1, and by possibly as much as 12 to 1.<sup>45</sup> In addition, while electricity prices may increase somewhat, EPA estimates that, due to increased use of cost-effective energy efficiency measures, actual electricity bills will fall by roughly 8% in 2030.<sup>46</sup>

#### **ANALYSIS OF H.R.2042 THE “RATEPAYER PROTECTION ACT OF 2015”**

The following is a brief summary and analysis of the legislation

##### **A. Summary of H.R. 2042**

Section 2 of the bill delays implementation of the final Clean Power Plan by extending all compliance deadlines based on pending judicial review. Under subsection (b), the compliance or submission date extension applies to “any final rule to address carbon dioxide emissions from existing sources that are fossil fuel fired electric utility generating units under section 111(d) of the Clean Air Act.” Also, subsection (b) specifically references and applies to rules that grow out of both the Clean Power Plan and the November 4, 2014 supplemental proposal covering Indian Country and U.S. Territories.<sup>47</sup>

Subsection (c) establishes a uniform time period for all Clean Power Plan compliance and submission deadline extensions. Under the legislation, the time period starts 60 days after the

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<sup>42</sup> U.S. Environmental Protection Agency, *Fact Sheet: Clean Power Plan, Overview of the Clean Power Plan* (June 2, 2014) (online at [www2.epa.gov/sites/production/files/2014-05/documents/20140602fs-overview.pdf](http://www2.epa.gov/sites/production/files/2014-05/documents/20140602fs-overview.pdf)).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> U.S. Environmental Protection Agency, *Fact Sheet: Clean Power Plan, By the Numbers* (June 2, 2014) (online at [www2.epa.gov/sites/production/files/2014-06/documents/20140602fs-important-numbers-clean-power-plan.pdf](http://www2.epa.gov/sites/production/files/2014-06/documents/20140602fs-important-numbers-clean-power-plan.pdf)).

<sup>46</sup> U.S. Environmental Protection Agency, *Fact Sheet: Clean Power Plan, Overview of the Clean Power Plan* (June 2, 2014) (online at [www2.epa.gov/sites/production/files/2014-05/documents/20140602fs-overview.pdf](http://www2.epa.gov/sites/production/files/2014-05/documents/20140602fs-overview.pdf)) (emphasis added).

<sup>47</sup> H.R.2042, the “Ratepayer Protection Act of 2015,” at § 2(b).

final rule appears in the Federal Register, and ends when “judgment becomes final, and no longer subject to further appeal or review.”<sup>48</sup>

Section 3 of the bill restates current law, that no state is required to submit a 111(d) plan. Subsection (a) further allows any governor to decide that the state shall not be subject to a federal 111(d) plan, if the governor makes a determination that implementation of the state or federal plan would “have a significant adverse effect on the State’s residential, commercial, or industrial ratepayers” or would “have a significant adverse effect on the reliability of the State’s electricity system.”<sup>49</sup>

In making a determination on the state or federal plan’s impact on ratepayers and electric reliability, the governor shall take into account a number of specific factors. Regarding the potential impact on ratepayers, a governor must consider any rate increases that are either associated with, or necessary for, implementation of the state or federal plan, as well as “other rate increases that have been or are anticipated to be necessary to implement, or are associated with, other Federal or State environmental requirements.”<sup>50</sup> Further, the governor must consider the state’s existing and planned electricity generation, retirements, transmission and distribution infrastructure, and projected demand when determining the state or federal plan’s impact on electric reliability.<sup>51</sup>

Subsection (b) requires the governor to consult with the public utility commission or public service commission of the state, state environmental protection, public health and economic departments, and any regional transmission organization or independent service operator with jurisdiction over the state.

## **B. Issues Raised by the H.R. 2042**

This legislation raises several major issues. In summary, the bill would suspend implementation of the Clean Power Plan and effectively prevent EPA from ever controlling carbon pollution from existing power plants to any significant degree, if a state fails—or outright refuses—to comply with the requirements of section 111(d) of the Clean Air Act.

The bill’s proponents argue that legislation is needed to delay implementation of the Clean Power Plan until all legal challenges are resolved by the courts. However, legal challenges to final EPA rules are routine and courts have the power on their own to stay the effectiveness of regulations under court challenge. The bill throws out the existing judicial process by legislatively granting a blanket extension for any compliance deadline, regardless of the merits of the legal challenge or the final outcome. Under the legislation, the Clean Power Plan would automatically be delayed by however much time it takes to conclude litigation, providing encouragement both for frivolous challenges and additional appeals in order to

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<sup>48</sup> *Id.* at § 2(c).

<sup>49</sup> *Id.* at § 3(a).

<sup>50</sup> *Id.* at § 3(a)(1).

<sup>51</sup> *Id.* at § 3(a)(2).

extend the ultimate compliance time.

The bill's proponents have also argued that the legislation is needed to provide a "safe harbor" for states who cannot—or will not—comply with the requirements of the Clean Power Plan. Under current law, EPA sets the emissions reduction goals under section 111(d) and it is up to the states to decide how to best achieve these reductions. States are not required to develop or implement their own plans for reducing carbon emissions from existing power plants, but EPA is required to step in with a federal 111(d) plan when a state does not implement its own. The Clean Air Act's use of cooperative federalism ensures that environmental risks are addressed, either by state action or by federal action where a state fails to act.

The bill's opt-out provision disregards decades of success under the Clean Air Act's use of cooperative federalism. Instead, the draft would allow governors to refuse to comply unconditionally with the federal requirements of the Clean Power Plan. A governor would be able to take the "Just Say No" approach to reducing carbon emissions by simply determining that compliance with a phantom plan would adversely impact ratepayers or electric reliability.

A number of amendments were offered during the full committee markup to address these concerns. The first, offered by Rep. Tonko, would ensure that a governor's decision to opt-out of the Clean Power Plan is subject to judicial review. The amendment highlighted that a governor's decision to not follow federal law is completely unreviewable under the bill. The second amendment, offered by Rep. Rush, would require a governor wishing to opt-out of the Clean Power Plan, to certify that the ratepayer costs attributed to implementation of the Clean Power Plan must exceed the state costs of responding to extreme weather events caused by climate change such as sea level rise, flooding, storms, wildfires and drought. Rep. Rush also offered an amendment that would require a governor wishing to opt-out of the Clean Power Plan, to certify that such a decision would not result in significant adverse public health effects, including childhood asthma attacks, heart attacks, hospital admissions, and missed school and work days. Finally, Rep. Pallone offered an amendment to add a sense of Congress that the federal government should promote national security, economic growth and public health by addressing human induced climate change through the increased use of clean energy, energy efficiency and reductions in carbon pollution. The amendment was identical to an amendment offered by Sen. Bennet, which passed the Senate on March 26, 2015, with the support of all Democratic Senators, as well as seven Republican Senators.<sup>52</sup> All amendments were defeated in full committee on a party line vote. H.R. 2042 was approved by the full committee by a party line vote of 28-23.

## **LEGAL ISSUES RELATED TO THE CLEAN POWER PLAN**

Although numerous parties critical of the Clean Power plan have suggested that EPA lacks authority for the plan or that the details of the plan cannot be squared with the language of the Clean Air Act, there is ample reason to believe that legal challenges to the EPA rule will ultimately fail. EPA has set forth its interpretation of the Clean Air Act as applied to the Clean

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<sup>52</sup> Ayotte, Collins, Graham, Heller, Murkowski, Kirk and Portman

Power Plan in a detailed legal memorandum and its interpretation is reasonable, grounded in the statute and case law and supported by the facts.<sup>53</sup> EPA's reasonable interpretation of the statute will be entitled to deference.<sup>54</sup>

### **Analysis of EPA Legal Authority**

As an initial matter, it is beyond dispute that the Statutes at Large, not the United States Code provide definitive evidence of the law. The majority report recognizes this fact at footnote 24, and specifically cites 1 U.S.C. 112 for that proposition ("the Statutes at Large serve as legal evidence of the law.") Nor can it be disputed that there are two provisions relating to section 111(d) in the Statutes at Large and both provisions were passed by both chambers of Congress in identical fashion and both provisions were signed by the President into law.

Despite the majority report's consistent citation to the United States Code, on this point, the United States Code is not the law and it cannot be considered controlling. As the majority admits, only when the United States Code is "enacted as positive law" does it "replace the statutes at large" as "legal evidence of the laws."<sup>55</sup> Such codification has not happened and therefore the Statutes at Large, with both the House and Senate provisions are the law of the United States.<sup>56</sup>

Contrary to the views of the majority, there is no evidence that the Senate-originated language was enacted into law in error, whereas a wealth of evidence shows that it was intentionally adopted by Congress. Because there is no dispute that this language was included in the final bill passed by both houses of Congress and signed into law by the President of the United States, the Senate provision is just as much part of the Clean Air Act as the House-originated language. For EPA now to disregard that Senate provision would be a dereliction of the executive's duty to "take care the laws be faithfully executed."<sup>57</sup>

In addition, the majority report cites the Chafee-Baucus "Statement of Senate Managers" as evidence that the Senate-originated amendment is nothing more than a scrivener's error. In

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<sup>53</sup> U.S. Environmental Protection Agency, *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* (June 2, 2014) (online at [www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf](http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf)).

<sup>54</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

<sup>55</sup> Majority Report at footnote 24.

<sup>56</sup> See *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) ("[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent.") (quoting *Stephan v. United States*, 319 U.S. 423, 426 (1943)); see also *Five Flags Pipe Line Co. v. DOT*, 854 F.2d 1438, 1440 (D.C. Cir. 1988) ("Thus, where the language of the Statutes at Large conflicts with the language in the United States Code that has not been enacted into positive law, the language of the Statutes at Large controls.")

<sup>57</sup> U.S. Const., art. II, § 3.

fact, this document is entitled to no legal weight and is scant evidence of the actual intent of Congress as a whole in adopting the 1990 Clean Air Act Amendments. This statement by two members of one chamber was not reviewed or approved by all of the Senate conferees, let alone by the House conferees.<sup>58</sup> Nor was it reviewed by the members of Congress who voted to adopt the final statutory language or by the President who signed the final statute into law. For these reasons, the D.C. Circuit has explicitly held that the Chafee-Baucus Statement “cannot undermine the statute’s language.”<sup>59</sup>

The majority’s interpretation of section 111(d) merely repeats the arguments made by Murray Energy in their failed lawsuits in the D.C. Circuit challenging EPA’s proposed Clean Power Plan. These arguments are not persuasive and are undercut by the text, structure, design, and history of the Clean Air Act, which demonstrate that the agency must regulate carbon dioxide pollution from existing power plants under section 111(d), regardless of whether or not it has regulated power plants’ hazardous air pollutant (“HAP”) emissions under section 112. EPA’s actions are fully in accord with the purpose of section 111(d), and the Clean Power Plan is on solid legal footing.

In 1990, Congress enacted two amendments to section 111(d)(1)(A)(i) to replace an obsolete cross-reference to the list of HAPs. As the Congressional Research Service’s (CRS) legislative history, compiled shortly thereafter, these amendments “appear to be duplicative; both, in different language, change the reference to section 112.”<sup>60</sup> Despite the arguments of the majority, both the Senate and House amendments authorize EPA’s promulgation of the Clean Power Plan. There is no doubt that the Senate amendment permits EPA to regulate power plant CO<sub>2</sub> emissions under section 111(d), since it requires the agency to control “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) . . . .” Since the agency has not issued air quality criteria for CO<sub>2</sub> or listed it under section 108(a) or 112(b), it must regulate carbon dioxide pollution from existing power plants.

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<sup>58</sup> *see* U.S. Senate, Debate on Agreeing to H. Rept 101-952 (Oct. 27, 1990)

<sup>59</sup> *Environmental Defense Fund v. EPA*, 82 F.3d 451, 460 n. 10 (D.C. Cir. 1996).

<sup>60</sup> *See* Congressional Research Service, *A legislative History of the Clean Air Act Amendments of 1990, Prepared for the Committee on Environment and Public Works*, 103rd Cong. (1993) (S. Pt. 103-38, Vol. I at 46 n.1). To the extent the two provisions conflict with one another, EPA is entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984) in resolving the conflict. *See Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (where “internal tension” in provision “makes possible alternative reasonable constructions, . . . *Chevron* dictates that a court defer to the agency’s . . . expert judgment about which interpretation fits best with, and makes the most sense of, the statutory scheme.”) (Kagan, J., plurality); *id.* at 2228 (“before concluding that Congress has legislated in conflicting and unintelligible terms,” “traditional tools of statutory construction” should be used to “allow [the provision] to function as a coherent whole”) (Sotomayor, J. dissenting). As discussed below, EPA’s interpretation of the statute is reasonable and consistent with the text, history, purpose, and structure of section 111(d), and thus merits *Chevron* deference.

The best interpretation of the House-originated provision produces an identical result, consistent with the observation that the two amendments are “duplicative.” Therefore even if one were to rely solely on the House provision and exclude the Senate language (which again, would be to disregard the actual law), EPA would continue to have authority to promulgate the Clean Power Plan.

The House language directs the agency to regulate “any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or emitted from a source category which is regulated under section 112 . . . .” Because EPA has not issued air quality criteria for carbon dioxide or listed it under section 108(a), this language requires the agency to regulate existing sources’ emissions of carbon dioxide under section 111(d) unless carbon dioxide qualifies as an “air pollutant . . . emitted from a source category which is regulated under section 112.”

In construing this provision, it is necessary to consider “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”<sup>61</sup> Considered by itself, the House language is ambiguous. One key source of ambiguity is the meaning of the phrase “regulated under section 112.” To determine whether section 112 “regulate[s]” existing sources of carbon dioxide, it is necessary to parse the “what” of the term “regulate[s].”<sup>62</sup> . It is not facially clear whether this language exempts an existing source of carbon dioxide from regulation under section 111(d) when the source is subject to *any* requirement under section 112, or specifically when it is subject to a requirement under section 112 *with respect to its carbon dioxide emissions*.<sup>63</sup>

The textual ambiguity is resolved when the House-originated language is read in light of “the specific context in which that language is used, and the broader context of the statute as a whole.”<sup>64</sup> Reading the House-originated language to bar section 111(d) regulation of non-HAPs from any source category regulated under section 112 does not make sense in the immediate context in which the language appears. The House language modifies the phrase “any air pollutant”—not the phrase “any existing source”—and appears alongside two other subclauses that exclude certain air pollutants from regulation under section 111(d). The natural inference is that the House language excludes a set of air pollutants, not a set of sources.

The same conclusion follows from consideration of the broader statutory context. The Senate-originated amendment<sup>65</sup>, unambiguously exempts only HAPs from regulation under

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<sup>61</sup> *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

<sup>62</sup> *Cf. Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 366 (2002) (to determine whether a law “regulates insurance,” it is necessary to “pars[e] . . . the ‘what’” of the term “regulates”)

<sup>63</sup> *Cf. Rush Prudential*, 536 U.S. at 366 (a law does not “regulate[s] insurance” unless “insurers are regulated *with respect to their insurance practices*”) (emphasis added).

<sup>64</sup> *Robinson*, 519 U.S. at 341.

<sup>65</sup> Clean Air Act Amendments of 1990, Pub. L. 101-549, § 302(a).

section 111(d). The natural inference is that the House-originated amendment performs a similar or identical function, since the simplest explanation for the conferees' failure to reconcile the two amendments is that, in the absence of any substantive difference between the position of the two chambers, the conferees failed even to notice the presence of two amendments to the same clause. Indeed, this view is supported by the conclusion that the two provisions are "duplicative."<sup>66</sup>

Lending additional support to this position is section 112(d)(7) of the statute, also enacted in 1990. Section 112(d)(7) provides that "[n]o emission standard or other requirement promulgated under [section 112] shall be interpreted . . . to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section [111]" or "other authority of [the Clean Air Act]."<sup>67</sup> This provision is clear evidence that Congress did not intend regulation of a source's HAP emissions under section 112 to displace regulation of that source's other emissions under section 111(d). On the contrary, Congress fully expected identical sources to be regulated under sections 111 and 112 at the same time; otherwise, section 112(d)(7) would make no sense.

Furthermore, section 111(d) must be interpreted in a manner that is consistent with the Clean Air Act's "structure and design."<sup>68</sup> Section 111(d) is one of three major regulatory programs that Congress enacted in 1970 to control air pollution from existing industrial sources.<sup>69</sup> Each program—the NAAQS program under sections 108-110, the HAP program under section 112, and section 111(d)—was designed to regulate a specific class of air pollutants. Together, the three programs were designed to provide a comprehensive regulatory scheme for existing sources with "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare."<sup>70</sup>

Section 111(d) would be largely eviscerated if section 111(d)(1)(A)(i) were construed to exempt *all emissions* (HAP and non-HAP alike) from any source subject to regulation under section 112 with respect to its HAP emissions, since as Congress intended, every large industrial source category is subject to regulation under section 112 for its HAP emissions.<sup>71</sup> The majority's view of section 111(d) would destroy the conscientious design of the Clean Air Act and would, perversely, change a *gap-filling* provision—section 111(d)—into a *gap-creating* provision. This would turn the law on its head.

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<sup>66</sup> Congressional Research Service, *A legislative History of the Clean Air Act Amendments of 1990, Prepared for the Committee on Environment and Public Works*, 103rd Cong. (1993) (S. Prt. 103-38, Vol. I at 46 n.1).

<sup>67</sup> 42 U.S.C. § 7412(d)(7).

<sup>68</sup> *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014).

<sup>69</sup> See 40 Fed. Reg. 55,240 (Nov. 17, 1975).

<sup>70</sup> Senate Committee on Public Works, *National Air Quality Standards Act of 1970*, 91st Cong. (1970) (S. Rept. 91-1196); see also 40 Fed. Reg. 55,240 (Nov. 17, 1975).

<sup>71</sup> See 42 U.S.C. § 7412(c)(1) (requiring the listing of "all categories and subcategories of major sources and area sources" of HAPs).

There is simply no evidence that Congress intended to abandon the Clean Air Act's seamless, tripartite regulatory framework in 1990. To the contrary, the legislative history of the 1990 amendments "reflects Congress' desire to require EPA to regulate more substances," not fewer.<sup>72</sup> The regulatory history of section 111(d) is in accord with the legislative history. EPA has regularly used section 111(d) to regulate non-HAP emissions from sources that were simultaneously regulated with respect to their HAP emissions under section 112.<sup>73</sup> Moreover, in the four presidential administrations since the 1990 Amendments, EPA has consistently interpreted section 111(d) to authorize and require the regulation of any air pollutant not regulated under the NAAQS or HAP program.<sup>74</sup>

The majority's interpretation of the House language would also produce absurd results. Under that reading of the statute, EPA would only be prohibited from issuing section 111(d) regulations for existing power plants if a section 112 rule for those sources were already finalized and in effect. It would not, however, prohibit EPA from issuing section 111(d) regulations *first* and *subsequently* regulating those sources under section 112. In other words, under the majority's view, if EPA waited until the day after it finalized power plant CO<sub>2</sub> regulations to issue the Mercury Air Toxics Standards (MATS) rule, the agency would be within its legal rights; but if it issued the MATS rule the day *before* it finalized power plant CO<sub>2</sub> regulations, it would relinquish its authority to promulgate the latter regulation. This is, of course, a nonsensical outcome, and illustrates in stark terms why the majority's reading of the Clean Air Act is untenable.

Also debunking the majority's interpretation of the statute is the Supreme Court's opinion in *American Electric Power Co. v. Connecticut (AEP)*.<sup>75</sup> In *AEP*, Connecticut and other states urged the recognition of a federal common law cause of action that would allow states injured by climate change to sue the owners of existing coal-fired power plants, the nation's largest emitters of CO<sub>2</sub>. The companies insisted that the nuisance remedy was not available because Congress, by enacting the Clean Air Act, had conferred authority on EPA to regulate carbon dioxide emissions, including from petitioners' power plants. The companies emphasized that the Clean Air Act is a "comprehensive regulatory scheme," and pointed to language from the sponsors of

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<sup>72</sup> 70 Fed. Reg. 15,994, 16,032 (Mar. 29, 2005).

<sup>73</sup> See 70 Fed. Reg. at 16,032; see also *Amicus Br. of Inst. For Policy Integrity* ("IPI Brief") at 10-11, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. 2015) (discussing municipal solid waste landfills).

<sup>74</sup> See IPI Brief at 8-22; see also U.S. Environmental Protection Agency, *Memorandum of EPA General Counsel Jonathan Z. Cannon, to EPA Administrator Carol M. Browner, Re: EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* at 3 n.2 (Apr. 10, 1998) (stating that EPA's duty to regulate under section 111(d) extends to any dangerous air pollutant "except criteria pollutants or hazardous air pollutants").

<sup>75</sup> *American Electric Power Co. v. Connecticut* ("AEP"), 131 S. Ct. 2527 (2011).

the 1990 amendments who “repeatedly characterized the Act as ‘comprehensive,’ and commented on its expansive reach.”<sup>76</sup>

The petitioners’ briefs in *AEP* pointed specifically to EPA’s authority to regulate existing power plants under section 111(d),<sup>77</sup> and highlighted the absence of any “‘gap’ in the statutory system with respect to the particular emissions restrictions plaintiffs seek.”<sup>78</sup> The Supreme Court, by an 8-0 vote, adopted industry’s argument, holding that section 111(d) “speaks directly to emissions of carbon dioxide from the defendants’ power plants,”<sup>79</sup> thereby displacing federal common law.

In a footnote, the *AEP* Court wrote that “EPA may not employ [section 111(d)] if existing stationary sources of *the pollutant in question* are regulated under the [NAAQS] program . . . or the [HAP] program.”<sup>80</sup> The Court understood the relevant question to be whether existing sources are regulated with respect to the “pollutant in question” under the NAAQS or HAP programs. Crucially, the Court treated the NAAQS exclusion and the HAP exclusion as parallel limits on EPA’s authority. The NAAQS exclusion clearly excludes a class of pollutants, not sources, from regulation under section 111(d).<sup>81</sup> The Court’s syntax indicates that it understood the HAP exclusion to establish a parallel, pollutant-based exclusion. Thus, the Court’s footnote is properly read to provide that “EPA may not employ [section 111(d)] if existing stationary sources of the pollutant in question are regulated” *with respect to that pollutant* under the NAAQS program or HAP program. Had the Court *not* intended the HAP exclusion to be pollutant-specific, a key premise of its unanimous merits holding—EPA’s authority to regulate power plants’ carbon dioxide pollution under section 111(d)—would have been negated, since power plants’ emissions of criteria pollutants have been regulated since the 1970s.

Notably, the section 112(n)(1) rule regulating power plants’ HAP emissions (known as the Mercury and Air Toxics Standards rule) was well advanced during the briefing in *AEP*<sup>82</sup>, and

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<sup>76</sup> Petitioner’s Brief at 9, 42, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (D.C. Cir. No. 10-174) (2011) (internal citations omitted). *See also* Amicus Br. of Edison Elec. Inst., *et al.*, in Support of Pets. At 9, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (D.C. Cir. No. 10-174) (2011) (brief of leading power industry associations, stating: “In the case of air pollutants that are not regulated under certain other provisions of the Clean Air Act, such as [greenhouse gases], the Act then ‘requires the States to determine appropriate control limits for existing sources for which there is an NSPS.’”) (internal citation omitted).

<sup>77</sup> Pet’s Br. at 6–7, 47,

<sup>78</sup> Reply Br. at 17, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (D.C. Cir. No. 10-174) (2011).

<sup>79</sup> 131 S. Ct. at 2537.

<sup>80</sup> *Id.* at 2538 n.7 (emphasis added).

<sup>81</sup> *See* 42 U.S.C. § 7411(d)(1)(A)(i) (providing that EPA may regulate “any air pollutant . . . which is not included on a list published under section [108(a)]”).

<sup>82</sup> *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (D.C. Cir. No. 10-174) (2011).

the proposed rule was signed by the Administrator more than a month before the *AEP* oral argument and more than three months before the Court's decision came down. No party suggested in *AEP* that EPA's authority to regulate carbon dioxide would go away with the promulgation of a section 112(n)(1) standard for power plants.<sup>83</sup> It is highly implausible that the Court believed the statutory authority underlying its displacement analysis would disappear within months if EPA finalized the emission standards for power plants' HAPs emissions that it had already proposed.

Despite the text, structure, and history of section 111(d), the consistent practice of EPA with regard to that provision, and the Supreme Court's holding in *AEP*, the majority maintains that EPA may not regulate CO<sub>2</sub> emissions from existing power plants under section 111(d). Not only is the majority's view of the House-originated language incorrect, its argument fails independently unless the Senate-originated language is simply excised from the statute as a "drafting error" or a non-substantive "conforming amendment." The majority report cites no cases, precedents, or other legal authorities holding that a duly enacted provision in the Statutes at Large can be disregarded in this manner. On the contrary, the Supreme Court has instructed that courts must "give effect, if possible, to every word Congress used" when construing a statute.<sup>84</sup> The Court has also admonished against "plac[ing] more weight on the 'Conforming Amendments' caption than it can bear."<sup>85</sup>

Furthermore, there is no evidence that the Senate amendment was adopted in error. A scrivener's error is "a mistake made by someone unfamiliar with the law's object and design,"<sup>86</sup> which produces language with "no plausible interpretation."<sup>87</sup> In contrast, the Senate's eighteen-word amendment makes it clear that substituting "112(b)" for "112(b)(1)(A)" was precise and intentional, not a typographical error. The amendment maintains section 111(d)'s prior function in the Act's comprehensive regulatory scheme and produces a perfectly sensible result. Moreover, the drafting history of the 1990 amendments indicates that the conferees restored the Senate-originated language to the final bill after it emerged from the House.

In any case, the Chafee-Baucus Statement provides no support for the majority's position. The statement says nothing to suggest that Congress intended to create a gap in the pre-existing comprehensive coverage of all dangerous air pollutants. The most plausible explanation for this silence is that Chafee and Baucus saw no difference in meaning between the Senate and House provisions and believed them consistent with the "no gaps" policy in place since 1970.

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<sup>83</sup> *Id.*

<sup>84</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

<sup>85</sup> *Burgess v. United States*, 553 U.S. 124, 135 (2008). *See also United States v. R.L.C.*, 503 U.S. 291, 305 n.5 (1992) (refusing to disregard the effects of a "technical amendment" because "a statute is a statute, whatever its label").

<sup>86</sup> *U.S. Nat'l. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 (1993),

<sup>87</sup> *Williams Co. v. FERC*, 345 F.3d 910, 913 n.1 (D.C. Cir. 2003).

For these reasons, the majority is incorrect to assert that EPA may not regulate CO<sub>2</sub> emissions from existing power plants due to the earlier promulgation of the MATS rule. On the contrary, the Clean Air Act directs the agency to control all of the dangerous air emissions from existing major sources such as power plants. The Clean Power Plan is well within EPA's authority under section 111(d), and arguments to the contrary miss the mark.

### **Other Legal Arguments**

The majority report also raises other legal arguments against the Clean Power Plan, including an argument that EPA may not take a system-wide approach to regulating greenhouse gases from electric generating units. EPA has addressed this issue at length in its Legal Memorandum.<sup>88</sup>

Clean Air Act section 111 defines the term “standard of performance” as “a standard for emissions of air pollution which reflects the degree of emission limitation achievable through the best system of emission reduction...which the Administrator determines has been adequately demonstrated.”<sup>89</sup> That definition is clearly broad enough to encompass the four building block approach contemplated by the proposed EPA Clean Power Plan. As EPA notes in its Legal Memorandum, when each component term of “system of emission reduction” is given its ordinary meaning, the overall term is reasonably defined as “any set of things that reduces emissions.”<sup>90</sup>

Moreover, section 111(d) makes clear that the procedure governing submission of state 111(d) plans shall be “similar” to the procedure governing submission of SIPs under Clean Air Act section 110.<sup>91</sup> Section 110, in turn, makes clear that such plans may include “economic incentives such as marketable permits or auctions of emission allowances.”<sup>92</sup> Thus, it is not only clear that EPA would have authority to consider the use of such emission reduction methods, but also, there is a strong argument that EPA may be required to consider such methods in setting the appropriate emission limit under section 111(d).

In the legislative history of the 1977 amendments, Congress indicated that EPA should consider beyond-the-fence measures in regulating under section 111. For example, the legislative history instructed that EPA should consider “oil desulfurization/denitrification *at the*

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<sup>88</sup> U.S. Environmental Protection Agency, *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* (June 2, 2014) (online at [www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf](http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf)).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 51.

<sup>91</sup> Clean Air Act § 111(d)(1).

<sup>92</sup> Clean Air Act § 110(a)(2)(A).

*refinery*” in establishing emission standards for oil-fired power plants.<sup>93</sup> The Conference Committee was in agreement: EPA should “give credit for accepted minemouth and other precombustion fuel treatment processes, whether they occur at, or are achieved by, the source or by another party.”<sup>94</sup> Thus, Congress specifically contemplated that section 111 standards would reflect the availability of credits for off-site activities implemented by third parties, even during the years (1977-1990) when the statute required standards for new sources to reflect the application of a “*technological* system of continuous emission reduction.”

In addition there is precedent in EPA rulemakings under the Clean Air Act for reductions that take place at off-site locations, such as coal pre-treatment requirements for coal fired electric generating units.<sup>95</sup> Furthermore there is also precedent for crediting zero emission output sources in an averaging plan.<sup>96</sup>

In short, EPA’s proposed rule relies on a system-based approach that is grounded in the language of the statute and for which there is ample authority and precedent under the Clean Air Act and in EPA rulemakings that have been upheld on judicial review. There is no reason to expect that EPA’s approach will not be upheld.

### **Legislation Addressing a Proposed Rule**

On June 9, 2015, the United States Court of Appeals for the District of Columbia Circuit denied the Petitions for Review of EPA’s proposed Clean Power Plan filed by the Murray Energy Corporation and the State of West Virginia.<sup>97</sup>

Although most of the legal arguments set forth in the majority report were briefed in that case, the rationale for the court’s decision was very simple. The court declined to review a proposed rule. As Judge Kavanaugh noted in his opinion:

EPA has not yet issued a final rule. It has issued only a proposed rule. Petitioners nonetheless ask us to jump into the fray now. They want us to do something they

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<sup>93</sup> U.S. House of Representatives, Conference Report, *Clean Air Amendments of 1977*, at 130, 95th Cong. (Aug. 3, 1977) (H. Rept. 95-564).

<sup>94</sup> U.S. House of Representatives, Conference Report, *Clean Air Amendments of 1977*, at 130, 95th Cong. (Aug. 3, 1977) (H. Rept. 95-564).

<sup>95</sup> U.S. Environmental Protection Agency, *New Stationary Sources Performance Standards; Electric Utility Steam Generating Units*, 44 Fed. Reg. 33580, 33581 (June 11, 1979).

<sup>96</sup> See U.S. Environmental Protection Agency, *2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards*, 77 Fed. Reg. 62624, 62627-28 (Oct. 15, 2012). See also U.S. Environmental Protection Agency, *Joint Technical Support Document: Final Rulemaking for 2017-2025 Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards* at 3-7 (2012) (crediting of zero emission vehicles).

<sup>97</sup> See *In Re Murray Energy Corporation v. EPA*, No 14-1112, Slip op. (D.C. Cir. 2015)

candidly acknowledge we have never done before: review the legality of a proposed rule. But a proposed rule is just a proposal...We deny the petitions for review and the petition for a writ of prohibition because the complained of action is not final.<sup>98</sup>

H.R. 2042 has the same problem. The rule is not yet final. H.R. 2042 seeks to have Congress legislate to address a proposed rule, not a final rule. It would be extraordinary enough for Congress to pass legislation extending by law the implementation dates of a final EPA rule and explicitly giving the states the ability to disregard federal law. However, here, Congress would be acting in similar fashion with regard to a proposed rule. It is entirely possible that EPA will act in the final rule to address many of the issues that are raised in the majority report and that the projected dire impacts will either be greatly mitigated, eliminated or proven to be non-existent in the final rule. Therefore it would be irresponsible and a waste of time for the Congress to act to legislate against EPA's proposed Clean Power Plan.

As Ranking Member Pallone has stated: "this legislation is not only dangerous, but also premature, unnecessary and poorly conceived. It asks us to legislate to address phantom problems in a rule that has not yet been finalized and it gives individual governors the unfettered ability to thumb their nose at the Clean Air Act."<sup>99</sup>

For the reasons stated above, we dissent from the views contained in the Committee's report.



Frank Pallone, Jr.  
Ranking Member  
Committee on Energy and Commerce



Bobby L. Rush  
Ranking Member  
Subcommittee on Energy and Power

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<sup>98</sup> *In re Murray Energy*, slip op. at 6

<sup>99</sup> Statement of Ranking Member Frank Pallone, Jr. Subcommittee on Energy and Power Markup of H.R. 2042., Ratepayer Protection Act April 22, 2015