Hearing on EPA's CO_2 Regulations for New and Existing Power Plants: Legal Perspectives

Testimony of Elbert Lin, Solicitor General of the State of West Virginia

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I. Introduction

I appreciate the invitation to appear before this Subcommittee to address EPA's now-final rules regulating fossil fuel-fired power plants under Section 111 of the Clean Air Act. My name is Elbert Lin, and I am the Solicitor General of the State of West Virginia in the Office of Attorney General Patrick Morrisey. Under the leadership of General Morrisey, the State of the West Virginia has been over the past year at the forefront of the legal challenges to EPA's Section 111(d) Rule, which regulates existing power plants. The Section 111(d) Rule—called the "Clean Power Plan" by EPA—was unlawful when EPA first proposed it in 2014 and remains unlawful today. My testimony today will focus on the Power Plan and explain why the Rule does not survive legal scrutiny on several grounds.

II. The Power Plan Is Unlawful

On August 3, 2015, the EPA Administrator signed as final the Power Plan, which sets aggressive carbon dioxide emission limitations on each State based on what the agency believes the State can meet by shifting from coal-fired energy to natural gas and renewable energy resources. EPA claims Congress gave it authority to promulgate the Power Plan under Section 111(d) of the Clean Air Act ("CAA"), 42 U.S.C. 7411(d). EPA is wrong. The plain language of Section 111(d) does not authorize the Power Plan, and therefore the entire rule is illegal.

A. Background

1. Section 111 of the Clean Air Act

In 1970, Congress enacted Section 111 of the CAA, entitled "standards of performance for new stationary sources." Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 111, 84 Stat. 1676, 1683. As its name indicates, the central focus of Section 111 is the regulation of emissions from *new* sources. Under Section 111(b), EPA is permitted to establish emission standards for "categor[ies] of sources," under certain circumstances. Section 111(b) is a robust program, which EPA has employed "for more than 70 source categories and subcategories . . . [including] fossil fuel-fired boilers, incinerators, sulfuric acid plants . . . ." 73 Fed. Reg. 44,354, 44,486-87 nn.239 & 242 (July 30, 2008).

Although the primary focus of Section 111 is national regulation of "new source[s]," Section 111(d) provides a more limited program for State-based regulation of emissions from certain existing sources. If EPA has issued a federal new source standard under Section 111(b) for a category of sources, Section 111(d) authorizes EPA in some situations to issue guidelines for States to develop existing standards for the same category of sources. 42 U.S.C. § 7411(d). Relevant to the Power Plan, Section 111(d) includes a provision that prohibits EPA from requiring States to develop an existing source performance standard for "any air pollutant . . . emitted from a source category which is regulated under [Section 112 of the CAA]." *Id.* This has been referred to as the "Section 112 Exclusion," which is discussed more fully below.

EPA has successfully invoked Section 111(d) only a few times and in limited circumstances. "Over the last forty years, under CAA section 111(d), [EPA] has regulated four pollutants from five source categories." Power Plan at 209.[1] In each case, the regulations were directed at pollutants emitted by specialized industries, such as acid mist emitted from sulfuric

[1] The Power Plan may be found at: http://www3.epa.gov/airquality/cpp/cpp-final-rule.pdf.

acid plants. *Id*. As EPA itself explained long ago, Section 111(d) is designed to address unique, industry-specific pollution problems, where pollutants are "highly localized and thus an extensive procedure, such as the SIPs require, is not justified." 40 Fed. Reg. 53,340, 53,342 (Nov. 17, 1975)). Under Section 111(d), EPA said, "the number of designated facilities per State should be few," and the required state plans will be "much less complex than the SIPs" that regulate criteria pollutants under CAA Section 110. *Id*. at 53,349.

2. Section 112 of the Clean Air Act

Also in 1970, Congress adopted Section 112 of the Clean Air Act. *See* Pub. L. No. 91-604, § 112, 84 Stat. at 1685-86. As originally enacted, Section 112 required EPA to list and then regulate hazardous air pollutants ("HAPs"). HAPs were defined narrowly as pollutants that "may cause, or contribute to, an increase in mortality or an increase in serious irreversible[] or incapacitating reversible[] illness." *Id*. In 1990, Congress undertook a comprehensive expansion of the reach and severity of Section 112. The new Section 112 established a preliminary list of 189 HAPs to be regulated. It also permitted EPA to add more HAPs to this list when EPA determines that a pollutant may present "a threat of adverse human health effects" "through inhalation or other routes of exposure" or "adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise." 42 U.S.C. § 7412(b). Furthermore, Congress required EPA to publish a list of "source categories" that emit HAPs. *Id*. § 7412(c). Whether a source category is listed under Section 112, or removed after being listed, depends upon a variety of factors. *Id*. For each listed source category under Section 112, Congress required EPA to "impose[] specific, strict pollution control requirements on both new and existing sources of HAPs," reflecting "the . . . 'best available control technology.'" *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008) (quoting S. Rep. No. 101-228, at 133 (1989)).

As EPA has explained, "the entire concept of 'source categories' in [S]ection 112 was new in 1990." Final Brief, EPA, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155494, at n.40 (D.C. Cir. July 23, 2007).

The 1990 Amendments provided special treatment under Section 112 for the category of sources known as "electric utility steam generating units," commonly referred to as power plants. Congress required EPA to study the "hazards to public health reasonably anticipated to occur as a result of" HAPs emitted from power plants before EPA determined whether to list them under Section 112. 42 U.S.C. § 7412(n)(1)(A). EPA was then to determine, based on that study, whether it is "appropriate and necessary" to regulate power plants under Section 112. *Id*.

3. The Section 112 Exclusion

As noted above, the Section 112 Exclusion is a statutory limitation on EPA's Section 111(d) authority, which Congress changed when it revised and strengthened Section 112 in 1990. Before the 1990 Amendments, the Section 112 Exclusion barred EPA from requiring States to regulate under Section 111(d) the emission from existing sources of "any air pollutant . . . included on a list published under section [112](b)(1)(A)." *See* Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990). At the time, that was the list of pollutants deemed by EPA to be HAPs under the narrow pre-1990 criteria. *See* 70 Fed. Reg. 15,994, 16,030 (Mar. 29, 2005).

But in 1990, Congress fundamentally changed the Section 112 Exclusion, in light of its decisions to significantly expand the scope of what constitutes a HAP and to require regulation under Section 112 by "source category." Specifically, Congress amended the Exclusion to prohibit EPA from requiring States to regulate under Section 111(d) the emission of "any air pollutant . . . emitted from a source category which is regulated under section [112]." Pub. L. No. 101-549, § 108, 104 Stat. 2399 (codified at 42 U.S.C. § 7411(d)(1)). As EPA has

consistently conceded, "a literal reading" of this language means "that a standard of performance under section 111(d) cannot be established for any air pollutant—HAP and non-HAP—emitted from a source category regulated under section 112." 70 Fed. Reg. at 16,031; *accord* EPA, Legal Memorandum, at 26 (June 2014), EPA-HQ-OAR- 2013-0602-0419 ("2014 Legal Memo").[2]

According to EPA itself, the legislative history of the 1990 Amendments shows that the revision of the Section 112 Exclusion to "shift [its] focus to source categories" from air pollutants was "no accident." 2007 EPA Brief, 2007 WL 2155494 (quotations omitted). The House of Representatives—where the 1990 revision to the Section 112 Exclusion originated—"sought to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112." 70 Fed. Reg. at 16,031. This policy change reflected the House's judgment that EPA should not be permitted to require state-by-state regulation of an existing source category under Section 111(d), when that category already had to comply with the more stringent national emission standards being introduced by amendment into Section 112. 70 Fed. Reg. at 16,031. This "desire" to avoid "duplicative regulation" of existing source categories makes sense, given that it may not be feasible for already up-and-running facilities to comply with Section 112's stringent requirement and also regulation imposed by States under Section 111(d). 70 Fed. Reg. at 16,032. EPA has noted that Congress seemed especially concerned about "duplicative or otherwise inefficient regulation" of existing power plants, 70 Fed. Reg. at 15,999, and that the change of the Section 112 Exclusion from pollutants to "source categories" was intended to work in tandem with EPA's obligation to study power plants under Section 112(n). Congress wanted

[2] The 2014 Legal Memo may be found here: http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf.

to make EPA choose between regulating HAP emissions from existing power plants under the national standards of Section 112, or all emissions from those power plants under the state-by-state standards of Section 111(d). 70 Fed. Reg. at 15,995, 16,031.

The U.S. Court of Appeals for the D.C. Circuit and the United States Supreme Court have discussed the Section 112 Exclusion on two important occasions.

First, in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), the D.C. Circuit struck down EPA's attempt to require under Section 111(d) that the States regulate the emission of mercury from existing power plants. 70 Fed. Reg. 28,606 (May 18, 2005). The critical issue was that EPA had previously determined under Section 112(n) to regulate power plants under Section 112. 70 Fed. Reg. 15,994. To avoid the Section 112 Exclusion, EPA sought to reverse that prior determination, *id*., but the D.C. Circuit would not allow it. The court held that, if EPA wanted to undo Section 112 regulation of power plants, the agency had to follow the procedures for de-listing a source category under Section 112(c)(9). *New Jersey*, 517 F.3d at 582. Because EPA had not followed those procedures, power plants remained regulated under Section 112, and thus were prohibited by the Section 112 Exclusion from being regulated under Section 111(d). *Id*. at 583.

Second, in 2011, the Supreme Court confronted Section 111(d) in *American Electrical Power Company, Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*"). In *AEP*, the Court held that there was no action for federal common law public nuisance to abate carbon dioxide emissions from power plants. *Id*. at 2537. The Court explained that Congress has granted EPA the authority to require States to regulate carbon dioxide emissions under Section 111(d), and that the mere existence of this authority preempts any federal abatement cause of action, regardless of whether EPA has exercised that authority. *Id*. at 2537-38. The Court noted,

however, that there are statutory "exception[s]" to EPA's authority under Section 111(d). *Id*. at 2537 n.7. As relevant here, "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]." *Id.*

4. EPA Regulates Power Plants Under Section 112

On February 16, 2012, EPA finalized a national emission standard for new and existing power plants under Section 112. 77 Fed. Reg. 9,304 (Feb. 16, 2012) ("MATS Rule"). In this rule, EPA reaffirmed the agency's 2000 decision that it is "necessary and appropriate" for power plants to be listed as a "source category" under Section 112, and proceeded to impose on those plants significant regulations, which will cost over $9 billion per year. *See* 77 Fed. Reg. at 9,365-75; EPA, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards at 1-3−3-13 (Dec. 2011), EPA-HQ-OAR-2009-0234-20131. Even though the Supreme Court ruled earlier this year in *Michigan v. EPA*,135 S. Ct. 2699 (2015), that EPA acted unlawfully when it refused to consider costs, the Supreme Court did not vacate the rule. Further litigation over the future of the MATS Rule is ongoing in the D.C. Circuit and the regulation remains in effect.

5. EPA Finalizes the Power Plan

On August 3, 2015, the EPA Administrator signed the Power Plan. Under the guise of imposing "standards of performance" on existing coal-fired power plants under Section 111(d), the Power Plan is based primarily on what EPA believes each State can achieve by shifting its energy portfolio away from coal-fired power and fossil fuels generally. Two features of the Rule are relevant here.

First, EPA justifies the Power Plan as a regulation of coal-fired power plants, even though those plants are extensively regulated under Section 112. *See* 77 Fed. Reg. 9,304 (Feb.

16, 2012) (imposing Section 112 regulations on power plants). As noted above, the Section 112 Exclusion prohibits EPA from regulating a source category under Section 111(d) where that category is "regulated under [Section 112]." 42 U.S.C. § 7411(d)(1)(A). Abandoning its position of the last 20 years, EPA now claims that "the phrase 'regulated under section 112' refers only to the regulation of HAP emissions." Power Plan at 267. And because EPA has not (yet) decided to regulate carbon dioxide as a HAP under Section 112, the agency argues that it may impose carbon dioxide limitations under Section 111(d) on power plants, regardless of whether EPA has regulated those plants under Section 112.

Second, the Power Plan requires the States to fundamentally reorganize their energy grids, to reduce reliance on coal-fired power plants and fossil fuels more generally. EPA has mandated that the States design State Plans to achieve carbon dioxide emissions targets that EPA calculated based on three "building blocks": (1) altering coal-fired power plants to increase their efficiency; (2) shifting reliance on coal-fired power to natural gas; and (3) shifting reliance on coal-fired power to low or zero-carbon energy generation like wind and solar. Power Plan at 230. Blocks 2 and 3 represent across-the-board energy policy changes, aimed explicitly at reducing reliance on coal-fired energy, and block 3 in particular seeks to shift away from fossil fuels more generally. As justification for this approach, EPA asserts that Section 111(d) authorizes the agency to base a rule on any measures that "shift[] generation from dirtier to cleaner sources." Power Plan at 325. That is, EPA believes that Section 111(d) permits it to force States to design plans that will shift a State's energy portfolio toward different, "cleaner" sources.

B. The Clean Power Plan Violates the Section 112 Exclusion

1. The Section 112 Exclusion, as amended in 1990, prohibits EPA from regulating under Section 111(d) "any air pollutant" emitted from a "source category . . . regulated under [Section

112]." 42 U.S.C. § 7411(d)(1). As EPA has repeatedly concluded, starting in the Clinton Administration and continuing to the proposed version of the Power Plan itself, the "literal" terms of this text prohibit EPA from requiring States to regulate a source category under Section 111(d) when EPA regulates that source category under Section 112.[3] 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 [Section 112]." *AEP*, 131 S. Ct. at 2537 n.7.

The current Exclusion reflects the substantial changes that Congress made to Section 112 in 1990. Before the 1990 Amendments, Section 112 and Section 111(d) were complementary provisions, each covering different pollutants. While Section 112 applied only to an extremely narrow category of pollutants, Section 111(d) applied to all pollutants not covered by Section 112 or the CAA's National Ambient Air Quality Standards.[4] But in 1990, Congress changed the focus of Section 112 from individual pollutants to source categories, and also vastly expanded the pollutants covered under Section 112 with language very similar to that in Section 111(d).[5] Since 1990, EPA has never identified any pollutant that falls within one definition but not the other, including carbon dioxide.[6]

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[3] *See* EPA, Legal Memorandum at 26 (June 2014); Brief of EPA, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155494 (D.C. Cir. July 23, 2007); 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005); 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004); EPA, Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines, Pub. No. EPA-453/R-94-021, 1-5–1-6 (1995).

[4] Before 1990, Section 112 applied to pollutants that "may cause, or contribute to, an increase in mortality or an increase in serious irreversible[] or incapacitating reversible[] illness." Pub. L. No. 91-604, § 112, 84 Stat. 1676, 1685-86 (1970).

[5] *Compare* 42 U.S.C. § 7412(b)(2) (any pollutants "which present, or may present . . . a threat of adverse human health effects . . . or adverse environmental effects . . ."), *with* 42 U.S.C. § 7411(b)(1)(A) (any pollutants "which may reasonably be anticipated to endanger public health or welfare").

[6] *See* 73 Fed. Reg. 44,354, 44,493-95 (July 30, 2008).

Given the fundamental change in the relationship between Sections 112 and 111(d), Congress revised the Exclusion to prohibit EPA from regulating under Section 111(d) any "source category . . . regulated under [Section 112]." 42 U.S.C. § 7411(d)(1). As EPA itself has explained, the House of Representatives—which originated the 1990 revision to the Exclusion—"sought to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112." 70 Fed. Reg. at 16,031. This revision reflected the "desire . . . to avoid duplicative regulation" of existing source categories—especially power plants—in light of the significant capital investments that these facilities have made in their operations. 70 Fed. Reg. at 16,032. Under the revised Exclusion, such facilities would not be forced to comply with the stringent Section 112 regulations imposed by EPA, as well as state-by-state regulations under Section 111(d).

With the expansion of the Section 112 program, there was little need for Section 111(d). Indeed, since 1990, EPA has never before contended that it needed to regulate the same source category under both Sections 112 and 111(d). EPA has only used Section 111(d) for two regulations since 1990. In the first, it sought to undo a Section 112 regulation to impose a Section 111(d) regulation of the same source category. *See New Jersey*, 517 F.3d at 583-84. In the second, EPA justified its rule by specifically noting that the source category was not "actually being regulated under section 112."[7]

In the final rule, EPA concedes that under the States' reading of the Exclusion, the Power Plan is illegal. Acknowledging that it previously shared the same interpretation of the text, EPA admits that "[t]he effect of this reading would be to preclude the regulation of CO_2 from power

[7] *See* 1995 EPA Landfill Memo, at 1-6.

plants under CAA section 111(d) because power plants have been regulated for (HAP) under CAA section 112." Power Plan at 263.[8]

2. EPA seeks to save the Power Plan by adopting an interpretation of the phrase "regulated under [Section 112]" that the agency never suggested before litigation in the D.C. Circuit this year. Specifically, the agency concludes that the Exclusion "only exclud[es] the regulation of HAP emissions under CAA section 111(d) and only when th[e] source category [at issue] is regulated under CAA section 112." Power Plan at 267. That is because, in EPA's new view, "the phrase 'regulated under section 112' refers only to the regulation of HAP emissions." *Id*.

This contrived reading—invented by EPA after two decades of reading the text "literal[ly]"—is indefensible. Section 111(d) permits the regulation of "any air pollutant" "which is not . . . emitted from a source category which is regulated under [Section 112]." 42 U.S.C. § 7411(d)(1). EPA's new interpretation would rewrite the plain terms of the statute to permit regulation of any air pollutant "which is not . . . emitted from a source category which is regulated under [Section 112], where the air pollutant is a hazardous air pollutant regulated under Section 112." But EPA may not "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("*UARG*").

3. As an alternative relegated to a footnote in the final rule, EPA falls back on the "differing amendments" theory of the Section 112 Exclusion, which was once the lynchpin of EPA's attempt to re-write the Exclusion. *See* Power Plan at 266 n.294. The argument relies on

[8] The D.C. Circuit's upcoming decision on remand from *Michigan v. EPA*, 135 S. Ct. 2699 (2015), thus cannot have any impact on the Section 111(d) Rule's legality because agency action can only be upheld on the "grounds upon which [EPA] itself based its action." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

the Statutes at Large, which reflect that Congress passed two amendments to Section 111(d) in 1990—a substantive amendment and an extraneous conforming amendment. Only the substantive amendment was included in the U.S. Code, but EPA argues that the existence of the conforming amendment creates an "ambiguity" that the agency has the right to resolve.

EPA's argument cannot be squared with longstanding legislative practice and binding D.C. Circuit precedent.

a. Congress's official legislative drafting guides, which courts regularly consult in interpreting statutes, set forth well understood and accepted conventions for drafting a bill that makes amendments to an existing law. *See, e.g.*, *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60-61 (2004) (analyzing the official legislative drafting manuals to interpreted a statute); *United States v. O'Brien*, 560 U.S. 218, 233-34 (2010) (same); *accord Frederick v. Shinseki*, 684 F.3d 1263, 1270 (Fed. Cir. 2012) (same)*; Perry v. First Nat'l Bank*, 459 F.3d 816, 820 (7th Cir. 2006) (same). As the Senate Legislative Drafting Manual ("Senate Manual") provides, "substantive amendments"—those amendments making substantive changes to the law—"should appear first in numerical sequence of the Act amended or be organized by subject matter."[9] A bill should then list "[c]onforming [a]mendment[s]," which are "amendment[s] of a provision of law that [are] necessitated by the substantive amendments or provisions of the bill." *Id*. Conforming amendments thus make clerical adjustments to an existing law, such as changes to "tables of contents" and corrections to pre-existing cross-references, *after* the "substantive amendments" are executed. *Id.*; *accord* House Legal Manual on Drafting Style § 332(b) (1995) ("House Manual").

[9] This source is available at http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf.

Consistent with these drafting guides, the Office of the Law Revision Counsel follows a consistent practice of first executing substantive amendments, then executing subsequent conforming amendments, all while excluding as clerical errors any conforming amendments rendered unnecessary by previously executed substantive amendments. *See* Senate Manual, § 126(d); House Manual, § 332(d). Our research revealed that the Office's longstanding and uniform practice is to exclude from the U.S. Code any conforming amendment that conflicts with a prior substantive amendment, and to simply note that the conforming amendment "cannot be executed."[10] Many of the hundreds of examples located were similar to the circumstances here, where the substantive and conforming amendments appeared in the same bill and purported to amend the same preexisting statutory text.[11] We have not found a single example of the Office of Law Revision Counsel giving *any* meaning to a conforming amendment that could not be executed as a result of a previously executed substantive amendment.

[10] *See, e.g.*, Revisor's Note, 7 U.S.C. § 2018; Revisor's Note, 10 U.S.C. § 869; 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, 12 U.S.C. § 1787; Revisor's Note, 14 U.S.C. ch. 17 Front Matter; Revisor's Note, 15 U.S.C. § 2081; Revisor's Note, 16 U.S.C. § 230f; 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, 22 U.S.C. § 3651; Revisor's Note, 22 U.S.C. § 3723; Revisor's Note, 26 U.S.C. § 105; Revisor's Note, 26 U.S.C. § 219; Revisor's Note, 26 U.S.C. § 4973; 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, 40 U.S.C. § 11501; Revisor's Note, 42 U.S.C. § 218; Revisor's Note, 42 U.S.C. § 290bb–25; Revisor's Note, 42 U.S.C. § 300ff–28; Revisor's Note, 42 U.S.C. § 1395x; Revisor's Note, 42 U.S.C. § 1396a; Revisor's Note, 42 U.S.C. § 1396r; Revisor's Note, 42 U.S.C. § 5776; Revisor's Note, 42 U.S.C. § 9601; Revisor's Note, 49 U.S.C. § 47115.

[11] Revisor's Note, 11 U.S.C. § 101; Revisor's Note, 12 U.S.C. § 4520; Revisor's Note, 15 U.S.C. § 2064; Revisor's Note, 18 U.S.C. § 2327; Revisor's Note, 21 U.S.C. § 355; Revisor's Note, 23 U.S.C. § 104; Revisor's Note, 26 U.S.C. § 1201; Revisor's Note, 42 U.S.C. § 1395u; Revisor's Note, 42 U.S.C. § 1395ww; Revisor's Note, 42 U.S.C. § 1396b; Revisor's Note, 42 U.S.C. § 3025; Revisor's Note, 42 U.S.C. § 9875.

The D.C. Circuit similarly has recognized that a mistake in conforming an amended statute should be ignored and not treated as "creating an ambiguity." *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336 (D.C. Cir. 2013). In *American Petroleum*, the court confronted a statute where Congress had renumbered a specific provision but failed to also correct, by way of a conforming amendment, a pre-existing cross-reference. *Id.* The court refused to allow that clerical error to "creat[e] an ambiguity" that might alter the substantive meaning of the statute. *Id.* Instead, the court recognized that an error in updating a cross-reference "was far more likely the result of a scrivener's error" and should be ignored. *Id.* Such minor errors in conforming a statute that has been substantively amended, the court observed, are quite common in today's "enormous and complex" legislation and should not be elevated in significance. *Id.* at 1336-37; *cf. Dir. of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 323 (2001) (treating "conforming amendment" as non-substantive); *CBS, Inc. v. FCC*, 453 U.S. 367, 381–82 (1981) (same).

b. Applying this uniform legislative drafting practice and binding case law to the two 1990 amendments to Section 111(d), the Office of the Law Revision Counsel correctly excluded the extraneous conforming amendment from the U.S. Code.

The first amendment, which the Office of the Law Revision Counsel included in the U.S. Code, is a substantive amendment to Section 111(d) ("Substantive Amendment"). Before 1990, the Section 112 Exclusion prohibited EPA from requiring States to regulate under Section 111(d) any air pollutant "included on a list published under . . . 112(b)(1)(A)." 42 U.S.C. § 7411(d) (1989); Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990); *see* 70 Fed. Reg. at 16,030. This meant that if EPA had listed a pollutant as a HAP, the agency could not regulate that pollutant under Section 111(d). In order "to change the focus of section 111(d) by seeking to preclude

regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112," 70 Fed. Reg. at 16,031, the Substantive Amendment instructs:

> *strik[e] "or 112(b)(1)(A)" and insert[] "or emitted from a source category which is regulated under section 112."*

Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990). This "change [in] focus" is plainly a *substantive* change, and the amendment is accordingly listed among other substantive amendments in the Statutes at Large. *See* 2007 EPA Brief, 2007 WL 2155494 at *n.35 ("the House version . . . was included with a variety of substantive provisions").

The second amendment appears 107 pages later in the Statutes at Large, among a list of "[c]onforming [a]mendments" that make clerical changes to the CAA ("Conforming Amendment"). *See* 2007 EPA Brief, 2007 WL 2155494 at *n.35. As noted above, conforming amendments are "amendment[s] of a provision of law that [are] necessitated by the substantive amendments or provisions of the bill." Senate Manual § 126(b)(2). Consistent with this description, the Conforming Amendment merely updated the cross-reference in the Section 112 Exclusion. The Conforming Amendment instructs:

> *strik[e] "112(b)(1)(A)" and insert[] in lieu thereof "112(b)".*

Pub. L. No. 101-549, § 302(a), 104 Stat. 2399 (1990). This clerical update was necessitated by the fact that the substantive amendments expanding the Section 112 regime—broadening the definition of a HAP and changing the focus to source categories—had renumbered and restructured Section 112(b).

Applying the process required by the official legislative drafting guides, and consistent with D.C. Circuit case law, the Office of Law Revision Counsel correctly found the Conforming Amendment to be extraneous and excluded it from the U.S. Code. The Office first executed the Substantive Amendment, producing the text of the Section 112 Exclusion that appears in the

U.S. Code today. Next, the Office looked to the Conforming Amendment and determined that it "could not be executed" because the Substantive Amendment had deleted the reference to "[1]12(b)(1)(A)." *See* Revisor's Note, 42 U.S.C. § 7411. This was entirely proper because it was impossible then to "strik[e] '112(b)(1)(A)' and insert[] in lieu thereof '112(b),'" as the Conforming Amendment directed.

c. Although EPA has indicated that it understands the Conforming Amendment is "a drafting error and therefore should not be considered," 70 Fed. Reg. at 16,031, it has inexplicably refused (and continues to refuse) to follow that proper approach. Instead, EPA would treat each Amendment as independently creating a separate revised version of the Section 112 Exclusion. The first "version" is the version in the U.S. Code, created by executing only the Substantive Amendment. The second "version" would be created by executing only the Conforming Amendment. Out of these two "versions" of the Section 112 Exclusion, EPA's claim of "ambiguity" was born.

EPA's approach, which it continues to press in the alternative today, is baseless. If EPA's approach to the amendments was correct, *every one* of the numerous instances where the Office of Law Revision Counsel has excluded from the U.S. Code an amendment that "could not be executed" would now need to be treated as creating previously unidentified statutes-in-exile. There is no basis in logic, legislative practice, or congressional intent to permit this unprecedented and deeply disruptive result.

C. Section 111(d) Does Not Authorize EPA to Force States To Reorder Their Energy Sectors Under the "Building Block" Approach

Even if the Section 112 Exclusion did not invalidate the Power Plan, EPA's "building block" approach, which requires States to overhaul their energy sectors to reduce reliance on coal-fired energy, is also illegal in several respects.

1. Section 111(d) only authorizes regulation based on measures, such as pollution control technologies, for the more efficient operation of an existing source of emissions. Under Section 111(d), EPA may direct States to establish "standards of performance for any existing source," under certain narrow circumstances. 42 U.S.C. § 7411(d)(1)(A) (emphasis added). A "standard of performance" is "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 ['BSER']." *Id.* § 7411(a)(1) (emphasis added). Moreover, "in applying a standard of performance *to any particular source*," a State may "take into consideration, among other factors, the remaining useful life of *the existing source* to which such standard applies." *Id.* § 7411(d)(1)(B) (emphases added). Such "other factors" include "[p]hysical impossibility of installing necessary control equipment." 40 C.F.R. § 60.24(f)(2). Section 111(d) thus requires a BSER that is capable of "application" to the "existing source," while requiring consideration of "other factors," such as the "remaining useful life" of that source.

These statutory provisions make clear that a BSER is not an unlimited grant of roving authority to EPA. *See Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). Rather, it is simply one of the Clean Air Act's many requirements for the adoption of "pollution control devices," *Union Elec. Co. v. EPA*, 427 U.S. 246, 257 (1976), or other measures that "hold the industry to a standard of improved design and operational advances," *Sierra Club v. Costle*, 657 F.2d 298, 364 (D.C. Cir. 1981). Even EPA understands as much; its BSER under Section 111(b) for *new* coal-fired power plants is a pollution control device—partial carbon capture and storage.[12]

[12] Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, EPA-HQ-OAR-2013-0495 &

Building blocks 2 and 3 of the Power Plan go far beyond EPA's authority to require States to develop standards of performance for the source category in question. Rather than requiring "improved design and operational advances," *Costle*, 657 F.2d at 364, the Power Plan is premised on far-reaching measures aimed at reducing usage of coal-fired energy by increasing reliance upon competing sources of energy: natural gas and, especially, renewable energy such as solar power and wind. These are economy-wide energy policy mandates, which simply disfavor coal-fired power plants and favor other source categories. On this reasoning, the agency could mandate that States require all coal-fired power plants to close, if the "integrated" power grid can produce sufficient electricity from other "cleaner" sources to supply the nation. That is not a "standard of performance" for power plants, but one of *non*-performance.

2. EPA's interpretation of Section 111(d) also unlawfully arrogates to the agency decisions of vast economic and political significance without clear congressional authorization. In *UARG*, the Supreme Court held that Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" 134 S. Ct. at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)); *accord King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). Specifically, the Court barred EPA from regulating under the Prevention of Significant Deterioration and Title V programs "the construction and modification of tens of thousands, and the operation of millions, of small [carbon dioxide] sources nationwide." *UARG*, 134 S. Ct. at 2444. Such regulation would have "br[ought] about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Id.* "[W]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" the Court

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EPA-HQ-OAR-2013-0603, at 13-14, tbl. 1 (Aug. 3, 2015) ("Section 111(b) Rule"), http://www.epa.gov/airquality/cpp/cps-final-rule.pdf.

stressed, "[courts should] greet its announcement with a measure of skepticism." *Id.* (quoting *Brown*, 529 U.S. at 159).

This is fatal to the Power Plan. Invoking authority under a statutory provision it has utilized on only five previous occasions, EPA has given itself the power to "drive a more aggressive transformation in the domestic energy industry," in order to reduce demand for fossil-fuel-fired energy.[13] This is broad-based energy policy, not environmental regulation. EPA claims to have "discover[ed] in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *UARG*, 134 S. Ct. at 2444 (internal quotations omitted). But there is no evidence that Congress "clearly" assigned to EPA the authority to make these energy policy decisions of "vast economic and political significance." *Id.* (quotations omitted).

The implications of EPA's interpretation of Section 111(d) are staggering and go well beyond even EPA's claim of authority in *UARG*. The Power Plan relies entirely upon EPA's assertion that Section 111(d) gives it the right to mandate "shifting generation from dirtier to cleaner sources." Power Plan at 325. But consider the consequences of that position. In its most recent successful Section 111(d) regulation, EPA required States to impose standards of performance for municipal solid waste landfills. *See* 61 Fed. Reg. 9,905 (Mar. 12, 1996). Under EPA's new theory of Section 111(d), the agency could now update those standards to require States to adopt measures that require recycling rather than disposal of trash, including forcing landfills to buy "credits" from recycling plants, on the theory that recycling plants are "cleaner" than landfills. Power Plan at 325. After all, according to EPA, the "management of the resulting

[13] Joby Warrick, *White House set to adopt sweeping curbs on carbon pollution*, Washington Post (Aug. 1, 2015) (quoting "White House fact sheet"), http://www.washingtonpost.com/national/health-science/white-house-set-to-adopt-sweeping-curbs-on-carbon-pollution/2015/08/01/ba6627fa-385c-11e5-b673-1df005a0fb28_story.html.

waste . . . release[s] greenhouse gas emissions such as carbon dioxide."[14] In short, EPA's novel interpretation of Section 111(d) would transform this environmental regulator into the most powerful central planner in the federal bureaucracy—with the authority to decide that any source category is "cleaner" than its competitor category, and to require the States to systematically favor the supposedly "cleaner" category of competitors.

3. EPA's claim that Section 111(d) permits the agency to reorganize the nation's energy economy on a state-by-state basis must also be rejected because it violates the Tenth Amendment. States' authority over the intrastate generation and consumption of electricity is "one of the most important functions traditionally associated with the police powers of the States." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Congress recognized this State authority in the Federal Power Act ("FPA"), which confines federal authority over electricity markets to "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. § 824(a); *see also id.* § 824(b)(1). Regulation of the intrastate consumer market remains where it constitutionally belongs: in the hands of the States. The FPA and other federal energy statutes respect the States' "traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983); *cf.* 18 U.S.C. § 808(d)(2)(A).

The Power Plan runs roughshod over States' constitutional rights regarding intrastate generation and use of electricity, and is thus illegal. Blocks 2 and 3 require States to fundamentally alter electricity generation for intrastate use. These State-based energy policies

[14] EPA, Reducing Waste at http://www.epa.gov/greenhomes/ReduceWaste.htm.

have deep implications for the intrastate "[n]eed for new power facilities, their economic feasibility, and rates and services." *Id.*

That the Power Plan leaves States the option of not submitting State Plans does not cure these constitutional problems. If States comply and submit State Plans to reorganize their energy economies, they will become mere "administrative agencies of the Federal Government" in this critical area of state authority. *New York v. United States*, 505 U.S. 144, 188 (1992). On the other hand, if States refuse to submit State Plans, EPA will impose its own federal plan, imposing a federal takeover of the generation of intrastate energy. Not even Congress is permitted to enact a so-called "cooperative federalism" regime if both choices exceed Congress's direct regulatory power. *Id.* at 167 (quotations omitted). "Moreover, Congress is not permitted to directly command[] a State to regulate or indirectly coerce[] a State to adopt a federal regulatory system as its own." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602, 183 L. Ed. 2d 450 (2012) (quotations omitted).

At a minimum, EPA's interpretation of the statute must fail in light of these constitutional issues. *See Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) ("[W]e will not submit to an agency's interpretation of a statute if it presents serious constitutional difficulties." (quotations omitted)). Put another way, to the extent that Section 111(d) could be read to adopt EPA's reading—which it cannot—"basic principles of federalism embodied in the Constitution . . . resolve [any] ambiguity" against EPA's interpretation. *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014).

III. Conclusion

While all of EPA's recent actions relating to carbon dioxide emissions from fossil-fuel-fired power plants are legally suspect, I have aimed to lay out several of the major legal defects

with EPA's regulation of existing fossil-fuel-fired power plants under Section 111(d). We believe these defects are fatal to the Rule, and we look forward to presenting our arguments in court. Thank you again for this opportunity, and I look forward to your questions.