

**Testimony of Richard Revesz
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Before the Subcommittee on Energy and Power
House Committee on Energy and Commerce
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Introduction

Good morning and thank you for inviting me to testify before this subcommittee. I am Richard Revesz, the Lawrence King Professor of Law and Dean Emeritus at New York University School of Law. At NYU Law School, I also serve as the Director of the Institute for Policy Integrity, a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. In addition, I am the Director of the American Law Institute, the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The views I express today are my own and do not represent the views, if any, of New York University or the American Law Institute.

I have written eight books and more than 70 articles and book chapters on environmental law, administrative law, and regulatory policy, and have twice won the American Bar Association's yearly award for the best article or book in the areas of administrative law and regulatory practice. In particular, my recent work has focused on the Clean Air Act and on the regulation of greenhouse gases. Over the course of the last year, I published "Rethinking Health-Based Environmental Standards" in the *NYU Law Review* (co-authored with Michael Livermore), which focuses on the setting of National Ambient Air Quality Standards under the Clean Air Act, and an article in *Nature* (co-authored with Nobel Prize winner Kenneth Arrow

and other leading economists, climate scientists and legal scholars), which analyzes the models used to evaluate the damages from greenhouse gas emissions. My forthcoming article, "Toward a More Rational Environmental Policy," in the *Harvard Environmental Law Review*, focuses on the two Clean Air Act cases that the Supreme Court of the United States decided last spring.

I am also a public member of the Administrative Conference of the United States and have served on the Science Advisory Board of the U.S. Environmental Protection Agency and on committees of the National Academy of Sciences and the National Research Council.

My testimony before this subcommittee explains that EPA's Clean Power Plan is well justified under the Clean Air Act and the Constitution and is consistent with over thirty years of regulatory practice, under administrations of both political parties.

Summary

EPA's flexible, cost-minimizing approach is consistent with the law and with over thirty years of EPA Clean Air Act practice, under administrations of both political parties. The Clean Power Plan is not, as its opponents argue, an unprecedented approach that risks economic calamity; instead, it is just another example of EPA doing its job to ensure that polluters account for the cost of their pollution in a manner that will result in substantial net economic benefits to the public.

My testimony covers four main topics:

- (1) The Clean Power is a natural extension of previous EPA policies—stretching back decades and promulgated under both Republican and Democratic administrations—that used flexible compliance mechanisms to address the environmental harms of power production;
- (2) The Clean Power Plan does not give rise to any constitutional problems;
- (3) EPA has clear authority to implement the Clean Power Plan under Section 111(d) of the Clean Air Act; and
- (4) EPA’s proposed guidelines under Section 111(d) are authorized by the statute and based upon demonstrated approaches that some utilities and states have already taken to reduce greenhouse gas emissions.

I. EPA’s Clean Power Plan, Like Regulations from Prior Presidents of Both Parties, Stretching Back Decades, Uses Flexible Mechanisms to Ensure that Polluters Address Their Environmental Harms, While Minimizing Compliance Costs

Opponents of the Clean Power Plan argue that the Obama administration's proposal represents a drastic change from the policies of previous Democratic and Republican Administrations. This assertion is flatly wrong. For the past quarter of a century, each president, Democratic and Republican, has taken measures to regulate the emissions of existing power plants because they are the nation's largest sources of many harmful air pollutants, including mercury, which adversely affects the nervous system; sulfur dioxide, which forms deadly particulates and causes environmental harm in the form of acid rain; and carbon dioxide, which causes climate change.

Under the George H.W. Bush administration, Congress enacted the 1990 amendments to the Clean Air Act, which capped sulfur dioxide emissions from existing power plants and established an innovative emissions trading program to ensure that reductions could be achieved as cheaply as possible. Later, the administrations of Bill Clinton, George W. Bush, and Barack Obama each promulgated important regulations requiring existing power plants to reduce emissions of smog and particulate precursors that negatively affect air quality in downwind states, again using cost-effective, flexible trading mechanisms.¹ (Last year, the Supreme Court upheld the most recent of these interstate pollution rules in *EPA v. EME Homer City Generation*.²) And finally, both the George W. Bush and Obama administrations issued rules limiting emissions of mercury from existing power plants.³ (The former rule was struck down because it had relied on the wrong section of the Clean Air Act.⁴) As in the case of all these earlier programs, EPA's Clean Power Plan will cost-effectively reduce carbon pollution from existing power plants through a flexible program that enables states to rely on traditional regulation, emissions trading, or any other tool they prefer.

Like the prior regulations of existing power plants, the Clean Power Plan reflects the fact that the pollution produced by coal is so much greater than that from readily available, cleaner sources of energy. But one of the main challenges coal now faces is wholly unrelated to policies of the Obama administration. It is the

¹ 63 Fed. Reg. 57,356, 57,376 (Oct. 27, 1998); 70 Fed. Reg. 25,162, 25,174 (May 12, 2005); 76 Fed. Reg. 48,208 (Aug. 8, 2011).

² 134 S. Ct. 1584 (2014).

³ 70 Fed. Reg. 28,606 (May 18, 2005); 77 Fed. Reg. 9304 (Feb. 16, 2012).

⁴ See *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

record-low price of natural gas, which stems from improvements in hydraulic fracturing technologies and the discovery of significant reserves—developments that Clean Power Plan opponents overlook, presumably because they do not fit their narrative.

II. EPA's Clean Power Plan Passes Constitutional Muster

Some opponents of the Clean Power Plan have argued that it gives rise to constitutional problems. That is simply not the case. Opponents raise three constitutional arguments, none of which is even remotely plausible.

Their first claim is that there is a problem with the way Congress delegated regulatory power to the EPA in Section 111(d), because the House and Senate passed arguably inconsistent amendments to the provision in 1990. Both the House and Senate versions were then included in a conference bill passed by each chamber and signed by President George H.W. Bush.

In all of our history, the Supreme Court has struck down only two statutory provisions as constitutionally impermissible delegations to an administrative agency,⁵ both in the mid-1930s, during its skirmishes with President Franklin Roosevelt over the New Deal. Moreover, the Supreme Court unanimously rejected this constitutional claim against Clean Air Act standards in *Whitman v. American Trucking Associations*.⁶

⁵ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (striking down portions of the 1933 National Industrial Recovery Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (same); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down portions of the Bituminous Coal Conservation Act).

⁶ 531 U.S. 457 (2001).

The Supreme Court has never invalidated a federal statute on nondelegation grounds on the basis of the argument that the opponents of the Clean Power Plan now advance: that a statute has arguably inconsistent provisions. The courts have consistently dealt with this problem by finding ways to develop a workable interpretation of the statute. In fact, giving meaning to seemingly inconsistent provisions in federal statutes is an important part of the work of the federal courts, and tools of statutory interpretation, rather than the Constitution, are the way all of those cases get resolved. Furthermore, as explained below, the premise of this dubious constitutional argument—that one of the two statutory amendments would, standing alone, forbid EPA from regulating carbon dioxide—is itself unfounded, and contrary to the positions of every presidential administration since 1990.

Opponents of the Clean Power Plan make a similarly farfetched argument that the Clean Power Plan violates the Takings Clause of the Fifth Amendment, which protects private property rights. A regulation leads to a takings violation only if it deprives an owner of essentially all of the value of his or her property, which is not the case here. And even if a particular firm had a plausible takings challenge, the remedy would not be to invalidate a nationwide regulation. Instead, the aggrieved firm would have the right to pursue a subsequent action for compensation.

Finally, opponents claim that the Clean Power Plan runs afoul of the Tenth Amendment's prohibition against the commandeering of state institutions by the federal government. This extreme and unsupported interpretation of the Tenth Amendment would invalidate many of the core provisions of the Clean Air Act, not only Section 111(d), on which the Clean Power Plan rests. The standard approach of

the Clean Air Act is for the federal government to establish statewide pollution reduction requirements and for the states then to choose how to allocate the burden of this reduction among sources in their respective jurisdictions. If a state declines to take action, the federal government imposes requirements directly on polluters within the state. As a result, no state institution is commandeered.

The states are given the option of allocating the pollution burden among polluters themselves so that a state plan can reflect that state's own environmental and economic preferences and can allocate the pollution reduction burden in the manner that the state deems most desirable. If states choose not to exercise this option, EPA promulgates a federal implementation plan, which it clearly has the constitutional power to do, and which does not raise any Tenth Amendment problem, because it does not impose any requirements on state institutions.

That, for example, is the approach under the National Ambient Air Quality Standards, which are the Clean Air Act's centerpiece. The Clean Power Plan is not like the requirement invalidated in *New York v. United States*,⁷ under which states had either to take title to nuclear waste or to enact particular regulations. Nothing at all is required of the states under the Clean Power Plan; they are just given an option to tailor an implementation plan suited to their unique needs and preferences. Neither does the Clean Power Plan give rise to a situation like that in *National Federation of Independent Business v. Sebelius*, the first Supreme Court review of the Affordable Care Act.⁸ There, the Court deemed the Act's requirement that states either expand Medicaid or lose *all* federal Medicaid funding "so coercive as to pass

⁷ 505 U.S. 144 (1992).

⁸ 132 S. Ct. 2566 (2012).

the point at which ‘pressure turns into compulsion.’”⁹ In the case of the Clean Power Plan, a few states have already indicated that they may not prepare state implementation plans, thereby accepting the reality that they will be subject to a federal implementation plan. Whatever else might be at issue here, it is definitely not “compulsion.”

Instead, the Clean Power Plan is a run-of-the-mill example of the cooperative federalism that is common under the Clean Air Act and that is totally unproblematic. The Clean Power Plan is not some unconstitutional invention of the Obama administration.

III. EPA Has Authority to Promulgate the Clean Power Plan Under Section 111(d) of the Clean Air Act

The Clean Power Plan is an entirely permissible use of EPA’s authority under Section 111(d) of the Clean Air Act. Section 111(d) presents an unusual situation because, in the 1990 amendments to the Clean Air Act, the House and the Senate passed arguably different versions of the provision, and the two versions were never reconciled in conference.¹⁰ As I already indicated, both provisions were then approved by both chambers and signed by the President. However, since the passage of the 1990 Amendments, and through administrations of both parties, EPA has repeatedly interpreted Section 111(d) in ways that are consistent with its authority to promulgate the Clean Power Plan.

⁹ *Id.* at 2604.

¹⁰ Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990) (House amendment); Pub. L. No. 101-549, § 302(a), 104 Stat. at 2574 (Senate amendment).

Opponents of the Clean Power Plan argue that because the House version of the provision was transcribed into the U.S. Code, that version should govern. However, it is well established that when the Statutes at Large and the U.S. Code conflict, the text in the Statutes at Large controls (unless the U.S. Code itself is adopted as legislation, which not the case here).¹¹ Because both the Senate amendment and the House amendment appear in the Statutes at Large, an interpretation of Section 111(d) must try to give effect to both.

And, indeed, EPA has repeatedly—under administrations of both parties—read Section 111(d) to give effect to both the Senate and House amendments. The difference between the two amendments concerns the extent to which a source is excluded from Section 111(d) regulation when it is already regulated under Section 112 for emitting hazardous air pollutants. EPA has consistently construed this Section 112 exclusion in Section 111(d) to pertain to air pollutants, not entire source categories.¹² In particular, EPA has interpreted the Section 112 exclusion to

¹¹ See *Stephan v. United States*, 319 U.S. 423, 426 (1943) (“[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent”); *Five Flags Pipe Line Co. v. Dep’t of Transp.*, 854 F.2d 1438, 1440 (D.C. Cir. 1988) (“[W]here 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.”). The Statutes at Large trump the U.S. Code until Congress has enacted the title at issue into positive law, which has not occurred for Title 42.

¹² See 56 Fed. Reg. 24,468, 24,469 (proposed May 30, 1991) (determining that the Section 112 Exclusion applies to particular pollutants—namely those deemed “hazardous” under Section 112—rather than entire source categories); 63 Fed. Reg. 18,504 (Apr. 15, 1998) (issuing hazardous air pollutant standards under Section 112 for pulp and paper producers, including Kraft pulp mills); 64 Fed. Reg. 59,718 (Nov. 3, 1999) (approving Maryland’s 111(d) state air quality plan for total reduced sulfur emissions from existing Kraft pulp mills, even though Section 112 standards already applied to Kraft pulp mills); 65 Fed. Reg. 66,672, 66,674-75 (proposed Nov. 7, 2000) (indicating that EPA would be permitted to simultaneously regulate landfill gas under both Section 111(d) and Section 112); 68 Fed. Reg. 23,209 (May 1, 2003) (approving Maine’s 111(d) state air quality plan for total reduced sulfur emissions from existing Kraft pulp mills, even though Section 112 standards already applied to Kraft pulp mills); 68 Fed. Reg. 2227, 2229 (Jan. 16, 2003) (indicating that Section 111(d) emissions guidelines would continue operating for landfill gases despite Section 112 standards being enacted); 68 Fed. Reg. 74,868, 74,868 (Dec. 29, 2003) (approving Pennsylvania’s 111(d) state air quality plan for total reduced sulfur emissions from existing municipal solid waste landfills, even though Section

apply to listed hazardous air pollutants that are emitted from source categories actually regulated under Section 112, so that the same pollutants from the same source cannot be regulated under both Section 112 and 111(d).¹³ In other words, if EPA has already used Section 112 to regulate emissions of Pollutant A from Source Category X, it cannot *also* regulate emissions of Pollutant A under Section 111(d). It can, however, use Section 111(d) to regulate emissions of some *other* pollutant from Source Category X. In fact, the opposite interpretation would provide a sweeping exclusion for large categories of harmful air pollutants.

Opponents of the Clean Power Plan agreed wholeheartedly with EPA's longstanding interpretation when the agency, under President George W. Bush, described its approach to the conflicting amendments in a 2005 rule regarding mercury emissions from power plants.¹⁴ These opponents now maintain, however, that because EPA has already regulated power plants' mercury emission under Section 112, it cannot regulate those same plants' emissions of any other pollutant—including carbon dioxide, the subject of the Clean Power Plan—under Section 111(d).

112 standards already applied to municipal solid waste landfills); 77 Fed. Reg. 9304, 9447 (Feb. 16, 2012) ("Designated pollutant means any air pollutant, the emissions of which are subject to a standard of performance for new stationary sources, but for which air quality criteria have not been issued and that is not included on a list" published under Section 108 or Section 112.)

¹³ 70 Fed. Reg. 15,994, 16,031- 32 (Mar. 29, 2005); EPA, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units 26 (2014), <http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legalmemorandum.pdf> (proposed interpretation for Clean Power Plan).

¹⁴ Joint Br. of State Respondent-Intervenors et al. [including eight petitioners in the currently pending challenges to the Clean Power Plan in the D.C. Circuit] at 25, *New Jersey v. EPA*, 517 F.3d 574 (2008) (Nos. 05-1097 et al.) (supporting EPA's "reasoned way to reconcile the conflicting language" in the House and Senate Amendments and arguing that the "Court should defer to EPA's interpretation").

In order to reach their new conclusion that EPA lacks authority to promulgate the Clean Power Plan, opponents must, among other argumentative leaps, completely disregard the Senate's amendment and rely on the administrative decision of a staff member in the Office of Law Revision Counsel to include just the House amendment in the U.S. Code. But this staff member cannot supplant the will of Congress. In fact, adopting the approach urged by the opponents of the Clean Power Plan would lead to a serious constitutional problem. Law would be made without following the constitutional requirements of bicameralism (passage by both the House and the Senate) and presentment (signature by the President or veto override by Congress). The Supreme Court has made clear in *Immigration & Naturalization Service v. Chadha* that such arrangements are unconstitutional.¹⁵ And even if one got past that problem, one would need to argue that the House amendment is subject to a single meaning and deprive EPA of the deference that it is owed under the *Chevron* doctrine when it interprets ambiguous statutory provisions. In fact, reasonable interpretations of the House amendment would support the Clean Power Plan.

IV. EPA's Proposed Guidelines Under Section 111(d) Are Consistent with the Statute

Opponents of the Clean Power Plan also argue that EPA cannot account for the full range of emissions reduction possibilities that are actually available in a

¹⁵ 462 U.S. 919 (1983).

state, claiming that the agency must arbitrarily limit its analysis to reductions that are achievable within the “fence line” of individual power plants¹⁶

It is first important to note that the Clean Power Plan does not require any state or any power plant to undertake any particular approach to reducing carbon emissions. As an initial matter, all the plan does is set carbon emissions targets for a state, which the state then has the discretion to decide how to meet.¹⁷ So the plan does not require any power plant to reduce emissions that it cannot control.

Furthermore, EPA has broad authority to tailor the emissions targets for standards of performance under Section 111(d) in light of the particular characteristics of the regulated entities and the pollutant at issue. Nowhere does Section 111(d) limit standards of performance to technological, end-of-pipe requirements, and indeed, Congress specifically removed a requirement that performance standards be technologically based in its 1990 amendments to the Clean Air Act.¹⁸ Several states and utilities are already using the techniques outlined in EPA’s “best system of emission reduction” to reduce greenhouse gas emissions from the power sector—including not just efficiency improvements at coal plants, but also increased use of natural gas plants, increased use of renewables, and demand-side energy efficiency improvements. The electric grid is interconnected and the relevant product is electricity, not electricity produced by coal-fired plants. As a result, a system of emission reduction that controls greenhouse gases cost-effectively by treating fossil fuel-fired power plants as part of a network, averaging

¹⁶ See 42 U.S.C. § 7411(a)(1) & (d).

¹⁷ 79 Fed. Reg. 34,830, 34,833 (June 18, 2014).

¹⁸ Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 403(a), 104 Stat. 2399, 2631; compare Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 109(c)(1)(A), 91 Stat. 685, 699-700.

emissions across plants, and recognizing changes in fuel use that reduce emissions is both highly desirable and eminently reasonable.

If a state fails to adopt a plan that meets Section 111(d) requirements, EPA has the authority to promulgate a federal implementation plan instead. Opponents of the Clean Power Plan have suggested that, even if EPA can consider beyond-the-fence-line changes like improvements in demand-side energy efficiency to be part of the “best system or emission reduction” when it calculates state reduction targets, EPA will not be able to enforce such changes directly as part of a federal implementation plan.

It remains to be seen what a backstop federal implementation plan will look like for the Clean Power Plan. EPA has indicated that it will release a model federal implementation plan this summer, so there is little value in speculating about this issue now. However, a federal implementation plan need not institute particular energy efficiency or renewable energy requirements on either a state or a source, even if these approaches make up part of the “best system of emission reduction” in the guidance that EPA gives states under Section 111(d). For example, under a federal implementation plan, EPA could simply allocate a state’s emission budget to the power plants in the state. The power plants could then meet the emissions requirements using a combination of heat rate improvements and other verifiable means of greenhouse gas reduction, including securing reductions from other sources through an emissions trading framework.

Conclusion

I am very grateful to have been invited to testify today and will be delighted to answer any questions you might have.