Hearing on EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues

Testimony of Allison Wood, Partner, Hunton & Williams LLP

U.S. House Committee on Energy and Commerce
Subcommittee on Energy and Power

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Summary

Section 111(d) of the Clean Air Act has always been an insignificant provision designed to be used rarely. Indeed, it has been used only five times since 1970. EPA's proposed section 111(d) rule turns this notion on its head and seeks to regulate an enormous part of the economy. The rule suffers from numerous legal deficiencies, including whether EPA even has authority to issue it given that electric generating units are regulated under section 112 of the Clean Air Act. EPA agreed for many years that regulation under section 111(d) occurs only if the source category (rather than the pollutant) is not regulated under section 112. EPA now claims there is ambiguity in the statute due to a clerical error made in the Statutes at Large. EPA is incorrect.

The proposed rule is also unlawful because it attempts to redefine the statutory term "system of emission reduction" by relying on a dramatic redefinition of the word "system" to broaden the program beyond the source by claiming that it may base a standard of performance on any "set of things" that leads to reduced emissions from the source category overall. This is misguided. A "system of emission reduction" must begin and end at the source itself.

There are numerous other legal deficiencies with the proposed rule that will certainly be litigated. Given the complexity of this rule and the deadlines for state plans, however, states and regulated entities will be forced to comply with this rule long before courts decide the legal challenges. They are not going to be able to wait to see what happens in court, so under the current timing any victory that they achieve will end up being hollow.

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I. Introduction

It is an honor to appear before this Subcommittee to offer testimony on EPA's proposed rule to regulate existing electric generating units under section 111(d) of the Clean Air Act. My name is Allison Wood, and I am a partner in the law firm of Hunton & Williams LLP. I have practiced environmental law for over 16 years, and for the past decade my practice has focused almost exclusively on climate change. I have represented industry clients in every major rulemaking and case involving the regulation of greenhouse gases under the Clean Air Act, including preparing comments on EPA's proposed section 111(d) rule[1] for several clients, including the Utility Air Regulatory Group, and I represent that group in litigation pending before the D.C. Circuit regarding whether EPA has authority under the Clean Air Act to issue the section 111(d) rule. I am not representing anyone with regard to this testimony, however. I am testifying in my own personal capacity as a Clean Air Act practitioner who focuses on climate change.

EPA's proposed section 111(d) rule suffers from numerous legal deficiencies. I would like to briefly touch on two of those issues today. The first is whether EPA even has authority under section 111(d) to issue the proposed section 111(d) rule in light of the fact that electric generating units (which are sometimes referred to as "EGUs") are already regulated under

[1] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule, 79 Fed. Reg. 34,830 (June 18, 2014).

section 112 of the Clean Air Act, which addresses hazardous air pollutants. The second issue is whether EPA's proposed section 111(d) rule can properly be considered to be a "system of emission reduction" under the Clean Air Act, even assuming EPA has authority to issue a section 111(d) rule for electric generating units. There are other legal defects in EPA's proposed section 111(d) rule, including numerous issues related to the Federal Power Act and the constitutional issues that Professor Tribe will be addressing today.

In addition, the Subcommittee should also be aware that a legal prerequisite for regulation under section 111(d) is that there must also be regulation of the same new sources under section 111(b). I will not get into them today, but there are many issues associated with EPA's proposed new source performance standards under section 111(b) for new coal-fired electric generating units, including the controversial requirement for partial carbon capture and sequestration. In the event those new source performance standards are overturned by a court, the foundation for EPA's section 111(d) rule would disappear.

All of these legal issues give rise to a great deal of uncertainty regarding the proposed section 111(d) rule and cast serious doubt over whether it will be able to survive review by the courts. In the meantime, however, states face deadlines for the submission of state plans and the owners of electric generating units have to begin preparing. They do not have the luxury of waiting to see whether these rules will make it through court review. In the last section of this testimony, I will address timing aspects of EPA's proposed section 111(d) rule and the impacts that are already being felt by states and regulated entities from the proposal.

II. EPA's Authority Under Section 111(d)

Section 111(d) has always been an insignificant provision of the Clean Air Act designed to be used rarely. Between 1970 and 1990, EPA issued regulations under this provision only

four times, regulating: (1) fluoride emissions from phosphate fertilizer plants;[2] (2) sulfuric acid mist from sulfuric acid production units;[3] (3) total reduced sulfur emissions from kraft pulp mills;[4] and (4) fluoride emissions from primary aluminum plants.[5] After the 1990 amendments to the Clean Air Act, which further restricted section 111(d), only one section 111(d) regulation was promulgated that still exists. That regulation addresses landfill gas emissions from municipal solid waste landfills.[6]

EPA promulgated its regulations to implement section 111(d) in 1975, and those regulations have been changed only in minor ways since.[7] At that time, the Agency explained that it planned to implement section 111(d) in a manner that would reflect the narrow, limited scope of the provision. Specifically, EPA noted that section 111(d) focuses on pollutants that are "highly localized and thus an extensive procedure … is not justified."[8] In accordance with this well-understood, limited reach, the five existing source categories regulated to date under this provision have been singular and specialized. EPA provided that "the number of designated facilities per State should be few" and specifically said that state plans would be "much less complex than the [state implementation plans or "SIPs"]" issued under section 110 to ensure

[2] 42 Fed. Reg. 12,022 (Mar. 1, 1977).

[3] 42 Fed. Reg. 55,796 (Oct. 18, 1977).

[4] 44 Fed. Reg. 29,828 (May 22, 1979).

[5] 45 Fed. Reg. 26,294 (Apr. 17, 1980).

[6] 61 Fed. Reg. 9905 (Mar. 12, 1996). EPA also promulgated the Clean Air Mercury Rule under section 111(d), 70 Fed. Reg. 28,606 (May 18, 2005), but that rule was ultimately struck down by the D.C. Circuit on grounds unrelated to the issues being discussed here today, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

[7] 40 Fed. Reg. 53,340 (Nov. 17, 1975).

[8] *Id.* at 53,342.

national ambient air quality standards are met.[9] Thus, section 111(d) has always been understood by EPA to have limited reach. That reach became even more limited after the 1990 Amendments to the Clean Air Act.

In 1990, section 111(d) was amended to require the EPA Administrator to prescribe regulations for controlling pollution from "any existing source":

> (i) for which air quality criteria have not been issued or which is *not* included on a list published under section [108(a)] of this title *or emitted from a source category which is regulated under section [112] of this title* but
>
> (ii) to which a standard of performance under this section would apply if such existing source were a new source….[10]

Before 1990, section 111(d) prevented EPA from regulating the emission of a *pollutant* from existing sources when that *pollutant* was regulated under section 112.[11] The purpose of this exclusion was to avoid duplicative regulation between section 111(d) and section 112.

Before the 1990 amendments to the Clean Air Act, section 112 focused on regulating hazardous air pollutants, which were defined to be pollutants not regulated under the national ambient air quality standards program and pollutants that could cause death or "serious irreversible, or incapacitating reversible, illness."[12] In 1990, Congress decided to significantly expand the reach of section 112, listing 189 specific pollutants to be regulated under section 112 and allowing EPA to add pollutants to the list that more broadly present a threat to public health or that cause adverse environmental effects, provided the pollutant is not regulated under the

[9] *Id*. at 53,345.

[10] 42 U.S.C. § 7411(d)(1) (emphases added).

[11] 42 U.S.C. § 7411(d) (1989).

[12] Clear Air Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1685-86 (1970).

national ambient air quality standards program.[13] Congress also provided, for the first time, that *source categories* would be listed and regulated with national emission standards under section 112.[14] As EPA stated in litigation involving its 2005 Clean Air Mercury Rule, "the entire concept of 'source categories' in section 112 was new in 1990. Prior to 1990, section 112 simply directed EPA to develop a list of hazardous air pollutants and then to establish corresponding emission standards for these pollutants."[15] The focus of section 112 thus broadened significantly, and section 112 went from a section with just four subsections to one with nineteen.

The controversy over whether EPA has authority to issue the proposed section 111(d) rule or whether it is prohibited from doing so because electric generating units are a source category regulated under section 112 stems from two competing amendments that were made to section 111(d) in the spring of 1990, one by the House and one by the Senate. The Senate's amendment was passed first and was non-substantive in nature. It was a conforming amendment to update a cross-reference to section 112 and retained the pre-1990 focus of section 111(d) on pollutants rather than source categories. The House amendment to section 111(d) was substantive in nature and passed nearly two months later.[16] Both amendments appear in the Statutes at Large. Recognizing the mistake in the Statutes at Large, the codifiers included only

[13] 42 U.S.C. § 7412(b)(2).

[14] 42 U.S.C. § 7412(c), (d).

[15] Final Brief of Respondent EPA, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155494, at 109 n.40 (D.C. Cir. July 23, 2007).

[16] H.R. 3030 (containing the substantive provision) passed on May 23, 1990, while S. 1630 (containing the ministerial cross-reference) passed on April 3, 1990. *See* H.R. Rep. No. 101-490, at 444 (1990), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 ("LEG. HISTORY"), at 3021, 3468 (1993) (report to accompany H.R. 3030); S. 1630, 101st Cong. § 305(a) (as passed by Senate, Apr. 3, 1990), *reprinted in* 3 LEG. HISTORY, at 4119, 4534.

the House amendment in the United States Code. This was appropriate given that the managers of the Senate bill *expressly* stated that they were deferring or "receding" to the substantive House amendment:

> [T]he House amendment contains provisions for … amending section 111 … relating to new and existing stationary sources, for amending section 302 … which contains definitions, to provide a savings clause, to state that reports that are to be submitted to Congress are not subject to judicial review, and for other purposes.
>
> Conference agreement. *The Senate recedes to the House* except that with respect to the requirement regarding judicial review of reports, the House recedes to the Senate and with respect to transportation planning, the House recedes to the Senate with certain modifications.[17]

It was thus Congress's clear and stated intent to do away with any language that interfered with House language on the same topic unless it was in the area of judicial review or transportation planning, and it was proper for the Senate amendment not to be included in the U.S. Code.

It made complete sense in 1990 to shift the focus of section 111(d) from pollutants to source categories when section 112 was expanded to focus on source categories. Quite simply, Congress amended section 111(d) to reflect what it had done with section 112. The House amendment's focus on source categories aligns with the shift in focus in section 112 from pollutants to source categories. The Senate amendment's focus on pollutants makes no sense in the context of the comprehensive amendments to section 112.

Although it takes a different approach now, EPA itself concluded in 1994 that the only logical reading of the 1990 amendments to section 111(d), especially in the context of the changes to section 112, is to honor the U.S. Code version containing the House amendment:

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[17] Chafee-Baucus Statement of Senate Managers, S. 1630, The Clean Air Act Amendments of 1990, § 108 (Oct. 27, 1990), *reprinted in* 1 LEG. HISTORY at 885 (1993) (emphasis added).

> EPA also believes that [the House amendment] is the correct amendment because the Clean Air Act Amendments revised section 112 to include regulation of source categories in addition to regulation of listed hazardous air pollutants, and [the House amendment] thus conforms to other amendments of section 112. The section not adopted by title 42 [the Senate amendment], on the other hand, is a simple substitution of one subsection citation for another, without consideration of other amendments of the section in which it resides, section 112. Thus *EPA agrees that CAA section 111(d)(1)(A) should read* "[t]he Administrator shall prescribe regulations which … establish[] standards of performance for any existing source for any air pollutant … which is not … emitted from a *source category* which is regulated under section 112."[18]

Twenty years later, on June 2, 2014, EPA changed its position. In a Legal Memorandum that was issued along with the proposed section 111(d) rule, EPA concluded that it could regulate electric generating units under section 111(d) even though those units are source categories subject to regulation under section 112. Specifically, EPA stated that the two competing amendments to section 111(d) were "drafting errors" that create "ambiguity."[19] EPA says this "ambiguity" allows it to interpret section 111(d), which it has done in a way that adopts an even narrower limitation than either the Senate amendment or the House amendment. Under EPA's interpretation, section 111(d) does not apply only when *both* the source category is regulated under section 112 *and* the pollutant in question is one listed under section 112.[20]

EPA's determination that it has the authority to regulate electric generating units under both section 111(d) and section 112 is particularly nonsensical when viewed in light of the

[18] EPA, EPA-453/R-94-021, Air Emissions from Municipal Solid Waste Landfills – Background Information for Final Standards and Guidelines, at 1-5 to 1-6 (Dec. 1995), *available at* http://www.epa.gov/ttn/atw/landfill/bidfl.pdf.

[19] Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units at 12, 21(undated), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-0419.

[20] *Id.* at 26.

extensive, comprehensive, and expensive Maximum Achievable Control Technology that EPA has imposed on coal-fired electric generating units as part of its Mercury and Air Toxics Standards under section 112. EPA's proposed section 111(d) rule envisions shifting electric generation from coal-fired units to gas-fired units through environmentally-based dispatch of electricity, constructing and expanding low- or zero-carbon generating units (such as solar and wind generation) to replace fossil fuel-fired generation, and reducing electricity demand.[21] It makes little sense to impose extremely costly maximum control technology requirements on existing electric generating units under section 112 and then turn around and tell those exact same sources that have already invested and installed those controls to cease or significantly reduce operations to comply with section 111(d) of the Clean Air Act, a provision that Congress clearly intended to be both insignificant and non-additive. Indeed, EPA estimates that the section 111(d) rule by itself (notwithstanding the Mercury and Air Toxics Standards under section 112) will cause 46 to 49 gigawatts of coal-fired capacity (as well as 16 gigawatts of oil/gas steam capacity) to retire by 2020 and will cost the electric utility industry another $5.5 to $7.5 billion annually to comply by 2020.[22] This is exactly the type of duplicative regulation that Congress sought to avoid by making regulation of existing sources under section 111(d) and section 112 mutually exclusive.

The question of whether EPA has authority to issue the section 111(d) rule in light of the fact that electric generating units are subject to regulation under section 112 is currently pending before the D.C. Circuit in two related cases: *In re Murray Energy Corporation*, No. 14-1112 (consolidated with No. 14-1151), and *West Virginia v. EPA*, No. 14-1146. The court has scheduled oral argument in these two cases for April 16, 2015. The opening and reply briefs of

[21] 79 Fed. Reg. at 34,836.

[22] *Id*. at 34,933, 34,934.

West Virginia and 11 other states (Alabama, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and Wyoming) in the *West Virginia* case are attached to this testimony as Attachment 1 because those briefs provide an excellent presentation of the legal arguments against EPA's interpretation of section 111(d). Those briefs also demonstrate the harm that states are suffering now as a result of the proposed section 111(d) rule. The opening and reply briefs of the Utility Air Regulatory Group (which I represent) and the National Federation of Independent Business in the *Murray Energy* case are also attached to this testimony as Attachment 2. Those briefs contain legislative history relevant to section 111(d) and provide a discussion of the harm that electric generating companies and their customers are experiencing as a result of the proposed section 111(d) rule.

III. EPA's Interpretation of "Best System of Emission Reduction" in the Proposed Section 111(d) Rule

The second legal issue I would like to address today is EPA's interpretation of the term "system of emission reduction" in section 111 of the Clean Air Act. Section 111(a)(1) of the Clean Air Act requires that any standard of performance, including one under section 111(d), be based on "the best system of emission reduction" that has been adequately demonstrated for the source category.[23] In its proposed section 111(d) rule, EPA relies on a dramatic redefinition of the statutory term "system" to broaden the scope of this program "beyond the source"[24] by claiming that it may base a standard of performance on any "set of things" that leads to reduced

[23] 42 U.S.C. § 7411(a)(1).

[24] EPA's "beyond the source" approach is often described as "beyond the fenceline." Although it is true that EPA cannot regulate "beyond the fenceline" under section 111, the term "beyond the source" is actually more precise in that section 111 is apparatus specific. For example, EPA's Subpart Da regulations (which are at issue here), 40 C.F.R. §§ 60.40Da-60.52Da, regulate the boiler of an electric generating unit and do not go beyond the boiler to other parts of the power plant. The phrase "beyond the fenceline" appears to allow regulation of other components within the power plant, which is not permissible under section 111 of the Clean Air Act.

emissions from the source category overall, ranging from utilization limits at certain units to enforceable obligations for other entities that reduce utilization of some sources.[25] This interpretation is misguided. The plain language, the statutory context, and the regulatory history of section 111 are unambiguous. A "system of emission reduction" must begin and end at the source itself.

To illustrate and better understand the problem with EPA's overbroad interpretation of "system of emission reduction," it helps to put it in the perspective of automobiles. Imagine that EPA proposes regulations under a section of the Clean Air Act authorizing the Agency to develop tailpipe emissions standards to reduce air pollution from cars. One might expect that these regulations would require vehicles to be equipped with emission control equipment (such as catalytic converters) or operational features (such as on-board diagnostic computers) to limit each vehicle's tailpipe emissions per mile. But what if EPA went farther? Imagine that these regulations also attempted to reduce vehicle tailpipe emissions by requiring car owners to shift some of their travel to buses, or by requiring there to be more electric vehicle purchases, or by requiring individuals to reduce vehicle use altogether by working from home once a week. Can a "standard of performance" reasonably include measures like these on the basis that they are a "set of things" that lead to reduced emissions? Would the Clean Air Act allow it?

To many, such broad requirements would seem entirely out of place and beyond the scope of EPA's authority to limit air pollution from cars, despite the fact that these types of measures would indirectly reduce tailpipe emissions from vehicles. That is because they would have no effect on the emissions rate of the individual vehicles themselves, and they are beyond the control of the vehicle manufacturer altogether. In order to require such measures, EPA

[25] 79 Fed. Reg. at 34,885-86.

would need authority to reach beyond the source—or, in this hypothetical, beyond the car—to impose obligations on other entities such as the car's owner.

Although this imagined scenario seems fanciful, it is precisely what EPA proposes to do in the proposed section 111(d) rule. Rather than limit itself to emission control or other production process-related measures to lower the rate of carbon dioxide emissions from existing electric generating units, EPA instead proposes to require electricity generation to be shifted from coal- and oil-fired units to natural gas-fired units (akin to requiring car owners to take the bus more), mandate the building of additional renewable energy (akin to requiring the purchase of more electric vehicles), and require programs that will result in customers using less electricity (akin to requiring drivers to work from home one day a week). This approach violates common sense and the Clean Air Act.

Section 111 of the Clean Air Act authorizes EPA and states to promulgate standards of performance for new and existing sources within certain source categories. At its heart, section 111 is quite simple. It provides for the regulation of sources through standards that are based on what an individual source can do to reduce the source's emissions at a given level of operation. Nothing in Building Blocks 2, 3, or 4 of EPA's proposed section 111(d) rule would reduce the pounds per megawatt hour of carbon dioxide emitted from any electric generating unit. Those Buildings Blocks are all designed simply to make coal- and oil-fired units operate less (if at all). Efforts to require aggregate emission reductions by targeting entities outside the designated source category exceed the scope of this program; a "standard of performance" cannot ask another source to operate more (or other entities to reduce demand for a product) so that the source in the designated source category must curtail its operations or simply not "perform" at all.

A. Statutory Text

On its face, section 111 clearly does not authorize EPA or states to impose requirements that reach beyond individual sources in a regulated category. Instead, the statute provides only for standards that regulate the emissions performance of *individual* stationary sources. This narrow focus is evident simply from reading the titles used in these provisions: section 111 is designated "[s]tandards of performance for new stationary sources," and section 111(d) is titled "[s]tandards of performance for existing sources; remaining useful life of source." Likewise, the plain text of these provisions is clear that standards of performance apply only to sources in specific categories: new source performance standards under section 111(b) apply only to "new sources within [a listed] category,"[26] while state standards under section 111(d) apply to "any existing source . . . to which a standard of performance . . . would apply if such existing source were a new source."[27] In addition, section 111(d) explicitly directs states and EPA to consider the "remaining useful life" of existing sources when applying any standard of performance, further demonstrating that this section focuses solely on what individual sources can do to improve their performance at reasonable cost rather than what the entire source category (or other entities) can do collectively.[28]

The Clean Air Act also narrowly confines the stationary sources that may be regulated under section 111 to any individual "building, structure, facility, or installation which emits or may emit any air pollutant."[29] This definition notably does not extend to combinations of these facilities or to other non-emitting entities. EPA has attempted in the past to treat multiple

[26] 42 U.S.C. § 7411(b)(1)(B).

[27] *Id.* § 7411(d)(1).

[28] *Id.* § 7411(d)(1)(B), (d)(2).

[29] *Id.* § 7411(a)(3).

individual sources as a single system subject to regulation for the purposes of section 111, only to be rebuked by the courts for violating the clear language of the statute.[30] For example, the D.C. Circuit has held that if EPA is concerned about the cost or need for flexibility in regulating a category of sources, the solution is to change the *standard*, not the entity to which the standard applies.[31]

Importantly, section 111 also requires that any standard of performance be "achievable" by the individual sources to which it applies based on application of an "adequately demonstrated" system of emission reduction.[32] The achievability requirement is clearly inconsistent with a beyond the source approach. A standard cannot be "achievable" for a source if the source must rely on the conduct of some other entity that it does not control, or must simply not operate at all, in order to achieve the standard. The hypothetical automobile standard provides a telling example. If a standard of performance for tailpipe emissions from new motor vehicles were to be based on the emission reductions that would result from encouraging people to work from home one day a week, how would the manufacturer of any motor vehicle achieve that standard? No change in the design or operation of the vehicle could achieve those reductions. How would the owners of existing vehicles adjust the emissions performance of their cars? A source does not "achieve" a level of required performance by "performing" less or ceasing to "perform" at all.

B. Statutory Context

Further, nothing in the remainder of the Clean Air Act even hints that EPA has *any* authority under section 111 to impose beyond the source emission reduction measures. Other

[30] *See ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978).

[31] *Id.* at 329.

[32] 42 U.S.C. § 7411(a)(1).

provisions of the Clean Air Act draw a sharp contrast between source-focused regulatory programs and programs that reduce aggregate emissions.

The Clean Air Act's other provisions establishing emission standards for new and existing sources all focus solely on achieving reductions in the rate of emissions at individual sources. Emission standards for hazardous air pollutants must be based on the maximum achievable control technology and reflect the application of "measures, processes, methods, systems or techniques" directly to individual sources.[33] Standards for visibility-impairing pollutants must reflect "the best available retrofit technology . . . for controlling emissions from [each eligible] source," considering the costs, existing control technology, and remaining useful life for that source.[34] And under the Clean Air Act's program for prevention of significant deterioration, new and modified sources must implement the "best available control technology" (or "BACT"), which the permitting authority must identify on a case-by-case basis for each source and which must reflect "application of production processes and available methods, systems, and techniques" at the source.[35] None of these programs allows EPA to set an emission standard based on capping or restricting a source's operations.

The BACT program is particularly relevant because Congress explicitly tied these emission standards to section 111. Standards of performance under section 111 provide a regulatory floor for BACT standards.[36] But if a standard of performance relies on a "system of emission reduction" that goes beyond the source itself, it cannot meaningfully inform a BACT standard for individual sources in that category.

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[33] *Id.* § 7412(d)(2) (listing acceptable measures).

[34] *Id.* § 7491(b)(2)(A).

[35] *Id.* §§ 7475(a)(4), 7479(3).

[36] *Id.* § 7479(3).

In contrast, in the few regulatory programs where Congress did authorize broad emission control measures for the purpose of meeting aggregate emission reduction goals, it spoke clearly and precisely. When Congress took action in the 1990 Clean Air Act Amendments to cap acid rain-forming emissions and establish a program for emissions allowances and trading, it added an entirely new title (Title IV) to the Clean Air Act spelling out the requirements and implementation procedures for that program in great detail.[37] Unlike the portion of the Clean Air Act in which section 111 is found, Congress's statement of purpose in Title IV establishes clear goals for nationwide "reductions in annual emissions" and explicitly states its desire to "encourage energy conservation, use of renewable and clean alternative technologies, and pollution prevention as a long-range strategy, consistent with the provisions of this subchapter, for reducing air pollution."[38] Congress also gave EPA specific instructions on how to credit sources for compliance with emission requirements based on avoided emissions from renewable energy and energy conservation.[39] The exhaustive provisions in Title IV prove that when Congress intends to establish a program requiring aggregate emission reductions that reaches beyond measures implemented at individual sources, it does not hide such authority in general terms like "system of emission reduction."

C. Regulatory History

Even if the statutory language left any doubt, EPA's long and consistent history of implementing section 111 at the source would give lie to today's novel attempts to extend that section beyond the source. In fact, to the best of my knowledge, in the 44-year history of the

[37] *See id.* §§ 7651-7651*o*.

[38] *Id.* § 7651(b).

[39] *Id.* § 7651c(f).

Clean Air Act, EPA has limited the scope of section 111 to the emission rate improvements at the regulated source in *every rulemaking it has undertaken*.

First, EPA's 1975 Subpart B regulations—which establish a procedural framework for states to adopt standards of performance for existing sources under section 111(d)—share section 111's exclusive focus on standards that are achievable by individual sources. Subpart B directs EPA to publish a "guideline document containing information pertinent to control of the designated pollutant [from] *designated facilities* [i.e., existing sources subject to regulation under 111(d)]."[40] Echoing the statutory text, emission guidelines under Subpart B must "reflect[] the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated *for designated facilities*."[41] Acknowledging section 111's statutory command to consider the "remaining useful life" of regulated existing sources, Subpart B also notes that states may tailor standards of performance for individual designated facilities to account for "[u]nreasonable cost of control resulting from plant age, location, or basic process design," "[p]hysical impossibility of installing necessary control equipment," or "[o]ther factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable."[42] This discretion reflects Subpart B's focus on what emission rate improvements individual existing sources can achieve themselves.

Subpart B also specifies that compliance with any standards of performance for existing sources will be shown through a series of "[i]ncrements of progress," which are "steps to achieve compliance which must be taken by an owner or operator of a designated facility."[43] These

[40] 40 C.F.R. § 60.22(a) (emphasis added).

[41] *Id.* § 60.22(b)(5) (emphasis added).

[42] *Id.* § 60.24(f).

[43] *Id.* § 60.21(h).

increments of progress include awarding contracts, initiating on-site construction or installation, and completing on-site construction or installation of emission control equipment or process changes.[44] Thus, Subpart B makes clear that compliance with standards of performance is achieved through on-site measures taken by regulated sources.

Second, out of the nearly 100 new source performance standards and emission guidelines EPA has promulgated and subsequently revised since 1970, to the best of my knowledge, *not one* has included beyond the source measures as part of a "system of emission reduction." For example, when the Agency promulgated and later revised the new source performance standards for kraft pulp mills, it never considered basing the standard of performance on measures that indirectly reduce those sources' operations by reducing demand for paper, such as promoting double-sided printing or encouraging businesses to provide "paperless billing" for customers.[45] EPA's source-focused approach has not changed from 1970 to the present. In a June 30, 2014 new source performance standard rulemaking, EPA reaffirmed that standards of performance "apply to sources" and must be "based on the [best system of emission reduction] *achievable at that source*."[46]

Nor has EPA ever taken a beyond the source approach in emission guidelines for existing sources. As discussed above, since 1970, EPA has only published valid emission guidelines under section 111(d) for five source categories, and in all five of these rulemakings the emission guidelines were based on the application of pollution control technology or other process

[44] *Id.* § 60.21(h)(1)-(5).

[45] *See* 43 Fed. Reg. 7568, 7572 (Feb. 23, 1978); 79 Fed. Reg. 18,952 (Apr. 4, 2014).

[46] 79 Fed. Reg. 36,880, 36,885 (June 30, 2014) (emphasis added).

controls at individual sources.[47] The Clean Air Mercury Rule, which was promulgated under section 111(d), also did not adopt a beyond the source approach to establishing standards of performance. Although that rule did authorize an emissions trading program as a tool for *compliance* with standards of performance, the "system of emission reduction" that was used to set the emission guidelines themselves was limited to pollution control technology that could be installed at individual sources.[48]

In light of this statutory language, context, and regulatory background, the beyond the source approach contained in EPA's proposed section 111(d) rule clearly conflicts with section 111 of the Clean Air Act. Just as the Clean Air Act does not authorize EPA to require drivers to stay home or to use public transportation in order to reduce motor vehicles' tailpipe emissions, the Agency cannot require stationary source owners to operate their sources less or to rely on other measures outside of their control as part of a standard of performance. In the context of existing electric generating units, this means that any final carbon dioxide emission guidelines EPA ultimately promulgates (assuming it has authority to do so) may be based only on measures that electric generating unit owners may incorporate into the design or operation of their units themselves, such as improvements in heat transfer efficiency. Although this may result in lower

[47] 41 Fed. Reg. 19,585 (May 12, 1976) (draft guidelines for phosphate fertilizer plants based on "spray cross-flow packed scrubbers"); 41 Fed. Reg. 48,706 (Nov. 4, 1976) (proposed guidelines for sulfuric acid production units based on "fiber mist eliminators"); 43 Fed. Reg. 7597 (Feb. 23, 1978) (draft guidelines for kraft pulp mills based on various process controls and two-stage black liquor oxidation system); 45 Fed. Reg. at 26,294 (final guidelines for primary aluminum plants based on "effective collection of emissions followed by efficient fluoride removal by dry scrubbers or by wet scrubbers"); 61 Fed. Reg. at 9907 (final guidelines for municipal solid waste landfills based on "(1) [a] well-designed and well-operated gas collection system and (2) a control device capable of reducing [non-methane organic compounds] in the collected gas by 98 weight-percent").

[48] 70 Fed. Reg. at 28,617-20, 28,621 (final guideline was "based on the level of [mercury (Hg)] emissions reductions that will be achievable by the combined use of co-benefit (CAIR) and Hg-specific controls").

overall emission reductions than a beyond the source approach, it is the outcome that the Clean Air Act requires. As the Supreme Court recently held in striking down a major component of EPA's prevention of significant deterioration permitting program for greenhouse gases, "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."[49] Because section 111 focuses solely on standards that are achievable by individual sources, EPA's standards of performance must as well.

IV. Timeline for State Plans Under EPA's Proposed Section 111(d) Rule

EPA has stated that it will finalize its section 111(d) rule this summer. States will then have one year, until the summer of 2016, to finalize their state plans. Although states may submit partial state plans at the one-year deadline and seek an extension, the state needs to show significant progress on its plan, and there is no guarantee that an extension would be granted and that a federal plan would not be imposed on the state. The compliance period for the section 111(d) rule was originally supposed to begin on January 1, 2020, but EPA has announced that it now intends for the compliance period to begin in summer 2020. State plans will be submitted well in advance of the beginning of the compliance period.

The plans that states will need to prepare are extremely complicated. In the *West Virginia* litigation, for example, the State of Alabama described preparation of the plan that will be needed for the section 111(d) rule as "the most complex air pollution rulemaking undertaken by [Alabama] in the last 40 years."[50] The rule essentially requires a complete overhaul of each state's energy portfolio. In addition, many states are going to have to enact laws and regulations to enable them to do the things contemplated by the proposed rule. All of this will be completed

[49] *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014).

[50] Final Brief for Petitioners, Exhibit A, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. Mar. 4, 2015) (Attachment 1 to this testimony).

before litigation over the rule is complete. If the rule is ultimately held to be unlawful, the states will have already expended enormous amounts of resources to develop the plan, and any laws or regulations that have been enacted cannot be easily reversed.

Similarly, the owners of electric generating units are having to plan now to comply with the rule—even as significant uncertainty surrounding the legality, parameters, and stringency of state plans puts the industry's long-term planning in limbo. Important decisions, such as whether to make improvements or to install emission control equipment on certain power plants, are suspended because it is uncertain whether those plants will remain operational after this rule goes into effect. Companies are also reluctant to enter into long-term contracts for power or fuel during the pendency of the rulemaking and the state planning process, which can add costs that are being passed on to consumers. If companies are going to need to increase their renewable generation in order to meet customer demand, then decisions need to be made now regarding the timing of that construction. Decisions will need to be made about plant closures, and once these decisions have been made, they are not easily reversed.

As discussed earlier, there are myriad legal issues regarding the section 111(d) rule, and while the outcome of litigation is uncertain, the fact that it will occur is certain. Unless the rule is stayed by the court during litigation—which is highly unusual and cannot be counted on—states and the owners of electric generating units will have no choice but to proceed. This could lead to a situation where a victory in litigation could ring very hollow because so much of the injury to states and electric generating unit owners will have already occurred and will not be able to be remedied.

Indeed, this situation has happened with EPA's Mercury and Air Toxics Standards. The Supreme Court is hearing oral argument to determine whether that rule is unlawful next week.

In the meantime, most electric generating units subject to that rule have installed controls already to comply with it. A victory in the Supreme Court will not be able to give those companies back the money that has been spent to install those controls, and in some circumstances might even threaten the ability of the utility to recover those costs because they could be deemed to have been unnecessary.

V. Conclusion

EPA's proposed section 111(d) rule suffers from many legal infirmities and violates the Clean Air Act. I touched on just two of those legal issues today that should prove fatal to the rule, but there are many more. The problem is that the court process is going to take time to play out, and in the meantime, states and regulated entities are going to have to begin the process of figuring out how to comply with this rule—even if they believe as I do that the rule is unlawful. Because of the complexity of the rule and the enormous ramifications it has for how energy is distributed in each state, the ability to wait and see what happens in court is not a realistic option.

Thank you again for the opportunity to testify today.