BLACK SWAN RECONFIGURATION: LEGAL SEPARATION OF AMERICAN POWERS

Steven Ferrey[*†]

ABSTRACT

In a legal Black Swan *event, the Supreme Court, in an unprecedented action, stayed and blocked implementation of the Obama Administration's core domestic and international agenda—years before a legal challenge to the regulation would ever reach the highest Court. This decision underscores major changes in the legal separation of U.S. governmental powers, and alters long-standing* Chevron *deference to the executive branch.*

The Clean Power Plan served as the foundation of the Obama Administration's goal to reduce climate-warming gas emissions from power plants. It provided the legal mortar cementing the U.S. commitment to the 2015 International Paris Agreement on climate change. This plan was a controversial exercise of executive action in the second Obama term that wove together domestic and international legal policy. With a 5–4 split, the Supreme Court decision peremptorily stayed the Plan—years before the lower court could rule on a contested challenge or advance to it—and the court of appeals froze. Raising the stakes, the Trump Administration is now recalculating the costs and benefits of the Plan in order to change American law.

These are pending disputes of legal first impression, fundamentally reshaping constitutional law. Rules of law have changed due to a combination of the unprecedented Supreme Court stay of executive action—years before any challenge would reach it on appeal—and the Trump Administration's efforts to recalibrate the costs and benefits of the regulations. This article analyzes in detail the legal position of each side

---

* Steven Ferrey is Professor of Law at Suffolk University Law School and was a Visiting Professor of Law at Harvard Law School. Since 1993, Professor Ferrey has been a primary legal consultant to the World Bank, the European Union, and the United Nations on their renewable energy and climate change reduction policies for developing countries, where he has worked extensively in Asia, Africa, and Latin America. He holds a B.A. in Economics from Pomona College, a Juris Doctor degree and a master's degree in Regional Energy Planning both from the University of Californian Berkeley, and was a post-doctoral Fulbright Fellow at the University of London between his graduate degrees. He is the author of 100 articles and seven books, the most recent of which are UNLOCKING THE GLOBAL WARMING TOOLBOX (2010); ENVIRONMENTAL LAW (7th ed. 2016) & (8th ed. 2019); and LAW OF INDEPENDENT POWER (45th ed. 2018).

† Professor Ferrey thanks his students Nick Boutoures and Lauren Karam for their assistance with research.

and the impacts of this long-pending, and significant constitutional confrontation, transfiguring domestic and international law.

I. RECEDING DEFERENCE IN ADMINISTRATIVE LAW

The Supreme Court initiated a major change reverberating in the separation of powers and administrative law.[1] The Supreme Court took the unprecedented, and still ongoing, action three years ago to stay and block enforcement of core Obama Administration domestic and international regulatory programs.[2] This action occurred years before the contested case ever reached a decision on the merits by the lower court or reached the Supreme Court on appeal.[3] This stay was an unprecedented preemptive reach of the Court.[4] Thereafter, the D.C. Circuit Court of Appeals avoided any decision upon hearing oral argument in 2015 for this critical matter of fundamental executive branch power.[5]

After the 2016 Presidential election, this pending judicial conflict on the separation of powers became even less clear to areas of constitutional and administrative law, creating unresolved issues of whether:

(1) A federal regulation's administrative benefits must always exceed costs;[6]

(2) So-called *co-benefits* can be counted as actual benefits when a regulation does not regulate such affected *co-benefits*;[7]

---

1. *See* Jonathan H. Adler, Opinion, *Supreme Court Puts the Brakes on the EPA's Clean Power Plan*, WASH. POST: VOLOKH CONSPIRACY (Feb. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/?utm_term=.076d469e7e5a [hereinafter *Brakes on CPP*] (referencing the Supreme Court's stay of the EPA's Clean Power Plan).

2. *See generally id.* (recounting the specifics of the Supreme Court's action).

3. *Id.*; *see also* Richard Wolf, *Supreme Court Blocks Obama's Climate Change Plan*, USA TODAY, https://www.usatoday.com/story/news/politics/2016/02/09/supreme-court-halts-obamas-emissions-rule/80085182/ (last updated Feb. 9, 2016) (outlining the history of the Clean Power Plan).

4. *See Brakes on CPP*, *supra* note 1 (commenting on the unusual nature of the action taken by the Supreme Court).

5. Janice Chon, Note, *Clean Power Plan*, 7 BARRY U. ENVTL. & EARTH L.J. 105, 107 (2017).

6. *See generally* Mario Loyola, *Federal Coercion and the EPA's Clean Power Plan*, ATLANTIC (May 17, 2015), https://www.theatlantic.com/politics/archive/2015/05/federal-coercion-and-the-epas-clean-power-plan/393389/ (calling into question the benefits of compliance with the Clean Power Plan).

7. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,928 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereinafter Clean Power Plan] (discussing *co-benefits* and their economic calculation).

(3) There is a new judicial rule when an agency confronts differing versions of statutory language incorporated in a statute;[8] and
(4) The *stare decisis* of prior U.S. Supreme Court opinions control the outcome.[9]

Administrative agencies in the 21st century have tried to avoid a court challenge reaching the merits of agency energy regulation.[10] Agencies have defended their administrative regulations by asking courts to avoid the legality of the merits or trying to disqualify the challenger on procedural grounds.[11] Such challenges include lack of plaintiff standing, failure to exhaust administrative remedies, and inability of courts to issue writs to executive agencies commanding compliance with the law.[12] Success on any of these defenses avoids a substantive decision on the merits of a legal controversy.[13]

This challenge to the Clean Power Plan (CPP) calls into question traditional rules of legal deference to agency actions.[14] The ongoing legal opposition to the Obama Administration's signature CPP is still not through the appellate process and the Supreme Court has not heard the case approximately three years after its challenge.[15] After the D.C. Circuit denied a request for a stay until a decision on the merits,[16] the Supreme Court, on February 9, 2016, took the unprecedented step of asserting its jurisdiction.[17] The Supreme Court ordered the EPA, prior to any opinion on

---

8. *See, e.g.*, *In re* Murray Energy Corp., 788 F.3d 330, 336 (D.C. Cir. 2015) (litigating the applicability of §§ 111(d) & 112 as amended and discussing judicial review of a proposed rule based on the EPA's interpretation of the statutory language).

9. *See* Lawrence Hurley & Valerie Volcovici, *U.S. Supreme Court Blocks Obama's Clean Power Plan*, SCI. AM., (Feb. 9, 2016), https://www.scientificamerican.com/article/u-s-supreme-court-blocks-obama-s-clean-power-plan/ (explaining that the Supreme Court has never blocked an EPA rule and that doing so would be unusual).

10. *See infra* Part IV.B.2 (explaining the remedies administrative agencies use to avoid unfavorable court decisions).

11. *See generally infra* Part IV (noting the different procedural methods used by agencies to halt litigation).

12. *See infra* Part IV.B.2.a (discussing the procedural grounds administrative agencies have used to dismiss cases from court).

13. *See infra* Part IV.B.2 (discussing the EPA's approach to avoiding a decision on the merits).

14. *See* Chevron U.S.A. v. NRDC, 467 U.S. 837, 866 (1984) (establishing the precedent of deference to agency action when Congress has not spoken to the issue and agency action is not arbitrary and capricious).

15. Wolf, *supra* note 3.

16. *See Brakes on CPP*, *supra* note 1 ("[A]s it is unusual for the high court to block federal regulations, particularly where (as here) the D.C. Circuit had denied a similar request.").

17. *See* Wolf, *supra* note 3 (describing how the Supreme Court stunned the environmental community by staying the CPP despite the need for the case to run its natural course first).

the merits or an appeal, to halt enforcement of the CPP until the D.C. Circuit issues an order on the lawsuit.[18]

This *Black Swan* legal event is unprecedented: the Supreme Court stepped in and preempted the circuit court on a stay when the merits were not yet decided by the D.C. Circuit.[19] This 5–4 split decision to issue a stay by the Court marks the first time the Supreme Court ever stayed a regulation before a judgment by the Court of Appeals.[20] Some commentators posit that this was not a surprising outcome, given the ruling in the 2015 Supreme Court decision in *Michigan v. EPA*.[21] Ultimately, the question is not about the CPP alone. There is a shift in administrative deference—both eroding the principles and ongoing practices emanating from the landmark *Chevron* decision.[22] There is a legal shift in the administrative state.[23]

This article navigates this shift that engulfs the pressing environmental and energy controversy of the 21st century—the control of our climate. Part II examines the contours of what the Obama Administration's CPP is, tracking both its proposed and modified final forms. We track its impacts at its cost of billions of dollars.[24]

Part III analyzes each aspect of the Petioners' substantive legal challenges to the CPP as arbitrary and capricious agency action not supported by the record. We dissect precedent ensnarling the substantive

---

18. *Brakes on CPP*, *supra* note 1; *see* Wolf, *supra* note 3 (explaining the suspension of CPP enforcement due to pending litigation).

19. *See* Jonathan H. Adler, Opinion, *Placing the Clean Power Plan in Context,* WASH. POST: VOLOKH CONSPIRACY (Feb. 10, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/10/placing-the-clean-power-plan-in-context/?utm_term=.c0e004e8cb0d [hereinafter *CPP in Context*] (describing the unprecedented manner of the actions taken by both the Court and the CPP).

20. Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016), https://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html.

21. *Brakes on CPP*, *supra* note 1. As a side note, there was no stay granted to the plaintiffs in the Supreme Court *Michigan* decision resulting in power plants paying for later-stricken upgrades to comply with the EPA's rulemaking during the litigation only to have it later overturned by the Supreme Court for the lack of cost-of-compliance analysis done by the EPA for the § 112 regulations. *See* Michigan v. EPA, 135 S. Ct. 2699, 2711–12 (2015) (holding that the EPA interpreted the statute unreasonably by not considering cost to be a relevant factor in their decision). By the time the order was invalidated, the costs were expended and plants were at or near compliance with the invalidated rulemaking, as suggested in Petitioners application for stay. *Id.*

22. *See* Chevron U.S.A. v. NRDC, 467 U.S. 837, 866 (1984) (detailing the Supreme Court's decision regarding deference to agencies).

23. *See, e.g.*, Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1393 (2017) (discussing the emergence and decline of the *Chevron* ruling).

24. *See infra* Parts II.A, III.C (providing an overview of the CPP).

legal issues and attempts at rebuttal by the Obama Administration EPA and Justice Department before the Supreme Court and federal courts.[25] At issue are the remaining contours of *Chevron* deference, a long-respected foundation of American administrative and constitutional law.[26]

In administrative law, there is substance and there is procedure. Part IV transitions to the procedural defenses raised by the agency to attempt to avoid a decision on the merits. These defenses raise issues of lack of citizen standing, failure to exhaust admnistrative remedies, and whether the executive branch agency can legally be subject to a judicial writ to compel its actions.[27] Every case has consequences. Part V charts lasting impacts for U.S. administrative law and the change to executive branch power.

II. DISSECTING THE CLEAN POWER PLAN

A. The Obama Administration's CPP Rule

1. Continuation or Significant Legal Departure?

The Obama Administration's CPP was the foundational U.S. environmental regulation with international implications, promulgated to meet Kyoto Protocol and 2015 Paris Agreement pledges to reduce carbon emissions.[28] The CPP did so by exclusively targeting carbon emissions from electricity produced by fossil fuels.[29] This was seen by many, including 15 states that sued the EPA on promulgation of this rule,[30] as a significant departure from previously allowed EPA regulations under the Clean Air Act.[31] The CPP requires state-differentiated plans with varying

---

25. *See infra* Parts III.A.1–A.2 (looking at CPP litigation parties' arguments).

26. *See* Steven Ferrey, *Mind the Gap: Supreme Court Contraction of Legal Discretion for the Executive Branch*, 13 TEX. J. OIL, GAS, & ENERGY L. 119, 121 (2018) [hereinafter *Mind the Gap*] ("*Chevron* and its progeny are the foundation of modern administrative law . . . .").

27. *See infra* Part IV (discussing various defenses the EPA has raised against challenges to agency decisions).

28. *See generally* Robinson Meyer, *The Problem with Abandoning the Paris Agreement*, ATLANTIC (Nov. 18, 2017), https://www.theatlantic.com/science/archive/2016/11/the-problem-with-abandoning-the-paris-agreement/508085/ (describing how Obama intended the CPP to bring the U.S. into compliance with the Kyoto Protocol and the Paris Agreement).

29. *See* Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014, 80 Fed. Reg. 64,996, 64,996 (proposed Oct. 23, 2015) ("In this action, the [EPA] is proposing a federal plan to implement the greenhouse gas (GHG) emission guidelines (EGs) for existing fossil fuel-fired electric generating units (EGUs) under the Clean Air Act (CAA).").

30. *See In re* Murray Energy Corp., 788 F.3d 330, 331–33 (D.C. Cir. 2015) (noting that 27 states were parties to the suit, albeit for various reasons).

31. *See, e.g.*, Loyola, *supra* note 6 (explaining the traditional operations of the EPA and the subsequent departure from those traditions in the face of missing statutory authority).

requirements,[32] and exclusively targets the electric power sector.[33] As detailed below, the regulation of carbon from stationary power plants (as opposed to mobile vehicle sources)[34] was a step beyond prior regulation.[35]

However, targeting the electric power sector to reduce Clean Air Act emissions is not a divergence from past practices.[36] Previous EPA regulatory practices also targeted the electric sector to reduce emissions.[37] The EPA prepares Control Technique Guidelines (CTGs)[38] and Alternative Control Techniques (ACTs)[39] to strongly influence how states implement required reductions in Clean Air Act criteria pollutant emissions.[40] The EPA created CTGs to target sources of volatile organic compound (VOC) emissions.[41] For Reasonably Achievable Control Technology (RACT) techniques—implemented by states—to control VOC emissions,[42] ACTs target power plant nitrogen oxide (NO_x) emissions.[43] As part of achieving State Implementation Plan (SIP)

---

32. *See infra* Part II.A.4 (summarizing CPP state requirements).

33. JAMES E. MCCARTHY ET AL., CONG. RESEARCH SERV., R44341, EPA'S CLEAN POWER PLAN FOR EXISTING POWER PLANTS: FREQUENTLY ASKED QUESTIONS 1 (2017).

34. *See, e.g.*, STEVEN FERREY, ENVIRONMENTAL LAW 219 (Wolters Kluwer 7th ed. 2016) [hereinafter ENVIRONMENTAL LAW] (explaining carbon regulation for mobile sources).

35. *See infra* Parts III.B.1, III.B.3 (highlighting the regulatory purview of the CPP and how the regulation differs from past regulations).

36. *See* 1 STEVEN FERREY, LAW OF INDEPENDENT POWER § 6:92, at 6–388, § 6:96, at 6–402 (Thomson Reuters 46th ed. 2018) [hereinafter LAW OF INDEPENDENT POWER] (providing past examples of the EPA targeting the electric power sector).

37. *See id.* § 6:96, at 6–402 (describing how, in 2000, the EPA issued a Clean Air Act § 126 rule that required roughly 400 power plants to reduce NO_x emissions).

38. *Id.* § 6:92, at 6–383.

39. *See id.* ("In an effort to give the states more direction in creating the appropriate NO_x RACT standard, the EPA created Alternative Control Techniques (ACT) documents.").

40. *Id.*

41. *Id.* These CTGs describe what SIP elements for particular sources the EPA will generally approve. The industry categories that the EPA identifies range from large pharmaceutical production to the coating of metal products. *Id.* Once the EPA develops a CTG for a category, the EPA expects the states to use it in creating a SIP for industries within the category. *Id.* CTGs, however, do not address major sources of NO_x, and the Act does not require CTG guidelines to do so. *Id.* This became a problem because states did not have any EPA direction in creating standards of control for sources that emit NO_x. *Id.*

42. *See* Approval and Promulgation of Implementation Plans; Revised Deadline for Submission of Volatile Organic Compound (VOC) RACT Regulations for Set II CTG Sources, 45 Fed. Reg. 78,121, 78,121 (Nov. 25, 1980) (to be codified at 40 C.F.R. pt. 52) [hereinafter RACT Regulations for Set II CTG Sources] (including RACT requirements in state ozone emission control measures for those states not yet having achieved attainment).

43. *See* Clean Air Act § 183, 42 U.S.C. § 7511a(f)(1) (2012) (providing requirements for RACT and ACTs to reduce NO_x pollution); RACT Regulations for Set II CTG Sources, 45 Fed. Reg. at 78,121 (explaining that these guidelines target source categories which describe SIP control elements that the EPA generally will approve). Section 183(c) of the Act requires that the Agency issue ACTs that identify alternative controls for all categories of stationary sources that emitted more than 25 tons per year of VOCs and NO_x. *See* 42 U.S.C. § 7511b(c) (2012) (detailing requirements for compliance

compliance, the EPA issues and supplies ACTs for all sources with NO_x emissions larger than 25 tons per year (tpy), as a guide for states to achieve RACT levels restricting existing stationary sources.[44]

While the EPA claimed that the ACTs were only intended to help guide the states in choosing among the RACT standards for their individual SIPs,[45] these CTG and ACT guidelines have the practical effect of compelling states to accept the EPA's definition of what level of control for power plant emissions is acceptable to satisfy RACT requirements of the Clean Air Act.[46] Courts have noted that EPA guidance on ACTs and CTGs for RACT are only "informal suggestions."[47] Although not required to follow the CTGs or ACTs, these federal EPA documents often do a significant portion of the design work for the states.[48] ACTs describe what techniques the EPA will generally approve promptly as part of a SIP submission.[49]

---

with the Clean Air Act). Similar to the CTGs issued for VOC source categories, the RACTs contain extensive background information on control techniques, costs, availability, feasibility, etc., that may be used by states in making RACT choices and determinations. *See* State Implementation Plans; General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas-Supplement, 44 Fed. Reg. 53,761, 53,762 (proposed Sept. 17, 1979) (to be codified at 40 C.F.R. pt. 52) (detailing generally EPA's expectation of states for RACT compliance). However, unlike the CTGs, the ACTs do not create a presumptive RACT. *See* 42 U.S.C. § 7511a(b)(2)(A) (2012) (explaining RACT requirements).

44. OFFICE OF AIR QUALITY PLANNING & STANDARDS, EPA, ALTERNATIVE CONTROL TECHNIQUES DOCUMENT—NO_x EMISSIONS FROM STATIONARY GAS TURBINES 1-1 (1993); *see* State Implementation Plans for National Primary and Secondary Ambient Air Quality Standards, 42 U.S.C. § 7410 (2012) (listing EPA requirements for responding to state-submitted implementation plans).

45. *See* State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 57 Fed. Reg. 13,498, 13,513 (Apr. 16, 1992) (to be codified at 40 C.F.R. pt. 52) [hereinafter Implementation of CAA Amendments of 1990] (outlining EPA requirement to suggest ACTs not meant to be presumed RACTs).

46. *See Demonstrating Compliance with New Source Performance Standards and State Implementation Plans*, EPA, https://www.epa.gov/compliance/demonstrating-compliance-new-source-performance-standards-and-state-implementation-plans (last visited Nov. 25, 2018) (explaining the SIP program and requirements); Paul DeCotis, *What the Clean Power Plan Means for You & How to Tackle Building a Compliance Strategy*, ENERGY CENT. (Nov. 7, 2014), https://www.energycentral.com/c/um/what-clean-power-plan-means-you-how-tackle-building-compliance-strategy (explaining EPA authority in regard to SIPs).

47. *See* Citizens for a Better Env't v. Costle, 515 F. Supp. 264, 278 (N.D. Ill. 1981) (arguing that CTGs, while informal guidelines, are preemptory attempts by the EPA to force states to follow EPA targeting of power plants; the court deferred deciding this issue); *see also* Nat'l Steel Corp. v. Gorsuch, 700 F.2d 314, 322 (6th Cir. 1983) (explaining the revision and implementation process for state plans under the EPA regulation).

48. *See* Implementation of CAA Amendments of 1990, 57 Fed. Reg. at 13,513 (detailing EPA recommendations and their foundation).

49. *See id.* (explaining the EPA requirement to provide ACTs for certain categories of pollutant sources that could produce 25 tons of such category pollutants).

While states have discretion to follow the EPA suggestions or deploy their own techniques to control NO_x and VOC criteria emissions, these preapproved options place significant pressure on the states to adopt EPA recommendations in order to expedite their SIP approval.[50] If the EPA denies a state plan, it can eventually impose a Federal Implementation Plan (FIP) and/or the state can lose federal highway funds.[51] When the EPA promulgates a FIP for a state, it can choose to adopt the controls originally specified in the ACTs.[52] There is more EPA influence and control over eventual state regulatory choices under the Clean Air Act than there appears in the plain language of the statute's constitutional federalism delegating decisions to the state.[53]

2. Proposed CPP Rule, Modified Rule, and CPP Final Promulgation

The Obama Administration's October 2015 CPP, a 460-page rule entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," would dramatically limit CO_2 emissions from large power-generating facilities.[54] The Obama Administration's CPP, implemented through executive branch regulation without congressional approval, would impose a required 32% reduction of annual CO_2 emissions from new and existing power plants by 2030.[55] The

50. *See* State Implementation Plans for National Primary and Secondary Ambient Air Quality Standards, 42 U.S.C. § 7410 (2012) (explaining the requirement of the EPA Administrator to provide minimum standards); *See also* LAW OF INDEPENDENT POWER, *supra* note 36, § 6:92, at 6–383 to 6–384 (highlighting the risk of federal sanctions to states that do not follow the EPA's ACTs and CTGs).

51. *See* 42 U.S.C. § 7509(b)–(d) (2012) (indicating that the Administrator can prescribe additional attainment measures and can withhold federal highway funds); NRDC v. Browner, 57 F.3d 1122, 1124 (D.C. Cir. 1995) (describing when and how the EPA imposes a FIP and sanctions on state funds).

52. *See* DANIEL P. SELMI, SABIN CTR. FOR CLIMATE CHANGE, FEDERAL IMPLEMENTATION PLANS FOR CONTROLLING CARBON EMISSIONS FROM EXISTING POWER PLANTS: A PRIMER EXPLORING THE ISSUES 9 (2015) (explaining that the EPA can employ measures to obtain the goal of reducing emissions and in some circumstances has much discretion to create the measures of a FIP).

53. *See* Approval and Promulgation of Implementation Plans; California-South Coast Air Basin; Ozone and Carbon Monoxide Plans, 53 Fed. Reg. 49,494, 49,495 (Dec. 7, 1988) (to be codified at 40 C.F.R. pt. 52) (detailing the potential for the EPA to need to assume legislative functions to create a FIP).

54. *See* Clean Power Plan, 80 Fed. Reg. 64,661, 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (noting that the purpose of the CPP was to reduce pollution emissions from emitting facilities).

55. *See id.* at 64,665 ("Nationwide, by 2030, [the] final CAA section 111(d) existing source rule will achieve CO_2 emission reductions from the utility power sector of approximately 32 percent from CO_2 emission levels in 2005."). Between the rule's promulgation in 2014 and final rule issuance in 2015, the EPA delayed implementation. *Id.* at 64,662, 64,790. This included more time for state compliance with a two-year delay for states filing required plans from 2016 to 2018, and a two-year delay in the first year of required CO_2 reductions, from 2020 to 2022. *Id.* at 64,669. The EPA's final

CPP uses the 2005 carbon emission levels as the baseline, against which future reductions are measured and with the first reduction pledge to be implemented by 2022.[56] In certain states, this would require a significant cut—up to 50%—in the carbon intensity of existing electric power generation.[57]

Starting from the beginning: In 2013, President Obama announced his "Climate Action Plan," and directed the EPA to work expeditiously to promulgate CO_2 emission standards for fossil-fuel-fired power plants.[58] The EPA proposed performance standards for "new, modified, and reconstructed power plants" under § 111(b) of the Clean Air Act.[59] Section 111(d) of the Act details the process for states to submit plans to address CO_2 emissions from existing power plants.[60] The original proposed rule contained two main elements: (1) state-specific, emission-rate-based CO_2 goals for all regulated coal- and natural gas-fired sources; and (2) guidelines for states to develop, submit, and implement state plans.[61] While the rule contained individualized CO_2 goals for each state, it did not prescribe how a state should meet its federally imposed carbon emission goal.[62] Rather, each state would have the flexibility to design its own means of limiting carbon emissions from large power plants or to use other techniques "outside the fence" of the regulated power plants.[63] The EPA received more than two million comments on its 2014 CPP proposed rule.[64]

---

regulation indicates that the goal of this rule is to substitute gas for coal in the generation of electricity. *Id.* at 64,665. The EPA increased how much CO_2 emissions will have to be brought down from the 2005 baseline in the next 15 years from the 30% proposed to 32% in the final rule. *See id.* (explaining that the new rule sets the baseline at 32%); *see also id.* at 64,736 n.384 (proposing the prior 30% baseline).

56. Clean Power Plan, 80 Fed. Reg. at 64,666, 64,736 n.384; *see also* Juliet Eilperin & Steven Mufson, *EPA Proposes Cutting Carbon Dioxide Emissions From Coal Plants 30% by 2030*, WASH. POST (June 2, 2014), https://www.washingtonpost.com/national/health-science/epa-to-propose-cutting-carbon-dioxide-emissions-from-coal-plants-30percent-by-2030/2014/06/01/f5055d94-e9a8-11e3-9f5c-9075d5508f0a_story.html?utm_term=.d0ac10c6d397 (explaining the general facts and objectives of the EPA's proposed regulation).

57. DeCotis, *supra* note 46.

58. *Fact sheet: President Obama's Climate Action Plan*, OFF. OF THE PRESS SEC'Y (June 25, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/06/25/fact-sheet-president-obama-s-climate-action-plan.

59. Clean Power Plan, 80 Fed. Reg. at 64,665.

60. *See also id.* (detailing the application of §§ 111(b) & (d) to power plants).

61. *See* DeCotis, *supra* note 46 (discussing the SIP under § 111(d) of the Clean Air Act).

62. *See* Eilperin & Mufson, *supra* note 56 (noting states have autonomy in choosing which methods they want implemented to meet CO_2 goals).

63. *See id.* (discussing how some states would have to cut emissions up to 50% under the CPP).

64. *See EPA Fact Sheet: Clean Power Plan and Carbon Pollution Standards*, EPA (Jan. 7, 2014), https://archive.epa.gov/epa/sites/production/files/2015-01/documents/20150107fs-key-dates.pdf (stating the timeline for implementing the CPP).

Between the rule's promulgation in 2014 and the final rule issuance a year later in October 2015, the EPA increased the degree of CO_2 emissions reductions and tried to immunize the rule from both legal attack and policy pushback through specific changes.[65] Environmental justice advocates told the EPA that the proposed CO_2 limits for power plants did not emphasize environmental equity and offered too much flexibility to states.[66] In response, the 2015 final EPA rule allowed state consideration of environmental equity and low-income community involvement in the development of their plans.[67]

The changes made for the final rule were significant. When compared to the 2005 baseline, the EPA increased the 2030 CO_2 emission requirements from 30% in the proposed rule to 32% in the final rule, providing the states with a 15-year compliance period.[68] Commensurately, this final rule included more time for state compliance with a 2-year delay for the required filing of state plans from 2016 to 2018, and delayed the first year of required CO_2 reductions from 2020 to 2022.[69] The EPA's final regulation indicated that the rule's goal is to substitute less CO_2-intensive natural gas for coal in the generation of electricity.[70]

Significant changes in the final rule included the elimination of energy conservation options to help reduce carbon emissions, although they are in the proposed rule.[71] The EPA eliminated the option to count energy efficiency and demand-response resource measures as carbon reduction components in state plans, although included in the original list of four state compliance options in the proposed CPP rule.[72] When the EPA eliminated energy efficiency as one of four compliance building blocks to reduce total CO_2 emissions, it left states with these remaining options in the final rule: improving coal-fired power facility operating heat rates; substituting natural

---

65. *See* Clean Power Plan, 80 Fed. Reg. at 64,662 (publishing the final CPP, which consisted of 93% preamble and 7% rule for regulating future CO_2 emissions from existing fossil-fuel-fired power plants).

66. Rachel Leven, *Power Plant Carbon Rule Lacks Equity, Environmental Justice Advocates Tell EPA*, BLOOMBERG BNA ENERGY & CLIMATE REPORT, Oct. 1, 2014.

67. *See* Clean Power Plan, 80 Fed. Reg. at 64,662–63 (providing a table of contents for the plan that shows sections on federal low-income requirements and state environmental equity considerations).

68. *Id.* at 64,736 n.384.

69. *Id.* at 64,673.

70. *See id.* at 64,678 (explaining the significant reduction of pollution through reliance on natural gas and the average age of coal-fired generating fleets, which is expected to urge industry to invest in the next generation of fuel rather than repair old infrastructure).

71. *See, e.g.*, *id.* at 64,673 (detailing key changes between the proposal and the final rule, including the exclusion of energy efficiency options as an allowable alternative to carbon emissions reduction).

72. *Id.*

gas for existing coal-fired electric facility operations; or constructing more renewable energy.[73] States can comply with the final rule by:

(1) Improving coal plant operational heat rates by 2–4.3%;
(2) Dispatching lower-carbon natural gas facilities in lieu of coal facilities; or
(3) Relying more heavily on renewable power generation technologies.[74]

The EPA, in the final rule, shifted to calculating state compliance by using a plant-by-plant CO_2 emission level/Mwh of emissions per usable unit of power generated.[75] In 2015, when the CPP regulation requiring states to submit plans was first proposed, Senator Mitch McConnell sent a letter to the National Governors Association urging states not to submit required plans complying with those regulations (once they were promulgated), in order to resist restructuring their electric systems in line with the EPA's wishes.[76] If a state refused to submit a CPP plan (which several governors stated that they would refuse to submit), or where the EPA rejected a state plan, the EPA would restrict fossil-fuel-facility CO_2 emissions of each and every power-generating plant in that state.[77] If states did not comply, the EPA could impose FIPs as mandatory elements for the states.[78]

The EPA's rule states that the "book life" of a coal plant is 40 years, and that states, in their required compliance filings, should consider barring older coal plants under this rule.[79] Utilizing historic data demonstrating that natural gas facilities can operate at 91% capacity, the EPA made the

---

73. *Id.*

74. JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R43652, STATE CO_2 EMISSION RATE GOALS IN EPA'S PROPOSED RULE FOR EXISTING POWER PLANTS 6–7, 9 (2014).

75. *See id.* at 1 (describing the method for measuring outputs to monitor state compliance). Coal-fired steam-cycle plants must meet a 1,305 lbs CO_2/MWh limit, while natural gas combustion turbines must meet 771 lbs CO_2/MWh limit by 2030 operations. EPA: OFF. OF AIR & RADIATION, CO_2 EMISSION PERFORMANCE RATE AND GOAL COMPUTATION TECHNICAL SUPPORT DOCUMENT FOR CPP FINAL RULE 18 (2015).

76. *See* Letter from Mitch McConnell, Senate Majority Leader, to National Governors Association (Mar. 19, 2015), https://www.ieca-us.com/wp-content/uploads/Senator-McConnell-Letter-to-NGA_03.19.15.pdf ("[P]roposed 'Clean Power Plan' . . . would require states to dramatically restructure their electricity systems based on the EPA's view of how electricity should be produced and used in each state.").

77. *See id.* (indicating that, if states are "unwilling or unable to submit a plan to the EPA's satisfaction, the only recourse for the EPA is to develop and impose its own federal plan for that state").

78. JEREMY M. TARR, NICHOLAS INST. FOR ENVTL. POLICY SOLUTIONS., THE CLEAN AIR ACT AND POWER SECTOR CARBON STANDARDS: BASICS OF SECTION 111(D) 3 (2013), https://nicholasinstitute.duke.edu/sites/default/files/publications/ni_pb_13-03.pdf.

79. Clean Power Plan, 80 Fed. Reg. 64,661, 64,872 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

assumption that states and regional independent system operators (ISOs) could take natural gas combustion turbines that were running at a national average of only 40–50% of their capacity factor, and increase them to a 75% operating capacity factor in order to displace coal-fired power.[80] The EPA included bankable CO_2 credits for a renewable energy project that starts construction after the state plan is submitted by 2018 and prior to compliance requirements under the rule in 2022.[81]

3. CPP Legal Tethering to the Clean Air Act—Plant-by-Plant

The EPA's CPP employs § 111(d) of the Clean Air Act to regulate existing CO_2 emission sources that are not regulated under other sections of the Act.[82] Section 111(d) differs from § 111(b) of the Act because it requires states to create EPA guided "performance standards for existing sources."[83] As a legal prerequisite, § 111(d) cannot regulate existing sources unless § 111(b) has already established New Source Performance Standards (NSPS) for new or modified sources.[84] This encompasses existing power plants.[85]

For new power plants emitting CO_2, the EPA also proposed new executive branch regulations under § 111(b) of the Clean Air Act, to which Best System of Emission Reduction (BSER) applies.[86] The EPA established a BSER so strict that it effectively made conventional coal-burning power

80. *Id.* at 64,799.

81. *Id.* at 64,890.

82. *See generally* EPA, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED CARBON POLLUTION GUIDELINES FOR EXISTING POWER PLANTS AND EMISSION STANDARDS FOR MODIFIED AND RECONSTRUCTED POWER PLANTS *passim* (2014), https://archive.epa.gov/epa/sites/production/files/2014-06/documents/20140602ria-clean-power-plan.pdf (providing general information on the CPP including, factsheets and press releases). Section 111(d) has been used only five times, because most other categories of sources are addressed in other sections of the Clean Air Act. Carbon Pollution Emission Guidelines for Existing Stationary Sources, 79 Fed. Reg. 34,830, 34,844 (proposed Jun. 18, 2014) (to be codified at 40 C.F.R. pt. 60).

83. JAMES E. MCCARTHY, CONG. RESEARCH SERV., R43127, EPA STANDARDS FOR GREENHOUSE GAS EMISSIONS FROM POWER PLANTS: MANY QUESTIONS, SOME ANSWERS (2013). *Compare* Clean Power Plan, 80 Fed. Reg at 64,665 (noting that § 111(b) authorizes new source performance standards for CO_2 from "new, modified, and reconstructed power plants"), *with id.* at 64,666 (noting that under § 111(d), the EPA develops "emission guidelines" that the states must develop plans to meet).

84. Carbon Pollution Emission Guidelines for Existing Stationary Sources, 79 Fed. Reg. at 34,852. The EPA stresses that § 111(d) provides a broad grant of power to flexibly address air pollutants that are not identified as criteria pollutants. *Id.* at 34,899. States determine the "combination of measures" that will meet the guidelines. *Id.*

85. *Id.* at 34,830.

86. *Id.* at 34,852.

technology impossible for use in new plants.[87] The Clean Air Act's NSPS must implement BSER and are supposed to take into account costs, environmental impact, and energy requirements.[88] NSPS apply to new and majorly-modified stationary sources, but only to those sources in certain high-emission industries.[89] NSPS applies only to approximately 50 major industry groups, including: electric utility steam-generating units, fossil-fuel-fired steam generators of more than 250 million British thermal units (MMBtu) heat input, glass manufacturing plants, and incinerators with more than a 50-tons-per-day charging rate.[90]

For the CPP, the EPA determined that carbon capture and storage (CCS)[91] is an "adequately demonstrated" technology that qualifies as BSER and is only applicable to all new coal-fired electric power plants.[92] The

87. Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources, 79 Fed. Reg. 1430, 1434–35 (proposed Jan. 8, 2014) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98); *see* Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources, 77 Fed. Reg. 22,392, 22,398 (proposed Apr. 13, 2012) (to be codified at 40 C.F.R. pt. 60) (adding emission standards for new power plants in 2012, which was withdrawn after comment period); Withdrawal of Proposed Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources, 79 Fed. Reg. 1352, 1352–54 (withdrawn Jan. 8, 2014) (to be codified at 40 C.F.R. pt. 60).

88. Carbon Pollution Emission Guidelines for Existing Stationary Sources, 79 Fed. Reg. 34,830, 34,844 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

89. The Clean Air Act defines "modification" to mean any change to "a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any [new] air pollutant . . . ." Clean Air Act, 42 U.S.C. § 7411(a)(2)–(4) (2012).

90. New Source Performance Standards Review, 76 Fed. Reg. 65,653, 65,656 (advanced notice of proposed rulemaking Oct. 24, 2011) (to be codified at 40 C.F.R. pt. 60). NSPS also cover iron and steel plants, municipal solid waste landfills, petroleum refineries, copper smelters, lead smelters, rubber tire manufacturing plants, and sewage treatment plants. New Source Performance Standards for Electric Utility Steam Generating Units and Industrial-Commercial-Institutional Steam Generating Units, 72 Fed. Reg. 32,710, 32,710 (June 13, 2007) (to be codified at 40 C.F.R. pt. 60).

91. There are at least three approaches to carbon capture: (1) pre-combustion (conversion of carbon in the fuel to CO_2, with removal prior to combustion); (2) post-combustion (separating dilute CO_2 from flue gas after combustion); and (3) oxycombustion (using nearly pure oxygen—rather than air—as the oxidant to produce a flue gas consisting mainly of CO_2 and water vapor). Based on comparison to a reference case of natural gas combined cycle plants without CCS, the cost of an avoided metric ton of CO_2 emissions ranged from $65.32–$142.27. *Carbon Capture Approaches for Natural Gas Combined Cycle Systems*, NAT'L ENERGY TECH. LAB. 1, 14 (Dec. 20, 2010), http://www.netl.doe.gov/File%20Library/Research/Energy%20Analysis/Coal/C_Capture_NGCC_20101220.pdf.

92. EPA, FACT SHEET: CARBON POLLUTION STANDARDS 2–3 [hereinafter EPA FACT SHEET], https://archive.epa.gov/epa/sites/production/files/2015-11/documents/fs-cps-overview.pdf (last updated Sept. 14, 2015). Facilities deploying CCS technology can filter and capture CO_2 from the emission waste stream and pump it into geologic formations or use it to extract coal-bed methane or oil in depleted or diminished oil reservoirs. *See* EPA, CARBON DIOXIDE CAPTURE & SEQUESTRATION FEDERAL RESEARCH & REGULATION, https://archive.epa.gov/epa/climatechange/carbon-dioxide-capture-and-sequestration-federal-research-and-regulations.html#EPA (last visited Nov. 25, 2018) (describing the capabilities of CCS technologies). The EPA cites four projects currently under

proposed "New Source Rule" issued by the EPA establishes the following separate performance standards for new coal- and gas-fired power plants:

(1) 1,400 lbs CO_2/MWh of electricity produced, as allowed emissions, for new coal plants (on a 12-operating-month rolling basis);[93]
(2) 1,000 lbs CO_2/MWh of electricity produced, as allowed emissions, for new gas-fired facilities with a heat input exceeding 850 MMBtu/h (250 MW);[94] and
(3) 1,100 lbs CO_2/MWh of electricity produced, as allowed emissions, for new gas-fired facilities with a heat input between 250 MMBtu/h (73 MW) and 850 MMBtu/h (250 MW).[95]

Thus, the EPA's CPP final rule establishes separate and differentiated performance standards for new coal- and gas-fired power plants:[96] For coal-fired steam cycle plants 1,100 lbs CO_2/MWh[97] and for natural gas turbines 1,000 lbs CO_2/MWh.[98] For coal, this established a regulatory threshold 40% lower than current *best-in-class* new coal-turbine technologies available on the market at the time the EPA promulgated the regulation.[99] This threshold is a level that then-current technology for coal facilities could not meet, having actual emissions of approximately 1,770 lbs CO_2/MWh.[100] Thereby, the CPP—and indirectly the BSER levels set by executive branch regulation without congressional input—substitutes operation of natural gas and renewable energy generation in lieu of existing coal-fired power plants.[101]

---

development that will deploy some type of CCS. *See id.* (listing EPA CCS projects that were ongoing at the time).

93. EPA FACT SHEET, *supra* note 92, at 1–3 (noting the different carbon emission standards for different types of power plants).

94. *Id.* at 2.

95. EPA, COMBINED HEAT & POWER P'SHIP, OUTPUT-BASED REGULATIONS: A HANDBOOK FOR AIR REGULATORS B–24 (2014), https://www.epa.gov/sites/production/files/2015-07/documents/output-based_regulations_a_handbook_for_air_regulators.pdf.

96. *See* Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources, 80 Fed. Reg. 64,510, 64,512 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98) (indicating that a "new source" does not include existing sources undertaking modifications or reconstructions, and certain projects currently under development).

97. *Id.* at 64,513.

98. *Id.* at 64,515.

99. *See id.* at 64,513 (detailing the technologies necessary to achieve the new standards).

100. *See* Clean Power Plan, 80 Fed. Reg. 64,661, 64,709 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (discussing "best" system emission reduction that is at a reasonable cost); *see also* LAW OF INDEPENDENT POWER, *supra* note 36, § 6:7.40, at 6–81 n.9 (highlighting that, at the time, "conventional coal-fired electric generation [could only generate] about 1770 lbs. [CO_2/MWh]").

101. Clean Power Plan, 80 Fed. Reg. at 64,726 (stating that the plan will substitute lower emitting units and renewable energy units for the higher emitting units). The EPA utilizes a planning assumption that states and independent system operators should take natural gas combustion turbines, whose history demonstrates that they can operate at 91% availability, but which nationally are running

There are technological distinctions: "Coal technologies typically employ steam turbines, while gas-fired plants can employ simple cycle turbines."[102] In the CPP regulations, there is an express exemption for simple cycle turbines.[103] The proposed rule effectively exempted new gas-fired power plants, which emit approximately 700 lbs CO_2/MWh of electricity generated.[104] The proposed rule exempted: peaking power generation plants,[105] oil-fired plants, combined heat and power/cogeneration facilities, and smaller generating facilities of less than 25 MW of generation capacity (although they all can emit more CO_2 per unit of power produced than gas-fired plants).[106]

The EPA's CPP final regulation reinforces that the goal of this rule is substituting the burning of natural gas in lieu of coal to generate electricity.[107] What do these standards translate to in terms of use of coal-fired new electric power generation? This CPP standard established a regulatory threshold significantly more stringent than current "best-in-class" new coal-turbine technologies available on the market.[108] In sum, no basic coal-fired power plant could meet the required CPP standard—conventional coal-fired electric generation could not meet the CPP emission standard of 1,100 lbs of CO_2/MWh, when best-in-class coal technologies

---

only at a 40–50% capacity factor, and increase those to a 75% capacity factor to displace coal-fired power. *Id.* at 64,799–800.

102. For more on steam cycle turbines and simple cycle turbines, *see* Steven Ferrey, *Presidential Executive Action: Unilaterally Changing the World's Critical Technology and Infrastructure,* 64 DRAKE L. REV. 43, 64 (2016).

103. Clean Power Plan, 80 Fed. Reg. at 64,716. The rule would require combustion turbine units (defined as including both simple cycle and combined cycle units) with a heat input rating greater than 250 MMBtu/hr to meet an emissions standard for CO_2 of 1,000 lbs/MWh, whereas combustion turbine units with a heat input rating at or below that threshold would have to meet an emissions standard of 1,100 lbs CO_2/MWh. *Id.*

104. *See id.* at 64,881 n.731 (stating that the only gas-fired units affected under the criteria are units supplying more than 25 MW).

105. *See id.* at 64,716–17 (explaining that peeking units must be exempted to avoid jeopardizing the reliability of the grid). Operating with less than 33% capacity factors, a stationary combustion turbine is not subject to the emissions standard unless it was constructed for the purpose of supplying, and supplies, one-third or more of its potential electric output and more than 219,000 MWh net-electrical output to a utility distribution system on a three-year rolling average basis. *See id.* at 64,953 (describing units that are excluded).

106. LAW OF INDEPENDENT POWER, *supra* note 36, § 6:7.20, at 6–70.5.

107. Clean Power Plan, 80 Fed. Reg. at 64,726.

108. *See* U.S. EPA Issues Proposed New Source Performance Standard to Limit Carbon Dioxide Emissions from New Fossil Fuel Electricity Generating Power Plants, SULLIVAN & WORCESTER (Feb. 2014), https://www.sandw.com/assets/htmldocuments/CLIENT-ADV-U-S-EPA-Issues-Proposed-New-Source-Performance-Standard-to-Limit-B1817903.pdf (explaining that compliance will require a 40% reduction in emissions for the best coal-powered plants currently made).

emit approximately 1,770 lbs CO_2/MWh.[109] It is simple math; the numeric spread is not close. These new regulations would require the addition of partial or full CCS technologies for new coal-fired generating facilities.[110] The EPA determined that CCS[111] is an "adequately demonstrated" technology for BSER.[112] Despite that, many considered it not demonstrated in practice in the United States, and therefore not legally a BSER.[113]

4. Differentiated Legal Treatment of Each State

How does the individualized CPP CO_2 emission standard for each state operate? The CPP establishes dramatically inconsistent "best system" CO_2 emission standards for each of the 50 states, depending on their existing means of producing electric power.[114] The EPA determined BSER for each state based on its mix of individual existing generating sources, expressed as a statewide lbs/MWh emission rate.[115]

In response to each state's different CPP reduction goal, states were free to determine how to reduce CO_2 emissions.[116] In certain states under the CPP regulations, this would require up to a 50% cut in carbon intensity of existing power generation in the state.[117] Figure 1 shows the relative degree of greenhouse gas (GHG) emissions by state, with the darker gray colors illustrating the greater GHG emissions.

---

109. *See* Seth Hilton, *The Impact of California's Global Warming Legislation on the Electric Utility Industry*, 19 ELECTRICITY J. 10, 14 (2006) (detailing emission specifications of coal-fired plants); *see also* NRDC, *California Takes on Power Plant Emissions: SB 1368 Sets Groundbreaking Greenhouse Gas Performance Standard*, CLIMATE FACTS (Aug. 2007), https://www.nrdc.org/sites/default/files/sb1368.pdf (indicating that the "1,100 lbs. CO_2/MWh" level for GHG emission standards in California will preclude coal-fired power plants as a source of future energy in the state).

110. The EPA calculated that a new coal plant without CCS would emit approximately 1,700 pounds of CO_2/MWh. *See* SULLIVAN & WORCESTER, *supra* note 108 (noting the national average is 2,200 pounds CO_2/MWh).

111. *See* EPA FACT SHEET, *supra* note 92, at 3 (noting that CCS technology has been demonstrated to be feasible in various industries).

112. *See* Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources, 80 Fed. Reg. 64,510, 64,511 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98) (verifying the EPA's evaluation of emission standards).

113. *See* Kevin Bullis, The Cost of Limiting Climate Change Could Double without Carbon Capture Technology, MIT TECH. REV. (April 18, 2014), https://www.technologyreview.com/s/526646/the-cost-of-limiting-climate-changecould-double-without-carbon-capture-technology (discussing the availability of carbon capture and sequestering technology).

114. Steven Ferrey, *Subnational Discretion Mediating New Climate Regulatory Challenges*, 7 SAN DIEGO J. OF CLIMATE & ENERGY L. 31, 34 (2016) [hereinafter *Subnational Discretion*].

115. *Id.* at 45–46.

116. *Id.* at 34–36, 44–45, 49.

117. *See also* DeCotis, *supra* note 46 (discussing the effects of the CPP on states).

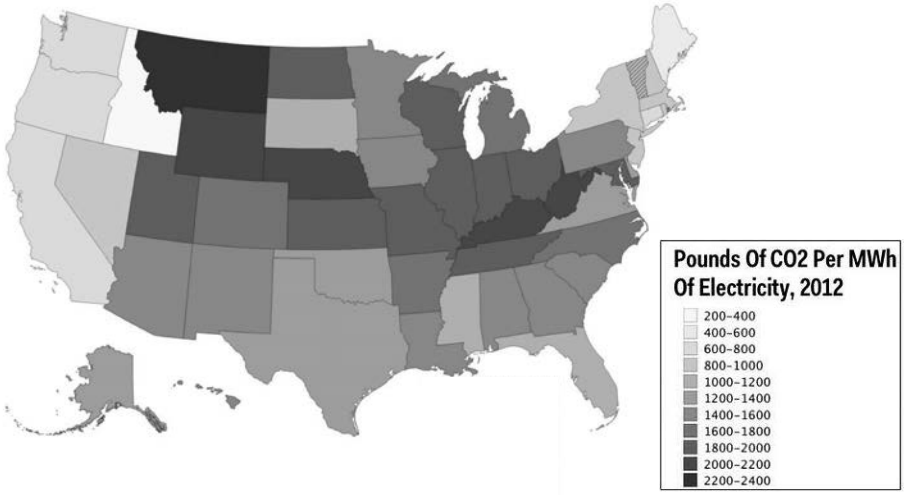

Figure 1. GHG Emissions by State[118]

Under the CPP, states have freedom to use a mass-based or rate-based calculation of carbon emissions and their power plants could join a multi-state plan.[119] Different state choices could produce inconsistent plans from the 50 states (plus the District of Columbia, 11 U.S. territories under federal jurisdiction, and 2 U.S. commonwealths).[120]

The CPP rule would also allow state plans that use CO_2 controls "beyond the fence line" of the affected power generation project's site deeded metes and bounds.[121] Of note, there was a fundamental change in allowing such off-site, "outside the fence line," compliance mechanisms with the most recent change of administrations.[122] In fall 2017, the Trump

118. Andy Kiersz & Brett LoGiurato, *Here's How Obama's New Carbon Rules Affect Each State*, BUS. INSIDER, fig.1 (June 2, 2014), https://www.businessinsider.com/epa-state-carbon-goals-2014-6. Vermont is shown with diagonal lines because it has no fuel-fired plants affected by the EPA's newly promulgated rule. *Id.*

119. *See Subnational Discretion*, *supra* note 114, at 46 n.60 ("Rate-based limits for emissions limit the pounds of a pollutant emitted per million British thermal units of energy produced by a power generation facility. Mass-based limits do not deal with emissions from individual sources, but instead limit the mass of regional emissions. California A.B. 32, RGGI, and the EU-ETS utilize mass-based limits for GHGs. With mass-based limits, they can be achieved by using lower-emission forms of generation such as renewable generation, or by reducing the need for power through end use efficiency, but does not affect the rate of emissions per unit of energy produced by conventional generators even when they operate for fewer hours.").

120. *See id.* at 46 (noting a few of the compliance options available to states that could result in disparities).

121. *Id.*

122. *See infra* Part V.B (discussing the Trump Administration's changes to the CPP and the "outside the fence line" policy).

Administration declared that the CPP was not permissible because the Clean Air Act—the legal authority underlying the CPP—requires individual power plant source regulation, rather than regulation "outside the fence line" or off-site and away from the emitting pollution source.[123] In other words, under the Trump Administration's EPA interpretation, individual source controls must be applied to reduce the actual individual power plant carbon emissions, rather than employing a generic command for states to find any way to reduce carbon emissions anywhere beyond the fence line of the regulated power plants.[124] Senate Majority Leader McConnell advanced this position to the National Governors Association in 2015.[125] In November 2017, the Trump Administration announced that it intended to repeal the CPP.[126] In the last few days of 2017, the EPA issued an Advance Notice of a Proposed Rulemaking to Replace the Clean Power Plan.[127]

B. Reduction of Coal Compared to Renewable Power and Natural Gas

1. The Nadir of Coal

If this final CPP regulation were upheld after the ongoing litigation,[128] it could dramatically affect—and explicitly is designed to affect—the frequency of dispatch orders for operation of the existing large fleet of coal-fired power generation plants, which would determine whether or not they are operated in 2022 and thereafter.[129] Given that the CPP regulations set different mandatory levels of CO_2 emissions for each state based on existing carbon intensity of state power sector emissions in 2012, there

123. *See infra* note 484 and accompanying text.

124. *Id.*

125. *See* Letter from Mitch McConnell, *supra* note 76 ("[A] federal plan likely would be limited to regulating a power plant itself, such as the efficiency measures under the EPA' s building block 1.").

126. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources, 82 Fed. Reg. 51,787, 51,787 (proposed Nov. 8, 2017) (to be codified at 40 C.F.R. pt. 60).

127. EPA, ADVANCE NOTICE OF PROPOSED RULEMAKING ON STATE GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING POWER PLANTS 1–2 (2017), https://www.epa.gov/sites/production/files/2017-12/documents/fs-anprm-state-guidelines-ghg-emissions-egus.pdf; *EPA Takes Another Step To Advance President Trump's America First Strategy, Proposes Repeal Of "Clean Power Plan,"* EPA [hereinafter *EPA Takes Another Step*], https://www.epa.gov/newsreleases/epa-takes-another-step-advance-president-trumps-america-first-strategy-proposes-repeal (last visited Nov. 25, 2018) (recommending the utilization of the BSER *at or to an existing power plant*, *at the source-specific level*, based on a physical or operational change to a building, structure, facility, or installation at that source).

128. *See CPP in Context, supra* note 19 (noting how the EPA could be given legal authority after a stay).

129. *See, e.g.*, *Analysis of the Impacts of the Clean Power Plan*, U.S. ENERGY INFO. ADMIN. (May 22, 2015), https://www.eia.gov/analysis/requests/powerplants/cleanplan/ (analyzing how the CPP would affect coal plants).

would be differential impacts and requirements in each state across the country.[130] The EPA utilized a planning assumption that states and regional ISOs should take natural gas combustion turbines, which had been running at a national average 40–50% capacity factor, and increase those to a 75% capacity factor, when their history demonstrates that they can operate at 91% availability.[131] This increase in operation of gas-combined cycle turbines would then displace operation of simple-cycle coal-fired steam turbines.[132]

With or without court deference to the Obama Administration initiatives culminating in the CPP, the zenith of coal use in the U.S. is ebbing under current economic conditions.[133] Coal for power generation has been rapidly decreasing in the most recent decade, to where it now supplies just over 30% of the U.S.'s electric power, with its share continuing to decrease substantially.[134] There has been a dramatic exodus of coal. In 2012, there were 1,308 coal-fired generating units in the U.S. totaling 310 gigawatts (GW) of capacity, of which 10.2 GW of coal-fired capacity retired in 2012, and more each year since.[135] The Energy Information Administration estimates that "60 gigawatts of coal-fired capacity will be shuttered by 2020."[136] U.S. coal-fired generating capacity is projected to decrease to 262 GW of installed capacity in 2040, which would constitute another 15% decrease, according to the U.S. Energy Information Agency.[137] Coal capability is expected to decrease 35% by 2040, with retirement of more than 90 GW of coal capacity.[138] Natural gas power generation and renewable electric energy have quickly supplanted coal generation over the

---

130. *See also* DeCotis, *supra* note 46 (noting the range in emission cuts for different states under the CPP).

131. Clean Power Plan, 80 Fed. Reg. 64,661, 64,799–800 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

132. *See id.* at 64,716–17 (discussing simple cycle turbines).

133. Wendy Koch, *EPA Seeks 30% Cut in Power Plant Carbon Emissions by 2030*, USA TODAY (June 3, 2014), https://www.usatoday.com/story/money/business/2014/06/02/epa-proposes-sharp-cuts-power-plant-emissions/9859913/.

134. *See id.* (noting the coal industry supplied about 37% of the U.S.'s electric power in 2014 and has been steadily decreasing since).

135. *AEO2014 Projects More Coal-Fired Power Plant Retirements by 2016 than Have Been Scheduled*, U.S. ENERGY INFO. ADMIN. (Feb. 14, 2014) [hereinafter *AEO2014 Projections*], http://www.eia.gov/todayinenergy/detail.cfm?id=15031.

136. Michael Bastasch, *Report: EPA Regulations to Accelerate Coal Plant Shutdowns*, DAILY CALLER (Feb. 14, 2014), https://dailycaller.com/2014/02/14/report-epa-regulations-to-accelerate-coal-plant-shutdowns/.

137. *See id.* ("U.S. coal-fired generating capacity will fall from 310 gigawatts in 2012 to 262 gigawatts in 2040 . . . .").

138. *Analysis of the Impacts of the Clean Power Plan*, *supra* note 129; *Industry Data*, EDISON ELEC. INST., http://www.eei.org/resourcesandmedia/industrydataanalysis/industrydata/Pages/default.aspx (last visited Nov. 25, 2018).

last five years, even without the CPP being implemented while it is stalled in court.[139]

2. Legal Emission Issues and *Chevron* Deference Before the D.C. Circuit Under the Clean Air Act

More than emissions of CO_2 are at issue here. Among other emissions, coal-fired plants emit mercury to the ambient air.[140] Mercury is a toxic pollutant generated by coal burning and is regulated by the Clean Air Act.[141] Also, mercury emissions pose a serious risk when emitted by coal-burning power plants and other stationary emission sources in the U.S.[142] In 2000, the EPA established regulations stating that mercury emitted by electric generation units was a Hazardous Air Pollutant (HAP), and began regulating power plant emissions of mercury under § 112 of the Clean Air Act.[143] This rule was later challenged.[144]

Four years later, the EPA elected to regulate power plant emissions utilizing a cap-and-trade system under § 111 of the Clean Air Act (primarily governing criteria pollutants).[145] At the same time, § 111 removed power plant sources from the list of facilities whose HAPs were regulated under § 112 (governing hazardous pollutants).[146] Section 112 of the Act allows the EPA to de-list a HAP only if the agency determines that "emissions from no source in the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source."[147]

The EPA argued that this language allowed it to bypass the § 112(c)(9) de-listing requirements if the agency determined that another section of the

---

139. *See Natural Gas, Renewables Projected to Provide Larger Shares of Electricity Generation*, U.S. ENERGY INFO. ADMIN. (May 4, 2015), http://www.eia.gov/todayinenergy/detail.cfm?id=21072 (highlighting how natural gas power and renewable electric energy usages are growing much more rapidly than coal generation).

140. *See* LAW OF INDEPENDENT POWER, *supra* note 36, § 6:22, at 6–152 ("Coal-fired plant emissions are the leading source for mercury . . . .").

141. Standards of Performance for New and Existing Stationary Sources, 70 Fed. Reg. 28,606, 28,606 (May 18, 2005) (to be codified at 40 C.F.R. pts. 60, 72, 75).

142. New Source Performance Standards for Electric Utility Steam Generating Units and Industrial-Commercial-Institutional Steam Generating Units, 72 Fed. Reg. 32,710, 32,728 (June 13, 2007) (to be codified at 40 C.F.R. pt. 60).

143. New Jersey v. EPA, 517 F.3d 574, 578 (D.C. Cir. 2008).

144. *Id.* at 577–78.

145. Standards of Performance for New and Existing Stationary Sources, 70 Fed. Reg. at 28,606.

146. *New Jersey*, 517 F.3d at 579–80.

147. 42 U.S.C. § 7412(c)(9)(ii) (2012).

Clean Air Act should regulate power plants.[148] The court disagreed with the EPA, finding that § 112(n)(1)(A) is not applicable after the EPA has listed a pollutant as a HAP, on which there was no ambiguity.[149] As such, the first step of the *Chevron* deference standard applied, and the EPA was bound to satisfy the de-listing requirements set forth in § 112(c)(9) of the Act.[150]

The EPA also argued that it has the inherent authority to reverse any earlier administrative determination or ruling if it has a principled basis for doing so.[151] According to the court, the agency could have reversed its decision to regulate electric generation units under § 112 prior to listing them; but after listing them, the agency may not reverse its decision because Congress expressly limited the EPA's ability to de-list HAPs.[152] Finally, the EPA argued that because it had previously removed HAPs from the list without satisfying the requirements of § 112, it should not be estopped from doing so in this instance.[153] The D.C. Circuit quickly rejected this argument by stating: "[W]e do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation."[154]

The D.C. Circuit Court in 2008 held that the EPA acted outside its authority by unilaterally removing, without congressional approval, power plant HAP emissions from § 112.[155] The Supreme Court majority opinion characterized the allocation choices EPA made as "equitable," "efficient," and "mak[ing] good sense,"[156] citing its landmark decision in *Chevron*

---

148. The EPA argued that the second step of the *Chevron* test applied in this case because § 112(c)(9)—which contains the instructions for removing a HAP from § 112—is made ambiguous by § 112(n)(1). *New Jersey*, 517 F.3d at 582–83. "[I]f EPA makes a determination under section 112(n)(1)(A) that power plants should not be regulated at all under section 112 . . . [then] this determination *ipso facto* must result in removal of power plants from the section 112(c) list." *Id.* at 582 (second and third alterations in original).

149. *See id.* at 583 (holding that the EPA must follow the plain text of § 112 in regard to the delisting process).

150. *See id.* at 582–83 (explaining that the text of § 112(c)(9) is not ambiguous and thus the EPA must follow the plain meaning of the text under *Chevron*).

151. *Id.* at 582.

152. *Id.* at 583.

153. *Id.*

154. *Id.* (quoting F.J. Vollmer Co. v. Magaw, 102 F.3d 591, 598 (D.C. Cir. 1996)).

155. *Id.* at 582.

156. EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1589–90, 1593–94, 1607 (2014) ("[C]urtailing interstate air pollution poses a complex challenge for environmental regulators. . . . The overlapping and interwoven linkages between upwind and downwind States with which EPA had to contend number in the thousands . . . . Rather, as the gases emitted by upwind polluters are carried downwind, they are transformed, through various chemical processes, into altogether different pollutants. The offending gases at issue in these cases—nitrogen oxide (NO_X) and sulfur dioxide (SO_2)—often develop into ozone and fine particulate matter ($PM_{2.5}$) by the time they reach the atmospheres of downwind States.").

U.S.A. v. NRDC.[157] The Supreme Court's dissenting opinion, agreeing with the D.C. Circuit Court majority, underscored limits necessary for unilateral executive action.[158] This dissent echoes strands of the non-delegation doctrine.[159] This did not end the contest though. The Utility Air Regulatory Group (UARG) then challenged the EPA's technical revisions to the cross-state air pollution rule, including revised emissions budgets for 13 states.[160]

In *Chevron*, the Court rejected each of the EPA's three arguments for its de-listing action.[161] In this earlier challenge to EPA regulation under the Clean Air Act, the EPA argued that its action was appropriately within its administrative discretion, as established by the *Chevron* doctrine of agency deference, when "Congress has not directly addressed the precise question at issue."[162] Under the first step of *Chevron*, if Congress did directly speak to the substantive issue, the EPA lacks interpretive discretion and the agency must respect the congressional statement.[163] On the other hand, if Congress did not speak directly to the substantive issue, under the second *Chevron* step, the Court asks "whether the agency's answer is based on a permissible construction of the statute," and if so, defers to the agency interpretation when otherwise supported.[164] At the second step, there is significant agency discretion in interpreting EPA authority.[165]

In this 2008 Clean Air Act challenge, the EPA argued that the second *Chevron* step, granting the agency deference, was applicable because Clean Air Act § 112(c)(9), which embodies the instructions for de-listing a HAP from § 112, is rendered ambiguous by the Act's § 112(n)(1),[166] which provides "if [the] EPA makes a determination under section 112(n)(1)(A)

157. *Id.* at 1607–21. Under *Chevron*, Congress's silence effectively delegates authority to the EPA to select from among reasonable options. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001) (explaining that courts should give authority to an agency interpretation when Congress did not give direction within the statute). EPA's chosen allocation method was held to be a "permissible construction of the statute." Chevron U.S.A. v. NRDC, 467 U.S. 837, 843 (1984) (explaining that when a statute has not spoken directly to an issue it must be determined if the agency has acted reasonably).

158. *EME Homer City Generation*, 134 S. Ct. at 1610 (Scalia, J., dissenting) ("Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress . . . . Today, the majority approves [an] undemocratic revision of the Clean Air Act.").

159. *See* ENVIRONMENTAL LAW, *supra* note 34, at 42–43 (discussing the non-delegation doctrine in depth).

160. Unopposed Motion to Govern Further Proceedings, Util. Air Regulatory Grp. v. EPA, 1, 2 (D.C. Cir. 2014) (No. 12–1346).

161. *See* NRDC v. Gorsuch, 685 F.2d 718, 727 (D.C. Cir. 1982) (reviewing the arguments presented by the EPA in lower court proceedings).

162. *Chevron*, 467 U.S. at 843.

163. *Id.* at 842–43.

164. *Id.* at 843.

165. *Id.* at 844.

166. New Jersey v. EPA, 517 F.3d 574, 582 (D.C. Cir. 2008).

that power plants should not be regulated at all under section 112 . . . [then] this determination *ipso facto* must result in removal of power plants from the section 112(c) list."[167] The EPA then asserted that this language allowed it to bypass the § 112(c)(9) de-listing requirements simply by determining that power plants should be regulated by some other section of the Clean Air Act.[168] The court disagreed with the EPA, concluding that § 112(n)(1)(A) was no longer applicable once the EPA listed a pollutant as a toxic HAP.[169] Thereafter, there was no conflict or ambiguity.[170] Under such a posture, rather than the second step, the first step of the *Chevron* standard applied.[171] The Clean Air Act bound the EPA to satisfy the de-listing requirements set forth in § 112(c)(9).[172]

III. SUBSTANTIVE LEGAL CHALLENGE TO THE CLEAN POWER PLAN

The EPA received 2.5 million comments in the period between initial proposal and final promulgation of the CPP regulation, under which each state is required to develop standards of performance to limit CO_2 emissions from existing fossil-fuel-fired generating facilities.[173] Seventeen concerned state attorneys general filed comments highlighting "numerous legal defects" and system reliability issues in the EPA's proposal to regulate power plant emissions under § 111(d) of the Clean Air Act.[174] Once the EPA proceeded, more than half the states thereafter sued the EPA regarding its authority to issue these regulations.[175] Less than two weeks after the EPA announced the final CPP rule, 27 states petitioned the U.S.

---

167. *Id.* (second and third alterations in original).

168. *See id.* at 582–83 (discussing an EPA brief in which the EPA expressed its position on the bypass process in § 112(c)(9)).

169. *See id.* at 583–84 (explaining the court's interpretation of § 112(c)(9)).

170. *See id.* (noting how Congress explicitly took steps to limit the EPA's discretion in removing sources once listed).

171. *Id*.

172. *Id*.

173. *Subnational Discretion*, *supra* note 114, at 46; *see* EPA, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED STANDARDS OF PERFORMANCE FOR GREENHOUSE GAS EMISSION FOR NEW STATIONARY SOURCES 1–1 (2013), https://www.epa.gov/sites/production/files/2013-09/documents/20130920proposalria.pdf (stating that the EPA considered the "public comments received—totaling approximately 2.5 million").

174. Att'ys Gen. of the States of Oklahoma, West Virginia, Nebraska, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota, Utah and Wyoming, Comment Letter on Proposed EPA Carbon Pollution Emission Guidelines for Existing Stationary Sources (Nov. 14, 2014), https://ago.wv.gov/publicresources/epa/Documents/Comment%20from%2017%20State%20Attorneys%20General%20on%20Proposed%20EPA%20Carbon%20Pollution%20Rule%20111d%20-%2011-24-2014.pdf.

175. *Subnational Discretion*, *supra* note 114, at 45.

Court of Appeals for the District of Columbia Circuit for an emergency stay of the regulation.[176]

A. Plain-Meaning Interpretation of the Clean Air Act

1. Legal Structure of the Clean Air Act

The Clean Air Act provides a comprehensive scheme for air pollution control, addressing three general categories of pollutants emitted from stationary sources: criteria pollutants, hazardous pollutants, and pollutants that are (or may be) harmful to public health or welfare but are not hazardous or criteria pollutants or cannot be controlled under those programs.[177] First, six relatively ubiquitous criteria pollutants are regulated under 42 U.S.C. §§ 7408–7410.[178] Once the EPA issues air quality criteria for such pollutants, the EPA Administrator must propose primary National Ambient Air Quality Standards (NAAQS) for the pollutants at levels requisite to protect the public health with an adequate margin of safety.[179]

Second, other than criteria pollutants, HAPs are regulated under § 112 of the Act and codified at 42 U.S.C. § 7412.[180] "[The] EPA must publish and revise a list of 'major' and 'area' source categories of hazardous pollutants, and [thereafter] has a nondiscretionary obligation to establish achievable emission standards for all listed hazardous air pollutants emitted by sources within a listed category."[181] The National Emission Standards for Hazardous Air Pollutants are additional federal emission limitations established for less widely emitted, but still dangerous, hazardous, or toxic air pollutants that are not covered by the NAAQS.[182] These hazardous

176. *See In re* Murray Energy Corp., 788 F.3d 330, 331–34 (D.C. Cir. 2015) (explaining that opponents to the proposed rule had originally attempted to bring suit before the agency finalized the rule).

177. Final Brief for Respondent at 3, *In re* Murray Energy Corp., 788 F.3d 330 (D.C. Cir. Mar. 9, 2015) (Nos. 14-1112 & 12-1151) [hereinafter Final Brief for Respondent].

178. *Clean Air Act Title I – Air Pollution Prevention and Control, Parts A Through D*, EPA, https://www.epa.gov/clean-air-act-overview/clean-air-act-title-i-air-pollution-prevention-and-control-parts-through-d (last updated Jan. 16, 2018). Note that 42 U.S.C. § 7412 corresponds to § 112 of the Clean Air Act. *Compare* Clean Air Act of 1970, Pub. L. No. 91–604, § 112, 84 Stat. 1676, 1685 (1970) (highlighting an amendment to the Clean Air Act, which does not include any discussion of six criteria pollutants), *with* 42 U.S.C. § 7412 (2012) (explaining the six criteria pollutants that this law regulates). Both terms are used interchangeably and similar transposed terms are also applied to other sections of the Act. *See, e.g.*, 42 U.S.C. §§ 7401, 7408–7410 (2012) (using similar terms to § 7412).

179. Final Brief for Respondent, *supra* note 177, at 3.

180. *Id.*

181. *Id.* at 4.

182. ENVIRONMENTAL LAW, *supra* note 34, at 197–98.

substances include carcinogens and mutagens.[183] The categorical emission limitations are intended, by an "ample margin of safety," to regulate pollutants that "may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness."[184]

Third, the final major category of pollutants that the Clean Air Act covers are harmful pollutants not regulated under the NAAQS or hazardous pollutant programs.[185] Section 111, codified at 42 U.S.C. § 7411, regulates this category of pollutants and has two main components.[186] First, § 111(b) mandates "EPA to promulgate federal 'standards of performance' addressing *new* stationary sources that cause or contribute significantly to 'air pollution which may reasonably be anticipated to endanger public health or welfare.'"[187] When the EPA sets new source standards that address particular pollutant emissions, § 111(d) "authorizes EPA to promulgate regulations requiring states to establish standards of performance for *existing* stationary sources of the same pollutant."[188] If a state fails to submit a satisfactory plan, the EPA can prescribe and enforce plans for the state.[189] Together, the NAAQS, hazardous pollutant, and performance standard programs create a comprehensive scheme designed to achieve "Congress' goal of 'protect[ing] and enhanc[ing] the quality of the Nation's air resources so as to promote the public health and welfare.'"[190]

In the Clean Air Act, there is a specified division of state and federal authority where states have the "first-implementer role,"[191] while the EPA "is relegated . . . to a secondary role."[192] However, within this Clean Air Act envelope, there is no federal case law, nor any EPA rules, which has or could resolve direct conflicts regarding how one counts environmental *benefits* against the cost imposed on the operation of power generation units to reduce their regulated polluting operation.[193] The closest precedent is provocative Supreme Court *dicta* from forty years ago in *Union Electric*,

183. *Id.*

184. Clean Air Act of 1970, Pub. L. No. 91–604, § 112, 84 Stat. 1676, 1685 (1970). This statutory language emphasizes that these standards are intended to protect the public health and welfare. NRDC v. EPA, 824 F.2d 1146, 1152, 1156 (D.C. Cir. 1987).

185. Final Brief for Respondents, *supra* note 177, at 5.

186. *Id.*

187. *Id.* (quoting 42 U.S.C. § 7411(b)(1)(A) (2012)).

188. *Id.*

189. *Id.*

190. *Id.* (quoting 42 U.S.C. § 7401(b) (2012)).

191. EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 28 (D.C. Cir. 2012) *rev'd*, 134 S. Ct. 1584 (2014) (explaining the first-implementer role that the states have, even though the EPA has the authority to draft and enforce standards).

192. Train v. NRDC, 421 U.S. 60, 79 (1975).

193. Steven Ferrey, *Broken at Both Ends: The Need to Reconnect Energy and Environment*, 65 SYRACUSE L. REV. 53, 97 (2014).

that stated an owner of a fossil-fuel-fired power generation facility can *always* "shut down its plant and curtail electric service" to meet any imposed environmental requirements.[194]

In its 2009 *Riverkeeper* decision, the Supreme Court held that Congress, in enacting Clean Water Act § 316(b), did not categorically forbid the EPA from comparing costs to benefits when determining the best technology available for minimizing adverse environmental impacts of power plant cooling water intake structures.[195] Instead, the EPA was left the authority to decide to engage or not to engage in such analysis.[196] Next, this article examines how the various stakeholder parties are approaching the legality of the CPP, in the context of this substantive Clean Air Act precedent. These positions frame the long, and still unresolved, legal battle over the ability of the EPA to implement additional regulation.[197]

2. Challengers' Legal Position on Plain Meaning of the Clean Air Act

Plaintiff challengers were the first movers in the legal battle. Lead challenger, Murray Energy Corporation, argued that the EPA had ignored the plain text of § 111(d) of the Clean Air Act when the agency erroneously claimed that conflicting and competing versions of key statutory provisions that gave the agency broad discretion to interpret the Act as it saw fit.[198] Murray disputed that any conflict enabled EPA to choose how to interpret the statute's conflicting language.[199] Murray argued instead that the EPA had ignored the text of the Clean Air Act, and that the U.S. Code did not contain an ambiguity,[200] which accurately directed a different result.[201]

---

194. Steven Ferrey, *International Power on "Power,"* 45 ENVTL. L. 1063, 1089 (2015); *accord* Union Elec. v. EPA, 427 U.S. 246, 265 n.14 (1976) ("In a literal sense, of course, no plan is infeasible since offending sources always have the option of shutting down if they cannot otherwise comply with the standard of the law.").

195. *See* Entergy Corp. v. Riverkeeper, 556 U.S. 208, 224–25 (2009) (requiring the EPA to provide a reasoned explanation if it should choose to regulate in a way that would do more harm than good, or provide a reasoned explanation why the agency is indifferent to that outcome, yet *did not require* the EPA to employ cost-benefit analysis).

196. *Id.* at 226.

197. AVI ZEVIN, INST. FOR POL'Y INTEGRITY, DUELING AMENDMENTS: THE APPLICABILITY OF SECTION 111(D) OF THE CLEAN AIR ACT TO GREENHOUSE GASES 3–4 (2013), https://policyintegrity.org/files/publications/2014-5_Zevin.pdf (describing the conflicting amendments and the options available for EPA interpretation and implementation of regulations).

198. Final Opening Brief of Petitioner at 29, *In re* Murray Energy Corp., 788 F.3d 330 (D.C. Cir. Mar. 9, 2015) (Nos. 14-1112 & 12-1151).

199. *See id.* (noting that the legislature, not the EPA, is the first to determine the meaning of the text).

200. *Id.* at 10.

201. *Id.* at 32.

Murray argued that when the Clean Air Act was last amended in 1990, there was a conforming amendment that prohibited § 111(d) provisions from regulating any toxic mercury sources already regulated under the separate and distinct § 112 of the Act.[202] It is not unusual in the U.S. process for legislation containing an amendment to an existing statutory provision to fail to be in force due to an earlier provisional amendment contained in the same bill.[203] However, where there are conflicting amendments contained within the same bill, Congress and the Office of Law Revision Counsel have uniform rules to resolve any such conflicts.[204] A statutory amendment is not effective if a prior amendment in the same bill removes or alters the text that the subsequent amendment purports to amend.[205] Pursuant to these longstanding rules, Murray argued that the U.S. Code thus resolved any conflict and accurately reflected the text of § 111(d) in force after the amendment.[206]

In a battle over the extent of executive branch authority, it becomes critical to remove the executive branch agency from deciding which conflicting legislative branch version of language it will elect to enforce.[207] Murray backstopped its position with this foundation, by arguing that the EPA had no delegated power to choose among legislative conflicts, even if there was one.[208] Murray argued that if the court determined that there was any conflict in provisions of 1990 Clean Air Act amendments,[209] such a conflict in legislation did not empower the EPA, an executive branch agency, to decide which version of the conflicting text of the law was the one in force. Murray stated that any dispute as to what the definitive text of

---

202. *See id.* at 30–31 (explaining the differences between the amendments).

203. *Id.* at 31.

204. *See* U.S. SENATE, OFF. OF THE LEGIS. COUNS., LEGISLATIVE DRAFTING MANUAL 33 (1997) ("If, after a first amendment to a provision is made . . . the provision is again amended, the assumption is that the earlier (preceding) amendments have been executed."); U.S. HOUSE OF REPRESENTATIVES, OFF. OF THE LEGIS. COUNS., HLC 104–1, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE 42 (1995) (explaining that the House also relies on the assumption that the earlier amendments have been executed).

205. *See* Final Opening Brief of Petitioner, *supra* note 198, at 33 (stating that the conforming amendment enacted by Congress had no effect on the Act); *see also id.* at 47, 49–50 (explaining that the U.S. Code accurately reflected the text of § 111(d) after incorporating provisions of the 1990 amendments to the Act).

206. *See id.* at 30–31, 33 ("[T]he conforming amendment . . . would do nothing other than update a reference by deleting the text '(1)(A).'").

207. *See id.* at 34–55 (discussing the balance of power between executive agencies, Congress, and the judiciary).

208. *See id.* at 34 (explaining that the EPA is not entitled to deference).

209. In its brief, Murray stated that there was no ambiguity and that the EPA was not entitled to deference in determining the current text of the Clean Air Act. *See id.* (arguing that the decision belongs to the courts, not the EPA).

the Act was after the 1990 amendments could not be decided by the Executive Branch.[210] According to Murray, disputes could only be resolved by the Office of Law Revision Counsel, a legislative agency, or by the judicial branch during litigation.[211] Unilaterally allowing the EPA to make this legal determination would allow the executive branch to usurp a legislative function and process.[212] Thus, Murray stated that it would be necessary to defer to the legislature's Office of Law Revision Counsel, rather than to the EPA, to respect the express legal roles and powers of these co-equal and independent branches of government.[213]

To the contrary, the EPA argued for continued deference under the *Chevron* doctrine.[214] In response, the intervenor brief submitted by Peabody Energy, represented by law professor Laurence Tribe,[215] countered that *Chevron* deference should never be afforded when the issue before the court is conflicting legislative amendments to an act of Congress.[216] Peabody Energy argued that executive "agencies exercise discretion only in the interstices created by statutory silence or ambiguity," not when there is a basic choice of what statutory language prevails when there are two versions.[217] Professor Tribe, for Peabody Energy, argued that in this instance, there were no interstitial gaps in the Clean Air Act statutory scheme or ambiguities in the conflicting House amendment and the Senate amendment; the agency had no power to choose which version of the amendments the agency wished to make legally operative.[218]

Peabody Energy asserted that the EPA was extending beyond its authority, attempting to exercise legislative law-making power, and not respecting the clear separation of powers, without any support for such extensions of its power in *Chevron.*[219] Petitioner Murray asserted that *Chevron* only addresses the degree of deference an agency receives when

---

210. *Id.*

211. *Id.* at 36.

212. *Id.* at 34.

213. *Id.* at 35.

214. *See id.* at 34, 51–52 (specifying that *Chevron* dictates that a court must accept an agency's interpretation if it is reasonable).

215. Final Brief for Intervenor Peabody Corp. at 17, *In re* Murray Energy Corp., 788 F.3d 330 (D.C. Cir. Mar. 9, 2015) (Nos. 14–1112 & 14–1151). [hereinafter Final Brief for Intervenor Peabody]; *EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues*, *Hearing Before the H. Subcomm. on Energy and Power Comm. on Energy and Commerce*, 114th Cong. 14 (2015) (testimony of Laurence H. Tribe).

216. *See* Final Brief for Intervenor Peabody, *supra* note 215, at 10–11 (asserting that *Chevron* deference is improperly used when the EPA is choosing between different versions of an amendment that Congress created).

217. *Id.* at 11 (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2445 (2014)).

218. *Id.*

219. *Id.*

resolving an ambiguity in statutes that the agency is charged with enforcing; *Chevron* does not empower an executive agency to elect, for itself, which version of a law Congress enacted it wishes to follow.[220] Peabody Energy and Murray argued that there was no statutory ambiguity in either version of congressional language at issue; and even if such ambiguity was found by a court to exist, the EPA failed in its *Chevron* prerequisite burden to show that Congress sought to delegate to the EPA the authority to resolve such an issue.[221]

3. *Chevron* as a Decision Rule for Broad Court Deference to EPA

What is the legal precedent? *Chevron v. NRDC* remains the key opinion on interpreting the EPA's administrative discretion in law-making.[222] *Chevron* is the most cited administratiave law precedent by the Supreme Court year after year,[223] and is one of the 20 most-cited Supreme Court cases in the history of the Court.[224] The Court opinion established a deferential judicial approach to EPA agency interpretations of law embodied in legislative rules, where Congress was wholly silent in the statute on such interpretation.[225] The Court overruled the D.C. Circuit's substitution of its legal interpretation for that of the EPA when the statute was ambiguous.[226] In *Chevron*, the circuit court had rejected each of the EPA's three arguments in support of its administrative action implementing the Clean Air Act.[227]

When attempting to apply the precedent to the CPP, the EPA first argued that its CPP rule was appropriately within its administrative

220. *See id.* at 10–11 (explaining further that *Chevron* deference is reserved for instances of statutory silence and ambiguity, and cannot be used to decide between conflicting amendments).

221. *See id*. (clarifying that, absent a statutory ambiguity, the EPA lacks the congressionally delegated authority to select between two different laws).

222. *See* Chevron U.S.A. v. NRDC, 467 U.S. 837, 837 (1984) (examining Supreme Court precedent regarding deference to agencies).

223. Chris Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REG. & ABA SEC. ADMIN. L. & REG. PRAC.: NOTICE AND COMMENT (Oct. 9, 2014), http://yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/.

224. Shane Marmion, *Most-Cited U.S. Supreme Court Cases in HeinOnline–PartII*, HEINONLINE: HEINONLINE BLOG (Feb. 16, 2009), http://heinonline.blogspot.com/2009/01/most-cited-us-supreme-court-cases-in.html.

225. *Chevron*, 467 U.S. at 837.

226. *See id.* at 842 (explaining that the lower court erred in assigning a definition where deference should have been given to the agency).

227. *See* NRDC v. Gorsuch, 685 F.2d 718, 727 (D.C. Cir. 1982) (discussing the arguments raised by the EPA before the lower court).

discretion under the *Chevron* standard,[228] because "Congress has not directly addressed . . . the issue."[229] If, and only if, Congress did not directly speak to the issue, does the EPA have statutory interpretive discretion under *Chevron*.[230] Where Congress did not speak directly to the issue, then the court moves to the second *Chevron* step, which determines "whether the agency's answer is based on a permissible construction of the statute."[231] The second step allows for significant agency discretion in interpreting ambiguity.[232]

However, the factual predicate for *Chevron* does not apply regarding many statutes and agency actions.[233] Where the *Chevron* precedent does not apply to afford deference, courts apply the "arbitrary [and] capricious" standard of review of agency action.[234] Under the "arbitrary [and] capricious" standard, the agency must offer a sufficient explanation for the actions taken, including a "rational connection between the facts found and the choice made."[235]

Where *Chevron* does not apply to a particular agency action, then under the *Skidmore* precedent*,* while not controlling upon the courts, the body of agency experience and informed judgment can guide the court.[236] Moreover, the way an agency exercises its power is legally significant. The

---

228. Final Brief for Respondent, *supra* note 177, at 51; *see also Chevron*, 467 U.S. at 837 (establishing a test to determine when deference shall be given to agency decisions).

229. *Chevron*, 467 U.S. at 843. It does this by explaining that the EPA was within administrative discretion by "employing traditional tools of statutory construction." *Id.* at 843 n.9. If the court deems the statutory language "clear," it simply "give[s] effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* If the agency construction is permissible, the court defers to that construction, and "does not simply impose its own construction of the statute." *Id*. The *Chevron* test can also be deemed not to apply. *See* United States v. Mead Corp., 533 U.S. 218, 218 (2001) (finding that when an agency asserts authority not promulgated through formal rulemaking the authority does not receive *Chevron* deference).

230. *Chevron*, 467 U.S. at 842–43.

231. *Id.* at 843.

232. *See id.* at 844 (clarifying that statutory interpretation has traditionally been guided by relevant agency interpretations).

233. *See* VALERIE C. BRANNON & JARED P. COLE, CONG. RESEARCH SERV., R44954, *CHEVRON* DEFERENCE: A PRIMER 5–6 (2017) (providing that *Chevron* deference is appropriately applied to formal rulemaking procedures).

234. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 413–14 (1971) (holding that agency action may be subject to review if the action was arbitrary, capricious, an abuse of discretion, or not in accordance with the law).

235. *Id.* at 414; Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

236. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority; do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

court gives no deference to an agency's position where its determination does not embody a formal regulation pursuant to the Administrative Procedure Act.[237] Deference is only afforded to an agency interpretation "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[238]

There is judicial deference to the substance of administrative rules where disputes turn on issues of technical fact or policy,[239] or if the statute does not precisely answer the question the rule addresses, as in *Chevron*.[240] Interpretive rules that are not issued pursuant to formal rulemaking procedures do not enjoy the strong deference accorded legislative rules,[241] but still enjoy an initial presumption of *Skidmore*-level deference.[242]

Correct administrative procedure matters when determining what kind of judicial deference an agency might enjoy. In some cases, courts will strike interpretive rules made by an agency when the rules were actually legislative rules that require a full notice and comment under formal or informal rulemaking processes.[243] However, there is little agreement among the courts on what distinguishes legislative (to which legal formalities attach) and interpretive rules (to which legal formalities do not attach).[244] Circuit Judge Posner stated, "[d]istinguishing between a 'legislative' rule, to which the notice and comment provisions of the Act apply, and an interpretive rule, to which these provisions do not apply, is often very difficult—and often very important to regulated firms, the public, and the

---

237. *See* United States v. Mead Corp., 533 U.S. 218, 240 (2001) (Scalia, J., dissenting) (summarizing the dissent's understanding that the decision made by the majority applies *Chevron* deference only to rules promulgated through official procedures).

238. *Id.* at 226–27 (majority opinion).

239. *See id.* at 220 (explaining that *Chevron* did not preclude the use of *Skidmore* analysis in situations involving highly specialized information).

240. Chevron U.S.A. v. NRDC, 467 U.S. 837, 837 (1984).

241. *See also Mead Corp.*, 533 U.S. at 220 (acknowledging that some degree of deference is generally given to agency interpretations regardless of form as held in *Skidmore*).

242. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (indicating that an administrator's interpretations and actions "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *see also* Christensen v. Harris, 522 U.S. 576, 587 (2000) (determining that interpretation of agency action that did not develop through formal rulemaking is not given the level of deference asserted under *Chevron*); Auer v. Robbins, 519 U.S. 452, 461 (1997) (extending *Chevron* deference from the interpretation of an agency's enabling statute to the interpretation of the agency's own rules and regulations); Christopher v. SmithKline Beechman Corp., 567 U.S. 142, 155–56 (2012) (limiting *Auer* deference when the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question and may cause unfair surprise).

243. *Cf.*, Morgan D. Mitchell, *Wolf or Sheep?: Is an Agency Pronouncement a Legislative Rule, Interpretive Rule, or Policy Statement?*, 62 ALA. L. REV. 839, 840–41 (2011) (highlighting the difficulty of determining whether an agency rule is interpretive or legislative).

244. *Id.* at 842–52.

agency."[245] Where mathematical or technical standards are imposed by an agency, or a new duty is imposed on a party, formal requisites of the Administrative Procedure Act notice and comment process are typically required.[246]

There is a web of prior precedent at least indirectly relevant to resolving the CPP dispute. First, Justice Antonin Scalia noted in *Whitman v. American Trucking Ass'n* that any statutory language is "absolute" and cannot be altered.[247] Second, the Supreme Court in *United States v. Mead Corp.* acknowledged that *Chevron* recognizes that Congress can implicitly delegate discretionary authority to an administrative agency.[248] Third, in *City of Arlington v. FCC*, the Supreme Court held that *Chevron* deference applies to an agency's interpretation of the scope of its own statutory jurisdiction: "Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency."[249] The Court explained that it makes no distinction in terms of deference afforded the agency between an agency's "jurisdictional and non-jurisdictional interpretations."[250] The Court further reasoned that "[i]f 'the agency's answer is based on a permissible construction of the statute,' that is the end of the matter."[251] This overruled the lower court's determination

---

245. Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 167 (7th Cir. 1996).

246. *E.g.*, Columbia Falls Aluminum Co. v. EPA, 139 F.3d 914, 922–24 (D.C. Cir. 1998) (clarifying that the EPA rulemaking under § 3004 of RCRA was arbitrary and capricious where the agency relied on an analytical model that it knew was flawed and not an accurate predictor).

247. *See, e.g.*, Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 465, 472–73 (2001) (providing that agencies cannot "cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute"). Justice Scalia wrote that the statute "unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA." *Id.* at 471.

248. United States v. Mead Corp., 533 U.S. 218, 229 (2001).

249. City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013). The Court noted that, under *Chevron*, the Court must first ask whether Congress directly spoke to the precise question at issue; if so, the Court must give effect to Congress's unambiguously expressed intent, and "if the statute is silent or ambiguous," the court must defer to the administering agency's construction of the statute so long as it is permissible. *Id.* (quoting Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842–43 (1984)).

250. *Id.* No "exception exists to the normal [deferential] standard of review" for "jurisdictional or legal question[s] concerning the coverage of [an] Act." NLRB v. City Disposal Sys., 465 U.S. 822, 830 n.7 (1984). There is no principled basis for carving out an arbitrary subset of jurisdictional questions from the *Chevron* framework. *See, e.g.*, Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co., 534 U.S. 327, 333, 339 (2002) (citing *Chevron*, 467 U.S. at 843–44) (explaining that agencies can interpret statutory language when it is found to be ambiguous).

251. *City of Arlington*, 133 S. Ct. at 1874–75 (quoting *Chevron*, 467 U.S. at 842); *see* United States v. Eurodif S.A., 555 U.S. 305, 315–19 (2009) (holding that an agency's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous"). *See generally* Commodity Futures Trading Co. v. Schor, 478 U.S. 833, 844–57 (1986) (highlighting how the Supreme Court has given deference to agencies' construction of the scope of their own jurisdiction).

that federal rules did not defer sufficiently to state implementation.[252] These precedents provide context as to how the courts will construe the 1990 amendments, the CPP regulations, and any resultant deference in liberties taken in regulation.

B. Prohibited Agency Double Regulation of Sources

1. Assessing Agency Discretion and Canons of Construction

The key legal issue is in the pending litigation: What discretion does an agency have when there are two versions of statutory amendment language enacted that it is charged with enforcing? Under the Senate version of amendments to § 111(d) of the Clean Air Act, if a pollutant source category is regulated under the Act's HAP provision embodied in § 112, other pollutants emitted by that *source* category are wholly excluded from any other regulation under the distinct § 111(d) of the statute.[253] In stark contrast, under the House of Representatives' version of amendments to § 111(d) of the Act, it is only the specific *pollutants* regulated under § 112 that are exempt from regulation under the separate § 111(d).[254] Given that both versions were included in the final statute amendments,[255] even if by error, only one can dominate, and it matters who makes this determination. This presents a critical case of first impression when the new regulation is challenged, as it now has been.[256]

Both the *what* and the *how* are important elements of the controversy around the CPP. How did two different congressionally enacted versions of the same statute emerge in the same amendment at the same time? In the original Clean Air Act amendments in 1970, § 111(d) authorized the EPA to establish a program for state regulation of existing sources within a source category when the EPA sets a NSPS technology-based BSER standard for new and modified stationary sources in that category.[257] Two decades later, the subsequent 1990 Clean Air Act amendments contained

---

252. While employing a different mechanism than the Clean Air Interstate Rule to address cross-state pollution, the D.C. Circuit found that it required some states to reduce emissions by more than what they contributed to downwind state pollution. EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 25 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1584 (2014). Fifteen states sought review of Cross State Air Pollution Rule, while nine states intervened to support the rule. *Id.* at 9–10.

253. *See* ZEVIN, *supra* note 197, at 4 (detailing Clean Air Act amendment differences).

254. *Id.*

255. *Id.*

256. *In re* Murray Energy Corp., 788 F.3d 330, 333 (D.C. Cir. 2015).

257. Clean Air Amendments of 1970, Pub. L. 91–604, 81 Stat. 486 (codified as amended at 42 U.S.C. § 7411(d) (1970)).

different Senate and House versions of amendments to § 111(d).[258] The Congressional Conference Committee combined the amendments, melding a final version of the amendments without clear reconciliation in the final enacted version.[259] Congress required the EPA to establish standards for each source category of hazardous pollutant emissions.[260]

At a deeper level of detail as to what happened, in the course of overhauling the regulation of HAPs under § 112 of the Act, Congress also edited § 111(d), which cross-referenced a provision of prior § 112 that was to be eliminated.[261] The pre-1990 version of § 111(d) obligated the EPA to require standards of performance "for any existing source for any air pollutant" (i) for which air quality criteria have not been issued or (ii) "which is not included on a list published under section [7408(a)] or [7412(b)(1)(A)]."[262] To address the then newly obsolete cross-reference to § 7412(b)(1)(A), which is § 112(b)(1)(A) of the Act, the two Houses of Congress passed two different language amendments that were never reconciled by the Conference Committee.[263]

The difference was only a few words—but of great legal significance. The House amendment replaced the cross-reference with the phrase "emitted from a source category which is regulated under section [7412]";[264] the Senate amendment replaced the same text with a cross-reference to § 7412 of the Code.[265] The Senate amendment was a technical amendment regarding NSPS criteria pollutant regulation without substantive change.[266] The House amendment made the same technical change, but added that § 111(d) of the Act regarding criteria pollutants could not be applied to regulate a category of sources already regulated

---

258. *See, e.g.*, ZEVIN, *supra* note 197, at 4 (noting that both versions were passed without addressing the differences).

259. *See, e.g.*, *id.* (explaining how the 1990 amendments were different when passed by the House and Senate, leaving the Conference Committee to resolve these issues).

260. 42 U.S.C. § 7411(b)(1)(A)–(B) (2012).

261. *See* ZEVIN, *supra* note 197, at 4 (detailing the conflict between §§ 111(d) & 112 as amended).

262. *Id.* at 12.

263. *Id.* at 24–25.

264. Clean Air Act Amendments of 1990, H.R. 3030, 101st Cong. (1989).

265. Clean Air Act Amendments of 1990, S. 1630, 101st Cong. (1989).

266. *See generally* ZEVIN, *supra* note 197, at 30–40 (detailing the Senate amendment as a whole).

under § 112, which regulates HAPs unrelated to the criteria pollutants.[267] The House version restricted what the EPA sought to do with the CPP.[268]

Both versions are included in the final amendments to the Act as wrought by the final Conference Committee, then passed by both Houses of Congress, and signed by the President.[269] Neither version is inconsistent with the other, as far as their basic subject.[270] Both amendments were included in the final version enacted into law in the Statutes at Large, which, under law, supersedes the U.S. Code if there is a conflict between the two.[271] In 2000, the EPA determined under 42 U.S.C. § 7412(n)(1)(A) "that regulation of hazardous pollutant emissions from coal- and oil-fired [power plants] under section 112 of the [Act] is appropriate and necessary," and added those coal and oil power plants to the § 7412(c) list of mercury emission source categories of facilities to be regulated under the Act.[272] This was referred to as the Mercury and Air Toxics Standard (MATS) rule, and unlike the CPP it does not regulate CO_2, which is not a listed HAP, but instead regulates mercury and several other air toxic pollutants.[273]

When a final bill includes two conflicting provisions, canons of statutory construction exist to give full intended interpretation to all words included in a final legislative version.[274] The plaintiffs in the Murray litigation submitted that a rulemaking to regulate the same pollutant sources under both §§ 111(d) and 112 of the Clean Air Act is *ultra vires*, because the amended Act prohibits statewide regulation under the former section and prohibits direct source regulation under the latter section of the Act.[275]

---

267. *See id.* at 27 (explaining how the actions of both the White House and the House of Representatives showed that both bodies intended substantive revisions to what is regulated by § 111(d)).

268. *See id.* at 29 (discussing concerns that the House version would leave the EPA the option of inaction).

269. *See id.* at 4 (recognizing that, despite a lack of reconciliation, the amendments were signed into law).

270. *See id.* (explaining that both amendments addressed the same material with minute but material differences).

271. *See id.* at 13–14 (describing the Supreme Court's interpretation that the Statutes at Large controls over the U.S. Code in the event of conflicting statutory language).

272. Final Brief for Respondent, *supra* note 177, at 7 (alteration in original) (quoting Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,826–30 (December 20, 2000)); *see Basic Information About Mercury and Air Toxics Standards*, EPA (June 8, 2017), https://www.epa.gov/mats/basic-information-about-mercury-and-air-toxics-standards (stating that it was "appropriate and necessary" to regulate mercury emissions).

273. *See Basic Information About Mercury and Air Toxics Standards, supra* note 272 (listing the toxic pollutants).

274. *See* ZEVIN, *supra* note 197, at 13–14 (outlining the rules of construction that guide conflicts between the U.S. Code and Statutes at Large).

275. *See* Final Opening Brief of Petitioner, *supra* note 198, at 39, 54 (arguing that the agency action is *ultra vires* and that the same pollutant sources are regulated under both sections).

Trying to hold a higher ground, the EPA admits that this is one possible interpretation of the statutory amendments.[276] It argues, though, that this interpretation could not be the intent of Congress, because if it were, then § 111(d) would be almost completely negated in its application and ineffective, as over 100 source categories, covering the full range of American industry, have been regulated under § 7412 in regard to some hazardous pollutant.[277] Therefore, one section would negate the application of the other. However, part of this interpretation is a function of how the EPA has chosen to regulate under each section.[278]

Supreme Court precedent on the Clean Air Act can constrain how the CPP is adjudicated. Justice Ruth Bader Ginsburg, in a footnote of the 8–0 majority opinion in *American Electric Power Co. v. Connecticut*, embodied that precedent and construed the EPA's authority under the Clean Air Act in a case that also involved CO_2.[279] She wrote: "[the] EPA may not employ § 7411(d) [§ 111(d)] if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408–7410, or the 'hazardous air pollutants' program, § 7412 [§ 112]."[280]

Regulating a plant for hazardous mercury air pollutants under § 7412 of the Code (§ 112 of the Act), which the EPA uses to regulate hazardous-coal-plant emissions, could bar the agency from issuing non-hazardous CO_2 standards under § 111(d).[281] Because power plants—a category of facilities—and specifically coal-fired power plants, are regulated under § 112, it becomes an interesting fit as to which interpretation controls and whether the EPA has authority to issue these regulations.[282] The Court held

---

276. *See* Final Brief for Respondent, *supra* note 177, at 35 (demonstrating why Murray's interpretation is not the only one available and why that interpretation is rather impossible).

277. *See, e.g.*, 42 U.S.C. § 7412(a)(11)(b) (2012) (listing the hazardous pollutants); *id.* § 7412(c) (listing the source categories).

278. *See* ZEVIN, *supra* note 197, at 13 (identifying different interpretations given to each section by the EPA).

279. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 n.7 (2011) (stating the exception to the precedent that the agency must establish standards for performance within a category).

280. *Id.*

281. *Cf.* ZEVIN, *supra* note 197, at 35–37 (explaining that application of § 112 to municipal solid waste landfills precluded the agency from applying § 111(d) standards, similar to the situation with power facilities).

282. *See* Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,826 (Dec. 20, 2000) ("[R]egulation of [mercury] emissions from coal- and oil-fired electric utility steam generating units under section 112 of the CAA is appropriate and necessary."). The EPA asserted in the preamble of the CPP rule and in the legal memorandum supporting the proposed CPP rule that this conflict in amendment language creates an ambiguity that the agency may resolve, and thus it is entitled to deference under the *Chevron* precedent. *See* ZEVIN, *supra* note 197, at 38 (discussing mercury emissions from electric generating plants and the

that the initial litigation under § 111(d) was premature when the regulation was not yet final.[283]

2. Challengers' Construction of Law on CPP Double Regulation

The lead challenger to the CPP regulation, Murray Energy Corp., is effectively the "largest privately-owned coal company in the United States."[284] It is also "the fifth largest coal producer in the country, employing approximately 7,500 workers in the mining, processing, transportation, distribution, and sale of coal."[285] Murray asked the court to rule that the EPA's legal conclusion supporting the proposed rule was illegal and to enjoin the proposed CPP.[286] Murray submitted that the EPA could not double-back to use § 111(d) of the Clean Air Act to mandate state-by-state standards for the same sources already regulated under § 112 of the Act, which is expressly prohibited by multiple section of the Act, as it constitutes double regulation.[287] Essentially, the EPA may not issue standards under § 111 of the Act for emissions that are from a source category already regulated under § 112 of the Act.[288]

Murray stated that the EPA had only one bite at the regulatory apple, arguing that Congress specifically directed the EPA to require states to implement national emission standards only if "appropriate and necessary."[289] This gave the EPA the choice of whether to issue a national standard or, in the alternative, to allow power plants to be regulated through state-by-state standards, but it could not do both.[290] Murray maintained that the EPA "repeatedly acknowledged that the text of Section 111(d), [as it stood] after the 1990 [Clean Air Act] Amendments, unambiguously

---

Clinton Administration's interpretation that the EPA did not have the legal authority to regulate under § 112); Clean Power Plan, 80 Fed. Reg. 64,661, 64,713–15 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (stating that the EPA has the power to resolve the ambiguities created by the House and Senate amendments).

283. *See, e.g.*, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 894 (1990) (citing Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164–66 (1967)) (acknowledging that any litigation must await final agency action); *see also In re* Murray Energy Corp., 788 F.3d 330, 336 (D.C. Cir. 2015) (holding that the proposed rule was not a final agency action subject to judicial review).

284. Final Opening Brief of Petitioner, *supra* note 198, at v.

285. *Id.*

286. *Id.* at 7.

287. *See id.* at 10 (describing how the 2012 and 2013 regulations attempted to regulate the same sources).

288. *See id.* (asserting that § 112 of the Act authorizes the EPA to issue national emission standards, meaning that the EPA may not thereafter mandate state-by-state emission standards for that same source category without impermissible double regulation of the source).

289. *Id.* at 16.

290. *Id.*

prohibit[ed] [the EPA from] doubly regulating existing source categories"[291] in this case, sweeping into a second impermissible requirement for coal-fired power plants under the CPP.[292]

Other intervenor parties in the litigation also opposed double regulatory provisions under multiple sections of the Clean Air Act.[293] Both the National Federation of Independent Business (NFIB) and the UARG filing as joint-intervenors argued that the plain language of § 111(d) of the Clean Air Act regarding source NSPS precluded double regulation of NSPS already regulated under § 112 of the Act for HAPs.[294] They argued that once the EPA adopted the MATS rule for existing electric generation units under § 112, it was clear that the EPA may not simultaneously regulate emissions from power plants under § 111(d).[295] Once the EPA imposed regulations on existing coal-fired power generators under § 112 for hazardous mercury emissions, the generators could not also be subject to simultaneous, duplicative regulation under § 111(d) for CO_2.[296] The reply brief of NFIB and UARG stated that the EPA counsel's new contrary legal interpretation contradicts and conflicts with EPA's prior interpretation of the same text and ignores applicable canons of construction.[297] NFIB and UARG maintained that § 111(d)'s plain meaning should be interpreted as a straightforward provision of law declaring that source categories regulated under § 112 are exempt from further duplicative regulation under § 111(d).[298]

---

291. *Id.*

292. *Id.*

293. *See, e.g.*, Brief for Intervenor–Petitioners Nat'l Fed'n of Indep. Bus. & Util. Air Regulatory Grp. at 9, *In re* Murray Energy Corp., 788 F.3d 330 (D.C. Cir. Mar. 9, 2015) (Nos. 14–1112 & 14–1151) [hereinafter Brief for Intervenor–Petitioners NFIB and UARG]; Final Brief of the States of West Virginia et al., at 4, *In re* Murray Energy Corp., 788 F.3d 330, (D.C. Cir. Mar. 9, 2015) (Nos. 14–1112 & 14–1151) [hereinafter Final Brief of the States of West Virginia et al.] (both demonstrating intervening parties with arguments against double regulation under §§ 111(d) & 112).

294. Brief for Intervenor–Petitioners NFIB and UARG, *supra* note 293, at 6.

295. *Id.* at 9.

296. *Id.*

297. *See id.* at 6 (arguing a clarification of EPA's prior interpretation that sources cannot be regulated under both statutes).

298. *See id.* at 7 (asserting that § 111(d) does not apply to sources that are already regulated under § 112); *see also* Final Brief of the States of West Virginia et al., *supra* note 293, at 8 (explaining that the amendment can be read literally to declare source categories as exempt from double regulation under §§ 111(d) & 112).

3. EPA Defense of No Double Regulation by the Agency

The EPA's response essentially was that "past is [p]rologue."[299] EPA defended and countered that it was the decision-maker with discretion—pursuant to the *Chevron* doctrine—to choose the version of statutory language it prefers and to simultaneously ignore any other versions.[300] The EPA reached back to past practices to explain that prior to the 1990 Clean Air Act amendments, the EPA had established precedent to regulate existing sources using § 111(d).[301] The EPA submitted that the 1990 Act amendments did not limit the ways through which the EPA could double regulate emission *sources* under the statute, but only prohibited the double-regulation of *pollutants* using § 111(d).[302]

Mercury and CO_2 qualify in different basic categories of pollutants—the former a toxic pollutant, the latter non-toxic.[303] The EPA used both sections of the Act simultaneously with the CPP to regulate the same existing power plant sources which emitted both the toxic and non-toxic pollutants.[304] The environmental protection community, supporting the EPA in the CPP litigation, previously argued that the House amendments should govern the statutory interpretation, which here would support the Petitioners' arguments.[305]

The EPA asserted that it had plenary authority and could use such authority as it saw fit.[306] On brief, the EPA argued that "Congress designed [§ 111(d) of the Act] to work in tandem with the NAAQS" regulating criteria pollutants and with § 112 programs regulating HAPs.[307] Together, these various elements of the Clean Air Act cover every emission from

---

299. WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1 (Thomas Y. Crowell & Co. 1903) (1623); *see* Final Brief for Respondent, *supra* note 177, at 50 (asserting that the legislative history of past versions of a statute is not relevant).

300. *See* Final Brief for Respondent, *supra* note 177, at 51–52 (arguing that the EPA has the authority under *Chevron* to choose whichever statutory interpretation it believes is best).

301. Brief for Intervenor–Petitioners NFIB and UARG, *supra* note 293, at 10.

302. *See* Final Brief for Respondent, *supra* note 177, at 44 (emphasizing that Congress explicitly allowed simultaneous regulation of sources under multiple regulatory programs); *see also* Final Brief of the States of West Virginia et al., *supra* note 293, at 7–8 (asserting that the amendment changed the restriction in § 111(d) to limit double-regulation of pollutants rather than sources regulated under § 112).

303. *See* LAW OF INDEPENDENT POWER, *supra* note 36, § 6:7, at 6–19, § 6:22, at 6–152 (highlighting that "CO_2 is not directly hazardous" and that "mercury [is] a bioaccumulative toxin with a long-term impact").

304. *Cf.* Final Opening Brief of Petitioner, *supra* note 198, at 3 (explaining that all three sections were applied at once).

305. Final Brief for Respondent, *supra* note 177, at 50.

306. *Id.* at 52.

307. *Id.* at 41.

stationary sources.[308] The EPA countered that under challenger Murray's single-authority reading of the Clean Air Act amendments, there would be a gap in coverage, leaving certain pollutants beyond the Act's scope.[309] At the macro level, the EPA submitted that the legislative history of the Act and its amendments conflicted with Murray's interpretation because the 101st "Congress [generally] sought to expand EPA's regulatory authority" under the Act.[310]

EPA argued not that the legislature had authority to determine which version of the Act amendment language officially prevailed, but that the EPA could adopt any well-supported interpretation, so long as it was not arbitrary and capricious.[311] In the EPA's view, for Murray to prevail on the merits of its challenge, Murray would have to show that its interpretation highlighting the House language regarding § 111(d) of the Act was indisputably the only possible interpretation of the controversial provision.[312] Thus, the EPA argued that a court would construe any statutory ambiguity against the complainant and in favor of an alternative interpretation proffered by the EPA.[313] The EPA asserted that there were several different interpretations and the agency deserved the court's absolute deference as to which version to apply.[314]

There was an undisputed lack of clarity between the House and Senate versions of the 1990 Act amendments, with the Senate version providing more discretion to the EPA.[315] The agency asserted that the assumed

---

308. *Id.* The 1970 Clean Air Act amendments instructed the EPA to promulgate NAAQS for six "criteria air pollutants" for which the EPA had issued scientific air quality criteria prior to 1970: (1) particulate matter, (2) sulfur dioxide, (3) ozone, (4) nitrogen oxides, (5) carbon monoxide, and (6) hydrocarbons. *NAAQS Table*, EPA, https://www.epa.gov/criteria-air-pollutants/naaqs-table (last updated Dec. 20, 2016). The EPA must review the adequacy of NAAQS at least once every five years. *1999 National-Scale Air Toxics Assessment: Fact Sheet*, EPA, https://archive.epa.gov/airtoxics/nata1999/web/html/naaqs.html (last updated Feb. 21, 2016). NAAQS are established, without regard to cost, to protect sensitive subpopulations. Am. Lung Ass'n v. EPA, 134 F.3d 388, 389 (D.C. Cir. 1998). NAAQS protect normal populations with an adequate margin of safety. *Primary National Ambient Air Quality Standard (NAAQS) for Sulfur Dioxide*, EPA, https://www.epa.gov/so2-pollution/primary-national-ambient-air-quality-standard-naaqs-sulfur-dioxide#additional-resources (last updated June 20, 2018).

309. *See* Final Brief for Respondent, *supra* note 177, at 42 (arguing that the court should provide the EPA an opportunity to interpret that particular provision to promote the purpose of the Clean Air Act, protecting health and welfare).

310. *Id.*

311. *See id.* at 52 (asserting that the EPA has the authority to find a reasonable interpretation when there is a conflict between amendments from the House and the Senate).

312. *Id.* at 34.

313. *See id.* at 35 (asserting that the court will evaluate the agency's interpretation in light of its reasonability, not necessarily considering whether the complainant's interpretation is superior).

314. *See id.* (emphasizing that the EPA has the authority to interpret the statute at its discretion).

315. *Id.* at 35–36.

unfavorable "literal text of the House-amended version of section [111(d) of the Act] . . . can be read as authorizing [the] EPA to address power plant emissions under that provision so long as the pollutant in question (here, [CO_2]) is not a criteria pollutant."[316] CO_2 is not a criteria pollutant.[317] Thus, the EPA Administrator may exercise *Chevron* discretion to require states to establish standards for an air pollutant so long as states have not established air quality criteria for that pollutant yet, or states have met one of the remaining criteria.[318] Following this logic, states have not issued air quality criteria for CO_2.[319] Thus, according to the EPA, it is irrelevant whether § 112 regulates power plants.[320] The EPA also countered that § 111(d) could also be read literally as requiring regulation of power plant CO_2 emissions.[321]

Other intervenors supported the EPA's defense. New York and other state intervenors argued that, under petitioner Murray's interpretation of § 111(d), the EPA would have had to choose to act as a regulator.[322] The EPA could have done this under "*either* section 112 to address dangers associated with hazardous air pollutants like mercury *or* section 111(d) to address . . . carbon dioxide emissions from power plants, as well as . . . sulfuric acid mist and fluoride compounds."[323] New York noted that Murray's reading would exclude the most prolific sources of CO_2 from regulation under § 111(d).[324] The EPA employed § 111(d) as its statutory foundation for the CPP, because those sources—including "power plants, petroleum refineries, and cement plants—[were] already regulated under section 112 due to their emission of hazardous air pollutants."[325] These intervenors concluded that "[n]othing in the legislative history of the 1990 [Clean Air Act] amendments suggest[ed] that Congress intended" to create such a large hole in agency authority.[326]

---

316. *Id.* at 36.

317. *Id.* at 37.

318. *Id.* at 36–37.

319. *Id.* at 37.

320. *Id.*

321. *Id.* (clarifying that § 111(d) could be read to require the EPA to regulate source emissions of a pollutant from a source category if that category is regulated under § 112).

322. Final Brief of the States of New York et al., at 9, *In re* Murray Energy Corp., 788 F.3d 330 (D.C. Cir. Mar. 9, 2015) (Nos. 14–1112 & 14–1151) [hereinafter Final Brief of the States of New York et al.].

323. *Id.*

324. *Id*. at 9–10.

325. *Id*.

326. *Id.* at 10.

And this is where things remain as the legal challenge has been enjoined by the Supreme Court and stalled for three years.[327]

C. The Controversy Around the New Math: "Co-Benefits"

1. Doing the Basic Math

Costs and benefits quantify the impact of a regulation.[328] A significant contention in the pending CPP litigation is the Obama Administration's EPA counting so-called *co-benefits* to justify that the CPP benefits outweigh costs.[329] *Co-benefits* are not impacts from pollutants that are regulated by the CPP, but occur because reducing the pollutant regulated by the CPP has the impact of simultaneously reducing co-pollutants.[330] Under the CPP, the administration regulates a pollutant at such a strict level that certain current technology is unable to meet these standards, and by default eliminating all pollutants otherwise emitted when the plants employing that technology shut down.[331] In the case of the CPP, the Obama Administration regulated CO_2 emissions from large power plants as a stated mechanism to reduce the operation of coal-fired power plants.[332] The CPP counts many *co-benefits* that stem from reducing pollutants other than the CPP-targeted CO_2 (which is neither a criteria nor toxic pollutant in the Clean Air Act).[333] Many international climate benefits were also added to and used to supplement relatively limited domestic climate benefits related to limiting or shutting down domestic electricity generation plants.[334]

---

327. *See* Amanda Reilly, *Environmental Groups Ask Supreme Court to Revisit Clean Power Plan Stay*, SCI. AM. (July 31, 2018), https://www.scientificamerican.com/article/environmental-groups-ask-supreme-court-to-revisit-clean-power-plan-stay/ (giving background on the history of the Supreme Court's CPP stay from 2015 to present).

328. *Quantifying the Benefits and Costs of Federal Regulations*, DEP'T OF TRANSP., VOLPE CTR. https://www.volpe.dot.gov/policy-planning-and-environment/economic-analysis/quantifying-benefits-and-costs-federal-regulations (last updated Mar. 7, 2018).

329. Amanda Reilly, *Air Pollution: Battle over EPA 'Co-benefits' Rages After Mercury Ruling*, E&E NEWS: GREENWIRE (July 1, 2015), https://www.eenews.net/stories/1060021172.

330. *Mind the Gap*, *supra* note 26, at 147.

331. *Id.*

332. *See* JAMES E. MCCARTHY & CLAUDIA COPELAND, CONG. RESEARCH SERV., R41561, EPA REGULATIONS: TOO MUCH, TOO LITTLE, OR ON TRACK? 13 (2016) [hereinafter TOO MUCH, TOO LITTLE, OR ON TRACK?], https://fas.org/sgp/crs/misc/R41561.pdf (discussing how the CPP planned to improve the efficiency of fossil-fueled power plants).

333. *See infra* tbl.1.

334. *Id.*

We start from the ground *up*. Various provisions of the Clean Air Act require the EPA to weigh both costs and benefits of regulations.[335] For example, § 111 directs the agency to establish performance standards for sources of air pollution that reflect the "best system" of pollution reduction, "taking into account the cost" of achieving the standard.[336] The EPA's calculations for indirect and direct costs and benefits related to Clean Air Act climate regulations are displayed in Table 1.

Statute	Type	Year	EPA Regulation	Annual Costs	Benefits
CAA	Report	2009	Green House Gas Reporting Rule	$867 per facility	
CAA 111	NSPS	2015	Clean Power Plan	$5.1–8.4 billion	$32–54 billion
CAA 111	NSPS	2016	Methane Emission for Oil & Gas Industries	$530 million	$690 million
CAA 112	MACT		Powerplant MATS Mercury & Air Toxics	$9.6 billion	Hg alone is $4–6 million w/ co-benefits $37–90 billion
CAA 111	NSPS	2012	Fracking Wells & Gas Distribution		$11–19 million
CAA 112	HAPs	2012			

Table 1. Costs and Benefits of Clean Air Act Climate-Related EPA Regulations[337]

The Obama Administration's EPA justified the economics of the CPP by highlighting the economic benefits of immediate respiratory health improvements from the *co-benefits* of reduction of lung irritants.[338] To alter the otherwise lopsided domestic cost-benefit outcome of the CPP—costs far exceeded direct benefits of the CO_2 pollutant expressly reduced from regulation—the Obama Administration's EPA added estimated indirect, incidental *co-benefits* related to reduction of pollutants, which were not regulated by the CPP rule.[339] According to the Congressional Research Service:

335. U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-252, CLEAN AIR ACT: OBSERVATIONS ON EPA'S COST-BENEFIT ANALYSIS OF ITS MERCURY CONTROL OPTIONS 1 (2005), https://www.gao.gov/assets/250/245489.pdf.

336. 42 U.S.C. § 7411(a)(1) (2012).

337. *See* TOO MUCH, TOO LITTLE, OR ON TRACK?, *supra* note 332, at 8, 13, 14, 19 (discussing background on EPA regulatory authority and providing information that author used to construct table).

338. *See* Clean Power Plan, 80 Fed. Reg. 64,661, 64,928 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (estimating the economic benefit to be $54 billion by 2030).

339. *Id.* at 64,679.

> There are recurring questions regarding the methodologies used to estimate both costs and benefits, including what to choose as the baseline against which to measure changes resulting from a regulation; how to monetize improvements in public health, such as the avoidance of premature death; whether to count both direct benefits and cobenefits (i.e., benefits achieved that were not the purpose of the regulation); how to account for benefits for which there is no accepted measurement or valuation methodology; whether to include reductions in the "social cost of carbon" as a benefit and, if so, how to measure those benefits; and whether certain benefits or costs are double-counted when simultaneous proposals address the same pollutant.[340]

There was also movement in the legislative branch regarding cost calculations. Evan Jenkins, a Republican Representative from West Virginia, introduced legislation to prohibit the EPA and the Department of Energy from including the social cost of controlling carbon and methane—GHGs—or ancillary *co-benefits* of particulate matter reduction.[341] Some states disagreed with the EPA's ability or discretion to count *co-benefits*.[342] The Director of the Ohio EPA, in comments to the U.S. EPA, stated:

> When U.S. EPA promulgates a revised [NAAQS] it uses the amount of air quality improvement as a measure to determine benefits. If a facility installs controls to meet the NAAQS and also complies with the Utility MATS, plus Cross State Air Pollution Rule (CSAPR), U.S. EPA should not double or even triple count those reductions as part of each rulemaking. The health benefit that U.S. EPA states is occurring can only occur once, not be recounted multiple times under separate U.S. EPA rulemakings.[343]

---

340. *See* TOO MUCH, TOO LITTLE, OR ON TRACK?, *supra* note 332, at 4 n.16 (discussing the questions surrounding cost and benefit methodologies).

341. H.R. 5668, 114th Cong. (2016).

342. *See Mind the Gap*, *supra* note 26, at 147 ("Legal challenges to the Clean Power Plan were filed by more than 100 parties following its promulgation in October 2015.").

343. Comment Letter from Scott J. Nally, Dir., Ohio EPA, to EPA Docket Ctr. (Jan. 15, 2016), https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2009-0234-20560&attachmentNumber=1&disposition=attachment&contentType=pdf; *see also* Util. Air Regulatory Grp., Comment in Response to the Environmental Protection Agency's Supplemental Finding That it is Appropriate and Necessary to Regulate Hazardous Air Pollutants 20 (Jan. 15, 2016) https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2009-0234-20557&attachmentNumber=1&disposition=attachment&contentType=pdf ("In order for there to be *co-benefits* from $PM_{2.5}$ to attribute to the Proposed Rule, the Proposed Rule must require more reductions of primary $PM_{2.5}$ and $PM_{2.5}$ precursors (*e.g.*, SO_2 and NO_x) than would otherwise occur under other

2. Court Decision Rules

Is there court precedent for counting *co-benefits* or elements not covered by a regulation? My search for court decisions regarding the counting of indirect *co-benefits* or alleged *double-counting* of benefits produced no precedent.[344] So, on these critical issues, the country is left with a case of first impression.

In 2011, a few years before the CPP, EPA proposed and promulgated maximum achievable control technology MATS for power plant mercury emissions.[345] "The final rule sets standards for all hazardous air pollutants (HAPs) emitted by coal- and oil-fired electric generating units (EGUs) with a capacity of 25 megawatts or greater."[346] These MATS promulgated by the EPA were estimated to avert up to "11,000 premature deaths, 4,700 heart attacks and 130,000 asthma attacks every year."[347] However, virtually none of the benefits were related to the emissions directly regulated by the rule.[348] Almost all of the projected value of avoided deaths and monetized benefits came from the rule's effect on emissions of particulates, which are non-toxic pollutants.[349] Rather, these benefits did not stem from an

---

existing regulations, including the current National Ambient Air Quality Standards (NAAQS) for $PM_{2.5}$. To include any co-benefits from reductions that will occur anyway as a result of the current $PM_{2.5}$ NAAQS in this rule would be to *double*-count those benefits—first as the direct benefits that were counted to justify the $PM_{2.5}$ NAAQS in that rule's 2006 RIA (EPA, 2006), and then again as co-benefits to justify this Proposed Rule.").

344. An independent search of court decisions concerning indirect *co-benefits* and double counting of benefits similarly returned no results.

345. Regulatory Actions - Final Mercury and Air Toxics Standards (MATS) for Power Plants, EPA, https://www.epa.gov/mats/regulatory-actions-final-mercury-and-air-toxics-standards-mats-power-plants (last visited Nov. 25, 2018). The EPA stated that the standards for existing units could be met by 56% of coal- and oil-fired electric generating units using pollution control equipment already installed; the other 44% would be required to install technology that would reduce uncontrolled mercury and acid gas emissions by about 90%, at an annual cost of $9.6 billion. TOO MUCH, TOO LITTLE, OR ON TRACK?, *supra* note 332, at 22.

346. *Basic Information About Mercury and Air Toxics Standards*, *supra* note 272 (emphasis removed). This affects larger coal plants, if coal is greater than 10% of fuel input, and the unit is greater than 25 MW capacity, produces electricity for sale, and supplies more than one-third of its potential output to any utility power distribution system, unless its annual capacity factor is less than 8% of rating (i.e., only used for peaking purposes). National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 77 Fed. Reg. 9304, 9309, 9384 (Feb. 16, 2012) (to be codified at 40 C.F.R. pts. 60, 63).

347. *Mercury and Air Toxic Standards: Healthier Americans*, EPA, https://www.epa.gov/mats/healthier-americans (last updated Dec. 7, 2016) [hereinafter *Healthier Americans*].

348. *See id.* (asserting that the incidental effects this rule has on particulate matter are the more direct cause of the predicted benefits of the rule).

349. *See id.* (reasoning that fine particulate reduction leads to a reduction in various severe health problems).

identified reduction of mercury or other air toxic chemical exposure regulated expressly by the MATS.[350]

What made the rule controversial is that the *co-benefits* associated with incidental reduction of fine particulate matter ($PM_{2.5}$) reductions comprised the overwhelming majority of all benefits attributed to the MATS regulations by the EPA.[351] $PM_{2.5}$ is already otherwise regulated by the EPA under other sections of the Clean Air Act NAAQS regulations.[352] This allowed the EPA to achieve, indirectly through executive action, $PM_{2.5}$ emissions reductions beyond those allowed or achieved under provisions of the Act authorizing direct regulation of $PM_{2.5}$.[353] Across the country, this rule had both strong supporters and detractors.[354]

Existing coal-fired power plants had until April 2015 (with a possible one-year extension) to meet the standards.[355] "The final rule set standards for all hazardous air pollutants emitted by coal- and oil-fired electric generating units with a generation capacity of 25 megawatts or greater."[356] Any existing source would have about four years to comply with the new MATS, and then under the Clean Air Act, a state could grant an additional year.[357]

Numerous parties petitioned the courts for review of the rule.[358] They contend that the EPA failed to conduct a cost-benefit analysis or cost consideration in its initial determination that control of air toxics from electric power plants was "appropriate and necessary."[359] Moreover, Petitioners alleged that the agency's later cost-benefit analysis demonstrated that the rule's direct benefits failed this test.[360] This issue proceeded on appeal to the Supreme Court in a challenge by a coalition of

---

350. *Cf. id.* (pronouncing that the value of the incidental impact on particulate matter accounts for the vast majority of the public health benefits).

351. Maxine Joselow, *Clean Air Advocates Worried by EPA's Move to Rethink Cost-benefit Calculations*, SCI. MAG. (June 25, 2018), http://www.sciencemag.org/news/2018/06/clean-air-advocates-worried-epa-s-move-rethink-cost-benefit-calculations.

352. *Id.*

353. *See id.* (indicating that the counting of *co-benefits* increased $PM_{2.5}$ emissions reduction calculations).

354. *See id.* (containing the names of both supporters and detractors of the CPP).

355. *AEO2014 Projections*, *supra* note 135.

356. *Basic Information About Mercury and Air Toxics Standards*, *supra* note 272.

357. *Healthier Americans*, *supra* note 347.

358. *See* Joselow, *supra* note 351 (mentioning the parties who sought judicial review of the EPA's rule).

359. TOO MUCH, TOO LITTLE, OR ON TRACK?, *supra* note 332, at 19.

360. *See id.* (stating the EPA's "appropriate and necessary" finding).

more than 20 states.[361] The agency could only quantify $4 million–$6 million in direct benefits related to reductions of HAPs regulated by MATS, a fraction of one percent of the total direct and indirect *benefits* claimed by the agency.[362] The EPA claimed primarily long-term *co-benefits* of $37 billion–$90 billion annually, without providing any statistical basis or medical proof.[363] On appeal, the Supreme Court overturned MATS because: "The [EPA] must consider cost—including . . . cost of compliance—before deciding whether regulation is appropriate and necessary."[364] "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."[365]

Both EPA regulations at issue in the MATS challenge and the CPP challenge are common in that each created a *de minimis* amount of *direct* public health benefits, scaled against much more significant costs for private industry to implement the reductions (mercury in the MATS rule and CO_2 in the CPP rule, respectively).[366] In both cases, to alter the outcome of costs far exceeding direct benefits of the pollutant specifically regulated, the EPA added estimated indirect, incidental *co-benefits* related to reduction of pollutants, which were not regulated by the rule.[367]

IV. THE AGENCY SWIVEL TO PROCEDURAL AGENCY DEFENSES

Both federal and state environmental agencies have attempted to stop the challengers' suits on procedural grounds to prevent a court from considering the merits of what the agency is regulating.[368] When can one

---

361. *See* Michigan v. EPA, 135 S. Ct. 2699, 2706 (2015) (agreeing to grant *certiorari* and consolidate three separate positions filed by the UARG, the National Mining Association, and 21 states, whereby 15 states supported the EPA's MATS regulation before the Court).

362. *Id.*

363. *Id.*

364. *Id.* at 2711.

365. *Id.* at 2707.

366. *See id.* at 2705, 2706–08, 2715 (explaining that the cost of regulating mercury outweighed the direct health benefits); *see also* Final Opening Brief of Petitioner, *supra* note 198, at 4, 6, 20, 22 (arguing that the cost of regulating carbon under the CPP also outweighed the direct health benefits).

367. *See* Jason Perkins, Essay, 2015–16 Olaus and Adolph Murie Award-winning Paper, *The Case for Co-Benefits: Regulatory Impact Analyses, Michigan v. EPA, and the Environmental Protection Agency's Mercury and Air Toxics Standards*, STAN. L. SCH., 13–14, 21 (Sept. 6, 2016) (discussing the history of, support for, and criticism of *co-benefits*).

368. *See* Steven Ferrey, *Can the Ninth Circuit Overrule the Supreme Court on the Constitution?*, 93 NEB. L. REV. 807, 817, 822, 849, 854 (2015) [hereinafter *Overrule Supreme Court*] (providing evidence of procedural challenges raised during trial); Steven Ferrey, *Wrinkles in the Administrative Fabric: Regulatory Initiatives and California Economic Development*, 20 NEXUS CHAPMAN'S J. L. & POL'Y 17, 22 (2015) [hereinafter *Wrinkles in the Administrative Fabric*] (noting one of seven significant state law challenges to California's sustainable energy policy succeeded on

sue on the merits? The Administrative Procedure Act § 706(2)(A) provides that courts must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[369] Procedure, timing, and exhaustion of remedies have become major defenses of government agencies at both the federal and state levels in litigation to attempt to truncate courts reaching the merits of challenges.[370] These challenges typically raise: (1) standing of the challengers, arguing that the challenger does not have a specific injury as was raised in the CPP case;[371] (2) that challengers have not exhausted their administrative actions or remedies prior to seeking review;[372] (3) that the current version of the regulation is not yet final and thus judicial action is not yet ripe;[373] or (4) no writ is available to halt agency initiatives.[374] Here, each of these procedural defenses constituted substantial aspects of the EPA's defense to try to prevent the government from needing to defend the legal merits of its substantive decision and CPP regulation.[375]

A. Exhaustion of Administrative Remedies

Opposed to the CPP, Murray Energy Corp. attempted to stop the rulemaking by filing suit as soon as the EPA placed the proposed rule in the Federal Register.[376] Procedural objections to any litigation were raised by the Obama Department of Justice as premature before final agency

---

procedural grounds, while the state raised procedural challenges to all six to try to avoid the merits of the claims).

369. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012).

370. *Cf.* Joseph F. DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research*, 1977 DUKE L.J. 409, 412–45 (1977) (discussing how some private parties are precluded by procedure and requirements such as exhausting available remedies); *see also* Melissa M. Devine, *When the Courts Save Parties from Themselves: A Practitioner's Guide to the Federal Circuit and the Court of International Trade*, 21 TUL. J. INT'L & COMP. L. 329, 334 (2013) (discussing the importance of judicial procedure).

371. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1991) (explaining that plaintiff must have a specific injury to have standing in a case).

372. *See* William Funk, *Exhaustion of Administrative Remedies – New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1, 1–2 (2000) (discussing how government agencies use exhaustion of remedies as a defense in court).

373. *See infra* Part IV.A (discussing the issue of ripeness as an agency defense in court).

374. *See* Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 461–62, 464–65, 472 (2008) (overviewing court holdings in the face of agency inaction).

375. *See infra* Part IV.B.2 (examining the EPA's legal approach to upholding the CPP).

376. *In re* Murray Energy Corp., 788 F.3d 330, 334 (D.C. Cir. 2015). Murray argued that its business would be negatively affected by the plan, and it had incurred costs in anticipation of the final rulemaking. *Id.* at 335.

action.[377] The legal doctrine of exhaustion of administrative remedies provides that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[378] To satisfy exhaustion, plaintiffs must demonstrate that they have exhausted all possible administrative remedies available at the promulgating administrative agency prior to securing judicial review.[379]

Exhaustion of administrative remedies serves four main purposes.[380] Those purposes are: (1) respecting the legislative purpose in granting implementation authority to an agency; (2) protecting agency autonomy and separation by allowing the agency the opportunity correct errors; (3) streamlining judicial review by developing the facts of the case at the agency level; and (4) promoting judicial economy.[381] In environmental cases, courts typically apply the *McKart* exhaustion factors to determine ripeness of judicial reviewability.[382] Courts frequently reject the exhaustion defense where judicial review of a decision is granted.[383]

---

377. *See id.* at 335, 339 (highlighting procedural issues raised by respondents).

378. *See* McKart v. United States, 395 U.S. 185, 193 (1969) (quoting Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938)) (summarizing the doctrine of exhaustion, which uses four factors to determine whether judicial review is appropriate for an agency action that is not the final agency determination on that matter). *McKart* described four factors that must be considered to determine whether judicial review is ripe: (1) the degree of plaintiff's injury; (2) the need to protect the integrity of agency functions; (3) the likelihood that judicial review would be enhanced by application of agency experience or the accumulation of a record; and (4) the improvement of judicial efficiency by avoiding intervention and first giving the agency a chance to correct the matter. *See* ENVIRONMENTAL LAW, *supra* note 34, at 63 (examining the court's opinion in the *McKart* case).

379. *McKart*, 395 U.S. at 193 (quoting *Myers*, 303 U.S. at 50–51). There are internal appeal processes within the EPA. *Environmental Appeals Board*, EPA, https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf (last updated Oct. 5, 2018). The EPA has a centralized Environmental Appeals Board (EAB) to hear appeals and petitions in three types of cases: civil penalties for violations of environmental statutes and regulations; issuance, modification, or revocation of permits regulating pollutants and activities; and costs associated with cleaning up hazardous waste sites. *Id.* However, none of these include general rulemaking as was at issue with the CPP. *See, e.g.*, Elec. Privacy Info. Ctr., *The Administrative Procedure Act (APA)*, https://www.epic.org/open_gov/Administrative-Procedure-Act.html (last visited Nov. 25, 2018) (noting that final rule makings are subject to APA adjudication).

380. Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C. Cir. 1984).

381. *Id.* at 1484.

382. *See McKart*, 395 U.S. at 193 (stating exhaustion factors that help other cases determine ripeness of review).

383. *See* State v. U.S. Steel Corp., 240 N.W.2d 316, 319 (Minn. 1976) (holding the exhaustion doctrine inapplicable because no administrative action occurred); State v. Dairyland Power Coop., 187 N.W.2d 878, 882–83 (Wis. 1971) (holding the exhaustion doctrine inapplicable because there was "no administrative action of any kind whatsoever").

1. Final Agency Action

In the challenge to the CPP, petitioners assertively argued that an agency's interpretation of the law is presumptively final once it is signed by the head of the agency.[384] Thus, Murray argued that the initial CPP proposal was a final agency action because the preamble that announced the EPA's legal conclusion was part of the regulation signed by the EPA Administrator, which plaintiff Murray argued was a final action by the agency.[385] Murray further argued that once the legal determination was made by the agency, it was irrelevant that the EPA would subsequently accept public comments on the proposed CPP rule.[386] Petitioners stated that although the EPA was free to later modify its legal positions, it did not render those positions any less final at the time they were made.[387] Therefore, judicial review could proceed as to whether the agency was correct.[388] Murray argued that the EPA's legal conclusion was a final agency action when the EPA concluded it had authority for this rule under its basic authority pursuant to § 111(d) of the Clean Air Act.[389]

2. The D.C. Circuit Decision on Timing of Litigation Challenges

The D.C. Circuit held that only final agency action, not proposed action, is subject to judicial review:[390]

> Proposed rules meet neither of the two requirements for final agency action: (i) They are not the 'consummation of the agency's decisionmaking process,' and (ii) they do not determine 'rights or obligations,' or impose 'legal consequences'. . . . [A] proposed regulation is still in flux, so review is premature . . . . Agency action is final when it imposes an obligation, denies

384. Final Opening Brief of Petitioner, *supra* note 198, at 48; *see also* NRDC v. Tenn. Valley Auth., 367 F. Supp. 128, 133 (E.D. Tenn. 1973) (claiming failure to comment on draft impact statements is a complete bar to an attack on NEPA statement adequacy).

385. Final Opening Brief of Petitioner, *supra* note 198, at 48–49.

386. *Id.* at 50.

387. *Id.*

388. *Id.*

389. *Id.* at 54.

390. *See In re* Murray Energy Corp., 788 F.3d 330, 334 (D.C. Cir. 2015) (denying petition for review on this basis). Murray's position was that their business would be negatively affected by the CPP, and their injury consisted of costs incurred in anticipation of the final rulemaking. *Id.*

> a right, or fixes some legal relationship, and an agency's proposed rulemaking generates no such consequences.[391]

Thereafter, the initial complaint in *In re Murray Energy Corp.* was dismissed by the D.C. Circuit in June 2015 because the challenged CPP rule was not yet in final form.[392] In principle, administrative remedies had not yet been exhausted, and thus the court lacked the authority to rule on its legality.[393] Then, even before there was a merited CPP challenge at the circuit level or petition for *certiorari* before the Supreme Court, the Supreme Court overruled the D.C. Circuit and granted an indefinite stay to the entire CPP on February 9, 2016.[394] This is now much more than two years before the D.C. Circuit would deliver any initial decision on the merits of the case.[395] It is a rare event for the Supreme Court proactively to override a circuit court's decision to not grant a stay when the case is not yet before the circuit court on the merits.[396] Some commenters posit that this was not a surprising outcome given the Supreme Court's ruling in *Michigan v. EPA*.[397] The agency went into defensive posture.[398]

B. Authority of a Court to Issue a Writ to Compel Agency

1. Challengers' Legal Position

Murray and several intervenors structured their requested relief asking for a writ from the court to enjoin alleged EPA double regulation of CO_2

---

391. *Id.* at 334–35 (internal citations omitted).

392. *Id.* at 334 ("[A] proposed rule is just a proposal. In justiciable cases, this Court has authority to review the legality of final agency rules.").

393. *Id.* ("We do not have authority to review proposed agency rules.").

394. *See Brakes on CPP*, *supra* note 1 (verifying the D.C. Circuit's denial of the request).

395. *See id.* (listing the action's procedural history).

396. *Cf. id.* (discussing how unusual it is for the Supreme Court to block federal regulations and override the decision of the circuit court).

397. *See id.* (providing a brief description of the *Michigan* Court's reasoning). There was no stay granted to the plaintiffs in *Michigan* resulting in them paying for upgrades to comply with the EPA's rulemaking during the litigation only to have the regulatory requirement overturned by the Supreme Court for the lack of cost-of-compliance analysis done by the EPA for the § 112 Clean Air Act regulations. *See* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (holding that the court was not going to grant plaintiffs a stay because by the time the order was invalidated, the costs were expended and the plants were at, or near compliance with the invalidated rulemaking). By the time the order was invalidated, the costs were expended and plants were at, or near compliance with the invalidated rulemaking, as suggested in Petitioners application for stay. *Id.*

398. *See Brakes on CPP*, *supra* note 1 (referencing the position of the EPA following the stay of action).

emissions under the Clean Air Act.[399] The challengers maintained that courts can issue extraordinary writs when appropriate, including the arrest of unlawful agency conduct.[400] There is direct judicial review of rules promulgated by the EPA if they are final agency actions.[401] Under the All Writs Act, federal courts may issue all writs necessary or appropriate.[402] An extraordinary writ would be available when an administrative agency exceeded its authority.[403] Challengers asserted this should apply even if not in the form of a final regulation, as it already constitutes an *ultra vires* agency action.[404]

The non-delegation doctrine restricting agency action is derived from Article I of the Constitution, whereunder all "legislative power herein granted shall be vested in a congress."[405] The Supreme Court held that "Congress cannot delegate legislative power to the President."[406] Even a permissible congressional delegation requires Congress to specify an *intelligible principle* to guide the agency's discretion.[407] For example, the same agency challenged in the CPP litigation, the EPA, was able to sustain its regulation when the agency's NO_x and $PM_{2.5}$ standards ultimately were upheld against challenge under the long-moribund "nondelegation doctrine."[408]

In the CPP litigation, Murray argued that it and others would suffer irreparable injury if the court did not provide immediate relief via writ.[409] Murray submitted that while it was a retail coal supplier, the deck was stacked against coal.[410] This was because utility companies it supplied with

---

399. *See* Final Opening Brief of Petitioner, *supra* note 198, at 39. *See generally* Nicole Einbinder, *Scott Pruitt Says That EPA Will Repeal the Clean Power Plan*, PBS (Oct. 10, 2017), https://www.pbs.org/wgbh/frontline/article/scott-pruitt-says-that-epa-will-repeal-the-clean-power-plan/ (explaining Obama's EPA CPP and its effects).

400. Final Opening Brief of Petitioner, *supra* note 198, at 38.

401. *Id.*

402. *Id.* at 39.

403. *Id.* at 40.

404. *Id.* at 41 ("EPA cannot resolve its lack of authority by revising the proposed rule, since EPA has no other legal basis for the rule . . . .").

405. *See* ENVIRONMENTAL LAW, *supra* note 34, at 42–43 (quoting U.S. CONST. art. I, § 1).

406. Field v. Clark, 143 U.S. 649, 692 (1899).

407. *See* Yakus v. United States, 321 U.S. 414, 424–25 (1944) (holding that the Emergency Price Control Act was not an unauthorized delegation of legislative power because the Act's prescribed standards sufficiently guided the Administrator towards achieving the legislative will).

408. *See* Am. Trucking Ass'n v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), *modified on reh'g*, 195 F.3d 4, 7 (D.C. Cir. 1999) (holding that the intelligible principle applied by the EPA fulfills the purpose of the nondelegation doctrine); *see also* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 475–76 (2001) (reversing the lower court's decision that the Clean Air Act unconstitutionally delegated to the EPA authority to set specific air-quality standards).

409. Final Opening Brief of Petitioner, *supra* note 198, at 41.

410. *Id.* at 41–42.

coal were already forced to make costly decisions about the future economic and environmental viability of existing coal-fired power plants under already impending compliance deadlines established before the 2012 EPA § 112 Clean Air Act toxics rules.[411] The newly proposed additional rules of the CPP—also expressly targeting coal-fired power generation facilities—added additional unauthorized rules with large costs to comply with the distinct CPP carbon standard for coal-fired power plants.[412]

Moreover, regarding the required state agency public response, the new § 111(d) CPP mandate required all 50 states to begin development of 50 different unique state plans to satisfy the rule.[413] Even though states had one year from the date of the final rule in 2015 to submit their final state-specific plans,[414] the balancing process for intrastate power supply and demand, as well as power reliability concerns and concerns about economic growth and employment, had to commence immediately.[415] Murray argued such immediate impacts and related injuries justified immediate injunctive relief by a writ prohibiting the EPA from issuing the final rule.[416]

Intervenors NFIB and UARG further noted that the EPA employed § 111(d) to regulate only five emission source categories in the prior 40 years since the Clean Air Act was enacted.[417] Thus, the EPA's resuscitation of this provision in 2015 to address carbon was a unique and questionable use of § 111(d).[418] Intervenors argued that the EPA's mistake arose from agency interpretive errors of constitutional dimension.[419]

2. EPA Position on Agency Immunity to Court Writs

The EPA, as expected, countered that a writ was not warranted under the circumstances.[420] Halting an ongoing rulemaking before the EPA had issued the rule in final form would be extraordinary and without legal basis.[421] The EPA, as it had done before, attacked the petitioners

411. *Id.*

412. *Id.*

413. *Id.* at 42.

414. *Clean Power Plan Timeline*, CTR. FOR CLIMATE & ENERGY SOLUTION: SOLUTIONS FORUM, https://www.c2es.org/site/assets/uploads/2015/09/cpp-implementation-timeline.pdf (last updated Feb. 22, 2016).

415. Final Opening Brief of Petitioner, *supra* note 198, at 42.

416. *Id.* at 43.

417. Brief for Intervenor-Petitioners NFIB and UARG, *supra* note 293, at 36.

418. *Id.*

419. *Id.* at 37.

420. *See* Final Brief for Respondent, *supra* note 177, at 27–34 (arguing that the courts lack jurisdiction to issue a writ to stop an ongoing rulemaking).

421. *Id.* at 33–34.

procedurally[422] in an attempt to block the court from reaching the merits of the CPP rule.[423] It argued in multiple dimensions that Murray lacked Article III standing, the court lacked jurisdiction over Murray's direct challenge to the proposed rule, the court lacked jurisdiction to issue a writ of prohibition to the agency, and the court should not stop the rulemaking based on a challenger's interpretation of an ambiguous provision.[424]

a. Lack of any Intervenor's Standing to Challenge Agency Action

The EPA argued that Murray lacked necessary Article III standing because Murray was unable to show an individualized injury resulting from the proposed rule.[425] To establish Article III standing, an injury must be concrete, particularized, actual or imminent, fairly traceable to the challenged agency action, and redressable by a favorable ruling.[426] The EPA sought to establish that standing based on the expectation of future injury, as with the still unpromulgated CPP rule, must surmount a significantly more rigorous burden to establish standing.[427] Based on case precedent, the EPA stated that when the petitioner is not itself the object of the government action or inaction it challenges, standing ordinarily becomes substantially more difficult to establish.[428] The EPA maintained that an administrative agency's initiation of a rulemaking through a notice and comment process did not yet impair the rights of interested parties.[429] Thus, such rulemaking does not give rise to Article III standing, even if an eventually promulgated final rule would eventually regulate such parties.[430]

---

422. *See Overrule Supreme Court*, *supra* note 368, at 817, 822, 849, 854 (noting procedural defenses raised by the California environmental regulator to try to avoid challenges on the merits of claims against its carbon regulation); *Wrinkles in the Administrative Fabric*, *supra* note 368, at 17, 22 ("Of seven significant legal challenges to California sustainable energy policy raised pursuant to *state* law, California settled in favor of challengers in more than half of these which have proceeded to a decision, while one was sidetracked on procedural grounds without reaching the merits of the claim[.] Of six significant suits pursuant to the Supremacy Clause of the U.S. Constitution regarding regulation of its electric power generation facilities and liquid fuels, California settled in favor of challengers or lost four of these six, with the fifth matter pending and sixth matter dismissed on procedural grounds without reaching the merits of the claim, leaving plaintiffs with discretion to re-file the complaint[.]").

423. *See In re* Murray Energy Corp., 788 F.3d 330, 335, 339 (D.C. Cir. 2015) (referencing the motivation for the EPA's actions).

424. *See* Final Brief for Respondent, *supra* note 177, at 9–10 (discussing the court's ability to issue a writ to stop an ongoing rulemaking).

425. *Id.* at 9, 12.

426. *Id.* at 9.

427. *Id.* at 10–11.

428. *Id.* at 11.

429. *Id.*

430. *Id.*

The EPA also argued that any future Murray injury was speculative in a proposed rule, and insufficient to confer standing.[431] The EPA argued that the Article III standing cases that Murray relied on to establish its standing involved final rules promulgated after notice and comment, not proposed rules published for the purpose of soliciting public comments.[432]

The State of New York, supporting all EPA defenses, stated that the court lacked jurisdiction to issue the requested writ absent a uniquely compelling unusual justification.[433] New York argued that Murray needed to wait to participate in the ongoing rulemaking and that only judicial review of the final rule would be available to assess alleged injury.[434]

The EPA's standing argument sought to isolate Murray's injury as too attenuated because Murray is a coal producer, not a regulated entity burning the coal under the CPP.[435] The EPA argued that on this basis of not being directly regulated, Murray bore a greater burden to link the downstream economic effects it alleged were future potential injuries to Murray's business and were genuinely traceable to the EPA's rule, not to the independent choices of third-party coal consumers, and that the injury would be redressable if relief were granted.[436] The EPA asserted that Murray would fail even if its claim was not premature before the EPA had completed its rulemaking process, because its claim was totally speculative and conjectural.[437]

---

431. *Id.* at 12. The EPA stated that when it was still evaluating the millions of comments it received, any predictions about what state-specific guidelines the EPA might include in a final rule, as well as what requirements each state, in turn, independently may later impose on power plants pursuant to such guidelines, were not yet final or known. *Id.* at 13. However, of note, the EPA's eventual final rule, while different than the proposed rule, was not different in ways that materially impacted Murray's allegation in its suit. *See* Jehmal Terrence Hudson, *EPA's Clean Power Plan Final Rule: What's Next?*, 55 INFRASTRUCTURE 1, 5–7 (2016) (explaining the differences in the final rule compared to the proposed rule, along with significant aspects of the final rule).

432. Final Brief for Respondent, *supra* note 177, at 13.

433. Final Brief of the States of New York et al., *supra* note 322, at 2.

434. *See id.* at 2–3 (arguing that the court does not have jurisdiction until after notice and comment, rulemaking, and the EPA has made a decision based on the notice and comment rulemaking process).

435. Final Brief for Respondent, *supra* note 177, at 14.

436. *Id.* The EPA asserted that Murray was required to demonstrate a substantial probability that the economic effects would not have occurred but for the EPA action, as well as demonstrating that if it gained the requested relief, the plaintiff's alleged injury would be redressed. *Id.* EPA complained that Murray simply stated in a conclusory fashion that certain of Murray's customers' power plants would have to shut down or were slated for closure, without going into detail regarding reasons for these decisions. *Id.* at 15.

437. *See id.* at 12 (asserting that Murray does not have standing because its claim is based on speculative impacts of a ruling, not on an actual injury-in-fact, as is required for standing).

b. Lack of Final Agency Action

The EPA also noted that there was no final agency action.[438] The Clean Air Act § 307(b)(1) provides judicial review as an exclusive remedy.[439] The EPA stated that the Act makes clear that only a final promulgated rule consummates the rulemaking process after a proposed rule is made available for public comment in the Federal Register for a specific period.[440] Having never advanced to the threshold of a promulgated rule, judicial review was not allowed nor was Murray's entitlement to a writ.[441]

c. Court Jurisdiction to Issue Writs Compelling Agency Results

The third argument asserted as part of the EPA's procedural defense was lack of jurisdiction to issue a writ of prohibition to stop an ongoing non-final rulemaking under the All Writs Act.[442] The EPA stated that the All Writs Act does not itself confer court jurisdiction where it is otherwise absent, nor does it enlarge court jurisdiction.[443] The EPA asserted that the court cannot entertain a challenge to the ongoing § 111(d) rulemaking without impermissibly enlarging the court's jurisdiction.[444] The EPA asked the court to find that a writ is an extraordinary remedy not available when review by any other means is possible.[445] The EPA additionally maintained that Murray's petition did not fit into any of the three narrow categories in which an extraordinary writ may be issued under a court's jurisdiction.[446]

---

438. *See id.* at 17 (highlighting that this is not a final action, and precedent establishes that there must be a final action for the court to have jurisdiction over the case).

439. *Id.*

440. *Id.* at 18.

441. *See id.* at 17, 27 (explaining that a writ will not confer jurisdiction where it is lacking and, therefore, Murray is not entitled to one for that purpose).

442. *Id.* at 27.

443. *Id.*

444. *Id.* According to the EPA brief, allowing Murray to challenge the rule while in only its proposed form, would allow any party to bypass congressional limitations on litigation, while simultaneously enlarging the court's jurisdiction. *Id.* at 27–28. EPA stated that a plaintiff must wait until the rule is final to seek a remedy under the Clean Air Act. *See id.* at 28 (emphasizing that Murray's challenge must wait until the rule is final and must challenge under the Clean Air Act's review process).

445. *Id.* at 29.

446. *Id.* at 29–31. The EPA's brief noted three categories for which such a writ may be issued: (1) to issue a writ of mandamus to compel agency action where an agency has unreasonably delayed taking action required of it by law; (2) to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority; or (3) to resolve an important, undecided issue that will forestall future error in trial courts. *Id.*

Of note, the Supreme Court recently circumscribed some of the issues of court deference to administrative decisions.[447] In *King v. Burwell*, the Court held that the IRS would not be granted *Chevron* deference because the IRS does not have expertise in crafting health insurance policies.[448] Congress would have to grant express authority to the agency for it to have deference.[449] The potential analogy for the CPP litigation is that the EPA is not the agency with expertise on energy policy.[450] Thus, the EPA is not entitled to deference from courts when it enacts regulations to reorganize how power is generated and sold in America.[451] No court has yet decided claims on this matter.[452]

V. CLEAN POWER PLAN'S CHANGING IMPACT ON ADMINISTRATIVE LAW

The Supreme Court will eventually see this case again on a petition for *certiorari* if the D.C. Circuit renders a decision on the merits.[453] Prior to the change in Presidential Administrations, the defendant agency remained in a defensive posture by attempting to convince the D.C. Circuit not to reach the merits and instead dismiss the complaint on the following procedural grounds:

(1) The agency had not completed its actions thus, the complaint was premature;[454]
(2) Prerequisite administrative remedies had not been exhausted to allow court review;[455]

---

447. *See also* King v. Burwell, 135 S. Ct. 2480, 2487–89 (2015) (holding that there would be no deference to the IRS because Congress could not have intended such a delegation).

448. *Id.*

449. The *Chevron* framework for analyzing an agency's interpretation of a statute "'is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.' [But] '[i]n extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.'" *Id.* at 2488–89 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)); *see also id.* (highlighting how the *Chevron* two-step framework is based on the theory that when a statute is ambiguous, it is an implicit delegation from Congress to the agency; however, there are circumstances where Congress might not intend this effect).

450. *Cf. id.* at 2489 (discussing how the IRS does not have the health insurance expertise required to craft health insurance regulations).

451. *Cf. id.* (analogizing IRS and EPA deference).

452. *Cf.* Bruce Huber, *FERC and EPA: Better Together?*, YALE J. ON REG. & ABA SEC. ADMIN. L. & REG. PRAC.: NOTICE AND COMMENT (Dec. 24, 2014), http://yalejreg.com/nc/ferc-and-epa-better-together-by-bruce-huber/ (noting there are few, if any, historical interactions between the regulated fields of energy and the environment).

453. *See* Response Opposing Requests for Further Abeyance Combined with Motion to Decide the Merits of Case at 1, West Virginia v. EPA (D.C. Cir. 2018) (No. 15–1363) (discussing how the petitioners should not get more time and that the case should proceed).

454. Final Brief for Respondent, *supra* note 177, at 9.

(3) Complainants could show no injury and therefore had no standing to bring a claim;[456] and

(4) Lack of access to a judicial mechanism or writ to arrest agency actions.[457]

If not successful in procedurally derailing litigation, the agency's substantive defense is that:

(1) *Chevron* Step Two applies and precedent provides the agency free discretion and deference;[458]

(2) The CPP agency regulatory program stands unless it is arbitrary or capricious;[459]

(3) The Supreme Court's *King* precedent removing agency deference should not apply because the CPP is akin to environmental regulation on which the EPA has expertise—notwithstanding that CPP applies only to energy-plant operations—which is not within the EPA's expertise;[460] and

(4) The restrictions to *Chevron* deference established in various recent Supreme Court decisions involving the EPA and the Clean Air Act should not apply to the CPP.[461]

Timing matters with the CPP because only final rulemakings, not proposed rules, can be challenged.[462] "Proposed rules meet neither of the two requirements for final agency action: (i) They are not the 'consummation of the agency's decisionmaking process,' and (ii) they do not determine 'rights or obligations,' or impose 'legal consequences.'"[463] Notwithstanding arguments of the parties, the recent fabric of Supreme Court precedent provides context for where the Court might proceed on this matter. In 2014, the Supreme Court blocked the EPA's attempt to finesse

---

455. *Id.* at 29.

456. *Id.* at 11.

457. *Id.* at 27.

458. *Id.* at 35.

459. *Id.*

460. *See id.* at 36 (noting the EPA has power to regulate power plant emissions, so long as they are not criteria pollutants).

461. *Id.* at 51–52.

462. *See In re* Murray Energy Corp., 788 F.3d 330, 335 (D.C. Cir. 2015) (holding the proposed rule was not a final agency action subject to judicial review; a final rule must be published before it is subject to judicial review).

463. *Id.* at 334 (citing Bennett v. Spear, 520 U.S. 154, 177–78 (1997)); *see also* Action on Smoking & Health v. Dep't of Labor, 28 F.3d 162, 165 (D.C. Cir. 1994) ("Agency action is final when it 'imposes an obligation, denies a right, or fixes some legal relationship' . . . [and an agency's] 'proposed rulemaking generates no such consequences.'" (quoting NRDC v. U.S. Nuclear Regulatory Comm'n, 680 F.2d 810, 815 (D.C. Cir. 1982))).

explicit congressional statutory terms.[464] Again in 2014, the Supreme Court, reversing a D.C. Circuit decision, upheld EPA executive environmental action.[465]

In 2015, the Supreme Court in *Michigan* reversed a split D.C. Circuit decision, overturning an EPA environmental rule.[466] In reaching its narrowly split decision in *Michigan*, the Supreme Court majority cited the dissent of Judge Kavanaugh in the D.C. Circuit decision in *White Stallion Energy Center LLC v. EPA*,[467] which on appeal became the seminal Supreme Court opinion in *Michigan*.[468] Judge Kavanaugh, as part of his confirmation process to the Supreme Court, expressly singled out his dissent in this case as one of the ten most important cases of his career, stating "the Supreme Court's majority opinion agreed with and cited my dissent" in *Michigan*.[469] With Justice Kavanaugh now seated on the Supreme Court, such new restrictions on EPA authority and discretion are elevated.

A. Lack of Agency Discretion to "Tailor" Agency Actions

The CPP addresses only electric power plant carbon emissions.[470] The Supreme Court already decided a matter construing EPA agency discretion on Clean Air Act carbon emission rules in the U.S.[471] Regarding GHG regulation under the Clean Air Act's so-called "Tailoring Rule," the EPA took a phased approach and chose only to regulate those sources whose GHG emissions exceeded 75,000 tons per year (tpy) for modification of sources or 100,000 tpy for new source construction.[472] However, the Clean

---

464. *See* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444–45 (2014) (concluding "that EPA's rewriting of the statutory thresholds was impermissible").

465. EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1590 (2014).

466. Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015); *see supra* notes 21, 361, 397 and accompanying text (discussing *Michigan* in further detail).

467. White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1238–40 (D.C. Cir. 2014), *rev'd*, *Michigan*, 135 S. Ct. at 2699.

468. *See Michigan*, 135 S. Ct. at 2707 (citing and relying on Justice Kavanaugh's dissenting opinion in *White Stallion Energy Center*).

469. Fatima Hussein, *Kavanaugh Touts Court Loss Among His Highest Accomplishments*, BNA (July 24, 2018) ("In my view, it was unreasonable—and therefore unlawful under the Administrative Procedure Act—for EPA not to consider the costs imposed by regulations in determining whether such regulations were 'appropriate and necessary' . . . . All nine Justices agreed with my position that the statute requires consideration of costs.").

470. *See supra* Part II.A (detailing the CPP's focus on emissions from electric power plants).

471. *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 412 (2011) (holding that the EPA should be the first to decide emission standards, not the court).

472. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,523 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51 52, 70).

Air Act Prevention of Significant Deterioration provisions enacted by Congress, which provided the congressional authority for the EPA's tailoring rule, apply to all "major sources" that potentially can emit at least 100 tpy or 250 tpy of the relevant criteria pollutant.[473] This 400:1 ratio disparity between what the EPA chose to implement and what the congressional statute expressed, created a conflict between agency discretion and congressional mandate.[474]

The challenging petitioners in that case argued that Congress—by establishing an explicit quantitative tpy threshold for emissions at a much lower 250 tpy metric—left no room for the EPA to exempt all emission sources between 250–75,000 tpy from regulation.[475] The Supreme Court struck the EPA's Clean Air Act "Tailoring Rule" for CO_2, which altered the plain language of the statute, despite EPA's claim that it could cut corners for administrative agency convenience: "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."[476]

The Court concluded that the EPA's interpretation of the Act was neither compelled nor permissible to change the expressly specified statutory quantitative value.[477] Thus, the Court invalidated the EPA's "Tailoring Rule" as an impermissible exercise *de facto* amending the statute:

> We conclude that EPA's rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency's

473. *Id.* The Supreme Court also addressed this: "To qualify for a [PSD] permit, the facility must . . . comply with emissions limitations that reflect the 'best available control technology' (or BACT) for 'each pollutant subject to regulation under' the Act [in § 7475(a)(4)]." Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2435 (2014). Additionally, the Court stated that while the "EPA thought its conclusion that a source's greenhouse-gas emissions may necessitate a PSD or Title V permit followed from the Act's unambiguous language . . . . We disagree." *Id.* at 2439. "[W]here the term "air pollutant" appears in the Act's operative provisions, EPA has routinely given it a narrower, context-appropriate meaning." *Id.* When addressing concerns that BACT may not be suited to greenhouse-gas regulation, the Court "acknowledge[d] the potential for greenhouse-gas BACT to lead to an unreasonable and unanticipated degree of regulation, and our decision should not be taken as an endorsement of all aspects of EPA's current approach, nor as a free rein for any future regulatory application of BACT in this distinct context." *Id.* at 2449.

474. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444–45.

475. Joint Reply Brief of Petitioners, Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014) (Nos. 12-1248, 12-1254, 12-1268, & 12-1272), 2014 WL 632086, at *31 (arguing that the statutory definitions should have guided the EPA to exempt from regulation emission sources at the 250–75,000 tpy level).

476. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (internal citations omitted).

477. *Id.* at 2444–45.

> interpretation of the triggering provisions. An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always "give effect to the unambiguously expressed intent of Congress."[478]

The full contours and application of this *Utility Air Regulatory Group v. EPA* "tailoring" precedent will be defined as courts determine the legality of the CPP. In 2015, Senate Majority Leader McConnell urged states not to comply with filing required CPP state plans.[479] Senator McConnell raised this Supreme Court precedent as defining the limits of EPA rulemaking authority.[480]

B. Executive Power When Executives Change

The Trump Administration has taken a different approach than the Obama Administration on carbon emissions and climate change mitigation.[481] The Trump Administration is withdrawing from the international Kyoto Agreement's successor mechanism, the Paris Agreement, while simultaneously working to revoke domestic CPP regulation.[482] The CPP is being revoked and replaced with less vigorous regulation as a matter of administrative discretion.[483]

In 2017, the Trump Administration EPA switched gears. The Administration did not base its proposed repeal of the CPP on a change in policy goals or on any cost considerations, which under the recent Supreme Court decision in *Michigan* now could constitute a valid basis.[484] Rather,

---

478. *Id*. at 2445 (quoting Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 665 (2007)).

479. Letter from Mitch McConnell, *supra* note 76.

480. *See id.* (citing *Util. Air Regulatory Grp. v. EPA* as a limit on agency rulemaking authority).

481. *See* Brad Plumer, *Trump Put a Low Cost on Carbon Emissions. Here's Why It Matters*, N.Y. TIMES (Aug. 23, 2018), https://www.nytimes.com/2018/08/23/climate/social-cost-carbon.html (comparing the different interpretations of facts by the Trump and Obama Administrations).

482. Brady Dennis, *As Syria Embraces Paris Climate Deal, it's the United States Against the World*, WASH. POST (Nov. 7, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/11/07/as-syria-embraces-paris-climate-deal-its-the-united-states-against-the-world/?utm_term=.ef742f6ea9a6; Annie Sneed, *Trump Pulls out of Paris: How Much Carbon will His Policies Add to the Air?*, SCI. AM. (May 31, 2017), https://www.scientificamerican.com/article/trump-pulls-out-of-paris-how-much-carbon-will-his-policies-add-to-the-air/.

483. *See EPA Takes Another Step*, *supra* note 127 (explaining the Trump Administration's decision to repeal the CPP).

484. *See id.* (explaining the Trump Administration's concerns with the Obama Administration's oversight of the CPP).

the current EPA regulatory repeal is predicated on a legal concern that the CPP violated the Clean Air Act.[485] The EPA asserts that the CPP regulates "outside the fence line" of individual power plant sources emitting carbon.[486] The CPP would have had costs exceeding benefits if the Obama Administration EPA had not counted indirect *co-benefits* in its 2015 assessment.[487] In 2017, the Trump Administration EPA no longer counted indirect *co-benefits*, and no longer added avoided generation costs to CPP costs.[488] The Obama Administration CPP stated that its purpose was to render it too expensive for existing coal-fired power generation plants to continue operation, by counting *co-benefits* from reduction of non-CPP-regulated pollutants when coal plants were forced to close.[489] The CPP regulation neither mentioned nor regulated the criteria pollutants whose indirect *co-benefits* were counted.[490]

There is no Supreme Court determination about this *new math* algorithm for justifying administration rules and law, although the Court provided a new interpretation of the *cost* issues in 2015.[491] The question remains whether an executive agency can add estimated indirect, incidental *co-benefits*, not included in what a rule regulates or addresses, to change the reported cost-effectiveness and impact assessment of a proposed rule. This question remains in contention and unresolved after the Supreme Court stayed the CPP.[492] A new calculus of what counts as benefits changes the otherwise determined net cost-effectiveness.[493]

Pending this awaited decision, the Trump Administration EPA also seeks continued federal court delay of a decision regarding the CPP.[494]

---

485. *Id.*

486. *See id.* (discussing the difference between outside and inside fence line interpretations of traditional EPA authority); *see also* Michigan v. EPA, 135 S. Ct. 2699, 2699 (2015) (holding that the EPA unreasonably deemed cost irrelevant when it decided to regulate power plants).

487. *See supra* Part III.C.1 (noting how the Obama Administration added *co-benefits* to help balance the scales of benefits and cost resulting from the CPP).

488. Ted Gayer, *The Social Costs of Carbon*, BROOKINGS INST. (Feb. 28, 2017), https://www.brookings.edu/testimonies/the-social-costs-of-carbon/ (explaining that estimated total global climate benefits greatly exceed estimated domestic benefits).

489. *See supra* notes 75, 80, 101, 102, 110 and accompanying text (looking at the statistics from before and after CPP implementation).

490. *See id.* (noting that the CPP took into account various *co-benefits* without directly regulating the pollutants being affected).

491. *See supra* Part III.C.2 (discussing lack of precedent for counting *co-benefits*).

492. Plumer, *supra* note 481.

493. *See id.* (referencing the impact of the Supreme Court's decision on standards of proposed rule evaluation).

494. Sharyn Stein, *Trump Administration Seeks to Delay Judicial Review of Clean Power Plan*, ENVTL. DEF. FUND (Mar. 28, 2017), https://www.edf.org/media/trump-administration-seeks-delay-judicial-review-clean-power-plan.

Contrarily, environmental groups have continued to press for a decision from the D.C. Circuit Court to uphold the CPP as legal.[495] There is a shift in the contours of administrative law. The Supreme Court took the unprecedented step of staying enforcement of a regulation with disputed costs and benefits three years before a challenge on the merits could even reach it.[496] The Supreme Court has not taken such a peremptory step before.[497] This alteration restricting the powers of the executive branch is in even more sharp focus now that the Trump Administration is reversing course on climate warming mitigation and international cooperation.[498]

495. *See* Sharyn Stein, *D.C. Circuit Court Pauses Clean Power Plan Litigation for Sixty More Days*, ENVTL. DEF. FUND (Aug. 8, 2017), https://www.edf.org/media/dc-circuit-court-pauses-clean-power-plan-litigation-sixty-more-days ("EDF, along with millions of concerned Americans, will keep working to ensure EPA complies with its legal obligations and acts to protect our nation from climate pollution.").

496. *See Brakes on CPP*, *supra* note 1 (articulating the procedural timeline of the CPP litigation).

497. Liptak & Davenport, *supra* note 20.

498. *See Brakes on CPP*, *supra* note 1 (providing dates for timeline verification).