"THE PAST AND PRESENT WILT": LITIGATING THE "GLORIOUS MESS" OF CLIMATE CHANGE REGULATION UNDER THE CLEAN AIR ACT § 111(D)

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INTRODUCTION

On July 22, 2010, on the floor of the U.S. Senate, the final breath of air seeped from the body of effort by federal lawmakers to create comprehensive climate change legislation.[1] In the wake of this failure, policymakers and environmental advocates shifted their focus to Environmental Protection Agency ("EPA") regulation of greenhouse gas ("GHG") emissions through the Clean Air Act ("CAA").[2] This regulation took form as the cornerstone of the Obama Administration's second-term climate agenda, the Clean Power Plan.[3] Despite EPA's broad outreach to stakeholders to craft the draft carbon regulation to fit each state's energy profile,[4] the failure of the comprehensive legislation stands as the Plan A that died too young.[5] In an oft-quoted jeremiad from 2008, Rep. John Dingell (D-Mich.), then-chairman of the House of Representatives Committee on Energy and Commerce, warned that failure to pass a comprehensive bill would leave only GHG regulation, which would amount to a "glorious mess" of rules and legal challenges.[6]

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[1] *See* Carl Hulse & David M. Herszenhorn, *Democrats Call Off Climate Bill Effort*, N. Y. TIMES (July 22, 2010), http://www.nytimes.com/2010/07/23/us/politics/23cong.html?_r=0.

[2] *See* Eric Pooley, *In Wreckage of Climate Bill, Some Clues for Moving Forward*, YALE ENVIRONMENT 360 (July 29, 2010), http://e360.yale.edu/content/feature.msp?id=2299; 42 U.S.C. § 7401 *et seq*.

[3] *See* Coral Davenport, *Obama to Take Action to Slash Coal Pollution*, N. Y. TIMES (June 1, 2014), http://www.nytimes.com/2014/06/02/us/politics/epa-to-seek-30-percent-cut-in-carbon-emissions.html.

[4] *See* Environmental Protection Agency website, "Public Hearings: Clean Power Plan Proposed Rule," http://www2.epa.gov/carbon-pollution-standards/forms/public-hearings-clean-power-plan-proposed-rule.

[5] *See* Pooley, http://e360.yale.edu/content/feature.msp?id=2299.

[6] *See* Jonas Monast, Time Profeta, and David Cooley, "Avoiding the Glorious Mess: A Sensible Approach to Climate Change and the Clean Air Act at 1-2, Duke University, Nicolas Institute for

While Congress was expending this legislative effort, EPA, academics, and practitioners were developing ideas for using the CAA to regulate GHG emissions.[7] As far back as 1998, EPA had addressed the scope of its authority under the CAA and concluded that carbon dioxide fell within the CAA definition of an "air pollutant."[8] Many of these ideas would be employed, and others discarded, as the debate over the extent of EPA's authority grew.[9] The debate itself augured the contentious legal challenges to come, as well as EPA's responses. Arguably the most important CAA provision arising out of this debate is § 111(d) (42 U.S.C. § 7411(d)),[10] through which EPA instructs the states to set standards regulating existing stationary source pollution.[11]

Environmental Policy Solutions, October 2010, http://nicholasinstitute.duke.edu/sites/default/files/publications/avoiding-the-glorious-mess-paper.pdf. In this working paper, the authors consider several portions of the CAA through which EPA could target GHGs. They eventually isolate § 111(d), 42 U.S.C. § 7411(d), which addresses air quality standards through the New Source Performance Standards program.

[7] *See* John M. Broder, *E.P.A. Expected to Regulate Carbon Dioxide*, N. Y. TIMES (February 18, 2009), http://www.nytimes.com/2009/02/19/science/earth/19epa.html?pagewanted=all; Daniel Brian, *Regulating Carbon Dioxide under the Clean Air Act as a Hazardous Air Pollutant*, 33 COLUM. J. ENVTL. L. 369 (2008); Patricia Ross McCubbin, *EPA's Endangerment Finding for Greenhouse Gases and the Potential Duty to Adopt National Ambient Air Quality Standards to Address Global Climate Change*, 33 S. ILL. U. L.J. 437 (Spring 2009); Vera P. Pardee & Kassie R. Siegel, *The Clean Air Act: an Indispensable Tool to Combat Global Warming*, 24-SPG Nat. Resources & Env't 38 (Spring 2010); Nathan Richardson, *Greenhouse Gas Regulation Under the Clean Air Act: Does* Chevron *Set the EPA Free?*, 29 STAN. ENVTL. L.J. 283 (May, 2010).

[8] Cannon, EPA General Counsel's Memorandum to Administrator Browner, "EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources," April 10, 1998. Jonathan Cannon's memorandum featured prominently nearly a decade later in *Massachusetts v. EPA*, where the Supreme Court found that EPA had considered carbon dioxide emissions as being within its authority to regulate. 449 U.S. 497, 510 (2007).

[9] *See e.g. American Electric Power Company v. Connecticut*, 131 S.Ct. 2527 (2011) (claims that climate change amounted to public nuisance under federal common law are displaced by EPA's efforts to address climate change by regulating GHG emissions).

[10] For readers less familiar with the provisions of the CAA, 42 U.S.C. § 7408 is typically shorthanded to § 108, § 7409 becomes § 109, etc. In his time with the material, the author has not yet found a clear answer for why this is so. As shown below, clarity here is elusive.

[11] *See* 42 U.S.C. § 7411(d); Jonas Monast, Tim Profeta, Brooks Rainey Pearson, John Doyle, *Regulating Greenhouse Gas Emissions from Existing Sources: Section 111(d) and State Equivalency*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10206, 10207 (March, 2012).

When it comes to carbon dioxide emissions[12], the biggest stationary-source polluters are fossil fuel-fired power plants.[13]

The general question of this paper is whether EPA's efforts to regulate carbon dioxide emissions through § 111(d) will survive a thorny statutory challenge nascent in the terms of that provision.[14] More specifically, will a narrow construction of the "112 Exclusion" under § 111(d) detonate EPA's efforts, and the Clean Power Plan with it, before the rule is even finalized?[15]

Part I provides general background information for the legal authority to regulate carbon dioxide, as well as other GHG emissions, through the CAA. It first reviews the structure of the CAA's regulatory mechanisms in the wake of the 1990 Amendments.[16] From there, the paper touches upon the differing versions of § 111(d) passed by each chamber of Congress in 1990, as well as Congress' collective oversight in failing to reconcile the versions.

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[12] Carbon dioxide is the dominant compound of the GHGs which EPA is regulating through the CAA. *See* "Overview of Greenhouse Gases," available at http://www.epa.gov/climatechange/ghgemissions/gases.html (accessed Nov. 1, 2014). For this reason, the other GHGs are measured and assessed in terms of "Carbon Dioxide Equivalent Units" (CO2e). Under this measure, the 100-year Global Warming Potential (GWP) of other GHGs is converted into that of carbon dioxide and adjusted accordingly. *See* EPA Final Rule, "Endangerment and Cause or Contribute Findings for Greenhouse Gasses Under Section 202(a) of the Clean Air Act," 74 FR 66499, n. 4 (Dec. 15, 2009) ("Endangerment Finding").

[13] U.S. EPA, "Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2012," pg. 2-2 (Apr. 15, 2014).

[14] *See* 42 U.S.C. 7411(d)(1)(A)(i); *infra* Part II.

[15] The United States Court of Appeals for the District of Columbia Circuit addressed two legal challenges to the Clean Power Plan by denying petitioners' claims on ripeness grounds in *In re Murray Energy Corp.*, No. 14-1112, 2015 WL 3555931 (D.C. Cir. June 9, 2015). The decision in *In re Murray Energy Corp.* did not address the merits issues in those challenges, of which this paper will review. For a full compendium of legal challenges to climate change litigation, with links to the decisions, see the "Climate Change Litigation in the U.S." chart, prepared by the law firm Arnold & Porter LLP, October 7, 2014, http://www.arnoldporter.com/resources/documents/ClimateChangeLitigationChart.pdf.

16 CLEAN AIR ACT, AMENDMENTS, PL 101–549, November 15, 1990, 104 Stat 2399 ("CAA 1990 Amendments").

Part I then addresses three landmark Supreme Court rulings regarding EPA's power to apply the CAA to carbon dioxide emissions: *Massachusetts v. Environmental Protection Agency*, *American Electric Power Company, Inc. v. Connecticut*, and *Utility Air Regulatory Group v. Environmental Protection Agency*.[17] These rulings collectively redrew the boundaries of EPA's authority, rejecting certain regulatory options and ratifying others.

Next, the paper discusses EPA's 2010 Settlement Agreement with the state, city, and interest groups who sued EPA in the wake of *Massachusetts* to begin regulating carbon dioxide under the CAA. That Settlement Agreement committed EPA to proposing rules under § 111 to regulate new and existing sources of carbon dioxide. After this, Part I quickly mentions EPA's 2012 Mercury Rule under § 112, which ostensibly creates the avenue through which states and industry groups are challenging the cornerstone of the Clean Power Plan – EPA's § 111(d) draft rule for existing power plants and other carbon emitters.

Part I concludes with a breakdown of the Clean Power Plan as drafted.[18] EPA is currently conducting a rulemaking docket,[19] wherein it will finalize the rule for stationary source carbon emissions and send that rule to the states to draft their corresponding State Implementation Plans ("SIPs") as dictated by § 111(d).[20]

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[17] 549 U.S. 497 (2007); 131 S.Ct. 2527 (2011); 134 S.Ct. 2427 (2014).

[18] The draft rule setting stationary source carbon emissions guidelines for states to follow was published in the Federal Register two weeks after EPA revealed the details to the public. Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (June 18, 2014) ("Draft Carbon Rule"); *see* Coral Davenport, *Key Details of E.P.A. Carbon Emissions Proposal*, N. Y. TIMES (June 2, 2014), http://www.nytimes.com/2014/06/03/us/politics/key-details-of-epa-carbon-emissions-proposal.html.

[19] *See* "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule" ("Draft Rule"), 79 Fed. Reg. 34830 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60). The Draft Rule, along with the numerous public comments thereto, can be found at Docket EPA-HQ-OAR-2013-0602 at www.regulations.gov.

[20] *See* 42 U.S.C. § 7411(d)(1).

Part II reviews the arguments made in *In re Murray Energy Corp.* and *West Virginia v. EPA*.[21] This challenge rests on the premise that EPA is prohibited from mandating state-by-state technology standards under § 111(d) for sources already regulated under the national hazardous substances regulations of § 112. Both fossil fuel-based electric generators and coal-heavy states claim that this amounts to a "double regulation" and that § 111(d) is not so ambiguous to allow any of EPA's narrower constructions of the "112 Exclusion."

Part III assesses the force of these points and offers an additional argument for upholding EPA's efforts to regulate existing source emitters of carbon dioxide under § 111(d). Despite the Court of Appeals for the D.C. Circuit's finding for EPA on ripeness grounds,[22] the merits arguments will almost certainly be appealed to the Supreme Court. The § 111(d) carbon rulemaking will eventually be final, at which point coal-intensive states and industry claimants may file without procedural fear.[23] This paper concludes by assessing whether EPA's carbon regulations are likely to survive legal challenge long enough to begin achieving their mission – to meaningfully reduce GHG emissions.

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[21] *See In re Murray Energy Corp.*, *supra* note 15.

[22] *Id.*

[23] *See* 42 U.S.C. 7607(b)(1); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) ("[T]wo conditions must be satisfied for agency action to be 'final': First, the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."). Although EPA and Respondent Amici in *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Aug. 1, 2014) vigorously contested the notion that the proposed carbon rule in the Clean Power Plan is "final" under § 7607, the docket for the proposed rule is scheduled to conclude in the Summer of 2015. U.S. EPA, "EPA Fact Sheet: Clean Power Plan and Carbon Pollution Standards, Key Dates," at 2, available at http://www2.epa.gov/sites/production/files/2015-01/documents/20150107fs-key-dates.pdf. Although EPA's proposed rule for new and modified source categories of carbon emitters was due in January 2015, the agency delayed the new / modified rule to coincide with the Summer 2015 deadline for the existing power plant rulemaking. *See* EPA Delays Timeline for Finalizing Carbon Standards for New, Existing Power Plants, Bloomberg BNA, available at http://www.bna.com/epa-delays-timeline-n17179921945/.

I. BACKGROUND TO CLEAN AIR ACT REGULATION OF CARBON

A. General Structure of the Clean Air Act and Changes in the 1990 Amendments

The air pollution control provisions of the CAA, as enacted in 1970, "addressed three general categories of pollutants emitted from stationary sources."[24] These include (1) "criteria" pollutants regulated through the National Ambient Air Quality Standards ("NAAQS") program at CAA §§ 108-110[25]; (2) hazardous pollutants under § 112[26]; and (3) other pollutants that "are (or may be) harmful to public health or welfare" but are not criteria or hazardous pollutants "or cannot be controlled under sections 108-110 or 112."[27] . This third category of pollutants is covered under § 111(b) for new source emitters and, once new sources standards have been established, EPA can regulate existing sources under §111(d).[28] In creating this third category for air pollutants which fall outside the six "criteria" pollutants but are not "hazardous" under the CAA, Congress prevented a "gaping loophole" from opening up in the statutory scheme.[29]

The original language of § 111(d) for the third category pollutants imposed upon EPA the duty to create standards of performance:

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[24] *See* Brief for Respondent EPA at 3, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Aug. 1, 2014) ("EPA Br."), *quoting* 40 Fed. Reg. 53,340 (Nov. 17, 1975).

[25] 42 U.S.C. §§ 7408-7410. "Criteria" pollutants include carbon monoxide, lead, nitrogen oxides, ozone, particulate matter (including PM2.5 and PM10), and sulfur oxides. *See* 40 C.F.R. Part 50.

[26] 42 U.S.C. §7412. The original § 112(b)(1)(A) mandated that the EPA "Administrator shall, within 90 days after the date of enactment of the Clean Air Act Amendments of 1970,." UNITED STATES STATUTES AT LARGE, PL 91-604, December 31, 1970, 84 Stat. 1676, 1685 ("Original CAA"). As will be detailed, this section was removed in the 1990 Amendments and replaced by terms encompassing Congress' dictated list of 189 hazardous pollutants, as part of an effort to expand the scope of the hazardous pollution protections under § 112. *See* 42 U.S.C. § 112(b)(1).

[27] 40 Fed. Reg. 53,340.

[28] *See id.*; 42 U.S.C. §7411.

[29] 40 Fed. Reg. 53,343.

> for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under [§ 108(a)] *or [§ 112(b)(1)(A)]* . . . .[30]

The intent and direction of this is clear: if a pollutant is not listed under the "criteria" or hazardous sections, the source emitter of that pollutant can be regulated under § 111(d).[31] This relatively simple phrasing – regulation is permitted "for any existing source *for any air pollutant . . . which is not included* on a list published under" criteria or hazardous sections – would be inadvertently complicated by the CAA 1990 Amendments' effect on § 112.

Congress' original hazardous pollutant provisions at § 112(b)(1)(A), rather than prescriptively listing pollutants, instructed the EPA Administrator to "publish (and . . . from time to time thereafter revise) a list which includes each hazardous air pollutant for which he intends to establish an emission standard under this section."[32] Congress curtailed EPA's discretion to gradually list hazardous pollutants when, in the eighteen years following passage of the CAA, EPA "listed only eight [hazardous pollutants], established standards for only seven, and as to these seven addressed only a limited selection of possible pollution sources."[33]

As part of the CAA 1990 Amendments, Congress removed the original § 112(b)(1)(A) entirely, placing a § 112(b)(1) "List of Pollutants" section – 189 pollutants strong – in its place.[34] This meant changing the original § 111(d) cross-reference to that now-defunct discretionary language in § 112(b)(1)(A). Unfortunately for everyone, the House of Representatives and the

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[30] UNITED STATES STATUTES AT LARGE, PL 91-604, December 31, 1970, 84 Stat. 1676, 1684 ("Original CAA") (emphasis added).
[31] *See id*.
[32] *Id*. at 1685.
[33] *White Stallion Energy Ctr., LLC v. E.P.A.*, 748 F.3d 1222, 1230 (D.C. Cir.) cert. granted in part sub nom. *Michigan v. EPA*, 135 S. Ct. 702 (2014) and cert. granted in part sub nom. *Util. Air Regulatory Grp. v. E.P.A.*, 135 S. Ct. 702 (2014) and cert. granted in part sub nom. *Nat'l Min. Ass'n v. EPA*, 135 S. Ct. 703 (2014).
[34] 42 U.S.C. § 7602(b)(1) (2014).

Senate passed different amendments to § 111(d) and failed to fully reconcile their versions in conference committee.[35]

The House amendment struck the "or 112(b)(1)(A)" language and inserted "or emitted from a source category which is regulated under section 112," rendering the provision such that EPA has a duty to create standards of performance:

> for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under [§ 108(a)] *or emitted from a source category which is regulated under section 112*.[36]

Stripped of context, this language could be construed to prohibit EPA from regulating pollutants which (a) are listed under the "criteria" portions of § 108, as well as those pollutants "emitted from a source category *where that source category is regulated under section 112*" for hazardous pollutants.[37] In short, it is possible to construe the House amendment as forcing EPA to *pick* which pollutant to regulate – the "other" pollutants under § 111(d), or hazardous pollutants under § 112.

The Senate's amendment, although listed as a "conforming amendment" in the Statutes at Large, is much clearer. It simply struck "112(b)(1)(A)" and inserted "112(b)," leaving the EPA with a duty to create standards of performance:

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[35] Robert R. Nordhaus & Avi Zevin, *Historical Perspectives on §111(d) of the Clean Air Act*, 44 ENVTL. L. REP. NEWS & ANALYSIS 11095, 11098 (2014):

> "The version passed by the Senate would have struck out the same cross-reference and inserted another text. Then, in the confusion following an all-night session of the House/Senate conference, the Conference Report (which was filed the next day) included, in separate titles of the Report, both amendments to the same cross-reference to §112 that had appeared in §111(d)(1)(A)."

[36] CLEAN AIR ACT, AMENDMENTS, PL 101–549, November 15, 1990, 104 Stat 2399, 2467.

[37] This is precisely the argument advanced by the petitioners in the respective cases *West Virginia* and *In re Murray Energy Corp.*, described further below.

> for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under [§ 108(a)] or *112(b)*.[38]

This language would functionally keep the Original CAA § 111(d) version of this "112 Exclusion" – EPA would create standards of performance regulating existing sources for emission of any *pollutant* (a) not listed under the "criteria" pollutant portion of § 108 and (b) not listed under the hazardous pollutant portion of § 112.

The failure to reconcile the two versions[39] imperils EPA's efforts to regulate power plants and other stationary source emitters of carbon dioxide through § 111(d), as many of those source categories are already regulated for their hazardous pollution emissions under § 112.[40] If EPA is barred from employing § 111(d) to reduce GHGs for any source already regulated for its hazardous emissions under § 112, this leaves a few major GHG emitters regulated by the CAA and every other major emitter slipping through the "gaping hole."[41]

B. Supreme Court Cases Defining EPA's Authority to Regulate GHGs

Massachusetts v. Environmental Protection Agency

In 1999, a group of states, municipalities, and private organizations petitioned EPA to begin regulating the motor vehicle tailpipe emissions of four GHGs, including carbon dioxide, under § 202(a)(1) of the CAA.[42] The Petitioners alleged that EPA had abdicated its responsibility under the CAA to regulate these emissions and asked the court to determine whether EPA had

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[38] 104 Stat 2399, 2574.
[39] *See* Nordhaus & Zevin, *supra* note 35.
[40] *See* Brief of Natural Resources Defense Council, Environmental Defense Fund, and Sierra Club ("Environmentalists Br.") at 3, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Aug. 1, 2014) ("EPA Br."), *citing* 67 Fed. Reg. 6,521 (Feb. 12, 2002) (listing 146 source categories regulated under § 112).
[41] *See supra* note 29.
[42] *Massachusetts v. Environmental Protection Agency* ("*Massachusetts*"), 449 U.S. 497, 510 (2007); *see* 42 U.S.C. § 7521(a)(1).

the authority to regulate tailpipe emissions under § 202(a)(1).[43] The statutory language provides that:

> "The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of *any air pollutant* from any class or classes of new motor vehicle engines, which *in his judgment* cause, or contribute to, air pollution *which may reasonably be anticipated to endanger public health or welfare*. . . ."[44]

The definition of "air pollutant" at § 7602(g) includes "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air."[45]

The Supreme Court finally decided the issue in April of 2007.[46] After acknowledging the narrow scope of its review and the broad discretion of an agency "to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities," the Court described why the GHGs at issue fell under the CAA's "sweeping definition of 'air pollutant.'"[47] The Court ruled that, provided that the EPA Administrator makes a "judgment" that GHGs contribute to air pollution which may reasonably be anticipated to endanger public health or welfare ("Endangerment Finding"), EPA *must* prescribe standards regulating tailpipe emissions

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[43] In his dissent in *Massachusetts*, Chief Justice Roberts insisted that Petitioners had no standing under Art. III, § 2 of the Constitution, as this was not a "case" or "controversy" which was justiciable by the Court. 449 U.S. at 536. Fifteen years prior, the Court adjusted the standing requirements for citizen suits, with the effect of narrowing the range of circumstances through which plaintiffs could show sufficient injury to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Specifically, a plaintiff must show (1) a concrete and particularized injury which is either actual or imminent, (2) a causal connection between the injury and the defendant's conduct, and (3) that it is likely that the injury will be redressed by a favorable decision. *Id*. The Majority in *Massachusetts* responded to that all three elements were present and, furthermore, "[n]otwithstanding the serious character of [the] jurisdictional argument and the absence of any conflicting decisions construing § 202(a)(1), the unusual importance of the underlying issue persuaded us to grant the writ" of certiorari. *Id*. at 506.

[44] 42 U.S.C. § 7521(a)(1) (emphasis added).

[45] 42 U.S.C. § 7602(g).

[46] *Massachusetts*, 549 U.S. at 527, 535.

[47] *Id*. at 529.

of those air pollutants.[48] Once the Administrator delivers such an Endangerment Finding, EPA has a *non-discretionary duty* to regulate the pollutant at issue under § 202(a). Neither a vague congressional intent in the issue of climate change nor a seeming overlap of agency responsibility with the Department of Transportation could excuse EPA's duty.[49]

On December 7, 2009, the EPA Administrator signed an Endangerment Finding and the agency published it in the Federal Register on December 15, 2009.[50] The Endangerment Finding codified EPA's judgment that "the body of scientific evidence compellingly supports" the finding that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare."[51] Having published the Endangerment Finding, EPA would begin its efforts to launch the § 111 rulemaking for new and existing stationary source emitters of carbon dioxide at the heart of *West Virginia* and *In re Murray Energy Corp*.[52]

American Electric Power Company v. Connecticut

Four years after *Massachusetts*, the Court affirmed that carbon dioxide and other GHGs fall "within EPA's regulatory ken."[53] The decision in *American Electric Power Company v. Connecticut* ("*AEP*") stands for the proposition that EPA's efforts to address GHG emissions through the CAA displace any federal common law right to seek abatement of carbon dioxide

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[48] *Id*. at 528.
[49] *Id*. at 528-29, 531-32.
[50] *See* Endangerment Finding, *supra* note 12.
[51] *Id*. at 66497. The Endangerment Finding listed six GHGs which endangered public health and welfare, discussing the physical properties and climatological effects of each: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. *Id*. at 66517-19.
[52] *See* Draft Carbon Rule, *supra* note 18, at 34841-45.
[53] *American Electric Power Company v. Connecticut*, 131 S.Ct. 2527, 2537 (2011).

emissions from fossil-fuel fired power plants.[54] EPA will take the lead in climate change litigation, at the expense of common law citizen suits and enforcement through the courts.[55] EPA has sufficiently occupied the field to displace the "new federal common law," analogous to displacement of state legislation.[56]

The *AEP* decision did not further elucidate EPA's authority to regulate GHGs under the CAA. However, the Court noted as part of its displacement holding that the CAA "speaks directly to emissions of carbon dioxide from the defendants' power plants," specifically referencing § 111 and the pending rulemaking procedures for new and existing stationary source emitters.[57] The Court likewise referenced the very statutory provision that would prompt the key litigation challenging EPA's § 111 carbon dioxide rulemaking.[58] Tucked away in the decision's last footnote, the Court observed an exception to EPA's §111 rulemaking authority: "EPA may not employ [§ 111(d)] if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, [§§ 108-110], or the 'hazardous air pollutants' program, [§ 112]."[59] The parties in *West Virginia* and *In re Murray Energy Corp.* would fight bitterly over the meaning of this brief footnote.

Utility Air Regulatory Group v. Environmental Protection Agency

Three years after the *AEP* decision, the Court reviewed a challenge by states and industry groups of EPA's determination that its motor-vehicle tailpipe emissions regulations automatically triggered permitting requirements under the CAA for stationary sources.[60] As in

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[54] *Id*. at 2537.
[55] *Id*. at 2538.
[56] *Id*.
[57] *Id*. at 2530.
[58] *Id*. at 2537 n.7.
[59] *Id*.
[60] *Utility Air Regulatory Group (UARG) v. EPA*, 134 S.Ct. 2427, 2435 (2014).

AEP, the Court here is parsing-out permissible types of requirements imposed on GHG emitters.[61] Unlike in *AEP*, however, the options are entirely regulatory, with the Court deciding which portions of the CAA that EPA can use to address the problem of climate change.[62]

Crucial to this case, the EPA attempted to "tailor" the statutory threshold amount of GHG pollutants to the unique circumstances of GHGs.[63] GHGs occupy a much larger portion of the collective atmosphere than pollutants previously regulated under the CAA. Unless the thresholds were tailored, EPA argued, relatively minor stationary sources of GHGs would have to obtain new and modified source permits under the Prevention of Significant Deterioration ("PSD") program and operating permits under Title V of the CAA.[64]

The Court rejected this "tailoring" as an impermissible rewriting of statutory thresholds.[65] As part of this holding, the Court stated "where the term 'air pollutant' appears in the [CAA's] operative provisions, EPA has routinely given it a narrower, context-appropriate meaning."[66] As "any air pollutant" is used in the PSD and Title V permitting provisions, the Court ruled that the EPA's authorization to permit source emitters was limited to *already regulated* air pollutants, as the statutory context demanded.[67] Both challengers and defenders in *West Virginia* and *In re Murray Energy Corp.* would rely on this notion – that common phrases in the CAA like "regulated," "air pollutant," and "source category" must be read in their narrow statutory context.

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[61] *See* 131 S.Ct. at 2537.
[62] *UARG*, 134 S.Ct. at 2438.
[63] *Id*. at 2437.
[64] *Id*.; *see* 42 U.S.C. §§ 7475(a)(1), 7479(2)(C), 7661a(a).
[65] *UARG*, 134 S.Ct. at 2445.
[66] *Id*. at 2440.
[67] *Id*.

C. EPA's 2010 Settlement Agreement with Schedule for Carbon Rulemaking under § 111 and EPA's 2012 Mercury Rulemaking under § 112

While the post-*Massachusetts* GHG jurisprudence was developing, EPA was fending-off petitions and legal challenges to compel it to act on GHG regulation. A December 2010 settlement ("Settlement Agreement") resolved one such challenge when various state and environmental entities[68] threatened EPA with litigation to compel the agency to act on GHG regulation in the wake of the *Massachusetts* decision.[69] The proposed settlement docket closed on March 9, 2011, the agency having approved the Settlement Agreement.[70]

The Agreement committed EPA to a schedule for proposing (1) a rule under § 111(b) for standards of performance for GHGs from *new and modified* sources and (b) a rule under § 111(d) "that includes emissions guidelines for GHGs from existing [electric utility steam generating units ("EGUs")] that would have been subject to 40 C.F.R. part 60, Subpart Da if they were new sources."[71] EPA's deadline for proposing both the new / modified source rule and the existing source rule was July 26, 2011.[72] The Settlement Agreement stipulated that EPA would take final action with respect to the proposed[73] rule by May 26, 2012.[74]

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[68] *See* Notice of Proposed Settlement Agreement, Clean Air Act Citizen Suit, 75 Fed. Reg. 82392 (Dec. 30, 2010). Petitioners included the following governments: New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York; along with the following environmental interest groups: Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund. *Id*. Many of these parties comprise the State Intervenors and Environmentalist Intervenors in *West Virginia v. EPA*, having intervened in support of EPA.

[69] *Id*.

[70] Final Approval of Settlement Agreement, EPA-HQ-OGC-2010-1057-0036 (Mar. 9, 2011), available at www.regulations.gov.

[71] Settlement Agreement ¶¶ 1-4, EPA-HQ-OGC-2010-1057-0002 (Dec. 30, 2011), available at www.regulations.gov.

[72] *Id*. at ¶¶ 1-2.

[73] Interesting enough, the Settlement Agreement gives EPA more discretion than one would think out of threatened litigation. EPA was to "consider public comment" and take action on the final rule "with respect to the proposed rule." *Id*. at ¶ 3. This left open the possibility that EPA could consider public comments and bow to countervailing arguments against such a rule. The

Merely one year after finalizing the Settlement Agreement, EPA promulgated a national emission standard to regulate mercury ("Mercury Rule") as a hazardous emission from new and existing power plants, listing the plants as a "source category" under § 112.[75] The Court of Appeals for the D.C. Circuit recently upheld EPA's § 112 rule for power plants, although the Supreme Court granted certiorari to review that decision.[76]

By promulgating (1) the § 112 rule for power plants' hazardous pollutants and (2) the § 111(d) proposed carbon rule under the Clean Power Plan, the *West Virginia* and *In re Murray Energy Corp.* petitioners insist EPA has violated the "112 Exception" as dictated by the House version of the conflicted § 111(d) provision.[77]

D. The Clean Power Plan and EPA's Proposed Rule to Regulate Power Plants under § 111

The Clean Power Plan is a series of guidelines for states to follow in developing individualized plans to reduce carbon dioxide emissions from the power sector by 30% from 2005 levels.[78] Building on the earlier outline (*supra* Part I.A.), the third category of non-criteria,"

Settlement Agreement further stipulated that "[i]f EPA finalizes standards of performance for GHGs pursuant" to the proposed rule, it will promulgate the final rule by the stipulated deadline. *Id*. at ¶ 4. EPA and Respondent Amici in *West Virginia* would rely on these points to argue that the Clean Power Plan's § 111(d) proposed carbon rulemaking was not an outgrowth of the Settlement Agreement, but of the Obama Administration's comprehensive regulatory initiative.

[74] *Id*. at ¶ 4.

[75] Final Rule for National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Unites and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9,304 (Feb. 16, 2012).

[76] *White Stallion Energy Ctr., LLC v. E.P.A.*, 748 F.3d 1222, 1230 (D.C. Cir.) cert. granted in part sub nom. *Michigan v. EPA*, 135 S. Ct. 702 (2014) and cert. granted in part sub nom. *Util. Air Regulatory Grp. v. E.P.A.*, 135 S. Ct. 702 (2014) and cert. granted in part sub nom. *Nat'l Min. Ass'n v. EPA*, 135 S. Ct. 703 (2014).

[77] Petition at 3, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Aug. 1, 2014); Petition at 2, 5-6, *In re Murray Energy Corp.*, Nos. 14-1112 (D.C. Cir. filed June 18, 2014) and 14-1151 (D.C. Cir. filed Aug. 15, 2014).

[78] Draft Rule, 79 Fed. Reg. 34,830.

non-hazardous pollutants under § 111(d) are regulated through a process setting standards of performance that reflect the emission reductions achievable through the application of "adequately demonstrated" cost-effective technology.[79]

Traditional § 111(d) regulation of existing emission sources unfolds over a three-step process: (a) EPA identifies potential emission limits achievable from existing emission-reduction systems for a category of sources; (b) EPA assesses each limit based on costs and benefits to determine "an emission guideline that reflects the best system of emission reduction"[80]; and (c) after EPA publishes that guideline, states submit to EPA their state plans incorporating the emission guidelines as the performance standard and detail how the state will implement and enforce the standard.[81] This represents a state-by-state approach, as opposed to a uniform federal mandate of the sort found in § 112 for hazardous air pollutants.[82]

The Clean Power Plan mirrors this traditional process, but with extra emphasis on state autonomy to craft individual SIPs to meet individual energy profiles. The Brattle Group, a leading energy consulting firm, reviewed the Clean Power Plan and affirmed that each state will have broad latitude to tailor its SIP to the "regulatory structure, level of interstate power flows, . . . renewable resource base, and other factors" unique to its jurisdiction.[83] EPA determined the "best system of emission reduction" (BSER) for state plans by developing a range of measures that fall into four main categories, or "building blocks":

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[79] *See* Monast, 42 Envtl. L. Rep. News & Analysis at 10207; 42 U.S.C. § 7411(a)(1).
[80] 42 U.S.C. § 7411(d); 40 C.F.R. § 60.22.
[81] Monast, 42 Envtl. L. Rep. News & Analysis at 10208.
[82] *See* 42 U.S.C. § 7412.
[83] THE BRATTLE GROUP, "EPA's Proposed Clean Power Plan: Implications for States and the Electric Industry," http://www.brattle.com/system/publications/pdfs/000/005/025/original/EPA's_Proposed_Clean_Power_Plan_-_Implications_for_States_and_the_Electric_Industry.pdf?1403791723 (accessed June 20, 2015).

(1) Make fossil fuel power plants more efficient by reducing the carbon intensity;

(2) Use low-emitting power sources more, such as natural gas-based generators;

(3) Use more zero- and low-emitting power sources, including solar, wind and nuclear energy; and

(4) Use electricity more efficiently by reducing demand.[84]

Under the Clean Power Plan, states can also convert their default rate-based emissions goals to mass-based ones. States could then form a group and develop a regional cap-and-trade markets for carbon emissions.[85]

Ultimately, only the first option – making fossil-fuel power plants more efficient – is within the control of the power plant operators themselves. This involves improving equipment and processes to draw as much electricity as possible per unit of fuel.[86] The second and third options are questions of large-scale policy for state legislatures and public utility commissions.[87] These involve crafting energy profiles for entire states or, as in the case of Northeast and Mid-Atlantic states' Regional Greenhouse Gas Initiative, multi-state cooperatives.[88] Finally, reducing demand is an end-user task, asking consumers and businesses to increase efficiency through smart appliances and reduce consumption.[89]

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[84] EPA, "Fact Sheet: Clean Power Plan Framework," http://www2.epa.gov/carbon-pollution-standards/fact-sheet-clean-power-plan-framework (last updated June 13, 2014); *see also* Draft Rule, 79 Fed. Reg. 34,836.
[85] *Id*.
[86] *See* EPA, "Fact Sheet: Clean Power Plan Framework," http://www2.epa.gov/carbon-pollution-standards/fact-sheet-clean-power-plan-framework (last updated June 13, 2014).
[87] *See id*.
[88] *See* RGGI, "CO2 Auctions, Tracking & Offsets," available at http://www.rggi.org/market.
[89] *See* EPA, "Fact Sheet: Clean Power Plan Framework," http://www2.epa.gov/carbon-pollution-standards/fact-sheet-clean-power-plan-framework (last updated June 13, 2014).

EPA's updated timeline suggests the agency will finish the § 111(d) rule for existing power plants by Summer 2015.[90] In addition, EPA plans to propose a federal plan for meeting the Clean Power Plan's goals for public review and comment by the Summer as well.[91] States are to submit their State Implementation Plans by the following year, Summer of 2016.[92] The operative period for source categories to comply with the SIPs will begin in the Summer of 2020.[93]

The Clean Power Plan, along with last year's bilateral U.S. – China emissions agreement, has taken center stage in U.S. environmental policy at a time when nations around the planet are gathering in Paris for the U.N. Climate Change Conference.[94] A judicial halt on the § 111(d) carbon rulemaking for power plants could remove the load-bearing pillar of U.S. climate negotiations there.[95] Two of the earliest and most forceful challenges are *West Virginia v. EPA* and *In re Murray Energy Corp. v. EPA*.[96]

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[90] U.S. EPA, "EPA Fact Sheet: Clean Power Plan and Carbon Pollution Standards, Key Dates," at 2, available at http://www2.epa.gov/sites/production/files/2015-01/documents/20150107fs-key-dates.pdf.

[91] *Id*.

[92] *Id*.

[93] *Id*.

[94] THE WHITE HOUSE, "Climate Change and President Obama's Action Plan," available at http://www.whitehouse.gov/climate-change (last visited Feb. 26, 2015) (main page is dominated by two paragraphs – one outlining the Clean Power Plan, the other discussing the November 2014 agreement with Chinese officials for the U.S. to reduce emissions 26-28% below 2005 levels by 2025 and for China to peak its carbon emissions by 2030).

[95] Jeff McMahon, *To Undermine Paris Climate Talks, Stop EPA Clean Power Plan*, FORBES (Jan. 1, 2015), http://www.forbes.com/sites/jeffmcmahon/2015/01/08/to-undermine-paris-climate-talks-stop-epa-power-plan/ (last visited Feb. 26, 2015) (reporting on comments by Michael Gerrard, director of the Sabin Center for Climate Change Law at Columbia Law School, who spoke at the University of Chicago on potential plans to derail the U.N. talks by litigating CAA regulation).

[96] *See* Climate Change Litigation, *supra* note 15.

II. CHALLENGING THE CLEAN POWER PLAN'S § 111(D) REGULATION IN *WEST VIRGINIA V. EPA*

On August 1, 2014, state government Petitioners[97] launched a thorough challenge to the Settlement Agreement and, by extension, the proposed carbon rule for existing power plants under § 111(d).[98] Although the D.C. Circuit denied the Petitioners' challenges on ripeness grounds, the Court did not address the merits.[99] The parties' merits arguments will appear again, likely before the D.C. Circuit once the regulations are final.[100]

The Petitioners claim that the scope of the Settlement Agreement was such that it committed EPA to the course it took in § 111 regulation under the Clean Power Plan.[101] EPA insists this is a mischaracterization, for two reasons. First, according to the agency, the Settlement Agreement deadlines are long passed, and the state and NGO settlement parties have not pursued the only available remedy to them – litigation to enforce the Agreement.[102] Second,

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[97] The parties in *West Virginia* consist of "Petitioners": West Virginia, Alabama, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota; Respondent EPA; "State Intervernors": California, Connecticut, Delaware, New Mexico, State of New York, Oregon, Rhode Island, Vermont, Washington, City of New York, Massachusetts, District of Columbia; "Environmentalists" Intervenors: Environmental Defense Fund, Natural Resources Defense Council, Sierra Club; "Amici" for Petitioner: American Chemistry Council, American Coatings Council, American Fuel and Petrochemical Manufacturers, American Iron and Steel Institute, Chamber of Commerce of the United States, Council of Industrial Boiler Owners, Independent Petroleum Association of America, Metals Service Center Institute, National Association of Manufacturers, Pacific Legal Foundation; "*Amicus*" for Respondent: Institute for Policy Integrity at the New York School of Law.

[98] Petitioners' Opening Brief ("Pet. Br.") at 11-14, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Aug. 1, 2014).

[99] *In re Murray Energy Corp.*, No. 14-1112, 2015 WL 3555931 (D.C. Cir. June 9, 2015).

[100] *See supra* note 95, Michael Gerrard: "Three lawsuits have already been filed challenging the EPA proposal. They are almost certainly premature . . . but once the rules do go final in June there will be, almost certainly, more than a hundred lawsuits filed."

[101] *Id*. at 13 ("As sole consideration for EPA's commitment, the State and NGO Intervenors gave up the right to future litigation.").

[102] EPA Br. at 26.

the Settlement Agreement merely committed EPA to *proposing* a rule, which EPA did and which satisfied the Agreement – rendering Petitioners' claim moot.[103]

As mentioned earlier (*supra* Part I.A.), the House amendment to § 111(d) as part of the CAA 1990 Amendments left a possible construction where EPA could only regulate the third category "other" pollutants under § 111(d) if those pollutants were not on the "criteria" list of § 108 and they were not "emitted from a *source category*" regulated under § 112, regardless of the pollution in question.[104] Petitioners in *West Virginia* claim that not only is this a *possible* construction, it is the *only reasonable* construction of the "112 Exclusion,"[105] which would strip EPA's reading of any deference under *Chevron*.[106] To this, EPA responds with the several other interpretations available in the text of the statute.[107]

To review, the text of the "112 Exclusion" in the U.S. Code, which included only the House amendment to § 111(d)(1)(A)(i) reads as follows:

> The Administrator shall prescribe regulations . . . under which each State shall submit to the Administrator a plan which establishes standards of performance for any existing

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[103] *Id*. ("EPA has *already* published the section 7411(d) proposal, which is the only step EPA was *required* to take.").

[104] *See supra* notes 34-36.

[105] Pet. Br. at 31, 35 ("The text of the Section 112 Exclusion . . . is clear," and "EPA and Intervenors seek to 'create ambiguity where none exists.'").

[106] The familiar *Chevron* analysis is as follows: "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." (1) Has Congress directly spoken to the precise question at issue? and (2) If not, and if the statute is silent or ambiguous with respect to the specific issue, is agency's answer based on a permissible construction of the statute? *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). If the answer to (1) is "no" and the answer to (2) is "yes," the court will defer to the agency's interpretation. *But see* Nordhaus, *Historical Perspectives on §111(d) of the Clean Air Act*, 44 Envtl. L. Rep. News & Analysis at 11103 (noting the split decisions of plurality and two concurrences in *Scialabba v. Cuella de Osorio*, 134 S.Ct. 2191, where the plurality opinion held that where "internal tension makes possible alternative reasonable constructions . . . *Chevron* dictates that a court defer to the agency's choice"; but two concurring Justices and one dissenter separately held that, in cases of *direct conflict*, *Chevron* does not apply at all).

[107] EPA Br. at 35-45.

> source for any air pollutant for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title . . .[108]

First, EPA suggests a reading in which, because the three exclusions[109] are separated by the conjunction "or" rather than "and," the three clauses could be alternatives, rather than simultaneous requirements.[110] Under this reading, if EPA is faced with a pollutant wanting regulation, and *any* of the three conditions is absent - rather than *all three* of them being absent – EPA has authority to regulate that pollutant under § 111(d). In short, a substance covered under only two conditions is fair game to be regulated.

Second, the agency notes that each of the first two clauses contains a negative ("air quality criteria have *not* been issued," "which is *not* included on" a 7408(a) list), but the "112 Exclusion" does not ("or emitted from a source category which is regulated under section 7412").[111] EPA claims that "Petitioners presume that the negative from the second clause was intended to carry over," rewriting the statute to say:

> "The Administrator shall prescribe regulations . . . under which each State shall submit to the Administrator a plan which establishes standards of performance for any existing source for any air pollutant . . . [*which is not*] emitted from a source category which is regulated under section 7412."[112]

EPA then suggests removing the bracketed language, at which point it has an affirmative duty to regulate any pollutant under § 111(d) which is already regulated under § 112.[113]

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[108] 42 U.S.C. § 7411(d)(1)(A)(i).
[109] To wit, "criteria have not been issued," "not included on a list published under section 7408(a)," not "emitted from a source category which is regulated under section 7412."
[110] EPA Br. at 35-36.
[111] *Id*. at 37.
[112] *Id*.
[113] It bears mentioning that EPA does not necessarily subscribe to this admittedly creative "literal" reading. *See id*. at 37-38. The agency presents it as a "literal" reading to show that the provision in question is, as EPA put it, "a grammatical mess" plagued by ambiguity. *Id*. at 33.

Moving away from these "literal" readings, EPA makes a point emphasized by the Environmentalists – that the "112 Exclusion" clause modifies the phrase "any air pollutant."[114] As shown in *UARG*, the phrase "air pollutant" is to be given a "context-specific meaning."[115] In this context, the "112 Exclusion" is discussing *hazardous* air pollutants, which is properly the subject of the prohibition, and not the *source category* emitting the hazardous pollutant.

If all of these interpretations fail to show ambiguity in the text, EPA then points to the existence of the clearer Senate version of the amended § 111(d), which simply swapped the "§ 112(b)(1)(A)" reference to a section that no longer existed for the reference to the 189 listed hazardous pollutants at "112(b)."[116] Petitioners argue that this was merely a "conforming" amendment which was not even included in the U.S. Code, which "establish[es] prima facie the laws of the United States."[117] Petitioners then rely on the Senate Legislative Drafting Manual[118] and House Legal Manual on Drafting Style[119] for the proposition that the "substantive" House amendment with the facially broad "112 Exclusion" trumps the "conforming" Senate amendment, with its clearer reference mirroring the 1970 directive.[120]

The State Intervenors note that Petitioners' reading means that Congress chose to massively and *silently* change the regulatory regime under which EPA addresses third category

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[114] *Id*. at 38; Environmentalists Br. at 11-12.
[115] *See* 134 S.Ct. at 2440; *supra* notes 66-67.
[116] *See supra* note 38.
[117] Pet. Br. at 40-41 (*citing* 1 U.S.C. § 204(b)).
[118] Senate Manual § 126(b)(2), available at http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf (last visited Feb. 26, 2015).
[119] House Legal Manual on Drafting Style § 332(b), available at http://legcounsel.house.gov/HOLC/Drafting_Legislation/draftstyle.pdf (last visited Feb. 26, 2015).
[120] Pet. Br. at 42.

pollutants pursuant to § 111(d).[121] Although no party brought it up, it bears noting that when Congress chose to alter the level of discretion afforded to EPA to regulate hazardous pollutants under § 112, it was not subtle about it.[122] Congress listed 189 hazardous substances for EPA to regulate – and then told the agency to regulate them.[123]

Petitioners likewise argue that EPA has done an about-face with the Clean Power Plan – that it previously hewed to the restrictive reading of the House version of § 111(d) now adopted by Petitioners and their Amici.[124] Furthermore, Petitioners and Amici argue, the Supreme Court in *AEP* anticipated efforts to regulate under § 111(d) and foreclosed such options for pollutants emitted from source categories regulated under § 112.[125]

With respect to the "EPA about-face" claim, the agency offers a rebuttal,[126] but the effort pales in comparison to that of the Respondent Amicus Institute for Policy Integrity ("IPI").[127] IPI details each of EPA's consistent statements – limiting the "112 Exclusion" to excluding *hazardous pollutants*, not *entire source categories* of pollutants – then notes that the Supreme Court has repeatedly recognized the importance of "accord[ing] particular deference to an agency interpretation of longstanding duration."[128] IPI concludes with perhaps the best policy

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[121] State Intervenors Br. at 20 (*citing Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress 'does not . . . hide elephants in mouseholes.'").
[122] *See supra* notes 33-34.
[123] *Id*.; *see* 42 U.S.C. §§ 7412(b)(1), 7412(c)(2).
[124] Pet. Br. at 32 (*citing* EPA, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units ("Legal Memo") at 26, EPA-HQ-OAR-2013-0602-0419, available at www.regulations.gov) ("[A] literal reading of that language would mean that EPA could not regulate any air pollutant from a source category regulated under section 112."); Amici Br. at 9.
[125] Pet. Br. at 39-40; Amici Br. at 13; *see* 131 S.Ct. 2537, n.7; *supra* notes 58-59.
[126] EPA Br. at 51-53.
[127] IPI Br. at 8-22 (detailing every instance where EPA took a position on § 111(d)'s "112 Exclusion," under each presidential administration including and after George H. W. Bush).
[128] *Id*. at 7-8 (*quoting Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461, 487 (2004).

argument offered for § 111(d) carbon regulation, namely that *it is the least bad regulatory option to tackle climate change*.[129]

III. CONCLUSION: THE MISSING ARGUMENT

IPI comes tantalizingly close to the argument that *ought* to have accompanies all of this hairpin *explication de texte*: the Supreme Court in *Massachusetts* laid down EPA's statutory mandate to regulate GHGs if the agency finds that they endanger human health or wellbeing.[130] Having published the Endangerment Finding based on sound scientific evidence of anthropogenic climate change, EPA had a non-discretionary duty to regulate GHGs as "pollutants" under the CAA.[131] EPA held off from regulating for a few years, until well-organized citizen suits compelled it to enforce the law.[132] Even then, the agency missed the deadlines and faced no legal accounting. With the Clean Power Plan, EPA is abiding by the terms of the CAA as articulated in the Supreme Court's *Massachusetts* mandate.

The whole of EPA's arguments in *West Virginia v. EPA* is certainly greater than the sum of its parts. Petitioners have the heavy merits burden of establishing that § 111(d) is clear and unambiguous. The many interpretations offered by EPA, coupled with the exhaustive legislative history and consistent EPA interpretations on the "112 Exclusion" should ultimately secure a ruling for the agency in future litigation over the final regulations.

The ironic part of this litigation is that, even if Petitioners are correct that § 111(d) prohibits regulation of *source categories* already subject to § 112 regulation (regardless of the actual pollutant being regulated), *that result is not conversely true*. Both EPA and the

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[129] *See id*. at 22-29.
[130] *See supra* note 48.
[131] *See supra* note 50-52.
[132] *See supra* Part I.C.

Environmentalists noted that, under Petitioners' reading, the EPA could regulate source categories under both § 111(d) *and* § 112 – so long as it promulgated the § 111(d) rules *first*.[133]

For some, economics and poor carbon accounting are the drivers of climate change.[134] For others, the problem is rather a malignant moral apathy so vast it is visible from space.[135] Which brings us back to that Mercury Rule. The very last footnote on the very last page of Petitioners' brief contains an interesting observation:

> EPA has two paths to end the regulation of power plants under Section 112. *First*, the Supreme Court . . . granted review of EPA's decision to regulate power plants under Section 112(n) . . . . Should the Court rule against EPA, the agency could decline on remand to regulate the power plants under Section 1112(n). *Second*, EPA alternatively could delist the regulation of power plants pursuant to Section 112(c)(9) . . . Unless and until EPA chooses either of these paths, power plants will continue to be "regulated under Section 112, and the Section 112 Exclusion will prohibit EPA from complying with the Section 111(d) portions of the settlement.[136]

Petitioners are acknowledging that, if the source category is not regulated under § 112, there is no "112 Exclusion" obstacle to regulating it under § 111(d). Murray Energy intervened in the Mercury Rule litigation seeking to have the courts *invalidate the § 112 rule for power plants*.[137] If Murray Energy gets what it wants in the Mercury Rule, it will have removed EPA's barrier to

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[133] EPA Br. at 49, n.31; Environmentalists Br. at 7.

[134] HM Treasury, The Stern Review: The Economics of Climate Change, at viii, available at http://mudancasclimaticas.cptec.inpe.br/~rmclima/pdfs/destaques/sternreview_report_complete.pdf (last visited Feb. 26, 2015) ("Climate change is the greatest market failure the world has ever seen."); *see also* William Nordhaus, *A Review of the Stern Review on the Economics of Climate Change*, 45 J. ECON. LITERATURE 686 (2007).

[135] Your humble author cleaves to the latter, for what it's worth. *See also* JOHN BROME, CLIMATE MATTERS: ETHICS IN A WARMING WORLD 46-47 (2012) ("Because it is best, economists engaged in the politics of climate change have been trying to achieve a result like *efficiency with sacrifice* [Other things being equal, it would be a bad idea to benefit the rich at the expense of the poor. But if the total of benefits can be greatly increased by doing so, it may be a good idea]. I think this is a strategic mistake. It makes the best the enemy of the good. Aiming for *efficiency with sacrifice* rather than *efficiency without sacrifice* [Receivers – future generations – in effect bribe emitters not to harm them] is to encumber the task of fixing climate change with the much broader task of improving the distribution of resources between generations.").

[136] Pet. Br. at 59, n.12.

[137] *See* Amicus Curiae Brief of Murray Energy Corp. in Support of Petitioners, *State of Michigan v. Environmental Protection Agency*, 2015 WL 412059 (U.S.), 4 (U.S.,2015).

regulating Murray Energy's carbon under § 111(d).[138] The Petitioners are large, they contain multitudes.[139]

[138] This is admittedly not the only unusual strategy Murray Energy has taken to protect its business. After President Obama was re-elected, the corporation's chairman and chief executive, Robert E. Murray, "read a prayer to a group of company staff members on the day after the election, lamenting the direction of the country and asking: 'Lord, please forgive me and anyone with me in Murray Energy Corp. for the decisions that we are now forced to make to preserve the very existence of any of the enterprises that you have helped us build.'" He then laid-off over 150 people, blaming Pres. Obama's "war on coal." Steven Mufson, *After Obama reelection, Murray Energy CEO reads prayer, announces layoffs*, WASH. POST (Nov. 9, 2012), http://www.washingtonpost.com/business/economy/after-obama-re-election-ceo-reads-prayer-to-staff-announces-layoffs/2012/11/09/e9bca204-2a63-11e2-bab2-eda299503684_story.html?tid=pm_pop.

[139] Walt Whitman, Leaves of Grass, "Song of Myself," § 51 (1855).