

August 2018

Determining Whether the Environmental Protection Agency Has Proper Authority Under Section 111(d) of the Clean Air Act to Enforce President Obama's Clean Energy Plan

Stephen J. Otte

Follow this and additional works at: <https://scholarship.law.uc.edu/uclr>

Recommended Citation

Stephen J. Otte, *Determining Whether the Environmental Protection Agency Has Proper Authority Under Section 111(d) of the Clean Air Act to Enforce President Obama's Clean Energy Plan*, 85 U. Cin. L. Rev. (2018)

Available at: <https://scholarship.law.uc.edu/uclr/vol85/iss1/9>

This Student Notes and Comments is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.

DETERMINING WHETHER THE ENVIRONMENTAL PROTECTION
AGENCY HAS PROPER AUTHORITY UNDER SECTION 111(D)
OF THE CLEAN AIR ACT TO ENFORCE PRESIDENT OBAMA'S
CLEAN ENERGY PLAN

*Stephen J. Otte**

I. INTRODUCTION

On August 3, 2015, President Obama announced his administration's Clean Energy Plan (Plan), a bold initiative to reduce significantly carbon-dioxide emissions under the direction of the Environmental Protection Agency (EPA).¹ Describing the Plan as "the single most important step America has ever taken in the fight against global climate change," the President emphasized that the regulations concern not only future, but present health, safety, and environmental concerns.²

Broadly speaking, the Plan calls for nationwide reductions in carbon-dioxide emissions by 2030, mandating a thirty-two percent decrease in carbon dioxide relative to 2005 emissions.³ Pursuant to its apparent authority under section 111(d) of the Clean Air Act, the EPA has proposed certain emission standards concerning carbon dioxide released from existing sources of fossil-fueled power plants.⁴ As currently proposed, the Plan will take the form of state-specific regulations commensurate with each state's potential to deploy cost-effective emission reductions.⁵

The EPA identified three distinct measures necessary to achieve this goal: (1) reduce heat rate among coal-fired power plants; (2) decrease steam-generating power plants in exchange for natural-gas plants; and (3) develop zero-emission renewable sources of energy in place of fossil fuels.⁶ The EPA will deem a state to be in compliance with the Plan if it has achieved the desired ratio of carbon dioxide emitted per unit of energy.⁷

Although the Plan calls for mandatory emission reductions, it

* Associate Member, 2015-2016 *University of Cincinnati Law Review*.

1. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (proposed July 18, 2014) (to be codified at 40 C.F.R. pt. 60).

2. President Barack Obama, Remarks by the President in Announcing the Clean Power Act (Aug. 3, 2015).

3. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. at 34,832.

4. *Id.*

5. *Id.* at 34,834.

6. *Id.* at 34,834-35.

7. *Id.* at 34,834.

provides states considerable flexibility in forming the method to achieve compliance.⁸ For instance, the states are encouraged to develop their own compliance strategies that are proportionate with their economic and energy-producing needs.⁹ Additionally, states were not required to submit these compliance plans until June 2016.¹⁰ In some cases, they may even apply for a three-year extension to submit their plans.¹¹

Despite these measures, the Plan sparked intense resistance and increased litigation, especially among leaders in coal-producing states. For instance, in *In Re Murray Energy Corp.*, the petitioners, company officials for the Murray Energy Corporation, requested an extraordinary writ of stay on behalf of the corporation in order to bar the effectuation of the Plan.¹² In their petition, they argued, *inter alia*, that the EPA does not have the authority to promulgate such sweeping regulations.¹³ The petitioners contested that the 1990 House amendments to section 111(d) of the Clean Air Act explicitly preclude the EPA from regulating stationary carbon-dioxide sources.¹⁴ They also claimed that the Plan contradicts the Clean Air Act's plain language.¹⁵ Finally, the petitioners argued that the 1990 Senate amendment to section 111(d) has no legal effect because it is a mere "conforming amendment."¹⁶

Despite this resistance, President Obama has remained undeterred and has directed the EPA to employ expeditiously its section 111(d) authority to enforce the Plan. Whether the EPA actually has such authority, however, will certainly face continued legal challenges. Although the D.C. Circuit ultimately denied the petitioner's emergency writ in *Murray*, it is quite certain that the same substantive issues will be challenged once the Plan is officially recorded in the Federal Register, possibly requiring a ruling from the Supreme Court. Therefore, reference to "opponents" throughout this review will refer not only to the petitioners in *Murray*, but also to future challengers of the Plan as well.

This comment discusses whether the EPA has the authority under section 111(d) of the Clean Air Act to enforce the Clean Energy Plan. Part II provides the statutory framework of the Clean Air Act as well as

8. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. at 34,834.

9. *Id.*

10. *Id.* at 34,838.

11. *Id.* at 34,833.

12. *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015).

13. Petition for Extraordinary Writ, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Circuit 2015) (No. 14-1112).

14. *Id.* at 8.

15. *Id.* at 6.

16. *Id.* at 19.

the 1990 amendments to section 111(d). Part III provides a detailed analysis discussing why section 111(d) affords the EPA with the proper scope and authority to enforce the Plan. Finally, Part IV concludes the arguments in favor of the EPA's interpretation of section 111(d), which maintains that the EPA indeed has the authority to enforce Obama's Clean Energy Plan.

II. BACKGROUND: THE CLEAN AIR ACT AND SECTION 111(D)

In 1970, Congress enacted the Clean Air Act to establish a collaborative federal and state program for air pollution control.¹⁷ The Act provides the EPA with the authority to regulate three categories of air pollutants: (1) criteria pollutants, (2) hazardous air pollutants, and (3) pollutants that qualify as neither criteria nor hazardous air pollutants.¹⁸ The latter category is governed by section 111(d) of the Act, which authorizes the EPA to mandate specific "standards of performance" concerning both existing and new sources of air pollution.¹⁹

Prior to 1990, section 111(d) authorized the EPA to regulate "any existing source for any air pollutant not included on the list published in section 108(a) (criteria pollutants) or section 112(b)(1)(a) (hazardous air pollutants)."²⁰ In 1990, however, Congress amended the Clean Air Act to control more effectively hazardous air pollutants under section 112.²¹ In doing so, Congress identified 189 hazardous air pollutants, and required the EPA to list all source categories that emit those pollutants.²² Congress also mandated that the EPA issue subsequent emission standards for each pollutant pursuant to section 112(b).²³

When amending section 112, Congress deleted subsection 112(b)(1)(a), a provision that had previously given the EPA general authority to list hazardous air pollutants which was cross referenced in section 111(d).²⁴ To account for this change, both houses of Congress subsequently passed amendments to section 111(d). The House of Representatives eliminated "112(b)(1)(a)" and replaced it with the phrase: "or emitted from a source category which is regulated under

17. 42 U.S.C. § 7401 (2012).

18. *See id.*

19. State Plans for the Control of Certain Pollutants From Existing Facilities, 40 Fed. Reg. 53,340 (Nov. 17, 1975).

20. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1684 (1970).

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

22. *Id.* at 11096.

23. *Id.* at 11096.

24. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2467 (Nov. 15, 1990).

section 112.”²⁵ Unlike the House amendment, the Senate amendment did not disturb the pre-1990 section 112 exclusion. Rather, it allowed section 111(d) to function alongside section 112 as a gap-filling provision for sources that did not qualify as hazardous air pollutants.²⁶

In order to harmonize the pre-1990 section 112 exclusion with the language of the 1990 amendments, the Senate passed a conforming amendment to section 111(d).²⁷ Like the House amendment, the Senate’s amendment eliminated “112(b)(1)(a)” and replaced it with the phrase “112(b).”²⁸ However, neither the House nor Senate amendments to section 111(d) were discussed in floor debates or in conference committees.²⁹ The Conference Committee simply adopted the House amendment without discussion.³⁰ Although this should have rendered the Senate language moot, the Conference Committee failed to remove the Senate’s conforming amendment.³¹ Both the House and Senate amendments were therefore included in the final bill signed by President Bush.³² Consequently, the statutes at large contained both the substantive amendment of the House and the conforming amendment of the Senate.³³ Thus, as of June 2016, the Amendment now provides that section 111(d) authorizes the EPA to mandate state-by-state emission standards for existing sources from a source category that is regulated under section 112.³⁴

III. DISCUSSION

A. *Outline of the Issues in Dispute*

Opponents contest that the 1990 House amendment fundamentally alters the role of section 111(d) because it limits the scope of EPA regulation. For instance, before the 1990 amendments to the Clean Air Act, section 111(d) could not be applied to hazardous air pollutants regulated under section 112.³⁵ Yet, after the 1990 House amendment,

25. *Id.*

26. *Id.*

27. Nordhaus & Zevin, *supra* note 21.

28. Section 112(b) was limited to just the list of hazardous air pollutants specifically designated by Congress. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2574 (Nov. 15, 1990).

29. Nordhaus & Zevin, *supra* note 21, at 11103.

30. *Id.*

31. *Id.* at 11101.

32. *Id.* at 11102.

33. *Id.* at 11098.

34. 42 U.S.C. § 7411(d) (2012).

35. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1684 (1970).

this exclusion could be interpreted to exclude both source categories as well as specific pollutants that fell under the umbrella of section 112.³⁶

The petitioners in *Murray* argued just that; specifically, that the House amendment bars the EPA from regulating any carbon-dioxide-emitting sources because such sources are already subject to regulation under section 112.³⁷ Under this interpretation, section 111(d) cannot be utilized to regulate carbon dioxide because it would impermissibly allow for double regulation under sections 111 and 112.

However, this interpretation depends upon several erroneous assumptions. For instance, opponents of the Plan assume that the 1990 Senate Amendment to the Clean Air Act has no legal significance because it is not contained in the U.S. Code and is thus a mere drafting error.³⁸ Furthermore, they also assume that Congress implicitly repealed the EPA's authority to regulate an entire source of air pollutants via the 1990 House amendment language.³⁹ As discussed below, these assumptions are contrary to not only the legislative history, purpose, and structure of the Clean Air Act, but they also require the contradiction of various canons of statutory construction.

B. Legislative History of the Clean Air Act Supports the EPA's Interpretation of Section 111(d)

When Congress initially enacted the Clean Air Act, section 111(d) was included as a catchall provision for dangerous air pollutants not subject to regulation under either section 108 or section 112.⁴⁰ Section 111(d)'s primary function, therefore, was to ensure that there would be no gaps in the Act's treatment of dangerous air pollutants.⁴¹ Although the 1990 amendments allowed pollutant-specific carve outs in order to prevent duplicative regulation, it was clear that these changes would not displace section 111(d)'s historical function as a gap filler within the statute.⁴² For instance, even following the 1990 amendments, the EPA continued to utilize section 111(d) pursuant to its historic function.⁴³

36. Nordhaus & Zevin, *supra* note 21, at 11101.

37. Petition for Extraordinary Writ, *supra* note 13, at 6.

38. *Id.* at 20.

39. *Id.* at 15–17.

40. Nordhaus & Zevin, *supra* note 21, at 11097.

41. *Id.*

42. *Id.* at 11100.

43. *Id.* at 11102; Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants, 70 Fed. Reg. 15994, 16031-32 (Mar. 29, 2005) (to be codified at 40 C.F.R. pt.63).

Although some litigants have recently argued that the 1990 amendments eliminated 111(d)'s gap-filling role, this interpretation is extraordinary. Eviscerating section 111(d)'s gap-filling role through the passage of the 1990 amendments "would have been extraordinary for Congress to [do] . . . without any mention of [its] possible effect."⁴⁴ Even if Congress did intend for such a departure, one would expect that it would have been mentioned somewhere in the legislative history.⁴⁵ It was not. Instead, the legislative history suggests that Congress desired to expand, rather than diminish, the EPA's authority to regulate dangerous air pollutants.⁴⁶ Hence, reading the House language as a bar against regulation of any source category governed by section 112 does not make sense in the context of the rule's legislative history.

C. The Structure and Purpose of the Clean Air Act Favors the EPA's Interpretation of Section 111(d)

As previously mentioned, challengers to the Plan argue that the EPA must be barred from regulating existing sources of carbon dioxide under section 111(d) because it would create "double regulation" in conjunction with section 112. However, this policy, if implemented, would constrict the intended structure and purpose of the Clean Air Act; stationary sources, such as those that emit carbon dioxide, were never intended to be regulated by just one section of the Act.⁴⁷ Rather, the inherent, overriding principle inherent of the Clean Air Act is that its provisions should be interpreted liberally to maximize public health and safety.⁴⁸

Case law supports this interpretation of how the Clean Air Act should be construed. In *American Electric Power Co. v. Connecticut*, Connecticut and other states sought the recognition of a federal cause of action for environmental harms caused by states through the actions of owners of existing coal-fired power plants.⁴⁹ The defendants insisted that such a remedy was not available because the Clean Air Act conferred authority to the EPA to control such emissions under section

44. *Sale v. Haitian Ctrs. Council Inc.*, 509 U.S. 155, 176 (1993).

45. *Taylor v. United States*, 495 U.S. 575, 601 (1990).

46. Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants, 70 Fed. Reg. at 16,032 ("Such a reading would be inconsistent with the general thrust of the 1990 amendments, which, on balance, reflect Congress' desire to require EPA to regulate more substances, not to eliminate EPA's ability to regulate large categories of pollutants like non-HAP.")

47. *See generally* Nordhaus & Zevin, *supra* note 21.

48. *Id.* at 11096.

49. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011).

111(d).⁵⁰ They argued that section 111(d) allows for a comprehensive regulatory scheme that empowers the EPA to avert the harms caused by carbon dioxide via the enforcement of section 111(d).⁵¹

In a unanimous decision, the United States Supreme Court agreed with the defendants, holding that section 111(d) does indeed “‘speak[] directly’ to emissions of carbon dioxide from the defendants’ plants.”⁵² The Court further held that the “EPA may not employ [section 111(d)] if existing stationary sources of the pollutant in question are regulated under the [criteria] or [hazardous air pollutant] program.”⁵³ Thus, the relevant question exacted from *American Electric* is whether an existing source is regulated with respect to the specific pollutant in question or if it is regulated as an entire source.⁵⁴ If a pollutant is not deemed either a criteria pollutant under section 108 or a hazardous air pollutant under section 112, then section 111(d) commands authority.⁵⁵

Opponents’ interpretation, however, would create an anomaly in the statute because it renders the EPA powerless to regulate any sources of carbon dioxide if it is even remotely regulated under section 108 or 112; such an interpretation would entirely bar the EPA from effectuating any plan to control carbon dioxide for the general health or welfare of the public at large. Because section 111(d) is written to create an affirmative obligation for the EPA to address non-criteria or hazardous air pollutants, this interpretation would strip the EPA of its ability to meet its statutory obligation.

Therefore, in light of both historical perspectives and case law, opponents’ interpretation clearly fails to capture the purpose and function of section 111(d). Instead, it merely “impute[s] to Congress a purpose to paralyze with one hand what it sought to promote with the other.”⁵⁶

D. The Senate Amendment to Section 111(d) Conforms to the Structure, Design, and Purpose of Section 111(d)

The Senate Amendment unambiguously allows the EPA to utilize section 111(d) for the regulation of harmful pollutants not formally categorized as either criteria or hazardous pollutants.⁵⁷ For instance,

50. *Id.* at 419.

51. *Id.* at 424–28.

52. *Id.* at 424.

53. *Id.* at 424 n.7.

54. *Am. Elec. Power Co.*, 564 U.S. at 424 n.7.

55. *Id.*

56. *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 513 (1981) (quoting *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631 (1973)).

57. *Nordhaus & Zevin*, *supra* note 21, at 11096.

section 112(n), in referring to section 111(d) provides: “No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 111.”⁵⁸ Accordingly, the scope of section 111(d) was intended to remain inclusive; any other reading would create inconsistencies among the other subsections of the Clean Air Act, including section 112.

Clearly, then, section 112 was not intended to disrupt section 111(d)’s structure or purpose. Despite this, challengers of the Plan cite section 112 as evidence that Congress intended to preclude overlap between section 111(d) and section 112.⁵⁹ Yet, this argument fails because section 112 does not support the notion that Congress was forcing the EPA to choose which provision would supersede the other. Rather, section 112(n) merely eliminates double regulation of a specific *type*, not the specific *source* of air pollutants.⁶⁰

The structure, history, or purpose of the Clean Air Act therefore does not support Arguments that the Senate’s amendment provides an exception to the statutory scheme of section 111(d). Section 111(d) clearly allows for double regulation of the same source, but not necessarily the same type of air pollutant. Thus, in the present case, this means that the EPA may regulate the same source of carbon dioxide under more than one provision of the Clean Air Act, which would logically include section 111(d). This point is critical because opponents’ entire theory relies on the premise that all sources of carbon dioxide, if subject to regulation via section 112 or section 108, may not be subject to 111(d)’s regulation, as to avoid duplicative regulation.

E. The Senate’s “Conforming Amendment” Label Does Not Abrogate Its Legal Authority

As discussed above, the Senate Amendment reflects congressional intent to exempt pollutants that are regulated simultaneously by section 112, but does not exempt sources from dual regulation under section 111(d). Challengers to the rule contest that, even if the Senate language evinces this plain meaning, it is nonetheless null and void because the Senate Amendment is not legally binding.

Opponents challenge the legitimacy of the Senate Amendment because it is labeled as a “conforming amendment.”⁶¹ Although

58. 42 U.S.C. § 7412(d)(7) (2012).

59. Petition for Extraordinary Writ, *supra* note 13, at 8.

60. 42 U.S.C. § 7412(n)(1)(A) (2012).

61. Petition for Extraordinary Writ, *supra* note 13, at 19–20.

opponents may argue that the Senate's label renders the law nonsubstantive, case law suggests otherwise.⁶² For instance, the United States Supreme Court has held that "the [heading of a section] cannot limit the plain meaning of the text."⁶³ The Court has also articulated that a label cannot strip conforming amendments of their substance;⁶⁴ a statute is a statute regardless of the label.⁶⁵ Tradition dictates that conforming amendments should only be deemed nonsubstantive when Congress clearly did not intend to make major changes to a given statutory scheme.⁶⁶

In the present case, there is no evidence that the Senate's conforming Amendment was intended to render major changes to the Clean Air Act. On the contrary, the Senate language largely preserves the pre-1990 gap-filler role of section 111(d).⁶⁷ Therefore, reviewing courts must give effect to every word used in the Senate Amendment when interpreting the meaning of section 111(d) as a whole.⁶⁸

F. The Senate Amendment to Section 111(d) Has Legal Effect Because It Is Contained in the Statutes at Large

Critics to the Plan also contest that the plain meaning of the Senate Amendment is moot because the Senate Amendment is not contained in the U.S. Code. This argument also fails because, although it may not have been transcribed in the U.S. Code, both the House's substantive Amendment and the Senate's conforming Amendments are contained in the statutes at large.⁶⁹ Congress must approve and the President must sign statutes at large, so they constitute the "legal evidence of laws" and are therefore the official law.⁷⁰

The U.S. Code, on the other hand, is considered "non-positive law" that may only "establish prima facie the laws of the United States."⁷¹ Because the U.S. Code is merely prima facie, it cannot, by definition, prevail over the statutes at large in the event that the two are in conflict.⁷² The U.S. Code can trump statutes at large only if

62. Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008).

63. *Id.* (quoting Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 212 (1998)).

64. *Id.*

65. United States v. R.L.C., 503 U.S. 291, 305 n.5 (1992).

66. Dir. of Revenue v. CoBank ACB, 531 U.S. 316, 323 (2001).

67. S. REP. NO. 91-1196 (1970).

68. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979).

69. Nordhaus & Zevin, *supra* note 21.

70. 1 U.S.C. § 112 (2012).

71. 1 U.S.C. § 204(a) (2012).

72. Stephan v. United States, 319 U.S. 423, 426 (1943).

Congress were to approve the title as being positive law.⁷³

In the present matter, the Code's omission of the Senate Amendment in section 111(d) does not abrogate the Amendment's legal significance because the statutes at large override U.S. Code.⁷⁴ Furthermore, Congress has never approved Title 42 of the U.S. Code, so the omission of the Senate Amendment to section 111(d) in the U.S. Code has no legal effect. Again, this provides evidence that any interpretation of the meaning of section 111(d) must consider the language contained in both the House and Senate Amendments.

G. The House Amendment Does Not Provide Support For An Inclusive Source Exemption From Section 111(d)

Challengers to the Plan believe that the House Amendment stripped the EPA of any authority to regulate stationary sources of carbon dioxide under section 111(d).⁷⁵ However, this reading is suspect because it would not only cripple section 111(d)'s long-standing role as a catchall provision for those sources, but would also represent an unambiguous departure from the most reasonable understanding of the House Amendment's language.⁷⁶ One example of this is how the phrase "regulated under section 112" should be interpreted. While opponents may recognize the word "regulated" in the House Amendment as a blanket exemption to all source categories, the term could also be interpreted to favor the EPA's understanding of section 111(d).⁷⁷ For instance, "regulated under section 112" could also be read to mean "with respect to that same pollutant." Under that interpretation, the House Amendment bolsters the EPA's conclusion that section 111(d) provides authority to regulate the same sources of pollution, even if those sources are concurrently regulated under section 108 or 112.

In any event, the EPA's interpretation should prevail. The Supreme Court has held, for instance that "[the term 'regulated'] require[s] interpretation, for [its] meaning is not 'plain.'"⁷⁸ Yet, a contextual reading of the House language indicates that section 111(d) modifies the phrase "any air pollutant" but not the phrase "any existing source." Based on this syntax, the most logical

73. U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 (1993).

74. *See id.*

75. Petition for Extraordinary Writ, *supra* note 13, at 8.

76. *See generally* Nordhaus & Zevin, *supra* note 21.

77. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2467 (Nov. 15, 1990).

78. UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 363 (1999).

inference is that the House Amendment is actually consistent with the historical function of section 111(d): it exempts certain air pollutants, but not their sources, from simultaneous regulation with section 112.

Clearly, opponents' interpretation of section 111(d) is suspect even when the language of the House Amendment is read in isolation. Yet, such ambiguity diminishes when reading the House Amendment within the specific context of the Act as a whole. For instance, reading the House Amendment in consideration of the cross reference to section 112, makes clear that its language must allow for greater, not diminished, coverage of air pollutants. Section 112 explicitly requires the "maximum degree of reduction in emissions of the hazardous air pollutants [to be] subject to this section."⁷⁹ Therefore, logic dictates that section 111(d) must function alongside section 112 as a gap-filling provision.

In sum, even when read out of context, there is sufficient ambiguity in the House Amendment's language to conclude that it does not bar the EPA from utilizing section 111(d) to enforce the Clean Energy Plan. There is even less ambiguity, however, when the amendment is read in context with section 112 as well as the rest of the statute. In such context, it is clear that the term "regulated" most likely means that the same sources, but not necessarily the same pollutants, are to be regulated concurrently with section 112 or section 108.

H. Chevron Will Apply to This Dispute

When determining whether a regulatory agency's construction of a statute should be entitled to deference, the courts often employ a two-step inquiry.⁸⁰ In *Chevron*, the United States Supreme Court held that the term "stationary source" of the Clean Air Act Amendment of 1977 constituted all pollution-emitting devices contained within the same industrial grouping, or "bubble."⁸¹ The Court reasoned that this was a proper construction of the ambiguous term because it was based on a "permissible construction of the statute."⁸²

Hence, under the *Chevron* framework, a court must consider whether Congress has directly and unambiguously spoken to a precise question at issue.⁸³ If it has, the regulatory agency must adhere to that clear meaning. However, if Congress was silent or ambiguous, the second

79. 42 U.S.C. § 7412(d)(2) (2012).

80. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984).

81. *Id.*

82. *Id.* at 843, 845.

83. *Id.* at 842-43.

question to determine is whether “the agency’s answer is based on a permissible construction of the statute.”⁸⁴ If a court deems the regulatory agency’s answer a permissible construction, the court will likely give deference to the agency’s interpretation.⁸⁵

Courts applying the *Chevron* framework need not determine the “plain meaning” of a statute. Instead, the reviewing court must only determine if the regulatory agency promulgated a reasonable interpretation.⁸⁶ Accordingly, the *Chevron* doctrine entrusts the expert agency with the benefit of the doubt in statutory interpretation because any given agency has “a full understanding of the force of the statutory policy.”⁸⁷

The *Chevron* Court held that it is “entirely appropriate” for regulatory agencies “to make such policy judgments —resolving the competing interests which Congress either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”⁸⁸ This holding presumptively favors regulatory agencies’ interpretations of the statutes they enforce. For instance, as *Chevron* makes explicitly clear, regulatory agencies, not the judiciary, should resolve issue of interpretation in their first pass.⁸⁹ Therefore, in order to overcome such deference to a given agency, challengers must prove that the regulatory agency rendered an unreasonable interpretation.

It is apparent that *Chevron* would apply in this case. Whether intentional or by accident, the amendments to section 111(d), by both the House and Senate, created an ambiguity in the statute’s meaning. Therefore, the EPA, “charged with the administration of the statute,” should be entitled to resolve that ambiguity through its own reasonable interpretation of section 111(d).⁹⁰ Although the Supreme Court has never addressed whether ambiguity created by a legislative anomaly warrants a *Chevron* analysis, the Court has rejected analogous attempts to avert the *Chevron* rule. For instance, in *Scialabba v. De Osorio*, the Court held that *Chevron* still applies even if the ambiguity has resulted from conflicting statutory language.⁹¹ Likewise, the Court has also ruled that, when statutory construction deals with the proper scope of a

84. *Id.*

85. *Chevron*, 467 U.S. at 843–44.

86. *See, e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 219 (2008).

87. *Chevron*, 467 U.S. at 864.

88. *Id.* at 865–66 (noting that “[j]udges are not experts in the field, and are not part of either political branch of the Government”).

89. *Id.*

90. *Id.*

91. *See generally* *Scialabba v. De Osorio*, 134 S. Ct. 2191 (2014).

regulatory agency, *Chevron* remains equally applicable.⁹²

In the present matter, opponents argue that the statutory text of the House Amendment evinces plain meaning; thus, *Chevron* cannot apply.⁹³ Moreover, opponents assert that, even if there were sufficient ambiguity in the statutory language, *Chevron* would still not be an appropriate framework because the Senate Amendment constitutes a mere “drafting error.”⁹⁴

This argument is not persuasive, however, because, as previously demonstrated, the Senate Amendment is not a drafting error. Moreover, although the nexus of the ambiguity in the statute is unclear, nothing in the present case undermines the policy justifications outlined in *Chevron*. Therefore, the EPA should not be enjoined from proffering its version of section 111(d) to enforce the provisions of the Plan, as it is entitled to do under *Chevron*.

I. Canons of Statutory Construction Favor the EPA

Opponents of the rule would prefer to interpret the House Amendment’s reference to a “source category” as a blanket exception for all stationary sources under section 111(d).⁹⁵ However, this interpretive methodology is contrary to traditional canons of statutory construction. For instance, the Supreme Court has held that “[a]mbiguity is a creature not of definitional possibilities but of statutory context.”⁹⁶ Moreover, “[t]he literal language of a provision taken out of context cannot provide conclusive proof of congressional intent.”⁹⁷ Thus, courts must “employ all the tools of statutory interpretation, including ‘. . . structure [and] purpose.’”⁹⁸ Opponents to the Plan, however, do not consider context. Instead, they assume that the Senate Amendment simply lacks legal effect, and that the 1990 House Amendment language eviscerated the EPA’s long-standing authority to regulate an entire source of air pollutants under section 111(d).⁹⁹

Opponents to the Plan also argue that the Plan violates the canon of construction against the implied repeal of prior law.¹⁰⁰ Only when

92. *City of Arlington, Tex. v. FCC.*, 133 S. Ct. 1863, 1871–73 (2013).

93. *See* Petition for Extraordinary Writ, *supra* note 13, at 8.

94. *See id.*

95. *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015).

96. *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

97. *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

98. *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014) (quoting *Pharm. Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001)).

99. *Murray Energy Corp.*, 788 F.3d at 334.

100. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976).

Congressional intent to override an earlier provision is “clear and manifest” will the courts rescind valid law.¹⁰¹ Here, the record is far from being “clear and manifest;” rather, it is void of Congressional intent to eliminate the pre-1990 scope of section 111(d). For instance, no mention of such intent was apparent in committee reports, floor debates, or conference reports for the 1990 amendments.¹⁰² Instead, the House Amendment was introduced with language that would have expanded section 111(d) coverage to include hazardous air pollutants where the EPA had discretion not to regulate a source under section 112.¹⁰³

Opponents also interpret the House and Senate Amendments to be in irreconcilable conflict. Because of such conflict, they argue that the language of the House Amendment should prevail.¹⁰⁴ However, the courts have held that there needs to be “a positive repugnancy between” two provisions or a clear indication “that they cannot mutually coexist.”¹⁰⁵ Additionally, the Supreme Court has held that if “two statutory provisions are fundamentally at odds, constitutional doubt will have to serve as the best guide to breaking the tie.”¹⁰⁶ Therefore, even if there is conflict between the statutes, it absolutely can be resolved.

Proving irreconcilable conflict is unlikely here. For instance, after viewing the two amendments in light of the legislative history of the 1990 amendments to section 111(d), it is clear that there is not a “positive repugnancy” between the House and Senate versions. Even if there were an irreconcilable conflict, the Senate version would control because the D.C. Circuit Court has applied the last-in-order rule which gives legal vitality to the most recently enacted provision of a law.¹⁰⁷

Finally, assuming that opponents do not bring a *Chevron* argument, the courts themselves are entitled to give meaning to conflicting provisions in a statute unless there is a clearly expressed Congressional intention to the contrary.¹⁰⁸ Historically, courts have employed this canon of construction in similar cases involving interpretive disputes of the Clean Air Act.¹⁰⁹ In *Spencer County v. EPA*, for instance, the D.C.

101. *See id.* at 154 (quoting *Posadas v. Nat'l City Bank*, 262 U.S. 497, 503 (1936)).

102. Nordhaus & Zevin, *supra* note 21, at 11103.

103. *Id.* at 11102.

104. Petition for Extraordinary Writ, *supra* note 13, at 19.

105. *Radzanower*, 426 U.S. at 155.

106. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 509 (1999).

107. *See Edward v. Carter*, 580 F.2d 1055, 1080 (D.C. Cir. 1978).

108. *See Morton v. Mancari*, 417 U.S. 535, 550 (1974).

109. *See Citizens to Save Spencer Cty. v. EPA*, 600 F.2d 844, 870 (D.C. Cir. 1979). *See generally Atwell v. Merit Sys. Prot. Bd.*, 670 F.2d 272 (D.C. Cir. 1981).

Circuit reviewed a conflict resulting from section 165 of the 1977 Clean Air Act, which purportedly prohibited the construction of stationary sources without adherence to new permitted requirements subject to state approval.¹¹⁰ In *Spencer County*, as is the case here, both the House and Senate Amendments to section 165 were “conceived in separate Houses and . . . never reconciled when the Act as a whole was given birth in Conference.”¹¹¹ Although the specific requirements of the Act were unclear, the court found that neither amendment expressed intention to bar completely the eventual implementations; hence, the court approved the EPA’s implementation plan in the face of conflicting amendments and held that “it was the greater wisdom for the agency. . . to give maximum possible effect to both.”¹¹²

Analogous to *Spencer County*, the 1990 amendments regarding section 111(d) also originated in different chambers. However, they nonetheless achieve the same purpose of ensuring that the EPA will prescribe regulations pursuant to section 111(d)’s purpose. Thus, the House and Senate Amendments to section 111(d) must be read together, ensuring maximum effect to each.

Opponents’ interpretation of section 111(d) should be defeated because it is incompatible with the canons of statutory construction. First, it violates the canon against prior repeal of law. Second, opponents’ interpretation of 111(d) fails to consider both the context and the history of the Clean Air Act, the language of the Senate’s Amendment to section 111(d), and the overall structure and purpose of said provision. Third, because the Senate Amendment was drafted following the construction of the House Amendment, the last-in-order rule would give deference to the Senate Amendment, even if it were found to be in irreconcilable conflict with the House language. Finally, all things considered, the courts will likely give maximum effect to both the House and the Senate Amendments, thereby preserving the previously held function of section 111(d).

Thus, the most logical interpretation of section 111(d) is one that enables the EPA to utilize this provision to enforce the Plan. Any interpretation that would impair this function not only deprives maximum effect to the House and Senate provisions but also is unreasonably contrary to the history and purpose of the Clean Air Act itself.

110. *Spencer Cty.*, 600 F.2d at 870.

111. *Id.* at 866.

112. *Id.* at 872.

IV. CONCLUSION

Since 1970, section 111(d) has been an integral part of the Clean Air Act, functioning as a catchall for air pollutants not regulated elsewhere in the Act.¹¹³ However, opponents to the Act have contested, and likely will contest, that the breadth of its regulations exceeds the scope of section 111(d).¹¹⁴ In particular, they assert that the 1990 House amendment to the Clean Air Act crippled this provision's originally held purpose.¹¹⁵ As such, challengers argue that the EPA lacks authority to initiate such sweeping reductions in carbon-dioxide emissions.

As demonstrated, this interpretation fails on several grounds. First, the legislative structure, design, and purpose of the Clean Air Act, which establishes that section 111(d) has historically functioned as a gap-filling provision to regulate sources of pollutants not controlled for under sections 108 or 112 of the Act, contradicts this interpretation.¹¹⁶ Second, there is no plain-meaning interpretation or textual evidence that either the 1990 House or Senate amendments were drafted with the intent to strip section 111(d) of its previously held gap-filling role. Even assuming there is insufficient ambiguity in the statute to draw this conclusion, *Chevron* dictates that the EPA's interpretation of section 111(d) should nonetheless be given deference. Lastly, opponents' interpretation directly contradicts the canons of statutory construction.¹¹⁷

Climate change is one of the greatest challenges of our time, threatening "some of the most fundamental determinants of health: food, air, and water."¹¹⁸ Despite its gravity, this important issue is still fundamentally viewed as political or partisan. In a sense, "it has been turned into a political football primarily by the climate deniers who have a vested interest in maintaining the status quo."¹¹⁹ Although the EPA's Plan will require fundamental changes in our country's energy-producing infrastructure, the Plan represents a viable step in solving the ever-growing environmental catastrophe that potentially awaits. For all these reasons, the EPA's interpretation of section 111(d) should prevail when

113. Nordhaus & Zevin, *supra* note 21, at 11096.

114. *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Circuit 2015).

115. *Id.*

116. Nordhaus & Zevin, *supra* note 21, at 11100.

117. NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:5 (7th ed. 2007); *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *Edward v. Carter*, 580 F.2d 1055, 1080 (D.C. Cir. 1978).

118. CLIMATE CHANGE AND HEALTH, WORLD HEALTH ORGANIZATION [WHO], Doc. EB122/4 (Jan. 16, 2008).

119. G.D., *Disappearing Ice*, ECONOMIST: PROSPERO (Dec. 17, 2012), <https://www.economist.com/blogs/prospero/2012/12/qa-james-balog>.

2017] DETERMINING WHETHER THE EPA HAS PROPER AUTHORITY 317

it comes under attack over the coming months and years.