Historical Perspectives on §111(d) of the Clean Air Act

by Robert R. Nordhaus and Avi Zevin

Robert Nordhaus is Professional Lecturer in Law at George Washington University Law School and a senior partner at Van Ness Feldman LLP, where Avi Zevin is an associate.

Summary

Looking at the history of the Clean Air Act provides some guidance on what Congress intended when it required the "best system of emission reduction" under §111(d) and on EPA's supervisory authority over state plans. But the drafting error, where the conflicting House and Senate amendments to §111(d) were not reconciled, remains largely uninformed by the legislation's history and will have to be resolved by EPA and, ultimately, the courts.

On June 18, 2014, the U.S. Environmental Protection Agency (EPA) published in the *Federal Register* its proposed rule regulating carbon dioxide (CO_2) emissions from existing power plants under §111(d) of the Clean Air Act (CAA).[1] The proposal, known as the Clean Power Plan (CPP), uses §111(d) to require a projected 30% reduction in CO_2 emissions from existing electric generating units (EGUs) by 2030. It does so by setting state-specific carbon intensity (pounds CO_2 per megawatt hour) targets (or "state goals"). Each state is required to draft a compliance plan that demonstrates how it will meet its EPA-set state goal by 2030. While states have significant flexibility in the emission reduction measures that may be used, the plan must be approved by EPA as "satisfactory." If a state does not submit such a plan or if EPA does not find the plan satisfactory, EPA is required to issue its own federal compliance plan.

This Article reviews the history of §111(d) and the relevance of that history to EPA's authority to regulate such CO_2 emissions. Specifically, this Article addresses three key areas for which EPA has relied on the legislative history of §111 in its proposed CPP. First, EPA has proposed to interpret its authority to determine the "best system of emission reduction . . . adequately demonstrated," which forms the basis of the stringency of the state goals, to include measures that occur both at existing power plants and measures that occur beyond those power plants, but that reduce emissions at power plants. Section II.A. discusses how the legislative history of §111 may implicate EPA's authority to make this interpretation.

Second, EPA has proposed that it has authority not only to require states to submit plans, but that it also has authority to set substantive criteria for approving a state plan, including that it has the authority to set state goals. Section II.B. discusses how the legislative history of §111 may implicate EPA's authority to make this interpretation.

Authors' Note: This Article draws on Mr. Nordhaus' presentation at the ELI/Nicolas Institute Workshop on July 14, 2014, and on Mr. Zevin's research while a student at NYU School of Law, available at http://policyintegrity.org/publications/detail/dueling-amendments/. The authors wish to thank Kyle Danish, Ilan Gutherz, and Doug Smith for their review, assistance, and helpful comments. We also wish to thank Claire Brennan and Hayley Mittler for their invaluable editorial assistance. The views presented in this Article are the authors' and do not necessarily represent the positions of Van Ness Feldman, its clients, or reviewers.

1. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Proposed Rule, 79 Fed. Reg. 34830 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60) [hereinafter EGU Emission Guidelines]. The CAA is codified at 42 U.S.C. §§7401-7671q, ELR Stat. §§CAA 101-618.

Third, EPA has interpreted the scope of its authority under §111(d) to include the regulation of pollutants, such as CO_2, that are neither "criteria pollutants" (defined below) nor "hazardous air pollutants" (HAPs). This interpretation reflects EPA's attempt to resolve an apparent drafting error introduced when the U.S. Congress amended §111(d) as part of the CAA Amendments of 1990. Sections II.C. and II.D. discuss the implications of the drafting error on EPA's authority, what the legislative history suggests was Congress' intent in revising §111(d) in 1990, and how a court may view this unique circumstance when this issue is eventually litigated.

But first, in Section I, we outline the relevant history of the key provisions.

I. History of §111(d)

A. 1970 Origins of §111(d)

The CAA Amendments of 1970 were enacted in the almost-forgotten era when congressional committees marked up bills, amendments were offered on the floor of the U.S. House of Representatives and the U.S. Senate, conference committees reconciled the differing versions passed by the two Houses, and Congress enacted major regulatory legislation. The political context was also noteworthy. Richard Nixon and Edmund Muskie were positioning themselves for the 1972 presidential election. The 1970 legislation, as it was being developed, became a key part of their respective campaign strategies. For that reason, the 1970 CAA Amendments were a high-visibility exercise that captured the attention of those involved on Capitol Hill, as well as in the nascent environmental movement and much of the business community.

On February 10, 1970, the Nixon Administration submitted a relatively simple proposal to Congress that, among other things, recommended amendments to the CAA.[2] Legislation reflecting President Nixon's proposal was introduced in the Senate on February 18, 1970.[3] The proposal's most important elements regarding air pollution from stationary sources included giving the then-U.S. Department of Health, Education, and Welfare (HEW) (EPA had not yet been established)[4] authority to prescribe what are now known as national ambient air quality standards (NAAQS) applicable to criteria pollutants[5]; to use a state implementation plan mechanism to implement the NAAQS[6]; and to establish federal emission standards for emissions from selected classes of new stationary sources that are major contributors to air pollution (comparable to current law's new source performance standards (NSPS))[7]; as well as emissions from new and existing stationary sources that were "extremely hazardous to health" (roughly equivalent to today's HAPs).[8] (Throughout this Article, we use terminology that reflects the current regulatory jargon, not the terms used in the bills at the time.)

The House bill[9] largely followed the Nixon Administration proposal. Relevant to the discussion of §111(d), the House bill authorized HEW to prescribe NAAQS for criteria pollutants, to approve state implementation plans, to establish NSPS, and to control emissions of HAPs from new and existing stationary sources.[10] Except for regulation of emissions of criteria pollutants pursuant to state plans and HEW regulation of HAP emissions, the House bill had no provision for regulating existing stationary sources.

In March 1970, Senator Muskie introduced a more ambitious proposal in the Senate.[11] In September, the Senate Committee on Public Works Subcommittee on Air and Water Pollution reported out a bill that combined the Nixon Administration's proposal and Senator Muskie's alternative bill.[12] This bill, which foreshadowed much of the 1970 statute, would ultimately pass the Senate.[13] The Senate bill included the key stationary source provisions of the Nixon Administration bill: NAAQS for criteria pollutants; state implementation plans; provisions akin to the 1970 Act's NSPS; and regulation of HAPs. It also added a mysterious §114[14] to the CAA that would have given HEW

2. *See* Richard Nixon, *Special Message to the Congress on Environmental Quality*, *The American Presidency Project* (Feb. 10, 1970), http://www.presidency.ucsb.edu/ws/?pid=2757.
3. S. 3466, 91st Cong. (1970), *as reprinted in* 2 Committee on Public Works, A Legislative History of the Clean Air Amendments of 1970, 1474-94 (1974) [hereinafter 1970 Leg. Hist.].
4. EPA was established by Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (Oct. 6, 1970), which was submitted to Congress under special procedures on July 9, 1970, and became effective on Dec. 2, 1970, 84 Stat. 2086. The principal environmental functions of HEW and a number of other agencies were transferred to EPA as of that date. While all of the major 1970 CAA Amendment proposals were introduced prior to the reorganization and therefore placed implementing responsibility with HEW, the final 1970 CAA was enacted on Dec. 31, 1970, and placed implementing responsibility with the EPA Administrator.
5. S. 3466, §7, *as reprinted in* 2 1970 Leg. Hist. at 1484-89. "Criteria pollutants," under current law, are pollutants for which EPA prescribes air quality criteria under CAA §108. Once criteria are issued for a pollutant, EPA must prescribe NAAQS for that pollutant under CAA §109(a).
6. *Id.*
7. *Id.*
8. *Id.* §8, *as reprinted in* 2 1970 Leg. Hist. at 1489-21 (equivalent to CAA §§112(a) & (b), 42 U.S.C. §§7412(a) & (b) (2012)).
9. H.R. 17255, 91st Cong. (1970), *as reprinted in* 2 1970 Leg. Hist. at 910-40.
10. *Id.* §5, *as reprinted in* 2 1970 Leg. Hist. at 920-24.
11. S. 3546, 91st Cong. (1970), *as reprinted in* 2 1970 Leg. Hist. at 1451-69.
12. S. 4358, 91st Cong. (1970), *as reprinted in* 1 1970 Leg. Hist. at 531-625.
13. *Compare* S. 4358 (as passed Senate, Sept. 17, 1970), *as reprinted in* 1 1970 Leg. Hist. at 531-625, *with* CAA Amendments of 1970, Pub. L. No. 91-604, *as reprinted in* 1 1970 Leg. Hist. at 67-104.
14. S. 4358 §6, *as reprinted in* 1 1970 Leg. Hist. at 560-65. Section 114 of the Senate bill was not a model of clarity. By its terms, it appeared to apply to new and existing sources, even though its coverage would overlap that of §113 (the then-equivalent analog to current NSPS). The Committee report was equally confusing. The Committee's report indicated that the pollutants subject to §114 include:

> agents which are not emitted in such quantities or are not of such a character as to be widely present or readily detectable on a continuous basis with available technology in the ambient air. The presence of [which] is generally confined, at least for detection purposes, to the area of the emission source.

S. Rep. No. 91-1196, at 18 (1970). The report, however, goes on to state that because §114 standards can be established for any pollutants not considered hazardous under §115, "there should be no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." *Id.* at 20.

authority to regulate "selective pollution agents"—if they were emitted by a source that was part of a source category subject to the then-equivalent of NSPS. These were pollutants that (using current regulatory jargon) were neither criteria pollutants nor HAPs.

The House/Senate conference on the legislation convened during the lame duck session of the 91st Congress, following the 1970 congressional elections. The Senate had urged inclusion of its §114 to cover emissions of non-criteria, non-HAP pollutants from existing sources that would be subject to its version of NSPS if new.[15] The House, however, refused to accept the Senate §114; it objected to giving EPA[16] authority to prescribe emissions for existing sources' emissions of non-criteria, non-HAP pollutants at a time when it was not known how extensive either the criteria pollutant category or the HAP category would be, so that the gap to be covered by §114 could be a very narrow class of pollutants or a very broad one.

The ultimate compromise was the 1970 version of §111(d) under which states would establish "emission standards" for emissions of certain pollutants emitted from existing sources that, if new, would be subject to NSPS for those pollutants.[17] These pollutants were those not regulated under §108 as criteria pollutants, nor included on a list of HAPs under §112(b)(1)(A)[18]—in the words of the Senate conferees, pollutants that "cannot be controlled through the ambient air quality standards and which are not hazardous substances."[19] These emission standards would be incorporated into state plans[20] that would have to be "satisfactory" to the newly established EPA.[21]

The term "emission standards" was not defined in the Act. However, the 1970 statute contained a definition of "standard of performance," relevant for regulation of new sources under §111(b), that was very similar to today's definition. A standard of performance would reflect the "degree of emission limitation achievable through application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated."[22] However, because the 1970 CAA version of §111(d) required states to establish "emission standards" and not "standards of performance," the definition applied only to new sources under §111(b) and did not apply to regulation of existing sources under §111(d).

The §111(d) compromise was enacted into law as part of the 1970 CAA Amendments,[23] and EPA issued general implementing regulations in 1975.[24] It issued guidelines for only one existing source category before enactment of the 1977 CAA Amendments.[25]

B. 1977 CAA Amendments

The CAA Amendments of 1977 made several significant changes affecting §111(d). The first was a change in the scope of the definition of "standard of performance," which until then applied only to new sources. In 1977, §111(d)(1)(A) was amended to substitute "standard of performance" for "emission standards," so that states would establish standards of performance (as defined in §111(a)), rather than emission standards for existing sources.[26] Second, the definition of "standard of performance" was significantly modified. Instead of referring to "best system of emission reduction," it referred to "best technological system of continuous emission reduction" for new sources.[27] For existing sources under §111(d) (to which, up until 1977, the definition of "standard of performance" did not apply), the definition was framed in terms of "best system of continuous emission reduction."[28] Third, several other minor amendments to §111(d) were made, including one directing the states (and EPA in a federal plan) to consider an existing source's remaining useful life.[29]

Shortly after enactment of the 1977 CAA Amendments, EPA issued three additional emission guidelines for source categories under §111(d).[30] The section was then largely forgotten until after the 1990 Amendments, when EPA issued two emission guidelines based solely on its §111(d) authority.[31] In 1996, EPA issued emission guidelines for municipal

15. S. 4358, §6 (adding §114 of the CAA), *as reprinted in* 1 1970 Leg. Hist. at 560-65.
16. By the time of the Conference, Reorganization Plan No. 3 had been ratified by Congress and the responsibilities that had been given to HEW under the House and Senate bills were rewritten to apply to EPA. *See* H.R. Rep. No. 91-1783, at 13 (1970).
17. CAA §111(d)(1), 42 U.S.C. §1857c-6(d)(1) (1970).
> The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 under which each State shall submit to the Administrator a plan which (A) establishes emission standards 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 section 108(a) or 112(b)(1)(A) but (ii) to which a standard of performance under subsection (b) would apply if such exiting source were a new source, and (B) provides for the implementation and enforcement of such emission standards.
18. CAA §112(b)(1)(A), 42 U.S.C. §1857c-7(b)(1)(A) (1970).
> The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and shall 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.
19. S. 3546, S. 4358, 91st Cong., 116 Cong. Rec. 20601 (1970) (Senate consideration of the Report of the Conference Committee).
20. CAA §111(d)(1), 42 U.S.C. §1857c-6(d)(1) (1970).
21. CAA §111(d)(2), 42 U.S.C. §1857c-6(d)(2) (1970).
22. CAA §111(a)(1), 42 U.S.C. §1857c-6(a)(1) (1970).
23. CAA §111(d), 42 U.S.C. §1857c-6(d) (1970).
24. State Plans for the Control of Certain Pollutants From Existing Facilities, 40 Fed. Reg. 53340, 53346 (Nov. 17, 1975) [hereinafter 1975 Standards for State Plans].
25. Phosphate Fertilizer Plants, Final Guideline Document Availability, 42 Fed. Reg. 12022 (Mar. 1, 1977).
26. CAA Amendments of 1977, Pub. L. No. 95-95, §109(b)(1), 91 Stat. 685 (amending 42 U.S.C. §7411(d)(1)).
27. *Id.* §109(c)(1)(A) (amending 42 U.S.C. §7411(a)(1)).
28. *Id.* (amending 42 U.S.C. §7411(a)(1)(C)).
29. *Id.* §109(b)(1) (amending 42 U.S.C. §7411(d)).
30. Emission Guideline for Sulfuric Acid Mist, Final Rule, 42 Fed. Reg. 55796 (Oct. 18, 1977); Kraft Pulp Mills, Final Guideline Document, 44 Fed. Reg. 29828 (May 22, 1979); Primary Aluminum Plants, Availability of Final Guideline Document, 45 Fed. Reg. 26294 (Apr. 17, 1980).
31. Note that EPA has also issued emission guidelines for six categories under CAA §129, which requires the use of §111(d) to regulate hazardous pollutants from waste combustion categories. *See* Emission Guidelines and

solid waste landfills[32]; and in 2005, EPA issued the now-vacated emission guidelines for emissions of mercury from power plants.[33]

C. 1990 CAA Amendments

In the CAA Amendments of 1990, Congress again amended the §111(a) definition of "standard of performance," retreating from "best technological system of continuous emission reduction" for new sources and "best system of continuous emission reduction" for existing sources, and going back to "best system of emission reduction," so that the definition of "standard of performance" was very close to the 1970 definition.[34] The newly amended definition of standard of performance was made applicable to both new and existing sources.[35]

The other important but enigmatic change to §111 was to §111(d)(1)—the much discussed "drafting error." By way of background, the House and Senate had passed different amendments to the same provision of §111(d). The version of the 1990 Amendments initially passed by the House would have struck out §111(d)(1)'s cross-reference to "112(b)(1)(A)"—the pre-1990 reference to the list of HAPs to be regulated under §112—and inserted one text.[36] The version passed by the Senate would have struck out the same cross-reference and inserted another text.[37] 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).[38]

The two amendments have been read to reflect sharply different positions. The policy was clear on the Senate side. It changed the cross-reference from the pre-1990 list of HAPs at §112(b)(1)(A) to the post-1990 list of HAPs at §112(b). By so doing, the Senate amendment essentially continued the 1970 policy. The scope of pollutants to be covered by §111(d) were non-HAP, non-criteria pollutants, and the Senate made just a simple conforming change in §111(d) to reflect an organizational change in §112.

The scope of the change intended by the House's amendment was less clear. Under §111(d) as amended by the House, EPA would prescribe state plan regulations under which states would "establish[ ] 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 section 108(a) *or emitted from a source category which is regulated under section 112* . . . ."[39]

There are numerous potential readings of this change. The most common reading of the House amendment is that §111(d) applies only to non-criteria pollutants emitted from a source category not regulated under §112.[40] Under this reading, CO_2 emissions from existing EGUs could not be regulated since EGUs are now regulated under §112 by reason of the Mercury and Air Toxics Standards (MATS) Rule.[41]

This interpretation is consistent with one theory of the underlying purpose of the House amendment. The amendment to §111(d) that was included in the bill that was ultimately passed by the House and went to conference actually originated from the initial White House proposal for the 1990 CAA Amendments,[42] and was passed by the House without change. The White House proposal (and the House-passed bill) also contained a provision that became §112(n) of the amended CAA, which allowed EPA to regulate EGUs under §112 only after finding that "such regulation is appropriate and necessary" based on the

Compliance Times for Large Municipal Waste Combustors, 60 Fed. Reg. 65415 (Dec. 19, 1995) (codified at 40 C.F.R. pt. 60, subpt. Cb); Emission Guidelines and Compliance Times for Hospital/Medical/Infectious Waste Incinerators, 62 Fed. Reg. 48379 (Sept. 15, 1997) (codified at 40 C.F.R. pt. 60, subpt. Ce); Emission Guidelines and Compliance Times for Small Municipal Waste Combustion Units, 65 Fed. Reg. 76384 (Dec. 6, 2000) (codified at 40 C.F.R. pt. 60, subpt. BBBB); Emission Guidelines for Commercial/Industrial Solid Waste Incinerators, 65 Fed. Reg. 75362 (Dec. 1, 2000) (codified at 40 C.F.R. pt. 60, subpt. DDDD); Emission Guidelines and Compliance Times for Other Solid Waste Incineration Units, 70 Fed. Reg. 74907 (Dec. 16, 2005) (codified at 40 C.F.R. pt. 60, subpt. FFFF); Emission Guidelines and Compliance Times for Existing Sewage Sludge Incineration Units, 76 Fed. Reg. 15404 (Mar. 21, 2011) (codified at 40 C.F.R. pt. 60, subpt. MMMM). However, these guidelines do not raise questions regarding the conflict between §111(d) and §112, because §129 prohibits the use of §112 to regulate these categories. CAA §129(h)(2), 42 U.S.C. §7429(h)(2) (2012).

32. Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, Final Rule and Guideline, 61 Fed. Reg. 9905, 9906 (Mar. 12, 1996) [hereinafter 1996 MSWL Rule].
33. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, Final Rule, 70 Fed. Reg. 28606, 28657 (May 18, 2005) [hereinafter CAMR].
34. *Compare* CAA Amendments of 1990 §403(a), Pub. L. No. 101-549, 104 Stat. 2399, 2631 (1990) [hereinafter 1990 CAA], *with* CAA §111(a)(1), 42 U.S.C. §1857c-6(a)(1) (1970).
35. CAA §111(a)(1) & (d)(1), 42 U.S.C. §7411(a)(1) & (d)(1) (1994).
36. S. 1630, 101st Cong., §108(f) (as passed by House, May 23, 1990), *as reprinted in* 2 A Legislative History of the Clean Air Act Amendments of 1990, at 1979 (1993) [hereinafter 1990 Leg. Hist.].
37. S. 1630, 101st Cong., §305(a) (as passed by Senate, Apr. 3, 1990), *as reprinted in* 3 1990 Leg. Hist. at 4534.
38. *See* 1990 CAA §§108(g) & 302(a), Pub. L. No. 101-549, 104 Stat. 2399, 2465 & 2574.
39. *See* H.R. Rep. No. 101-490, at 443-44 (1990), *as reprinted in* 3 1990 Leg. Hist. at 3467-68 (showing changes relative to then-current law for §111(d)).
40. *See, e.g.*, Pet. for Extraordinary Writ at 6, In re Murray Energy Corp., No. 14-1112 (D.C. Cir. June 18, 2014) [hereinafter Murray Energy Pet.] ("Thus, once a source category is regulated under section 112, EPA may not mandate state-by-state emission standards for that source category.").
41. National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, Final Rule, 77 Fed. Reg. 9304 (Feb. 16, 2012) (codified at 40 C.F.R. pts. 60, 63) [hereinafter MATS Rule].
42. *Compare* H.R. 3030, 101st Cong. §108(d) (1990) (as introduced in House, July 27, 1989), *as reprinted in* 2 1990 Leg. Hist. at 3857 (introduced at the request of President H.W. Bush by Rep. John Dingell), *with* Clean Air Act Amendments (Part 3): Hearing on H.R. 4 and H.R. 2585 Before the Subcomm. on Health and the Environment of the Comm. on Energy and Commerce, 101st Cong. (June 22, 1989), Serial No. 101-116, at 95 (1990) [hereinafter CAA Hearing].

results of a study EPA was directed to perform.[43] Because of this provision, there was a possibility that this large source category that emitted listed HAPs would be outside the scope of §112. If that happened without revising §111(d) to cover the potential gap created by §112(n), those pollutants would also be outside the scope of §111(d) by reason of the fact that they were listed HAPs, even though they were emitted by sources that could not be regulated under §112. This theory is reinforced by an additional provision from the White House proposal (which was ultimately dropped from the House bill) that would have only required EPA to regulate half of the source categories listed under §112, and so would have necessitated even more category-based gap-filling.[44] Under this interpretation, the purpose of striking out the reference to non-HAP pollutants and inserting instead the reference to pollutants emitted by a source category subject to §112 was to close the potential gaps created by the ultimately deleted White House proposal and the adopted §112(n).

Thus, in the context of the statutory scheme of the House bill, even after the deletion of the White House proposal, there would be a policy rationale for the interpretation that §111(d) applies to a source category's non-criteria pollutant emissions if the category is not regulated under §112.

However, this interpretation of the House amendment is not the only one. As we outline in the Appendix to this Article, there are at least five other readings of the House provision, four of which interpret the House amendment more broadly, and would permit CO_2 regulation of existing power plants.

In sum, the enactment of both the House and Senate amendments to the same cross-reference (as well as the multiple potential interpretations of the underlying House amendment) create a massive ambiguity in the coverage of §111(d). If the House amendment is read as limiting §111(d) to non-criteria pollutants emitted by sources regulated under §112 (only one of several readings of the House amendment), EPA would not be able to regulate any source under §111(d) that is in a source category regulated under §112. Now that EGUs, by virtue of the MATS Rule, are a source category regulated under §112, they would be outside the reach of §111(d). The Senate amendment, by contrast, would continue the 1970 policy: namely, any non-HAP, non-criteria pollutant would be within the ambit of §111(d). CO_2 is a non-HAP, non-criteria pollutant, and so EGU emissions could be reached by §111(d). As a result, EPA and the courts are faced with a significant ambiguity that goes to the heart of whether EPA can regulate existing EGU CO_2 emissions under §111(d) at all.

II. Observations

Stepping back from the details of this short history, one can make several observations:

A. *"Best System" Under Definition of Standard of Performance*

The history of the amendments to the definition of standard of performance is instructive. In 1977, Congress marched up the hill of "best technological system of continuous emission reduction" for new sources (and the hillock of "best system of continuous emission reduction" for existing sources), and then marched down again in 1990. The 1990 retreat could certainly support arguments that what is contemplated now by the definition of standard of performance is not limited to hardware at the end of the pipe, and that a much broader suite of technologies and operational techniques could be included. Whether this broader suite includes the full range of "Building Block" measures that EPA uses to construct state emission rate goals under its proposed CPP is a more difficult question.[45]

B. *EPA Authority Over State Plans*

The 1970 version of §111(d) gave EPA authority to impose a federal plan if a state's plan was not "satisfactory." In promulgating its 1975 implementing regulations, EPA interpreted its authority—based on Congress' directive that EPA disapprove plans that are not satisfactory—to include the authority to set substantive criteria for the approval or disapproval of state plans, including numerical emission limits, as part of establishing emission guidelines.[46] Congress significantly strengthened EPA's hand when, in 1977 and 1990, it made a series of changes both to the text of §111(d) and to the definition of standard of performance to make it clear that what states establish under their §111(d) plans are "standards of performance" (rather than "emission standards") and that, under the definition of "standards of performance," the standards must reflect an emission limitation that is achievable through the application of the best system of emission reduction that *EPA*

43. *See* H.R. 3030, 101st Cong. §301 (1990) (as introduced in House, July 27, 1989), *as reprinted in* 2 1990 Leg. Hist. at 3945-46; S. 1630, 101st Cong. §301 (1990) (as passed by House, May 23, 1990), *as reprinted in* 2 1990 Leg. Hist. at 2148-49.

44. Specifically, the White House proposal only required that 25% of listed categories be regulated after four years and an additional 25% of listed categories be regulated after seven years. EPA was required to evaluate, but not necessarily regulate, all other listed categories within 10 years. H.R. 3030, 101st Cong. §301 (as introduced in House, July 27, 1989), *as reprinted in* 2 1990 Leg. Hist. at 3937. If the pre-1990 scope of §111(d) was retained, EPA would have been prevented from regulating HAPs under §111(d) for any of the remaining 50% of categories EPA chose not to regulate under §112. That is, without the change to §111(d) that ultimately became the House amendment, the White House proposal would have opened a potentially very large category-based gap in the regulation of HAPs. The House rejected the element of the White House proposal giving discretion to EPA as to which categories to regulate under §112. House Debate on H.R. 3030 (May 21, 1990), *as reprinted in* 2 1990 Leg. Hist. at 2561. The House bill sent to conference would have required regulation of *all* listed categories within 10 years. *See* S. 1630, 101st Cong. §301 (1990) (as passed by House, May 23, 1990), *as reprinted in* 2 1990 Leg. Hist. at 2137-38.

45. *See* EGU Emission Guidelines, *supra* note 1, 79 Fed. Reg. at 34885-86. For review of key issues, see Robert R. Nordhaus & Ilan W. Gutherz, *Regulation of CO_2 Emissions From Existing Power Plants Under §111(d) of the Clean Air Act: Program Design and Statutory Authority*, 44 ELR 10366, 10383-90 (May 2014).

46. 1975 Standards for State Plans, *supra* note 24, 40 Fed. Reg. at 53342.

determines has been adequately demonstrated.[47] EPA thus has two supervisory tools over state plans: (1) the general authority to reject a plan that is not "satisfactory"; and (2) the more specific authority to determine the "best system of emissions reduction" that must be reflected in the state plan's standards of performance.

C. Section 111(d) Coverage and the 1990 "Drafting Error"

It is clear that the original intention in 1970 was that §111(d) would be a gap-filler. Up until 1990, it was also clear that the gap to be filled was emissions of non-HAP, non-criteria pollutants by existing sources that would be subject to NSPS if new. Post-1990, §111(d) still appears to be a gap-filler, but because of the dueling amendments to §111(d), there is confusion as to what gap should be filled (and even arguments that the 1990 Amendment was intended to create a gap rather than fill one).[48] There are at least four potential interpretations.

Interpretation 1: Senate Policy Only

The first interpretation is that §111(d) still applies to the 1970 gap: non-criteria, non-HAP pollutants from existing sources that would be subject to NSPS if they were new sources. Under this interpretation, the House amendment was effectively included as a mistake and only the Senate amendment would apply. However, there is little evidence, either from the text or the legislative history, to lend support for this position. Perhaps, the strongest argument for the theory is the idea that Congress would not have intended such a significant change to the scope of §111(d) without clear indication.[49] However, as we explain below, there are plausible contextual arguments that rebut the position that the inclusion of the House amendment was a simple mistake.

Interpretation 2: House Policy Only

A second interpretation is that Congress affirmatively intended to change the scope of §111(d) by making it apply only to source categories not already regulated by §112. This theory views the House amendment as controlling, reads it to amend §111(d) to apply only to non-criteria pollutants emitted from source categories not regulated under §112, and views the inclusion of the Senate amendment as the drafting error. Advocates of this theory primarily point to the headings used in the 1990 CAA Amendments.[50] The House amendment is included with a handful of other small but substantive changes in §108 of the 1990 CAA Amendments, a section given the heading "Miscellaneous Provisions."[51] In contrast, the Senate amendment is in §302 of the 1990 CAA Amendments in a section given the heading "Conforming Amendments."[52] This interpretation relies on the idea that substantive changes should take precedence over conforming "ministerial" changes or that amendments under the section heading "Miscellaneous" somehow trump those under "Conforming."[53] The argument is unpersuasive as it assumes, without justification, that in making the "conforming amendment" the Senate did not affirmatively intend to retain the pre-1990 gap-filling nature of §111(d).[54]

Interpretation 2 also appears to be consistent with EPA's initial interpretation of the drafting error. In a 1995 background document for its municipal landfill emissions rule,[55] EPA acknowledged the dueling amendments to §111(d),[56] treated the inclusion of the Senate amendment as an error, and regarded the House amendment as controlling.[57] EPA pointed out that §112 itself was amended to regulate HAPs emitted from designated source categories and argued that

47. CAA §111(a)(1), 42 U.S.C. §7411(a)(1).
48. On the same day that EPA published the EGU Emission Guidelines in the *Federal Register*, Murray Energy Corp. (Murray Energy) filed a challenge to the proposed rule in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit claiming that EPA had violated its discretionary authority by proposing to regulate EGUs under §111(d) because they are already a category subject to regulation under §112. *See* Murray Energy Pet., *supra* note 40. Murray's primary argument relies on the House amendment and argues that Congress affirmatively intended to "prohibit double regulation" of existing sources between §112 and §111(d). *Id.* at 8-9. The court ordered EPA to file a response to the petition. Order, In re Murray Energy Corp., No. 14-1112 (D.C. Cir. Sept. 18, 2014). EPA did so on November 3, 2014, Response to Pet., In re Murray Energy Corp., No. 14-1112 (D.C. Cir. Nov. 3, 2014), arguing, among other things, that the court does not have jurisdiction to hear Murray Energy's challenge, *id.* at 7-18, that Murray Energy does not have standing to challenge the proposed rule at this time, *id.* at 19-20, and that on the merits, EPA should not be prohibited from proposing the CPP. *Id.* at 21-30 (arguing, consistent with the interpretations outlined in the Appendix to this Article, that the language of the House amendment is not clear). The court has not made a ruling in this case.
49. *See, e.g.*, Br. of Envtl. Pet'rs at 23, New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008) ("Neither the House nor the Senate amendment changed this status quo. . . . Both amendments were plainly for housekeeping purposes.").
50. Br. of the States of West Virginia, Alabama, Alaska, Kentucky, Nebraska, Ohio, Oklahoma, South Carolina, and Wyoming as *Amici Curiae* in Support of the Petitioner, In re Murray Energy Corp., No. 14-1112 (D.C. Cir. June 25, 2014) [hereinafter State Amicus Br.].
51. 1990 CAA Amendments, Pub. L. No. 101-549, §108, 104 Stat. 2399, 2465.
52. *Id.* §302, 104 Stat. at 2574.
53. State Amicus Br., *supra* note 50, at 9 ("When this conforming amendment is applied after *all* the substantive amendments, as is required by basic legislative drafting rules, it is no longer necessary.").
54. There is, in fact, no recognized tool of statutory construction that conforming amendments should take precedence over or be applied after substantive amendments. The case that State Amici cite for that proposition holds the opposite, stating that even an apparent scriveners error involving a conforming amendment "gives us no reason to depart from" the "statutory language and probative legislative history." Am. Petroleum Inst. v. SEC, 714 F.3d 1329, 1337, 43 ELR 20146 (D.C. Cir. 2013). Moreover, while section headings can be used as interpretive tools, "headings and notes are not binding, may not be used to create an ambiguity, and do not control an act's meaning by injecting a legislative intent or purpose not otherwise expressed in the law's body." 2A Norman J. Singer, Sutherland on Statutes and Statutory Construction §47:14 (7th ed. 2014); *see also* Bhd. of R.R. Trainmen v. Balt. & O.R. Co., 331 U.S. 519, 528-29 (1947) ("[T]he heading of a section cannot limit the plain meaning of the text.").
55. *See* U.S. EPA, Air Emissions From Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines (Pub. No. EPA-453/R-94-021) (Dec. 1995) [hereinafter MSWL BID].
56. *Id.* at 1-5.
57. *Id.* ("The EPA also believes that section 108(g) is the correct amendment. . . .").

§111(d) should be consistent with this change.[58] It discounted the Senate provision by pointing out that it is a "simple substitution of one subsection citation for another, without consideration of other amendments of the section in which it resides, section 112."[59]

The Municipal Solid Waste Landfills (MSWL) BID in which EPA made this interpretation functioned as the Agency's response to comments and main technical support document to the 1996 MSWL Rule.[60] However, EPA's interpretation was not itself subject to notice-and-comment rulemaking and was not necessary to the regulation of municipal solid waste landfills, which at the time were not in a source category regulated by §112. It is therefore not clear what weight this interpretation has as Agency precedent. And, of course, EPA is free to change its interpretation (so long as it properly justifies that change),[61] which in fact it has done in the Clean Air Mercury Rule (CAMR) and CPP rules. (See below.)

A more substantive argument for the second interpretation is that changes to §112 had reduced the universe of non-HAP, non-criteria pollutants to close to zero; thus, the original 1970 gap no longer needed to be filled. Before 1990, EPA retained significant discretion to include or not include pollutants on the list that had previously been at §112(b)(1)(A).[62] However, primarily because EPA had failed to use its discretion, the 1990 Amendments reduced EPA's discretion and included a long statutory list of HAPs.[63] It also directed EPA to administer the program on a source category-by-source category basis.[64] Since Congress had effectively listed the most significant known HAPs in 1990, there may have been less concern that there were significant pollutants left out that required use of §111(d).

Nonetheless, Congress deleted a number of known pollutants from the HAP list in the course of consideration of the 1990 Amendments,[65] and it also gave EPA the authority to add or delete pollutants from the HAP list.[66] There remained a possibility that unlisted non-criteria pollutants (such as CO_2) or pollutants that Congress or EPA removed from the HAP list would be completely exempt from regulation without a pollutant-focused gap-filling section such as §111(d) as it had existed since 1970.[67]

Moreover, the reading of the House amendment discussed above (non-criteria pollutants from non-§112 sources) is not the only reading of that amendment. In the Appendix to this Article, we point out how semantic and syntactic ambiguities in §111(d)(1)(A)(i), as amended by the House, create at least five additional textual readings of §111(d), four of which, if taken literally, would permit regulation of CO_2 emissions from existing EGUs under that section. EPA and the courts, before they address the dueling House and Senate amendments, will have to sort out (or at least acknowledge) the plethora of different readings of the House amendment. Even if the Senate amendment was included in the conference substitute by mistake, as this interpretation posits, these other readings of the House amendment would permit regulation of existing EGU emissions of CO_2.

Interpretation 3: Combine House and Senate—Narrow Coverage

A third interpretation could be that Congress intended §111(d) to cover only non-criteria, non-HAP pollutants emitted from source categories not covered by §112, the narrowest possible outcome. That is, by including both amendments, Congress should be assumed to have intended that both exclusions to §111(d) be given effect, and that they should operate independently. The basis for this theory is that since each amendment functions as an independent limitation on the scope of §111(d), they should not, together, be less limiting than either individually. Advocates for this theory have claimed that Congress' purpose was to preclude "duplicative or overlapping regulation" of certain source categories.[68] In effect, this interpretation presumes Congress intended to create a large gap in the scope of the CAA, so that neither HAP emissions from non-§112 source categories nor non-HAP emissions from §112 source categories were covered. However, there is no structural or legislative history-based evidence that Congress in fact intended the 1990 CAA revisions to §111(d) to create a gap in the scope of existing source emissions that may be regulated under the Act. The CAA is full of instances of multiple regulatory requirements affecting

58. *Id.* ("[T]he Clean Air Act Amendments revised section 112 to include regulation of source categories in addition to regulation of listed hazardous air pollutants, and section 108(g) thus conforms to other amendments of section 112.").
59. *Id.*
60. *Supra* note 32, 61 Fed. Reg. 9905.
61. FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).
62. CAA §112(b)(1)(A), 42 U.S.C. §1857c-7(b)(1)(A) (1970).
63. *See* CAA Hearing, *supra* note 42, at 2.
64. CAA §112(c), 42 U.S.C. §1857c-7(c) (1970).
65. *Compare* H.R. 4, 101st Cong., *as reprinted in* 2 1990 Leg. Hist. at 4041-46, *with* CAA §112(b)(1), 42 U.S.C. §1857c-7(b)(1) (1970) (including 15 known pollutants as listed HAPs in the bill that was the precursor to §112(b) as enacted, including aldrin, ammonia, benzo(a)pyrene, butyl benzyl phthalate, dicofol, dieldrin, hydrogen sulfide, 2-methoxy ethanol, nitric acid, nitrogen, osmium tetroxide, terophthalic acid, and thallium). In fact, some pollutants that the Senate had intended the precursor to §111(d)—§114—to cover (e.g., copper, vanadium, barium) continued to be unlisted in §112 even after the 1990 Amendments. *Compare* S. Rep. No. 91-1196, at 18 (1970), *with* CAA §112(b)(1), 42 U.S.C. §1857c-7(b)(1) (1970).
66. CAA §112(b)(2), 42 U.S.C. §7412(b)(1) (2012).
67. Advocates of this theory also point to the approach of Law Revision Counsel, the congressional office responsible for creation of the *United States Code*. The *United States Code* contains the House amendment because the Senate amendment to modify the cross-reference to §112(b)(1)(A) could not be made after the House amendment had already removed the reference to that section. The mere fact that only the House amendment is included in the *United States Code* is not dispositive, because when the *United States Code* conflicts with the Statutes at Large, the Statutes at Large should prevail. *See* United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 (1993). Moreover, the Law Revision Counsel's methodology is inconsistent with the principle of legislative drafting that all provisions of an Act are deemed to be enacted at the same time. *See* Antonin Scalia & Bryan A Garner, Reading Law: The Interpretation of Legal Texts 189 (2012).
68. State Amicus Br., *supra* note 50, at 15.

the same source, including existing sources,[69] and there is no evidence that Congress was particularly concerned with the potential in this instance.

Interpretation 4: Combine House and Senate—Broad Coverage

A fourth interpretation is that the Senate amendment was intended to fill the original 1970 gap and the House amendment was intended to fill a potential new gap created by the 1990 CAA changes to §112, and specifically to deal with the inclusion of §112(n). Since they were both included in the 1990 CAA Amendments, together they should be interpreted to amend the scope of §111(d) to fill both gaps.

This explanation leaves open the question of why the House proposal would have opened a non-criteria, non-HAP pollutant gap in §111(d) while attempting to close the newly created §112(n) gap. One answer is that, as we discuss in the Appendix, it was not clear from the House bill what the intended scope of §111(d) was to be. The inclusion of both the House and Senate amendments in the final 1990 CAA can be read to mean that, in fact, when Congress closed the §112(n) gap, it did not intend to reopen the original non-criteria, non-HAP gap that was closed in 1970. That is, the very inclusion of the Senate amendment is evidence that Congress did not intend to abandon the pre-1990 CAA gap-filling function of §111(d).

Interpretation 4 thus attempts to give effect to the respective intentions of each house of Congress and to reconcile the conflicting provisions of the enacted statute. The Senate could be presumed to have intended to maintain the purpose of §111(d) as a gap-filling measure for non-HAP, non-criteria pollutants. The purpose of the House amendment, while uncertain, seems most likely to have been an attempt to ensure that §111(d) could be used as a backstop measure should emissions of HAPs from a source category such as EGUs not be unregulable if EPA determined §112 was not "appropriate and necessary," but not necessarily to open a new gap in §111(d).

And, in fact, this is the interpretation the George W. Bush Administration's EPA tried to effectuate under CAMR.[70] After reversing the Clinton Administration's "appropriate and necessary" determination for EGUs,[71] the Bush Administration's EPA interpreted the two amendments together to exclude only criteria pollutants and HAP pollutants emitted from source categories already regulated under §112.[72]

> Where a source category is being regulated under section 112, a section 111(d) standard of performance cannot be established to address any HAP listed under section 112(b) that may be emitted from that particular source category. Thus, if EPA is regulating source category X under section 112, section 111(d) could not be used to regulate any HAP emissions from that particular source category.[73]

The U.S. Court of Appeals for the District of Columbia (D.C.) Circuit vacated CAMR's regulations for new and existing EGUs without ruling on EPA's interpretation of the conflicting amendments (holding that EPA had not properly followed §112's procedure for removing EGUs from the list of categories to be regulated under §112).[74] In the proposed CPP, EPA has again embraced this interpretation.[75] In fact, EPA has cited directly to its interpretive analysis in the CAMR rulemaking as its primary justification for its authority to promulgate a CO_2 emission guideline for EGUs.[76] As articulated in the CPP:

> [T]his approach reasonably interprets the Section 112 Exclusion to give some effect to both amendments. The EPA emphasized that it is not reasonable to give full effect to the House language because a literal reading of that language would mean that the EPA could not regulate any air pollutant from a source category regulated under section 112, a result that would be inconsistent with (i) Congress' desire in the 1990 CAA Amendments to require the EPA to regulate more substances, and not to eliminate the EPA's ability to regulate large categories of air pollutants, and (ii) the fact that the EPA has historically regulated non-hazardous air pollutants under section 111(d), even where those air pollutants were emitted from a source category actually regulated under section 112.[77]

D. Application of the Chevron Doctrine

Ultimately, the courts will be faced with the question of how to resolve the 1990 drafting error, as well as the underlying ambiguity in the House amendment. While statutory interpretation is a familiar function for courts,

69. For example, *existing* EGUs are regulated under state implementation plans, including under the cross-state air pollution rule under the good neighbor provisions of §110; under Title IV of the sulfur dioxide trading program; under the MATS Rule under §112; under the regional haze program under §169A; and under the nonattainment provisions.
70. *See* Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the Section 112(c) List, Final Rule, 70 Fed. Reg. 15994, 16029-32 (Mar. 29, 2005) [hereinafter EGU Delisting Rule].
71. *Id.* at 1600-08.
72. *See* CAMR, *supra* note 33, 70 Fed. Reg. 28606.
73. EGU Delisting Rule, *supra* note 70, 70 Fed. Reg. at 16031-32.
74. *See* New Jersey v. EPA, 517 F.3d 574, 583 (D.C. Cir. 2008) (vacating "CAMR's regulations for both new and existing EGUs"), *cert. denied sub nom.* Util. Air Reg. Grp. v. New Jersey, 555 U.S. 1169 (2009). Note that the regulations defining "designated pollutant" in 40 C.F.R. §60.21(a) were *not* regulations for existing *EGUs* but instead regulations of the emissions guidelines process generally. It is, therefore, not clear that the interpretation of §111(d) was vacated. However, in 2012, in its rule establishing emissions standards for HAPs emitted from EGUs under §112, the Obama Administration removed the interpretation of the two amendments from the *Code of Federal Regulations*. *See* MATS Rule, *supra* note 41, 77 Fed. Reg. at 9447.
75. *See* U.S. EPA, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units 22-27 (2014), http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf.
76. *Id.* at 26-27.
77. *Id.*

this drafting error appears to be a special case. Unlike a more conventional "scrivener's error,"[78] there is no clear, but obviously wrong text. First, there is no clear, single text of §111(d) at all and no obvious way of applying the two amendments that is consistent with both. Perhaps more problematically, there is no obvious congressional purpose undergirding the dueling amendments.[79] There are no floor statements or committee reports that directly answer the question of what Congress intended when amending §111(d) in the 1990 CAA and a number of the theories outlined above appear at least reasonable. One approach would be to regard this as a simple *Chevron* issue.[80] Under that doctrine, when Congress has directly spoken to the question at issue, determined using the traditional tools of statutory interpretation,[81] the Agency is required to implement congressional intent. If Congress' intent is not clear, any permissible (that is, reasonable) interpretation of the statute by the Agency will be given deference by the courts. Here, Congress could not have been more unclear—it enacted two dueling amendments to the same cross-reference, one of which is itself ambiguous.

But before marching through the familiar *Chevron* analysis, another question must first be answered: Does *Chevron* apply at all in this circumstance? The *Chevron* doctrine, typically discussed as a "two step" analysis,[82] has, since 2001, become effectively three-stepped. Before even determining whether Congress has spoken directly to the question at issue in the statute, a court must first determine if Congress intended to delegate interpretive power to the Agency at all.[83] Referred to as *Chevron* "step zero,"[84] this inquiry looks at whether Congress has delegated rulemaking authority to the Agency and the Agency has used appropriately accountable procedures such as notice-and-comment rulemaking.[85]

This past term, in the case *Scialabba v. Cuella de Osorio*, this question was addressed by the U.S. Supreme Court in the context of a similar but not identical situation to that at issue here.[86] *Scialabba* involved the Board of Immigration Appeals (BIA) interpretation of a "Janus-faced"[87] statute, rather than two conflicting amendments to the same section of a statute. A majority of the nine Justices appear to view *Chevron* as applicable in the circumstance of that case. Three members of the majority[88] held that:

> internal tension makes possible alternative reasonable constructions, bringing into correspondence in one way or another the section's different parts. And when that is so, *Chevron* dictates that a court defer to the agency's choice—here, to the Board's expert judgment about which interpretation fits best with, and makes most sense of, the statutory scheme.[89]

The plurality ultimately held that BIA's interpretation, prioritizing one of the conflicting parts of the conflicting provision, was a "textually reasonable construction consonant with its view of the purposes and policies underlying immigration law."[90] In addition, two or three of the dissenters[91] appear to believe that *Chevron* applies to a case where there is a direct conflict,[92] but that "BIA's construction was impermissible."[93]

However, three members of the Court, two concurring in the judgment[94] and one dissenting,[95] took the position that in cases of direct conflict, *Chevron* does not apply at all. In Chief Justice John Roberts' words, writing for himself and Justice Antonin Scalia, "[d]irect conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice. *Chevron* is not a license for an agency to repair a statute that does not make sense."[96] It is not clear how Chief Justice Roberts would

78. *See* Michael S. Fried, A Theory of Scrivener's Error, 52 Rutgers L. Rev. 589, 593 (2000) (defining scrivener's error as "a typographical mistake or other error of a clerical nature in the drafting of a document").
79. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) ("For the *sine qua non* of any 'scrivener's error' doctrine, it seems to me, is that the meaning genuinely intended but inadequately expressed must be absolutely clear; otherwise we might be rewriting the statute rather than correcting a technical mistake."); Appalachian Power Co. v. EPA, 249 F.3d 1032, 1041, 31 ELR 20635 (D.C. Cir. 2001) ("[F]or the EPA to avoid a literal interpretation at *Chevron* step one, it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.") (citing Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1089, 26 ELR 21477 (D.C. Cir. 1996)).
80. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 14 ELR 20507 (1984).
81. *Id.* at 843 n.9.
82. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005).
83. *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).
84. *See* Cass R. Sunstein, *Chevron* Step Zero, 92 Va. L. Rev. 187, 197 (2006).
85. *See* City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1885-86, 43 ELR 20112 (2013) (Beyer, J., dissenting). However, Justice Stephen Breyer has attempted to push the step zero inquiry into a case-by-case inquiry focusing on whether Congress intended to give the Agency power to decide the particular question at issue.
86. Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2203 (2014) (Kagan, J., plurality opinion); *id.* at 2219-20 (Sotomayor, Breyer, Thomas (partial) JJ., dissenting).
87. *Id.* at 2203. ("Its first half looks in one direction, . . . the section's second half looks another way[.] . . . The two faces of the statute do not easily cohere with each other: Read either most naturally, and the other appears to mean not what it says.").
88. Justice Elena Kagan drafted a plurality opinion joined by Justices Anthony Kennedy and Ruth Bader Ginsberg. *Id.* at 2196-213. Chief Justice John Roberts drafted a concurring opinion for himself and Justice Antonin Scalia that agreed in outcome but specifically disagreed as to this point. *Id.* at 2214-16 (Roberts, C.J., concurring).
89. *Id.* at 2203.
90. *Id.* at 2213.
91. Justice Sonia Sotomayor drafted a dissenting opinion joined by Justice Breyer and (perhaps) Justice Clarence Thomas. *Id.* at 2216 (Sotomayor, J., dissenting). Justice Thomas did not join in footnote 3 of the dissenting opinion, relating this case to a prior one, *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U. S. 644 (2007), in which the Court found the conflict between two separate statutes sufficient to create ambiguity and allow *Chevron* deference. *Scialabba*, 134 S. Ct. at 2220-21. The full implication of Justice Thomas' failure to join in this footnote is not clear.
92. To be sure, the dissent does not directly state this. However, the opinion engages in significant analysis under *Chevron*. *Scialabba*, 134 S. Ct. 2191. Moreover, Justice Samuel Alito wrote separately to make the point that a direct conflict is not a situation for which *Chevron* deference is appropriate, suggesting that Justice Sotomayor's dissent did accept that premise. *Scialabba*, 134 S. Ct. at 2216 (Alito, J. dissenting).
93. *Id.* at 2221.
94. *Id.* at 2214-16 (Roberts, C.J., concurring).
95. *Id.* at 2216 (Alito, J. dissenting).
96. *Id.* at 2214 (citation omitted) (Roberts, C.J., concurring).

resolve such a direct conflict. In *Scialabba*, the Chief Justice offered a reading that obviated his need to do so, finding that there was no conflict at all and that the BIA's reading was the only permissible one.[97] Section 111(d)'s ambiguities could offer a similar out. Although the two amendments change the same existing language in different ways, the ambiguities in the House amendment that we point out in the Appendix might permit it to be reconciled with the policy of the Senate amendment.

Absent such a reconciliation, it is unclear how Justices Roberts, Scalia, and Alito would ultimately resolve a direct conflict. Perhaps, resolution of directly conflicting amendments is ultimately a question for the courts, not the Agency, and that the courts will muddle through, doing their best to divine the intent of Congress, using all of their tools of statutory construction (such as the rarely used but occasionally discussed option to pick the last provision in arrangement[98]) without any particular deference to the Agency. Another option would be to find the conflicting attempts to modify §111(d) void,[99] returning §111(d) to the pre-1990 text,[100] or conceivably rendering §111(d) void in its entirety.

Assuming the courts ultimately apply the *Chevron* analysis to §111(d) (either because they determine *Chevron* applies to "direct conflicts" or because they find no "direct conflict"), the courts would determine whether, using the "traditional tools of statutory construction," Congress has spoken directly to the question at issue, in which case, EPA would be constrained to an interpretation consistent with the Court's construction.

More likely, courts may find that, as has been the initial reaction of many lawyers, "this is the kind of case *Chevron* was built for"[101]—it is perfectly clear that Congress' intent is perfectly unclear. If the courts agree, this issue would be resolved at *Chevron* step 2. The *Scialabba* opinion is again instructive as to the extent of discretion the courts may give to EPA at *Chevron* step 2. In the plurality opinion, Justice Elena Kagan held that the BIA's interpretation—effectively picking one of the two conflicting positions, based on statutory structure and administrability—was an acceptable reading of the statute.[102] Justice Sonia Sotomayor dissented, stating that even if there is sufficient ambiguity for some BIA discretion,[103] what was *not* a reasonable interpretation was picking one provision at the exclusion of the other.[104] The Agency should have, instead, interpreted the seemingly conflicting statute to give effect to both provisions.[105] EPA's proposed interpretation—giving effect to both amendments with a construction that is not wholly consistent with the text of either one read alone—appears consistent with at least one reasonable interpretation of congressional intent. However, whether it is upheld as reasonable will depend largely on which of the *Scialabba* positions the courts find most apply to this case.

Thus, looking at this history, one can find some guidance as to what Congress might have intended on "best system" and on EPA's supervisory authority over state plans. But the one area in which we are likely to find less useful guidance is the 1990 drafting error. The question of the scope of §111(d) will ultimately have to be resolved by the D.C. Circuit or, more probably, by the Supreme Court.

Appendix: Syntactic and Semantic Ambiguity in 1990 House Amendment to CAA §111(d)(1)(A)(i)

Legislative draftsmen (and women) recognize several kinds of ambiguity in a statute. The first is semantic ambiguity—words and phrases have different or unclear meanings in common usage or in the context of a statute.[106] In particular, they point to ambiguities arising in the use of "and" and "or." Specifically, does "or" mean "and/or," or does it mean "or but not and"?[107] The second is syntactic ambigu-

97. *Id.* ("I see no conflict, or even 'internal tension'"). Similarly, Justice Alito wrote separately to agree with Justice Roberts that direct conflict does not justify *Chevron* deference, but came to the opposite conclusion as to what the statute clearly said. *Scialabba*, 134 S. Ct. at 2216 (Alito, J. dissenting).

98. *See* Lodge 1959, Am. Fed'n of Gov't Employees v. Webb, 580 F.2d 496, 510 n.31 (1978) (citing 81 cases referencing the rule), *cert. denied sub nom.* Lodge 1959, Am. Fed'n of Gov't Employees v. Frosch, 99 S. Ct. 311 (1978). State court citations of this rule date almost exclusively pre-1950. *See, e.g.*, State ex rel. Boone v. Tullock, 72 Mont. 482, 234 P. 277, 278 (1925) ("It is the rule, of course, that where two provisions of an act of the Legislature are conflicting and cannot be harmonized, the last in order of arrangement controls.") (citation omitted)). Note, however, that almost all cases that cite this provision claim that, in fact, there is no unresolvable conflict. *See, e.g.*, In re Adoption of Chaney, 128 Ind. App. 603, 609-10, 150 N.E.2d 754, 758 (1958) ("There might be merit in this contention if the two quoted provisions of the statute were in conflict but we see none."). *But see* United States v. Moore, 567 F.3d 187, 191 (6th Cir. 2009) ("We find that the last in order of arrangement—§3559(e)(1)—controls, there is no inconsistency and no ambiguity, and the rule of lenity does not come into operation.") (citation omitted)), *cert. denied*, 130 S. Ct. 282 (2009).

99. *See* Scalia & Garner, *supra* note 67, at 134-39 (describing the unintelligibility canon: "When its command is garbled beyond comprehension, there is no command; and in our system of separated powers, courts have no power to devise one." *Id.* at 138.); *see also* Earl T. Crawford, The Construction of Statutes §166 (1940); Reed Dickerson, The Interpretation and Application of Statutes 228 (1975). *But see* In re Interrogatories Propounded by Senate, etc., 536 P.2d 308, 315 (Colo. 1975) (discussing and rejecting relevant state case law indicating, in dicta, that if irreconcilable amendments are enacted on the same day, they should both be rejected as void, noting that while this rule has been regularly stated, it has not been often applied to void two amendments).

100. Section 111(d) would be limited to non-criteria pollutants and pollutants not included on the nonexistent list at §112(b)(1)(A). CO_2 seems to fit the bill.

101. *Scialabba*, 134 S. Ct. at 2213 (Kagan, J., referring to *Scialabba*).

102. *Id.* at 2213 (Kagan, J.).

103. *Id.* at 2227 (Sotomayor, J. dissenting).

104. *Id.* at 2220-21 (Sotomayor, J. dissenting) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (1999) indicating that, when possible, "courts 'must,'. . . 'interpret the statute "as a . . . coherent regulatory scheme"' rather than an internally inconsistent muddle" and outlining ways in which both provisions could be read together).

105. *Scialabba*, 134 S. Ct. at 2220. *See also* Citizens to Save Spencer Cnty. v. EPA, 600 F.2d 844, 9 ELR 20194 (D.C. Cir. 1979) (holding that in the face of a drafting error creating an irreconcilable conflict, a creative EPA interpretation was reasonable).

106. Reed Dickerson, Fundamentals of Legal Drafting §§6.1-6.12 (1965); Donald Hirsh, Drafting Federal Law §§5.5-5.9 (1980); Lawrence E. Filson & Sandra L. Strokoff, The Legislative Drafting Desk Manual §19.4 (2d ed. 2008).

107. Dickerson, *supra* note 106, §6.2, points out the semantic ambiguities in the use of "or," distinguishing between "inclusive" and exclusive" uses of the

ity, which arises from sentence structure and grammar.[108] The House amendment to §111(d)(1)(A)(i) of the CAA exhibits both syntactic and semantic ambiguities that render its interpretation much less straightforward than most commenters assume.[109] The interpretation of the House amendment as restricting the coverage of §111(d) to non-criteria pollutants emitted by sources that are not regulated by §112 is just one of several readings of the amendment. The text of this Article discusses the first of these, but close analysis reveals many more.

Under the relevant provisions of §111(d)(1), as modified by the House amendment, EPA prescribes rules under which each state submits a plan that (among other things):

> (A) establishes standards of performance for any existing source for any air pollutant for which air quality criteria have not been issued
>
> (i) or which is not included on a list published under section 108(a) or emitted from a source category which is regulated under section 112 but
>
> (ii) to which a standard of performance under this section would apply if such existing source were a new source.[110]

For purposes of this analysis, this statutory text can be simplified to direct states to submit plans that establish standards for any existing source for:

> any pollutant for which criteria have not been issued or which is not listed under §108 *or emitted by a §112 source.*

(For simplicity, we do not include discussion of the additional requirement that the pollutant be one to which a standard of performance would apply if the existing source were a new source.)

Breaking the emission standard requirement into its elements, it says that §111(d) directs states to set standards for any existing source for:

> any pollutant—
>
> ➢ for which criteria have not been issued or
>
> ➢ which is not—
>
> • listed under §108, or
>
> • emitted from a §112 source.

Because of the ambiguities in sentence structure and usages of "or," these elements yield a number of potential readings, outlined below.

Reading (1): Non-Criteria Pollutants From Non-§112 Sources Only

The most common reading of §111(d), as modified by the House amendment, is that all three elements are exclusions (that is, that the negation "not" applies to each) and the elements are conjunctive. To conform §111(d) to the interpretation most commenters give it—that non-criteria pollutants emitted from §112 sources *cannot* be regulated under §111(d)—the relevant provision would look much different if carefully drafted:

> any pollutant—
>
> ➢ for which criteria have not been issued *and*
>
> ➢ which is—
>
> • *not* listed under §108, *and*
>
> • *not* emitted from a §112 source.

Because "or" may sometimes be read to mean "and/or," this could be regarded as a reasonable interpretation of the House amendment to §111(d)(1)(A)(i). CO_2 emitted by EGUs could not be regulated under this interpretation because, while CO_2 is a pollutant for which criteria have not been issued, and it is a pollutant which is not listed under §108, it is a pollutant which *is* emitted from the §112 source category at issue—EGUs. However, even then, it is not clear that reading the "ors" of §111(d) to mean "and/or" would yield this interpretation (since it requires reading "or" as "and" not "and/or"). Moreover, there are many more interpretations.

Reading (2): Any Pollutant Other Than a Criteria Pollutant From a §112 Source

If both "ors" were read as truly disjunctive (i.e., "or" but not "and/or"), §111(d)(1)(A) would be read to mean states set standards for any existing source for—

> any pollutant—
>
> ➢ for which criteria have not been issued, or
>
> ➢ which is *either*—
>
> • not listed under §108, or
>
> • *not* emitted from a §112 source.

That is, under this interpretation, meeting the criteria-have-not-issued element is sufficient for §111(d) to apply to an air pollutant, regardless of whether the pollutant is on the §108 list or is emitted for a §112 source. Similarly, meeting the not-listed-under-§108 element or meeting the not-emitted-from-a-§112 source element would be sufficient as well. Under this reading, the *only* pollutants to which §111(d) would not apply would be criteria pollutants emitted from a §112 source.

---

word. Inclusive is "A or B or both"; exclusive is "A or B but not both." *See also* Hirsh, *supra* note 106, §5.9; Filson & Strokoff, *supra* note 106, §21.10.

108. Dickerson, *supra* note 106, §§6.4-6.12.

109. In its recent brief responding to Murray Energy Corp.'s Petition for an Extraordinary Writ, the Environmental Protection Agency (EPA) identified similar ambiguities in the meaning of the House amendment. *See* Response to Petition, In re Murray Energy Corp., No. 14-1112 (D.C. Cir. Nov. 3, 2014).

110. CAA §111(d)(1), 42 U.S.C. §7411(d)(1), *as modified by* CAA Amendments of 1990 §§108(g), 302(a), 104 Stat. 2465, 2574.

Because CO_2 is neither a pollutant for which criteria have been issued nor a pollutant on the §108 list, EPA would have authority to direct states to issue standards of performance for CO_2 from EGUs.

Reading (3): Any Non-Criteria Pollutant, Alternative A

Alternatively, the first "or" could be read as "and/or" but the second "or" could be read to be truly disjunctive. Under this reading, states set standards for any existing source for:

any pollutant—

- for which criteria have not been issued *and*
- which is *either*—
  - not listed under §108, or
  - *not* emitted from a §112 source.

Under this reading, for EPA to have authority to direct a state to issue standards of performance, the pollutant could not be one for which criteria have been issued. It must then also meet at least one of the following two elements: not listed under §108 or not emitted from a §112 source. However, because all pollutants for which criteria pollutants have been issued are included on the list of pollutants in §108, the §112 element is unnecessary—a pollutant need only satisfy the criteria-have-not-issued element and one of the remaining two, which will always occur.

Because CO_2 is not a pollutant for which criteria have been issued and is not on the §108 list, under this reading, EPA would have authority to regulate CO_2 from EGUs.

Reading (4): Any Non-Criteria Pollutant, Alternative B

Here, the first "or" could be read to have its common meaning of joining a disjunctive list. However, because the negation "not" modifies the second two elements, based on De Morgan's theorem,[111] the second two elements could be read to be the conjunction of two negations. That is, under this reading, states set standards for any existing source for:

any pollutant—

- or which criteria have not issued, or
- which is—
  - *not* listed under §108, *and*
  - *not* emitted from a §112 source.

This reading, which could be considered the most accurate textual reading based on formal logic, would also cover all non-criteria air pollutants, as the criteria-have-not-issued element is sufficient. It would also cover criteria air pollutants not on a §108 list that are not emitted from a §112 source. However, because EPA cannot designate a pollutant as a criteria pollutant unless it is included on the §108 list, this condition is not possible. Therefore, under this reading, a pollutant is either not a criteria pollutant and EPA could require states to set standards for it, or it is a criteria pollutant and §111(d) would be inapplicable. Because CO_2 is a non-criteria pollutant, EPA would have authority to require states to set standards under this reading.

Reading (5): Coverage of All §112 Source Pollutants

Another syntactical ambiguity under the House amendment arises from whether "emitted from a §112 source" modifies "which is" or "which is not." If the latter, §111(d), as amended by the House amendment, would be read such that states set standards for any existing source for:

any pollutant—

- for which criteria have not been issued, *or*
- which is—
  - *not* listed under §108, *or*
  - emitted from a §112 source.

This interpretation makes the emitted-from-a-§112 source element permissive rather than restrictive and sufficient to regulate the pollutant under §111(d). That is, it would apply §111(d) to any pollutant that was emitted from any §112 source. Because CO_2 from EGUs is an air pollutant emitted from a §112-regulated source, this reading would permit EPA's proposed rule. However, this reading would go against the syntactic canon of construction that a prepositive modifier to a parallel series applies to the whole series,[112] rather than to the nearest referent.[113] Moreover, stepping back from textual analysis, this reading is improbable since it would flip the 1970 policy so that HAPs from sources required to be regulated under §112 would be explicitly covered (rather than specifically excluded) under §111(d).

Reading (6): Broad Exclusion of §112 Source Pollutants

Finally, presuming the §112 source element is, in fact, an exclusion, there remains ambiguity as to the scope of that exclusion. Specifically, it is not clear whether it excludes pollutants that are emitted from *any* source category regulated under §112 or only those that are emitted from the source category at issue in the §111(d) regulation if *that* source category is regulated under §112. Under the first interpretation, the House amendment would direct states to set standards for any existing source for:

any pollutant—

- for which criteria have not been issued, *and*

111. *See* Scalia & Garner, *supra* note 67, at 119-21.

112. *Id.* at 147-51.

113. *Id.* at 152-53.

- which is—
  - not listed under §108, and
  - *not* emitted from a source *in any §112 category*.

This reading would effectively bar the use of §111(d) completely, as virtually all pollutants are emitted from at least one of the many source categories regulated under §112, even if that source category is not the source category to be regulated under §111(d). This reading can be avoided by distinguishing the use of the phrase "emitted from *a* source category which is regulated under §112" from the use of the phrases "*any* source category" and "*any* pollutant" earlier in the section.[114] Beyond the text, there is no legislative history indicating that the House amendment was intended to effectively void §111(d).

In sum, although many commenters read §111(d), as modified by the House amendment, to unambiguously prohibit the use of §111(d) to regulate CO_2 from EGUs, it is clear that there is significant ambiguity in how to interpret the amendment. At least four potential readings would leave open the possibility of EPA regulation of CO_2 emissions from existing EGUs. While the limited indicia of legislative history may suggest that Reading (1) is closest to what the House intended, from a strictly textual standpoint, Reading (4) may be the most consistent with the formal tools of statutory interpretation.

114. In fact, in its regulation promulgating the now-vacated CAMR, EPA adopted this distinction. *See* EGU Delisting Rule, *supra* note 70, 70 Fed. Reg. at 16031-32; CAMR, *supra* note 33, 70 Fed. Reg. at 28649.