

LESSONS FROM MERCURY: ENSURING LEGAL CERTAINTY FOR NEW GHG PERFORMANCE STANDARDS FOR EXISTING FOSSIL FUEL PLANTS

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ABSTRACT

In 2014, the United States Environmental Protection Agency (EPA) is expected to issue performance standards for existing fossil-fuel power plants pursuant to Section 111(d) of the Clean Air Act. The discretion afforded by this provision creates a tremendous opportunity for EPA as well as the energy and environmental communities. At long last, it may be possible for EPA to implement market-based incentives that achieve the goals of reducing greenhouse-gas emissions while providing regulated entities with the legal flexibility and certainty they need to make capital investments in a renewable-energy future. But key legal questions remain about EPA's authority to bring about this brave new world. In particular, it is unsettled whether EPA has authority even to invoke 111(d) to regulate power plants, and whether some of the more ambitious proposals are consistent with statutory and regulatory definitions of "standards of performance." Through the lens of EPA's earlier and ultimately unsuccessful defense of its existing-source rules for mercury emissions, this paper examines these two pressing questions, and in the filings in that case, finds reasons for optimism that these questions will not stand in the way of a transition to rational regulation of GHG emissions from existing power plants.

INTRODUCTION

Power plants account for about 40% of the carbon dioxide emissions in the United States and about one of third of its greenhouse gas (GHG) emissions.¹ In 2010, the United States Environmental Protection Agency (EPA) announced it would use its authority under Section 111 of the Clean Air Act to regulate GHG emissions from new and existing power plants.² This section of the Act authorizes EPA to establish "standards of performance" for new stationary sources and to prescribe regulations under which the states will establish standards of performance for existing sources.³ EPA originally proposed its standards for new power plants in April 2012, issued new revised standards in September 2013, and it is expected to propose regulations for the adoption of state standards for existing power plants in the coming months.⁴ President Obama has ordered EPA to "work expeditiously" to complete these regulations.⁵

Section 111 holds out particular promise for the regulation of GHGs from existing sources because it does not confine EPA to any one particular mode of emission-regulation. A "standard of performance" is defined only as a "[1] a standard for emissions of air pollutants which [(2)] reflects the degree of emission limitation achievable through the application of best system of emission reduction which . . . has been adequately demonstrated."⁶ This definition gives EPA discretion to determine the form that a "standard of performance" might take. For example, in its rule for new power plants, EPA proposed its standards of performance for coal-fired and natural-gas-fired units as maximum emissions rates: either 1,000 or 1,100 pounds of carbon dioxide per megawatt hour, depending on the size of the unit.⁷ But the statutory text does not require that type of an

emissions cap, nor does it prohibit EPA or the states from promulgating a standard that includes many different types of measures within a single performance standard.

The flexibility inherent in the definition of standard of performance is critical for the effective regulation of existing sources because hard emissions caps, standing alone, are not a sensible way of regulating the aging power plant fleet. This is particularly the case for coal-burning plants. To meet a hard cap, the plant's only options are to substitute cleaner-burning natural gas for coal (where supply permits) or to bury its plants' GHG emissions underground through a sequestration process. For many facilities, though, the remaining useful life of the plant does not justify these types of investments. Thus the only cost-effective option may be to retire the plant prematurely—which could lead to higher consumer electricity prices. The hope, then—and this is a hope shared by both environmentalists and the industry—is that, through the discretion afforded in Section 111, EPA will be able to devise a system of emissions reductions that gives utilities a smooth “glide path” as they transition to cleaner and renewable sources of energy.

What Section 111 does not have to offer at the moment, however, is legal certainty. Although its provisions are broadly worded, there are no court decisions interpreting Section 111's provisions as they relate to existing sources. One reason for the lack of precedent is that EPA has just not issued that many existing-source regulations. And in one of its most recent attempts to do so—with respect to mercury emissions from coal-fired power plants—the standards were vacated by the federal court of appeals.⁸ In that decision, which we refer to as the “CAMR litigation” because it involved EPA's “Clean Air Mercury Rule,” the court held that mercury had to be regulated as a “hazardous air pollutant” under Section 112 of the Act instead of through performance standards under Section 111. The court did not examine the substance of the standards that EPA had promulgated and thus never determined whether those would have been consistent with the text of Section 111.

Because it highlights some areas of legal uncertainty about Section 111, the CAMR litigation is an important place to start for regulators and advocates crafting policy proposals for GHG emissions under Section 111. Although the court's opinion itself says very little about existing-source performance standards, the arguments in the case set the stage for the legal debates that might arise about existing-source regulation for GHGs. This paper addresses two of the questions that came up in the CAMR litigation that EPA may need to address when it promulgates regulations under Section 111. First, *may EPA use Section 111 to regulate GHGs from existing power plants even though they are sources that are already regulated under 112?* Second, *does Section 111 permit performance standards to be satisfied through the recognition of “beyond the fence line” emissions reductions, such as renewable offsets and demand response?* We believe the arguments in EPA's briefing provide a framework for answering “yes” to both questions. However, we think there is room to improve on these arguments and that EPA must endeavor to do so to ensure that its existing-source GHG standards can stand up to a potential court challenge.

DISCUSSION

We begin by reviewing the regulatory framework under Section 111 and, then, discuss EPA's ultimately unsuccessful attempt to use that Section to regulate mercury emissions. Next, we address the two legal questions about EPA's Section 111 authority that are raised in the briefing in that case and explain how EPA's arguments in defense of its regulation can be updated and modified to shore up its Section 111 authority to regulate GHGs from existing power plants.

Regulation of Existing Sources Under 111(d)

Section 111(d) of the Clean Air Act directs EPA to prescribe procedures under which the individual states establish and enforce performance standards for existing stationary sources. EPA has also established a basic framework for its 111(d) regulations through rulemaking. For purposes of assessing EPA's legal authority, it is important to understand which provisions come from the statute and which from the regulations.

Statutory Provisions

Section 111 of the Clean Air Act provides for the establishment of “standards of performance” for stationary sources. A “standard of performance” is a “standard for emission of air pollutants which reflects the degree of

emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] determines has been adequately demonstrated.”⁹ The statute does not further define any particular terms in this definition. Section 111 thus gives EPA discretion to determine what constitutes a “standard,” what constitutes the “best system of emission reduction,” what it means for that system to be “adequately demonstrated,” and what is required for a standard to performance to “reflect the degree” of emissions limits achievable under that system. In short, Congress left EPA a number of regulatory gaps to fill in the definition of a standard of performance.

Section 111 regulates in three phases. EPA’s first obligation is to identify categories of stationary sources that cause or contribute significantly to “air pollution which may reasonably be anticipated to endanger health or welfare.” EPA must then, for the *new sources* in each category, establish national standards of performance. These two steps are described in Section 111(b) of the Act.¹⁰

Next, EPA must prescribe regulations under which the states establish performance standards for *existing sources*. Specifically, Section 111(d) provides that EPA “shall prescribe regulations which shall establish a procedure . . . under which each State shall submit [to EPA] a plan which . . . establishes standards of performance for any existing source for any air pollutant . . . to which a standard of performance under this section would apply if such existing source were a new source.”¹¹ But, unlike 111(b), this subsection carves two categories of pollutants out from the performance-standard requirement: (1) so-called “criteria” pollutants, which are regulated through ambient air quality standards, and (2) air pollutants that are “emitted from a source category which is regulated under section [112,]” the section of the Clean Air Act that governs hazardous air pollutants (called “air toxics”).¹² The specific wording of this second carve-out is important, but for the moment it is necessary only to recognize that there are two exempted categories.

EPA’s Implementing Regulations for Section 111(d)

EPA promulgated implementing regulations for Section 111(d) in 1975, and they have been largely unchanged since.¹³ These regulations establish a framework for the formulation of state performance standards and implementation plans.

Under the regulations, EPA issues a “guideline document” that would, first, set an emission guideline for the covered pollutant.¹⁴ That guideline would set a minimum emissions limitation that the state’s performance standard must achieve and describe the components of the system of emissions reduction on which that minimum requirement is based.¹⁵ The guideline would also establish compliance timelines. The state is then free to establish a performance standard that either matches or is equivalent to EPA’s emission guideline. However, Section 111 requires EPA to allow the state to apply its performance standard in a way that takes into consideration the remaining useful life of the existing source that is being regulated.¹⁶ The implementing regulations would thus allow for case-by-case variances from the emission guideline in certain circumstances where a less stringent approach would be “significantly more reasonable.”¹⁷

EPA’s implementation regulations thus establish a generic framework for the regulation of existing sources under Section 111(d). And in the handful of times EPA has regulated under Section 111(d), it has used this framework.¹⁸ Other than the CAMR rule described below, EPA has only departed from the framework just once. Its regulations for existing large municipal waste combustors authorizes states to adopt averaging and trading systems.¹⁹ These regulations have not been subject to legal challenge.

Although EPA’s implementing regulations provide a default framework for regulation, nothing in the Clean Air Act requires EPA to use the same framework for every air pollutant and every source category. EPA may take any approach to issuing existing-source regulations that complies with statute so long as the agency adequately justifies its choices in the course of its notice and comment rulemaking, consistent with basic principles of administrative law.²⁰

The Lack of Regulation Under Section 111(d)

As just noted, EPA does not promulgate existing-source regulations very often. The exemptions in Section 111(d) may be part of the reason why. EPA's regulation of power plants is one illustration. For example, in 2006 and 2007, EPA promulgated new source performance standards for two categories that include power plants: electric utility steam generating units and stationary combustion turbines.²¹ While the new source performance standards covered sulfur dioxide, nitrogen oxides, and (for the steam generating units) particulate matter and carbon monoxide, all of these pollutants are criteria pollutants that are regulated through ambient air quality standards and thus outside the scope of regulation under Section 111(d).²²

EPA's Experience With The Clean Air Mercury Rule

In 2005, EPA issued regulations establishing new source performance standards and existing-source emission guidelines for coal-fired power plants under Section 111. The litigation that followed and ultimately vacated these regulations sheds light on some important open questions about EPA's authority under Section 111(d).

In the 1990 Clean Air Act Amendments, Congress directed EPA to regulate mercury as a "hazardous air pollutant" pursuant to Section 112 of the Act and further directed EPA to list and regulate, on a priority basis, the categories of sources that emit mercury and other such pollutants.²³ With respect to power plants, however, Congress required EPA to first conduct a study to determine whether regulation of them as a category was appropriate and necessary.²⁴ EPA conducted that study in 1998, made the determination that regulating power plants for mercury was necessary and appropriate, and in the last days of the Clinton Administration added power plants to the list of source categories regulated under Section 112.²⁵

Under the Bush Administration, EPA changed course and "delisted" power plants from Section 112 and regulated them under Section 111.²⁶ But in its Delisting Rule, EPA did not follow the statute's requirements for delisting, which would have required the agency to find that no source in the category was exceeding appropriate emissions levels.²⁷ Instead, EPA announced it had essentially made a mistake in declaring Section 112 regulation necessary and appropriate for power plants.²⁸ And, with the plants removed from the ambit of Section 112, EPA proposed to regulate new and existing power plants under Section 111.²⁹ The new regulations would have, among other things, established a voluntary cap and trade program for existing sources under Section 111(d).³⁰

States and environmental groups sued EPA in the United States Court of Appeals for the D.C. Circuit and prevailed. First, the court held that EPA violated Section 112 when it delisted power plants without satisfying the statutory requirements for doing so.³¹ Next, the court held that the reversal of the delisting rule required it to vacate the regulations issued under Section 111 because EPA's decision to issue new source performance standards under 111(b) had been premised on the absence of regulation under Section 112, and the court was restoring that regulation. EPA had (according to the court) "conceded" that source categories listed under Section 112 cannot also be regulated as existing sources under section 111(d).³²

The court's approach in the CAMR ruling allowed it to avoid resolving two hotly contested issues in the briefs. First, the court characterized EPA as conceding that sources regulated under Section 112 cannot be regulated under Section 111(d), even though EPA may not have actually intended to concede the point and in fact devoted a significant portion of its brief to arguing otherwise. Second, the court did not address whether the voluntary cap-and-trade program authorized in Section 111(d) could be included within a "standard of performance."

Both of these questions could resurface in the rulemaking for GHGs for existing sources so it is worth reviewing EPA's arguments and whether they would be persuasive in the context of GHG regulation, which does not involve hazardous air pollutants regulated under Section 112.

The Section 112 Problem

The D.C. Circuit's CAMR decision implied that the regulation of power plants under Section 112 removes them from the reach of existing-source regulation under Section 111(d). That implication could be fatal to regulation of GHGs under Section 111(d) and will likely need to be addressed in the course of EPA's rulemaking.

The Source of the Problem

As codified in Title 42 of the United States Code, Section 111(d) requires states to submit a plan to EPA that:

(A) establishes 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 7408 (a) of this title or emitted from a source category which is regulated under section 7412 of this title [Section 112] but

(ii) to which a standard of performance under this section would apply if such existing source were a new source.³³

The text would thus appear to preclude standards of performance for existing sources for *any* air pollutant that is emitted from *any* source category that also happens to be regulated for hazardous air pollutants (HAPs) under Section 112. Or, as EPA put it in the Delisting Rule, a literal reading would mean that “if source category X is a ‘source category’ regulated under section 112, EPA could not regulate *HAP or non-HAP* from that source category under section 111(d).”³⁴ And if that literal reading accurately reflects the law, then EPA would not have authority to regulate GHGs from existing power plants because power plants remain subject to regulation under Section 112 for mercury and other air toxics. In other words, under the literal reading of the U.S. Code, EPA could not regulate GHGs from existing sources under Section 111(d) *even though GHGs are not “hazardous air pollutants” within the meaning of Section 112.*

In its CAMR decision, the D.C. Circuit believed EPA had accepted this literal reading as the correct way to interpret the statute. EPA’s view—according to the court of appeals—was that Section 111(d) “cannot be used to regulate sources listed under section 112.”³⁵ Accordingly, EPA had “concede[d]” that its 111(d) regulations could not stand if power plants were re-listed under Section 112. The D.C. Circuit thus interpreted EPA to be reading Section 111(d) in a way that would now preclude regulation of GHG emissions from existing sources under that provision.

The D.C. Circuit’s characterization of EPA’s position was, however, mistaken. In fact, EPA had repeatedly renounced the very interpretation the court attributed to it. As the agency explained, the relevant text in the U.S. Code (“emitted from a source category which is regulated under section 7412”) comes from the 1990 Amendments to the Clean Air Act that were approved in the House of Representatives.³⁶ The version that passed the Senate, however, did not refer to *sources* regulated under Section 112; it referred to *pollutants* listed in Section 112(b)—that is, hazardous air pollutants. Thus, under the Senate’s version, Section 111(d) could still be used to regulate *non-hazardous* air pollutants from source categories whose hazardous pollutants were otherwise regulated under Section 112. Despite the variation in the House and Senate provisions, *both* were included in the Statutes at Large and became part of the law.³⁷ EPA therefore *rejected* the literal reading of the U.S. Code because it did not account for the Senate’s version.

Instead of the literal reading, EPA interpreted Section 111(d) to preclude the regulation of existing sources *only with respect to hazardous air pollutants* emitted from that source category. That is, “[w]here 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] that may be emitted from that particular source category.”³⁸ Or, as EPA succinctly put it in its brief: “The section 111(d) exclusion *only* extends to hazardous air pollutants[.]” Thus, under EPA’s actual interpretation of the statute (not the one attributed to it by the court), states could be required to regulate GHGs from existing power plants because, even though *power plants* are a regulated source category under Section 112, *GHGs* are not regulated as *pollutants* under that section.³⁹

Reviving and Improving EPA’s Arguments

To date, commentators have simply assumed that the reference to pollutants “emitted from a source category which is regulated under [Section 112]” will not be an issue for EPA in the rulemaking.⁴⁰ However, the point

has not been entirely overlooked,⁴¹ and EPA could face a dispute on this point if the rule is challenged in court. EPA will likely be well advised to develop a defense of this point in preparation for its rulemaking. We think it can draw from its CAMR briefing and fundamental principles of statutory interpretation to do so.

First, EPA could revive the arguments it made in its litigation brief in the CAMR litigation.⁴² There, citing *Citizens to Save Spencer County v. EPA*,⁴³ it argued that its interpretation limiting the 111(d) bar to hazardous pollutants was a reasonable attempt to “harmonize” the conflicting provisions of the House and Senate versions of the 1990 Amendments. This argument could now be bolstered by the Supreme Court’s recent decision in *City of Arlington v. FCC*, where it reiterated that the deferential *Chevron* framework applies when an agency interprets a jurisdictional provision of a statute it administers.⁴⁴ EPA could certainly argue that interpreting 111(d) to preclude duplicative regulation of hazardous air pollutants—but to authorize new regulation of pollutants that otherwise would go unregulated—is a “permissible construction of the statute” that must be upheld.⁴⁵

EPA could also invoke the fundamental principle that a statute should be read as a whole with each part given meaning.⁴⁶ If 111(d)(1)(A) really does prohibit performance standards for existing-sources when a pollutant is emitted by *any* source category that is regulated under Section 112 for *any other* pollutant, then it Section 111(d) is essentially a dead-letter. It is difficult—perhaps impossible—to think of an air pollutant that is (a) emitted by stationary sources within the ambit of Section 111) but (b) not also emitted by some sources (stationary or otherwise) that *also* emit hazardous air pollutants.

Because the literal reading of the U.S. Code would effectively write Section 111(d) out of the Clean Air Act we suspect there are numerous other canons of statutory interpretation—perhaps even the doctrine against absurd results⁴⁷—that EPA could invoke in support of limiting the exclusion in 111(d) to hazardous air pollutants.

Regulating Beyond the Fence Line

The CAMR litigation also sets up some of the arguments that might recur if EPA authorizes states to take flexible approaches to performance standard that recognize emissions reductions or credits from sources other than the affected power plant. In CAMR, EPA set a national mercury emissions cap and allocated each state an emissions “budget.”⁴⁸ Within that budget, states could adopt cap and trade program according to model parameters specified by EPA. There are similar calls to authorize a cap and trade system for GHGs under Section 111(d), as well as suggestions for supplemental offset programs that would credit energy produced from renewable sources and reductions in demand.⁴⁹ Using the statutory arguments advanced by EPA to defend its cap-and-trade proposal in CAMR, we briefly assess each of these categories of proposals.

EPA’s Argument For the CAMR Model Cap and Trade System

In the CAMR litigation, EPA faced a number of arguments that it could not lawfully authorize states to adopt a cap-and-trade system in lieu of source-specific emissions caps. These arguments centered on the specific wording of the mandate in Section 111(d) and the definitions of “standard of performance” in Section 111(a) and Section 302.⁵⁰

EPA argued that a cap-and-trade system established by a state would constitute a “standard of performance” for “any existing source” as required by Section 111(d). In the CAMR rule, EPA argued that a cap-and-trade requirement was a “standard for emissions of air pollutants” because it was a “rule for air emissions.”⁵¹ In its brief, EPA cited the Supreme Court’s adopted definition of a “standard” as “that which ‘is established by authority, custom, or general consent, as a model or example; criterion test.’”⁵² Under that standard, EPA argued, the cap-and-trade requirement “clearly constitute[d]” a model or criterion for emissions established by authority because it requires states and individual sources to operate with an emissions budget at a level the agency determines. Second, EPA argued that a cap-and-trade requirement “reflects the degree of emission limitation achievable” because it is based on the agency’s assessment (through the emissions budgets) of the overall degree of emission reduction achievable by power plants. Third, the requirement would reflect the degree of limitation achievable “through application of a system of emission reduction” because the cap-and-trade program would set allowances lower than current emissions.

In addition to its arguments under Section 111, EPA also maintained that its cap and trade system would independently satisfy the definition of “standard of performance” that appears in the general definitions in Section 302 of the Act. The general definition, which applies to all provisions in the Act, defines a “standard of performance” as “a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.”⁵³ EPA stated that it believed a cap-and-trade requirement would serve as a requirement for “continuous emissions reduction” because sources would be required to hold an allowance for each unit emitted and the allowances would be capped below the level of current emissions.

Application of the Arguments to Regulation of GHGs Under Section 111(d)

EPA’s arguments from the CAMR litigation are all plausible in the context of GHG regulation for existing sources. It also seems unlikely that EPA will face a challenge from environmental groups in adopting a cap-and-trade system or other types of flexible credit and offset programs. Significantly, although NRDC was lead petitioner in the CAMR litigation, and argued there that cap-and-trade would not satisfy the definition of a standard of performance, NRDC has developed the most prominent proposal for just such a system for GHGs.⁵⁴ Nevertheless, there are several areas where further legal analysis and preparation seems to be needed.

For one, EPA will need to show that whatever system of offsets and credits it holds out as the “best system of emissions reduction” (BSER) can also be characterized as having been “adequately demonstrated.”⁵⁵ Although some commentators have suggested that *no* system of GHG reduction has been adequately demonstrated, EPA might respond that individual components of its proposed system have been adequately demonstrated through EPA’s own experience with other cap-and-trade requirements⁵⁶ and the existing GHG cap-and-trade programs implemented in California and the Northeast.⁵⁷ Given certain groups’ focus on the “adequate demonstration” requirement, further work needs to be done on this aspect of the statutory defense.⁵⁸

EPA might also have vulnerability on the “any existing source” requirement. Its argument in CAMR was that a cap-and-trade requirement would regulate every existing source because every source in the category is subject to the requirement for emissions allowances. While technically that might be true, there is something a bit too easy about the argument. After all, the statute speaks of the “standard” *itself* being “enforced” or “applied” to particular sources. Although a cap-and-trade system would contain a requirement for holding allowances, it is not clear that the cap-and-trade *system* itself is a “standard” being “enforced” source-by-source. For strict-constructionist judges, an industry wide trading program might not seem to match up with the notion of a “standard of performance” applicable to “an existing source.”

Less ambitious types of offset programs than cap-and-trade may be on surer legal footing. It may be that the best way to provide legal certainty is to begin with an emissions guideline in the mold of EPA’s framework regulations and to supplement that guideline with discrete types of offsets programs where the offsets can be shown to have a relationship to reduced carbon emissions within the fence-line of the source. Establishing a source-specific guideline would avoid debate about whether there is a “standard” that applies to each “existing source” and states could be authorized to set that standard at a level that expects and incentivizes utilities to buy into “systems of emissions reduction”—such as demand-reduction programs or renewable-energy production—that have been *empirically* demonstrated to have reduced emissions in areas where they have been used. EPA could add to the list of “adequately demonstrated” types of offsets on a periodic basis a renewable sources of production become more cost-effective.

CONCLUSIONS

Section 111(d) does provide a tremendous opportunity. The CAMR litigation is an important precedent for rulemaking under this section that should not be overlooked simply because the court did not rule on certain questions. The litigation there unearthed a number of important questions that EPA should address thoughtfully in the course of its rulemaking. For the rule to be successful as a practical matter, there must be flexibility in the program but also a fair degree of certainty about its legality. We think EPA’s arguments on CAMR have done some important groundwork but there is more to be done. And if that analysis shows that certain building blocks an existing-source program (such as demand-side reductions) are more likely to pass legal muster than

others, that is where EPA should start, with a promise to return regularly as new technologies prove themselves to be “adequately demonstrated” at reducing emissions.

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- 1 U.S. Env. Protection Agency, Carbon Dioxide Emissions, <http://www.epa.gov/climatechange/ghgemissions/gases/co2.html>
- 2 See 42 U.S.C. § 7411; *American Electric Power Corp. v. EPA*, 131 S.Ct. 2527, 2533 (2011) (describing settlement of *New York v. EPA*, No. 06-1322 (D.C. Cir.)).
- 3 42 U.S.C. § 7411(b),(d).
- 4 EPA, Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, __ Fed. Reg. __ (proposed Sept. 20, 2013), available at <http://www2.epa.gov/sites/production/files/2013-09/documents/20130920proposal.pdf>. This proposal rescinds EPA’s first proposed rule, which appeared at 77 Fed. Reg. 22,392 (Apr. 13, 2012). While the first proposal would have regulated coal- and gas-fired units as a single category, the current proposal would regulate them as separate sub-categories of sources.
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- 10 42 U.S.C. § 7411(b).
- 11 42 U.S.C. § 7411(d).
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- 13 40 Fed. Reg. 53340 (Nov. 17, 1975); 40 C.F.R. §§ 60.20 *et seq.*
- 14 40 C.F.R. § 60.22(a).
- 15 40 C.F.R. § 60.22(b).
- 16 42 U.S.C. § 4211(d)(1)(B).
- 17 40 C.F.R. § 60.24(f)(3).
- 18 See, e.g., EPA, Final Guideline Document: Control of Fluoride Emissions from Existing Phosphate Fertilizer Plants, EPA-450/2-77-005 (Mar. 1977), available at <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=2000UNFK.txt>; EPA, Primary Aluminum Draft Guidelines for Control of Fluoride Emissions from Existing Primary Plants, EPA-450/2-78-049a (Feb. 1979) available at <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=9100SG1P.txt>.; 40 C.F.R. part 60 subpart M (guidelines for existing sewage sludge incineration units).
- 19 40 C.F.R. § 60.33b(d)(1), (2).

20 *See FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009) (holding that an agency may adopt change its position so long as it provides “good reasons” for doing so).

21 40 C.F.R. part 60, subparts Da and KKKK.

22 EPA, Six Common Air Pollutants, at <http://www.epa.gov/air/urbanair>.

23 42 U.S.C. § 7412(b), (c). *See also New Jersey v. EPA*, 517 F.3d at 578-79.

24 42 U.S.C. § 7412(n).

25 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825 (Dec. 20, 2000).

26 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 Steam Generating Units from the Section 112(c) List, 70 Fed. Reg. 15994 (March 29, 2005).

27 42 U.S.C. § 7412(c)(9). *See New Jersey*, 517 F.3d at 582.

28 Delisting Rule, 70 Fed. Reg. at 16002.

29 Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28606 (May 18, 2005) (“Clean Air Mercury Rule,” or “CAMR”).

30 CAMR, 70 Fed. Reg. at 28616.

31 *See New Jersey*, 517 F.3d at 582-583.

32 *Id.* at 583.

33 42 U.S.C. § 7411(d). The United States Code constitutes prima facie evidence of the laws of the United States while the Statutes at Large are controlling legal evidence of the law, except where the United States Code has been specifically enacted into positive law. *See* 1 U.S.C. § 204

34 Delisting Rule, 70 Fed. Reg. at 16031.

35 *New Jersey*, 517 F.3d at 583.

36 Brief for Respondents, *New Jersey v EPA*, part V. Available at 2007 WL 2155494.

37 Pub. L. No. 101-549, §§ 108(g), 302(a).

38 Delisting Rule, 70 Fed. Reg. at 16032.

39 Although the D.C. Circuit appears to have misread EPA’s brief, the mistake was ultimately not material to the disposition of the case. Even under EPA’s interpretation of 111(d), that section precludes the agency from requiring performance standards for existing sources in categories regulated under section 112 *with respect to hazardous air pollutants*. Consequently, EPA does not have authority to regulate mercury emissions from existing power plants under 111(d) because power plants continue to be listed under Section 112 *and* mercury is a hazardous air pollutant.

40 *See, e.g.*, Daniel A. Lashof, et al., Closing the Power Plant Carbon Pollution Loophole: Smart Ways the Clean Air Act Can Clean Up America’s Biggest Climate Polluters, Natural Resources Defense Council Report 12-11-A, at 83 n.25 (Dec. 2012), available at <http://www.nrdc.org/air/pollution-standards/files/pollution-standards-report.pdf>; Jeremy M. Tarr, et al., Nicholas Inst. For Env’tl. Policy Solutions, Duke Univ. Regulating

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41 *See, e.g.*, Energy Washington Week, Bush Counsel Says EPA Lacks Power to Set GHG NSPS at Existing Plants (Dec. 19, 2012).

42 EPA brief, *supra* note 36, section V.B.

43 600 F.2d 844, 872 (D.C. Cir. 1979).

44 133 S. Ct. 1863, 1871 (2013).

45 *Id.* at 1874.

46 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

47 *See, e.g.*, *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041-42 (D.C. Cir. 2001) (upholding EPA's interpretation of conflicting provisions in another section of the 1990 Clean Air Act Amendments under doctrine against producing absurd results).

48 CAMR, 70 Fed. Reg. at 28622.

49 *See, e.g.*, Lashof, et al., *supra* n.40.

50 *See* Brief of State Petitioners, *New Jersey v. EPA*, Part IV.B, *available at* 2007 WL 2155491; Brief of Environmental Petitioners, *New Jersey v. EPA*, Point III, *available at* 2007 WL 2155492.

51 EPA Brief, *supra* note 36, Part VI.B; CAMR, 70 Fed. Reg. 28617.

52 *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252-253 (2004) (quoting Webster's Second International Dictionary at 2455 (1945)).

53 42 U.S.C. § 7602(l).

54 *See* Lashof, et al., *supra* n.40.

55 42 U.S.C. § 7411(a). *See also* *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973) ("An adequately demonstrated system is one which has been shown to be reasonably reliable, reasonably efficient, and which can reasonably be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way.").

56 *See, e.g.*, CAMR, 70 Fed. Reg. at 28617 (citing, as evidence of "adequate demonstration" of cap and trade requirement, sulfur dioxide program adopted under EPA's Acid Rain Program and regional ozone trading program authorized in 1998 NOx SIP Call).

57 *See* California Air Resources Board, Cap and Trade Program, <http://www.arb.ca.gov/cc/capandtrade/capandtrade.htm>; Regional Greenhouse Gas Initiative, www.rggi.org (program for Northeastern states).

58 *See, e.g.*, *Sierra Club v. Costle*, 657 F.2d 298, 341 n.157 (D.C. Cir. 1981) (finding then-new dry-scrubbing technology not to have been "adequately demonstrated").