

# EPA's Section 111(d) Carbon Rule: What if States Just Said No?

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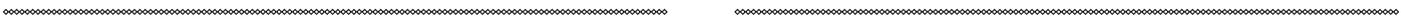
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- Clean Air Act: SCCCL’s 2011 Section 111 Project, COLUMBIA LAW SCHOOL SABIN CENTER FOR CLIMATE CHANGE LAW: <http://web.law.columbia.edu/climate-change/clean-air-act>
- Megan Ceronsky & Tomas Carbonell, *Section 111(d) of the Clean Air Act: The Legal Foundation for Strong, Flexible & Cost-Effective Carbon Pollution Standards for Existing Power Plants*, Environmental Defense Fund (Oct. 2013): <http://blogs.edf.org/climate411/files/2013/10/Section-111d-of-the-Clean-Air-Act-The-Legal-Foundation-for-Strong-Flexible-Cost-Effective-Carbon-Pollution-Standards-for-Existing-Power-Plants-O.pdf>
- Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units, Environmental Protection Agency (June 2014): <http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf>

## ABOUT THE AUTHORS

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### Introduction

“[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.” These words, quoted with approval by Chief Justice Roberts in the Supreme Court’s recent decision striking down the portions of the Affordable Care Act that attempted to coerce States to accept a significantly expanded Medicaid program,<sup>1</sup> apply with particular force to the latest proposal of the Environmental Protection Agency (EPA or Agency) to regulate greenhouse gases from the nation’s coal-fired power plants.<sup>2</sup> In that proposal, promulgated under Section 111(d) of the Clean Air Act (CAA),<sup>3</sup> EPA seeks to compel States to become the enablers of the Administration’s vision of what a “transformed”—and much more costly and unreliable—electric utility system should be. The question is, what if States refuse to go along? What if States refuse to give EPA the aggressive carbon-reduction plans the Agency is demanding?

Some States have good reason to resist. EPA’s proposed regulations require States to submit plans establishing power-sector carbon dioxide performance standards. These standards must meet what EPA calls “goals” but which in reality are EPA-established State-by-State emissions caps. EPA developed these “goals” based on an aggressively unrealistic set of “building block” assumptions as to how each State should reengineer its electric grid to reduce the use of coal-fired electricity: (a) EPA assumed that coal plants can operate six percent more efficiently than they do now, when these plants already have every incentive to operate as efficiently as possible; (b) it assumed that every natural

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gas combined-cycle generator could operate 70 percent of the time, thereby reducing coal generation, even though only 10 percent of these generators operated at that level in 2012 when the country experienced historically low natural gas prices; (c) it assumed that every State should adopt aggressive renewable portfolio standards, even though only about half the States have those standards now and most of those that do have standards have less aggressive ones; and (d) it made truly heroic assumptions about future reductions in electric demand, including the assumption that electric demand in 2030 will be little higher than it is today,<sup>4</sup> and in fact will decline between 2020 and 2030,<sup>5</sup> even though the Census Bureau projects that the country will add more than two million people *per year* between now and then<sup>6</sup> and even though at some point the country should return to normal economic growth rates.

Given the stringency of EPA’s goals, States would be required to adopt plans that are so onerous for coal generation that, according to the Agency’s own projections, the amount of coal used for electric generation in this country would decline by almost 40 percent from 2009 levels.<sup>7</sup> As higher-cost electric resources replace coal, costs to utilities and their ratepayers would skyrocket. The well-respected economic consulting and analysis firm, NERA, concluded that the proposal is the most expensive environmental regulation ever imposed on the electric power sector, costing between \$41 and \$73 billion per year, with 14 states facing peak year electricity price increases that could exceed 20%.<sup>8</sup> Worse, regional grid reliability coordinators have already begun warning that the rule will cause portions of the grid to suffer “cascading outages” and “voltage collapse.”<sup>9</sup> The North American Electric Reliability Corporation (NERC), the entity responsible for ensuring the reliability of the Nation’s grid, recently produced an initial analysis that questioned the validity of the basic assumptions underlying the rule and raised a host of concerns as to how the rule could affect the grid.<sup>10</sup>

EPA’s proposal is unprecedented in the 40-year history of the Section 111 performance-standards program, both in its severity and in its conceptual underpinnings. Before now, the agency has always formulated Section 111 standards based on what have

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come to be referred to as “inside-the-fence” measures—cost-effective actions that can be undertaken at the regulated facility itself, such as installing pollution controls.<sup>11</sup> When it comes to controlling carbon dioxide emission from coal generators, however, EPA obviously did not think that inside-the-fence measures would yield a sufficient level of emission reductions. EPA has conceded that the only feasible inside-the-fence measure for reducing coal-plant carbon dioxide emissions is improving the efficiency of the combustion process.<sup>12</sup> But even under EPA’s highly aggressive assumptions as to the efficiency gains existing generators can hypothetically make, the result is only a six percent reduction in carbon dioxide emissions,<sup>13</sup> which is far short of the President’s carbon goals.<sup>14</sup>

As a result, EPA has “creatively” reinterpreted its Section 111 authority for adopting performance standards and, for the first time, has proposed standards based on “outside-the-fence” actions. To do so, EPA has seized upon Section 111(d), an obscure, seldom-used regulatory provision, to dictate a fundamental overhaul of the nation’s electric system, a course that Congress rejected when it refused to adopt cap-and-trade legislation in the first two years of the current Administration when the Democrats had control of the House and a filibuster-proof majority in the Senate. Under EPA’s Section 111(d) proposal, States are required to develop and implement plans to drastically increase the use of natural gas and renewable power, and to make sharp reductions in consumer use of electricity, in order to drive down the use of coal power to meet EPA’s carbon-reduction goals.

EPA’s proposal places many States in an extremely difficult, even untenable, position. EPA gives States only one year following final adoption of the rule to submit a plan that meets EPA’s requirements.<sup>15</sup> This schedule may be administratively impossible for some States to meet given the monumental task of redesigning the State’s electric system. Under other CAA programs, States typically are given up to three years to submit implementation plans to EPA,<sup>16</sup> and those plans are much less complex than the plan EPA demands here. Additionally, reengineering the State power grid is outside the authority and expertise of state environmental agencies. As to expertise, unlike any prior

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rule, this proposal will require the State environmental agencies to consult closely with numerous other state agencies and authorities that do have that expertise—at a minimum, the State public utilities commission and/or commerce commission, and the myriad of local electric authorities and boards responsible for municipal power and electric cooperatives. In addition to this cross-agency coordination, States must also coordinate with an unusually broad array of stakeholders, not only power industry and NGO representatives, but also manufacturers and other ratepayer and consumer advocate groups.

As to authority to act, the plan will almost certainly require additional state legislation. In many states, no single state agency has all of the authority that would be required to implement EPA’s outside-the-fence measures. State legislation would be necessary to fill those authority gaps. The needed legislation is very unlikely to be adopted within a year (some legislatures meet only biannually), and some State legislatures may refuse to adopt the legislation at all. Although EPA’s proposal gives States the option of taking two years to submit a plan under certain circumstances, States must still submit an “interim” plan within one year in which they make the critical decisions,<sup>17</sup> which some States may not be able to do. The proposal also allows a third year for plan submission, but only if the State opts into a regional plan<sup>18</sup> that will be very difficult to negotiate.

The State’s task is made even more unpalatable by the prospect that the rule stands a high probability of ultimately being reversed in court, thus rendering worthless the extensive time, resources and political capital devoted to preparing the State’s plan. The Supreme Court recently struck down EPA’s greenhouse gas “Tailoring Rule” because “it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”<sup>19</sup> In the authors’ opinion, the Court’s ruling is a death knell for EPA’s far more “enormous and transformative” Section 111(d) proposal. Indeed, EPA may not have authority to adopt *any* Section 111(d) regulations governing carbon dioxide emissions from the power sector, even much more modest inside-the-fence regulations.<sup>20</sup>

The challenge EPA’s proposal poses to States is

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not just administrative, however; for many States, the rule will create real hardship for the States' citizens. EPA's proposal is built on a fault line, with California and northeastern and northwestern States, which do not use much coal, on one side, and most midwestern and southern States, which use much more coal, on the other. Coal-using States will be subjected to high compliance costs, which ultimately must be borne by the public in the form of significantly increased electric rates. For instance, the Midwest Independent System Operator (MISO), the grid operator for a region covering all or part of 15 States, preliminarily estimated that, just in MISO, the 20-year discounted compliance cost of the rule will be \$55-\$83 billion.<sup>21</sup> States will also be extremely concerned with the rule's impacts on the reliability of the power grid. Nick Akins, Chairman & CEO of American Electric Power, testified to Congress that last winter's cold weather required the company to operate 89 percent of the coal capacity that AEP will retire in 2015 due to EPA's Mercury and Air Toxics Standards rule.<sup>22</sup> Cheryl LaFleur, Chair of the Federal Energy Regulatory Commission (FERC) told a FERC conference that skyrocketing electricity and natural gas prices last winter brought the electric grid "close to the edge" of breaking on several occasions.<sup>23</sup> And this was before EPA's Section 111(d) rules were even proposed, much less implemented. Examining the impact of the Section 111(d) rules in its 12-state region, the Southwest Power Pool concluded that the rules, as proposed, will result in violations of grid reliability standards leading to rolling blackouts and will leave the region far below needed reserve margins by 2020 and below the amount of power needed to meet load even without considering reserve margins by 2024.<sup>24</sup>

States, thus, may be taking a hard look at their options if EPA finalizes its Section 111(d) regulations anywhere near the lines proposed. Of course, many States will appeal the rule. But obtaining a judicial stay of the rule during the pendency of the litigation is always difficult, no matter how flawed the rule, and if no stay is obtained, it will likely take a year-and-a-half to two years for the appellate court to issue its decision, and additional time will be consumed if the case goes to the Supreme Court. In the meantime, States will be under

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a mandate to undertake enormously controversial and resource-draining administrative and likely legislative proceedings to prepare a hugely impactful plan that at least some States believe is antithetical to the interests of their citizens.

Thus, some States may be considering the consequences of either not submitting a plan at all or submitting a plan based on whatever traditional cost-effective, inside-the-fence measures may be available to reduce coal-plant carbon dioxide emissions, at least until a court determines that EPA's outside-the-fence approach is legally valid. They may wonder, if they take that course of action, what EPA's alternatives would be in response. The most obvious EPA option would be to impose a federal plan, an action EPA is expressly authorized to take under Section 111(d). But can EPA really impose a plan on States that contains outside-the-fence measures, such as ordering the State to adopt a renewable portfolio standard or placing a limit on the amount of electricity the State's citizens can consume? If EPA is unwilling or unable to impose outside-the-fence measures, would EPA just proceed against the State's coal generators, by limiting the amount of time these plants could operate so as to reduce their carbon dioxide emissions? Doing so risks leaving the State short of power. Would EPA want to be directly responsible if, as many States believe, the consequence could be power outages and significantly increased electric rates to consumers? And could EPA impose sanctions if a State fails to adopt a plan that EPA views as satisfactory?

These questions are explored below.

## I. EPA DOES NOT HAVE AUTHORITY TO IMPOSE SANCTIONS

The notion that EPA could impose sanctions if States fail to submit the plan EPA demands can be dismissed quickly: EPA does not have that authority. EPA has not cited any such authority in its power-sector Section 111(d) rules, EPA's generic Section 111(d) rules do not provide for sanctions and provide only that EPA may impose a federal plan if a State fails to submit a "satisfactory" plan or no plan at all,<sup>25</sup> and Section 111(d) itself likewise authorizes only the single remedy of a federal plan.<sup>26</sup>

But what if EPA threatens to cut federal highway

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funds to the state or take administrative or judicial enforcement actions leading to penalties? While these sanctions are provided for under Section 179 (highway funding)<sup>27</sup> and 113 (administrative and judicial enforcement)<sup>28</sup> of the Act, neither authorizes sanctions for failure to comply with Section 111(d).

#### A. Section 179

Section 179 provides that EPA can cut off federal highway funding or increase the number of emissions offsets required for construction of new facilities in nonattainment areas under the National Ambient Air Quality Standards (NAAQS) program, if a State fails to comply with certain CAA obligations. But this provision plainly applies only to two types of State plans: (a) “any implementation plan or plan revision required under this part,” meaning part D of Title I of the CAA, and (b) any such plan or plan revision “required in response to a finding of substantial inadequacy as described in section 7410(k)(5).”<sup>29</sup>

A State failure to submit a Section 111(d) plan (or failure to submit what EPA would view as a satisfactory plan) would not be a failure to submit a plan under part D of the CAA. Part D applies to NAAQS nonattainment State Implementation Plans (SIPs) submitted under Section 110 of the Act, not Section 111(d) performance-standards plans. As EPA states in its *Criteria for Exercising Discretionary Sanctions Under Title I of the Clean Air Act*, “section 179 provides for mandatory sanctions with respect to failures under part D....”<sup>30</sup> A Section 111(d) plan is obviously not a Section 110 nonattainment SIP.

Nor would a State’s failure to submit a Section 111(d) plan (or failure to submit a “satisfactory” plan) be actionable under Section 7410(k)(5). A Section 7410(k)(5) inadequacy finding can be made only for inadequate SIPs under Section 110, not Section 111(d) plans. EPA has made clear that a Section 111(d) plan is not the same as a Section 110 SIP. Section 111(d) provides that EPA shall adopt regulations establishing a “procedure similar to” the Section 110 procedure for the submission of State plans. As EPA states, “[a]lthough there are similarities in the two programs,”<sup>31</sup> a “section 111(d) state plan is not a CAA section 110 state implementation plan (SIP).”<sup>32</sup> EPA also notes “the significant differences between CAA sections 110

and 111.”<sup>33</sup>

In sum, EPA would have no basis to threaten a State’s highway funding or to impose additional nonattainment area offset requirements if a State refused to submit a Section 111(d) plan or submitted one based only on cost-effective, “inside-the-fence” measures.

#### B. Section 113

EPA would also have no basis to impose sanctions under Section 113. Section 113(a)(3) provides that whenever “the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter ... including, but not limited to, a requirement or prohibition of any rule,” the Administrator can impose penalties, compel compliance, bring a civil action, or even request that the Attorney General commence a criminal action. Since the CAA defines any “person” to include a State, and since “this subchapter” includes Section 111(d), Section 113 might seem relevant in this context at a first glance.

Unquestionably, however, the Administrator could not use Section 113 to take action against a State for failure to submit a satisfactory Section 111(d) plan. A long line of firm Supreme Court precedent, most recently the Court’s decision in the Affordable Care Act case, confirms that the federal government can only seek to incent State participation in a federal regulatory scheme; it cannot compel compliance. “[T]he Constitution simply does not give Congress the authority to require the States to regulate,” wrote Chief Justice Roberts in the Affordable Care Act case.<sup>34</sup> “That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own. Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system.”<sup>35</sup> This rationale has been used to reject the notion that States could be penalized under Section 113 for failing to regulate under the CAA.<sup>36</sup>

In short, EPA cannot invoke Section 113 to force States to comply or penalize a State’s decision not to cooperate with EPA under Section 111(d).

## II. EPA AUTHORITY TO IMPOSE ITS OWN PLAN—A CREDIBLE THREAT?

Although EPA lacks sanction authority, it definitely

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has authority under Section 111(d) to impose a federal plan if a State fails to submit a “satisfactory” plan (or does not submit one at all). But the Agency will face its own difficult challenges should it attempt to develop and implement federal Section 111(d) plans. In the first place, it is absolutely clear that EPA lacks authority under Section 111(d) to impose a federal plan containing outside-the-fence measures, such as ordering the State’s natural gas generators to produce more electricity or the State’s utilities to acquire more renewable or demand-side resources. Under Section 111(d), a performance standard is an “emission limitation;” it is not a standard for facilities to operate *more* which, in the case of natural gas generators, would have the effect of increasing those generators’ emissions. Not even FERC or the Department of Energy, much less EPA, has authority to order electric generation facilities to operate more.<sup>37</sup> In addition, renewable sources of energy don’t emit anything at all, and therefore cannot be regulated as a “stationary source” of emissions under the CAA. The notion that EPA could force increased natural gas and renewable energy generation is thus hollow.

As a result, EPA’s federal-plan authority would be limited to inside-the-fence measures applied to coal plants. But given its aggressive carbon-reduction goals, EPA could not establish the traditional type of emission-rate limitations, based on cost-effective, inside-the-fence measures, that it has previously adopted under the New Source Performance Standards program, where facilities could operate as much as they wish so long as they meet the emission-rate standard. Instead, to impose its aggressive carbon goals through federal plans, the Agency would have to order a hard limit on a State’s coal-plant operations, either through a limitation on the plants’ annual carbon dioxide emissions or a limitation on their annual hours of operation (which are effectively the same thing). Since EPA could not order other generating facilities to operate more (or the State’s electric consumers to consume less), EPA would leave it to the State to figure out how to replace the coal generation that EPA has prevented from operating.

Given the stakes involved, it is hard to imagine that EPA would want to take this action. States that do not submit the type of plan that EPA is demanding

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would be motivated by real fear that the plan EPA wants would create unacceptable consumer electric rate increases and jeopardize reliable operation of the grid. If EPA dismisses these concerns and simply mandates that the coal generators operate less, it takes the risk that other resources will be not be available in the time frame needed to maintain grid reliability. If it is wrong and blackouts or brownouts ensue, EPA would be the cause. The State would have done its best to resist this outcome—by advocating in comments and discussions with EPA and elsewhere that the agency should reformulate the rule, by challenging EPA’s authority in court, and ultimately by refusing to be responsible for a plan that jeopardizes the State’s electric system.

Oklahoma provides an illustrative example of the dilemma EPA would face. Coal and natural gas generation supply almost all of Oklahoma’s electricity—45.5% of the State’s generation is fueled with coal; 46.4% with natural gas.<sup>38</sup> Conventional hydro and other renewables supply the remaining amount.<sup>39</sup> In determining Oklahoma’s carbon-intensity goal, EPA assumed that the State, by 2020, would replace roughly half its coal generation with natural gas generation.<sup>40</sup> If the State refused to submit the plan EPA wants, would the Agency really want to order Oklahoma’s coal generators to halve their output, thus eliminating more than 20% of the State’s total generation—in an environment where every other State from which Oklahoma could possibly purchase replacement electricity was also scrambling to cut coal generation and ramp up other generation to meet their own EPA-assigned goals?

Keep in mind that under EPA’s proposed schedule, Oklahoma’s plan would be due in June 2016, one year after the rule is finalized, and EPA’s timetable for approving or disapproving the State plan would be June 2017.<sup>41</sup> EPA’s proposed Section 111(d) rules do not state how long it would take EPA after it disapproved a State plan to impose a federal plan, but EPA over the years has been notoriously slow in acting on SIP submissions and formulating federal plans (even in the face of a statutory deadline). Assuming, in the best (and unlikely) case that EPA met its one-year deadline for disapproving Oklahoma’s plan and simultaneously imposed a federal plan, the State would

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have little more than two-and-one-half years to find the substitute non-coal generation. Regardless of whether the agency does or does not have legal authority to order such reductions—and the State would surely argue that it does not—whether EPA would wish to take responsibility for the consequences of this type of action is another question altogether.

Oklahoma is not even the most extreme example. The “best” system that EPA has hypothesized for the States to meet their EPA-established goals would zero out coal generation in 12 States.<sup>42</sup> This would include Mississippi, where an electric utility currently has a \$660 million scrubber project underway to meet other EPA regulations,<sup>43</sup> and Arizona, where several utilities have either recently undertaken or are in the process of undertaking pollution-control projects that cost in the hundreds of millions of dollars.<sup>44</sup> EPA’s “best” system for meeting its goal for Florida is to reduce coal generation by 90 percent.<sup>45</sup> Yet Florida utilities have recently invested almost \$2 billion in pollution-control projects at those facilities.<sup>46</sup> Would EPA, whose regulations compelled these States’ utilities to spend this money, now adopt a plan that would force these plants to close, simultaneously stranding these costs and jeopardizing grid reliability?

An additional consideration is the fact that the due date for EPA action on the State plan would be June 2017, meaning that the action would be due just six months into a new Administration, and EPA consideration of this action would take place during a Presidential election. Whether the outgoing Administration would wish to make anti-consumer EPA action a campaign issue, and whether a new Administration would wish to take on such a serious issue soon after taking office (or at all if a Republican President is elected), adds further complexity to the mix.

Certainly, EPA has imposed federal plans in the past. But EPA has never faced a situation where it will need to force a State to reengineer such an important sector of the State’s economy with such potentially enormous consequences. The outcome of a State’s refusal to comply cannot be predicted, but it would leave the State no worse off than if the State begrudgingly agreed to become EPA’s partner in producing potentially disastrous consequences for the State. Moreover, the

States challenge to EPA’s disapproval of its State plan and implementation of a federal plan may well take place in a regional federal court of appeals rather than the D.C. Circuit.

### III. CONCLUSION

The issue for States is how much they wish to collaborate in EPA’s attempt to expand the CAA to make fundamental and irreversible changes to the power grid in a way that undoubtedly works for the Administration’s political constituencies but will create severe harm in other areas of the country. In thoughtfully examining how to respond to EPA’s demand that States lead from the front, while EPA leads from behind, States may conclude that challenging EPA to take public ownership of the consequences is preferable to acquiescence. Sometimes the best answer is to just say no.

### Endnotes

- 1 Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (quoting New York v. United States, 505 U.S. 144, 168 (1992)).
- 2 Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule, 79 Fed. Reg. 34,830 (June 18, 2014).
- 3 42 U.S.C. § 7411.
- 4 See Data File: GHG Abatement Measures Scenarios 1 and 2 (3,773,750 GWh of consumption in 2014, rising to only 3,792,371 GWh in 2030).
- 5 EPA CLEAN POWER PLAN: COSTS & IMPACTS ON U.S. ENERGY MARKETS, ENERGY VENTURES ANALYSIS (Aug. 2014).
- 6 2012 National Population Projections, U.S. CENSUS BUREAU, <http://www.census.gov/population/projections/data/national/2012/summarytables.html>, Table 1, middle series projection.
- 7 EPA’s Regulatory Impact Analysis for the Mercury and Air Toxics Standards rule reported power-sector coal use in 2009 as 942 million tons. Technical support information that the agency provided for its Clean Power Plan projects 576 million tons of power-sector coal use in 2030. See EPA spreadsheet G162, Data File, GHG Abatement Scenario 1.
- 8 POTENTIAL ENERGY IMPACTS OF THE EPA PROPOSED CLEAN POWER PLAN, NERA ECONOMIC CONSULTING (Oct. 2014).
- 9 Comment letter of Southwest Power Pool to EPA, October 9, 2014, p. 4.
- 10 Potential Reliability Impacts of EPA’s Proposed Clean Power Plan, Initial Reliability Review, NERC (Nov. 2014), available at <http://www.nerc.com/Pages/default.aspx>.

11 Indeed, the statutory requirement for setting performance standards has usually been called “best demonstrated technology.” See, e.g., JULIE R. DOMIKE AND ALEC C. ZACAROLI, THE CLEAN AIR HANDBOOK, AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY AND RESOURCES 2001, 328 (3d ed. 2011).

12 See 79 Fed. Reg. at 34,836 (conceding that carbon capture and storage is not a feasible control technology for existing coal generators).

13 79 Fed. Reg. at 34,861.

14 See White House Release, President to Attend Copenhagen Climate Talks, (November 25, 2009) announcing goal of reducing greenhouse gas emissions by 17% below 2005 levels in 2020 and 83% by 2050.

15 79 Fed. Reg. at 34,915.

16 42 U.S.C. § 7410(a)(1).

17 79 Fed. Reg. at 34,915 & proposed § 60.5760(a).

18 79 Fed. Reg. at 34,915.

19 Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2444 (2014).

20 See In re Murray Energy Corp., No. 14-1112 (D.C. Cir.).

21 MISO, GHG Regulation Impact Analysis – Initial Study Results (September 17, 2014) (comparing the base-case with the more likely sub-regional (state-by-state) compliance case).

22 *Id.* at 2

23 Lynn Garner, *FERC Conference Highlights Problems of Using Natural Gas for Electric Generation* (BNA Apr. 1, 2014). See also Winter 2013-2014 Operations and Market Performance, FERC Docket No. AD 14-8-000 Technical Conference (April 1, 2014) (transcript at 6) available at <http://www.ferc.gov/CalendarFiles/20140424112341-Transcript0401technical.pdf>

24 “SPP’S Reliability Impact Assessment of the EPA’s Proposed Clean Power Plan,” attached to comment letter of Southwest Power Pool to EPA, October 9, 2014.

25 40 C.F.R. § 60.27.

26 42 U.S.C. § 7411(d)(2)(A).

27 42 U.S.C. § 7509.

28 42 U.S.C. § 7413.

29 42 U.S.C. § 7509(a).

30 59 Fed. Reg. 1476, 1479-80 (January 11, 1994). See also EPA’s Section 179 regulations, which “apply to any State in which an affected area is located and for which the Administrator has made one of the following findings with respect to any part D SIP or SIP revision required under the Act.” 40 C.F.R. § 52.31(c). “Affected area” is defined as a nonattainment area. *Id.*, § 52.31(a)(3). It should be noted that Section 110(m), 42 U.S.C. § 110(m) provides that EPA may apply Section 179 sanctions “in relation to any plan,” but only if EPA makes the findings required under Section 179(a)(1)-(4), which, as discussed, apply only to “any

implementation plan or plan revision required under” part D.

31 79 Fed. Reg. at 34,909.

32 *Id.*

33 *Id.* at 34,834.

34 *Sebelius*, 132 S. Ct. at 2602 (quoting *New York*, 505 U. S., at 178).

35 *Id.* See also *New York*, 505 U. S., at 175 (overturning a statute that sought to compel a State to enact certain waste regulations by requiring the State to take title of the waste if it did not).

36 *Sierra Club v. Korleski*, 681 F.3d 342, 351-52 (6th Cir. 2012) (Under *New York v. United States* and similar cases, Section 113 cannot be used to penalize a State for failing to regulate).

37 DOE has authority under the Federal Power Act, 16 U.S.C. § 824a(c), to order facilities to generate during an emergency, and of course a generation-owner, in joining an RTO or ISO, can accept tariff provisions under which it agrees to operate under certain conditions. But, of course, Section 111 of the CAA does not provide similar authority to EPA.

38 Institute for Energy Research, Oklahoma Energy Facts, [www.instituteforenergyresearch.org/States](http://www.instituteforenergyresearch.org/States) (using EIA data).

39 *Id.*

40 *Id.* at column M.

41 79 Fed. Reg. at 34,951-52 & proposed §§ 60.5715, 60.5755.

42 Alaska, Arizona, California, Connecticut, Maine, Massachusetts, Mississippi, Nevada, New Hampshire, New Jersey, Oregon, and Washington, as shown on the EPA spreadsheet at <http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule-technical-documents-spreadsheets>.

43 *Plant Daniel Scrubber Project More Than Halfway Complete, On Track for 2016 Completion*, GULFLIVE.COM, Mar. 24, 2014, <http://blog.gulflive.com/mississippi-press-news/2014/03/plant-daniel-scrubber-project.html> (March 24, 2014, 5:38 PM).

44 Brief of Arizona Public Service Co. and Salt River Agricultural Improvement and Power District in *Arizona v. EPA*, No. 13-70355 et al. (Ninth Cir., August 19, 2013) at 5-6.

45 EPA spreadsheet at <http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule-technical-documents-spreadsheets>.

46 See <http://www.gulfpower.com/community/stewardship/air/plant-crist.cshtml>, <https://www.progress-energy.com/company/media-room/news-archive/press-release.page?title=Progress+Energy+Florida+completes+clean+air+project+at+Crystal+River+Energy+Complex+&pubdate=05-25-2010>.



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