

EPA's Clean Power Play: Who Needs Congress?

EPA's new proposal to regulate carbon emissions from existing power plants is the most significant step this country has ever taken to address climate change—but is it consistent with the Clean Air Act?

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The much anticipated centerpiece of President Obama's climate plan is finally here. The proposed rule—which the U.S. Environmental Protection Agency (EPA) calls its “Clean Power Plan”—would slash greenhouse gas emissions from existing power plants in this country by 30 percent from 2005 levels by 2030.

In this article, we provide a short overview of the proposal, attempt to show which states will be the most impacted, and analyze the three biggest legal questions facing the rule, with the aim of answering the question everyone is asking: Will EPA's Clean Power Plan make it through the courts? We conclude that EPA's legal justifications for its Clean Power Plan are tenuous, and as written, the courts are likely to overturn it—at least in part.

I. EPA's Proposed Clean Power Plan

EPA is proposing to issue its Clean Power Plan under section 111(d) of the Clean Air Act (CAA). Without question, this is an obscure provision: EPA has only used it five times in the past forty years and only for relatively minor sources of air pollutants like landfills and sulfuric acid plants.¹

Section 111 requires EPA to first establish a list of source categories that EPA finds “cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare.”² Once EPA adds a source category to this list, section 111(b) then directs the agency to establish “standards of performance” for new sources in that particular category. After establishing these standards for new sources, EPA can then, under certain circumstances, use section 111(d) to set “standards of performance” for existing sources in the category, but it does so in the form of binding emissions guidelines to be adopted by the states.³

The “standards of performance” promulgated under both section 111(b) (for new sources) and 111(d) (for existing sources) must be based on the “best system of emission reduction” (BSER) that has been “adequately demonstrated” for the affected sources.⁴ Importantly, although EPA has only used section 111(d) a handful of times, the EPA has used section 111(b) on at least sixty occasions to make BSER determinations for new sources.⁵

Last September, EPA proposed a section 111(b) standard aimed at reducing greenhouse gases from new power plants. With its Clean Power Plan, EPA is now trying to use section 111(d) to establish guidelines to curb carbon dioxide (CO₂) emissions from existing power plants.

EPA's proposed standards of performance for existing power plants take the form of state-specific “rate-based” emissions targets, expressed as pounds of CO₂ per MWh.⁶ Once finalized, the state will be responsible for creating and implementing a plan that will enable its fleet of electric generating units (EGUs) to meet an interim target rate from 2020-2029, and then a more stringent final target rate in 2030 and beyond. States will determine whether their EGU fleet complies with the interim rate by calculating the fleet's average emission rate over the entire ten year period between 2020 and 2029. Thereafter, states will calculate their EGU fleet's compliance with the final target rate by averaging emissions over a three-year rolling average period (e.g., 2030-2032, 2031-2033, etc.). Generally speaking, these target rates cover all existing fossil-fuel fired electric generating units that are 73 MW or larger.

EPA set each state's CO₂ emission rate targets based on its determination of what constitutes BSER for all existing power plants on a state-wide basis. Specifically, EPA determined that the best system for reducing CO₂ emissions from existing power plants is for states to implement the following four actions—or as EPA calls them, “building blocks”:

- 1) Improve the efficiency of all coal-fired EGUs in the state by six percent;
- 2) Ramp up the operation of all existing natural gas combined cycle units (NGCC) in the state to a 70 percent capacity factor, and assume increased generation from these NGCC units offsets existing generation at coal-fired EGUs in the state;
- 3) Increase the percentage of renewables (excluding large hydro) used in the state to between 2% and 25%, depending on the state, and assume that nuclear plants under construction will be built and that 5.8% percent of all existing nuclear capacity does not retire; and
- 4) Increase the use of energy efficiency programs to reduce electricity consumption by 9% to 12% by 2030, depending on the state.

For example, in our home state of Wisconsin, EPA derived the CO₂ emission rate targets by assuming that all of the existing coal plants in the state would install technology to become six percent more efficient; that 25 percent of coal-fired generation would re-dispatch to NGCC units; that the state would satisfy 11 percent of its electricity demand from renewable sources by 2030; and that the state would increase its energy efficiency efforts to reduce electricity demand by about 12 percent by 2030.

Although EPA set each state's target rates using these assumptions, states are given significant flexibility to decide how they will comply with their targets. States can implement state or regional cap-and-trade programs, set unit specific limits, use state-wide averaging, or propose almost any type of approach imaginable to meet the limits.

II. Which States Does The Proposal Impact The Most?

Since EPA released its Clean Power Plan, there have been numerous reports about how difficult it is to determine which states are the most impacted. The problem is that you can't just compare how much each state is required to reduce its carbon intensity because, for example, some states are already planning to retire coal-fired units, while others are required to achieve a larger carbon emission rate reduction, but only a small portion of their generation is covered by the rule.

Table 1 is our attempt to provide a more robust comparison of which states are most affected by the Clean Power Plan. This table uses the states in the Midcontinent Independent System Operator (MISO) region as an example of how such a comparison could be conducted for the entire country. In the first column, we compare each state's target CO₂ rates under the Clean Power Plan to EPA's base case assumption of what their CO₂ rates would otherwise be in 2020/2030, without the rule in place. This result should give the percent reduction required for each state, taking into account EPA's assumptions regarding impending

retirements and expected load growth unrelated to the Clean Power Plan. In column two, we provide the percent of each state’s total generation that is considered an “affected source” under the Clean Power Plan. This column shows how much of the state’s total current generation will be subject to the emissions targets that EPA is proposing. Finally, in the last three columns, we examine how EPA’s “building blocks” affect coal generation, renewable energy generation, and energy savings from energy efficiency programs in each state. The third column shows the degree to which the rule would reduce the dispatch of coal generation in each state under EPA’s assumptions. The fourth column shows the difference between the proportion of renewable energy EPA assumed each state would generate in 2020/2030 and the proportion of renewable energy each state actually generated in 2012. And the fifth column shows the difference between the amount of energy that EPA assumed each state would save from energy efficiency programs in 2020/2030 and each state’s current cumulative energy efficiency savings.

Table 1: The Clean Power Plan’s Impact On MISO States

MISO State	CO2 Rate Reduction Compared to Base Case in 2020/2030	Total % Generation Affected by Rule (2012)	% Coal Generation Reduced Through Re-dispatch	RE Target % 2020/2030 – State’s RE in 2012	EE Target 2020/2030 – State’s EE in 2012
Kentucky	15% / 19%	91%	1%	1% / 2%	1% / 9%
Illinois	21% / 24%	44%	16%	3% / 5%	1% / 9%
Indiana	17% / 13%	86%	5%	2% / 5%	3% / 10%
Iowa	12% / 15%	63%	19%	-10% / -10%	-4% / 3.3 %
Michigan	32% / 36%	62%	24%	3% / 4%	2% / 9%
Minnesota	46% / 48%	46%	51%	-3 % / - 3%	-8% / -1%
Missouri	18% / 22%	88%	11%	1% / 2%	1% / 9%
Montana	12% / 17%	47%	0%	3% / 5%	-2% / 5%
Nebraska	25% / 30%	67%	10%	4% / 7%	2% / 10%
North Dakota	8% / 10%	69%	0%	0% / 0%	3% / 10%
Ohio	15% / 25%	76%	7%	5% / 10%	1% / 8%
South Dakota	29% / 34%	28%	67%	-9% / -9%	1% / 10%
Wisconsin	34% / 38%	68%	25%	3% / 6%	-5% / 4%

As this table illustrates, states like Minnesota and South Dakota—which have to reduce their CO₂ emission rates by a relatively high percentage—are actually not the most impacted in the MISO region. This is because the Clean Power Plan affects a relatively small portion of their total generation, and because they currently have more renewable generation than EPA assumed they would have in 2020/2030. Meanwhile, states like Ohio, Indiana, Missouri, and Kentucky do not need to reduce their CO₂ emission rates by as much as some other states, but the rule affects a greater proportion of their overall generation. Moreover, EPA assumed that these states would achieve their required reductions primarily through increased use of renewables and demand-side energy efficiency measures.

Based on our analysis, we conclude that Ohio is the most impacted state in the MISO region. Almost three quarters of its total electric generation will be affected by the rule,

and the state will have to reduce its CO₂ emission rate by 25% in 2030, relative to EPA’s base case assumptions. Ohio would also have to increase its renewable energy generation by 10% and its energy efficiency savings by 8%, relative to 2012 levels.

Interestingly, as shown in Table 2, EPA’s re-dispatch building block assumes that, nation-wide, twelve states will no longer have any coal-fired generation by 2020 because all of their existing coal generation will switch to natural gas plants.

Table 2: EPA’s Re-Dispatch From Coal In 2020

EPA Assumes The Following States Will Close All Of Their Existing Coal Plants By 2020 To Comply With The Clean Power Plan	Existing Coal Generation in 2012 (MWh)
Alaska	215,407
Arizona	24,335,930
California	933,157
Connecticut	99,461
Massachusetts	2,268,133
Mississippi	7,503,114
Nevada	4,133,662
New Hampshire	1,281,341
New Jersey	2,602,990
New York	4,156,143
Oregon	2,640,259
Washington	3,735,730

And, as shown in Table 3, EPA’s renewable energy building block assumes that twenty-three states will implement renewable portfolio standards (RPS) that are more stringent than the respective state’s current RPS.

Table 3: EPA’s RPS Assumptions

EPA Assumes The Following States Will Implement A Renewable Portfolio Standard That Is More Stringent Than The State’s Current RPS	
Alabama	North Dakota
Alaska	Oklahoma
Arkansas	Pennsylvania
Florida	South Carolina
Georgia	Tennessee
Idaho	Texas
Indiana	Utah
Kentucky	Virginia
Louisiana	West Virginia
Mississippi	Wisconsin

Nebraska	Wyoming
New Mexico	

III. Did EPA Impermissibly Rely On “Outside The Fence Line” Reductions To Set The State Limits?

Since Congress enacted the Clean Air Act, EPA has established more than sixty standards under section 111, and for numerous types of sources.⁸ When setting these standards, EPA typically considers various factors, including feasibility and cost, to determine the best technology for a plant to install to reduce pollution.⁹ EPA then sets an industry-wide limit for a given pollutant, assuming (but not requiring) that each plant installs the particular technology. In fact, in its proposal for new power plants, EPA did exactly that: it determined that partial carbon capture and storage (CCS) was the best technology available for all new coal-fired power plants, and then it proposed to set the standard for CO₂ emissions based on a new plant installing CCS.¹⁰

That is how EPA usually does it, but that is not what EPA did in its Clean Power Plan. Instead of looking at what technology is available at the plant level (or “inside the fence-line”), EPA looked at what actions the state could take on a state-wide basis to reduce CO₂ emissions from all of the affected sources in the state. Never before has EPA taken such a broad interpretation of section 111.

Section 111(d) allows EPA to “establish[] standards of performance *for any existing source*,” and “standards of performance” is defined as “a standard . . . which reflects the degree of emission limitation achievable through the application of the best *system* of emission reduction . . .”¹¹ EPA relies on the word “system” to assert that it can set each state’s carbon emission rates based on the best technology available for the state’s entire electric system.¹² This statutory reading, however, ignores the fact that the EPA is supposed to set the “standards of performance *for any existing source*.” Section 111 says nothing about setting the best system of emission reduction on a state-wide basis.

Nonetheless, as discussed above, EPA established the emission rates for each state based on four “building blocks,” which EPA says collectively make up the best system of emission reduction. Ironically, EPA’s numbering of these four building blocks correspond to how likely they are to make it through the courts, with (1) being the most likely and (4) being the least likely. Here’s why:

Block (1) – Increasing Coal Plant Efficiency By 6 percent:

Although one could certainly quibble with EPA’s 6% reduction figure, this is exactly the type of technological determination that EPA usually makes under section 111. EPA looked at what technology is available inside a coal plant’s fence-line and determined that the average existing coal plant could install technology to reduce emissions by 6 percent. As such, Block 1 is likely based on a permissible reading of the statute.

Block (2) – Re-dispatching NGCC Units On A State-Wide Basis: Some have mistakenly described Block 2 as also being an inside the fence-line reduction, but that’s not the case. Unlike Blocks 3 and 4, this block does involve modifying existing plant operations. However, forcing a natural gas plant to operate instead of a coal plant is not a “technology” that goes inside the fence-line of the coal plant in question. In fact, this block looked at re-dispatching plants on a state-wide basis—not on a utility-footprint basis. In other words, EPA is asserting that the best technology available for a coal plant owner to reduce its carbon emissions is, in many instances, for a different plant owner to increase its generation elsewhere. EPA’s building block might have been more defensible if it assumed that utilities would dispatch their own NGCC plants in lieu of their own coal plants, yet that is not what EPA did. In any event, courts have consistently held that CAA technology determinations cannot “redefine the source,” which seems to be exactly what EPA has done with Block 2.¹³

Block (3) – Increased Renewables With Less Nuclear Retirements: This block is even further outside of a coal plant’s fence line than Block 2. It would not just ask plant owners to operate their plants differently—it would actually require them to build new renewable plants or, at a minimum, purchase energy from such new plants. Put another way, EPA is saying the best technology available to reduce a given coal plant’s CO₂ emissions is for the plant owner to build a new plant elsewhere, which again smacks of EPA impermissibly “redefining the source.”¹⁴ If a court were to allow EPA’s interpretation, it would essentially mean that EPA could use section 111(d) to force a company to close an existing plant of any type (not just power plants) by asserting that the owner could build a new, less polluting plant of a different type elsewhere.

Block (4) – Increasing Demand-Side Energy Efficiency: Last in order—and certainly the most legally suspect—this block assumes that states/utilities can implement demand-side energy efficiency, such that customers use as much as 12% less energy by 2030 to offset coal plant generation. Demand-side energy efficiency, however, isn’t just outside of the fence line—it is arguably outside of the states’ and utilities’ control. Moreover, if a court were to allow EPA’s interpretation, where would it end? Could EPA then be allowed to use section 111(d) to require paper companies to reduce their emissions by making their customers print two-sided, thereby lowering demand for paper?

To be clear, the critical legal question is not whether EPA can give states the flexibility to use these types of actions to comply with whatever rate targets it sets. The question

is whether EPA can set the target limits under the CAA using these types of technological assumptions. We think not.

EPA knew it was taking a big risk with each of these building blocks, which is why it did something clever. The agency tried to structure the state limits so that if a court finds any of these four blocks unlawful, the remaining blocks can remain. In other words, EPA’s emissions targets can be established independently for each block. Table 4 shows the cumulative emission reductions required as each block is added for each MISO state.

Table 4: Percent Reduction Required By Each EPA Block By 2030

MISO State	Block One (Coal -6%)	Block Two (Re-dispatch)	Block Three (Add Nuke and RE) ¹⁵	Block Four (Add EE)
Illinois	6%	15%	22%	33%
Indiana	6%	8%	11%	20%
Iowa	6%	16%	5%	16%
Kentucky	6%	9%	10%	18%
Michigan	5%	17%	21%	31%
Minnesota	5%	32%	29%	41%
Missouri	6%	11%	13%	21%
Montana	6%	6%	14%	21%
Nebraska	6%	10%	18%	26%
North Dakota	6%	6%	6%	11%
Ohio	5%	10%	18%	28%
South Dakota	6%	35%	21%	35%
Wisconsin	5%	19%	25%	34%
US Total	4%	16%	24%	33%

Let’s again look at our home state of Wisconsin as an example. If a court threw out Blocks 2 through 4, Wisconsin would have to reduce its CO₂ emission rate by five percent. If, on the other hand, it threw out just Blocks 3 and 4, Wisconsin would have to cut its CO₂ emission rate by about 19 percent. Table 4 also includes the total for the United States for each block. Notably, Block 1 (the most lawful block) would only reduce emission rates by about 4% nationwide, which is likely why EPA is trying to broadly interpret section 111.

Personally, we think EPA’s building blocks contain a lot of good ideas: increased renewable generation and implementing demand-side energy efficiency programs will not only reduce this country’s carbon footprint, but also promote a host of other, ancillary environmental benefits. But if a court found for EPA, it would have to look past the plain language of the statute, as well as EPA’s long-standing practice of only requiring inside the fence-line reductions. Ultimately, that is why we think industry will have the stronger legal argument in court on this issue.

IV. Will EPA's Rule For New Plants Kill Or Delay Its Clean Power Plan?

Section 111(d) also says that EPA cannot adopt standards of performance for existing sources, unless and until EPA has regulations in place for new sources under section 111(b).¹⁶ That is why, last September, EPA proposed a standard of performance under section 111(b) for new power plants, which it is slated to finalize in June 2015. If a court overturns this new plant rule, however, section 111(d) precludes EPA from implementing its existing plant rule.

As discussed, EPA's section 111(b) proposal claims that the best system of emission reduction for new coal-fired power plants is partial carbon capture and storage technology. Although CCS has never been installed on any large-scale power plant anywhere in the world, the technology, in theory, will separate the primary greenhouse gas (carbon dioxide) from the plant's exhaust and pump it to underground reservoirs for storage, thereby lowering the new coal plant's emissions by about 40 percent.

The EPA's legal problems with this rule are threefold: (1) the CAA requires EPA to pick a technology that is adequately demonstrated; (2) it requires the technology to be available at a reasonable cost; and (3) a provision in the Energy Policy Act states that EPA cannot point to U.S. Department of Energy (DOE)-funded projects to prove that a technology is adequately demonstrated.¹⁷ Yet, in its new plant proposal, the EPA only points to small-scale CCS pilot projects and a few larger CCS projects under construction to prove that CCS is ready for prime time—and many of these projects had DOE backing.¹⁸

The EPA's position on cost is also tenuous. The agency has admitted that adding CCS to a new coal power plant would increase the cost of electricity from the plant by about 80 percent, and that estimate is almost certainly too low. To see why, look no further than Mississippi, where the costs of installing CCS on a new coal plant have continued to balloon over the projected budget since construction began. There, one of the largest American utilities, Southern Company, is working with DOE funding to build the first full-scale coal power plant with CCS in Kemper County, Mississippi. In its new power plant proposal, EPA assumed that an integrated gasification combined cycle (IGCC) coal plant with CCS would cost between \$3,274/kW and \$4,086/kW to build.¹⁹ The Kemper plant (which is an IGCC plant with CCS) is now projected to cost \$5.5 billion, and it is only 582 MW, meaning the actual cost to build it will be at least \$9,450/kW.²⁰ That is more than twice the cost EPA assumed in its new plant proposal.

In all, if EPA finalizes its CCS requirement for new plants, we think the agency will be hugely (and unnecessarily) jeopardizing its Clean Power Plan.²¹

V. Does EPA Even Have The Authority To Regulate Greenhouse Gases From Existing Power Plants Under Section 111(d)?

Perhaps the most widely discussed legal problem with the Clean Power Plan is whether EPA even has the legal authority to issue it.²² Section 111(d) states that EPA can only establish a "standard of performance" for "any existing source for any air pollutant . . . which is not . . . emitted from a source category which is regulated under section [112]" of the CAA. The

problem is that existing power plants are a source category that is regulated under section 112: EPA recently finalized its mercury and air toxic standards for existing power plants (MATS rule) pursuant to section 112.²³ Thus, under a plain reading of the statute, EPA does not have the authority to regulate CO₂ emissions from existing power plants.

Fortunately for EPA, the issue is not as simple as that. When Congress last amended the CAA back in 1990, it passed two different versions of section 111(d)—both of which were signed into law, and both of which say completely different things. After the Senate and the House each passed their own sets of CAA amendments, the conference committee—which was responsible for turning the separate versions into a single bill—inadvertently forgot to harmonize the House and Senate language in section 111(d), and both versions were accidentally signed into law.

The difference between each version is subtle, but important, as it could drastically impact EPA's authority to issue its Clean Power Plan. The Senate's version simply states that EPA can adopt existing plant standards for any pollutant that isn't a listed toxic air pollutant under section 112.²⁴ CO₂ is not regulated as a toxic pollutant under section 112, so the Senate's language, standing alone, would permit the EPA to issue the existing plant rule. On the other hand, the House version is what made it into the U.S. Code, and it has the language discussed above that would not allow the EPA to issue the existing plant rule.²⁵

So which version of section 111(d) controls? Although this situation is unusual, it is not unique. In this situation, a court will attempt to give effect to each version, especially because the two provisions are not mutually exclusive.²⁶ For example, EPA could establish rules for emissions of CO₂ (a non-toxic pollutant) from sources that aren't currently regulated under section 112 (e.g., small factories, shopping centers, etc.), and comply with both requirements. Reading the provisions together, however, means that EPA would not be able to adopt its Clean Power Plan.²⁷

Of course, courts also look at Congressional intent when interpreting statutes, and several state attorneys and environmental groups argue that Congress could never have intended this result.²⁸ They say the House revision was just poorly worded, and was not supposed to be different from the Senate version. They note that the 1990 CAA amendments were generally intended to require EPA to regulate more substances, not less, and that where Congress intended specific source categories to receive regulatory relief, it explicitly stated as much (and did so after much debate).²⁹

Although these groups' assertions are certainly plausible, so far the groups have not been able to come up with any actual evidence to support their claims. We have reviewed the entire legislative record and not found any mention of either the Senate's or the House's intent when drafting these revisions to section 111(d). Again, while a court might find the statute ambiguous and give EPA deference because of the conference committee's error, industry has the better overall argument based on the statutory language and the case law.

VI. So What Will The Courts Do?

That's the multi-billion dollar (per year) question. The U.S. Court of Appeals for the D.C. Circuit will be the first court to hear challenges to the new plant and existing plant rules. As is the case with most courts, the EPA's chances of success at the D.C. Circuit will largely depend on which three judges get randomly selected to hear the case. Some judges on the D.C. Circuit (like Judge Judith Rogers) love to side with the EPA, and others (like Judge Brett Kavanaugh) do not.

It is always risky forecasting what a court will do, but we think it is highly unlikely that both the new plant and existing plant rules, as proposed, will make it through the D.C. Circuit. Therefore, at a minimum, we expect that legal challenges will delay implementation of the final Clean Power Plan. The D.C. Circuit typically gives less weight to EPA's policy rationales and more weight to the statutory language, which, as we have shown, does not favor the agency.

The U.S. Supreme Court, however, is a different matter. Although dubbed conservative, this Supreme Court has often bent over backwards to find for EPA—particularly where the Court believes that EPA has a good policy rationale for what it's trying to do. For example, in the Court's recent *EME Homer* decision, the Court went out of its way to read ambiguity into a fairly unambiguous provision of the CAA. In so doing, it upheld EPA's Cross-State Air Pollution Rule, all because it thought the rule made good policy sense.³⁰

Even so, in this case EPA may have gone too far, even for a sympathetic court. It is a cardinal rule of administrative law that agencies only have as much power as granted to them by statute.³¹ EPA's Clean Power Plan relies on a rarely used provision of the CAA to effectively force states to implement a cap-and-trade program, a federal renewable portfolio standard, and an energy efficiency standard—all in one rule.

To borrow the words of Justice Scalia, EPA's Clean Power Plan "sacrifices democratically adopted text to bureaucratically favored policy."³² Above all, that is why we have a hard time believing that a John Roberts-led Supreme Court will uphold EPA's proposal: because doing so would allow EPA to blatantly circumvent Congress.

¹ See ENVTL. PROTECTION AGENCY, LEGAL MEMORANDUM FOR PROPOSED CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING ELECTRIC UTILITY GENERATING UNITS 9-10 (2014) [hereinafter "CLEAN POWER PLAN LEGAL MEMORANDUM"], available at <http://www2.epa.gov/sites/production/files/2014-05/documents/20140602tsd-legal-memorandum.pdf>.

² 42 U.S.C. § 4711(b)(1)(A).

³ See generally *id.* § 4711(d).

⁴ *Id.* § 4711(a)(1).

⁵ See generally 40 C.F.R. parts 60 Cb–OOOO (standards of performance for new stationary sources).

⁶ The target rate will generally be calculated by taking the collective CO₂ emissions from all affected sources and dividing by the total net generation of the sources, plus generation from renewable sources and generation saved from energy efficiency projects in the state.

⁷ EPA assumes that 99% of coal generation in New York will be generated by natural gas plants after New York implements the rule; however, it is unlikely that the remaining coal plant would generate enough electricity under EPA's assumptions to stay economically viable.

⁸ See *supra* note 5.

⁹ 42 U.S.C. § 7411(a)(1).

¹⁰ See Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units; Proposed Rule, 79 Fed. Reg. 1430, 1434 (Jan. 8, 2014).

¹¹ 42 U.S.C. § 7411(a)(1), (d)(1) (emphasis added).

¹² See CLEAN POWER PLAN LEGAL MEMORANDUM, *supra* note 1, at 50–66.

¹³ See, e.g., *Sierra Club v. Env'tl. Prot. Agency*, 499 F.3d 653, 655 (2007); *Longleaf Energy Associates, LLC v. Friends of the Chattahoochee, Inc.*, 681 S.E.2d 203 (Ga. App. 2009); *In re Old Dominion Electric Cooperative*, 3 E.A.D. 779, 793 n. 38 (EPA Adm'r 1992). In these cases, the agencies were determining the “best available control technology” (BACT) for the plant in question. Although agencies conduct BACT determinations under a separate program (the New Source Review program), these determinations can be no less stringent than the applicable NSPS. And if agencies are prohibited from “redefining the source” when making a BACT determination, it follows that they would also be prohibited from doing so section 111.

¹⁴ *Id.*

¹⁵ Some of these percentages decrease as compared to block two because the EPA’s assumed RE in the state in 2030 is less than the state’s existing RE generation during the baseline period (2012).

¹⁶ 42 U.S.C. § 7411(d)(1) (“[EPA] shall prescribe regulations which shall establish a procedure . . . under which each State shall submit to [EPA] a plan which (A) 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 . . .”).

¹⁷ 42 U.S.C. § 15962(i).

¹⁸ See 79 Fed. Reg. 1,430, 1,471–1,475 (Jan. 8, 2014) (describing projects where carbon capture and sequestration has been successfully implemented); see also Complaint at 5–8, *Nebraska v. Env'tl. Prot. Agency*, No. 4:14-CV-3006 (D. Neb. Jan. 15, 2014) (noting that, in support of its assertion that CCS is “adequately demonstrated,” EPA cited to the expected performance of CCS at the Kemper County Energy Facility, the Texas Clean Energy Project, and the Hydrogen Energy California—all of which, according to the complaint, have received assistance from the DOE under the Clean Coal Power Initiative).

¹⁹ ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED STANDARDS OF PERFORMANCE FOR GREENHOUSE GAS EMISSIONS FOR NEW STATIONARY SOURCES: ELECTRIC UTILITY GENERATING UNITS 5-20 (2013), available at <http://www2.epa.gov/sites/production/files/2013-09/documents/20130920proposalria.pdf>.

²⁰ Eileen O’Grady, *Southern Co Delays Advanced Coal Plant to 2015 Amid Rising Costs*, REUTERS (Apr. 29, 2014), <http://www.reuters.com/article/2014/04/29/utilities-southern-kemper-idUSL2N0NL2K220140429>.

²¹ Perhaps because EPA knows its new plant rule stands on shaky legal ground, it has made a novel argument in its Clean Power Plan for existing plants. The agency argues that, to issue a section 111(d) standard for existing sources, there has to be either a section 111(b) rule in place for new sources or a rule in place for modified and reconstructed sources. EPA bases this claim on the fact that “new source” is defined as “any stationary source, the construction or modification of which is commenced after” regulations have been published under section 111(b). EPA’s interpretation of the term “new source” is certainly inventive; however, we have a hard time believing that a court will buy EPA’s argument. Not only is it an odd interpretation of the statutory language, but EPA is also proposing in its modified/reconstructed plant proposal that modified and reconstructed sources would still be subject to the existing source standards after modification, and would not be considered new sources.

²² See, e.g., WILLIAM J. HAHN, THE FEDERALIST SOCIETY, THE CLEAN AIR ACT AS AN OBSTACLE TO THE ENVIRONMENTAL PROTECTION AGENCY’S ANTICIPATED ATTEMPT TO REGULATE GREENHOUSE GAS EMISSIONS FROM EXISTING POWER PLANTS (2013).

²³ 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, 77 Fed. Reg. 9,304 (Feb. 16, 2012).

²⁴ H.R. Rep. No. 101-952, at 183 (1990) (Conf. Rep.).

²⁵ Ironically, this mix-up occurred under the watch of two congressmen who have been long-time supporters of climate change legislation—John Dingell (D-MI, who chaired the conference committee) and Henry Waxman (D-CA, who was a member of the committee). Now, the conference committee’s carelessness could thwart the most significant step this country has ever taken to address climate change.

²⁶ See *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks and citations omitted) (“It is . . . a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute.”)

²⁷ Some commentators have suggested that, because the Senate version comes after the House amendment in the Statutes at Large, the Senate version should control. See, e.g., Ann Brewster Weeks, *Essay Responding to Brian H. Potts, “The President’s Climate Plan for Power Plants Won’t Significantly Lower Emissions,”* 31 Yale J. on Reg. Online 38. However, courts applying this canon have applied it to interpret two *different* provisions of the same statute or legislation when the provisions conflict and when one provision is more specific than the other. None of those circumstances are present here.

²⁸ See COMMENTS OF THE ATTORNEYS GENERAL OF NEW YORK, CALIFORNIA, MASSACHUSETTS, CONNECTICUT, DELAWARE, MAINE, MARYLAND, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, AND THE DISTRICT OF COLUMBIA ON THE DESIGN OF A PROGRAM TO REDUCE CARBON POLLUTION FROM EXISTING POWER PLANTS 9–14 (2013).

²⁹ *Id.* at 12.

³⁰ *Env’tl. Prot. Agency v. EME Homer City Generation*, No. 12-1182, slip op. at 26–27 (Apr. 29, 2014).

³¹ See, e.g., *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”)

³² *EME Homer City Generation*, No. 12-1182, slip op. at 3 (Scalia, J., dissenting).