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THE LEGAL CLIMATE ON CLIMATE CHANGE: THE FATE OF THE EPA'S CLEAN POWER PLAN AFTER *MICHIGAN* AND *UARG*

ABSTRACT

One of the centerpieces of the United States' effort to combat climate change is the Environmental Protection Agency's (EPA) controversial Clean Power Plan, which consists of the first-ever federal regulations requiring states to achieve massive carbon dioxide emissions reductions from existing fossil fuel-fired power plants. The regulations operate by setting interim and final emissions target dates for states to ultimately reach an aggregate 32% reduction in carbon emissions by the year 2030. This Note argues that the current regulations will not survive judicial scrutiny, because the U.S. Supreme Court has moved away from traditional administrative deference in instances where an administrative agency seeks an enormous and transformative expansion to its regulatory authority. Furthermore, several studies predict that the impact to global greenhouse gas reduction from unilateral U.S. action will be negligible. As a result, rather than promulgating sweeping and inflexible rules for limiting carbon emissions, the EPA's central focus and barometer for the plan's effectiveness should be its ability to spur and then sustain international climate change efforts. This Note thus suggests some pragmatic amendments to the Clean Power Plan to ensure that, when implementing reduction plans, states and utilities have sufficient flexibility to alleviate potential grid reliability complications, negative economic ramifications, and legal challenges that plague the current regulations.

INTRODUCTION

When the Environmental Protection Agency (EPA) announced the final regulations for the Clean Power Plan (CPP or the Plan), the Plan was met with wide disapproval from two-dozen U.S. states, fossil fuel groups, and the coal industry.¹ The regulations, proposed in June 2014 and finalized in August 2015, are the first federal rules to limit carbon dioxide emissions from existing power plants.² They set individualized targets for states to cut energy-sector carbon dioxide emissions before the year 2030, by 32% from

1. Editorial Board, *President Obama's Tough, Achievable Climate Plan*, N.Y. TIMES (Aug. 4, 2015), https://www.nytimes.com/2015/08/04/opinion/president-obamas-tough-achievable-climate-plan.html?_r=0; Chelsea Harvey, *Trump Has Vowed to Kill the Clean Power Plan. Here's How He Might—And Might Not—Succeed*, WASH. POST (Nov. 11, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/11/11/trump-has-vowed-to-kill-the-clean-power-plan-heres-how-he-might-and-might-not-succeed/?utm_term=.f42fe3495c30.

2. See generally Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

2005 levels.³ The EPA asserts the Plan rests on a sound legal and technical foundation,⁴ while critics allege the Plan represents an illegal federal overreach, which will drive up utility rates and undercut electric grid reliability.⁵ Almost immediately following the final promulgation of the Plan, this controversy entered federal court.⁶

This Note focuses on the ongoing lawsuit and argues that the CPP requires certain amendments to survive, and to achieve its intended environmental impact, for two distinct reasons. First, although historically the U.S. Supreme Court granted an administrative agency's statutory interpretation broad deference, the Court has moved away from the *Chevron v. NRDC*⁷ line of cases and has taken a new approach in both *UARG v. EPA*⁸ and *Michigan v. EPA*.⁹ The latter cases indicate that the Supreme Court will cut the EPA little slack; the Court will likely determine that the EPA has unduly interfered with the energy sector and thereby overstepped the bounds of reasonable regulation.

Second, the modest—or insignificant—projected effects the CPP will have on global greenhouse gas (GHG) emissions reflect the limited potential of unilateral U.S. action to impact the planet's climate. Given that the Plan requires states to reach ambitious targets within a short timeframe to reduce carbon emissions, states and utility companies will most likely resort to dramatic energy efficiency mandates, including premature retirement of coal-fired power plants, in order to meet these goals. This in turn could lead to serious repercussions in the form of staggering costs to utility customers and significant risks to electric grid reliability. The result: one of the most expensive EPA regulations ever—and one that does not even accomplish its intended goal to reduce atmospheric GHGs and to counter global warming.¹⁰

The CPP regulations raise serious questions about the EPA's legal authority to act in this instance. Accordingly, for the CPP to sustain an inevitable legal challenge before the Supreme Court the EPA must scale back

3. ENVTL. PROT. AGENCY, FACT SHEET: OVERVIEW OF THE CLEAN POWER PLAN 2–3, <http://www2.epa.gov/sites/production/files/2015-08/documents/fs-cpp-overview.pdf> [hereinafter CPP FACT SHEET].

4. See generally LEGAL MEMORANDUM ACCOMPANYING CLEAN POWER PLAN FOR CERTAIN ISSUES, <https://www.epa.gov/sites/production/files/2015-11/documents/cpp-legal-memo.pdf> [hereinafter CPP MEMORANDUM]; see Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,661; see also CPP FACT SHEET, *supra* note 3, at 2.

5. Editorial Board, *supra* note 1.

6. See, e.g., *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015); *In re West Virginia, et al.*, No. 15-1277 (D.C. Cir. filed Sept. 9, 2015).

7. See generally *Chevron v. NRDC*, 467 U.S. 837 (1984).

8. See generally *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

9. See generally *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

10. See, e.g., Paul C. Knappenberger & Patrick J. Michaels, *0.02°C Temperature Rise Averted: The Vital Number Missing from the EPA's 'By the Numbers' Fact Sheet*, CATO AT LIBERTY, (June 11, 2014, 12:39 PM), <http://www.cato.org/blog/002degc-temperature-rise-averted-vital-number-missing-epas-numbers-fact-sheet>.

the enormous and transformative expansion the Plan confers on the EPA's regulatory authority. Furthermore, the EPA must amend the CPP to avoid the risks of more expensive and less dependable energy, while at the same time sending a strong message to the international community that the United States is serious about its commitment to curb carbon emissions.

This Note offers three amendments to the CPP, which, taken together, would permit states more flexibility to implement carbon emission reduction plans. This, in turn, will mitigate potential grid reliability complications, negative economic ramifications, and legal challenges that plague the current regulations. First, the EPA should replace its interim target goals beginning in 2022 with a more flexible approach that provides states with greater leeway in determining the proper glide path to achieve the EPA's final goals by 2030. Second, the CPP should offer states the flexibility to extend the 2030 deadline if a clear path to meaningful reduction is evident in a reasonable timeframe. Finally, the EPA should revise its compliance formula to provide proper credit under the EPA's rate-based method for retiring and not replacing existing coal-fired power plants with other forms of fossil generation.

Part I of this Note explains the general framework of the EPA's Clean Power Plan. Part II describes how the Supreme Court is moving away from the traditional deference courts have granted to administrative agencies' statutory interpretations, and how the cases inform judicial review of the CPP. Part III details how, if implemented, the CPP will negatively impact the economy in the form of higher energy costs, grid reliability complications, and job losses. Finally, Part IV sets forth comprehensive measures that, if adopted by the EPA, will allow the CPP to survive judicial review and enable clean energy development to occur under a sensible, transparent, and flexible regulatory environment.

I. GENERAL BACKGROUND

On August 3, 2015, the EPA announced the Clean Power Plan, which the agency referred to as a "historic step" to reduce carbon emissions.¹¹ The EPA introduced the CPP as evidence mounted on carbon pollution's contribution to climate change.¹² According to the National Research Council,¹³

11. *Clean Power Plan for Existing Power Plants*, ENVTL. PROT. AGENCY, <http://www2.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants> (last visited Jan. 8, 2017).

12. Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,509, 64,517 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98).

13. The National Research Council is a nonprofit and private institution "that provides expert advice on some of the most pressing challenges facing the nation and the world." According to the National Research Council's website, its mission is to improve government decision making and public policy, increase public understanding, and promote the acquisition and dissemination of knowledge in matters involving science, engineering, and health. See *Who We Are*, NAT'L RES.

“emissions of carbon dioxide from the burning of fossil fuels have ushered in a new epoch where human activities will largely determine the evolution of earth’s climate.”¹⁴ Already in 2009, based on a large body of robust and compelling evidence, former EPA Administrator Lisa P. Jackson issued the Endangerment Finding under Section 202(a)(1) of the Clean Air Act (CAA).¹⁵ In the Endangerment Finding, the EPA determined that the current, elevated concentration of GHGs in the atmosphere—already at levels unprecedented in human history—may reasonably “endanger public health and welfare” of current and future generations in the United States.¹⁶ The EPA concluded carbon emissions directly contribute to climate change and the effects of climate change have been felt already.¹⁷ According to the EPA, climate change has caused extreme weather events, from wildfires and severe drought in the western United States to rising water levels throughout the country.¹⁸ In fact, in 2014 the EPA noted that, “2014 was the hottest year recorded in history, and 14 of the 15 warmest years on record have occurred all in the first 15 years of this century.”¹⁹ In order to combat climate change, the EPA focused its attention on existing coal-fired power plants, since they are the largest source of carbon emissions in the United States—making up 38.3% of all energy related carbon dioxide emissions.²⁰

As part of the Plan, the EPA imposed carbon dioxide emission limits on each of the forty-eight states with fossil fuel power plants, to be implemented by 2022;²¹ the Plan aims to reduce nationwide carbon dioxide emissions from fossil fuel power plants by 32% by 2030.²² These limits vary by state, and account for each state’s ability to implement three distinct emission reduction

COUNCIL, <http://www.nationalacademies.org/about/whoweare/index.html> (last visited Jan. 8, 2017).

14. NAT’L RES. COUNCIL, CLIMATE STABILIZATION TARGETS: EMISSIONS, CONCENTRATIONS, AND IMPACTS OVER DECADES TO MILLENNIA 3 (2011) [hereinafter CLIMATE STABILIZATION TARGETS].

15. Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,517; *see also* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (codified at 40 C.F.R. pt. 98).

16. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,497.

17. *Id.*; *see also* CPP FACT SHEET, *supra* note 3, at 2.

18. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,497–98; *see also* CLIMATE STABILIZATION TARGETS, *supra* note 14, at 3.

19. CPP FACT SHEET, *supra* note 3, at 2.

20. Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,509, 64,522–23 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98).

21. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,664 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

22. CPP FACT SHEET, *supra* note 3, at 2.

measures, or “building blocks.”²³ These building blocks, also designated by number, include the following measures:

(1) reducing the carbon intensity of electricity generation by improving the heat rate of existing coal-fired power plants; (2) substituting increased electricity generation from lower-emitting existing natural gas plants for reduced generation from higher-emitting coal-fired power plants; and (3) substituting increased electricity generation from new zero-emitting renewable energy sources (like wind and solar) for reduced generation from existing coal-fired power plants.²⁴

State plans were due to be submitted by September 2016.²⁵ States that required additional time had the ability to request an extension of up to two years.²⁶ The Plan also grants the EPA authority to impose the agency’s own regime, in the form of default rules, on states that fail to comply.²⁷

Before the EPA issued the final Plan, the nation’s largest coal company, Murray Energy Corp., and fourteen coal-producing states filed suit, challenging the EPA’s climate change rules.²⁸ The United States Court of Appeals for the District of Columbia granted summary judgment for the EPA, finding it would be unprecedented for a court to review a rule that had been introduced only in draft form.²⁹ When the final regulations were issued in August 2015, West Virginia and fifteen other states (the States) filed suit, claiming, among other things, the EPA lacked legal authority to implement the law under Section 111(d) of the Clean Air Act.³⁰ Rather than wait for the

23. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,667.

24. CPP FACT SHEET, *supra* note 3, at 4.

25. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,855. This deadline has not been enforced since the U.S. Supreme Court stayed the implementation of the Plan in February 2016. *See State of West Virginia et al., v. EPA, et al.*, 577 U.S. (2016) (unpublished table decision); Lyle Denniston, *Carbon Pollution Controls Put on Hold*, SCOTUSBLOG (Feb. 9, 2016, 6:45 PM), <http://www.scotusblog.com/2016/02/carbon-pollution-controls-put-on-hold/>. The Court’s decision also put state planning processes in limbo. Montana Governor, Steve Bullock, immediately put the state’s compliance plans on hold. *See* Emily Holden, Elizabeth Harball & Ellen M. Gilmer, *SCOTUS Halts Clean Power Plan, Stuns States Planning Carbon Cuts*, E&E NEWS (Feb. 10, 2016), <http://www.eenews.net/stories/1060032137>. Other states, including Arizona, Virginia, Arkansas, Oklahoma, and South Carolina, have taken a more measured approach and are cautiously awaiting the outcome, but at the same time, pushing to remain fully prepared should the court uphold the regulations. *Id.*

26. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,855.

27. *Id.* at 64,855–56.

28. *See generally In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015).

29. *Id.* at 336.

30. Brief for Petitioners for Extraordinary Writ at 4–8, *In re West Virginia, et al., v. EPA*, No. 15-1277 (D.C. Cir. Aug. 13, 2015) [hereinafter Brief for Extraordinary Writ].

Plan's publication, the States sought an emergency stay of the rules' already-applicable deadlines under the All Writs Act.³¹

The States argued that because of the rigid deadlines demanded by the regulations, absent an immediate stay they would be "irreparably harmed" by the steps that must immediately be taken to begin reordering the way their citizens receive and consume energy.³² Additionally, the States contended that in order to meet the CPP targets, the States would have to assess the "forms of energy available to the State, whether developing more new energy sources is feasible, and what changes to state law would be required."³³ These and other expenditures would "immediately redirect sovereign institutions away from serving the people, causing further irreparable harm."³⁴ Finally, the States argued that they were "clearly and indisputable entitled to relief," because the EPA did not have the authority to regulate carbon emissions from coal-fired power plants under the CAA.³⁵

On September 9, 2015, in a two-paragraph order, a three-judge panel for the D.C. Circuit ruled that the petitioner States must await the agency's publication of the final regulations in the Federal Register before the States may file suit and request a stay of the CPP.³⁶ The Judges cryptically wrote, "[p]etitioners have not satisfied the stringent standards that apply to petitions for extraordinary writs that seek to stay agency action."³⁷

On October 23, 2015, the final regulations were published in the Federal Register.³⁸ Not surprisingly, the publication of the regulations was quickly followed by a "flurry of litigation" from twenty-three states, again led by West Virginia.³⁹ Oklahoma and North Dakota additionally filed suits in separate actions.⁴⁰ On January 26, 2016, the State of West Virginia along

31. *Id.* at 9. The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2012).

32. Brief for Extraordinary Writ, *supra* note 30, at 2.

33. *Id.* at 13.

34. *Id.* at 14.

35. *Id.* at 16–21; *see also infra* Part II B.

36. *In re West Virginia v. EPA*, No. 15-1277 (D.C. Cir. Sept. 9, 2015).

37. *Id.*

38. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (setting emission-limits for existing fossil-fuel fired electric generating units (GHGs)); Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources, 80 Fed. Reg. 64,509 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98) (setting carbon-emission limits for new, modified and reconstructed power plants).

39. *See* State Petitioners Motion for Stay and for Expedited Consideration of Petition for Review, *State of West Virginia, State of Texas et al v. EPA*, No. 15-1363 (D.C. Cir. Oct. 23, 2015); Joby Warrick, *States Sue to Block EPA's Pollution Rule — Even as Some Try to Comply*, WASH. POST (Oct. 23, 2015), https://www.washingtonpost.com/national/health-science/states-sue-to-block-epas-pollution-rules—even-as-some-try-to-comply/2015/10/23/1002a1de-79c6-11e5-b9c1-f03c48c96ac2_story.html.

40. Warrick, *supra* note 39.

with twenty-five other states⁴¹ filed an application to stay the CPP with the U.S. Supreme Court.⁴² Two weeks later, the Supreme Court granted the stay halting the implementation of the CPP, pending the resolution of the legal challenges in the D.C. Circuit.⁴³

II. THE CPP WILL NOT SURVIVE A SUPREME COURT CHALLENGE

A. BACKGROUND TO SECTION 111(D) OF THE CLEAN AIR ACT

The EPA's legal authority to set emission standards derives from Section 111(d) of the Clean Air Act.⁴⁴ This statute, codified in 42 U.S.C. § 7411,⁴⁵ requires states to set performance standards, subject to EPA guidelines, for existing sources of air pollutants not otherwise regulated as a "national ambient air quality standard" pursuant to Section 7408⁴⁶ or emitted from a source regulated under the hazardous air pollutant provisions of Section 7412.⁴⁷ Section 7411(a) defines "standard of performance" in terms of the level of pollution reduction achievable by the "best system of emission reduction which . . . the Administrator . . . has adequately demonstrated."⁴⁸

Under the CPP, the EPA defines "best system" of reduction as more than just improvements at individual electricity generating units.⁴⁹ Since these units are part of an integrated electrical grid,⁵⁰ the EPA believes the best system extends to what can be achieved across the network, through fuel substitution, energy efficiency, and other measures that would reduce the demand for coal-fired power.⁵¹ This results in three "building block" measures that regulate existing power plant emissions and also attempt to regulate "beyond the line" of the power plant.⁵² In other words, in addition to

41. These states are: Texas, Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming. See Application for Immediate Stay of Final Agency Action at 49–54, State of West Virginia, State of Texas, et al v. EPA, No. 15A773 (U.S. Jan. 26, 2016).

42. See generally *id.*

43. State of West Virginia v. EPA, 577 U.S. (2016) (unpublished table decision); Denniston, *supra* note 25.

44. See CPP MEMORANDUM, *supra* note 4, at 1–4; Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,663–64 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

45. See 42 U.S.C. § 7411 (2012).

46. *Id.* § 7408.

47. *Id.* §§ 7411(d)(1), 7412.

48. *Id.* § 7411(a).

49. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,664–67.

50. *Id.* at 64,665.

51. *Id.* at 64,667; see also CPP FACT SHEET, *supra* note 3, at 3–6.

52. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,667.

these regulations setting emission limits based on the actual source of the emissions, the regulations also require alternate scenarios to reduce GHG emissions that have nothing to do with the power plant itself.⁵³ These measures include renewable energy generation and demand-side energy efficiency.⁵⁴

B. QUESTIONABLE LEGALITY

The twenty-six states (the Complainant States) that have filed lawsuits, as well as leading industry and constitutional experts, have raised several important arguments that should be considered when a reviewing court analyzes the CPP.⁵⁵ Emissions from existing coal-fired power plants are already regulated under Section 112 of the CAA,⁵⁶ meaning under the CPP these power plants would be subject to double regulation. The Complainant States and others argued that, pursuant to the explicit language of CAA section 111(d), the EPA may not regulate “any air pollutant” emitted from a “source category . . . regulated under [Section 112].”⁵⁷ Since power plants are a “source category” that has already been regulated by the EPA for their mercury pollution under Section 112,⁵⁸ the EPA cannot use Section 111(d) to reach another air pollutant emitted from that same source category. The EPA adopts a different interpretation of the phrase “regulated under” from the Complainant States and concludes that the Section 112 exclusion only

53. *Id.*

54. *Id.*

55. See generally Brief for Extraordinary Writ, *supra* note 30. Several important arguments were also raised by Professor Lawrence Tribe, U.S. constitutional scholar, and counsel for Peabody Energy Corp., “the world’s largest private sector coal company.” Erica Martinson, *Lawrence Tribe, Obama’s Legal Mentor, Attacks EPA Power Plant Rule*, POLITICO (Mar. 22, 2015, 5:14 PM), <http://www.politico.com/story/2015/03/epa-power-plant-rule-lawrence-tribe-116258>; *EPA’s Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues, Testimony before H. Comm. on Energy & Commerce, Subcomm. on Energy & Power* (2015) (testimony of Lawrence Tribe, Professor, Harv. Univ. & Harv. Law Sch.), <http://docs.house.gov/meetings/IF/IF03/20150317/103073/HHRG-114-IF03-Wstate-TribeL-20150317-U1.pdf> [hereinafter *EPA Proposed 111(d) Rule*].

56. On December 20, 2000, the EPA promulgated regulations, which limit certain mercury emissions from existing coal-fired power plants. See ENVTL. PROT. AGENCY, FACT SHEET: CONSIDERATION OF COST IN THE APPROPRIATE AND NECESSARY FINDINGS FOR THE MERCURY AND AIR TOXICS STANDARDS FOR POWER PLANTS 2 (2016), https://www.epa.gov/sites/production/files/2016-05/documents/20160414_mats_ff_fr_fs.pdf [hereinafter MATS FACT SHEET]. These regulations were issued pursuant to section 112(n)(1)(a) of the CAA. *Id.* On February 16, 2012, the final MATS rules were published in the Federal Register. See generally 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. 9304 (proposed Feb. 16, 2012) (to be codified at 40 C.F.R. pts. 60, 63).

57. 42 U.S.C. § 7411(d)(1) (2012); Brief for Extraordinary Writ, *supra* note 30, at 16–17; see also *EPA Proposed 111(d) Rule*, *supra* note 55, at 33–36.

58. See MATS FACT SHEET, *supra* note 56, at 2–3; see also National Emission Standards for Hazardous Air Pollutants from Coal-and Oil-Fired Electric Utility Steam Generating Units, 77 Fed. Reg. at 9307.

“excludes the regulation of *hazardous* air pollutants” (HAP).⁵⁹ Since the EPA does not list carbon dioxide as a type of HAP,⁶⁰ the EPA claimed that the Section 112 exclusion did not apply.⁶¹

Even if carbon dioxide could be characterized as a type of HAP, the EPA still averred it had regulatory authority under Section 111(d), since the section is ambiguous.⁶² If a statute is ambiguous, the courts generally give deference to the administrative agency implementing the regulations, so long as the agency’s interpretation is reasonable.⁶³ The EPA’s current interpretation of Section 111(d) claims there are essentially two versions of Section 111(d), which leaves the provision open to interpretation and therefore ambiguous.⁶⁴ This stems from conflicting amendments made to Section 111(d) during the 1990 CAA Amendments.⁶⁵ The Senate version of the bill provided that “pollutants” previously regulated under Section 112, could no longer be regulated under Section 111(d).⁶⁶ The House of Representative (HOR) version, however, can be read to exclude “sources” rather than just their pollutants.⁶⁷ In other words, under the HOR version, once a source (in this case a power plant) has been regulated under Section 112, it can no longer be regulated under Section 111(d).⁶⁸ Conversely, under the Senate version—which the EPA adopts⁶⁹—the EPA is free to regulate carbon emissions, which to date have not been regulated.

The Complainant States, however, adopted the HOR version of the statute and therefore concluded that carbon emissions cannot be regulated under Section 111(d), since power plant emissions of mercury and other

59. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,710 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (emphasis added); *see also* EPA’s Response in Opposition, at 32–35, *In re West Virginia v. EPA*, No. 15-1277 (D.C. Cir. Aug. 13, 2015).

60. *See* 42 U.S.C. § 7412(1)(b) (carbon dioxide not included in the list); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,710.

61. EPA’s Response in Opposition, *supra* note 59, at 32–35.

62. *Id.* at 32–33.

63. *See, e.g., Chevron v. NRDC*, 467 U.S. 837 (1984).

64. EPA’s Response in Opposition, *supra* note 59, at 32–35.

65. *Id.* at 33. Compare the Senate amendment to the version of the bill contained in the “conforming amendments” section of Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990), with the HOR version, Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990) (adding “emitted from a *source category* which is regulated under section 112”). *See* Clean Air Act Amendments of 1990 (Clean Air Act), Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990) (codified as amended at 42 U.S.C. § 7411(d)(1) (2012)) (emphasis added). The HOR version is essentially the language that now appears in the U.S. Code. *See* 42 U.S.C. § 7411(d)(1).

66. *See* Clean Air Act, § 302(a).

67. *See id.* § 108(g); Brief for Extraordinary Writ, *supra* note 30, at 18; *see also EPA Proposed 111(d) Rule*, *supra* note 55, at 40–42.

68. *See* 42 U.S.C. § 7411(d)(1).

69. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,714 n.294 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

hazardous pollutants are already regulated under Section 112.⁷⁰ The Complainant States, in their pleadings, characterized the Senate version as a simple “drafting error,” the type that occurs frequently in “modern, complex legislation.”⁷¹ The Senate version, they argued, was purely a conforming amendment that was intended to update a cross-reference in Section 111(d).⁷² The States therefore concluded that the EPA should ignore the error in the cross reference, and it should be “given no substantive meaning.”⁷³

C. SUPREME COURT PRECEDENT

A court scrutinizing the CPP must review the regulations in light of Supreme Court precedent and determine whether the EPA even has the authority to author such expansive—and in practice, ineffective—regulations. Although there is great controversy surrounding the potential effects the CPP will have on global warming and the economy, the recent trend in the Supreme Court—to limit deference to administrative agencies’ statutory interpretations—requires the EPA to make appropriate revisions to the CPP in order to survive a judicial challenge. This trend is apparent in two recent Supreme Court cases, *Michigan v. EPA* and *Utility Air Regulatory Group (UARG) v. EPA*.⁷⁴ Both cases involved an enormous and transformative expansion of regulatory authority by the environmental agency.

Prior to *Michigan* and *UARG*, the Supreme Court’s decisions dealing with agencies’ interpretations of statutory questions were analyzed under the two-step framework adopted in *Chevron*.⁷⁵ Under *Chevron*, a court first applies the traditional rules of statutory interpretation to determine whether Congress has spoken directly on the question.⁷⁶ If the statute is ambiguous, the court will generally defer to the agency’s interpretation, so long as it is reasonable.⁷⁷

In *Michigan*, the Supreme Court, by a 5-4 margin, held that the EPA had improperly excluded cost from its determination that regulation of power plant emissions of mercury and other toxics was “appropriate and necessary”

70. Brief for Extraordinary Writ, *supra* note 30, at 18.

71. *Id.* at 21.

72. *Id.*

73. *Id.* The AG brief also makes textual and constitutional arguments as to why building blocks 2 (shifting reliance on coal-fired power plants to natural gas) and 3 (shifting reliance on coal-fired power to low or zero carbon energy generation like wind and solar) are illegal. Namely, that the Plan violates the Tenth Amendment because it tramples on the states’ authority over interstate generation and consumption of electricity “which is one of the most important functions traditionally associated with police powers of the state.” *Id.* at 27; *see also EPA Proposed 111(d) Rule*, *supra* note 55, at 16–23.

74. *See generally* *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

75. *See generally* *Chevron v. NRDC*, 467 U.S. 837 (1984).

76. *See id.* at 842–43.

77. *Id.*; *see also Michigan*, 135 S. Ct. at 2707.

under Section 112 of the CAA.⁷⁸ In *UARG*, the Court largely upheld the EPA's authority to regulate GHGs from stationary sources under the CAA's Prevention of Significant Deterioration (PSD) Program.⁷⁹ However, the Court held that GHG emissions alone could not trigger the permitting requirements of the program.⁸⁰

D. BACKGROUND TO MATS REGULATION AND *MICHIGAN V. EPA*

The 1990 CAA Amendments required the EPA to regulate electric utility steam generating units (EGUs), if it found that such regulation was "appropriate and necessary" after conducting a utility study.⁸¹ In 2012, the EPA confirmed that EGU regulation was necessary and promulgated emission standards.⁸² The emission standards set limits on mercury, arsenic, nickel, dioxins and furans, and acid gasses emitted by coal-fired power plants, known collectively as "mercury and air toxics" (MATS).⁸³ The State of Michigan, twenty-two other states, and a group of non-profit organizations challenged the regulations before the Court of Appeals for the D.C. Circuit.⁸⁴ The D.C. Circuit upheld the MATS regulations and the plaintiffs appealed to the U.S. Supreme Court, which granted certiorari.⁸⁵

Writing for the majority, Justice Scalia concluded it was unreasonable for the EPA to refuse to consider costs when making its determination that regulation was appropriate and necessary.⁸⁶ Citing precedent, the Court explained that, to be lawful, an agency regulation must be based on an agency's consideration of the relevant factors, and the majority recognized that agencies frequently consider costs when determining whether regulation is appropriate.⁸⁷ The Court explained that the applicable "appropriate and necessary" standard at issue in the case necessarily encompassed a consideration of costs by the EPA.⁸⁸ While the Court questioned whether the rule was cost effective based on the EPA's cost-benefit analysis, it made clear that the EPA's error was its refusal to consider costs at the initial "appropriate and necessary" determination stage.⁸⁹ The majority clearly emphasized that

78. *Michigan*, 135 S. Ct. at 2707–08.

79. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442.

80. *Id.* at 2446.

81. 42 U.S.C. § 7412(n)(1)(A) (2012).

82. MATS FACT SHEET, *supra* note 56, at 2.

83. 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. 9304, 9306 (proposed Feb. 16, 2012) (to be codified at 40 C.F.R. pts. 60, 63).

84. *See generally* White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014).

85. *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015).

86. *Id.* at 2712.

87. *Id.* at 2707.

88. *Id.* at 2707–08.

89. *Id.* at 2708–10.

typical *Chevron* deference did not apply in this case, stating: “*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not.”⁹⁰

Justice Kagan, writing for the dissent, agreed with the majority that it would be unreasonable for the EPA to ignore costs entirely in the Section 112 rulemaking process.⁹¹ However, the dissent concluded that the EPA’s decision to exclude costs when making its “appropriate and necessary” determination *was* reasonable, because the EPA intended to and had considered costs at each of the subsequent steps in the rulemaking process.⁹² The dissent emphasized the deference owed to the EPA when interpreting the requirements of the Clean Air Act and concluded that the EPA’s interpretation of how to incorporate costs was reasonable.⁹³

Despite *Chevron*’s deferential attitude towards an administrative agency’s statutory interpretation, the Court in *Michigan* struck down the EPA’s interpretation of “appropriate and necessary” and held that the EPA was required to evaluate costs as part of its rulemaking process.⁹⁴ This indicates that in certain contexts, the Supreme Court is now willing to scrutinize agency regulations when the agency’s authority to regulate stems from an ambiguous statute. This limited deference might prove to be the CPP’s undoing.

E. *MICHIGAN V. EPA’S IMPACT ON THE CPP*

Former EPA Administrator Gina McCarthy dismissed *Michigan* as a narrow holding and argued that the case, limited to its facts, bore no relevance to the legality of the CPP.⁹⁵ At first glance, it would seem that her assertions are correct. The CPP would seem to have no similarity to the MATS regulations for power plants at issue in *Michigan*. The two are based on different provisions of the CAA. MATS was issued under Section 112, which establishes a technology-based framework for reducing emissions of hazardous air pollutants,⁹⁶ whereas the CPP derives from Section 111(d), which authorizes “standards of performance” for existing sources of pollutants not regulated under Section 112.⁹⁷ More importantly, the two provisions differ in their approach to costs. Section 111(d) identifies cost as a relevant factor in setting standards of performance and the EPA has

90. *Id.* at 2708.

91. *Id.* at 2714 (Kagan, J., dissenting).

92. *Id.* at 2718–19 (Kagan, J., dissenting).

93. *Id.* at 2726 (Kagan, J., dissenting).

94. *Id.* at 2712.

95. Timothy Cama, *Supreme Court Defeat Won’t Hinder Climate Push, Says EPA Chief*, THE HILL (July 7, 2015, 12:08 PM), <http://thehill.com/policy/energy-environment/247049-epa-head-confident-after-supreme-court-loss>.

96. 42 U.S.C. § 7412(n)(1)(A) (2012).

97. *Id.* § 7411(d).

analyzed and explicitly considered cost as a relevant factor in its CPP rulemaking.⁹⁸ By contrast, Section 112(n)(1)(A) does not mention cost explicitly⁹⁹ and the EPA made a conscious choice (albeit to its detriment) not to consider cost in its threshold decision to regulate power plants.¹⁰⁰

However, *Michigan*'s significance as precedent for the CPP's eventual fate does not turn solely on the specific language of the statutory provisions the EPA utilized. Rather, its significance is the unusually aggressive approach of the majority in scrutinizing and then rejecting the EPA's legal and policy choices.¹⁰¹ Congress left the interpretation of "necessary and appropriate" in the CAA open to the EPA's discretion.¹⁰² The EPA then determined that regulation of power plants for their MATS emissions was "appropriate," because power plant emissions presented "risks to human health and the environment" and control options existed "to reduce these emissions."¹⁰³ It determined that regulation was "necessary," because other CAA requirements applicable to power plants "[will] not eliminate these risks."¹⁰⁴

The EPA also reasoned that a meaningful analysis of costs was impossible before a proposed rule had been developed, but that costs would be considered later in the rulemaking process.¹⁰⁵ Nevertheless, the Court concluded that the EPA had strayed "far beyond [its] bounds."¹⁰⁶ In the Court's view, the term "appropriate" encompassed cost considerations and it was unreasonable for the EPA to give these costs no weight in the original decision to regulate power plants.¹⁰⁷

A reviewing court will likely view the CPP in a similar fashion. Like Section 112(n)(1)(A), Section 111(d) contains ambiguous language susceptible to differing interpretations. One example of such language is the phrase, "best system of emission reduction,"¹⁰⁸ which the EPA has defined to include more than regulation of an actual power plant, but also energy

98. *Id.*

99. *Id.* § 7412(n)(1)(A).

100. *See Michigan v. EPA*, 135 S. Ct. 2699, 2709–10 (2015).

101. *Id.* at 2708 (noting that "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not").

102. *See* 42 U.S.C. § 7412(n)(1)(A).

103. *Michigan*, 135 S. Ct. at 2705 (citing 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. 9304, 9363 (proposed Feb. 16, 2012) (to be codified at 40 C.F.R. pts. 60, 63)).

104. *Id.*

105. National Emission Standards for Hazardous Air Pollutants from Coal-and Oil-Fired Electric Utility Steam Generating Units, 77 Fed. Reg. at 9326–27.

106. *Michigan*, 135 S. Ct. at 2707.

107. *Id.* at 2707–08.

108. 42 U.S.C. § 7411(a) (2012).

efficiency mandates and increased reliance on renewables.¹⁰⁹ Another example is the conflicting amendments to the statute and the EPA's choice to adopt the version that allows double regulation of existing power plants.¹¹⁰ Despite the strong case for administrative agency deference, the court will closely analyze whether the regulation in fact sets forth the "best system of emission standards," and whether Congress intended this expansion to the EPA's authority by adopting the Senate version of the bill. A court may very well conclude that the EPA is interfering with the entire energy sector and acting beyond the bounds of its regulatory authority.

F. *UARG v. EPA* AND THE EPA'S "TAILPIPE RULE"

The *UARG* case was initiated after the EPA published, in the Federal Register, an endangerment finding for GHGs on December 15, 2009.¹¹¹ Accordingly, the EPA determined that GHGs, defined as an aggregate group of six key gases, "may reasonably be anticipated both to endanger public health and to endanger public welfare."¹¹² Based on that finding, the EPA then issued a rule promulgating emissions standards for motor vehicles, known as the "Tailpipe Rule."¹¹³

In the EPA's view, the Tailpipe Rule set off a chain reaction under the CAA.¹¹⁴ Under the CAA's PSD Program, major stationary sources in certain areas that emit, or have the potential to emit, 250 tons per year or more of any air pollutant (or 100 tons per year for certain other sources) are required to obtain preconstruction permits (PSD Program).¹¹⁵ Essentially, the PSD Program "makes it unlawful to construct or modify a 'major emitting facility' in any area which [the PSD program] applies."¹¹⁶ Sources subject to the PSD Program are also required to install the best available control technology (BACT) for "each pollutant subject to regulation under this chapter."¹¹⁷ Under Title V of the CAA, meanwhile, major stationary sources in certain areas that emit, or have the potential to emit, 100 tons per year or more of

109. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,664 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

110. See EPA's Response in Opposition, *supra* note 59, at 32–35.

111. See generally Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (codified at 40 C.F.R. pt. 98).

112. *Id.* at 66,497.

113. See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2434 (2014); Light Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (codified at C.F.R. pts. 85, 86, 600).

114. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2437; see generally Reconsideration of Interpretation of Regulation That Determines Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2012) (codified at 40 C.F.R. pts. 50, 51, 70, 71).

115. See 42 U.S.C. §§ 7475, 7479(1) (2012).

116. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2431.

117. See 42 U.S.C. § 7475(a)(4).

any air pollutant are required to obtain operating permits.¹¹⁸ In addition, there are inspecting, monitoring, and reporting requirements (Title V Requirements).¹¹⁹

The EPA has interpreted these provisions to mean that, once a pollutant becomes regulated under the CAA, any major source that emits, or has the potential to emit, over 100 or 250 tons per year of such pollutant is subject to the PSD Program and Title V Requirements (PSD Trigger).¹²⁰ Thus, the newly minted motor vehicle regulations fell squarely within these requirements, subjecting these vehicles to the onerous PSD Program and Title V Requirements. After numerous parties, including several states, challenged the regulation, the U.S. Supreme Court limited its decision to one question: “whether the EPA permissibly determined that its regulation of GHG emissions from new motor vehicles triggered permitting requirements under the CAA for stationary sources that emit GHGs.”¹²¹ In another 5-4 ruling, the Supreme Court answered that question in the negative.¹²² In an opinion once again authored by Justice Scalia, the Court rejected the notion that the EPA’s interpretation of the PSD Trigger was statutorily compelled.¹²³ The Court further held that the EPA’s interpretation of the PSD Trigger was not permissible, because this interpretation would “place plainly excessive demands on limited governmental resources” and would “bring about an enormous and transformative expansion in the EPA’s regulatory authority without clear congressional authorization.”¹²⁴ The Court also noted that it should respond skeptically when “an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy.”¹²⁵ Additionally, the Court emphasized that “[they] expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”¹²⁶ This decision is another example of the Court refusing to defer to the EPA in interpreting the CAA, when in the Court’s view the interpretation brings about an enormous expansion to the EPA’s authority.

Ann Carlson and Megan Herzog¹²⁷ argue that, similar to the GHG emissions in *UARG*, the Supreme Court will likely view the broad scope and effect of the EPA’s CPP, implementing a rarely utilized text of Section

118. *See id.* §§ 7602(j), 7661a(a).

119. *Id.* § 7661c(a)–(c).

120. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2436.

121. *Id.* at 2438.

122. *Id.* at 2442.

123. *Id.*

124. *Id.* at 2444.

125. *Id.* (internal quotation marks omitted).

126. *Id.*

127. Ann E. Carlson is the Shirley Shapiro Professor of Environmental Law and Co-Faculty Director of the Emmett Institute on Climate Change and the Environment at UCLA School of Law. Megan M. Herzog is the Emmett/Frankel Fellow in Environmental Law and Policy at UCLA School of Law.

111(d),¹²⁸ as overly expansive, without clear congressional direction.¹²⁹ Thus, instead of affording traditional agency deference, the Court will scrutinize the statutory source of the EPA's authority. First, "the Court would reject the CPPs focus on an integrated system of electricity generation, transmission, and delivery rather than individual plants."¹³⁰ Instead, the Court could find "that the language of [S]ection 111(d) reflects congressional intent to check sources' emission intensity via modest, state-driven technology requirements imposed directly on power plants."¹³¹ In addition, "[c]onsidering reductions achievable through measures that displace generation from regulated plants would be viewed as a dramatic expansion of EPA authority well beyond the scope of what the CAA envisions."¹³²

Carlson & Herzog continue: "[f]urthermore, notwithstanding that [S]ection 111(d) grants the EPA broad authority, *UARG* noted that courts respond skeptically where 'an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy.'"¹³³ The EPA used Section 111(d) only thirteen times previously in the form of "traditional emission limits," rather than by providing alternate energy generation measures.¹³⁴ Also, the *UARG* Court was clear that the EPA could not claim authority over previously unregulated small sources such as motor vehicles, reasoning that courts are prohibited from extending deference to agency decisions of vast "economic and political significance."¹³⁵ The Court could invoke similar reasoning when reviewing the CPP.

These two cases demonstrate that in certain instances the Supreme Court will refuse to defer to an agency's statutory interpretation, particularly when the regulation at issue involves vast economic restructuring. Thus, the CPP will likely be viewed as a remarkably expansive power grab by the federal government. As Professor Lawrence Tribe of Harvard Law School described the regulations:

EPA possesses only the authority granted to it by Congress. It lacks "implied" or "inherent" powers. Its gambit here raises serious questions under the separation of powers, Article I, and Article III, because EPA is attempting to exercise lawmaking power that belongs to Congress and judicial power that belongs to the federal courts. The absence of EPA legal

128. See Application for Immediate Stay of Final Agency Action at 2, *State of West Virginia, State of Texas v. EPA*, No. 15A773 (U.S. Jan. 26, 2016).

129. Anne E. Carlson & Megan M. Herzog, *Text in Context: The Fate of Emergent Climate Regulation After UARG and EME Homer*, 39 HARV. ENVTL. L. REV. 23, 30–31 (2015); see also Jody Freedman, *Why I Worry About UARG*, 39 HARV. ENVTL. L. REV. 9, 10–11 (2015).

130. Carlson & Herzog, *supra* note 129, at 30.

131. *Id.*; see also Freedman, *supra* note 129, at 15–16.

132. Carlson & Herzog, *supra* note 129, at 30.

133. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014); Carlson & Herzog, *supra* note 129, at 31; see also Application for Immediate Stay of Final Agency Action at 15–18, *State of West Virginia, State of Texas v. EPA*, No. 15A773 (U.S. Jan. 26, 2016).

134. Carlson & Herzog, *supra* note 129, at 29.

135. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

authority in this case makes the Clean Power Plan, quite literally, a “power grab.”¹³⁶

Accordingly, for the CPP to sustain an inevitable legal challenge before the Supreme Court, the EPA will have to scale back on the enormous and transformative expansion the Plan provides to the agency’s regulatory authority.

IV. ECONOMIC POLICY CONSIDERATIONS FOR IMPLEMENTING THE CPP

A. EFFECTS ON THE ECONOMY

Restricting the production of carbon-emitting conventional fuels with heavy-handed regulations, such as the CPP, may significantly harm the U.S. economy.¹³⁷ Americans feel the pain of higher energy prices directly, but also indirectly through almost all of the goods and services they purchase, because energy is a necessary component of virtually all production and service.¹³⁸ As prices rise, companies will relocate to new countries where the cost of doing business is lower. This results in lost jobs, lower incomes, and fewer opportunities for workers.

Although the EPA estimates that the CPP will generate 52,000 to 83,000 jobs by the year 2030, by way of demand-side energy efficiency programs,¹³⁹ a report by the National Rural Electric Cooperative Association (NRECA) estimates 882,000 to 2.2 million jobs *lost* due to the new regulations.¹⁴⁰ The NRECA report also predicts a potential 10% to 25% increase in electricity costs.¹⁴¹ Other projections also suggest that the cost of electricity may increase significantly. The economic consulting firm National Economic Research Associates (NERA) projects that whether or not a plan is state-administered or EPA-administered, electricity prices will increase considerably.¹⁴² If states administer their own plans, electricity prices will

136. *EPA Proposed 111(d) Rule*, *supra* note 55, at ii.

137. *See, e.g.*, WAYNE WINEGARDEN, PH.D. & ALEXANDER SPECHT, *THE CLEAN POWER PLAN’S ECONOMIC IMPACT* 7 (2016), https://www.pacificresearch.org/fileadmin/images/Studies_2016/CleanPowerPlan_RegressivityReduction_Web.pdf; *see also* Sarah K. Magruder Lyle & Alfredo Ortiz, *Obama’s Clean Power Plan Hurts the Economy*, THE HILL (Aug. 18, 2015, 9:00 AM), <http://thehill.com/blogs/congress-blog/energy-environment/251302-obamas-clean-power-plan-hurts-economy>.

138. *See* Magruder Lyle & Ortiz, *supra* note 137.

139. EVTL. PROT. AGENCY, *REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE ES 25* (2015), <http://www2.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf>.

140. NAT’L RURAL ELEC. COOP. ASS’N, *AFFORDABLE ELECTRICITY: RURAL AMERICA’S ECONOMIC LIFELINE* 7 (2015), <http://www.nreca.coop/wp-content/uploads/2015/07/Affordable-Electricity-Rural-Americas-Economic-Lifeline.pdf>.

141. *Id.*

142. *See* NAT’L RURAL ELECTRIC COOPERATIVE ASS’N, *POTENTIAL ENERGY IMPACTS OF THE EPA PROPOSED CLEAN POWER PLAN S 6–7* (2014), <http://www.nera.com/content/dam/nera/>

increase by a projected average of 12% between 2017 and 2031, but if the administration is left to the EPA, prices project to increase an average of 17% during that time period.¹⁴³ Thus, if the NRECA prediction is correct, the job losses far outweigh any of the job increases that the EPA expects the CPP will generate.

The plethora of health benefits the EPA associates with the CPP is based on a flawed assumption. According to the EPA, the health benefits will amount to \$14 billion to \$34 billion by the year 2030.¹⁴⁴ Experts explain that there are two main ways the CPP can improve health: (1) by reducing the effects of climate change, thereby decreasing deadly extreme weather events like hurricanes and heat waves; and (2) by improving everyday air quality to reduce premature deaths, asthma attacks, and heart disease.¹⁴⁵ The EPA took both the effects of climate change and air quality into account when it determined the health benefits the CPP would generate.¹⁴⁶ Although the CPP regulations will likely improve the quality of the air we breathe, especially in coal-heavy states,¹⁴⁷ it is unlikely to reduce the effects of climate change on a global scale, thereby increasing the health benefits associated with the reduction of extreme weather patterns.¹⁴⁸ According to the Model for the Assessment of Greenhouse Gas Induced Climate Change, which the EPA assisted in developing, the climate regulations will reduce an estimated mere 0.018 degree Celsius of warming by 2100.¹⁴⁹ Thus, the long-term health benefits are in fact much lower than what the EPA is estimating them to be. While the precise number is difficult to assess, in all likelihood it is far less than the \$14 billion to \$34 billion that the EPA estimates, and perhaps it is even less than the \$8.4 billion annually it will cost to implement the CPP by 2030.¹⁵⁰

publications/2014/NERA_ACCCE_CPP_Final_10.17.2014.pdf [hereinafter POTENTIAL ENERGY IMPACTS].

143. *Id.*

144. CPP FACT SHEET, *supra* note 3, at 3.

145. Dallas Burtraw, *Significant, Widespread Health Benefits Possible Under EPA's Clean Power Plan*, RESOURCES FOR THE FUTURE (May 4, 2015), <http://common-resources.org/blog/2015/significant-widespread-health-benefits-possible-under-epa-s-clean-power-plan> (Dallas Burtraw is a Darius Gaskins senior fellow and a co-author of “*US Power Plant Carbon Standards and Clean Air and Health Co-benefits*” published in the May issue of *Nature Climate Change*).

146. CPP FACT SHEET, *supra* note 3, at 2–3.

147. *See, e.g.*, Burtraw, *supra* note 145.

148. *See* Knappenberger & Michaels, *supra* note 10.

149. *Id.*

150. ENVTL. PROT. AGENCY, FACT SHEET: BY THE NUMBERS CUTTING CARBON POLLUTANTS FROM POWER PLANTS 2 (2015), <http://www2.epa.gov/sites/production/files/2015-08/documents/fs-cpp-by-the-numbers.pdf>.

B. GRID RELIABILITY

One of the primary concerns among many electricity-grid operators across the country is the CPP's effect on grid reliability.¹⁵¹ The concerns stem from the uncertain reliability of renewable energy sources, and that power plants will be forced to close earlier than otherwise planned.¹⁵² For instance, solar power only works during the day; wind turbines only generate electricity when the wind is blowing. Indeed, the Southwest Power Pool (SPP) warned that “unless the proposed CPP is modified, the SPP region faces serious, detrimental impacts on reliable operation of the bulk electric system—introducing the very real possibility of rolling blackouts or cascading outages that will have significant impacts on human health, public safety, and economic activity.”¹⁵³

C. GOOD ECONOMIC POLICY

Sound economic policy dictates that the EPA amend its regulations to mitigate the potential economic harm. The Cato Institute's Paul Knappenberger and Patrick Michaels estimate that a miniscule amount of warming would be averted by the EPA's CPP—about 0.018°C by 2100—using a publicly available model developed by academic researchers with support from the EPA and other organizations.¹⁵⁴ Indeed, the CATO Institute concludes that even reducing U.S. carbon emissions by 80% would have an insignificant effect on global climate change.¹⁵⁵

The modest and even insignificant size of those projected effects reflects huge inertia present in the planet's climate and, more importantly, the limited effect of unilateral U.S. action.¹⁵⁶ Therefore, actions by other countries, especially China and India, are essential in efforts to reduce global warming.¹⁵⁷ Given that the estimated reduction levels are miniscule compared to the overall global GHG reductions required to make a

151. See e.g., N. AM. ELEC. RELIABILITY CORP, POTENTIAL RELIABILITY IMPACTS OF EPA'S PROPOSED CLEAN POWER PLAN 17–20 (2014), http://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/Potential_Reliability_Impacts_of_EPA_Proposed_CPP_Final.pdf [hereinafter RELIABILITY IMPACTS]; see also SW. POWER POOL, SPP CLEAN POWER PLAN COMPLIANCE ASSESSMENT (2015), <http://www.spp.org/publications/SPP%20Regional%20Compliance%20Assessment%20Report.pdf>.

152. See RELIABILITY IMPACTS, *supra* note 151, at 17–20.

153. See Dave Levitan, *Will Power Plant Rules Cause Blackouts?*, FACTCHECK (Feb. 27, 2015), <http://www.factcheck.org/2015/02/will-power-plant-rules-cause-blackouts/>.

154. Knappenberger & Michaels, *supra* note 10.

155. See CTR. FOR THE STUDY OF SCI., CATO INST., ADDENDUM: GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 9 (2012), <https://www.cato.org/pubs/Global-Climate-Change-Impacts.pdf>.

156. *Id.*

157. *Id.*; see also Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009) (codified at 40 C.F.R. pt. 98).

meaningful impact on climate change, the purpose of any sweeping federal regulation should be distilled to motivate international climate change efforts.

Recently, the United States has made great strides in the effort to curb international carbon emissions by heading the negotiation and eventual ratification of an international agreement among 197 nations to combat climate change.¹⁵⁸ While these efforts should certainly be applauded, what is now needed is a continued and sustained effort from all of the nations involved. Thus, now more than ever, the United States should refrain from gambling with the very real threat of job losses and unreliable, higher-cost energy.¹⁵⁹ Rather, a more measured approach is appropriate so long as the regulations the United States ultimately implements are sufficiently vigorous to motivate a sustained international effort. Therefore, the economic “safe bet” requires less over-reaching regulations. Moreover, if the EPA does sustain a loss at the Supreme Court, the credibility of the United States would sustain a serious and perhaps fatal blow, because we would fail to deliver on our commitment.¹⁶⁰

As a result of the EPA’s overreaching regulations, the chances of a real globalized effort to curb GHG emissions may be lost or significantly delayed. The EPA should craft a regulatory scheme bearing the following in mind: (1) the regulatory scheme cannot be an enormous transformative expansion of authority in order to pass judicial scrutiny; and (2) the regulations must be sufficiently vigorous to effectively spur international climate change efforts, without the potentially devastating economic ramifications.

158. See Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, THE WHITE HOUSE BLOG (Sept. 3, 2016, 10:41 AM), <https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement>; *The Paris Agreement*, UNITED NATIONS, http://unfccc.int/paris_agreement/items/9485.php (last visited Feb. 13, 2017).

159. POTENTIAL ENERGY IMPACTS, *supra* note 142, at S-5.

160. This is especially the case now after the Paris Agreement, a global response to the threat of climate change, that was ratified by the United States and 126 other nations. See *The Paris Agreement*, *supra* note 158. Some of the key aspects of the agreement are: (1) long-term temperature goals to limit the increase in temperature to 1.5 degrees Celsius; (2) establishing binding commitments by all parties “to prepare, communicate, and maintain a nationally determined contribution, and to pursue domestic measures to achieve them;” and (3) to help and support underdeveloped countries “to build clean, climate resilient features.” *Summary of the Paris Agreement*, UNITED NATIONS, <http://bigpicture.unfccc.int/#content-the-paris-agreement> (last visited Jan. 31, 2017). The CPP are the regulations intended to be utilized to fulfill the United States’ obligations to curb carbon emissions under the Paris Agreement. See Coral Davenport, *Donald Trump Can Put Climate Change on Course for ‘Danger Zone,’* N.Y. TIMES (Nov. 10, 2016), https://www.nytimes.com/2016/11/11/us/politics/donald-trump-climate-change.html?_r=0.

V. SOME SENSIBLE AMENDMENTS TO THE CPP

A. FLEXIBILITY—A KEY COMPONENT FOR THE CPP TO PASS JUDICIAL SCRUTINY

A key component necessary for the Supreme Court to view the CPP favorably is whether the regulations contain efforts to allow states more flexibility when implementing plans to curb carbon emissions. If the EPA demonstrates sufficient flexibility, it would be difficult for a court to strike down the regulations, because the regulations would no longer be a “dramatic expansion of authority.”¹⁶¹ The Court could acknowledge that the EPA’s chosen program for “best system of emission standards”¹⁶² sensibly takes into account cost effectiveness and gives the states proper leeway to accomplish the reduction limits. Additionally, it would be easier for a court to see the electric grid as an interconnected and integrated system when the EPA is working together with, rather than against, the states, by way of more flexible proposals to reach emission reduction targets.

Any rational solution must endeavor to serve two primary objectives. First, the regulations must accomplish substantial GHG reduction, to spur and then sustain international carbon emission reductions. Second, these reduction measures must ensure states enough flexibility to implement a carbon emissions reduction scheme without sparking the severe repercussions in the form of higher energy costs and grid reliability risks. Regulations that allow more flexibility will not only help alleviate most of the grid reliability concerns, but, as an added benefit, will be more likely to pass judicial scrutiny. To that end, the EPA should make the following common-sense amendments to the CPP regulations.

B. REPLACE 2022 INTERIM TARGETS

As part of the CPP regulations, the EPA has not only established final carbon emission performance rates that states are required to reach by 2030, but has also set up interim rates that the states must meet by 2022.¹⁶³ The interim and final statewide goals come in three distinct forms:

[(1) a] rate-based state goal measured in pounds per megawatt hour (lb/MWh); [(2) a] mass-based state goal measured in total short tons of carbon dioxide; and [(3) a] mass-based goal with new source complement measured in short tons of carbon dioxide.¹⁶⁴

States must then develop and implement customized plans that achieve the interim carbon emission performance rates by 2022 and the final carbon

161. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

162. *See* 42 U.S.C. § 7411(a) (2012).

163. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,664 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

164. CPP FACT SHEET, *supra* note 3 at 3–4.

emission rates by 2030.¹⁶⁵ The State of Missouri, for example, must meet 62% of its final 2030 targets by the year 2022.¹⁶⁶ On a broader scale, industry experts predict that in just seven years, the United States could lose more than one-third of its coal-fired power plant fleet, causing many regions to fall below reserve margin standards necessary to ensure reliability.¹⁶⁷ Also, if meeting these interim emission rates will result in premature closure of coal-fired power plants, many people will be left unemployed.

Provided that electricity generation is “planned decades in advance to ensure reliability,”¹⁶⁸ the interim targets that the states must meet impede the flexibility the states need to carry out carbon emission reductions in a cost-effective manner, and jeopardize the reliability of the electricity supply. The EPA can ensure that substantial reductions occur within the 2030 timeframe by eliminating the rigid interim targets and substituting them with flexible, individually tailored glide paths to the 2030 targets. To mitigate compliance concerns, the EPA could require state plans to include reporting requirements demonstrating obedience to the state plan. Additionally, the EPA could require states to implement contingency plans that would be designed to remedy any divergence.

In sum, by replacing the rigid interim target requirements with a more flexible glide path, the EPA achieves the following key objectives: First, the Supreme Court is more likely to view these regulations as sensibly taking into account cost effectiveness and thereby falling within the EPA’s congressional authorization. Second, the regulations come with less compliance costs and reliability risks. Third, the regulations provide state regulators and energy providers with the needed flexibility to adapt to constantly changing conditions and to exploit new technologies as they become available. Finally, and most importantly, the regulations are still capable of providing meaningful carbon emission reductions.

C. FLEXIBILITY IN THE 2030 TARGET DATE

A second adjustment the EPA should make to the regulations is to allow the states to extend the compliance deadline beyond 2030 upon the showing that a state plan will achieve a similar amount of reduction within a reasonable timeframe. A key concern among industry leaders is that the current strict deadline of 2030 does not allow “for the orderly retirement of

165. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,677; *see also* CPP FACT SHEET, *supra* note 3, at 4.

166. AMEREN, AMEREN’S GENERATION STRATEGY VS. THE EPA’S CLEAN POWER PLAN: A CASE STUDY IN THE BENEFITS OF MIDWESTERN PRAGMATISM 10 (2015). For a full list of interim and final carbon emission reduction goals on a state-by-state basis *see*, *Clean Power Plan—State Specific Fact Sheet*, ENVTL. PROT. AGENCY, <https://www.epa.gov/cleanpowerplantoobox/clean-power-plan-state-specific-fact-sheets> (last updated Sept. 16, 2016).

167. *See* Levitan, *supra* note 153; *see also* RELIABILITY IMPACTS, *supra* note 151, at 17–20 (the CPP is likely to lead to reduced grid reliability).

168. AMEREN, *supra* note 166, at 10.

coal plants to coincide with the planned construction of lower emitting sources and renewables.”¹⁶⁹ As mentioned, this takes years of advance planning. The strict 2030 deadline under the CPP effectively compromises all that planning. Again, to ensure compliance under this proposal, state plans would be required to have strict disclosure requirements.

D. RE-EVALUATE RATE-BASED METHODOLOGY

On February 11, 2015, Ameren Energy Company released a study analyzing the practical effects the CPP would have on its energy generation.¹⁷⁰ In the study, Ameren suggested a third amendment that the EPA should make to significantly improve the CPP. As explained, one of the formulas the EPA uses to gauge progress as utilities undertake the transition to less-carbon intense generation sources is the lb/MWh ratio.¹⁷¹ Ameren points out that, under this formula, only when a retired plant is replaced with other fossil fuel generation is proper credit given.¹⁷² However, when a retired plant is not replaced with fossil fuel generation, the improved emission dynamic is not accounted for. The result is that coal-heavy states that are forced to retire many plants in order to achieve compliance with emission targets get very little credit for the emissions reductions they actually achieved. Ameren concluded that:

properly recognizing this credit, utilities would be incentivized to retire coal-fired generation not required for reliability purposes and avoid installing unneeded new generation to comply with the EPA’s emission reduction formula. The result would be more stable electricity prices, a reduction in CO₂ emissions, reduced risk of reliability problems and proper credit for significantly lowering CO₂ emissions. It would also provide states additional needed flexibility in achieving their final CO₂ target rate.¹⁷³

Giving utility companies and states proper credit where credit is due will help alleviate some of the burdens in meeting the interim and final target dates. This additional flexibility will play a strong role in the CPP’s ability to pass judicial scrutiny.

VI. CONCLUSION

While we may live in an era “where human activities will largely determine the evolution of earth’s climate,”¹⁷⁴ heavy-handed and sweeping regulations—such as those under the CPP—are not necessarily the solution.

169. *Id.*

170. *See generally id.*

171. The EPA’s formula for setting carbon emission reductions is “CO₂ from fossil fuel-fired power plants (in pounds) divided by electricity generation from fossil-fuel fired power plants and certain low-or-zero emitting power sources in megawatt hours.” *Id.* at 3.

172. *Id.* at 11.

173. *Id.*

174. CLIMATE STABILIZATION TARGETS, *supra* note 14, at 3.

As one commentator bluntly concluded, “President Obama’s climate plan would have a chilling effect on the economy, not the climate.”¹⁷⁵ Constructive and common sense amendments to the CPP are needed to help the regulations pass judicial scrutiny, avoid the risk of imposing staggering costs on utility customers, and prevent significant risks to electric grid reliability.

This Note posits some pragmatic amendments to the EPA’s Plan that include: removing the plan’s interim targets that begin in 2022; enhancing states’ interim reporting requirements to ensure that progress is being made to achieve the 2030 target; allowing for a reasonable extension of the 2030 deadline if utilities are making substantive progress toward achieving the EPA’s final greenhouse gas goals; and allowing full credit for the retirement of coal-fired power plants. These amendments will give states much needed flexibility to ensure compliance with the target dates set out in the Plan. Additionally, this added flexibility will mitigate the negative economic risks currently associated with the Plan. More importantly, these amendments ensure that the Supreme Court will not see these regulations as a federal overreach beyond the EPA’s statutory authority.

EPILOGUE

Just prior to this Note’s publication, on March 28, 2017, President Trump signed an Executive Order directing the EPA to dismantle the CPP (the Order).¹⁷⁶ Specifically, the Order directs the EPA Administrator to “as soon as practicable, suspend, revise or rescind [the CPP].”¹⁷⁷ Legal experts explain that pursuant to the language of this Order, EPA Administrator Scott Pruitt is now faced with two possible options moving forward.¹⁷⁸ The first option is to repeal the Plan and not replace it with anything at all.¹⁷⁹ This can be accomplished by the EPA pointing to the legal challenges that plague the current regulations, such as the CAA’s prohibition against double regulation of existing coal-fired power plants.¹⁸⁰ In other words, the EPA can make the

175. Nicholas Loris, *The Many Problems of the EPA’s Clean Power Plan and Climate Regulations: A Primer*, HERITAGE FOUND. (July 7, 2015), http://www.heritage.org/research/reports/2015/07/the-many-problems-of-the-epas-clean-power-plan-and-climate-regulations-a-primer#_ftnref48.

176. See *Presidential Executive Order on Promoting Energy Independence and Economic Growth*, <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economy-1> (last visited Apr. 3, 2017) [hereinafter *Executive Order*]; see also Tatiana Schlossberg, *What to Know About Trump’s Order to Dismantle the Clean Power Plan*, N.Y. TIMES (Mar. 27, 2017), https://www.nytimes.com/2017/03/27/science/what-to-know-about-trumps-order-to-dismantle-the-clean-power-plan.html?_r=1.

177. See *Executive Order*, *supra* note 176, at Sec. 4.

178. See e.g., Brad Plumer, *I asked Legal Experts How Trump Could Kill Obama’s Clean Power Plan. Here’s What They Said*, VOX (Mar. 28, 2017, 10:16 AM), <http://www.vox.com/energy-and-environment/2017/2/23/14691438/trump-repeal-clean-power-plan>.

179. *Id.*

180. *Id.*

argument that under the HOR version of the CAA, the EPA is not required to regulate GHGs from existing power plants, and in fact, it is illegal to do so because this would subject these power plants to double regulation.¹⁸¹

Alternatively, the EPA could concede (or maintain its current position) that it has authority to regulate emissions from existing power plants and replace the current regulations with a more modest version.¹⁸² The EPA can implement regulations with much more flexibility that allows GHG emission reduction to occur without sparking negative repercussions such as higher energy costs and grid reliability risks. Arguably, these new regulations can look very similar to the regulations this Note advocates for.

Regardless of which route the EPA ultimately settles on, it must follow a lengthy administrative proceeding to repeal the existing regulations and/or to enact any new regulations.¹⁸³ This process can take months and even years, because it requires periods of public notice and comment.¹⁸⁴ In addition, any repeal or replacement plan is sure to spark massive resistance from advocates and environmental groups, which will likely result in even further delays.¹⁸⁵

It is still too early to determine how other countries around the world, especially China and India, will react to the United States' unsettled climate policies. However, one major drawback with all this uncertainty is that without a concrete plan of its own, the United States cannot hope to lead a sustained international effort to control carbon emissions. In sum, while this Order offers the EPA the opportunity to craft a more sensible regulatory scheme, the fallout from a protracted legal battle may eviscerate any serious efforts to curb global GHG emissions.

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181. *Id.*

182. *Id.*

183. *See* Schlossberg, *supra* note 176.

184. *Id.* The Clean Power Plan, for example, took well over a year from when it was first proposed in June 2014 to when it was finalized in August 2016.

185. *See* Plumer, *supra* note 178.

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