CENTER FOR ENVIRONMENTAL ACCOUNTABILITY

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Comments on
New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emissions Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule; Proposed Rule

88 Fed. Reg. 33,240 (May 23, 2023)
Docket No. EPA EPA–HQ–OAR–2023–0072

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The Center for Environmental Accountability (CEA) submits these comments on the United States Environmental Protection Agency's (EPA) proposal *New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule*, 88 Fed. Reg. 33,240 (May 23, 2023) (the Proposal).

CEA is a 501(c)(3) organization devoted to educating the public and government on the importance of transparency and accountability in the areas of environmental and energy policy. CEA's work is driven by its core principles, including a commitment to the rule of law, to a clean environment, and to a healthy human environment founded on a strong economy and vibrant communities animated by people gainfully employed in the all the occupations of human flourishing. CEA understands that adherence to law requires respect for the proper roles of each branch of government and for the respective roles of the federal government and of state governments. CEA recognizes that the public interest requires a balance of environmental stewardship, resource development, and energy access and security, and that environmental remediation functions best when targeted at those communities injured by unlawful pollution.

I. Introduction.

Utility regulation is one of the most important subjects of government policy for American households and businesses. We are all energy consumers. Energy is not a luxury good and this is not a niche issue.

For over a century, the Federal Power Act's division of authority has held. Federal energy regulators have jurisdiction over interstate transmission of energy, but states determine the resource mix of intrastate generation as a core area of traditional state police power. Whether Congress could ever have constitutionally asserted a federal interest in all energy-generation matters, it did not do so. The Clean Power Plan (CPP) was, notoriously, an attempted end run around this division of authority.

West Virginia's core teaching is clear: EPA cannot reshape the utility sector in the guise of pollution control. But this Proposal is nothing more than a pretextual gambit, whose real objective remains to do just that.

CEA advocates for accountability and transparency in environmental policymaking. The new Proposal is an affront to both. Major aspects of utility regulation have been kept at the state level for good reason. But this proposal, as the CPP would have, obfuscates which players and policies will be responsible for fuel-mix changes, price impacts, and the looming threat of increased blackouts as an already challenged grid struggles to accommodate this new burden.

CEA is committed to adherence to the rule of law as an essential component of sound, durable environmental stewardship. The Proposal fails this test, as well. The Proposal is based around claiming that certain technologies are "adequately demonstrated," the statutory requirement for using them as a basis for crafting standards under Clean Air Act (CAA) Section 111. But they're

nowhere near meeting that standard—and may never be. EPA surely knows its proposal, if finalized, is unlikely to survive judicial review. It seizes on old, permissive caselaw, although its new interpretation of its authority goes far beyond even the bygone high-water mark that this caselaw represents. And it mouths the words of *West Virginia* and of the statute while twisting their substance beyond recognition.

Apart from these obvious flaws in EPA's approach, this is not garden-variety agency overreach. EPA's crusade to force the energy transition has already led to two massive and unprecedented steps by the Supreme Court: the 2016 stay of the CPP and then the christening of the major questions doctrine in *West Virginia*. Yet EPA is apparently unconcerned whether its new Proposal will likewise fall afoul of that doctrine, or of the related "federalism canon," despite retracing the same trespasses on congressional and state prerogatives.

In this regard, EPA's distortion of the existing-source statute is especially pernicious. The existing-source provision under Section 111(d) is a regulatory backwater, languishing in obscurity for the first 35 years of its existence, used only a handful of times on sectors with relatively low importance to the political economy of the nation. But now, the mousehole has become a menace, as EPA again brandishes it to reshape the nation's utility fleet.

The text of Section 111(d) is very plain: States are to establish standards of performance for their existing plants on an individual basis, and EPA *must* allow them when doing so to take into account those source's particular characteristics. EPA completely inverts the existing-source provision's statutory text and structure. Under its proposed interpretation and implementation, states are bound to follow EPA's preferred policies, and must demonstrate practical impossibility before establishing a less stringent standard for any particular plant. (No extra showing is required before establishing a *more* stringent one).

And yet, no particular source has to be required to actually do anything, because states have free rein to apply any cap-and-trade scheme they desire, untethered from the plain statutory language establishing that their task is a source-specific one. EPA only allows this, though, because it's planning to impose a completely atextual aggregate, statewide reduction obligation.

Adding insult to injury, EPA then gaslights the public by claiming it is the true federalist here. This is absurd. EPA cannot suffocate an explicit congressional grant of state discretion only to claim this is compensated for by an *ultra vires* insertion of the precise policy scheme that the Supreme Court ruled only last year was beyond its power under this section of the CAA. This is true just as a matter of regular statutory interpretation. It is confirmed by the application of the "federalism" clear-statement rule, which establishes a presumption against interpretations that would invade a core area of traditional state sovereignty.

This is also an area where EPA's proposal would undermine core principles of environmental and regulatory accountability. State plans are not merely a matter of state law—an approved state plan also becomes federal law, enforceable as such by any NGO in a district-court suit under CAA Section 304. This means that the power to enforce these programs that Congress has not authorized would be transferred to groups with *no* connection to any elected officials, a double derogation of democracy.

By favoring speculative, uneconomic technologies the Proposal further misaligns the interests of utilities and ratepayers. This rule will also provide utilities with a *prima facie* case that their compliance expenditures are prudent for purposes of rate recovery. It's not clear what ratepayers could expect to gain from this arrangement, since EPA's topsy-turvy reading of the statute effectively forbids a state from focusing on the actual emissions performance capabilities of their existing-source fleet. But any boondoggle project employing putatively "adequately demonstrated" measures such as carbon capture and "low-GHG [greenhouse gas] hydrogen" will be infinitely subsidized, by federal taxpayers on the front end and captive state ratepayers on the other end. This is a rent-seeking machine of unprecedented ambition. It is the epitome of evading accountability.

With claims of awesome authority comes great responsibility: to voters, taxpayers, and all classes of ratepayers. In an "electrifying" world, the accountability structure around the regulation of electricity generation is more crucial than ever. But this Proposal would be a disaster for such values. This is not a good-faith, technically derived, transparent rulemaking. The courts will hopefully shut this down soon after it is finalized. But much damage may already be done, because the Proposal's real intent is cynical: to move markets *now*, through the sheer boldness of the Proposal's terms. This is no way to regulate, and if EPA does not change course, it will be up to the courts to remind it, yet again, that there are limits to its power.

II. Summary of Argument.

1. EPA's proposal to find that certain "systems of emission reduction" have been "adequately demonstrated" is based on the Agency's own misunderstanding of the statutory language at issue and the applicable caselaw. Properly construed, the statute requires EPA to *first* consider whether a "system of emission reduction" has been "adequately demonstrated," taking into account certain enumerated factors. Only *then* may EPA proceed to determine which of these adequately demonstrated systems of emission reduction is the "best system of emission reduction" (BSER). This proper understanding of the statute reveals that EPA's current characterization of its discretion under the statute is far too broad.

In support of its proposed BSER, EPA spins a comforting cocoon of permissive-seeming soundbites from antiquated caselaw. A deeper understanding of that early caselaw, and the remarkable lengths to which EPA now seeks to stretch it, confirm that this Proposal would never pass muster even under a generous reading of EPA's statutory discretion as interpreted in those early cases. In any event, EPA's view of its discretion cannot be squared with the teachings of *West Virginia*—or even with the view of the statute offered by the *dissent* in that case.

The correct interpretation of "adequately demonstrated" is: It'll soon be widely available, and it has a proven track record. EPA seems to suggest that the longer the timeframe it projects for the developing availability of a given system, the broader its latitude to make projections, but this is incorrect. In any event, neither the text nor the caselaw support anything like the Proposal's fifteen-year plan.

There are multiple, fundamental, and independent reasons why EPA's Proposal is far over the line of any permissible interpretation of "adequately demonstrated." The only interpretation that could support EPA's Proposal is functionally boundless, which would necessarily trigger a major-questions standard (if not a constitutional non-delegation inquiry)—a standard that EPA does not even attempt to satisfy here.

EPA's cost analysis by itself dooms its proposed BSER. It insists on focusing only on the massively subsidized cost to a plant's owner, but the text cannot bear that construction, as the caselaw and statutory history demonstrate. And, interrelated with the defects in its analysis of "energy requirements," its projections of overall, societal cost are unreliable, confused, and most likely severe underestimates.

EPA admits its proposed BSER determinations would not be possible without a recent, massive increase in tax credits and other subsidies. That is, it necessarily must interpret the statutory term "the cost of achieving such reduction" to allow it to net out the cost of the subsidies themselves, or, put differently, to look only at the subsidized cost falling on the plant's owner. It offers no substantive interpretation of the statutory term "cost" which permits this approach. And that term cannot reasonably be read to support it. Again, the early D.C. Circuit caselaw confirms that this is so. Further, the statement of one member from the House floor *after* the Inflation Reduction Act (IRA) passed not only provides no support for EPA's blinkered cost analysis, but also helps reveal the Proposal's pretextual nature and its true, forbidden intent to force the "energy transition" and reshape the grid's fuel mix.

EPA's energy-requirements analysis is likewise fatally flawed. It has inappropriately narrowed the scope of that analysis, its underlying assumptions are unjustified, and it bizarrely declines to analyze the implications for the grid of what it projects will be massive shifts as a result of the IRA.

CCS and "low-GHG hydrogen" are invalid BSER candidates for other reasons. CCS does not actually reduce emissions, it just transports them off-site. And, contrary to EPA's claims, not only did *West Virginia* not approve of "fuel-switching," particularly in the amounts EPA proposes with respect to hydrogen—the Court expressed "doubt" that this approach would be legal. And EPA's focus on the emissions from upstream hydrogen production, and from the generation of the energy used to produce it, reveals that this aspect of the proposed BSER is simply the CPP with one extra step. Instead of directly compelling regulated sources to subsidize their competitor's generation, this would compel them to secure fuel made by their competitors' generation. This transparent evasion of the strictures outlined in *West Virginia* borders on open defiance of the high Court, a perilous course into which the Agency seeks to conscript nascent, still vulnerable industries.

2. The overarching flaw in EPA's approach to Section 111(d) is easily stated: It disagrees with the policy choice Congress made to give broad discretion to states in establishing standards of performance for their existing-source fleets, and so it's trying to effectively nullify that choice. The amount of ground they're trying to seize here is breathtaking.

Congress in the 1977 CAA amendments told EPA it *must* let states take into account source-specific characteristics, including a source's remaining useful life, when setting standards of performance for any particular source. This is resolute federalist language deferential to the states, and that reading of what's already plain in the text is buttressed by the underlying clear-statement federalism canon. But EPA, here and in two other pending proposals, would require states to show that EPA's "emission guidelines" cannot reasonably be applied to a particular source before exercising this discretion. This constraint on the states is not supported in the statutory text, nor in the 1975 EPA regulations that Congress was drawing from when it enacted that text.

Nor is EPA's new, and preposterous, position that states can, without any extra process or showing required, invoke this discretion to impose standards *more* stringent than EPA's "emission guidelines" and have those federalized via plan approval. States can, consistent with CAA Section 116, be more stringent on stationary sources as a matter of state law, but there's no warrant to do so via this provision.

EPA also proposes to allow states to employ averaging and trading schemes in their state plans, despite the Supreme Court in *West Virginia*'s pointed observation that those policies are *not* authorized under Section 111. And don't let this apparent flexibility fool you: EPA is not going to bat for the states' regulatory primacy. For it also proposes to impose statewide, aggregate reduction obligations, without any authority. EPA cannot take away express discretion for the states, replace it with the fool's gold of "flexible" trading schemes, while treating a state as just a giant source of emissions subject to an illegal statewide cap that it retains ultimate discretion to dial down at will.

Finally, EPA wrongly asserts that it *must* impose a federal plan if EPA fails to submit a "satisfactory" one. But Congress said only that EPA has the "authority" to do so, and EPA hasn't justified its choice to treat this not as authority but obligation.

3. EPA's Proposal is pretextual. Its real policy goal is precisely what the Supreme Court forbid it from seeking in *West Virginia:* "forc[ing] a nationwide transition away from the use of coal," and more broadly restructuring the utility markets and the fuel-mix of the nation's electric grid. The clearest "tell" here is in the rule's structure, as EPA breaks from precedent through hyper-subcategorization of power plants not by their design, but by their market function and expected operating horizon. This foray into hyper-technocracy is the gravamen of EPA's recidivism. The scheme, combined with its provision of massive incentives to close down early, is patently intended to compel a restructuring of the grid's fuel mix. The *West Virginia* dissent forecast that EPA might try such an approach; the Court warned EPA not to try it. And yet here we are.

EPA will doubtless deny any such intent, but its allies and its own leaders are not so reticent. Again and again, and as recently as the day these comments are filed, they reveal that this Proposal is not a good-faith, source-specific pollution control measure. Rather, in the words of EPA's Administrator only a few weeks ago, it is designed to "help us transition from heavily fossil fuel resources to clean resources." This is precisely what the Supreme Court held was not

authorized under Section 111. Despite all the recent massive legislative subsidies, no amendment of that section has been enacted, let alone one providing the clear statement of authorization for generation-shifting that the major questions doctrine requires.

Pretext is a difficult thing to show in administrative law, but we're now well within that realm. EPA has, at long last, lost the benefit of the doubt.

III. EPA's Proposed Best System of Emission Reduction (BSER) Is Not "Adequately Demonstrated."

EPA's proposal to find that certain "systems of emission reduction" have been "adequately demonstrated" is based on the Agency's own misunderstanding of the statutory language at issue and the applicable caselaw. We will explain.

The plain text.

> The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

42 U.S.C. § 7411(a)(1).

The text of this provision, and the order of operations thereunder, is clear: the EPA Administrator first determines which "system[s] of emission reduction" have been "adequately demonstrated." Of those systems, the Administrator then identifies the "best" one. A "standard of performance" (established for new sources by EPA itself and for existing sources in the first instance by states in their state plans) "reflects" the "degree of emission limitation" "achievable through the application" of that "best" "system."

The text within the parentheses (*i.e.*, "taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements," referred to herein as the "parenthetical factors") are *not* subject to a general weighing by EPA, along with other textual or extra-textual factors outside the parenthesis, to determine what is the "best" system. Rather, they are factors which EPA is required to take into account in making its initial "adequately demonstrated" determination, and *only* in making that determination.[1] Stray remarks in D.C. Circuit caselaw that suggest the looser and more general approach, under which EPA has

[1] This interpretive outcome is driven by the syntax of what is, admittedly, a somewhat convoluted sentence: *i.e.*, the presence of the word "which" *before* the parenthetical phrase dictates that the factors contained therein are meant to apply to, and inform, EPA's determination of what "system[s] of emission reduction" have been "adequately demonstrated." For those parenthetical factors to have application for EPA's determination of which "system of emission reduction" is "best," or what "degree of emission limitation" is "achievable" through the "application" of that "best system," the word "which" would have to appear *after* the parenthetical phrase. The statutory language says what it says, and the two readings are not interchangeable.

latitude to mix all considerations into an interpretive "blender," are not a correct interpretation of this text.[2]

That is, these parenthetical factors give *content* to the term "adequately demonstrated." They speak to what EPA must consider when determining whether a "system of emission reduction . . . *has been* adequately demonstrated." (Emphasis added.) Only once one or more systems of

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[2] The Supreme Court properly construed the statute and its order of operations: "In devising emissions limits for power plants, EPA first 'determines' the 'best system of emission reduction' that—*taking into account cost, health, and other factors—it finds 'has been adequately demonstrated*.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) (emphasis added).

The D.C. Circuit, for its part, has occasionally construed this provision in a less-than-precise fashion that suggests the "blender" approach. The starkest example of this is at *Sierra Club v. Costle*, 657 F.2d 298, 330 (1981) (emphasis added):

> Parsed, section 111 most reasonably seems to require that EPA identify the emission levels that are "achievable" with "adequately demonstrated technology." *After* EPA makes this determination, it must exercise its discretion to choose an achievable emission level which represents the best balance of economic, environmental, and energy considerations.

This gloss seems to suggest that EPA identifies what reductions a system can yield, and *then* considers the parenthetical factors. But this is irreconcilable with the statutory text. It is irreconcilable with the text both as it exists now and as it existed in 1981; that earlier version, which the *Sierra Club* court had before it, spoke of "technology," whereas the current version does not, but that difference is not relevant to the interpretive issues examined here. The text ineluctably places the parenthetical factors at the front end of the process the statute requires EPA to observe, as the screening considerations for *whether* a system is adequately demonstrated, rather than as part of a "blender" mix or "balanc[ing]" act to be swallowed up by other considerations. Notably, this "blender" reading would also raise constitutional implications, as under that view Congress would be delegating to EPA a plenary balancing of major policy considerations.

The D.C. Circuit, however, has recently glossed the statute in more correct terms, eschewing the "blender" approach:

> The process starts with the EPA first applying its expertise to determine "the degree of emission limitation achievable through the application of the best system of emission reduction" that "has been adequately demonstrated." *That system must "tak[e] into account* the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements[.]" Once the Administrator identifies the best system of emission reduction, she then determines the amount of emission reduction that existing sources should be able to achieve based on the application of that system and adopts corresponding emission guidelines.

American Lung Ass'n v. EPA, 985 F.3d 914, 931 (D.C. Cir. 2021) (emphasis added).

Now, *American Lung*'s core holding, that generation shifting is eligible for consideration as BSER, was, of course, in error, *see generally West Virginia*. And the italicized phrase in the passage above is compressed: the "system" does not take the parenthetical factors into account. Rather, the *Administrator* takes them into account in determining whether the system "has been adequately demonstrated." Still, the *American Lung* reading does get the core order of operations right. This is not just a formalistic dispute: confirming the proper understanding of the order of operations reveals that EPA has a good deal less discretion than it believes it does when identifying BSER.

emission reduction have been adequately demonstrated does the Administrator proceed to identify the "best" among them.

EPA's Proposal embraces and amplifies the "blender" approach, placing great stress on its supposedly unguided discretion to consider all statutory and extra-statutory factors holistically in determining the "best system of emissions reduction":

> To determine the BSER, the EPA *first* identifies the "system[s] of emission reduction" that are "adequately demonstrated," *and then determines the "best"* of those systems, *"taking into account" factors including* "cost,"' "nonair quality health and environmental impact," and "energy requirements."' The EPA then derives from that system an "achievable"' "degree of emission limitation."

88 Fed. Reg. at 33,266-32,267 (emphases added). While this is all wrong, EPA *needs* to take this muddled view to lower the bar for "adequate demonstration" through interpretive sleight of hand. In fact, a clearer focus on the parenthetical factors as exclusive, threshold showings focused directly on whether a system is "adequately demonstrated" topples the house of cards EPA marshals to support its proposed BSER.

To reiterate, this reading is incompatible with the text. EPA does not *first* determine whether a system is adequately demonstrated and *then* take into account the parenthetical factors in determining which of those systems is "best."

Here again is the text: "the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." The parenthetical phrase can only reasonably be construed as informing the "adequately demonstrated" inquiry. Severing this close textual link would place excessive discretion in EPA's hands.[3] Conversely, giving full effect to the text's plain meaning makes it crystal clear that the parenthetical factors operate as a screen, and can only *rule out* a system of emission reduction for inclusion within the inquiry of which system is "best"—they cannot operate in a loose, holistic manner to *rule in* a system that has one or more other, fatal defects (e.g., a system that doesn't reduce emissions at all).

The invalidity of EPA's proposed BSER in light of the text, structure, context, and purpose of the statute.

In support of its proposed BSER, EPA spins a comforting cocoon of permissive-seeming soundbites from antiquated caselaw. A deeper understanding of that early caselaw, and the remarkable lengths to which EPA now seeks to stretch it, confirm that this Proposal would never pass muster even under a generous reading of EPA's statutory discretion as interpreted in those

[3] While this "blender" approach is incorrect, even under that approach, EPA's proposed BSER is not adequately demonstrated, for the reasons set forth below. The sheer scope of EPA's timeframe for phasing in its BSER, of the infrastructure needed to make it function, and of its total cost, taken alone are enough to disqualify it as "adequately demonstrated."

early cases. In any event, EPA's view of its discretion cannot be squared with the teachings of *West Virginia*—and even with the view of the statute offered by the *dissent* in that case.

What EPA asserts "adequately demonstrated" means.

Consider EPA's own theory of the case. We quote here the Proposal's gloss on "adequately demonstrated" at length for three reasons. First, EPA's framing of what this statutory term does (and does not) require of it is foundational to its case that the BSER that it proposes to identify is valid. Second, we wish to avoid any suggestion that we are omitting any portion of EPA's assertion of its own authority and discretion. Third, taken all at once, the breadth of that assertion is staggering, and helps demonstrate how far out on a limb EPA has climbed.

EPA says that "adequately demonstrated"

> means, according to the D.C. Circuit, that the system is "one which has been shown to be reasonably reliable, reasonably efficient, and which can reasonably be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way." It does not mean that the system "must be in actual routine use somewhere." Rather, the court has said, "[t]he Administrator may make a projection based on existing technology, though that projection is subject to the restraints of reasonableness and cannot be based on 'crystal ball' inquiry." Similarly, the EPA may "hold the industry to a standard of improved design and operational advances, so long as there is substantial evidence that such improvements are feasible." Ultimately, the analysis "is partially dependent on 'lead time,'" that is, "the time in which the technology will have to be available." The caselaw is clear that the EPA may treat a set of control measures as "adequately demonstrated" *regardless of whether the measures are in widespread commercial use*. For example, the D.C. Circuit upheld the EPA's determination that selective catalytic reduction (SCR) was adequately demonstrated to reduce NOX emissions from coal-fired industrial boilers, even though it was a "new technology." The court explained that "section 111 'looks toward what may fairly be projected for the regulated future, rather than the state of the art at present.'" The Court added that the EPA may determine that control measures are "adequately demonstrated" through a "reasonable extrapolation of [the control measures'] performance in other industries." The D.C. Circuit's view that the EPA may determine a "system of emission reduction" to be "adequately demonstrated*" if the EPA reasonably projects that it will be available by a future date certain*, is well-grounded in the purposes of CAA section 111 to reduce dangerous air pollutants. This view recognizes that pollution control systems may be complex and *may require a predictable amount of time* for sources across the source category to be able to design, acquire, install, and begin to operate them. In some instances, the control technology may be available, but the *installation may be a multi-year process*. For example, an existing coal-fired steam generating unit may require several years to plan, design, and install a Flue Gas Desulfurization (FGD) wet scrubber for the control of sulfur dioxide (SO2) emissions. Under these circumstances, *common sense dictates that the EPA may promulgate a rulemaking that imposes a standard on the sources, but establishes the date for compliance as a date-certain in the future, consistent*

> *with the period of time the source needs to install and start operating* the control equipment. In other circumstances, a system of emission reduction may be well-recognized as effective in controlling pollutants emitted by a large source category, but *manufacturers may require a predictable amount of time to manufacture enough control equipment* to cover the source category. In still other circumstances, *the infrastructure needed to support the system* so that it will cover sources across the category—*whether physical infrastructure such as pipelines or human infrastructure* such as skilled labor to install the equipment—*may require a predictable amount of time to build out or develop in sufficient quantity* to achieve such coverage. In all of these circumstances, *adopting requirements* under CAA section 111 *at the time that the EPA is able to reasonably project the future deployment* of the system of emission reduction, *and establishing the date of compliance as a date-certain in the future, serves the statutory purposes* of protecting against dangerous air pollution by ensuring that sources take action to control their emissions as soon as practicable. It should also be noted that because pollution control invariably entails additional cost, in some cases, *the EPA's promulgation of regulatory requirements may be an essential trigger for the sometimes lengthy process of implementing pollution controls. In these cases, delaying the promulgation* of the regulatory requirements until the pollution controls can be immediately deployed *would be futile*.[4]

88 Fed. Reg. at 33,272/3-33,273/2 (alterations in original) (footnotes omitted) (emphases added).

Let's break this down. EPA asserts that it can determine a system is "adequately demonstrated" so long as it "reasonably projects that [the system] will be available by a future date certain"—with no limit on that future date or the length or multitude of variables and assumptions embedded in EPA's "project[ion]." This "project[ion]" can include "predict[ions]" not just as to the future availability of control systems themselves, but of the future development of "physical" and "human infrastructure" needed to "support" the system—again with no limit to the breadth and depth of ancillary infrastructure that EPA's projection encompasses. And, at least "in some cases," EPA can promulgate regulatory requirements *in order to* compel the process of "implementing" pollution controls (which, in the context of this passage, also apparently entails calling into being their needed support infrastructure).

It is no accident that this passage contains no fewer than *seven* variations on the word "reasonable." Don't worry, EPA says—this may seem like a claim to sweeping, nigh-unlimited power, but it's all subject to an underlying requirement of rationality. What's all the fuss about?

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[4] In these final two sentences alone, EPA explicitly claims that it has authority to *transform* what technologies are available by promulgating regulations as a "trigger." This goes far beyond any previously recognized concept of valid "technology-forcing."

EPA is also erecting a straw man. Opposing the agency's expansive view of its own discretion is not the same as arguing that BSER for new sources must be "immediately deploy[able]." Instead, the question is whether EPA can purport to select a BSER whose components will not be available, even by EPA's own rosy projections across multiple variables, until some *fifteen years* in the future.

For one, "reasonableness" is a *judicial* standard for assessing whether an agency has proceeded correctly; it is not a magic word the *agency* itself can invoke to cloak its assertion of power in a mantle of validity that shields it from meaningful judicial scrutiny.

Second, it is telling that EPA *nowhere* in its Proposal considers whether its *current* statutory interpretation runs afoul of what brought down the CPP: the major questions doctrine.[5] Of course, it does. The CPP recognized no "horizontal" limit to EPA's reach, departing from pollution control and entering the realm of energy policy. This Proposal similarly recognizes no "vertical" limit to how far EPA can push sources (and their related, ancillary infrastructure), or for how long.[6] If EPA has the breadth of discretion it asserts, it has a transformative tool. But a closer study of the caselaw reveals that EPA does not, in fact, enjoy this degree of discretion.

What "adequately demonstrated" actually means.

In a dozen words: it'll soon be widely available and it has a proven track record.[7]

Portland Cement Association, 1973

Start at the beginning. The earliest D.C. Circuit case that EPA cites in the passage quoted at length above is *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

EPA cites this case for the propositions that:

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[5] EPA may have been better off if it studied more carefully the very first Section 111 case, which contained this prophetic admonition:

> This agency, particularly when its decisions can literally mean survival of persons or property, has a continuing duty to take a "hard look" at the problems involved in its regulatory task, and that includes an obligation to comment on matters identified as potentially significant by the court order remanding for further presentation.

Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973).

By the same token, it is inexplicable that EPA does not analyze its Proposal for potential major-questions issues. EPA may not like the constraints placed on its discretion by *West Virginia*, or that opinion's formal announcement of the "major questions" doctrine. But its cavalier indifference here verges on defiance of the high Court.

[6] Specifically as it relates to the scope of "lead time," the only EPA rule that looks anything like the approach here was the CPP itself. The Supreme Court in *West Virginia* had no cause to examine that aspect of the CPP, but the teachings of that case as applied here dictate the same result: this new rule is also a very long bridge too far.

[7] Well, plus another twenty: "taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements."

And we'll spoil the surprise right now: "proven track record" is the gloss on the "adequately demonstrated" requirement provided by the *dissent* in *West Virginia*. In other words, *all nine Justices* of the Supreme Court think that EPA has considerably narrower discretion under this statutory provision than the position taken in EPA's Proposal.

- The BSER need not "be in actual routine use somewhere";
- EPA "may make a projection based on existing technology," subject only to "the restraints of reasonableness" and a prohibition on "crystal ball inquiry";
- The adequately demonstrated analysis "is partially dependent on lead time"; and
- The statute "looks forward to what may fairly be projected for the regulated future, rather than the state of the art at present" (as cited by *Lignite Energy Council*).

88 Fed. Reg. at 33,272/3.

As a threshold matter, *Portland Cement* speaks of EPA's license-to-project in the specific context of new source regulation. This is plain early in the opinion's analysis:

> We begin by rejecting the suggestion of the cement manufacturers that the Act's requirement that emission limitations be "adequately demonstrated" necessarily implies that any cement plant now in existence be able to meet the proposed standards. Section 111 looks toward what may fairly be projected for the regulated future, rather than the state of the art at present, *since it is addressed to standards for new plants*–old stationary source pollution being controlled through other regulatory authority. It is the "achievability" of the proposed standard that is in issue.

486 F.2d at 391 (footnote omitted) (emphasis added).

The italicized passage reveals that precisely *none* of what this case and its progeny say about "what may fairly be projected" applies to *existing* source regulation.[8] In fact, quite the contrary: the clear implication here is that, for *existing* plants, EPA's discretion is narrower, and the ability of "plant[s] now in existence [t]o mee the proposed standards" *is* a constraint on *that* discretion.

This discrepancy between what has been said in the new-source 111(b) caselaw and the existing-source aspect of EPA's Proposal highlights an important fact: there is simply no substantive existing-source, 111(d) caselaw in existence yet.[9] This matter, or perhaps EPA's pending proposal to regulate methane from existing oil and gas operations, will likely give rise to the first such. That's why, as set forth in detail below, EPA is, here and in that other pending proposal, improperly trying to steal so much ground in its approach to the states and their role in existing-source regulation, and why it's so crucial that EPA promptly abandon its efforts in this regard.

Beyond that threshold matter, *Portland Cement* suggests EPA enjoys a temporally modest predictive reach:

> The Administrator may make a projection based on existing technology, though that projection is subject to the restraints of reasonableness and cannot be based on "crystal

[8] *See also, e.g.*, *Lignite Energy Council v. EPA*, 198 F.3d 930, 934 (D.C. Cir. 1999) ("*Because it applies only to new sources*, we have recognized that section 111 'looks toward what may fairly be projected for the regulated future, rather than the state of the art at present.") (emphasis added).

[9] *West Virginia* disposed of the CPP on anterior grounds (namely, the proper scope of a cognizable "system of emission reduction" under Section 111(a)(1)), and so reached nothing specific to 111(d)'s treatment of existing sources as such.

> ball" inquiry. As [in *International Harvester v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973)], the question of availability is partially dependent on "lead time", the time in which the technology will have to be available. Since the standards here put into effect will control new plants immediately, *as opposed to one or two years in the future*, the *latitude of projection is correspondingly narrowed*.

486 F.3d at 391-92 (citation omitted) (emphases added).

First, note that *Portland Cement* is here borrowing heavily from *International Harvester*, an opinion the court had issued earlier the same year. That case dealt with EPA's refusal to grant a suspension of certain vehicle emission standards. The statutory provision at issue there (unlike the one at issue here) *explicitly* addressed the question whether alternative technologies "are not available or have not been available for a sufficient period of time to achieve compliance."[10] So this underlying caselaw is already a shaky basis for the construct of "latitude of projection" based on "lead time" even on the terms for which these concepts are deployed by *Portland Cement*.

Second, even taking *Portland Cement* at face value, note that its discussion of "lead time" and "latitude of projection" is couched in terms of a standard taking effect "one or two years in the future." Here, EPA's proposed regulatory scheme extends at least *fifteen years* into the future (proposed in 2023, with the compliance date for "phase three" not kicking in until 2038).

EPA's implicit assumption when it invokes this caselaw is that its "latitude of projection" scales up in proportion with the "lead time" that it builds into its regulations. But, of course, not everything scales up in the manner that EPA here imagines. The rules may be different at different orders of magnitude. More to the point, things may sensibly scale in the opposite direction: EPA's latitude here can only reasonably be understood as *narrowing* the farther in the future it seeks to project technological development and related variables.

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[10] *See Int'l Harvester*, 478 F.2d at 623-24 ("Under section 202(b)(5)(D) of the Act, 42 U. S.C. § 1857f-1(b)(5)(D), the Administrator is authorized to grant a one-year suspension

> "'only if he determines that (i) such suspension is essential to the public interest or the public health and welfare of the United States, (ii) all good faith efforts have been made to meet the standards established by this subsection, (iii) the applicant has established that effective control technology, processes, operating methods, or other alternatives are not available or have not been available for a sufficient period of time to achieve compliance prior to the effective date of such standards, and (iv) the study and investigation of the National Academy of Sciences conducted pursuant to subsection I of this section and other information available to him has not indicated that technology, processes, or other alternatives are available to meet such standards.'").

Portland Cement also purports to discover that the true question under Section 111(a)(1) is one of projections of "availability" (a word that does not appear in the statute) by looking to a House Report, 486 F.2d at 391. One would instead expect the fact that Congress used this term in the vehicle statute but did *not* use it in the stationary-source statute to indicate that the word should *not* be imported and treated as the hinge concept in the statute that does not actually use it. Even still, it is clear from the fuller context of *Portland Cement*, and the cases on which it draws, that, even if the standard of Section 111(a)(1) can be framed as one of reasonably projected availability, that frame is not sufficient to support EPA's Proposal.

Caselaw that (in dictum!) acknowledges a "latitude of projection" that gets bigger over the course of "one or two years in the future" cannot itself be scaled up as a basis for EPA to claim discretion to propose a BSER with an implementation schedule stretching over *almost two decades*. If predictions along that time frame can be deemed to identify a system as "adequately demonstrated," then those words have no meaning, EPA's discretion is unbounded, and the major questions doctrine is squarely implicated. And if they can't, then EPA has no authority to structure a rule of this "fifteen-year plan" scope.

Look back to *International Harvester*:

> We cannot accept petitioners' arguments that the Administrator's determination whether technology was "available," *within the meaning of section 202(b)(5)(D)* of the Act, must be based solely on technology in being as of the time of the application, and that the requirement that this be "available" precludes any consideration by the Administrator of what he determines to be the "probable" or likely sequence of the technology already experienced. *Congress recognized that approximately two years' time was required* before the start of production for a given model year, for the preparation of tooling and manufacturing processes.

478 F.2d at 628 (emphases added).

Again, the court in *International Harvester* was dealing with a statutory scheme in which Congress *expressly* spoke both to what was "available" and to "lead time." Section 111(a)(1) contains neither of those terms. Judged by modern standards, for the D.C. Circuit to import this vehicle-statute precedent into its stationary-source-statute analysis was likely ill-considered. (And, of course, the Supreme Court has never blessed any of this.) Yet, even taking the D.C. Circuit precedent at face value, when you look at anything beyond the soundbites that EPA excerpts from it, it simply does not grant EPA an endlessly scaling power of projection.

International Harvester holds, modestly, that a statute that explicitly requires years of lead time for regulations to take effect allows an agency to build into those standards a reasonable "nudge" based on a projection of how technology will develop. *Portland Cement* extends this to a statute that does *not* on its face speak of lead time, based on the reasoning that standards for new plants can again provide a reasonable "nudge" based on projection of what will be *available*. EPA now asserts that *Portland Cement* and its progeny allow it *unbounded* ability to project the course of development over a generation (so long as that projection is "reasonable," of course), structuring phased regulatory requirements (for new *and existing* plants) of escalating stringency that entail the development of huge swathes of technology and infrastructure that are, at the present moment, just aspiration. EPA's theory of its authority here is hollow at the core.

Now let's peel back another layer of the onion by moving on to the *limit* that the D.C. Circuit placed on EPA's authority to project: EPA cannot engage in "crystal ball inquiry." As a matter of plain English, what do you use a crystal ball for? You use it to predict the future.[11] So already

[11] The tense of the phrase "*has been* adequately demonstrated" (emphasis added) should have already tipped EPA off that, whatever degree of anticipatory projection, nudging, or "forcing" is permitted, it's a

this is a sign that there has to be *some* limit to how far out EPA can predict that a system will be ready for prime time.

But let's look more deeply into the origins of this "crystal ball" concept.[12] *Portland Cement*, 486 F.2d at 391, takes it directly from *International Harvester*. In turn, *International Harvester*, 478 F.2d at 629 & n.44, takes it from *NRDC v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

Morton was a NEPA case, and it held that an agency was correct in declining to consider certain alternatives that were too futuristic and speculative. And the broader context in which it deployed the term "crystal ball" is eerily instructive in this case:

> We think there is merit to the Government's position insofar as it contends that no additional discussion was requisite for such "alternatives" as the development of oil shale, desulfurization of coal, *coal liquefaction and gasification*, tar sands and geothermal resources.
>
> The Statement sets forth (see Appendix) that while these possibilities hold great promise for the future, *their impact on the energy supply will not likely be felt until after 1980*, and will be dependent on environmental safeguards and technological developments. Since the Statement also sets forth that the agency's proposal was put forward to meet a near-term requirement, imposed by an energy shortfall projected for the mid-1970's, the possibility of the environmental impact of long-term solutions requires no additional discussion at this juncture. We say "at this juncture" for the problem *requires continuing review*, in the nature of things, and these alternatives and their environmental consequences *may be more germane to subsequent proposals* for OCS leases, in the light of changes in technology or in the variables of energy requirements and supply.
>
> Furthermore, the requirement in NEPA of discussion as to reasonable alternatives *does not require "crystal ball" inquiry*. Mere administrative difficulty does not interpose such flexibility into the requirements of NEPA as to undercut the duty of compliance "to the fullest extent possible." But if this requirement is not rubber, neither is it iron. *The statute must be construed in the light of reason* if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research–and time–available to meet the Nation's needs are not infinite.

Morton, 458 F.2d at 837 (emphases added).

The *Morton* court said that NEPA doesn't require "crystal ball" inquiry, and that technologies which won't likely be online until *eight years* in the future don't need to be considered as

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limited one, because the text is anchored in an adequate demonstration that *has* been made—not a prospective consideration of a distant time when it might be. EPA's conflation of the here-and-now with the one-fine-day is fundamental, pervasive, and fatal to its Proposal.

[12] EPA recites the "crystal ball" prohibition exactly once, as quoted above, 88 Fed. Reg. at 33,272/3. But it never stops to ask what this means, and what this concept precludes EPA from doing—let alone analyze whether its Proposal transgresses this prohibition. As the context of the term's origin demonstrates, the Proposal does indeed transgress it.

alternatives.[13] And *Morton*'s appeal to "the light of reason" is as a cutting-off point beyond which sight is too dim, not, as EPA's incessant invocations of "reasonableness" would have it, as a mantra that takes you as far as you want to go.

And *Morton* dealt only with what the government had to *consider*—not, as here, with what the government could require external parties to adopt. If anything, the "crystal ball" horizon should be *shorter* in this case. If Section 111 is not iron, neither is it rubber. The D.C. Circuit caselaw, whatever the provenance of its analysis, does squarely hold that *some* lead time is an acceptable element of BSER and EPA's Section 111 regulations. But there's a limit, and EPA's Proposal palpably is nowhere near the right side of that limit. Just as the Supreme Court in *West Virginia* had no trouble ruling that the CPP well exceeded EPA's authority under Section 111 without directly spelling out in its holding the precise boundaries of that authority, here too, whatever EPA can validly do, it can't do this.

Fortuitously, *Morton* also contains a snippet of text that resonates with *another* fatal flaw in EPA's "unlimited projection timeline" approach: it speaks of a problem that "requires continuing review." Section 111 is clearly that: it requires the EPA to "at least every 8 years, review and, if appropriate, revise [new-source] standards." 42 U.S.C. § 7411(b)(1)(B).

EPA notes the existence of this provision repeatedly in the Proposal.[14] But EPA never connects the dots, never considers the interplay between this feature of the statute and its view that all it

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[13] Notably, the list of these space-age technologies that the court recites contains items that sound awfully similar to some of the technologies that EPA is now proposing to deem *have been* "adequately demonstrated"—while admitting that they won't actually be deployable at scale until *twice as long as* the time frame which *Morton* deemed to already be a "crystal ball" projection.

[14] *E.g.*, 88 Fed. Reg. at 33,289/1 ("It should be noted that the multi-phased implementation of the standards of performance that the EPA is proposing in this rule, like the delayed or multi-phased standards in prior rules just described, is distinct from the promulgation of revised standards of performance under the 8-year review provision of CAA section 111(b)(1)(B)."); 88 Fed. Reg. at 33,301/1 ("[T]he IRC section 45Q tax credits for the sequestration of CO2 are only available for combustion turbines that commence construction by the end of 2032 and are available for 12 years. The construction timeframe is within the NSPS [new source performance standard] review cycle . . . .").

The first of these quotes misses the point entirely: the 8-year review cycle is a textually and structurally explicit feature of the statute. It is not "distinct" from EPA's claim to authority to construct rules with a long lead time, and a correspondingly long lens on what might *eventually* be sufficiently "available" in the far-off future to justify a *current* "adequately demonstrated" finding. That clam to authority, of course, is textually ungrounded, other than by the forbidden "absence of restraint" approach, *but see West Virginia*, 142 S. Ct. at 2632 ("Section 111 does not impose *any* constraints—technological or otherwise—on EPA's authority to regulate stationary sources (except for those stated, like cost).") (Kagan, J., dissenting) (emphasis very much in original). EPA can't just say a textual feature of the statute is "distinct" from its own wishes and leave it at that—yet this is just what EPA has done.

The second of these quotes is an odd glitch in EPA's approach, being the only sign that EPA thinks the review cycle is at all relevant to its rulemaking. But it is confused on its face (how can EPA in 2023 say that a project that only *commences* construction by December 31, 2032 is "within" the 8-year cycle?). And EPA nowhere explains why other aspects of its Proposal identify technologies coming on-line and requirements coming into force at the end of yet *another* review cycle's span after that.

needs is a "date certain" projection, no matter how far in the future. Yet it makes no sense for EPA to promulgate a BSER, major components of which will not kick in until well beyond the expiry of the 8-year review cycle (and, pegged from the 2040 cutoff to determine which coal plants are "long-term" and thus will need to install CCS, beyond the expiry of *two* entire 8-year review cycles). The 8-year cycle at least sets a presumptive upper limit to EPA's regulatory reach throughout time, the limit beyond which any projections are plainly well into "crystal ball" territory.[15] EPA has failed to grapple with this important aspect of the statutory scheme.

Basic fairness necessarily comes into play. Regulated parties have no assurance that EPA will not, after finalizing this Proposal, alter its terms fundamentally when the next 8-year review cycle comes around. Given that lack of certainty, it's absurd for EPA to claim authority to spell

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[15] Aspects of EPA's own Proposal demonstrate that the Agency itself has essentially taken the same view historically, because EPA here has severe trouble identify any comparably long "lead times" in prior Section 111 regulation.

EPA provides two long string cites of prior rules under Section 111 that it says provided a phase-in over a period of years. The first string cite, at 88 Fed. Reg. 33,289/3, doesn't identify any timeframe longer than 6 years ("2 to 3-year compliance timeframe and up to 6 years for certain emergency fire pump engines"). On its face this is a marginal example, and even the *longest* timespan EPA identifies in it is well within the 8-year review cycle.

The second string cite, at 88 Fed. Reg. 33,361/3, adds one example under 111(d): "70 FR 28606, 28619 (May 18, 2005) (establishing emission guidelines for electric utility steam generating units, with a 13-year compliance timeframe for a second control phase)." This is CAMR, the Clean Air Mercury Rule, which the Supreme Court in *West Virginia* correctly identified as having been vacated on other grounds, and equally correctly dismissed as not helping defend the CPP's legality in any event, *see* 142 S. Ct. at 2610.

Once again, this sole, stillborn rule is all EPA can point to as precedent. Of course, EPA in repealing the CPP effectively disavowed CAMR, *see* 32,526/3 n.65, although EPA does not appear to acknowledge that fact now in its Proposal.

In any event, here is the passage of CAMR cited in the Proposal:

> Availability of Hg Technology. Additionally, EPA is setting a Hg emissions cap of 15 tpy in 2018 from coal-fired Utility Units. This cap reflects a level of Hg emissions reductions that exceeds the level that would be achieved solely as a co-benefit of controlling SO2 and NOX under CAIR. We conclude that this approach is warranted because we find Hg-specific air pollution control technologies such as ACI are adequately demonstrated for use sufficiently before 2018 to allow for their deployment across the field of units to comply with the Phase II cap in 2018. This conclusion relies on the fact that the *current-day pilot scale ACI projects* at power plants *should* yield information that *ought to be* usable in implementing similar *pilot scale projec*ts at other facilities. Data from all of these pilot studies *ultimately should allow companies to design* full scale applications that *should* provide reasonable assurance that emissions limitations can be reliably achieved over extended compliance periods. We do not believe that such full scale technologies can be developed and widely implemented within the next 5 years; however, *it is reasonable to assume that this can be accomplished over the next 13 years*.

70 Fed. Reg. at 28,619 (emphases added). For the reasons set forth in these comments, this "one fine day" analysis was never a valid approach under the statute.

out a regulatory plan that goes out twice that far. Saying "reasonable" over and over again doesn't do anything to salvage that claim.

Essex Chemical Corporation, 1973

The next D.C. Circuit 111 case is *Essex Chemical Corporation v. Ruckelshaus*, 486 F.2d 427 (D.C. Cir. 1973).

In its summary of its own view of its discretion, EPA cites this case for the following proposition:

- An "adequately demonstrated" system of emission reduction is one that has been shown to be reasonably reliable, reasonably efficient, and which can reasonably be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way.

88 Fed. Reg. at 33,272/3.

As EPA additionally quotes the case a few pages later, *id.* at 33,275/3, *Essex Chemical* immediately warned EPA that an "achievable" standard may not be "purely theoretical or experimental," 486 F.2d at 433-34. This standard alone renders irrelevant much of EPA's claimed evidence for the *eventual* availability and achievability of its Proposal.

Essex Chemical also contains this admirable statement of the respective roles of the agency and the courts:

> *The judgment of the Administrator is to be weighted against his statutory function and limitations*, the record searched to determine if indeed his decisions and reasons therefore are themselves reasoned, and at that point our function terminates. Our "expertise" is not in setting standards for emission control but in determining if the standards as set are the result of reasoned decisionmaking. Yet, even this limited function requires that we foray into the technical world to the extent necessary to ascertain if the Administrator's decision is reasoned. While we must bow to the acknowledged expertise of the Administrator in matters technical we should not automatically succumb thereto, *overwhelmed as it were by the utter "scientificity"* of the expedition.

486 F.2d at 434 (emphases added). EPA is not big these days on acknowledging its "statutory function and limitations," as both the CPP and the current Proposal's nigh-boundless concept of EPA's regulatory reach demonstrate. But even the otherwise quite deferential 1973 D.C. Circuit refused to be "overwhelmed . . . by . . . utter 'scientificity.'" Rather, it engaged in searching inquiry as to the "adequately demonstrated" status of a technology that (quite unlike the technologies entailed in the later "phases" of EPA's Proposal) already had "been used extensively in Europe," *id.* at 535. So too must courts today refuse to be overwhelmed by the utter *futuristicity* of EPA's approach here.

National Lime Association, 1980

EPA does not cite the next major Section 111 case, *National Lime Association v. EPA*, 627 F.2d 416 (D.C. Cir. 1980), in its initial exegesis on its overall authority. But it does cite the case in a later discussion, at 88 Fed. Reg. 33,275/3, of what it means to be "achievable." Here's the key passage:

> [Petitioner] asserts that a standard which does not account for certain routine variations in conditions is "unachievable." We agree, where, as here, there is no evidence in the record that the "costs" of adjusting for such routine variations (assuming such adjustments to be possible) were considered by the Agency in promulgating its standard. . . [T]he flexibility appropriate to enforcement will not render "achievable" a standard which cannot be achieved on a regular basis. . . .
>
> [W]here test results are relied upon, it should involve the selection or use of test results in a manner which provides some assurance of the achievability of the standard for the industry as a whole, given the range of variable factors found relevant to the standards' achievability.

EPA quotes another passage from this opinion in a highly misleading fashion:

> Moreover, it may be sufficient to "generalize from a sample of one when one is the only available sample, or when that one is shown to be representative of the regulated industry along relevant parameters." *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 434, n.52 (D.C. Cir. 1980). 627 F.2d at 431 n.46, 432.

88 Fed. Reg. at 33,275/3 n.211. But here's the *full* passage that EPA is only selectively presenting:

> It is one thing to generalize from a sample of one when one is the only available sample, or when that one is shown to be representative of the regulated industry along relevant parameters. *It is another thing altogether to generalize from an extremely limited sample* when a broader sample (both different conditions at the same plant and conditions at different plants) can be readily obtained and when no showing of the representativeness of the sample is made.

627 F.2d at 434 n.52 (emphasis added).

EPA here is proposing to deem CCS and "low-GHG hydrogen" as "adequately demonstrated." But as to the former, the "degree of emission limitation" such systems are projected to one day provide as being "achievable," at very high rates very far off in the future, while the "extremely limited sample" of actual examples of the former that it presents are heavily subsidized demonstration plants that even on their own experimental terms have been plagued with cost overruns and technical failures. As to the latter, EPA's evidence is considerably weaker even than

that already inadequate showing.[16] This is what even the early (and, by modern standards of jurisprudence, notably permissive and deferential) caselaw says that EPA cannot do.

National Lime also contains a clear warning against EPA going down the road that it's now on:

> The Agency relies upon the flexibility built into the regulatory scheme to support the rationality of its standards. The wisdom of such flexibility has been applauded on earlier occasions by this court, but the statutory scheme prescribes "achievable" standards and there is a limit to the flexibility with which the Agency is or should be endowed.

627 F.2d at 449 (footnotes omitted). But the only limit on its "flexibility" EPA is now willing to acknowledge is the indispensable, bedrock restraint of "reasonableness." This was EPA's same view of its authority that led to *West Virginia*, and it will meet a similar result here if it does not change course.

Sierra Club, 1981

The last of the early Section 111 cases that EPA invokes is *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). In its grand statement on the sweep of its authority to determine what systems are "adequately demonstrated," EPA cites this case for the proposition that it can

- hold the industry to a standard of improved design and operational advances, so long as there is substantial evidence that such improvements are feasible.

88 Fed. Reg. at 33,272/3. This is at base a restatement of principles whose true meaning, context, and origins have already been revealed above.

EPA also cites the case for the proposition that fostering technological innovation is another element of its "adequately demonstrated" analysis, 88 Fed. Reg. at 33,275/2 n.203. But it's key to note that the Circuit actually invoked this concept in the course of affirming a *less* stringent standard than the one a mechanical "what gets the most reductions right now" approach might

[16] Contrast the *actual, factual* situation in *National Lime*, as opposed to EPA's extrapolations from the out-of-context statements it cobbles together from that and other opinions: "[T]he number of plants is large, use of the control methods found by the Agency to represent the 'best systems' is widespread . . . ." 627 F.2d at 454. And *even then*, the Circuit remanded due to concerns about EPA's treatment of variability and its implications for the "achievability of these standards for the industry as a whole," *id.* at 455.

See also, e.g., *Portland Cement Ass'n v. EPA*, 665 F.3d 177 (D.C. Cir. 2011) (cited in EPA's string cite at Proposal n.175 but not otherwise discussed) ("[G]iven the *universal movement in the Portland cement industry* towards adoption of preheater/precalciner technology, we have no basis for concluding that EPA's decision to focus primarily—but not exclusively—on preheater/precalciner kilns was arbitrary and capricious.") (emphasis added).

EPA's view of the caselaw and its implications for its own authority is topsy-turvy. EPA seems to believe that where it has *fewer* examples of use of a system and a *longer* time-horizon on which it predicts the system will be deployable at scale, that it has *more* latitude for extrapolation and *less* obligation to demonstrate the workability of its ambitions. This cannot be the law.

have selected, *see* 657 at 343. And even then, the court in a thoughtful footnote was very careful to establish that there's a limit to this type of thinking:

> Throughout the rulemaking EPA described dry scrubbing as an *innovative or emerging technology*. Nevertheless, at times EPA's discussion comes close to suggesting that dry scrubbing may be adequately demonstrated. *Although it is conceivable that a particular control technique could be considered both an emerging technology and an adequately demonstrated technology, there is inherent tension between the two concepts.* We feel compelled to state, so that there is no suggestion that the standard has been relaxed, that we do not hold that dry scrubbing is adequately demonstrated technology. Indeed, the record in this case would indicate the contrary. A report prepared for EPA as recently as February 1980 by a private contractor concludes: "In summary, dry systems do offer potential advantages over wet systems, especially in the areas of energy savings and costs. However, crucial issues such as waste disposal and demonstration of commercial-scale systems, which may continue to limit the overall acceptability of this technology, remain to be answered." . . .

657 F.2d at 341 n.157 (emphasis added).[17] So the *Sierra Club* court did allow EPA to base standards in part on a promising "emerging" technology that led to *less* stringent standards than were otherwise indicated, *while strongly cautioning EPA* not to push it too far in future rulemakings. "Yet EPA now cites this case to claim for itself the authority to set standards wildly *more* stringent than anything achievable now, based on technology that clearly is *at best* in the first stages of "emerging" rather than *having been* "adequately demonstrated."

And the court in *Sierra Club* again spoke in prophetic terms of where this type of thinking might lead the agency and how the statutory standard was designed to prevent it from leading there:

> The greater the imprint of the new technology on the final rule, the more demanding our review of the evidence about the potential benefits and capabilities of new technology. By the very nature of its newness, it would be inevitably harder for EPA to acquire as precise and complete information about the emerging technology as would be available in the case of older, more established technologies. Thus *the difficulty of justifying a standard that diverges from* a level determined by weighing cost, energy, and environmental effects of *the best presently demonstrated technology, solely to account for new technology, should provide built-in safeguards* against overuse of such a justification and prevent circumvention of the primary statutory goals.

627 F.2d at 348 (emphases added).

Again we see that EPA has inverted the true meaning of the caselaw, which teaches that a deviation from the "presently demonstrated" state of technology will be "difficult[]" to justify. The "statutory goal" the court speaks of here is that of emission reduction, but EPA's present twisting of the caselaw threatens to erode another "safeguard" and "goal": the requirement that

[17] CCS and "low-GHG hydrogen," putting it mildly, are plagued with "crucial issues" that "remain to be answered."

its regulations be based only on systems that have been "adequately demonstrated." Again, both common sense and the caselaw teach that this requirement becomes *more, not less demanding* when EPA is projecting further out into the future. EPA's fundamental misconstruing of this basic point is where its rulemaking runs aground.

West Virginia, 2022

At last we come to *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). It can't be stressed enough that this case was the first time the Supreme Court had cause to squarely address Section 111 and what it does and doesn't authorize EPA to do. Even though, as demonstrated above, the early D.C. Circuit caselaw is far from the blank check that EPA portrays, where the Agency is constrained only by its own sense of "reasonableness," it's fair to say that the statute as construed by the Supreme Court provides even less support for EPA's approach here than the D.C. Circuit caselaw does.

West Virginia approvingly noted that the EPA in 2019 repealed the CPP due in part to concerns that it was based on a

> novel reading of the statute [that] would empower EPA to order the wholesale restructuring of any industrial sector based only on its discretionary assessment of such factors as cost and feasibility.

142 S. Ct. 2587 (internal quotation marks omitted).

At the end of its opinion, the Court revealed that on this point it agreed entirely with the 2019 EPA:

> Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible solution to the crisis of the day. But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.

Id. at 2616.

As explained below, the current Proposal is at base a pretextual repackaging of the original intent of the CPP, dressed up in a source-specific guise that EPA hopes will slip within the bounds of the statute and caselaw. For present purposes, though, note that EPA has merely shifted the *basis* for its assertion that it is "empower[ed] . . . to order the wholesale restricting of [this] industrial sector . . . ." Whereas in the CPP EPA eschewed any limits to the *breadth* of its authority, openly seeking to manipulate the aggregate fuel mix of the nation's electric utility sector as such, here it eschews any limits to the *timeline and ambition* on which it can design a decades-long regulatory plan whose patent effect and intent are to restructure the sector.

EPA seems to think that the only reason *West Virginia* struck down the CPP was that the Plan departed from source-specific regulation. Not so. It was the *transformative intent* behind EPA's actions that was ultimately at issue, and the inadequacy of relying solely on "discretionary

assessment of such factors as cost and feasibility," that formed the fatal flaw. EPA has clearly learned nothing from that experience.

And it's worth noting that even the *dissent* in *West Virginia* glosses "adequately demonstrated" on terms that EPA's proposed BSER here plainly doesn't come close to meeting. The dissent says:

> Taken as a whole, the section [111(a)(1)] provides regulatory flexibility and discretion. It imposes, to be sure, meaningful constraints: Take into account costs and nonair impacts, and *make sure the best system has a proven track record*. But the core command—go find the best system of emission reduction—gives broad authority to EPA.

142 S. Ct. at 2629 (Kagan, J., dissenting) (emphasis added). "[A] proven track record"[18] is actually a decent summary of what "adequately demonstrated" requires (informed, of course, by the specific content of the parenthetical factors).[19] EPA should keep that phrase in mind as it considers the following objections to its proposed BSER.

Why EPA's proposed BSER is not "adequately demonstrated."

We've gone through the caselaw in such detail to illustrate just how far from its original context EPA has wrenched these stray phrases. Now, with a proper understanding of how the D.C. Circuit actually approached the Agency's early Section 111 rulemakings, and of how restrained those rulemakings were in comparison to the current Proposal, we can see multiple, fundamental, and independent reasons why that Proposal is far over the line of *any* interpretation of "adequately demonstrated"—other than interpretations which are functionally boundless and which would necessarily trigger a major-questions standard (which, again, EPA does not even attempt to satisfy here).

One basic, threshold reason why EPA's proposed BSER is not "adequately demonstrated," in light of the proper construction of that term as set forth above, is the sheer length of the timeframe EPA projects is necessary for actual adoption of the BSER. A related reason is that we've heard all this before. EPA points to almost nothing new (except new subsidies, which we'll get to) in its evidence that CCS has a "proven track record" and will in the future work at

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[18] Elsewhere the dissent speaks favorably of generation shifting as having "a *well-established pedigree* as a tool for reducing pollution," 142 S. Ct. at 2637 (emphasis added). This phrasing further suggests that *even the dissent* in *West Virginia* construes "adequately demonstrated" as requiring considerably more than EPA does here.

[19] A telling "dog that didn't bark," in terms of EPA's absence of anything like a "proven track record," is EPA's failure to identify any instance where it or any other permitting authority has identified CCS or "low-GHG hydrogen" as the Best Available Control Technology (BACT) under the Prevention of Significant Deterioration (PSD) program, despite including in the Proposal a prolonged discussion of the implications of the Proposal for that other program. "Available" was a term injected into Section 111 caselaw for the D.C. Circuit from caselaw interpreting another Title of the CAA altogether, as these comments explain, but even assuming that's the right lens to analyze whether something is "adequately demonstrated," if the "best available" source-specific permitting decisions haven't yet hit on these technologies, how can they be "adequately demonstrated"?

scale, almost nothing that wasn't in evidence in the conjoined CPP repeal and ACE rulemakings, or for that matter in the original CPP rulemaking. Its showing with respect to "low-GHG hydrogen" is, as hard as this is to believe, far scantier even than that. It's as if, a decade after an original presidential "moonshot" pledge, a successor said "okay, we'll be on the moon by the end of *this* decade, for real this time." A heightened degree of skepticism is warranted.[20]

Now let's return to the parenthetical factors. EPA's analysis is deficient on, at a minimum, the first and the third of them:

> taking into account
>
> [1] the cost of achieving such reduction and
>
> [2] any nonair quality health and environmental impact[21] and
>
> [3] energy requirements.

Cost.

EPA's cost analysis by itself dooms its proposed BSER. It insists on focusing only on the massively subsidized cost to a plant's owner, but the text cannot bear that construction, as the caselaw and statutory history demonstrate. And, interrelated with the defects in its analysis of "energy requirements," as discussed further below, its projections of overall, societal cost are unreliable, confused, and most likely severe underestimates.

EPA admits its proposed BSER determinations would not be possible without a recent, massive increase in tax credits and other subsidies.[22] That is, it necessarily must interpret the statutory

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[20] EPA also is violating the Energy Policy Act of 2005's (EPAct) multiple prohibitions on basing a standard "solely" on subsidized projects. This prohibition can't reasonably be read to allow EPA to promulgate a standard *other than* a standard which it could promulgate, including validly making the necessary perquisite "adequately demonstrated" determination, *without* reference to projects subsidized under EPAct. The Agency's claim that it *can* make the "adequately demonstrated" determination even *only* looking at non-EPAct-subsidized projects is just lip service.

[21] We won't be addressing this factor in depth. Suffice to say that EPA's view of this requirement is very narrow. It doesn't consider the environmental issues implicated by a Proposal that would spike demand for renewable energy infrastructure and its attendant front-end human rights and extraction concerns and back-end waste-disposal headaches, species impact, aesthetic impact, and the like. And alarmingly, the Regulatory Impact Analysis (at 6-14) predicts that up to half of the U.S. population will experience a worsening ozone situation, and warns of a "modest" exacerbation of ozone disparities, *id.* at 6-24, *see also* 6-26, 6-28.

[22] It's beyond belief that EPA would contest this characterization of its Proposal, given a number of statements to this effect: *See, e.g.*, 88 Fed. Reg. at 33,256/1 ("Particularly relevant to these proposals, the incentives in the [Inflation Reduction Act] . . . support the expansion of technologies, such as CCS and hydrogen technologies, that reduce GHG emissions from fossil-fired units."); 88 Fed. Reg. at 33,261/-2 ("The magnitude of this [tax credit[incentive—combined with those in the [Infrastructure Investment and Jobs Act]—should accelerate the production of low-GHG hydrogen for use in a broad range of applications across many sectors, including the utility power sector. . . .").

term "the cost of achieving such reduction" to allow it to net out the cost of the subsidies themselves, or, put differently, to look only at the subsidized cost falling on the plant's owner. It offers no substantive interpretation of the statutory term "cost" which permits this approach. And that term cannot reasonably be read to support it.

Notably, EPA never *quite* comes out and announces this interpretation, although it comes very close. It discusses the "cost" factor specifically for two *Federal Register* columns, *see* 88 Fed. Reg. at 33,273/2-3, and this is the closest it comes to forthrightly stating the view that it necessarily must hold:

> Under CAA section 111(a)(1), in determining whether a particular emission control is the "best system of emission reduction . . . adequately demonstrated," the EPA is required to take into account "the cost of achieving [the emission] reduction." *By its terms*, this provision [111(a)(1)] *makes clear that the cost* that the EPA must take into account *is the cost to the affected source* of the system of emission reduction.

(Emphases added.)

But this isn't interpretation so much as *ipse dixit*. The "terms" of the provision, of course, "make[] clear" no such thing. Nor does the caselaw that EPA marshals: the question whether EPA can hinge its cost determination on subsidies never came before the D.C. Circuit, so the D.C. Circuit never spoke to it. EPA's proffered excerpts from caselaw focusing on cost to industry are simply that: caselaw in which that was the question at issue. EPA identifies no prior rulemaking in which it staked all on subsidies, so it's not surprising that there's no caselaw on point yet.

So let's look, indeed, at the statute's terms: "cost of achieving such reduction." EPA is acting as if this provision instead read "compliance costs." Unfortunately for EPA, Congress conspicuously *didn't say that* here. By contrast, it *did* say it in Section 202, the vehicle-emission-regulation provision, which we've already seen in our foray into *International Harvester* and the origins of the D.C. Circuit's cross-pollinated "projection/lead time" caselaw:

> Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit

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And most conspicuously:

> For new base load combustion turbines, the EPA proposes that CCS with a 90 percent capture rate, beginning in 2035, meets the BSER criteria. This amount of CCS is feasible and has been adequately demonstrated. *The use of CCS at this level can be implemented at reasonable cost because it allows affected sources to maximize the benefits of the IRC section 45Q tax credit . . . .*

88 Fed. Reg. at 33,290/3 (emphasis added). It's right there in black and white: EPA proposes that CCS meets the cost factor *because of* the tax credit.

See also 88 Fed. Reg. at 33,348/1 ("Finally, it is noted that these CCS costs are lower than those in prior rulemakings due to the IRC section 45Q tax credit and reductions in the cost of the technology"). That "and" is doing a lot of work in this sentence. But nowhere does EPA claim that "reductions in the cost of the technology," apart from subsidies, render CCS (or hydrogen) adequately demonstrated.

> the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

CAA § 202(a)(2), 42 U.S.C. § 7521(a)(2). This is a significant variation. Congress knows how to specify when it's talking specifically about compliance costs, and it did it there, but it didn't do it here.

EPA's position here necessarily implies that the "cost of achieving such reduction," as that phrase appears among the parenthetical factors listed in CAA Section 111(a)(1), means *only* the cost to be borne by sources within the regulated sector. And so, under this reading, if CCS is to be subsidized by an exercise of some other power of the federal government, this gets subtracted from "cost" in the parenthetical-factor sense.

This reading is untenable. And we have good cause to doubt that even the early D.C. Circuit cases would have accepted it. Note that the D.C. Circuit, in its first engagement with the statute, was looking at a parenthesis that only included one factor: "taking into account the cost of achieving such reduction." For that was all that Congress included here in the 1970 version of the CAA, then codified at 42 U.S.C. § 1857c-6(a)(1).[23] The D.C. Circuit still felt free to interpret this version of the statute as follows, right from the get-go:

> [W]e note that section 111 of the Clean Air Act requires a "standard of performance" which reflects "the best system of emission reduction", and requires the Administrator to take "into account the cost of achieving such reduction." These criteria require the Administrator to take into account counter-productive environmental effects of a proposed standard, *as well as* economic costs to the industry. The Act thus requires that the Administrator accompany a proposed standard with a statement of reasons that sets forth the environmental considerations, pro and con which have been taken into account as required by the Act, and fulfillment of this requirement is reviewable directly by this Court.

Portland Cement, 486 F.2d at 385 (emphasis added).

The court needed to interpret the statute this way to justify its holding that "section 111 of the Clean Air Act, properly construed, requires the functional equivalent of a NEPA impact statement," *id.* at 384, and therefore that Section 111 rules didn't need to undergo NEPA analysis.[24] (Keep in mind that both statutes were quite new at the time, and also that Congress had not yet provided the blanket exemption from NEPA requirements for CAA actions that it would later bestow.) *Before* these considerations were explicitly added to the statute by

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[23] *See* 84 Stat. 1683.

[24] *See also Essex Chemical*, 486 F.2d at 433 (emphasis added): "An adequately demonstrated system is one which has been shown to be reasonably reliable, reasonably efficient, and which can reasonably be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic *or environmental* way."

congressional amendment, in other words, the Circuit was plainly construing "cost" as *not* limited to compliance cost, whether subsidized or not, but rather to a broader, societal cost.[25]

And the specific wording of the term confirms this. "[T]he cost of *achieving* such reduction" is *not* "the cost of compliance" or "the cost of the system of emission reduction." The cost of *achieving* the reduction is the *total* cost—very much including the many scores if not hundreds of billions of dollars of taxpayer money that have recently been heaped on these at-best-nascent technologies.

How could it be otherwise, given the purpose of the statute, which is, yes, to achieve emissions reductions, but to do so through standards based on what's "achievable" from the application of "adequately demonstrated" systems? Throw enough money at *anything* and you might make it move a bit. But there ain't no such thing as a free lunch. *Someone's* paying for it. (In this case, all of us are.)

Perhaps sensing it's in trouble here, EPA goes this route:

> It is reasonable to take the tax credit into account because it reduces the cost of the controls to the source, which has a significant effect on the *actual cost of installing and operating CCS*. In addition, all sources that install CCS to meet the requirements of these proposals are eligible for the tax credit. The legislative history of the IRA *makes clear that Congress was well aware* that the EPA may promulgate rulemaking under CAA section 111 based on CCS *and explicitly stated that the EPA should consider* the tax credit to reduce the costs of CCUS (i.e., CCS). Rep. Frank Pallone, the chair of the House Energy & Commerce Committee, included a statement in the Congressional Record when the House adopted the IRA in which he explained: "The tax credit[ ] for CCUS . . . included in this Act may also figure into CAA Section 111 GHG regulations for new and existing industrial sources[.] . . . Congress anticipates that EPA may consider CCUS . . . as [a] candidate[ ] for BSER for electric generating plants . . . . Further, Congress anticipates that EPA may consider the impact of the CCUS . . . tax credit[ ] in lowering

[25] Indeed, after Congress had in 1977 added the terms ". . . and any nonair quality health and environmental impact and energy requirements" to the parenthetical clause in CAA Section 111(a)(1), the D.C. Circuit in *National Lime*, 627 at 428 n.43, citing its earlier *Portland Cement* decision, found that this new terminology had "already" been a "part of the case law developed under section 111."

That is to say, the court in *National Lime* understood that it previously recognized that, properly construed, the parenthetical phrase "the cost of achieving such reduction" had *already* required EPA to "tak[e] into account" the full range of societal costs when determining whether a given "system of emission reduction" was, or was not, "adequately demonstrated." *See also Sierra Club*, 657 F2d. at 331 (noting congressional awareness of, and acquiescence to, the fact that, under "previous administrative and judicial interpretations of the former version of section 111 . . . *long term costs* to industry, *consumers*, and the environment" were to be accounted for in making the "adequately demonstrated" determination) (emphases added). Put simply, from the very debut of Section 111, the "cost of achieving such reduction" has meant something much broader than merely the "cost to the affected source," as EPA would now have it.

> the costs of [that] measure[ ].” 168 Cong. Rec. E879 (August 26, 2022) (statement of Rep. Frank Pallone).

88 Fed. Reg. at 33,300/2-3 (alterations in original) (emphases added).

First, saying that the tax credit has “a significant effect on the actual cost of installing and operating CCS” begs the question what the “actual” cost is. EPA seems to be saying that the “actual” cost is the *operator's* cost—but it seems like the “actual” cost would, rather, be the *total* cost, in which case EPA has it exactly backwards.

Second, “Congress” most certainly did not “explicitly state[]” anything about the relationship between tax credits and the “adequately demonstrated” (taking cost into account) factor in Section 111(a)(1). *One Representative* entered a statement into the record to that effect. But the IRA, of course, did not amend Section 111, otherwise provide any new regulatory authority to EPA, or alter any regulatory authority that EPA already had. And it had to be that way because, as anyone reading the news in 2022 was well aware, it was passed by party-line vote through a budget-reconciliation mechanism that provides only for spending, not regulatory authority.

As for the specific remarks of Representative Pallone, first, the early 111 caselaw is once again instructive: “We note that the remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.” *Sierra Club*, 657 F.2d at 321 n.55 (cleaned up).

Given that EPA is well aware of this maxim of statutory interpretation–and thus knows better–it is particularly telling that the Agency is nevertheless offering the (six days post-enactment), carefully-crafted musings of Rep. Pallone in support of its Proposal. With respect, EPA’s grasping here of this particular straw carries with it a note of desperation, a tacit acknowledgment that, at this point, the Agency has nothing better with which to prop up what is, when all is said and done, much more of a political gesture than it is a serious regulatory action that finds its grounding in the text of CAA Section 111 and the caselaw thereunder.

But second, that said, since EPA alleges that there is meaning to be found on page E879 of the August 26, 2022, edition of the *Congressional Record*, let’s see what else might be lurking in the “extension of remarks” set forth there. Among other things, Rep. Pallone explained that “Congress understands” that “EPA rulemaking to reduce GHG emissions from the electric power sector”–*i.e.*, this very rulemaking we’ve been commenting on–will have the “incidental effect” of “expediting the transition to clean energy because by requiring fossil fuel-fired power plants to reduce emissions, it will require additional investments by these plants that will not be needed for plants using cleaner forms of generation.”

In other words, according to Rep. Pallone, Congress understood–or, at least, some in Congress understood–that, notwithstanding its having been admonished in *West Virginia* regarding the actual scope of its statutory authority, EPA would be renewing its efforts to push through, again in the guise of CAA Section 111 rulemaking, a wholesale reorientation of the nation’s electricity-generation sector away from the use of fossil fuels in favor of other (heavily subsidized) energy sources, and that it would do this by imposing burdens on disfavored types of generation to advantage their favored competitors.

This statement trips guard-wires laid down in both the most recent (and only Supreme Court) Section 111 opinion, and in the very first one. First, *West Virginia*:

> Since passage of the [Clean Air] Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, *or subsidize increased generation by* natural gas, wind, or solar sources. The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.

142 S. Ct. 2659-2600 (emphasis added). The question now, or one of them, is whether EPA can come right back out with a rule palpably designed to achieve the same object so long as it pays lip service to *West Virginia* by disavowing this "broader conception," while bizarrely pointing to the statements of a Congressional backer who *re*-avows it, *pace* the face-saving insertion of the words "incidental effect."

And *West Virginia* again, describing the CPP: "So coal plants, whether by reducing their own production, subsidizing an increase in production by cleaner sources, or both, would cause a shift toward wind, solar, and natural gas." 142 S. Ct. at 2603. Rep. Pallone's statement helpfully illustrates that all this new Proposal does is remove the *formal* subsidy to *other* sources (while retaining it with one added step in the case of "low-GHG hydrogen," as discussed below), shifting it instead to a punitive burden on the *regulated* sources, all the while in furtherance of the same overall goal. If this kind of cynical evasion of a major Court holding is permissible, whither the rule of law?

West Virginia one more time:

> According to the dissent, "EPA is always controlling the mix of energy sources" under Section 111 because all of the Agency's rules impose some costs on regulated plants, and therefore (all else equal) cause those plants to lose some share of the electricity market. But there is an obvious difference between (1) issuing a rule that may end up causing an incidental loss of coal's market share, and (2) simply announcing what the market share of coal, natural gas, wind, and solar must be, and then requiring plants to reduce operations or subsidize their competitors to get there.

142 S. Ct. at 2613 n.4. Of course, there's also an obvious difference between a good-faith, source-specific rulemaking whose generation-shifting sequalae are *truly* just "incidental", and a pretextual repackaging of an already-failed *ultra vires* gambit. Calling these effects "incidental" on this record with this history behind it is akin to the proverbial statement "oh that? That's just rain."

Now let's spin the oldies. *Portland Cement* once again contains a discussion which is remarkably relevant here for a fifty-year-old case:

> Petitioners also challenge the cement standards as unfair in light of lower standards mandated for fossil-fuel-fired steam generating power plants and incinerators . . . The core of our response to petitioners is that the Administrator is not required to present affirmative justifications for different standards in different industries. Inter-industry comparisons of this kind are not *generally* required, or even productive; and they were not contemplated by Congress in this Act. The essential question is whether the mandated standards can be met by a particular industry for which they are set, and this can *typically*

> be decided on the basis of information concerning that industry alone. . . . There is, therefore, an avenue of judicial review and correction *if the agency does not proceed in good faith* to implement its general approach. But this is different from the supposition that a claim to the same specific treatment can be advanced by one who is in neither the same *nor a competitive industry*.

486 F.2d at 388, 389-90 (emphases). Now, this isn't *directly* on point, because EPA isn't separately setting standards for solar or wind energy. But those certainly are "competitive industries" with the ones being regulated here, EPA is not "proceed[ing] in good faith," and so, just as with the tortured history of the CPP, what is "not generally required" and what can "typically be decided" are not our only guideposts here.

Rep. Pallone also asserted that it was Congress's "inten[t] that, for purposes of rules under Section 111 and other CAA requirements based on CCUS or clean hydrogen, *the cost of CCUS or clean hydrogen* may be calculated on the assumption that the amount of the tax credit is the increased amount available under Internal Revenue Code Sections 45Q(h)(1) or 45(v)(e)(1), respectively, as added by this Act."

Good to know. What this tells us is that, in properly "taking into account the cost of achieving" the reduction of GHGs that the use of CCS or hydrogen as a "system of emission reduction" would occasion, as a required prerequisite step in determining whether CCS or hydrogen was "adequately demonstrated," it is incumbent on the Agency to *include* in that calculated "cost" the full amount of the expanded tax credits that Congress has most recently made available.[26]

When all's said and done, EPA's position makes no sense. To it, the more Congress feels the need to subsidize a technology, the *closer* to "adequately demonstrated" that technology becomes. But isn't it the reverse? Doesn't EPA's going on at length about the crucial effect of the subsidies serve only to highlight how wildly expensive this technology is?[27] (And wouldn't permitting this approach be the ultimate blow to accountability in environmental regulation? Robbing Peter to pay Paul may put more money in Paul's pocket, but it doesn't lessen the "cost of achieving" Paul's business schemes any lower—except from Paul's personal perspective.)

Finally, there's a curious, split nature to EPA's approach to the "cost" requirement here. As set forth above, it stops just short of explicitly interpreting "the cost of achieving such reductions" to

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[26] There's one more telling bit in Rep. Pallone's remarks (emphases added):

> The IRA recognizes this extraordinary time of transition in the energy sector and the rapid pace of technological change, and we urge EPA, where feasible, to base its emissions requirement on both *technologies that are available now* and those that will be available in the *near term*, including because of incentives contained within this Act.

EPA's proposed BSER here is, of course, available neither "now" nor in the "near term," hence EPA's grand fifteen-year-plan to summon it into existence. Again, as with the *West Virginia* dissent's "proven track record" gloss on "adequately demonstrated," even those EPA turns to for support have a much narrower view of the Agency's permissible powers of prognostication than the Agency does.

[27] "Look at the diamond-studded training wheels my parents just gave me! This means my ability to ride a bike is now 'adequately demonstrated!'" No.

only refer to the (subsidized) cost to the plant's operator, although this can't be right. Even there, though, EPA seems to not really have a firm idea how much cost would be too much. *E.g.*, 88 Fed. Reg. at 33,351/3 ("EPA is also taking comment on the level of costs of CCS that should be considered reasonable."); *id.* at 33,355/1 (declining to propose natural gas co-firing as BSER for "imminent-term or near-term units" because it would be "less cost effective" for them than for "medium-term units"—without articulating any theory of *how much less* cost-effective a measure needs to become before EPA won't propose it as adequately demonstrated, taking into account cost).[28] EPA may like this guessing-game approach of having no clear standard for when "cost" is excessive under Section 111(a)(1), or at least none it chooses to share with the public, but that doesn't make it legal or rational. It *does* mean that, even on EPA's improperly narrow construction of what the statute requires it to analyze with respect to cost, it hasn't actually done so.

However, EPA's regulatory docket *does* contain an analysis of the Proposal's total social cost—sort of. But read the fine print:

> [T]he social cost estimate *reflects the combined effect of the proposed rules' requirements and interactions with IRA subsidies* for specific technologies that are expected to see increased use in response to the proposed rules. *We are not able to identify their relative roles at this time*.

Regulatory Impact Analysis (RIA) 3-14 (emphases added).

"We can't parse out the effect of the IRA from the effect of this Proposal in terms of what it will cost us all." That's what EPA is saying here. And that's inadequate.

Energy requirements.

In its initial section of the Proposal setting forth the various textual (and judicially recognized) factors at play in Section 111(a)(1), EPA is perhaps tersest of all on this factor. Here's what it has to say:

> Energy requirements *may include* the impact, if any, of the air pollution controls on the source's own energy needs.

88 Fed. Reg. at 33,274/1 (emphasis added). Unlike the other sections parsing other elements of Section 111(a)(1), EPA doesn't cite any caselaw here, and indeed there doesn't seem to be any.

Notice that EPA is *not* saying this is the *only* inquiry required under this statutory term. This is a wise choice, because, at least in the context of this rulemaking and the focus of EPA's ultimate policy goal, the structure of its BSER and compliance phase-ins, and the reams of supporting (but, as shown below, hopelessly flawed) technical analysis on grid impact it marshals, it would be absurd to insist on so narrow a reading. And indeed the Proposal contains stray nuggets in

[28] As for the excessive subcategorization of sources with respect to their anticipated operating horizons, as discussed below, that's evidence that EPA's real regulatory object here is not emissions control as such, but rather the restructuring of the electric market and the nation's fuel mix.

which EPA seems to concede that the broader analysis of impacts on the energy sector is in fact entailed by the statutory command to take "energy requirements" into account, *e.g.*:

> For the reasons discussed above, co-firing low-GHG hydrogen qualifies as the BSER because it is adequately demonstrated, is of reasonable cost*, does not have adverse* non-air quality health or environmental impacts or *energy requirements—in fact, it offers potential benefits to the energy sector*—and reduces GHG emissions.

88 Fed. Reg. at 33,316/3 (emphases added).

EPA has staked so much on its claims that the Proposal will not unduly interfere with the affordable, reliable, orderly functioning of the nation's grid[29] that it cannot reasonably argue this analysis isn't essential to its proposed determination that its proposed BSER is "adequately demonstrated."[30] So let's examine those claims.

Now, others more technically knowledgeable than we are will no doubt be bringing receipts on all of this in their comments. We're happy to leave to them the task of chasing after EPA into the misty "'scientificity' of the expedition."[31] But, mindful of the repeated admonitions in the Section 111 caselaw[32] that fundamental constraints of reasonableness apply no matter how

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[29] We must note that, five days before the comment period on this Proposal closed, the Federal Energy Regulatory Commission (FERC) gave notice that it would hold a Reliability Technical Conference on November 9 of this year to "discuss the impact of the Environmental Protection Agency's proposed rule under section 111 of the Clean Air Act on electric reliability." FERC, Notice of Technical Conference, Docket No. AD23-9-000 (Aug. 3, 2023), *available at* https://www.ferc.gov/media/ad23-9-000-reliability-technical-conference.

This news raises questions about the extent to which EPA actually "consulted with the DOE and the Federal Energy Regulatory Commission (FERC) in the development of the[] [P]roposal[]," 88 Fed. Reg. at 33,247/1; *see also id.* at 33,415/3 ("The EPA routinely consults with the DOE and FERC on electric reliability and intends to continue to do so as it develops and implements a final rule."). EPA should expect to receive petitions to reopen the comment period and supplement its Proposal, depending on the results of this forthcoming Technical Conference.

[30] At the risk of beating a dead horse, "energy requirements" *must* encompass this broader inquiry, at least when EPA's regulating utilities. If a cement plant goes down, that's bad for its workers and customers, with ripple effects on construction for a start. But if *power plants* start to go down, that's another thing altogether. Interruptions in cement supply won't bring on a "Mad Max" scenario. Mess around with the electric grid too much, on the other hand . . . .

[31] *Essex Chemical*, 486 F.2d at 434.

[32] *E.g.*, *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 188 (D.C. Cir. 2011) ("[R]easoned decisionmaking is not a dispensable part of the administrative machine that can be blithely discarded even in pursuit of a laudable regulatory goal. The importance of reasoned decisionmaking in an agency action cannot be overemphasized. When an agency . . . is vested with discretion to impose restrictions on an entity's freedom to conduct its business, the agency must exercise that discretion in a well-reasoned, consistent, and evenhanded manner.") (alterations in original) (internal quotation marks omitted); *National Lime*, 627 F.2d at 430 ("The search for reasoned decisionmaking in a world of technical expertise must continue if judicial review is to have any meaning in the statutory scheme."); *id.* at 445-46 ("We are asked to conclude that the projection of an achievable standard for the industry as a whole based on tests conducted at two hydrator plants using calcitic stone represents a reasoned decision, without knowing

elaborate the technical showing EPA flashes, we'll lay out some core objections that raised the eyebrows of even humanities-major types like us.

EPA's docket contains a Technical Support Document (TSD) presenting a "Resource Adequacy Analysis." And there are some remarkable statements in this document, reflecting remarkable choices EPA made in structuring its analysis. Individually and collectively, they undermine EPA's claims to have adequately considered this aspect of the problem, both as a matter of the textual requirement to consider "energy requirements" in determining whether a system is "adequately demonstrated," and as, under basic rationality, what's undeniably an "important aspect of the problem"[33] no matter which way you slice it.

First, EPA tells us up front that it's *not* actually studying the *most* important aspect of the problem:

> As used here, the term *resource adequacy is defined as the provision of adequate generating resources to meet* projected load and generating reserve requirements in each power region, *while reliability includes the ability to deliver the resources to the loads, such that the overall power grid remains stable*. *This document is meant to serve as a resource adequacy assessment* of the impacts of the final rule and how projected outcomes under the final rule compare with projected baseline outcomes in the presence of the IRA.

Resource Adequacy Analysis TSD 2 (emphases added).

Did you catch that? EPA separates "resource adequacy" (whether there's enough capacity theoretically out there to meet demand) from "reliability" (whether there'll be the ability to deliver that capacity and, uh, ensure that the grid remains stable), *and then tells us it'll only be examining the former*. Given that "energy requirements" can't be met unless they can actually be met ("A=A"), this doesn't tell us what we actually need to know. (Which the TSD itself later admits: "[W]e have analyzed whether the projected effects of the rules would in this regard pose a risk to resource adequacy, a key planning metric that is *necessary (but not sufficient) for grid reliability*." *Id.* at 3 (emphasis added).) So right out of the gate, there's a fatal inadequacy in EPA's consideration of this factor.

Second, EPA tells us that it's not actually going to be analyzing for adequacy *or* reliability the vast bulk of what it thinks will happen to the sector in the coming years, because it thinks much of that will be attributed to the effects of the subsidies in the IRA, *which it is simply assuming will preserve resource adequacy*:[34]

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why."); *Essex Chemical*, 486 F.2d at 434 ("Our 'expertise' is not in setting standards for emission control but in determining if the standards as set are the result of reasoned decisionmaking.").

[33] *See Motor Vehicle Mfrs. Association v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[34] *But see id.* at 2 (footnotes omitted) (emphasis added):

> Under the baseline, the impacts of the IRA result in an acceleration of the ongoing shift towards lower emitting generation and declining generation share for fossil-fuel fired generation. While

> Under the baseline, the impacts of the IRA result in an acceleration of the ongoing shift towards lower emitting generation and declining generation share for fossil-fuel fired generation. . . .
>
> The results presented in this document show that the projected impacts of the proposed rules on preserving resource adequacy, are modest and manageable. The results presented in this document further demonstrate, for the specific cases illustrated in the Regulatory Impact Analysis (RIA), that the implementation of these rules can be achieved without undermining resource adequacy. *The focus of the analysis is on comparing* the illustrative proposed rules scenario from the RIA *to a base case* (absent the proposed requirements) *that is assumed to be adequate and reliable*.

Resource Adequacy Analysis TSD 3 (emphases added).

The assumption that IRA will lead to a resource-adequate, reliable grid is not reasoned. And if some cell on a spreadsheet somewhere in the docket purports to demonstrate it, well, so be it, but nowhere in the Proposal or even the esoteric Resource Adequacy TSD is this hypothetical demonstration marshalled. Again, that mode of rulemaking would be irrational. (And unaccountable, untransparent, illegitimate . . . .) EPA projects that IRA implementation will lead to major changes in the grid, *assumes* that those will not interfere with adequacy or reliability, and then analyzes its own Proposal's contribution on top of that for resource adequacy (but not for reliability). This is like saying "I assume the rest of the drive down the field will go off without a hitch—so my analysis focuses rather only on whether or not we fumble at the one-yard line."

Third, EPA appears to be telling us that the only reason its modeling indicates no threat to the grid is that it programmed the model to make sure it would yield this result:

> this document is limited to an analysis of resource adequacy within the context of this rulemaking, *a range of studies have outlined how reliability continues to be maintained under high variable renewable penetration scenario*s. This includes the Eastern Renewable Generation Integration Study, which showed how the Eastern grid could accommodate upwards of 30% of wind and solar penetration, and the Western Wind and Solar Integration Study, which examined the reliability impacts of high levels of variable renewable penetration in the West.

Once again, *Portland Cement* is the case that keeps on giving:

> [A] comment on the proper use of scientific literature may be in order. If such literature is relied upon, the agency should indicate which particular findings of that literature are significant. A generalized reference, to a work as a whole, will avail the agency little if a problem arises on judicial review.

486 F.2d at 400. The footnotes omitted from the TSD block quote above in this footnote are, precisely, to the "work[s] as a whole." In any event, EPA does *not* show (or even clearly *assert*) that these sources (somewhere) provide an analysis that *the IRA's* effects won't threaten adequacy or reliability—let alone endorse that analysis itself.

> Within each model region, IPM *assumes* that *adequate* within-region *transmission capacity exists or will be built* to deliver any resources located in, or transferred to, the region."

Resource Adequacy Analysis TSD 4 (emphases added).[35] "Assume a can opener," indeed.

And again:

> The Agency also *expects* that any resulting unit retirements will be carried out through an orderly process in which RTOs, balancing authorities, and state regulators use their powers to ensure that electric system reliability is protected.

Resource Adequacy Analysis TSD 3 (emphasis added). "Assume I give you four apples. Then expect you'll get another four apples. Do you project that you'll then have eight apples? Great!"

Fourth, EPA is projecting unrealistically high accredited capacity factors for renewables (and, for that matter) fossil energy. If it's wrong about these, then its rule will either cost much more than it projects (to the tune of hundreds of billions of dollars over the timeline of the fifteen-year plan), or will threaten grid reliability much more than it projects. Or both.

Why is this so? Because EPA is projecting that, within only a few years of this rulemaking, some or all regions of the country will be relying much more heavily on renewable, intermittent, non-dispatchable resources to meet reserve margin—and, a few years after that, that they'll be doing this just to meet peak load. As the grid's generation mix shifts to a higher proportion of non-dispatchable resources, the quality of assumptions about adequacy and reliability become more important, and the gap between adequacy and reliability can widen.[36] (This is analogous to the crucial role of EPA's assumptions about variability and achievability that led to the remand in *National Lime*, *see* 627 F.2d at 455.)

EPA has insufficient basis to project there will not be unacceptable impact on grid reliability or prices. It is only able to reach this projection by assuming that all necessary infrastructure buildout will occur, sufficient renewables will come online and will be available at well above their historically observed performance, etc. This is eerily similar to the CPP's projections, again confirming that this truly is a pretextual repackaging of "CPP 2.0." And even then, it's obvious that they've only been able to say all will be well by closing their eyes to the vast bulk of the landscape.

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[35] *See also id.* at 5 ("[T]he model must maintain adequate reserves in each region.").

[36] *Cf. West Virginia*, 142 S. Ct. at 2612 (alterations and emphasis added by the Court):

> There is little reason to think Congress assigned such decisions to the Agency. For one thing, as EPA itself admitted when requesting special funding, "Understand[ing] and project[ing] system-wide . . . trends in areas such as electricity transmission, distribution, and storage" requires "technical and policy expertise *not* traditionally needed in EPA regulatory development."

Other reasons why EPA's proposed BSER is invalid.

CCS

Carbon capture does not reduce emissions. It captures them and transports them elsewhere. As a threshold matter, this provides reason to doubt whether it's even eligible for consideration as a "system of emission reduction" at all. EPA's Proposal takes pains to disclaim any suggestion that it is regulating the back end of the CCS process, where the sequestration actually occurs.[37] But the functionality of CCS is completely dependent on what happens at that end of the chain, making this aspect of EPA's BSER very different from truly traditional add-on controls, input pre-treatment, improved operations, and the other source-specific measures that Section 111(a)(1) actually contemplates and authorizes.

Fuel switching

EPA's identification of lower amounts of co-firing natural gas as BSER for coal-fired power plants is, at best, of unclear validity under the statute. But its identification of co-firing hydrogen as BSER for many gas-fired power plants, escalating to a level of almost complete transfer from gas to hydrogen for some plants, is almost certainly invalid. And the Supreme Court has, in fact, already given EPA an exceedingly strong signal that this is the case.

EPA repeatedly insinuates that the Supreme Court has blessed "fuel switching." Not so.

See 88 Fed. Reg. at 33,315/1 ("In *West Virginia v. EPA*, the Supreme Court noted that in the EPA's prior CAA section 111 actions, the Agency has treated 'measures that improve the pollution performance of individual sources' as 'system[s] of emission reduction,' 142 S. Ct. at 2615, *and further noted with approval* a statement the EPA made in the Clean Power Plan that "fuel-switching" was one of the "more traditional air pollution control measures." 142 S. Ct. at 2611 (quoting 80 FR 64784; October 23, 2015).") (emphasis added) (footnote omitted); 88 Fed. Reg. at 33,269/3 ("The Court *noted with approval* those 'more traditional air pollution control measures,' and gave as examples "fuel-switching" and "add-on controls," *which, the Court observed*, the EPA had considered in the CPP. *Id.* at 2611 (internal quotations marks and citation omitted).") (emphases added); 88 Fed. Reg. at 33,272/2 ("In particular, *the Court identified* 'the sort of "systems of emission reduction" [the EPA] had always before selected,' which included efficiency improvements, fuel-switching,' and 'add-on controls'." 142 S. Ct. at 2611 (quoting the Clean Power Plan)") (emphasis added).

Here is the what the Supreme Court actually said:

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[37] 88 Fed. Reg. at 33,328/1-2 ("The EPA also notes that compliance with the standard is determined exclusively by the tons of CO_2 captured by the emitting EGU. The tons of CO_2 sequestered by the geologic sequestration site are not part of that calculation, though the EPA anticipates that the quantity of CO_2 sequestered will be substantially similar to the quantity captured. . . . [T]he existing regulatory requirements applicable to geologic sequestration are not part of the proposed rule."). Unlike traditional BSERs, in other words, EPA is not actually requiring here that the emissions it frames as being reduced by CCS will actually stay put. Yet another way in which this Proposal is no more in line with the text and implementation history of Section 111 than the CPP was.

> Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. . . . Indeed, *EPA* nodded to this history in the Clean Power Plan *itself, describing the sort* of "systems of emission reduction" *it had always before selected*—"efficiency improvements, fuel-switching," and "add-on controls"—*as "more traditional air pollution control measures."* 80 Fed. Reg. 64784. The Agency noted that it had "considered" such measures as potential systems of emission reduction for carbon dioxide, ibid., including a measure it ultimately adopted as a "component" of the BSER, namely, heat rate improvements. Id., at 64727.

West Virginia, 142 S. Ct. 2610-11 (emphases added). The Court is *not* "approv[ing]" of "fuel-switching" as a system of emission reduction within the meaning of Section 111(a)(1). It is *noting* the fact that EPA had historically focused on measures that address a source's emissions performance, while *quoting* the CPP's own characterization of some examples of that traditional (and the only definitely valid) approach. The Court does not expand on its understanding of the term "fuel-switching," let alone approve anything like what EPA now proposes.

EPA in its Proposal appears to have gotten the idea of portraying *West Virginia* as blessing its fuel-switching approach from this passage in the *dissent* in that case:

> EPA hasn't forced the elimination of coal plants—whether through technological controls or generation shifting—*because* the statutory constraints prevent it from doing so. The majority offers no reason to think that those constraints suffice for *the measures it approves (fuel switching and carbon capture)* but not for the measure it rejects (generation shifting). Either the constraints are enough or they are not. The majority cannot have it both ways.

West Virginia, 142 S. Ct. at 2639 n.7 (Kagan, J., dissenting) (second emphasis added).

This dissent makes this claim that the Court "approves" fuel switching (and carbon capture!) to support its argument that *West Virginia*'s holding is ultimately futile, because EPA still possesses power to restructure the nation's electric fuel mix though means other than expressly basing its rule around generation-shifting:

> Take, for example, the "fuel-switching" regulation the majority mentions. Such a rule does just what you might think: It requires a plant to burn a different kind of fuel—say, natural gas instead of coal. So it too can significantly "restructur[e] the Nation's overall mix of electricity generation." Or take an even more technological-sounding approach: the use of carbon-capture equipment. Order the installation of that equipment, the Trump administration concluded, and the "exorbitant" costs "would almost certainly force the closure" of all affected "coal-fired power plants." 84 Fed. Reg. 32548. The point is a simple one: If generation shifting can go big, so too can technological controls (assuming, once again, that the statute's text is ignored). The problem (if any exists) is not with the channel, but with the volume.

West Virginia, 142 S. Ct. at 2639 (Kagan, J., dissenting).

The Court was having none of it. And its response to the dissent on this point puts the lie to the Proposal's (and the dissent's) claim that the Court was "approving" fuel-switching as EPA now proposes it, and signals serious trouble ahead for EPA if it continues down this path:

> The dissent suggests that EPA could bring about the same result [*i.e.*, "forcing coal plants to 'shift' away virtually all of their generation"] by, for example, *simply requiring coal plants to become natural gas plants*, and that this would fit within the prior regulatory approach of efficiency-improving, at-the-source measures. *Of course, EPA has never ordered anything remotely like that, and we doubt it could*. Section 111(d) empowers EPA to guide States in "establish[ing] standards of performance" for "existing source[s]," § 7411(d)(1), not to direct existing sources to effectively cease to exist.

West Virginia, 142 S Ct. at 2612 n.3. (citation omitted) (emphases added).

Now the full extent of EPA's chutzpah is clear. It chooses to parrot the *dissent's* suggestion that the Court has *approved* "fuel-switching," taking that as license for proposing a BSER of up to *ninety-six percent* switching, while apparently completely ignoring the *Court* expressing harsh "*doubt*" that this is a permissible approach.[38] Yes, this footnote is probably "only" *dictum*—but a bigger warning sign in *dictum* is hard to imagine.

The presumptive invalidity of this measure isn't a special creature of 111(d)(1), either. Section111(b)(1) likewise authorizes EPA to issue "regulations, establishing Federal standards of performance for new sources within [a listed source] category," not to direct the prevention of the creation of one type of new source in favor of another. EPA, and the dissent, are wrong to claim any grant in Section 111 of authority to EPA to engage in this type of transformative approach. And the Court was right to express "doubt." It would not be wise for EPA to assume this was a bluff. Under the plain import of this footnote, complete or virtually complete fuel-switching is almost certainly *ultra vires*, and any requirement to co-fire at significant percentages starts to proportionately approach "requiring [one type of] plant[] to become [another type of] plant[]."

The children's story of the Three Little Pigs is instructive. One pig builds a house from bricks, the other from twigs, and the third from straw. Is EPA's job to figure out how brick houses can most cleanly be built? Or is it to say "we don't like bricks, bricks are unacceptably harmful, so why don't you start using straw instead?"[39] The former is the traditional, "build a better

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[38] Again, the very first CAA Section 111 case had already condemned this approach: "This agency . . . has a continuing duty to take a 'hard look' at the problems involved in its regulatory task, and that includes an obligation to comment on matters identified as potentially significant by the court . . . ." *Portland Cement*, 486 F.2d 375 at 394. EPA's ostrich act here does not become it, nor does it presage a durable outcome to this rulemaking.

[39] One possible response to this analogy is to recharacterize the business that EGUs are in at a higher level of generality, simply as "the generation of electricity"—or, for our little pigs, "making houses." But that is to verge on the territory *West Virginia* forbids: regulating the fuel mix as such and claiming authority to compel one type of generation to become or to subsidize another. That way lies major questions.

mousetrap" approach that is the clearly authorized heartland of Section 111. The latter is the road to legal ruin.

"Low-GHG Hydrogen"

EPA's measure of "low-GHG hydrogen" can't be BSER for two more reasons.

First, whatever the maximum scope of BSER (the fabled "fenceline" question),[40] EPA's unprecedented concern for the emissions at the site of hydrogen production, and even further upstream at the site of the generation of the power used to produce the hydrogen, exceeds it. This statutory provision authorizes EPA to regulate *sources*, and it can require them to meet a standard predicated on the use of certain types of input (e.g., pre-treated coal), assuming that all other BSER factors are duly met). But when EPA spends such an inordinate amount of regulatory attention on the *upstream* emissions associated with those inputs, which have no effect on the emissions *at the source*, it has once again got its approach the wrong way round.

Second, the "low-GHG hydrogen" measure is simply the CPP with one extra step. *West Virginia* teaches that EPA cannot use Section 111 to compel one type of plant to "subsidize increased generation" from another type, *see* 142 S. Ct. at 2599. Fine, EPA now says—instead, we'll construct our BSER around ensuring that one type of plant's *fuel* be *generated by the use of* another type's. (For that is what "low-GHG hydrogen" means.)[41] It's only a slightly more

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[40] Although note that again, *West Virginia* strongly suggests that the limit lies where the CPP repeal said it lies:

> We have no occasion to decide whether the statutory phrase "system of emission reduction" refers exclusively to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER. *To be sure, it is pertinent to our analysis that EPA has acted consistent with such a limitation* for the first four decades of the statute's existence.

142 S. Ct. at 2615 (emphasis added). And again, you will search the Proposal in vain for any acknowledgment of this warning sign, although EPA *does* inform us that in another pending proposed rule it "has proposed to reject that interpretation as too narrow." 88 Fed. Reg. at 33,272/2 n.181. Yet again, EPA's willful blindness bodes trouble ahead.

[41] *See, e.g.*, 88 Fed. Reg. at 33,310/3:

> Electrolyzers with various low-GHG energy inputs, like solar, wind, hydroelectric, and nuclear, appear most likely to product hydrogen that would meet [EPA's proposed definition of "low-GHG hydrogen"]. . . . The EPA recognizes that the pace and scale of government programs and private research suggest that we will gain significant experience and knowledge on this topic during the timeframe of this proposed rulemaking. Accordingly, the EPA is soliciting comment broadly on its proposed definition for low-GHG hydrogen, and on alternative approaches, to ensure that co-firing low-GHG hydrogen minimizes GHG emissions [at the site of production of the hydrogen and/or the site of generation of the energy used for that production, mind you, not at the regulated emissions source], and that combustion turbines subject to this standard utilize only low-GHG hydrogen.

In this one passage, EPA: (a) reveals that "low-GHG hydrogen" is in fact CPP with an extra step; (b) commits a blatant notice foul by saying in essence "we don't yet know whether or how this stuff works but we're hoping commenters will tell us"; and (c) tacitly concedes that this proposed BSER of "low-

complicated mechanism to achieve the same forbidden policy goal: ramping up renewable generation in the aggregate, dragooning other types of generation into the effort.

IV. EPA's Approach To Existing-Source Regulation Is Fundamentally Flawed.

On this front, we will be briefer. The several States are more than capable of asserting their own interests. And the issues here are not ones of dusty caselaw (for there is none), nor of complex models (what would they calculate?), but of our federalism and plain text.

The overarching flaw in EPA's approach to Section 111(d) is easily stated: It disagrees with the policy choice Congress made to give broad discretion to states in establishing standards of performance for their existing-source fleets, and so it's trying to effectively nullify that choice. The amount of ground they're trying to seize here is breathtaking.

And they're doing it in the manner of a full-court press. There are currently *three* pending proposed rules attempting to strangle state discretion under 111(d) for good: this Proposal, the proposal to revise regulations on new oil and gas facilities and establish the first regulations on existing oil and gas facilities, and the proposal to revise the "implementing" or "framework" regulations generally governing EPA's existing-source rulemakings.[42]

Well, EPA can spread its assault on federalism across as many different proposals as it wants. But it can't hide what it's doing, and it won't be able to evade accountability if it finalizes *any* action that contains this unacceptable approach.

Federalism is the shoe that didn't drop in *West Virginia*. Because the Court disposed of the CPP on the grounds that its generation-shifting-centered BSER was *ultra vires*, it had no cause to consider the validity of that rule's approach to the state-planning process specifically, and its evisceration of the discretion Congress expressly gave the states under that process. But neither did the Court bless that approach, and this time around, the chickens may be coming home to roost.

Section 111(d)(1) reads in full (emphases added):

> *The Administrator shall prescribe regulations which shall establish a procedure* similar to that provided by section 7410 of this title *under which each State shall submit to the*

GHG hydrogen" is, in fact, nowhere near meeting the statutory requirement that it "has been adequately demonstrated."

[42] In this regard, the current approach could not be more different than that of 2019 EPA, which forthrightly combined into one *Federal Register* publication three final actions: the repeal of the CPP; the promulgation of the ACE Rule; and the revisions to the "implementing" regulations.

If EPA now hopes to distract and exhaust the commenting public by introducing its improper approach to 111(d) into multiple rulemakings to be finalized separately, parties aggrieved by those rulemakings will have no recourse but to alert the judicial branch of this fact and seek consolidation of challenges as appropriate. In any event, EPA's tactics in this regard have not gone unnoticed, and comments objecting to this aspect of the other pending proposals were duly filed in those proposals' respective dockets.

> *Administrator a plan which (A) establishes standards of performance for any existing source* for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. *Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies*.

The language italicized at the end of this paragraph is an unusually stark command from Congress: EPA "shall" let states take source-specific factors into account when setting standards of performance for existing sources. This language was added to the statute in 1977,[43] after EPA had issued its first "implementing" regulations spelling out how it intended to implement the existing-source program, and after it had finalized the first of its handful of existing-source rules.

This language is not simply a ratification of an EPA-rules-the-roost view. Notably, the 1970 version of the CAA, and the first iteration of Section 111, did not contain the phrase "standards of performance" in Section 111(d). Instead, it spoke of states establishing "emission standards," a separate phrase from the "standards of performance" defined in Section 111(a)(1) and employed in Section 111(b)(1) to describe EPA's new-source regulations. *Compare* 91 Stat. 699 (1977 amendments) *with* 84 Stat. 1684 (1970 amendments).

Thus, in the original version of the statute, it was not clear that EPA's new-source regulations bore any direct relation to the substance of the states' existing-source ones. Congress in 1977 did harmonize the terminology between subsections (a), (b), and (d) by replacing "emission standards" with "standards of performance" in Section 111(d)(1), but this is far from a sign that Congress intended to ratify *any* version of a top-down, EPA's-way-or-the-highway approach, let alone the approach in EPA's currently pending proposals. As its addition of the command that EPA let states employ source-specific factors demonstrates, in fact, Congress's intention in 1977 seems to have been quite the opposite.

In this regard, it's important to note that none of this was before the Supreme Court, or necessary to its holding, when it said this in *West Virginia*:

> Although the States set the actual rules governing existing power plants, *EPA itself still retains the primary regulatory role* in Section 111(d). *The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved*. It does so by again determining, as when setting the new source rules, "the best system of emission reduction . . . that has been adequately demonstrated for [existing covered] facilities." 40 CFR § 60.22(b)(5) (2021); *see also* 80 Fed. Reg. 64664, and n.1. The States then submit plans containing the emissions restrictions that they intend to adopt and enforce *in order not to*

[43] 91 Stat. 699.

> *exceed the permissible level of pollution* established by EPA. *See* §§ 60.23, 60.24; 42 U. S. C. § 7411(d)(1).

142 S. Ct. at 2601-02 (emphases added). The history of the statute set forth here suggests that the situation is a good deal more nuanced.[44] But even if the harmonization of language in the 1977 amendments does mean that EPA sets *in the first instance* the degree of emission reduction that should generally be "achievable" for existing sources, Congress provided a crucial safety valve from that federal control by the addition of the federalist command to EPA that it added to the end of Section 111(b)(1) in the same amending legislation. And that safety valve is what EPA is now trying to close.

EPA's Proposal (and its approach in the other pending proposals) violates 111(d)(1) in multiple respects.

First, it purports to require states to make a showing they "*cannot reasonably apply* the BSER to achieve the degree of emission limitation determined by the EPA" via the EPA's own "presumptive" limits in its existing-source "emission guidelines," *see* 88 Fed. Reg. at 33,374/1 n.681 (emphasis added). This requirement is not on the face of the statute, cannot be supported by the statute's text, and would implicate the interpretative canon requirement a clear statement of congressional authorization before interpreting a statute to permit federal invasion of a traditional area of state sovereignty.[45] EPA also requires additional process and public engagement as a prerequisite for states invoking this authority that Congress explicitly gave them, again without identifying authority for EPA to require this.

To make matters worse, EPA now says that "other factors [and] the remaining useful life" can be used to justify a *more* stringent standard than what would result from a direct application of

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[44] Rather than blunt talk of EPA having the "primary regulatory role," therefore, we respectfully submit that the Ninth Circuit's characterization of the statutory scheme is more precise:

> For any "new" sources, EPA shoulders primary regulatory responsibility. *See id.* § 7411(b), (c). But regulation of "existing" sources is a *joint enterprise* between EPA and the states. *See id.* § 7411(d)(1).

California by and through Becerra v. EPA, 978 F.3d 708, 711 (9th Cir. 2020) (emphasis added).

When properly understood in its original design as a "joint enterprise," all Section 111(d)(1) directs EPA to do is establish a *procedural* regulation for plan submission. The history of the statute, in whose original version the states weren't even establishing "performance standards" for existing sources, but rather "emissions limitation," reveals that Congress may never have actually intended EPA to be setting *any* substantive regulations for existing sources. A lot of regulatory water has gone under the bridge since 1970, of course, but *no* acceptable reading of the statute can affirm the approach that EPA is proposing to take here and in its other pending proposals.

[45] *See, e.g.*, *Bond v. United* States, 572 U.S. 844 (2014). This canon lies beneath Congress's already broadly federalist text here, as backstop guarding against precisely the sort of power grab EPA is now attempting.

EPA's "emission guidelines." But this can't be right.[46] As an initial matter, EPA is not requiring any additional process or analysis by a state before it does so, creating a "one-way ratchet" that will incentivize states to establish only *more*, not *less* stringent standards on their existing sources—the precise opposite of the congressionally enacted text and obvious congressional intent.

Also, when EPA in 1975 issued its implementing regulations, before Congress added this language to the statute, the Agency said this:

> On a case-by-case basis for particular designated facilities, or classes of facilities, States may provide for the application of *less stringent* emission standards or longer compliance schedules than those otherwise required by paragraph (c) of this section, provided that the State demonstrates with respect to each such facility (or class of facilities):
>
> > (1) Unreasonable cost of control resulting from plant age, location, or basic process design;
> >
> > (2) Physical impossibility of installing necessary control equipment; or
> >
> > (3) Other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time *significantly more reasonable*.

40 Fed. Reg. at 53,347/3 (Nov. 17, 1975) (emphasis added). To the extent that Congress's 1977 amendment ratified any work of EPA's, therefore, it was this: allowing state plans to apply *less* stringent standards to their existing sources in consideration of their source-specific characteristics, on grounds including that doing so would be *significantly more reasonable*. Its current proposed "cannot reasonably apply" standard therefore (a) flips its original 1975 approach on its head and (b) is ungrounded in the text of Congress's broad federalist command.

Second, EPA departs from the text of Section 111 generally and Section 111(d)(1) in particular by proposing to allow state plans to include trading and averaging schemes as compliance mechanisms. It gives these reasons:

> [1] Nothing in the text of section 111 precludes States from considering a source's acquisition of allowances in implementing and enforcing a standard of performance for that particular source, *so long as the State plan achieves the required level of emission reductions*. . . .
>
> [2] Further supporting this statutory interpretation, section 111(d) requires a "procedure similar to that provided by Section 7410." . . . Section 110 [] does not distinguish between measures that do or don't apply at or to a source for compliance, and there is *no sound reason to read section 111's comparably broad language differently*. Such

[46] Generally speaking, CAA Section 116 provides that states can regulate a stationary source's emissions more stringently than federal law does—*as a matter of state law*. But a state plan under Section 111(d) is federalized after EPA approves it, and there's no warrant in the text of Section 111(d)(1) to federalize any more stringent standard that a state may choose for its own reasons to assign to any particular source.

> flexibility is consistent with the framework of cooperative federalism that CAA section 111(d) establishes, which vests States with substantial discretion.

88 Fed. Reg. at 33,340/1-2 (emphases added).

Keep your eye on that "required level of emission reductions," we'll pick that back up in a second. For now, focus on the second point. Yes, Section 111(d) refers to a "procedure similar to" the separate Section 110, which governs the state- (and federal-) planning process to implement the National Ambient Air Quality Standards (NAAQS) program.

But there's a *very* "sound reason to read Section 111" differently: Section 110 explicitly authorizes the use of trading schemes to comply, and Section 111 doesn't.

West Virginia handily disposes of this argument:

> Congress went out of its way to amend the NAAQS statute [in 1990] to make absolutely clear that the "measures, means, [and] techniques" States could use to meet the NAAQS included cap-and-trade. § 7410(a)(2)(A). Yet "not a peep was heard from Congress about the possibility that a trading regime could be installed under § 111." Id., at 10309.[47]

Third, double back to the "required level of emission reductions" EPA mentions in the quote above. What's EPA talking about? If states will be allowing their sources to average and trade emissions, how will those sources be meeting their "required level" of reductions?

Simple (but illegal): EPA is going to impose an *aggregate* reduction requirement on each state. *That's* why it's not concerned about allowing averaging and trading here:

> EPA proposes to interpret CAA section 111 as permitting each State to adopt measures that allow its sources to meet their emissions limits *in the aggregate*, when the EPA determines, in any particular emission guideline, that it is appropriate to do so, given, inter alia, the pollution, sources, and standards of performance at issue.

88 Fed. Reg. at 33,340/3 (emphasis added).[48]

But this is an wholly non-statutory construct that conflicts with the text, structure, and purpose of Section 111 and of the CAA as a whole. It "bubbles" the entire state, treating it like a giant power plant whose aggregate emission level EPA can dial down. And from *that* (atextual and illegal)

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[47] EPA's statement "[n]or did the [*West Virginia*] Court address the scope of the States' compliance flexibilities," 88 Fed. Reg. at 33,270/1, while true in the narrowest sense that this was not a necessary part of the Court's holding, is therefore misleading. The Court's analysis plainly addresses the fact that that cap-and-trade is an expressly allowed measure *in Section 110* that "States could use to meet the NAAQS," and that no such compliance means are available *under Section 111*.

[48] *See also id.* at 33,392/3 n.658, where the only precedents for allowing averaging and trading under its 111(d) rules that EPA can muster are: CPP and CAMR, yet again; a revision to the "implementing" regulations promulgated in conjunction with CAMR; and a waste-combustion rule so irrelevant that the *West Virginia* majority didn't even respond to the dissent's invocation of it, *see* 142 S. Ct. at 2640 (Kagan, J., dissenting).

aggregate emission reduction requirement, EPA brooks *no* variance. And EPA has the gall to say that *its* approach is the one consistent with "the framework of cooperative federalism?" Poppycock.

EPA is conflating the design of the NAAQS under Section 110, which is source-agnostic but which instead addresses ambient air quality within air quality regions, with Section 111, which, by contrast, is a *source performance* program. Section 111, unlike Section 110, places no aggregate reduction obligation on the states, but it also gives them no authority to comply via averaging and trading. The text of Section 111(d)(1) governing state plans is markedly federalist and deferential to the states' knowledge of the characteristics of their particular existing sources. EPA may disagree with Congress's choice to provide the states with this degree of discretion, but it cannot legally override that choice.

But Congress does expect states to actually consider their existing sources' characteristics if it wants to assign them less stringent standards of performance than EPA's regulations would indicate. EPA's ploy to smother the explicit federalist mechanism, offer an illusory "flexibility" through unauthorized averaging and trading, while slyly retaining ultimate control through its egregious "aggregate" reduction backstop, cannot stand.

Now let's return to the beginning: EPA stakes all its claim to authority to determine what systems of emission reduction have been "adequately demonstrated" on early D.C. Circuit caselaw that allows it to press beyond what existing plants can do, and to include some degree of projection as to the course of technological development. As we've shown above, EPA is stretching that caselaw to the breaking point in its Proposal. *But none of that caselaw endorses a similar approach for existing sources*. None of that caselaw reviews an existing-source rulemaking, and some of it explicitly distinguishes *itself* from the existing-source context.[49]

EPA never seems to acknowledge this. And it never grapples from the ground up with how existing-source regulation should work, separate from the crutch of (its misinterpretation of) the new-source caselaw. For instance: "Because these existing combustion turbines are similar to

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[49] *See Lignite Energy Council*, 198 F.3d at 934 ("Because it applies only to new sources, we have recognized that section 111 looks toward what may fairly be projected for the regulated future, rather than the state of the art at present.") (internal quotation marks omitted); *Nat'l Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 783 (D.C. Cir. 1976) ("But the Clean Air Act, and section 111 in particular, was also designed to prevent new pollution problems, especially the deterioration of air quality in areas where existing air quality levels exceed the promulgated air quality standards. The House reported that the provision for control over new stationary sources was enacted to 'prevent the occurrence anywhere in the United States of significant new air pollution problems . . . .'"); *Portland Cement*, 486 F.2d at 391 ("Section 111 looks forward to what may fairly be projected for the regulated future, rather than the state of the art at present, *since it is addressed to standards for new plants*—old stationary source pollution being controlled through other regulatory authority.") (emphasis added).

That these cases say that Section 111 only addresses new sources, when Section 111(d) on its face plainly addresses existing ones, is further evidence that Section 111(d) is in fact the "previously little-used backwater" that the Supreme Court deemed it, *West Virginia*, 142 S. Ct. at 2613. It's the ultimate mousehole. EPA needs to stop trying to conjure up elephants out of it.

new stationary combustion turbines, the EPA is proposing a BSER that is similar to the BSER for new base load combustion turbines." 88 Fed. Reg. at 33,245/3. This is nowhere near sufficient.

The text, structure, and purpose of Section 111(d)(1) signal that Congress understood existing sources are different from new ones and should be approached differently. There are at least two obvious policy reasons for this: it's more expensive and sometimes impossible to retrofit an existing plant, and states know the circumstances of their existing-source fleet better than the central, federal regulator does, whereas that knowledge deficit is not so stark when it comes to how new sources can be designed. That's why Congress, even as it was harmonizing terminology that might suggest that EPA gets to determine what standards the states will set, was careful to provide an unusually stark command that it let states take individual plants' characteristics into account and establish less stringent standards for them than EPA's first-cut "emission guidelines" would indicate.

But EPA would suffocate that textual command to respect state discretion by imposing unreasonable burdens on the exercise of that discretion found nowhere in the statute.

There's at least one other stolen base in EPA's Proposal. Section 111(d)(2) provides that, if a state fails to submit a "satisfactory" plan under Section 111(d)(1), EPA has the same "authority" to issue a federal plan as it does under the NAAQS program in Section 110. EPA at least once in the Proposal correctly characterizes this as meaning that it "may" issue a federal plan if a state doesn't submit a satisfactory plan, but elsewhere says, incorrectly, that it "must" do so.

But whereas in Section 110 Congress placed an *obligation* on EPA to issue a federal plan as a backstop where it does not approve a state plan,[50] in Section 111(d)(2) Congress only gave EPA the *authority* to do so. Whether and how to exercise that authority, then, is a choice, and EPA hasn't explained why it's treating this as an obligation. (To the extent that it's enshrined this obligation in other regulations, that just pushes the problem of an unexplained policy choice into those other regulations—including the other pending proposal to revise its implementing regulations.) This is no small matter: caselaw holds that the obligations EPA imposes on itself via regulation can be enforced by private third parties via a suit in federal district court under CAA Section 304,[51] and so EPA at the very least has to rationally explain its choice to do this, even assuming that *it* has authority to convert this *congressional* grant of authority into a binding obligation on itself. It hasn't done so here.

[50] 42 U.S.C. § 7410(c)(1) ("The Administrator *shall* promulgate a Federal implementation plan [if certain triggers are met]") (emphasis added).

[51] *See, e.g.*, *California v. EPA*, 360 F. Supp. 3d 984, 991 (N.D. Cal. 2018) (Congress intended in Section 304 "to waive sovereign immunity for the EPA's failure to perform nondiscretionary duties mandated by regulations").

V. EPA's Proposal Is a Prextextual Resumption of the Policy Goals of the Illegal Clean Power Plan.

EPA's Proposal is pretextual. Its real policy goal is precisely what the Supreme Court forbid it from seeking in *West Virginia:* "forc[ing] a nationwide transition away from the use of coal," and more broadly restructuring the utility markets and the fuel-mix of the nation's electric grid, *see* 142 S. Ct. at 2616.

The clearest "tell" here is in the rule's structure: an unprecedented scope and depth of subcategorization, with no precedent to speak of other than the 2015 new-source companion to the CPP (which was never tested in court), based on the *market function* and *operating horizon* of the power plants in question. That, coupled with a massive incentive (in the form of avoiding more stringent requirements) to close fossil-fired power plants early, should, in EPA's mind, just about do the grid-reshaping trick.

EPA is once again acting as if Congress had passed some "Energy Transition Act" delegating to it the role of grid-shaper. That never happened, of course, nor, as a practical political matter, is it likely ever to happen.[52] But that didn't stop President Biden from conspicuously proclaiming the transition as national policy during his first week in office.[53] So who's fooling whom, here?

The rule's structure makes little sense if the rule is actually about addressing the emissions performance of individual sources[54] by identifying the best system of emission reduction that (taking into account the parenthetical factors) has been adequately demonstrated. But it makes all the sense in the world if the goal is to reshape the electric markets, put the boot to coal plants, and deter the building of new gas plants. (Oh, and to provide yet another enormous *de facto* subsidy to wind and solar via the I-Can't-Believe-It's-Not-The-Clean-Power-Plan "low-GHG hydrogen" scheme—because apparently all the recent legislative subsidies aren't *quite* enough to compel the transition on EPA's preferred schedule.)

EPA again seems to draw inspiration from the WV *dissent*, which argued that if CPP wasn't BSER, then surely CCS must be. Something must be done–CCS (and "low-GHG hydrogen") are something–therefore they must be done.[55] But that doesn't follow, unless you fire up the blender.

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[52] In which respect once again *cf. West Virginia*, 142 S. Ct. at 2612 (alterations and emphasis added by the Court):

> There is little reason to think Congress assigned such decisions to the Agency. For one thing, as EPA itself admitted when requesting special funding, "Understand[ing] and project[ing] system-wide . . . trends in areas such as electricity transmission, distribution, and storage" requires "technical and policy expertise *not* traditionally needed in EPA regulatory development."

[53] *E.g.*, Executive Order 14,008 of January 27, 2021—Tackling the Climate Crisis at Home and Abroad, Sec. 201 (pledging to place the United States put the United States "on a path to achieve net-zero emissions, economy-wide, by no later than 2050").

[54] *See, e.g.*, *West Virginia*, 142 S. Ct. at 2611, 2612, 2615.

[55] Presumably, EPA finds at least some inspiration for this silly syllogism in the *West Virginia* dissent's opening Cassandra act, that "[t]oday, the Court strips the Environmental Protection Agency (EPA) of the

What a "system of emission reduction" is, is question zero. What's "adequately demonstrated" is question one. Only after that do you decide what's the "best" at question two.

For all the reasons above, the Proposal is lawless and irrational even when analyzed in routine fashion. Apply a major questions lens, and it's an early night. But when the pretextual, bad-faith dimension of this Proposal is laid bare, we find ourselves in "the frozen moment when everyone sees what is on the end of every fork."[56]

EPA's response to comments and eventual defensive briefing will inevitably disclaim any intent to adjust the nation's fuel mix. But its allies are not so reticent. A week before the scheduled end of the comment period on EPA's Proposal, *Politico*'s "Morning Energy" newsletter reported:

> POWER PLANT PUSHBACK: EEI [the Edison Electric Institute], the powerful trade group for investor-owned electric companies, is drawing pushback from greens as it circulates draft comments among its members on EPA's proposed power plant rule. EEI is considering calling on the agency to "significantly supplement" or even repropose the portion of its rule regulating existing natural gas plants, an EEI spokesperson told ME [Morning Energy].
>
> The trade group argued in a white paper in November that the proposal was unworkable because control technologies it relies on—hydrogen co-firing and carbon capture—haven't been demonstrated at scale. And EEI called in April for significant flexibility if EPA decided to regulate existing natural gas plants—elements that the agency added to the rule after White House review.
>
> But green groups believe that not all of EEI's member utilities—including some that have set bold decarbonization targets—agree with that position. In a letter this morning, the green groups are urging utilities to refuse to sign onto EEI's comments unless it commits

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power Congress gave it to respond to 'the most pressing environmental challenge of our time.'" *West Virginia*, 142 S. Ct. at 2626 (Kagan, J., dissenting), *quoting Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

In truth, the characterization of climate change as the "most pressing environmental challenge of our time" was an assessment made not by the Court in *Massachusetts*, but, rather, was a direct quotation lifted from the original petition for certiorari submitted by a "group of States, local governments, and private organizations." *See Massachusetts*, 127 S. Ct. at 1447. The Court itself in *Massachusetts* expressed no opinion of the seriousness of the matter, one way or the other, concluding that "[w]e need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding," and "hold[ing] only that EPA must ground its reasons for action or inaction in the statute." *Massachusetts*, 127 S. Ct. at 1463.

Whatever opinion EPA (or the dissent, for that matter) may have regarding the calamity we are supposedly now facing, it seems best not to ascribe that same opinion to the Supreme Court itself, given that there's no basis for it. On this issue, the arc of judicial history is not bending in the direction that some would suggest.

[56] William S. Burroughs, Introduction, *Naked Lunch* (1959).

> to collaboration, and to publicly commit to engaging with EPA to support carbon standards for coal and gas power plants.
>
> "If you align with the fossil fuel industry, rather than with clean electricity—and hide behind EEI's deeply-misguided comments—the public will know where your company stands," wrote the groups, which include Evergreen Action, Sierra Club and the League of Conservation Voters.
>
> "We understand that a trade organization's comments may not reflect the individual stances of every company involved, so we wanted to give you the opportunity to clarify your stance and public commitment to decarbonization," they added.
>
> The EEI spokesperson said the group is "working with our members to finalize extensive comments" ahead of the deadline next week.
>
> "There are elements of the proposal that are favorable, and we are making recommendations to strengthen them; elements that are fixable with additional flexibilities; and elements that miss the mark," the EEI spokesperson said.

Politico Pro, Morning Energy, Greens Take Aim at EEI (Aug. 1, 2023).[57]

The "letter sent this morning," from "Evergreen Action," is, well, revealing, and deserves to be quoted (and entered into EPA's comment record) in full:[58]

> August 1, 2023
>
> Dear CEO of EEI Member Utility,
>
> Your company has barely a week to decide whether to stand on the right side of history by committing to publicly support the U.S. Environmental Protection Agency's (EPA) common-sense standards controlling greenhouse gas pollution from coal and gas power plants. As you know, the EPA's comment period on standards under Section 111 of the Clean Air Act closes on August 8. Unfortunately, our understanding is that the utility trade association, the Edison Electric Institute (EEI), is preparing to send EPA formal comments flatly attacking those standards, especially as they relate to gas power plants. EEI's reported comments would call for scrapping or withdrawing of common-sense emissions rules in the middle of an unprecedented climate-caused heat wave that has impacted Americans and harmed local economies. This stance by EEI would falsely malign the legal and factual basis for the rule, only after industry took millions of dollars in public money to develop the very technologies that form the basis of the proposal.

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[57] *Available at* https://login.politicopro.com/?redirect=https%3A%2F%2Fsubscriber.politicopro.com%2Fnewsletter%2F2023%2F08%2Fgreens-take-aim-at-eei-00109117.

[58] *Available at* https://subscriber.politicopro.com/f/?id=00000189-aead-db28-a589-affd91780000, or wherever fine ransom letters are sold. (All emphases in original.)

On behalf of the environmental organizations signed below, and the larger public, we are writing to ask you to commit to a better future. During this hottest summer in over 100,000 years, and given the flexibilities in the rule and your company's clean energy commitments, **we are asking you to communicate to EEI leadership that your company will not sign or endorse EEI's comments unless they commit to collaboration; and to publicly confirm that your company will engage constructively with EPA to support carbon standards for not only existing coal but also for new and existing gas plants in their final form**.

This decision will have large consequences. On the one hand, you can choose to support sensible emissions controls while continuing to leverage the hundreds of billions of dollars available under the Inflation Reduction Act and Clean Air Act to control pollution and build a clean energy grid. As multiple sectors, from transport to buildings to industry, electrify, utilities can sell electricity to a growing customer base and support our national response to the existential risks of the climate crisis. Building a clean, electrified economy is a once-in-a-generation opportunity for the electric industry. Shareholders, ratepayers, and the public want to see a less-polluting electricity system, and many utilities have set laudable climate and clean energy goals accordingly. With unprecedented incentives for clean energy and increasing regulatory requirements for decarbonization at the state and federal levels, there has never been a better time to choose to lead the way to a more reliable and cleaner grid. Clean energy is not only more reliable, but also more affordable for consumers and less vulnerable to volatility like we recently observed during the beginning of the war in Ukraine. Utilities making this choice serve the public, and will be applauded.

On the other hand, if you align with the fossil fuel industry, rather than with clean electricity–and hide behind EEI's deeply-misguided comments–the public will know where your company stands. You can expect ratepayers, regulators, climate advocates and government funders to question whether your decarbonization commitments are serious, whether you are properly mitigating ratepayer and investor risk in light of the growing crisis, and whether federal and state funds should flow towards companies doubling down on yesterday's unstable power system. In this moment of simultaneous crisis and opportunity, this is a chance to lead, not to abandon your most fundamental responsibility to serve the public.

We understand that a trade organization's comments may not reflect the individual stances of every company involved, so we wanted to give you the opportunity to clarify your stance and public commitment to decarbonization. We will be sure to highlight your choice going forward. We look forward to your answer and would be delighted to meet with you and to collaborate on joint efforts to reduce pollution and build the safe climate future we so urgently need.

Sincerely, [lengthy list of signatory entities follows].

And then, to make things even clearer, "Evergreen Action" tweeted this the next day:[59]

> .@Edison_Electric lobbies on behalf of utility companies. As we suffer through the hottest year on record, EEI is attempting to take down critical climate regulations.
>
> Utility members need to make clear where they stand on this action. #UtilityMomentOfTruth

#UtilityMomentofTruth, indeed. We couldn't have put it better ourselves.

The letter's signatories are exercising their First Amendment rights, and more power to them. We welcome the letter, actually. It's clarifying.

Just to recap: the letter:

- dovetails neatly with the explanation given above of why it's absurd (and contrary to the only plausible reading of the statute) for EPA to focus on *subsidized* cost to the company as the sole scope of "the cost of achieving such reductions" ("industry took millions of dollars in public money to develop the very technologies that form the basis of the proposal"; "you can choose to support sensible emissions controls while continuing to leverage the hundreds of billions of dollars available");[60]
- is open-eyed about the true purpose of the Proposal, that being precisely what *West Virginia* says EPA cannot use this statute to do ("you can . . . build a clean energy grid"; "Building a clean, electrified economy is a once-in-a-generation opportunity for the electric industry."); and
- explicitly frames the Proposal as a proxy conflict between different types of generation ("On the other hand, if you align with the fossil fuel industry, rather than with clean electricity . . . .").[61]

All that in two pages. Impressive. And, again, clarifying. If this "Evergreen Action" outfit gets what's going on, surely the Supreme Court will. In any case, there are those, apart from Evergreen Action and EPA itself, who take interest in whether these tactics will work, whether any individual utility companies will choose to fold, and whether EEI itself is intimidated into shelving the quite valid objections that it is reported to hold.

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[59] Tweet from @EverGreen Action, 10:50 AM, Aug. 2, 2023, *available at* https://twitter.com/EvergreenAction/status/1686751371784032256.

[60] Whining about the fact that utilities are still having cold feet notwithstanding the hundreds of billions of dollars recently shoved at both "clean energy" and supposedly already "adequately demonstrated" technologies is an odd way to argue for the adequacy of the demonstration.

[61] Of course there's also the apocalyptic, Manichaean, simultaneously threatening and hysterical tone, but that sort of thing hardly raises an eyebrow these days.

Come to think of it, it's not just EPA's allies in civil society that can't stop giving the game away. It's also EPA's own leaders.[62] The statements of EPA Administrators and other powerful environmental officials from the Biden and Obama Administrations, to the effect that their intent is to compel an energy transition using Section 111, and that they don't much care *what* the Supreme Court has to say about it, are open, notorious, repeated, of long-standing, and the type of thing of which reviewing courts will be amply able to take judicial notice. But for fun, here's a *Whitman's Sampler* just from the last year.[63]

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[62] And members of Congress, *see* discussion above of the comments of Rep. Pallone. Indeed, *on the day the comment period closed*, 30 Democratic Senators sent the EPA Administrator a letter that once again reveals the true nature of this Proposal, and its forbidden nature under *West Virginia*:

> The IRA amended the Clean Air Act to add section 135(a)(6), which provides EPA funding and direction to use existing Clean Air Act authorities, such as section 111, to reduce greenhouse gas emissions from electricity generation. Other provisions of the IRA and the Bipartisan Infrastructure Law make available hundreds of billions of dollars to support cleaner electricity production, which is already accelerating market trends toward cleaner electricity. *EPA's rule should* build on these resources and ongoing progress, and *drive further advances*.

Letter from Sens. Carper *et al*. to The Honorable Michael S. Regan, Administrator, Environmental Protection Agency (Aug. 8, 2023), at 1 (emphases added) *available at* https://www.epw.senate.gov/public/_cache/files/9/f/9fdf54bd-eb5b-4f84-9cd6-7335e2e87f65/1142B71DF8A6E2B8AEC93AEB52E47301.08-08-23-letter-to-epa-power-plant-greenhouse-gas-standards.pdf.

Once again, they can't help themselves from revealing the Proposal's goal: to "drive further advances" in the nature of generation-shifting. Of course, as explained above, the IRA did not and could not have amended Section 111 to provide the requisite clear statement of authorization for generation-shifting that *West Virginia* found lacking.

Notably, many members of Congress initially responded to *West Virginia* by calling for a substantive amendment of Section 111 to provide the clear statement of congressional authorization to adopt generation-shifting as EPA policy that *West Virginia* held the section lacked. No such efforts were enacted.

[63] This is, of course, just the tip of the iceberg of what's now almost a decade-long unfortunate history when it comes to EPA's defiant statements with regard to its ultimate intentions for the power sector. In this regard, the most blatant and consequential example must be the then-EPA air chief's statement in 2015 when the Supreme Court in *Michigan v. EPA*, held the Mercury Air Toxics Standards regulations violated the CAA by refusing to consider cost, to the effect that the Court's ruling was meaningless because industry had already largely complied with the rule during the pendency of judicial review. The original statement from this official appears to have gone missing from EPA's website, so here's a report from later in 2015:

> The Clean Power Plan, EPA's comprehensive regulation that governs carbon emissions from power plants, will be finalized this summer. Once in effect, the Plan will force states to move away from coal fire power production, an outcome conservatives on Capitol Hill and industry representatives have been fighting hard to prevent. These groups now claim *Michigan v. EPA* is the court's warning to EPA to throw out, or at least reconsider, the Plan. According to them, the decision demonstrates the court's unwillingness to defer to EPA when regulating coal fired power plants.

As recently as *two weeks ago*, it was reported that the current EPA Administrator said in an interview:

> We are working on a proposed power plant standard in the United States that *helps us to transition* from heavily fossil fuel resources *to clean resources*. You have to do that in a very strategic way and obviously, technologies like carbon capture and storage, and carbon capture sequestration are something that have been thought of as a potential, cost-effective way to do that.
>
> But we also know that the use of coal is becoming less cost-effective, at least in America. We're not going to get out of this mess overnight. So, we will have to use some technologies to help with that transition, but eventually, *we're going to be using less and less coal*. *We have to make sure that the communities and the industries* that have been mining coal and helped our countries become as great as they are using coal, *transition to this clean energy economy*.[64]

The same official had this to say the day the Court issued *West Virginia* last year:

> While I am deeply disappointed by the Supreme Court's decision, we are committed to using the full scope of EPA's authorities to protect communities and reduce the pollution that is driving climate change. *We will move forward to* provide certainty and transparency for the energy sector, which will *support the industry's ongoing efforts to grow our clean energy economy*.[65]

> Environmentalists, of course, disagree. . . . For its part, EPA seems to embrace the environmentalists' claims. The agency's air chief, Janet McCabe, said in a blog post the day after the decision, that EPA "*remains committed to finalizing the Clean Power Plan*." According to McCabe, the court's decision "*will have no bearing on the effort* to reduce carbon pollution from the largest sources of emissions."
>
> But there is one point on which all sides agree—*Michigan v. EPA* demonstrates the court's willingness to dive deep into the morass of the Clean Air Act in evaluating EPA's actions. No doubt the court will do so again if asked to assess the legality of the Clean Power Plan. Only then will we know the full weight of *Michigan v. EPA*.

Mindy Goldstein, Emory Law News Center, *Michigan v. EPA*: Does it mean more than mercury? (July 10, 2015) (emphases added), *available at* https://law.emory.edu/news-and-events/releases/2015/07/Michigan-v-EPA-does-it-mean-more-than-mercury.html.

Likewise, if EPA finalizes the Proposal in anything like its current form, only then will we know the full weight of *West Virginia v. EPA*.

[64] World Energy, reprinting *The Hindu Businessline*, US working on power plant standards for energy transition: US EPA head (July 29, 2023) (emphases added), *available at* https://www.world-energy.org/article/34841.html.

[65] EPA Administrator Regan Issues Statement on *West Virginia v. Environmental Protection Agency* (June 30, 2022) (emphases added), *available at* https://www.epa.gov/newsreleases/epa-administrator-regan-issues-statement-west-virginia-v-environmental-protection.

And earlier that year, after the Court heard argument but before the opinion in *West Virginia* issued:

> [L]ater this year, we'll be taking a fresh look at our options for reducing carbon emissions from both new and existing power plants. EPA is obligated to put in place emission guidelines for carbon dioxide pollution from existing power plants under section 111(d) of the Clean Air Act. *We're committed to building on the lessons of our prior efforts* in this area and engaging a broad range of stakeholders. As we do that, we'll also propose revisions to the greenhouse gas standards for new power plants under section 111(b).[66]

Build on those lessons EPA did. But build on the lessons of *West Virginia*? Not so much.

Pretext is a high hill to climb, but EPA's done it.[67] The Agency is, of course, not writing on a blank slate here. *West Virginia* held that CPP's *object* was forbidden: regulatory manipulation of the generation mix. The cap-and-trade scheme was the CPP's *means*. (Footnote 3 of the Court's opinion and its colloquy with the dissent, as discussed above, demonstrates this most crisply.) And the dissent is, in a way, correct: EPA *could* pursue the same taboo object through a willful,

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[66] Administrator Michael Regan, Remarks to CERAWeek About EPA's Approach to Deliver Certainty for Power Sector and Ensure Significant Public Health Benefits, As Prepared for Delivery (Mar. 10, 2022), *available at* https://www.epa.gov/speeches/administrator-michael-regan-remarks-ceraweek-about-epas-approach-deliver-certainty-power (emphasis added).

See also Ben Geman, Axios, EPA floats path on electricity CO2 emissions—with an asterisk (Mar. 11, 2022) (emphases added)*, available at* https://www.axios.com/2022/03/11/epa-electricity-co2-emissions:

> Quick take: Regan's not putting all his eggs in the basket of directly regulating CO2 from existing coal plants.
>
> "*We don't have to overly rely on any one policy or rulemaking* to achieve our mission and ensure affordable and reliable energy," he said onstage.
>
> And Regan told reporters that rules targeting other pollutants have "co-benefits" that also curb CO2.
>
> "*The industry gets a chance to take a look at this suite of rules all at once and say*, is it worth doubling down in investments in this current facility, or operation, or *should we look at that cost and say, now it's time to pivot and invest in the clean energy of the future*," he said.

It could not be clearer. The current EPA Administrator, the official who signed the Proposal, said during the pendency of *West Virginia* that, no matter the fate on judicial review of CPP or any other one "policy or rulemaking," nothing would stop his Agency from using any rulemaking authority it can lay its hands on a blitz to compel industry to "pivot and invest in the clean energy of the future."

[67] *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573-74 (2019) (internal quotation marks and citations omitted):

> [W]e have recognized a narrow exception to the general rule against inquiring into the mental processes of administrative decisionmakers. On a strong showing of bad faith or improper behavior, such an inquiry may be warranted and may justify extra-record discovery.

bad-faith deployment of measures that are plausibly traditional and authorized under Section 111 in *form* (if you squint), albeit not in the *adequacy of their demonstration*.[68] And so it now has.

Where the Court put up a stop sign, EPA looks past it to the dissent's false green light. What EPA may not yet have realized is that it has, at long last, lost the benefit of the doubt.

VI. Conclusion.

So what should be done instead?

In brief: less, more thoughtfully, and with more restraint.

Much has been made of the claim that, even though the Supreme Court stayed the Clean Power Plan before it went into effect, the greenhouse gas emission reductions it was designed to effect "happened anyway," ahead of schedule—so what's the big deal?

Well, yes and no. *Nationwide, aggregate* reductions from the power sector did indeed happen faster without the CPP than the EPA predicted would have happened with it. But the Supreme Court's stay (and its eventual, final holding in *West Virginia* that CPP was illegal) prevented EPA from compelling every state to mimic certain coastal states' energy policies, or to be subjected to a massive penalty in the form of their power plant fleets being compelled to purchase credits for the privilege of maintaining their own states' chosen resource mix.

Many of these refusenik states have in fact realized major reductions, but they've done it on their own terms, either by letting the market operate or by exerting their own sovereign policy prerogatives. In fact, top-down GHG reduction mandates, including those mediated through *artificial* "markets" in cap-and-trade, haven't done any better than the policies of neighboring jurisdictions in reducing emissions, whether compared interstate or internationally.

But yes: emissions from the sector fell ahead of schedule. For those whose *actual* concern is to reduce emissions, that's great news. For those whose goal is instead to do an end-run around the Federal Power Act and invade core areas of traditional state sovereignty, though, it's not. And the current Proposal shows there's no distance yet mapped that the latter group won't travel to get their way.

The "double vision" created by the effect of the 2016 stay of the CPP, and the 2017-2019 repeal rulemaking's analysis that showed that the 2014-2015 CPP rulemaking's prior analysis was wildly underestimating the reductions that would occur in a no-CPP baseline, presents a Rorschach blot. Some look at this and say "CPP wasn't aggressive enough! We've got to do more, sooner!" Fortunately, the Supreme Court shut down *direct* demands for a "CPP 2.0"—which is how we ended up with the current pretextual Proposal.

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[68] *See* 142 S. Ct at 2640 (Kagan, J., dissenting):

> EPA could have designed the Clean Power Plan in the same way—say, by setting emissions limits based on carbon-capture technology, with the expectation that many plants would avail themselves of an approved cap-and-trade program instead. The majority gives no reason to think Section 111(d) allow that approach but disallows the Clean Power Plan.

Others, including us, have a different perspective. That "double vision" shows the limitations of EPA's, or any government agency's, ability to understand, predict, and shape these things. (EPA in particular clearly does not know the grid anywhere near as well as it thinks it does.) And the Proposal's repeated flouting of clear warning signs from the Supreme Court holds out the prospect of another round of big-ticket, "Super Bowl" litigation, which will likely once again end EPA right back where it started: vacatur and remand. The juice is not worth the squeeze.

It's not worth the squeeze in another respect, too. For this Proposal isn't simply a product of EPA's own pathologies. It points to the fundamental incoherence of the Administration's "whole of government" approach to the "climate crisis." An *actual* whole-of-government approach would carefully identify which agencies, acting well within the limits of their statutory authority, could use that authority to get the most reductions at the least cost. (And, where Congress hasn't delegated that authority to the Executive Branch, the Executive should renew its efforts to convince Congress to do so.) Again, that's what you'd do if your core concern were actually rational emissions reduction. We see no sign of that. Instead, each agency is hurtling ahead with multiple regulations, often *ultra vires* on their face, and often with eyes plainly fixed not so much on reducing emissions as on aggrandizing their authority at the expense of the private sector and the states.

Considerations of prudence, humility, restraint, adherence to the rule of law, and concern for the reliability of the grid should all compel EPA to fundamentally rework its approach to this rulemaking. It should limit its BSER to those measures that are *actually* adequately demonstrated, which, properly understood, means they'll soon be widely available and (taking into account the parenthetical factors) they have a proven track record.

But, sadly, we have little hope that EPA will heed this plea. (If it did, of course, heads would roll.) The clear objective of this Administration is to shift capital at the national and global capital level to wind and solar energy, and force a transition away from traditional energy, whatever the cost. Even from that perspective, however, the prudent thing to do would be to wait and see how IRA subsidies affect the utility sector.

The hundreds of billions of dollars recently doled out for CCS and hydrogen *may* eventually help them develop to a stage at which they can legitimately stand as "adequately demonstrated." That's what the statutory eight-year review cycle is for, after all. But they're not there now, and the necessary ancillary infrastructure certainly isn't. The Proposal's grand scheme of a fifteen-year plan is not authorized under the statute. But even if it were, it wouldn't be a good idea. A rulemaking proposal grounded in bad law, bad economics, and bad policy is no way to address what is said by some to be a crisis.

Pessimists may say there's no chance EPA will ever change course. And perhaps they're right, but hope springs eternal. After all, EPA is an American institution. And, in the too-good-to-check words often attributed to Churchill, you can always count on Americans to do the right thing– after they've tried everything else.

/s/

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