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Dueling Amendments: The Applicability of Section 111(d) of the Clean Air Act to Greenhouse Gases

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INTRODUCTION	1
Part I: Understanding the Conflict in Section 111(d).....	6
A. Statutory Context: The Structure of the Clean Air Act.....	6
B. Section 111(d): An Overview.....	9
C. A Textual Analysis of the Amendments to Section 111(d).....	11
D. Implications of the Conflict: Greenhouses Gases	16
Part II. A History of Section 111(d).....	21
A. Initial Enactment and Purpose	22
B. 1990 Amendments: Creation of a Conflict.....	24
C. Regulatory Application of Section 111(d)	34
Part III. Institutional Considerations in Resolving the Conflict.....	40
A. Theories of Judicial Deference to Agencies as Applied to Dueling Amendments	41
B. Dueling Amendments in the <i>Chevron</i> Context	51
Part IV: Interpretive Resolutions of the Section 111(d) Conflict	55
A. Choosing Neither Section	56
B. Choosing One Amendment	59
C. Harmonization.....	64
Part V. Conclusion.....	74

INTRODUCTION

After a close but ultimately unsuccessful attempt at the beginning of the Obama administration,¹ Congress has refused to proactively act to reduce the greenhouse gas (GHG) emissions in the United

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¹ See Steven Mufson, *In Close Vote, House Passes Climate Bill*, WASH. POST, June 27, 2009, http://articles.washingtonpost.com/2009-06-27/news/36831506_1_300-page-amendment-climate-bill-energy-and-environment-bill; Matthew Daily, *Climate Bill: Senate Democrats Abandon Comprehensive Energy Bill*,

States.² Faced with this frustrating inaction in the face of a serious public policy problem, President Obama, in his first State of the Union address following reelection, announced that his administration will act if Congress does not.³ Rooted in the landmark case of *Massachusetts v. EPA*,⁴ in which the United States Supreme Court determined that greenhouse gases (GHGs) were an “air pollutant” under the Clean Air Act (CAA), the Environmental Protection Agency (EPA) has already taken the first steps in meeting the President’s vision of federal administrative action. Shortly after Congressional failure, the EPA promulgated a quick succession of regulatory initiatives to comply with *Massachusetts v. EPA* and reduce GHG emissions, including determining that GHGs endanger public health and welfare,⁵ setting standards for mobile sources,⁶ and establishing a permitting program for new stationary sources.⁷ Most significant emissions reductions, however, are likely to come from rules setting emissions limits for stationary sources. The Administration has proposed but not yet finalized rules aimed at limiting emissions from *new* stationary sources.⁸ By EPA’s own analysis, however, the market, in the form of the drastic drop in natural gas prices, not new regulation, has already made new coal-fired power plants uncompetitive.⁹ Real regulatory action driving down emissions, therefore, will require reducing GHGs from existing sources. EPA, therefore, plans to take advantage of a rarely utilized provision of the Clean Air Act, section 111(d), to work with states to address emissions from *existing* stationary sources on a category-by-category basis.¹⁰ In fact, while there has been some political debate about whether the Obama Administration

ASSOCIATED PRESS, July 22, 2010, available at http://www.huffingtonpost.com/2010/07/22/climate-bill-senate-democ_n_656175.html.

² See Henry Waxman, Op-Ed., *Missing in action on climate change*, THE HILL, Mar. 11, 2013, <http://thehill.com/opinion/op-ed/287475-missing-in-action-on-climate-change->.

³ Remarks by the President in the State of the Union Address (Feb. 12, 2013), <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address> [hereinafter Obama 2013 SOTU] (“But if Congress won’t act soon to protect future generations, I will. I will direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy.”).

⁴ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁵ Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

⁶ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

⁷ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010).

⁸ Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22392 (April 13, 2012) [hereinafter “EGU GHG Proposal”].

⁹ EPA, EPA FACT SHEET: PROPOSED CARBON POLLUTION STANDARD FOR NEW POWER PLANTS 2, <http://epa.gov/carbonpollutionstandard/pdfs/20120327factsheet.pdf>.

¹⁰ See Jean Chemnick, *EPA to tackle existing power plant carbon rule in fiscal '14 – Perciasepe*, E&E NEWS (Apr. 10, 2013), <http://www.eenews.net/eenewspm/2013/04/10/1>. While this off-the-cuff remark was later clarified in a statement that “EPA currently has no plans to regulate GHG emissions from existing power plants,” it has been assumed by “those who track the issue” that this section will be utilized once the new source rules are finalized. *Id.*

intends to follow through with its plans,¹¹ according to a consensus among academics, environmentalists and industry, EPA is in fact *required* by the text of section 111(d) to issue regulations for a category of existing sources of GHGs once it has issued rules for new sources within that particular category under related provisions (the NSPS program).¹² Moreover, EPA has already agreed to use this provision in settlement agreements, at least for the particular source categories of power plants (often referred to as electric utility generating units or “EGUs”)¹³ and oil refineries.¹⁴

Political preferences of the Administration aside, the language of section 111(d), and therefore the legal obligation *or ability* for the agency to use that provision to regulate existing sources of GHGs, is not as clear as is often assumed. Specifically, commentators regularly refer to the scope of section 111(d) to be limited to those pollutants *not* already regulated in the CAA provisions for traditional air pollutants such as smog and localized toxic air pollutants such as mercury.¹⁵ GHGs are not regulated under either provision. However, a careful reading of the text of section 111(d) printed in the U.S. Code suggests that the agency may be precluded from using it to regulate many source categories, including EGUs. Despite the generally accepted framing, the language actually precludes the use of section 111(d) for pollutants “emitted from a source category which is regulated” by the air toxics provisions. Based on this language, the relevant question, then, is not whether the air toxics program regulates *GHGs*, but whether it regulates *sources* which also emit GHGs.

¹¹ See Jonathan Chait, *Obama Might Actually be the Environmental President*, N.Y. MAG. (May 5, 2013), <http://nymag.com/news/features/obama-climate-change-2013-5/>.

¹² See Jean Chemnick, *EPA’s ‘no plans’ stance on existing power plants doesn’t jibe with text of GHG rule*, E&E NEWS (Apr. 17, 2012), <http://eenews.net/Greenwire/2012/04/17/4>; GREGORY E. WANNIER, ET AL., INST. FOR POLICY INTEGRITY, DISCUSSION PAPER NO. 2011/2, PREVAILING ACADEMIC VIEW ON COMPLIANCE FLEXIBILITY UNDER § 111 OF THE CLEAN AIR ACT, (2011), http://policyintegrity.org/files/publications/Prevailing_Academic_View_on_Compliance_Flexibility_under_Section_111.pdf [hereinafter PREVAILING ACADEMIC VIEW].

¹³ See EPA, SETTLEMENT AGREEMENT OF DEC. 23, 2010 RE: FOSSIL FUEL-FIRED POWER PLANTS, <http://epa.gov/carbonpollutionstandard/pdfs/boilerghgsettlement.pdf> (“EPA will... propose[a] rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs.”).

¹⁴ See EPA, SETTLEMENT AGREEMENT OF DEC. 23, 2010 RE: PETROLEUM REFINERIES, <http://epa.gov/carbonpollutionstandard/pdfs/refineryghgsettlement.pdf> (“EPA agrees that it will... propose[a] rule that includes... emissions guidelines for GHGs pursuant to [section 111](d)... from existing affected facilities at refineries....”).

¹⁵ Jonas Monast et al., *Regulating Greenhouse Gas Emissions from Existing Sources*, 42 ENVTL. L. REP. 10206, 10207 (2012) (“performance standards are required for existing sources if... (2) the regulated pollutant is neither a HAP nor a criteria pollutant...”); GEORGETOWN CLIMATE CTR., EPA’S FORTHCOMING PERFORMANCE STANDARDS FOR REGULATING GREENHOUSE GAS POLLUTION FROM POWER PLANTS 3 (2011) (“GHGs are not currently regulated either as criteria pollutants or under the hazardous air pollution program...”); Chemnick, *supra* note 12 (“If emissions from existing sources are not controlled via other CAA regulation (and so far for GHG emissions, they are not), § 111(d) of the CAA authorizes EPA to regulate them with performance standards”); Franz T. Litz, et al., *What’s Ahead for Power Plants and Industry? Using the Clean Air Act to Reduce Greenhouse Gas Emissions, Building on Existing Regional Programs* 6 (World Res. Inst. & Columbia Law School Ctr. for Climate Change Law, Working Paper 2011) (“Section 111(d)... applies only to pollutants, like greenhouse gases, that are neither criteria pollutants nor hazardous air pollutants”).

In early 2012 the Obama Administration, for the first time, issued regulations for EGUs under the air toxics program,¹⁶ seeming to clearly preclude that category from existing source regulation under section 111(d). Moreover, while EGUs are the most recent GHG emitting category to be regulated under the air toxics program, they are hardly the only one. Many other source categories, including oil refineries, regulated under the air toxics provisions and as new sources under the NSPS program also emit GHGs. Therefore, to the extent EPA wants to use the CAA to regulate existing sources of GHGs, section 111(d) as printed in Title 42 of the U.S. Code seems to be a problem.

However, all is not as it seems. Despite the text printed in the U.S. Code, the true text of section 111(d) is in doubt. This is because of a small but potentially significant legislating error which occurred during the creation of the 1990 Clean Air Act Amendments.¹⁷ The unmodified text of the 1990 Clean Air Act Amendments contain two revisions to the exact same provision of section 111(d). One revises the CAA to, as printed in the U.S. Code, bar the use of section 111(d) for *categories* regulated in the air toxics program.¹⁸ The other, in line with the conventional interpretation of section 111(d) but uneffectuated by Law Revision Counsel, the congressional body which constructs the U.S. Code out of the Statutes at Large,¹⁹ revises the CAA to only bar the use of section 111(d) for the *air pollutants* regulated by the air toxics program.²⁰ As required by the Constitution, both amendments were passed by both Houses of Congress and signed by the President.²¹ On their face, these two amendments conflict with each other as they amend the same original language of 111(d) in different ways. EPA's authority to regulate greenhouse gases under Section 111(d) will likely depend on which of the two versions of the amendment is used.

Section 111(d) has only been used a handful of times since it was enacted in 1970, most of which are based on an explicit carve out from the bar related to the air toxics provision discussed above. In fact, besides a 2005 rulemaking to establish section 111(d) standards for the toxic air pollutant mercury for

¹⁶ National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9,304 (Feb. 16, 2012) [hereinafter EGU NESHAPs].

¹⁷ Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) [hereinafter 1990 CAA].

¹⁸ 1990 CAA § 108(g), 104 Stat. at 2465.

¹⁹ See 42 U.S.C. at page 6243 (2011) (“AMENDMENTS 1990—...Subsec. (d)(1)(A)(i). Pub. L. 101-549, §302(a), which directed the substitution of ‘7412(b)’ for ‘7412(b)(1)(A)’, could not be executed, because of the prior amendment by Pub. L. 101-549, §108(g), see below. Pub. L. 101-549, §108(g), substituted ‘or emitted from a source category which is regulated under section 7412 of this title’ for ‘or 7412(b)(1)(A)’.”).

²⁰ 1990 CAA § 302(a), 104 Stat. at 2574.

²¹ U.S. CONST. art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it...”).

EGUs,²² EPA has not explicitly revised its regulations on this section since the 1990 Clean Air Act Amendments passed. And that 2005 regulation, including the interpretation of section 111(d), was struck down in the D.C. Circuit on other grounds.²³ In order to fulfill President Obama’s commitment to “come up with executive actions we can take, now and in the future, to reduce [climate change] pollution,”²⁴ EPA will be forced to confront this issue of dueling amendments and resolve it in such a way that regulation under section 111(d) is possible.

Given the significance of this issue, it is surprising that only three brief mentions of the interpretive difficulty of the “emitted from a *source category* which is regulated” language as applied to GHGs has been found.²⁵ This paper aims to fill that gap by evaluating whether the conflicting amendments to section 111(d) will prove to be a problem or an opportunity for EPA in fulfilling the President’s commitment.

After providing some statutory context, Part I details and analyzes the dueling provisions of the 1990 Clean Air Act which seek to amend section 111(d) and considers how this will impact climate regulation. Part II lays out the legislative and regulatory history of section 111(d), virtually undiscussed in the existing literature, to develop a sense for what each amendment was attempting to accomplish, outline how the conflict arose, and detail EPA’s regulatory actions in light of the conflict. On the presumption that the first actor to address this issue will be EPA when it issues upcoming regulations, Part III considers to what extent courts will be deferential to whatever interpretation an agency develops in resolving dueling amendments in general, and this conflict in particular. Part IV presents and analyzes three possible types of interpretive resolutions to this conflict in light of existing theory regarding statutory interpretation. Finally, Part V concludes that, despite the conflict outlined above, almost all of the reasonable resolutions to the conflict leaves EPA with an “out” to address existing sources of GHGs. While some interpretations could ultimately foreclose critical existing source regulation under section 111(d), the most reasonable resolutions will not. In that way, this paper serves as an argument that despite the limiting language published in the U.S. Code, section 111(d) should remain a critical weapon in EPA’s arsenal to combat climate change.

²² See Revision of December 2000 Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the Section 112(c) List, 70 Fed. Reg. 15994, 16029-32 [hereinafter Delisting Rule] (interpreting section 111(d) in light of the conflicting amendments in the 1990 CAA); Standards of Performance for New and Existing Stationary Sources; Electric Utility Steam Generating Units, 70 Fed. Reg. 28606, 28649 (May 18, 2005) [hereinafter CAMR] (codifying that interpretation into regulation at 40 C.F.R. § 60.21(a) (2005), *repealed by* EGU NESHAPs, 77 Fed. Reg. at 9447).

²³ *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

²⁴ See Obama 2012 SOTU, *supra* note 3.

²⁵ See Dawn Reeves, *Bush Counsel Says EPA Lacks Power to Set GHG NSPS at Existing Plants*, INSIDEEPA.COM (Dec. 18, 2012); Monica Trauzzi, *Former EPA general counsel Martella discusses legal impacts of new power plant rule delay*, E&E NEWS (March 20, 2013), <http://eenews.net/eenewspm/2013/03/20/13>; John S. Gray, *Examining Federal Climate Change Regulations in the Second Decade of the Millennium*, 2013 WL 1750689 (ASPATORE).

PART I: UNDERSTANDING THE CONFLICT IN SECTION 111(D)

A. Statutory Context: The Structure of the Clean Air Act

In order to understand section 111(d) and the limits placed on its use by the Clean Air Act, it is important to first briefly recount how it fits into the overall scheme of air pollution regulation. The Clean Air Amendments, enacted in 1970, were a major overhaul of the nation's clean air laws.²⁶ Many aspects of the nation's clean air laws have changed since 1970, with the addition of new provisions and policy instruments,²⁷ however, the basic structure, at least as relevant to understanding section 111(d), remains the same as it did in 1970. While immensely complicated, the law can be conceived of as a collection of Titles to address different aspects of the nation's air pollution problems. First, the law implemented separate programs for mobile sources and for stationary sources.²⁸ Within the category of stationary sources, regulation is divided into three programs²⁹: the first which controls air pollutants that are widely present in the ambient air and cause negative impacts to public health and welfare ("criteria pollutants"), the second which controls toxic air pollutants which, even in small concentrations have a negative impact on human health and the environment ("hazardous air pollutants"), and the third which covers remaining pollutants and implements national standards potentially applicable to all pollutants.

Criteria Pollutant Program (Sections 108, 109 & 110)

The primary provisions to control stationary sources in the 1970 law were focused on measures to address pollutants released and found in the ambient air (criteria pollutants) which cause negative impacts on public health and welfare depending on their concentration in the local atmosphere.³⁰ The ambient standards program, like much of federal environmental law,³¹ relies on a system of cooperative federalism.³² Under Section 109 of the Clean Air Act, EPA sets general concentration goals for the various pollutants – National Ambient Air Quality Standards (NAAQS).³³ It then, under Section 110, relies on each state to develop a State Implementation Plan (SIP) which moves the state towards

²⁶ See Arnold W. Reitze, Jr., *The Legislative History of U.S. Air Pollution Control*, 36 HOUS. L. REV. 679, 702-5 (1999).

²⁷ See, e.g., Clean Air Act Amendments of 1977, P.L. 95-95, § 127, 91 Stat. 685, 731 (establishing the Prevention of Significant Deterioration Program in Title I Part C of the Clean Air Act); 1990 CAA § 401, 104 Stat. at 2584-2631 (establishing the Acid Rain program in Title IV of the Clean Air Act).

²⁸ Reitze, 36 HOUS. L. REV. at 703-04.

²⁹ See S. REP. NO. 91-1196, at 18-19 (1970).

³⁰ See Clean Air Act [hereinafter CAA] § 108(a), 42 U.S.C. § 7408(a) (outlining the conditions under which a pollutant may be listed as a criteria air pollutant).

³¹ See Robert Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995).

³² *Id.* at 1161.

³³ CAA § 109, 42 U.S.C. § 7409.

compliance with the NAAQS level, with the policy instrument and methods of compliance tailored to the priorities and needs of each particular state.³⁴

Hazardous Air Pollutants (Section 112)

Because of a history of under-enforcement, the hazardous air pollutant program (also called the “air toxics program”) has undergone more change over the history of the Clean Air Act. The 1970 law laid out a basic foundation of control of hazardous air pollutants (“HAPs”) - pollutants that were not criteria pollutants but which “cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.”³⁵ Under the original HAP system, Section 112(b)(1)(A) directed EPA to list the pollutants that it found met this definition,³⁶ and within 180 days to issue emissions standards – National Emissions Standards for Hazardous Air Pollutants (NESHAPs)³⁷ – for sources of those pollutants at a level that would, with an adequate margin of safety, protect public health and welfare.³⁸

While the 1970 law directed EPA to list HAPs and establish NESHAPs, the agency failed to take sufficient action over the course of the next 20 years.³⁹ In response, in the 1990 Amendments to the Clean Air Act, Congress significantly amended, and in the process reorganized, Section 112.⁴⁰ In the process of amending the HAP program, Congress made three significant substantive changes to Section 112. First, because EPA had failed to act on its own to list pollutants, the 1990 Amendments established in Section 112(b) a new listing procedure. In Section 112(b)(1) Congress established an initial list of 183 pollutants designated as HAPs.⁴¹ Congress retained some discretion for EPA to add additional pollutants to the list in Section 112(b)(2),⁴² required the agency to respond to listing petitions in Section 112(b)(3),⁴³ and

³⁴ CAA § 110, 42 U.S.C. § 7410.

³⁵ Clean Air Act Amendments of 1970, P.L. 91-604, § 112(a), 84 Stat. 1676, 1685 (1970) [hereinafter 1970 CAA] (establishing Section 112(a) of the Clean Air Act).

³⁶ 1970 CAA, § 112(b)(1)(A).

³⁷ Emissions standards promulgated under Section 112 after the 1990 Amendments to the Clean Air Act revising the entire toxic air pollution program are also called Maximum Achievable Control Technology (MACT) standards. *See* EPA, NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS COMPLIANCE MONITORING, at <http://www.epa.gov/compliance/monitoring/programs/caa/neshaps.html> (“these post-1990 NESHAPs are also referred to as MACT standards”). For the sake of simplicity, I refer here to both pre-1990 and post-1990 Section 112 standards as NESHAPs.

³⁸ CAA § 112(b)(1)(B).

³⁹ *See* ENVTL. & NATURAL RES. DIV., LIBRARY OF CONG., 103D CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 2456 [hereinafter 1990 Leg. Hist.] (in Clean Air Facts, a primer on the House bill introduced by Rep. Waxman for consideration by members on the floor of the House).

⁴⁰ *Compare* 42 U.S.C. § 7412 (1989) *with* 42 U.S.C. § 7412 (1991).

⁴¹ 1990 CAA § 112(b)(1), 104 Stat. at 2532-35.

⁴² 1990 CAA § 112(b)(2), 104 Stat. 2535-36. This section introduced a broader definition of what might be considered a HAP. *See Id.* (“pollutants which present... a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse

broadened the definition of HAPs to include pollutants which are “a threat of adverse human health effects... or adverse environmental effects.”⁴⁴ The second major change was to require EPA to regulate on a *source category* basis rather than an individual source basis.⁴⁵ EPA is required to *list* categories and subcategories of sources that are “major sources” (sources that emit more than 10 tons per year of one HAP or 25 tons per year of a combination of HAPs⁴⁶) and “area sources” (sources which emit HAPs but are not major sources⁴⁷).⁴⁸ EPA is directed to, to the extent practicable, harmonize the category lists of Section 112 with the category lists of Section 111.⁴⁹ EPA is then required to set emissions standards⁵⁰ for each listed category based on a specified schedule, which included setting standards for 40 categories within 2 years, and setting standards for *all* listed categories within 10 years.⁵¹ Finally, the 1990 Amendments made the emissions standards that EPA was to promulgate for source categories emitting listed pollutants more stringent. Rather than standards which provides an adequate margin of safety, at the discretion of EPA,⁵² the revised section requires a level based on the maximum degree of reductions in emissions, determined by a specific numeric calculation.⁵³ Importantly, NESHAPs apply both to new and existing sources of HAPs within a category.⁵⁴ Like many of the provisions of the Clean Air Act, states can implement and enforce the provisions of this section, however the standards themselves are set by EPA.⁵⁵

New Source Performance Standards (Section 111)

Finally, EPA has primary responsibility for the New Source Performance Standards program. Under these provisions, embodied in Section 111(b) of the Clean Air Act, EPA sets standards of performance for categories of sources that it determines “causes, or contributes significantly to air pollution which may

environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise...”). Pollutants already included on the list of criteria air pollutants in section 108(a) are explicitly excluded from listing under section 112(b). *Id.*

⁴³ 1990 CAA § 112(b)(3), 104 Stat. at 2536.

⁴⁴ CAA § 112(b)(2).

⁴⁵ See CAA § 112(c)

⁴⁶ CAA § 112(a)(1).

⁴⁷ CAA § 112(a)(2).

⁴⁸ CAA § 112(c)

⁴⁹ CAA § 112(c)(1).

⁵⁰ CAA § 112(d)

⁵¹ CAA § 112(e).

⁵² 1970 CAA § 112(B(1)(b), 84 Stat. at 1685.

⁵³ CAA § 112(d)(2). In determining this level, though, the agency is permitted to take cost, energy impacts, and other non-air quality health and environmental impacts into account. *Id.*

⁵⁴ CAA § 112(d)(2) (“Emissions standards promulgated under this subsection and *applicable to new or existing sources* of hazardous air pollutants shall require...”). However, EPA may find that the “maximum degree of reductions” is less stringent than for new sources as long as it is as stringent as the limitation achieved by the best 12 percent of existing sources. CAA § 112(d)(3).

⁵⁵ CAA § 112(l).

reasonably be anticipated to *endanger public health or welfare*.⁵⁶ Historically, these standards have primarily focused on the criteria air pollutants regulated in the NAAQS/SIP program, however section 111(b) is not statutorily limited to those pollutants.⁵⁷ The NSPS program under Section 111(b), however, is limited to *new* stationary sources.⁵⁸ EPA sets an emissions standard, the level of which is determined by the best system of emissions reduction that has been adequately demonstrated when taking costs, non-air health and environmental impacts, and energy requirements into account.⁵⁹ This level is based on the “best system of emission reduction...adequately demonstrated (“BSER”).⁶⁰ This program is less of a cooperative federalism program than the NAAQS/SIP program, with emissions standards set and revised for all nationwide sources within particular categories by EPA every eight years.⁶¹ The provisions were designed to be technology forcing, thereby creating new methods for states to meet the ambient standards embodied in Sections 108 and 110 and to become more stringent over time.⁶²

B. Section 111(d): An Overview

Section 111... (d) Standards of performance for existing sources... (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 of this title under which each State shall submit to the 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 108(a) or [section 112(b); emitted from a source category which is regulated under section 112] 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.⁶³

⁵⁶ CAA § 111(b)(1)(A) (emphasis added).

⁵⁷ CAA § 111(b). NSPS standards are to be set by EPA whenever it finds that the pollutants emitted from a source category significantly contribute to the endangerment of public health or welfare. Clean Air Act § 111(b)(1)(A).

⁵⁸ Clean Air Act § 111(b)(1)(B) (“The Administrator shall publish proposed regulations... for *new* sources within such category) (emphasis added). *New sources* is a term of art in the Clean Air Act meaning sources where construction commenced after the date of enactment *and* sources modified after that date. Clean Air Act § 111(a)(2). The extent of modification necessary for a source to fall under the new source provisions of the NSPS program have been the subject of significant litigation and regulatory changes. *See generally* Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 N.W. U. L. REV. 1677 (2007).

⁵⁹ CAA § 111(a)(1)

⁶⁰ See EPA, BACKGROUND ON ESTABLISHING NEW SOURCE PERFORMANCE STANDARDS (NSPS) UNDER THE CLEAN AIR ACT 1 [hereinafter NSPS Background], <http://epa.gov/carbonpollutionstandard/pdfs/111background.pdf>.

⁶¹ CAA § 111(b)(1)(B).

⁶² *See* S. Rep. No. 91-1196, at 17 (1970) (“Standards of performance should provide an incentive for industries to work toward constant improvement in techniques for preventing and controlling emissions from stationary sources, since more effective emission control will provide greater latitude in the selection of sites for new facilities.”)

⁶³ CAA § 111(d), 42 U.S.C. § 7411(d), *as modified* by 1990 CAA §§ 108(g), 302(a), 104 Stat.2465, 2574.

Section 111(d) is designed to fill the gaps between the programs described above. When EPA has set performance standards for new sources of an air pollutant under the NSPS program, and when standards do not also apply under the ambient air pollution or hazardous air pollution programs, the agency is required to address existing sources of that air pollutant under section 111(d).⁶⁴

Section 111(d) is a sort of compromise authority between state regulation of existing sources from the NAAQS/SIP program (sections 108, 109 & 110) and national regulation of existing sources from the HAP program (section 112).⁶⁵ EPA is directed to “establish a procedure similar to that provided by section 110,”⁶⁶ in which states take primary responsibility for regulation. Like in section 112, however, State regulation is subject to rather specific direction and approval by EPA, in what the agency has regularly deemed “emission guidelines.”⁶⁷ Moreover, unlike the SIP program, standards only apply to EPA-determined categories of sources rather than to any source within the state.

After EPA has established standards of performance for new sources under Section 111(b), and under specific conditions consistent with section 111(d), EPA then creates (binding) “emission guidelines,” directing states on how to establish standards of performance for that particular category/pollutant combination.

Falling within the section 111(a) definition of “standard of performance,” state standards are required to meet an EPA determined BSER level,⁶⁸ however this level can account for the fact that the best adequately demonstrated technology may be less stringent for existing sources than for new sources.⁶⁹ EPA then must approve state plans that meet its guidelines⁷⁰ and set federal standards for those states that

⁶⁴ Because of the complexity created by the errors in the 1990 amendments, this description is not necessarily quite accurate. It is, however, how the program is generally described in the academic literature. *See* Wannier, PREVAILING ACADEMIC VIEW. It is also how EPA describes the requirements in background documents. *See, e.g.,* EPA, NSPS BACKGROUND at 2.

⁶⁵ *See* State Plans for the control of Certain Pollutants From Existing Facilities, 40 Fed. Reg. 53340, 53343 [hereinafter Emission Guidelines Regulations] (“EPA believes section 111(d) is a hybrid provision, intended to combine primary state responsibility for plan development and enforcement... with the technology-based approach.”).

⁶⁶ CAA § 111(d)(1).

⁶⁷ *See* 40 C.F.R. § 60.22; *see also* Emission Guidelines Regulations, 40 Fed. Reg. at 53340 (“the Administrator will publish... emission guidelines,” “containing information pertinent to control of the [designated] pollutant from designated (i.e., existing) facilities.”)

⁶⁸ *See* 40 C.F.R. § 60.21(e).

⁶⁹ *See* Emission Guidelines Regulations, 40 Fed. Reg. at 53340 (“EPA’s emission guidelines will take into account the costs of retrofitting existing facilities and thus will probably be less stringent than corresponding standards of performance for new sources.”).

⁷⁰ 40 C.F.R. § 60.27(b).

do not establish compliant programs.⁷¹ As such, guidelines have typically included model performance standards that states can use as a safe harbor when developing their own plans.⁷²

Instead of merely specifying the provision as a gap filling provision, Congress established, in some detail, the specific conditions under which section 111(d) would apply. Parsing the text of section 111(d) presented at the start of Part I.B, *supra*, the Clean Air Act created a duty to regulate a pollutant from a source if, and only if, six conditions apply:

- (1) The source is an existing source;
- (2) The pollutant is an “air pollutant”;
- (3) No “air quality criteria” have been issued for the pollutant;
- (4) The air pollutant is not a pollutant listed under section 108(a);
- (5) (a) The air pollutant is not emitted from a source category regulated under section 112; (b) the air pollutant is not listed under section 112(b);⁷³ and,
- (6) A new source performance standard under Section 111(b) would apply if the source were a new source.

“For ease of use,”⁷⁴ EPA has deemed pollutants regulated by section 111(d) (that is, those that meet conditions (2), (3), (4), and potentially (5)(b), and have been regulated under (6)), “designated pollutants.”⁷⁵ It has also deemed existing sources which emit designated pollutants and which would be subject to section 111(b) standards of performance if they were new facilities to be “designated facilities.”⁷⁶ Consistent with the direction in the first part of section 111(d), EPA has issued general regulations, at 40 C.F.R. § 60.21, restating these conditions and “establish[ing] a procedure similar to that provided by section 110... under which each State shall submit to the Administrator a plan...”⁷⁷ These regulations establish general provisions which guide EPA in establishing specific emission guidelines for particular designated pollutant/designated facilities combinations.

C. A Textual Analysis of the Amendments to Section 111(d)

As outlined briefly in the Introduction, *supra*, the 1990 Amendments to the Clean Air Act included two provisions striking the same words from section 111(d) of the Clean Air Act, and replacing them with different provisions.

⁷¹ See CAA § 111(d)(2); 40 C.F.R. § 60.27(d).

⁷² See EPA, NSPS Background, at 2.

⁷³ Note here that whether (5)(a), (5)(b) or some combination of the two apply depends heavily on the correct interpretation of the dueling amendments to this section. As such, I list both requirements, separated by a semicolon to denote both possibilities.

⁷⁴ See Emission Guidelines Regulations, 40 Fed. Reg. at 53340.

⁷⁵ 40 C.F.R. § 60.21(a)

⁷⁶ 40 C.F.R. § 60.21(b).

⁷⁷ See 40 C.F.R. pt. 60 subpt. B.

This part examines each of the sections of the 1990 Clean Air Act meant to amend section 111(d) and demonstrates their incompatibility by attempting to reconcile them on a purely textual basis.

The relevant pre-1990 text of section 111(d) reads: (1) The Administrator shall prescribe regulations... for any existing source for any air pollutant (i)... which is not included on a list published under section 108(a) or section 112(b)(1)(A)...”⁷⁸

Section 108(g) of the 1990 Amendments

Located in Title I of the 1990 Clean Air Act, Section 108(g) provides, “Section 111(d)(1)(A)(i) of the Clean Air Act (42 U.S.C. 7411(d)(1)(A)(i)) is amended by striking ‘or 112(b)(1)(A)’ and inserting ‘or emitted from a source category which is regulated under section 112’.”⁷⁹

As amended, section 111(d) would read:

Section 111(d) “(1) The Administrator shall prescribe regulations...for any existing source for any air pollutant (i)... which is not included on a list published under section [1]08(a) ~~or [1]12(b)(1)(A)~~ **or emitted from a source category which is regulated under section 112**....”⁸⁰

Because this provision is not clearly constructed, it could be read to bar certain source categories from section 111(d) emission guidelines in one of two ways.

(1) Source Category Focused Limitation. First, “emitted from a source category” could refer to the particular source category to be regulated under section 111(d). EPA would be barred from issuing emission guidelines for existing sources already regulated by section 112, even if that section 112 regulation applied only to different pollutants than those the agency was seeking to regulate under section 111(d). A more clear version of this interpretation could have been written “The Administrator shall prescribe regulations... for any existing source [category not regulated under section 112] for any air pollutant...not included on a list published under section 108(a).”

(2) Air Pollutant Focused Limitation. Rather than reading “any air pollutant...emitted from a source category” to be a limit on regulating existing sources of air pollutants emitted from *a particular* source category regulated under section 112, section 108(g) could be read to be a limit on using section 111(d) to regulate existing sources of air pollutants emitted from *any* source category regulated under section 112.

The difference between these two readings is best illustrated with an example. Under the first interpretation, EPA would not be barred from regulating carbon dioxide (CO₂) emissions from existing

⁷⁸ See 42 U.S.C. § 7411(d) (1988).

⁷⁹ 1990 CAA § 108(g), 104 Stat. at 2465.

⁸⁰ See H. REP. NO. 101-490, at 444 (1990), 1990 LEG. HIST. at 3468 (showing changes relative to current law for section 111(d)).

ammonia production plants, because ammonia production plants are not “a source category which is regulated under section 112.” It would, however, be barred from regulating CO₂ from existing Portland cement facilities because Portland cement facilities are “a source category which is regulated under section 112.”⁸¹ However, under interpretation (2), EPA would also be barred from regulating CO₂ from existing ammonia production plants because CO₂ is emitted from many source categories regulated under section 112, even if ammonia production plants is not one of those categories.

EPA has argued that the first, category specific interpretation is more appropriate. In its only rulemaking explicitly interpreting this section since the 1990 Amendments, an interpretation later vacated on other grounds by the D.C. Circuit,⁸² EPA pointed out that the section 108(g) amendment refers to “a source category.” While “a” can mean “any” when followed by a limiting clause such as “regulated under section 112,” EPA determined the more appropriate definition of “a” was as referring to a particular source category.⁸³ The agency’s main substantive argument relied on comparing Congress’s use of “a” in this context with its explicit use of “any” in two other clauses in the section. Section 111(d) applies to “any existing source” and for “any air pollutant” so long as the conditions for regulation are met.⁸⁴ The agency claimed that the appropriate definition of “a” is best understood as being distinct from “any” as Congress clearly knew how to say “any” when it meant all source categories fitting a particular definition. At the very least, EPA argued, the appropriate definition of “a” as “a particular” versus “any” in this context was unclear, and therefore the agency should get deference under the familiar *Chevron* framework as to this point.⁸⁵ These arguments are relatively persuasive and this is an example where *Chevron* deference is likely to apply. For the remainder of this paper, therefore, I assume Section 108(g) would be read as a limit on the regulation of existing sources of air pollutants when *that particular* source category is regulated under Section 112. For most of the major stationary sources of GHGs, this distinction is not relevant, as they are also subject to Section 112 regulation. This interpretive distinction could manifest, however, as EPA works its way down the list of categories of sources which are GHG emitters but are not themselves regulated under section 112. This issue, therefore, should be explicitly considered as the agency revises the general regulations for section 111(d) in 40 C.F.R. § 60.21.

While this amendment is printed in the U.S. Code, that is not sufficient evidence that it should be controlling. Title I, Chapter 1 of the U.S. Code, establishing, *by law*, “rules of construction” states that the

⁸¹ 40 C.F.R. pt. 63 subpt. LLL

⁸² *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

⁸³ See Brief of Respondent at 114, *New Jersey*, 517 F.3d 574 (No. 05-1097).

⁸⁴ See Delisting Rule, 70 Fed. Reg. at 16031.

⁸⁵ Brief of Respondent at 114-15, *New Jersey*, 517 F.3d 574 (No. 05-1097).

U.S. Code “establish[es] prima facie the laws of the United States.”⁸⁶ This is contrasted with the description of the Statutes at Large as “legal evidence of laws.”⁸⁷ The Supreme Court has interpreted these two provisions to mean that, when there is a conflict between the Statutes at Large and the U.S. Code, the Statutes at Large shall prevail.⁸⁸ The U.S. Code is considered dispositive only for those provisions enacted into positive law.⁸⁹ Title 42, which contains federal environmental law, has not been enacted into positive law,⁹⁰ and so is not controlling. Therefore the text of section 111(d) as printed in the U.S. Code, containing only language as amended by section 108(g) of the 1990 Amendments is not dispositive. Other relevant provisions in the Statutes at Large must also be considered.

Section 302(a) of the 1990 Amendments

The amendment in section 302(a) of the 1990 Amendments is much more straightforward. Section 302(a) reads: “Section 111(d)(1) of the Clean Air Act is amended by striking ‘112(b)(1)(A)’ and inserting in lieu thereof ‘112(b)’.”⁹¹ Therefore, as amended, section 111(d) would read:

Section 111(d) “(1) The Administrator shall prescribe regulations...for any existing source for any air pollutant (i)... which is not included on a list published under section [1]08(a) or ~~[1]12(b)(1)(A)~~ **112(b)**....”⁹²

Because the listing of hazardous air pollutants under section 112 was merely moved from subsection (b)(1)(A) to subsection (b) in the 1990 Amendments, this amendment continues the status quo ante bar on the use of Section 111(d) for listed hazardous air pollutants.

The Conflict

Both provisions strike predominately the same language and insert different language in its stead. While somewhat pedantic, the easiest way to see that this is not an easily reconcilable conflict is to attempt to effectuate both provisions.

⁸⁶ 1 U.S.C. § 204(a).

⁸⁷ 1 U.S.C. § 112.

⁸⁸ U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 (1993). This has been the consistent position of the Supreme Court. *See, e.g.*, United States v. Welden, 377 U.S. 95, 98 n. 4 (1964) (“This Court, in construing that statute has said that ‘the very meaning of ‘prima facie’ is that the Code cannot prevail over the Statutes at Large when the two are inconsistent”); *Stephan v. United States*, 319 U.S. 423, 426, (1943) (same).

⁸⁹ *See* 1 U.S.C. § 204(a) (“Whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained”); *U.S. Nat. Bank of Oregon*, 508 U.S. at 448 n. 3 (interpreting that section to give its plain meaning).

⁹⁰ *See* OFFICE OF THE LAW REVISION COUNSEL, *About the Office and the United States Code*, <http://uscode.house.gov/about/info.shtml> (last visited May 23, 2013) (“The following titles of the Code have been enacted into positive law: 1, 3, 4, 5, 9, 10, 11, 13, 14, 17, 18, 23, 28, 31, 32, 35, 36, 37, 38, 39, 40, 41, 44, 46, 49 and 51.”).

⁹¹ 1990 CAA § 302(a), 104 Stat. at 2574

⁹² S. Rep. No. 101-228, at 510 (1989), 1990 Leg. Hist. at 8850 (showing changes relative to current law for section 111(d)).

Taking section 108(g) first, section 111(d) would read, as described above, “(1) The Administrator shall prescribe regulations...for any existing source for any air pollutant (i)... which is not included on a list published under section [1]08(a) ~~or [1]12(b)(1)(A)~~ **or emitted from a source category which is regulated under section 112**...” Trying to then codify section 302(a)’s direction to “strick[e] “112(b)(1)(A)” and insert[] in lieu thereof “112(b)” is impossible. The words 112(b)(1)(A) do not exist. Assuming one could strike words already stricken (akin to ignoring the impossible part of the direction), and inserting the language anyway (which is not an obviously acceptable means of codification), would yield an unintelligible sentence: “(1) The Administrator shall prescribe regulations...for any existing source for any air pollutant (i)... which is not included on a list published under section [1]08(a) ~~or [1]12(b)(1)(A)~~ **112(b)**⁹³ **or emitted from a source category which is regulated under section 112**...”

Alternatively, one could start with section 302(a). Section 111(d) would read, as described above, “(1) The Administrator shall prescribe regulations...for any existing source for any air pollutant (i)... which is not included on a list published under section [1]08(a) or ~~[1]12(b)(1)(A)~~ **112(b)**...” Trying to then codify section 108’s direction to “strick[e] ‘or 112(b)(1)(A)’ and insert[] ‘or emitted from a source category which is regulated under section 112’” is equally impossible, as 112(b)(1)(A) is not part of the provision as amended. Not able to effectuate all of the directions in the amendment, but trying to effectuate as much of the amendment as possible, one is left with two choices. The first option is to follow the direction to strike the “or,” even if the rest of the direction to strike is impossible (again akin to double-striking the 112(b)(1)(A)). This would yield the same nonsense as starting with section 108(g): “(1) The Administrator shall prescribe regulations...for any existing source for any air pollutant (i)... which is not included on a list published under section [1]08(a) ~~or 112(b)(1)(A)~~ **or emitted from a source category which is regulated under section 112 112(b)**...” The other option would be to totally ignore section 108’s direction to strike, but still follow the direction to insert, leaving section 111(d) to read “(1) The Administrator shall prescribe regulations...for any existing source for any air pollutant (i)... which is not included on a list published under section [1]08(a) or ~~[1]12(b)(1)(A)~~ **112(b) or emitted from a source category which is regulated under section 112**⁹⁴...” This interpretation makes grammatical sense and so may actually be the best purely textual reading of Section 111(d) after amendment by sections 108(g) and 302(a). However, in order to get to this reading, one has to decide to follow section 108(g)’s direction to strike, but, for some reason, ignore section 302(a)’s direction to strike.

⁹³ It’s actually not obvious where one would place this provision. The most likely options would be before the inserted “or,” as here, or after the inserted section 112. In either case, the sentence becomes meaningless.

⁹⁴ Again, it is not clear whether one would put this provision before or after the section 302(a) amendment. In this case, however, it would matter as to whether the provision made grammatical sense.

This exercise demonstrates the incompatibility of the two provisions. Following only the direction to strike as far as one can, and inserting language regardless can allow the inclusion of both provisions into the law, but only at the expense of nonsensical law. Following both amendments fully yields operative language in section 111(d) but only by valuing whichever amendment is made first. The fact that the order of amendment matters as to which provision would ultimately govern is a stark demonstration that the amendments directly conflict and are, in that way, textually irreconcilable.

D. Implications of the Conflict: Greenhouses Gases

With the exception of the condition related to HAPs, discussed *infra*, GHG emissions by existing EGUs, the first source category of GHGs EPA is likely to address, seems to fit all of the requirements of section 111(d). As outlined above, those conditions are:

- (1) The source is an existing source;
- (2) The pollutant is an “air pollutant”;
- (3) No “air quality criteria” have been issued for the pollutant;
- (4) The air pollutant is not a pollutant listed under section 108(a);
- (5) (a) The air pollutant is not emitted from a source category regulated under section 112; (b) the air pollutant is not listed under section 112(b); and,
- (6) A new source performance standard under Section 111(b) would apply if the source were a new source.

Greenhouse gases from existing EGUs unquestionably fit conditions (1)-(4), and are very likely to shortly fit condition (6). Condition (1) is by definition satisfied for regulations of existing sources. Greenhouse gases have already been deemed air pollutants under the Clean Air Act by the Supreme Court⁹⁵ and by EPA,⁹⁶ and so easily meet condition (2).⁹⁷ Conditions (3) and (4) are in effect the same and refer to the, at this time, six criteria air pollutants for which EPA has set National Ambient Air Quality standards.⁹⁸ Despite arguments from some that NAAQS would be a good or a legally required regulatory tool for

⁹⁵ See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁹⁶ See *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66496, 66536 (Dec. 15, 2009) (defining air pollutant to be the *flow* of the six well-mixed greenhouse gases).

⁹⁷ The Supreme Court has determined that the same words in different sections of the Clean Air, even if they rely on the same statutory definition, can be interpreted to mean different things. See *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007). It is theoretically possible that EPA, then, could define the six well mixed GHGs to be an air pollutant for the sake of mobile source standards and PSD but not for the sake of NSPS. However, the agency would likely need some compelling reason to do this in order not to be struck down as being arbitrary and capricious. See *Motor Vehicles Manufacturer's Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

⁹⁸ See CAA § 108(a).

climate change,⁹⁹ greenhouse gases are not currently subject to NAAQS,¹⁰⁰ and EPA has explicitly argued that they should not be.¹⁰¹

While condition (6) is not presently met, it is expected to be in the near future. EPA has issued a proposed rule for addressing GHGs from new EGUs under section 111(b).¹⁰² While EPA has delayed finalizing the rule,¹⁰³ the fact that the agency has committed to issuing a rule in a settlement agreement,¹⁰⁴ and is under significant pressure to finalize the rule,¹⁰⁵ suggests that the agency will eventually regulate GHGs from new EGUs, satisfying condition (6).

Presuming resolution of the conflicting provisions in the 1990 Amendments, EPA will be *required* to set section 111(d) standards. While it does not set out a timeline for regulation or specify the content of what a standard of performance on existing sources must look like, so long as all six conditions are met, section 111(d) creates a mandatory duty for EPA regulation under Section 111(d). The provision begins with the direction that “The Administrator *shall* prescribe regulations which *shall* establish a procedure... under which each State *shall* submit to the Administrator a plan.”¹⁰⁶ The Court has held that statutory use of words such as “shall” establishes non-discretionary duties.¹⁰⁷ Moreover, these standards of performance are to apply to “*any* existing source for *any* air pollutant” which meet the above conditions.¹⁰⁸ This language suggests that neither EPA nor the States have significant discretion in determining which

⁹⁹ See Nathan Richardson, *Greenhouse Gas Regulation under the Clean Air Act: Does Chevron v. NRDC Set EPA Free?*, 29 STAN. ENVTL. L.J. 283 (2010); see also CENTER FOR BIOLOGICAL DIVERSITY & 350.ORG, PETITION TO ESTABLISH NATIONAL POLLUTION LIMITS FOR GREENHOUSE GASES PURSUANT TO THE CLEAN AIR ACT (2009), available at

http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf.

¹⁰⁰ See 40 C.F.R. pt. 50 (setting NAAQS for SO₂, PM₁₀, PM_{2.5}, CO, Ozone, NO_x, and lead).

¹⁰¹ See *Regulating Greenhouse Gases under the Clean Air Act*, 73 Fed. Reg. 44354, 44363-64 (2008) (outlining reasons why a NAAQS is not the appropriate policy tool for climate change).

¹⁰² Standards of Performance for Greenhouse Gas Emissions for New Station Sources: Electric Utility Generating Units, 77 Fed. Reg. 22392 (proposed Apr. 13, 2012) (to be codified at 40 C.F.R. pt. 60).

¹⁰³ John M. Broder, *E.P.A. Will Delay Rule Limiting Carbon Emissions at New Power Plants*, N.Y. TIMES (April 12, 2013), <http://www.nytimes.com/2013/04/13/science/earth/epa-to-delay-emissions-rule-at-new-power-plants.html>. EPA is potentially revising the rule. Jean Chemnick, *New power plant rule running late, with major changes possible*, E&E NEWS (March 18, 2013), <http://eenews.net/Greenwire/2013/03/18/2>. To what extent that will result in changes which are relevant to the question of 111(d) is, at this point unclear.

¹⁰⁴ EPA, SETTLEMENT AGREEMENT OF DEC. 23, 2010 RE: FOSSIL FUEL-FIRED POWER PLANTS, <http://epa.gov/carbonpollutionstandard/pdfs/boilerghgsettlement.pdf>.

¹⁰⁵ Notice of Intent to Sue for Failure to Timely Promulgate New Source Performance Standards (NSPS) and Emission Guidelines for Greenhouse Gas Emissions from Electric Utility Generating Units, (EGUs), filed by Environmental Defense Fund, Sierra Club, and Natural Resources Defense Council (Apr. 15, 2013), <http://www.epa.gov/ogc/NOIdocuments/EnvNOIApr152013.pdf>.

¹⁰⁶ CAA § 111(d)(1) (emphasis added).

¹⁰⁷ See *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (“The word ‘shall’ is ordinarily ‘the language of command’”).

¹⁰⁸ CAA § 111(d).

existing sources will be subject to regulation, so long as new source standards have been issued for GHGs from that category.

Section 302(a)

The amendment in section 302(a) which bars section 111(d) regulation for pollutants listed in section 112(b) would not preclude existing source regulations for greenhouse gases. GHGs are not presently listed under section 112(b),¹⁰⁹ and EPA has not announced any plans to list them. That is, EGUs satisfy condition (5)(B). To the extent that the section 302(a) language is controlling, EPA will be required to regulate GHGs from existing EGUs and other source categories subject to section 111(b) standards.

Section 108(g)

While greenhouse gas emissions from electric generating units do not fall under the section 302(a) bar to section 111(d), the “source category regulated under Section 112” limit in section 108(g) of the 1990 Clean Air Act is less clear.

The 1990 Amendments established, in section 112(n)(1)(A) of the Clean Air Act, that EPA need not set NESHAP standards for the category of “electric generating units” initially.¹¹⁰ However, if, after a report to Congress outlining alternative control strategies, the Administrator finds regulation of EGUs under section 112 “appropriate and necessary,” EPA is required to issue a NESHAP for that category of sources.¹¹¹ In December 2000, the Clinton EPA made an appropriate and necessary finding for “coal and oil-fired electric steam generating units,”¹¹² adding that category of EGUs to the category list in section 112(c).¹¹³

The Bush Administration only got to addressing regulation of HAPs from EGUs in 2005. Rather than issue section 112(d) NESHAP standards, however, EPA made the determination that “it is neither appropriate nor necessary to regulate coal- and oil-fired Utility Units under section 112.”¹¹⁴ In the Bush Administration’s view, this allowed EPA to then determine that EGUs “did not meet the statutory criteria for listing at the time of listing,” and remove them from the section 112(c) list without following the

¹⁰⁹ See 40 C.F.R. pt. 63.

¹¹⁰ See H. Rep. No. 101-490, at 334 (1990), *reprinted in* 1990 Leg. Hist., at 3358.

¹¹¹ CAA § 112(n)(1)(A) (“The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.”).

¹¹² See Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units, 65 Fed. Reg. 79825 (Dec. 20, 2000).

¹¹³ *Id.* While EGUs were technically added to the list as of the 2000 notice, EPA formally “update[ed] the source category list to reflect that addition” in 2002. National Emission Standards for Hazardous Air Pollutants: Revision of Source Category List Under Section 112 of the Clean Air Act, 67 Fed. Reg. 6521, 6522 (2002).

¹¹⁴ Delisting Rule, 70 Fed. Reg. at 15994.

specified delisting procedure.¹¹⁵ A key component of the 2005 “not appropriate and necessary” finding was the ability of EPA to use section 111(d) to regulate existing sources of mercury from EGUs. However, the D.C. Circuit held that EPA’s decision not to use the statutorily specified delisting procedure in section 112(c) was contrary to the statute and vacated EPA’s rule.¹¹⁶

Finally, the Obama administration issued National Emission Standards for Hazardous Air Pollutants from coal- and oil-fired electric utility steam generating units in 2012, in a rule which concurrently revised the new source NSPS standards for criteria air pollutants from “Fossil-Fuel-Fired Electric Utility... Steam Generating Units.”¹¹⁷

The particular “category” of EGUs to be regulated in the proposed new source section 111 standard and the current section 112 HAP standard may not be identical. The HAP category EPA has listed is for “Coal- and Oil-Fired Electric Utility Steam Generating Units.”¹¹⁸ EPA explicitly decided not to regulate natural gas fired EGUs under section 112.¹¹⁹ On the other hand, the source category EPA proposed for the new source section 111(b) GHG standards are a combination of the presently regulated “electric utility steam generating units (boilers and IGCC units, which are currently included in the Da category)” and the “combined cycle units that generate electricity for sale and meet certain size criteria (which are currently included in the KKKK category).”¹²⁰ In effect, EPA has merged the previously separate coal category and natural gas category for the purposes of GHG emissions.¹²¹ EPA continues to refer to “Fossil Fuel-Fired EGUs” in both rules, however in the NSPS rule it is referring to coal and gas EGUs whereas in the NESHAP rule it is referring to coal and oil EGUs. It uses the same NAICS code to identify “potentially affected entities.”¹²²

Whether this small difference in the definition of EGU is sufficient to consider the NSPS version of EGUs a different category from the “source category regulated under section 112” is not clear. Section

¹¹⁵ See Delisting Rule, 70 Fed. Reg. at 16033.

¹¹⁶ *New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008).

¹¹⁷ EGU NESHAPs, 77 Fed. Reg. at 9304.

¹¹⁸ See 40 C.F.R. pt. 63, subpt. UUUUU (2013).

¹¹⁹ See EGU NESHAPs, 77 Fed. Reg. at 9309 (“this final rule does not regulate a unit that otherwise meets the CAA section 112(a)(8) definition of an EGU but that combusts natural gas...”).

¹²⁰ EGU GHG Proposal, 77 Fed. Reg. at 22394.

¹²¹ EGU GHG Proposal, 77 Fed. Reg. at 22394. EPA is explicit that this rule does not affect the categorization for conventional pollutants. *Id.* at 22398 n. 21. EPA’s proposal to combine categories for the purposes of only one pollutant has been criticized and may have been a contributing factor to EPA delaying finalizing this rule. See, e.g., National Association of Manufacturers, et al., Comments to EGU GHG Proposal, 11 (2012) (“C. The EPA’s New “Mega” Category Is Inconsistent With the Clean Air Act and is Inconsistent with Years of NSPS Regulatory History”), at <http://tinyurl.com/cjflgp>.

¹²² Compare EGU GHG Proposal, 77 Fed. Reg. at 22401 (listing NAICS code 221112) with EGU NESHAPs, 77 Fed. Reg. 9305 (listing NAICS code 221112).

112(c)(1) directs EPA to harmonize the source categories between the two sections.¹²³ At the very least, existing coal plants are members of both source categories. In fact, the section 108(g) version of section 111(d) bars EPA from issuing guidelines for existing *sources* (not categories) for air pollutants emitted from a source *category* regulated under section 112. Therefore it may not be necessary for the source categories to be perfectly harmonized, but merely that the particular source to be regulated by both programs for there to be a conflict. This will unquestionably be true for coal plants, which will be regulated under both sections.¹²⁴

Therefore, after a long-history, EGUs, or at least a subset of them, are clearly regulated by section 112. To the extent that the language in the section 108(g) amendment to section 111(d) is controlling, then, greenhouse gas emissions from existing EGUs would not meet condition (5)(a) of Section 111(d) and the agency would be prohibited from using that section to set emission guidelines for states to set standards of performance.

Moreover, while they certainly are the category of stationary sources with the most greenhouse gas emissions,¹²⁵ electric generating units are not the only source category of GHGs for which EPA is anticipated to issue section 111(b) NSPS standards. Announced concurrently with the settlement agreement on EGUs, in a separate settlement agreement EPA also committed to regulate greenhouse gas emissions from petroleum refineries.¹²⁶ EPA has not yet taken the step to issue a proposed rule for new sources under this category, and so both new source and eventual existing source regulations would not be expected right away. However, given the settlement agreement, the fact that petroleum refineries are significant sources of GHG emissions,¹²⁷ and the fact that petroleum refineries are already subject to existing NSPS standards for criteria pollutants under Part 60, Subpart J¹²⁸ and Subpart Ja,¹²⁹ EPA would

¹²³ CAA § 112(c)(1).

¹²⁴ Nonetheless, in addition to the potential resolutions to the dueling amendments explored in Part IV, *infra*, EPA should consider explicitly categorizing source categories for GHGs for the purpose of NSPS as different from those listed under section 112(c). Given the interpretive challenges in resolving the conflict, a court may be more receptive to arguments which allow it to avoid having to directly confront the dueling amendments problem. Creative category definition can mean that both sections 108(g) and 302(a) would not bar GHG regulation from that particular category, and so could be the very out a court would be receptive to. This should, therefore be part of EPA's strategy as it constructs section 111(d) standards with an eye towards litigation.

¹²⁵ EGU GHG Proposal, 77 Fed. Reg. at 22403-04.

¹²⁶ EPA, SETTLEMENT AGREEMENT OF DEC. 23, 2010 RE: PETROLEUM REFINERIES, <http://epa.gov/carbonpollutionstandard/pdfs/refineryghgsettlement.pdf>

¹²⁷ See Regulatory Impact Analysis for the Mandatory Reporting of Greenhouse Gas Emissions, Final Report, Table 5-1, September 2009, <http://www.epa.gov/ghgreporting/documents/pdf/archived/EPA-HQ-OAR-2008-0508-2229.pdf> (estimating refineries to be the second largest stationary source category of emitters of greenhouse gases).

¹²⁸ 40 C.F.R. pt. 63, subpt.J (“Standards of Performance for Petroleum Refineries”). See Standards of Performance for Petroleum Refineries; Standards of Performance for Petroleum Refineries for Which Construction, Reconstruction, or Modification Commenced After May 14, 2007, 77 Fed. Reg. 56422, 56426-27 (2012) (briefly explaining history of Section 111 regulation of petroleum refineries).

be hard pressed to argue it is not required under Section 111(b) to issue new source performance standards for GHG emissions from this category. Even more clearly than EGUs, however, petroleum refineries are a “category of sources regulated under Section 112.” EPA has issued NESHAP standards for “petroleum refining process units”¹³⁰ in Part 63, Subpart CC of the Code of Federal Regulations¹³¹ and an additional standard for previously excluded petroleum refinery process vents in Part 63, Subpart UUU.¹³² Finally, while EPA has not announced action for any other source categories, the overlaps between section 111(b) NSPS categories and section 112 NESHAP categories which emit GHGs go far beyond EGUs and petroleum refineries.¹³³

The resolution of the conflict between the House and Senate amendments to section 111(d), is, on its face, critical to determining whether anticipated EPA action to regulate existing sources of greenhouse gases would be in accordance with the Clean Air Act.

PART II. A HISTORY OF SECTION 111(D)

¹²⁹ 40 C.F.R. pt. 63, subpt. Ja (“Standards of Performance for Petroleum Refineries for Which Construction, Reconstruction, or Modification Commenced After May 14, 2007”).

¹³⁰ 40 C.F.R. § 63.640. It should be noted that the CFR language for applicable facilities under the NSPS regulations and under the NESHAP regulations are not identical, however they are intended to cover the same units. The NSPS regulations apply to “the following affected facilities in petroleum refineries: fluid catalytic cracking unit catalyst regenerators, fuel gas combustion devices, and all Claus sulfur recovery plants except Claus plants with a design capacity for sulfur feed of 20 long tons per day (LTD) or less,” 40 C.F.R. § 60.100, and “fluid catalytic cracking units (FCCU), fluid coking units (FCU), delayed coking units, fuel gas combustion devices, including flares and process heaters, and sulfur recovery plants.” 40 C.F.R. § 60.100a. The NESHAP regulations apply to “petroleum refining process units.” 40 C.F.R. § 63.640, which are defined as the same type of facilities listed under the NSPS regulations: “Examples of such units include, but are not limited to, petroleum-based solvent units, alkylation units, catalytic hydrotreating, catalytic hydrorefining, catalytic hydrocracking, catalytic reforming, catalytic cracking, crude distillation, lube oil processing, hydrogen production, isomerization, polymerization, thermal processes, and blending, sweetening, and treating processes. Petroleum refining process units also include sulfur plants.” 40 C.F.R. § 63.641.

¹³¹ 40 C.F.R. pt. 63, subpt. CC; *see* National Emissions Standards for Hazardous Air Pollutants from Petroleum Refineries, 74 Fed. Reg., 55670, 55671 (2009) (briefly explaining history of Section 112 regulation of petroleum refineries).

¹³² 40 C.F.R. pt. 63, subpt. UUU.

¹³³ *See, e.g.*, Synthetic Organic Chemical Manufacturing Industry (pt. 60 subpt. F, pt. 63 subpt. VV); Dry Cleaning Facilities (pt. 60 subpt. M, pt. 63 subpt. JJJ); Lead Smelting (pt. 60 subpts. X, TTT, pt. 63 subpts. L, R); Phosphate Fertilizers Production Plants (pt. 60 subpt. BB, pt. 63 subpts. T, U, V, W, X); Portland Cement Manufacturing Industry (pt. 60 subpt. LLL, pt. 63 subpt. F); Municipal Solid Waste Landfills (pt. 60 subpt. AAAA, pt. 63 subpt. CC); Beverage Can Surface Coating Industry (pt. 60 subpt. KKKK, pt. 63 subpt. WW); Rubber Tire Manufacturing (pt. 60 subpt. XXXX, pt. 63 subpt. BBB); Stationary Combustion Turbines (pt. 60 subpt. YYYYY, pt. 63 subpt. KKKK); Lime Manufacturing Plants (pt. 60 subpt. AAAAA, pt. 63 subpt. Subpart HH); Industrial, Commercial, and Institutional Boilers and Process Heaters (pt. 60 subpt. DDDDD, pt. 63 subpt. Dd); Asphalt Processing and Asphalt Roofing Manufacturing (pt. 60 subpt. LLLLL, pt. 63 subpt. UU); Steelmaking Facilities (pt. 60 subpt. YYYYY, pt. 63 subpts. AA, AAa).

Much has been written about the legislative history of the Clean Air Act, including the 1990 Amendments;¹³⁴ however, very little has been written directly about the history of section 111(d).¹³⁵ While this is unsurprising given the paucity of its use and impact, the fact that the provision will likely be employed to new and much greater effect justifies an in depth examination of its enactment, revision, and use. Moreover, this legislative history sheds some light on the purposes of each amendment and therefore potential resolutions to the conflict.

A. Initial Enactment and Purpose

The 1970 Clean Air Act was the subject of many compromises. One was that new sources would be regulated more stringently than existing sources, with the assumption that pollution from existing sources would phase out as they ended their useful life.¹³⁶ However, while the focus of many provisions, most specifically the NSPS provision, is on new sources, Congress recognized that the existent air pollution problem was caused by *existing* sources.¹³⁷ It therefore set up a system of regulation for existing sources of pollutants, albeit less stringent than the one governing new sources. States were provided primary authority for dealing with existing sources of ambient pollutants.¹³⁸ Existing sources of toxic air pollutants were addressed nationally through the NESHAP program, but EPA was given wide ranging discretion in settings standards for those sources such that less stringent standards for existing sources would be allowed.¹³⁹ And while the NSPS program was focused on new sources, because its scope was broader than the criteria or hazardous air pollutants regulated by other sections, Congress provided a specific mechanism to control existing sources of pollutants that would otherwise be left out of this scheme. As such, it provided the agency with “gap filling” authority, in section 111(d).¹⁴⁰

¹³⁴ See, e.g., GARY C. BRYNER, *BLUE SKIES, GREEN POLITICS: THE CLEAN AIR ACT OF 1990* (1993); RICHARD E. COHEN, *WASHINGTON AT WORK: BACK ROOMS AND CLEAN AIR* (2d ed. 1995); Arnold W. Reitze Jr., *The Legislative History of U.S. Air Pollution Control*, 36 *HOUS. L. REV.* 679 (1999).

¹³⁵ But see, Frank B. Cross, *Section 111(d) of the Clean Air Act: A New Approach to the Control of Airborne Carcinogens*, 13 *B.C. ENVTL. AFF. L. REV.* 215 (1986).

¹³⁶ See Jonathan Remy Nash & Richard Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 *NW. U. L. REV.* 1677, 1681-82 (2009).

¹³⁷ See 5 *ENVTL. POLICY DIV., LIBRARY OF CONG., 93RD CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970*, AT 144 [hereinafter 1970 Leg. Hist.] (Statement of Senator Randolph) (“...we are providing additional enforcement for those existing sources of air pollution, but more significantly we are providing effective means of prevention of future air pollution problems”).

¹³⁸ See 5 1970 Leg. Hist. 112 (Statement of Congressman Staggers, House Manager for 1970 CAA) (“The States on the other hand will have primary responsibility for the enforcement of State plans and the emission limitations provided for in those plans with regard to existing stationary sources”).

¹³⁹ See 1970 CAA § 112(b)(1)(B). EPA was also given the discretion to grant two year wavers for existing sources. 1970 CAA § 112(c)(1)(B)(ii). This, of course had the inadvertent effect of incentivizing industry not to build new sources and instead to rely on existing sources which did not require additional capital expenditure to meet modern air pollution standards. See Nash & Revesz, 101 *NW. U. L. REV.*

¹⁴⁰ See Frank B. Cross, *Section 111(d) of the Clean Air Act: A New Approach to the Control of Airborne Carcinogens*, 13 *B.C. ENVTL. AFF. L. REV.* 215, 233 (1986) (quoting sponsor of the pre-cursor section to Section

Section 111(d) began in a Senate proposal which would ultimately become incorporated into the final Clean Air Act.¹⁴¹ That provision was a more robust program, involving an explicit listing of pollutants that did not fit into Section 108 or Section 112, a defined schedule of regulation of the pollutants on that list, and emissions limits primarily set by EPA (with enforcement led by the states).¹⁴² While it was simplified into the language of section 111(d) in Conference, it retained much of its general character, including application only to *pollutants* not regulated under the ambient or hazardous air pollution provisions and application only to *categories* already subject to new source standards.

Because Congress felt it had, through the NAAQS/SIP provisions, addressed widely dispersed pollutants, section 111(d) was intended for those pollutants “which are not emitted in such quantities or are not of such a character as to be widely present or readily detectable on a continuous basis with available technology in the ambient air.”¹⁴³ That is, it was expected to regulate *local* pollutants¹⁴⁴ that did not, due to their lack of public health effect or lack of information, meet the “relatively restrictive definition”¹⁴⁵ of hazardous air pollutants.

While the 1977 Clean Air Act amendments made some changes to section 111(d), these were predominantly meant to provide greater flexibility to the states in their plans implementing EPA emission guidelines¹⁴⁶ and to clarify that the emission guidelines EPA promulgated and the standards states implemented under those guidelines should be “based on available means... (not necessarily technological).”¹⁴⁷ These changes were not relevant to the circumstances under which the EPA could use section 111(d) authority to regulate pollutants.

111(d) in the original Senate bill that would form part of the Clean Air Act Amendments of 1970, Senator Edmund Muskie).

¹⁴¹ See Emission Guidelines Regulations, 40 Fed. Reg. at 53342 (“Section 114 of the Senate bill was rewritten in conference to become section 111(d).”).

¹⁴² S. REP. NO. 91-1196, at 19 (1970).

¹⁴³ S. REP. NO. 91-1196, at 18 (1970).

¹⁴⁴ S. REP. NO. 91-1196, at 18 (1970) (“The presence of these agents is generally confined, at least for detection purposes, to the area of the emission source.”)

¹⁴⁵ S. REP. NO. 91-1196, at 20.

¹⁴⁶ See 1977 CAA, P.L. 95-95, § 109(b)(1), (2), 91 Stat. 685, 699, (giving states the power to consider “among other factors, the remaining useful life of the existing source to which such standard applies”).

¹⁴⁷ H.R. REP. NO. 95-294, at 11 (1977). See also 1977 CAA, P.L. 95-95, § 109(b)(1), 91 Stat. 685, 699, (changing “emissions standards” to “standards of performance”). This change may signal that Congress was attempting to provide more flexibility to EPA and the States in their development of plans covering existing sources. It may, therefore, support the claim that some have made that standards of performance in section 111(d) permits sector wide and perhaps economy wide emissions trading systems. See Wannier, PREVAILING ACADEMIC VIEW. *But see* Emission Guideline for Sulfuric Acid Mist, 40 Fed. Reg. 55796, 55796 (1977) (“While it is a prerequisite for the development of standards under section 111(d), the emission guideline is technology-based rather than tied specifically to protection of health or welfare.”)

In 1975 EPA issued general regulations for the “Adoption and Submittal of State Plans for Designated Facilities.”¹⁴⁸ This included, in 40 C.F.R. § 60.21(a), a definition of the pollutants and sources for which it would issue emission guidelines, which closely mirrored the scope of section 111(d) as set out in statute.¹⁴⁹

Between 1970 and 1990, EPA promulgated emission guidelines for only four categories of sources under 111(d):¹⁵⁰ total reduced sulfur from kraft paper mills,¹⁵¹ fluoride emissions from aluminum reduction plants,¹⁵² fluoride emissions from phosphate fertilizer plants,¹⁵³ and sulfuric acid mist from sulfuric acid production units.¹⁵⁴ EPA would then approve, or not approve, individual state plans under section 111(d) as part of a state’s SIP for pollutants not listed in sections 108(a) or 112(b)(1)(A).¹⁵⁵ State plans existed in only a handful of states. Section 111(d) clearly was not a widely used provision of the statute, and when it was used, it applied only to air pollutants for which EPA determined HAP regulation was not justified or appropriate.

B. 1990 Amendments: Creation of a Conflict

Perhaps the fact that it was so rarely used can explain why Congress was not particularly careful in amending the language of section 111(d) to conform to the far reaching changes to section 112 in the 1990 Clean Air Act Amendments.

In 1990, Congress significantly overhauled the Clean Air Act. The most significant changes to the stationary source programs, though hardly the only changes, were the creation of an innovative emissions trading program for acid rain-causing pollutants;¹⁵⁶ the strengthening of requirements in “nonattainment” areas for criteria pollutants;¹⁵⁷ and the overhaul of the hazardous air pollution program.¹⁵⁸ The general thrust of these and other changes was to strengthen the protection of clean air in the United States while introducing more flexible compliance options to keep costs low. However, this large and sprawling bill was the subject of significant political compromise and wrangling between the Senate, the House, and the

¹⁴⁸ See Emission Guideline Regulations, 40 Fed. Reg. at 53347 (1975).

¹⁴⁹ Compare 40 C.F.R. § 60.21(a),(b) (1975) with 42 U.S.C. § 7411(d) (1976).

¹⁵⁰ Before 1990, EPA was inconsistent when issuing emission guidelines. For example, its guideline for sulfuric acid mist was issued as a final rule and codified in the CFR. See 40 C.F.R. § 60.32(a) (1978). However, prior and subsequent guidelines were issued as “notices” and were not codified.

¹⁵¹ See Kraft Paper Mills; Final Guideline Document, Availability, 44 Fed. Reg. 29828 (May 22, 1979).

¹⁵² See Primary Aluminum Plants; Availability of Final Guideline Document, 45 Fed. Reg. 26294 (Apr. 17, 1980).

¹⁵³ See Phosphate Fertilizer Plants; Final Guideline Document Availability, 42 Fed. Reg. 12022 (March 1, 1977).

¹⁵⁴ See Emission Guideline for Sulfuric Acid Mist, 42 Fed. Reg. 55796 (Oct. 18, 1977).

¹⁵⁵ See, e.g., Kentucky: Plans for Control of Sulfuric Acid Mist, Total Reduced Sulfur, and Primary Aluminum Fluorides; Negative Declaration for Phosphate Fluorides, 47 Fed. Reg. 22955 (May 26, 1982) (codified at 40 C.F.R. Part 62).

¹⁵⁶ See 1990 CAA, Title IV.

¹⁵⁷ 1990 CAA, Title I.

¹⁵⁸ See 1990 CAA, Title III.

George H.W. Bush White House, where the proposal originated. This process resulted in separate bills passed by the Senate (S. 1630) and the House (H.R. 3030), which eventually had to be resolved in a Conference Committee.

As part of the overhaul to the hazardous air pollution program (section 112) in Title III of the 1990 Amendments, both the Senate bill and the House bill completely eliminated the provision which had previously given EPA general authority to list hazardous air pollutants, section 112(b)(1)(A).¹⁵⁹ For both bills, section 112(b)(1)(A) was replaced with a specific list of pollutants to be regulated in section 112(b), a requirement to regularly revise that list in section 112(b)(2), provisions for citizens to petition EPA to revise the list in section 112(b)(3), and additional provisions related to the pollutants regulated under section 112 in sections 112(b)(4)-(7). Because section 112(b)(1)(A) had been eliminated, both bills also included revision to section 111(d)(1)(A)(i), which had previously directly referenced the now eliminated section.

While both bills had amended the hazardous air pollution provisions using a similar structure, they amended section 111(d) in critically different ways, which were not resolved in the Conference Committee. Did one chamber of Congress, in fact, intend a substantive change in the scope of 111(d), or did both chambers merely intend, but fail, to retain the original scope of the provision, modified for the new structure of section 112? The specific language amending section 111(d) was not discussed once in the thousands of pages of committee reports, floor debates, hearings, or speeches surrounding the 1990 Clean Air Act amendments. However, while limited, the legislative history can provide some clues as to what “Congress intended” the scope of the (doubly) amended section 111(d) to be.

The White House Proposal and House Amendment

Both the Senate and the House had been attempting to modernize the Clean Air Act for a number of years. While these bills never passed either chamber, they provided the template that would eventually become the Clean Air Act Amendments of 1990. The election of George H.W. Bush, for whom environmental protection was a top agenda item, was one key factor in breaking the logjam that had until that point prevented action from moving forward.¹⁶⁰

The George H.W. Bush White House crafted its own comprehensive overhaul of the Clean Air Act, which the President announced at a public address and “sent to congress.”¹⁶¹ While its major push was an

¹⁵⁹ EPA retained authority to add HAPs to the list, now located in Section 112(b)(2).

¹⁶⁰ See GARY C. BRYNER, *BLUE SKIES, GREEN POLITICS, THE CLEAN AIR ACT OF 1990* 93-94 (1993).

¹⁶¹ See Presidential Statement on Signing the Bill Amending the Clean Air Act (Nov. 15, 1990), available at http://bushlibrary.tamu.edu/research/public_papers.php?id=2436&year=1990&month=11 (“In July of 1989, I sent to

innovative system of emissions trading for acid rain pollutants, the White House proposal included many changes, including a proposal to overhaul the air toxics program. Like the eventual House and Senate bills that passed, this provision changed the structure of section 112 and so at least necessitated a conforming amendment to section 111(d)(1)(A)(i).

The White House proposal was introduced, as requested, by Congressman John Dingell, chair of the House Energy and Commerce Committee, as H.R. 3030. This bill became the vehicle that the House Committee on Energy and Commerce would mark-up and amend to fit its priorities, and eventually send to Conference.¹⁶² The White House proposal contained the revision to the air toxics provision in Title III. Title I, “Provisions for Attainment and Maintenance of Ambient Air Quality Standards,” primarily contained, but was not limited to, new requirements for areas not in attainment of criteria air pollutant NAAQS. In addition, it included section 107, providing new flexibility for Indian Tribes to submit their own implementation plans;¹⁶³ section 108, titled Miscellaneous Provisions, containing “a number of miscellaneous amendments to Title I of the Clean Air Act”;¹⁶⁴ and section 109, titled “Conforming Amendments.”¹⁶⁵

The White House amendment to section 111(d), the same exact language that would be passed by the House¹⁶⁶ and included in the final Conference Report as section 108(g),¹⁶⁷ reads: “REGULATION OF EXISTING SOURCES.—Section 111(d)(1)(A)(i) of the Clean Air Act is amended by striking ‘or 112(b)(1)(A)’ and inserting ‘or emitted from a source category which is regulated under section 112’.”¹⁶⁸

the Congress a proposal to amend the Clean Air Act of 1970. My proposal was designed to improve our ability to control urban smog and reduce automobile and air toxic emissions...”).

¹⁶² Confusingly, the bill the House voted on and passed was numbered S. 1630, the same as the Senate provision. However, this bill was merely H.R. 3030, renumbered for procedural reasons. *See* 1990 Leg. Hist. at 2668 (Statement of David Bonoir, regarding H. Res. 399, the Rule providing for the consideration of H.R. 3030) (“After passage of H.R. 3030, it shall be in order to take from the Speaker’s table the bill S. 1630 and to consider said bill in the House, and it shall then be in order to move to strike out all after the enacting clause of the Senate bill and to insert in lieu thereof the provisions contained in H.R. 3030 as passed by the House...”).

¹⁶³ *See* H. COMM. ON ENERGY & COMMERCE, CLEAN AIR ACT AMENDMENTS OF 1990, H.R. Rep. No. 101-490, 1990 Legislative History at 3295 (detailing and explaining the provisions of Section 107, mostly unchanged from the White House proposal. *Compare* H.R. 3030 § 107 (as introduced), 1990 Leg. Hist., at 3851, *with* Section 107, H.R. 3030 § 107 (as reported), 1990 Leg. Hist., at 3295).

¹⁶⁴ *See* H. COMM. ON ENERGY & COMMERCE, CLEAN AIR ACT AMENDMENTS OF 1990, H.R. Rep. No. 101-490, 1990 Leg. Hist., at 3296 (detailing and explaining the provisions of Section 108, mostly unchanged from the White House proposal. *Compare* Section 108, H.R. 3030 § 108 (as introduced), 1990 Leg. Hist., at 3854, *with* H.R. 3030 § 108 (as reported), 1990 Leg. Hist. 3296).

¹⁶⁵ *See* H.R. 3030 § 109 (as introduced), 1990 Leg. Hist., at 3866. Section 109 was renumbered as Section 110 in S. 16030 as passed by the House, after the addition of a provision on Interstate Air Pollution as Section 109. *See* 1990 Leg. Hist., at 1985.

¹⁶⁶ *Compare* H.R. 3030 § 108(d) (as introduced), 1990 Leg. Hist., at 3857 *with* S. 1630 § 108(f) (as passed by the House), 1990 Leg. Hist., at 1979.

¹⁶⁷ *Compare* H.R. 3030 § 108(d) (as introduced), 1990 Leg. Hist., at 3857 *with* S. 1630 § 108(g) (as passed the House), 1990 Leg. Hist., at 1523.

¹⁶⁸ *See* H.R. 3030 § 108(d) (as introduced), 1990 Leg. Hist., at 3857.

The White House, rather than the House itself was the source of the change from an *air pollutant* bar in section 111(d) to a *source category* bar in section 111(d).

Despite the wishful thinking of some environmentalists,¹⁶⁹ it is unlikely this change was merely a mistake. As outlined above, the House amendment to section 111(d) was placed in section 108 of the White House proposal, “Miscellaneous Provisions;” which eventually became “Miscellaneous Guidance” in the final conference report. In both the White House Proposal\House bill and the final Conference Report, the provisions in this section are all substantive. It includes new duties, program clarifications, and changes in authority.¹⁷⁰ The least substantive provision, besides the amendment to section 111(d), is section 108(i), which adds a new limit to EPA delegation of rulemaking authority, a limit unrelated to new provisions enacted in the 1990 Amendments.¹⁷¹ In sum, all 14 subparagraphs of section 108 include relatively minor *substantive* changes to the Clean Air Act. In contrast, Section 109 of the White House proposal¹⁷² contains “Conforming Amendments,” consisting of eighteen amendments deleting and renumbering sections or adding references to new provisions enacted elsewhere in the act.¹⁷³ The fact that the White House included the change to section 111(d) in the section making substantive changes and not in the adjacent section making conforming changes suggests that the drafters of this provision understood it as an actual, substantive revision to the scope of section 111(d) existing source regulations.¹⁷⁴

The fact that the section 108 amendment originated in the White House, rather than as a product of Congressional intent, is reinforced by considering that the proposals related to hazardous air pollutants considered in the House prior to the Energy and Commerce Committee’s markup of the White House proposal would have kept a pollutant-based limit on section 111(d).

¹⁶⁹ See Brief of Env'tl. Petitioners, at 23, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (“Neither the House nor the Senate amendment changed this status quo.... Both amendments were plainly for housekeeping purposes.”).

¹⁷⁰ Examples include: a requirement for the EPA to consult with the Secretary of Transportation on transportation-air quality planning (Section 108(a), 1990 Leg. Hist., at 1520.); the establishment of a RACT/BACT/LAER reporting database (Section 108(c), 1990 Leg. Hist., at 1522); extension of the time for EPA to issue NSPS standards under Section 111(b) (Section 108(e), 1990 Leg. Hist., at 1522); amended definitions (Section 108(j)); a Savings clause related the new requirements in the 1990 Act (Section 108(l)); and a new public participation requirement (Section 108(p)).

¹⁷¹ See Section 108(i).

¹⁷² Renumbered as 1990 CAA § 110.

¹⁷³ See H.R. 3030 (as introduced), 1990 Leg. Hist., at 3866. These eighteen conforming amendments became six in the final conference report. These six provisions were equally non-substantive. See 1990 Leg. Hist., at 1525-26.

¹⁷⁴ *But see* *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 318 (1985) (noting that, despite the general presumption that “when Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect” (*Stone v. INS*, 514 U.S. 386, 397 (1995)), minor, unexplained changes in phraseology made during recodification are assumed to be “not intended to alter the statute’s scope”). Section 108(g) was, in fact, one of the few provisions of Section 108 not mentioned in the House Committee Report. See 1990 Legis. Hist., at 3295-98.

In 1989, Congressman Mickey Leland,¹⁷⁵ a liberal member of the House Energy and Commerce Committee, cosponsored, with Environment Subcommittee Chairman Henry Waxman, the Air Toxics Control Act. This bill required EPA to, within 10 years, regulate *all* listed major source categories of hazardous air pollutants. It also included, in section 6, an amendment to section 111(d)(1) striking 112(b)(1)(A) and inserting instead Section 112(b).¹⁷⁶ This is identical to the Senate language that was eventually included in Section 302 of the Clean Air Act Amendments. The proponents of amending section 112 in the House had not intended a substantive change in section 111(d).

The White House's proposal, on the other hand, did not require EPA to regulate all of the source categories that it listed. After 10 years, a total of 50% of categories listed had to be regulated.¹⁷⁷ This left 50% of listed categories which would be regulated only at EPA's discretion. The White House anticipated that section 112 regulation would be more forceful than it had been prior to 1990 but that gaps would still remain; namely for those categories of sources for which EPA had, at its discretion, chosen not to issue NESHAPs. Given this framework, it was completely rational to then give EPA a choice, for those categories listed but not regulated under section 112, to instead use the more flexible section 111 to limit existing sources of hazardous air pollutants. Retaining the air pollutant limit from the 1970s version of section 111(d) (as the Leland proposal and Senate bill had) would prevent any regulation of toxic air pollutants for those categories EPA determined did not warrant NESHAPs because the pollutants in question would be "on a list published under section 112(b)," even though they were not regulated for that source category.

While not used to this effect prior to 1990, the view of section 111 as an alternative means to regulate the emissions of air toxics was advocated both in the academic literature¹⁷⁸ and by EPA itself.¹⁷⁹ Most notably, in the run up to the 1990 Amendments, EPA had developed proposed section 111(d) standards for municipal waste combustion (MWC) sources which emitted carcinogens that were to be included on the statutorily specified section 112 list.¹⁸⁰ The White House proposal, then, left EPA to continue to

¹⁷⁵ Congressman Leland died in August 1989 in a tragic plane crash. Lisa Belkin, *Representative Mickey Leland, 44, Dies in Crash*, N.Y. TIMES (Aug. 14, 1989), <http://www.nytimes.com/1989/08/14/obituaries/representative-mickey-leland-44-dies-in-crash.html>. Whether his direct involvement in the Air Toxics revisions would have "caught" the section 108 substantive change is, of course, unknowable.

¹⁷⁶ See House Hearing 3, Serial No. 101-116, at 95.

¹⁷⁷ See Clean Air Facts, 1990 Leg. Hist., at 2525

¹⁷⁸ Frank B. Cross, *Section 111(d) of the Clean Air Act: A New Approach to the Control of Airborne Carcinogens*, 13 B.C. ENVTL. AFF. L. REV. 215, 231-34 (arguing that the use of Section 111(d) to regulate air toxics that did not fit the definition of hazardous air pollutants in Section 112 was intended by the drafters of the provision in 1970 and reaffirmed in 1977).

¹⁷⁹ See Advanced Notice of Proposed Rulemaking, 52, Fed. Reg. 25399, 25406 (determining that Section 111 was a better regulatory tool to limit carcinogenic air emissions from municipal waste combustion units than Section 112).

¹⁸⁰ See NPRM, Emission guidelines: Municipal Waste Combustors, 54 Fed. Reg. 52209 (1989).

develop these and other section 111(d) standards for air toxics emitted by listed categories it would not regulate under section 112.

While the retention of discretion was a key component of the White House proposal, it was strongly opposed by the House Energy and Commerce Committee. Those members were concerned that leaving EPA with general discretion not to regulate fifty percent of listed source categories would result in a situation too similar to the pre-1990 revisions of section 112 where EPA refused to take aggressive action. The eventual bill reported out of the House Energy and Commerce committee was a “compromise amendment offered by Rep. Waxman” which “significantly strengthened the provisions of [the White House proposal] but fell short of those in H.R. 2585 (the Leland/Molinari bill).”¹⁸¹ Critically, the Waxman compromise required regulation of 100% of listed source categories. The amendment, however, only changed language in Title III, the air toxics provisions. Changing the air toxics provision to require EPA to regulate *all* source categories of HAPs that it listed should have abrogated most of the need for flexibility to use section 111(d) for hazardous air pollutants. However, the provision amending section 111(d) remained hidden away in Title I.

Finally, while the change from a requirement that EPA regulate 50% of source categories to a requirement that EPA regulate 100% of source categories greatly reduced the justification for a category-based limit in section 111(d), its ultimate inclusion in the House passed bill nonetheless may have been intentional rather than a drafting error. That is, other amendments to the air toxics provisions in section 112 may necessitated a category-based limit in service of environmental *protection* (rather than merely the creation of gaps). For example, the House Committee included a requirement that, before EPA regulate EGUs, it issue a study and make a finding that such regulate was “appropriate and necessary.”¹⁸² Had section 111(d) retained a pollutant-specific limitation post-1990, a finding that a NESHAP was not necessary for EGUs would have barred EPA from regulating the air toxics that existing EGUs emit at all. Therefore, the purpose of the category-based bar on section 111(d) could be seen as an attempt to *avoid* gaps in regulation rather than an attempt to create them.

Determining conclusively whether the White House intended the section 108 amendment to, as presented above, merely retain flexibility for EPA to use section 111(d) for *otherwise unregulated air toxics*, or whether it was an intentional attempt to open up a regulatory gap for non-criteria, non-hazardous air pollutants emitted from existing sources is not possible given the limited legislative history. Any inquiry into the true nature of the White House’s goals is, therefore, only speculative. On the one hand, the general theme of the White House’s proposal was to improve environmental protection while maintaining

¹⁸¹ Clean Air Facts, 1990 Leg. Hist., 2561.

¹⁸² See CAA § 112(n).

and increasing flexibility for compliance.¹⁸³ Constraining the use of the flexible section 111(d) would force EPA to regulate additional categories and pollutants under section 112. It seems unlikely, including to those involved, that the White House would intend to push EPA towards using the relatively inflexible section 112 provisions more than necessary.¹⁸⁴ On the other hand, restricting section 111(d) could have been an attempt at “regulatory relief” for sources already under stringent regulation from section 112 (albeit for different pollutants).¹⁸⁵ Even if this was not the intent of high level policymakers in the White House, a prolonged legislative drafting process between White House Counsel, OMB, and EPA had “allowed major industries an opportunity to influence the vital details and various shades of meaning in the legislative language.”¹⁸⁶ This seemingly small change could easily have been “snuck in” during that process, suggested by a lobbyist and written in by a sympathetic staffer. The opacity of the White House process, and the length of time since passage, unfortunately, makes it almost impossible to know which explanation is correct.

The Senate Amendment

Like the House, the White House had their proposal, including the substantive change to section 111(d), introduced in the Senate as S. 1490.¹⁸⁷ While this bill was considered in committee,¹⁸⁸ it was ultimately put aside in favor of S. 1630, introduced by Senator Max Baucus, chairman of Environment subcommittee of the Committee on Environment and Public Works (EPW). As introduced, S. 1630 did not contain an air toxics Title.¹⁸⁹ However, in subcommittee it was combined with S. 816, Senators Durenberger and Lautenberg’s “Toxic Release Prevention Act of 1989,”¹⁹⁰ which closely mirrored Senator Leland’s “Air Toxics Control Act.” The Senate language related to section 111(d) came directly from the language of S. 816.¹⁹¹

S. 1630, when combined with S. 816, amended section 111(d) of the Clean Air Act in the Title making changes to the hazardous air emissions program – “Title III—Air Toxics.” Section 305(a) of the bill (changed to 302(a) in Conference), in a grouping of amendments titled “Conforming Amendments,”

¹⁸³ Telephone Interview with Boyden Gray, Former White House Counsel (Apr. 26, 2013).

¹⁸⁴ *Id.*

¹⁸⁵ See Delisting Rule, 70 Fed. Reg. 15994, 16031 (“This provision suggests that the House did not want to subject Utility Units to duplicative or overlapping regulation.”).

¹⁸⁶ COHEN, WASHINGTON AT WORK: BACK ROOMS AND CLEAN AIR 68.

¹⁸⁷ See *Hearings before the Subcomm. on Env'tl. Protection of S. Comm. on Env't & Pub. Works*, S. Hrg. 101-311, Pt. 2, at 235 (Sept. 26, 1989) (“Section 111(d)(1)(A)(i) of the Clean Air Act is amended by striking `or 112(b)(1)(A)' and inserting `or emitted from a source category which is regulated under section 112.’”).

¹⁸⁸ See *To Receive Testimony from Hon. William K. Reilly, Administrator, Environmental Protection Agency on S. 1490*, Hearings before the Subcomm. on Env'tl. Protect. of the Comm. on Env't and Pub. Works, S. Hrg. 101-311, Pt. 2 (Sept. 26, 1989).

¹⁸⁹ See S. 1630 (as introduced), 1990 Leg. Hist., at 9050-51.

¹⁹⁰ S. 816 (as introduced), 1990 Leg. Hist., at 9240.

¹⁹¹ See S. 816 § 4(c), 1990 Leg. Hist., at 9265.

contained the key provision: “Section 111(d)(1) of the Clean Air Act is amended by striking ‘112(b)(1)(A)’ and inserting in lieu thereof ‘112(b).’” As section 112(b) contained the list of both the congressionally mandated HAP pollutants and any revisions made by EPA on their own initiative or by petition, the Senate proposal did not substantively change the scope of section 111(d).

In fact, rather than creating a broad carve out for the category of HAPs EPA would likely be most concerned with regulating under section 112 – the solid waste combustion units for which the agency was already developing section 111(d) emission guidelines – the Senate wrote a narrow carve out into its version of the bill. Section 130, renumbered as section 129 in Conference, was a specific provision for the regulation of solid waste incineration units.¹⁹² This provision explicitly carved out the solid waste incineration category from section 112 regulation¹⁹³ and directed EPA to instead use the section 111 process¹⁹⁴ to control emissions of both listed criteria and listed hazardous air pollutants.¹⁹⁵ This section explicitly directs EPA to use section 111(d) “notwithstanding any restriction... regarding issuance of such limitations.”¹⁹⁶ Interestingly, while EPA is directed to use the section 111 process, including state-led implementation for existing sources from section 111(d), the *standard* EPA is to set is not the BDT standard from section 111(b) but instead the “maximum degree of emission reduction” standard of 112(d).¹⁹⁷

The bill reported out of the EPW committee leaned too heavily in the direction of environmental protection and so was the subject of extensive revision in a series of backroom negotiations primarily between Senate Majority Leader Mitchell, EPW members, and the White House.¹⁹⁸ Tellingly, however, because the White House had been excluded from House deliberations and the Conference Committee, the Senate Bill is actually the legislative text which most closely resembled Administration policy

¹⁹² See S. 1630 § 306(a) (as passed the Senate), 1990 Leg. Hist., at 4535-4557.

¹⁹³ See 1990 CAA § 305, 104 Stat. at 2583 (establishing in section 129(h)(2) of the Clean Air Act the restriction that “no solid waste incineration unit subject to performance standards under this section and section 111 shall be subject to standards under section 112(d) of this Act”).

¹⁹⁴ See CAA § 129(a)(1)(A) (“The Administrator shall establish performance standards and other requirements pursuant to section 111 and this section for each category of solid waste incineration units”).

¹⁹⁵ See CAA § 129(a)(4) (listing criteria pollutants (PM₁₀, PM_{2.5}, SO₂, NO_x, CO, Pb) and HAPs (HCl, cadmium, mercury, dioxins, dibenzofurans) to be regulated under section 111/129).

¹⁹⁶ CAA § 129(b)(1).

¹⁹⁷ Compare CAA § 129(a)(2) (standards “shall reflect the maximum degree of reduction in emissions ...that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing units...”) with CAA § 112(d)(2) (standards “shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources...”).

¹⁹⁸ See COHEN, WASHINGTON AT WORK: BACK ROOMS AND CLEAN AIR 96-112.

preferences, besides its actual proposal.¹⁹⁹ And yet, the bill did not create a loophole in the gap-filling nature of section 111(d). Given the closed door nature of these negotiations, it is not known whether such a change was advocated for but rejected or whether the intended scope of the section 108 amendment had not been to create a loophole in the first place. However, what is known is that the conforming amendment merely changing the reference in section 111(d) from section 112(b)(1)(A) to section 112(b), was passed by the full Senate in the revised S. 1630 and sent to Conference Committee.²⁰⁰

Conference

As with most major legislation, the incompatibilities of the House and Senate versions of the 1990 Amendments was worked out in a Conference Committee. In Conference, the House's approach to Title I won out, with only minor changes.²⁰¹ This left the House amendment to section 111(d) in the final bill, renumbered as section 108(g).

Title III was based on a combination of the House and Senate provisions.²⁰² The Conference Committee included in Title III the provisions requiring a study before the listing and regulation of EGUs from the House²⁰³ and the provisions from the Senate directing EPA to use a hybrid of the structure of section 111(d) (emission guidelines to the states) with the emission standard level of section 112(d) to regulate solid waste combustion, despite the fact that the pollutants to be regulated were listed in section 112(b).²⁰⁴ The Conference adopted the provisions that EPA regulate *all* listed source categories within 10 years.²⁰⁵ And critically, it included the provision originating in the Senate amending section 111(d) to be substantively consistent with the pre-1990 conditions under which EPA can issue emission guidelines, renumbered as section 302(a).²⁰⁶ Therefore, while the Leland/Waxman/Senate approach to regulating all listed categories of air toxics won out, and therefore there was little need to substantively revise section 111(d), the White House's amendment in section 108(a) was left in.

¹⁹⁹ See COHEN, WASHINGTON AT WORK: BACK ROOMS AND CLEAN AIR.

²⁰⁰ See S. 1630 § 305 (as passed the Senate), 1990 Leg. Hist., at 4534.

²⁰¹ See 1990 Leg. Hist., at 10800-01 (Statement of Rep. John Dingell, Chair H. Comm. on Energy & Comm.).

²⁰² 1990 Leg. Hist. at 10801 (Statement of Rep. John Dingell, Chair H. Comm. on Energy & Comm.).

²⁰³ See 1990 CAA § 301, 104 Stat. at 2558 (establishing in section 112(n)(1) of the Clean Air Act a requirement that EPA regulate EGUs only if "appropriate and necessary" after a study).

²⁰⁴ See 1990 CAA § 305(a), 104 Stat. at 2578 (establishing regulation for "solid waste combustion" in section 129 of the Clean Air Act).

²⁰⁵ See 1990 CAA § 301, 104 Stat. at 2542 (establishing the requirement that EPA issue NESHAPs for *all* listed source categories within 10 years in section 112(e)(1)(E) of the Clean Air Act).

²⁰⁶ See 1990 CAA § 302(a), 104 Stat. at 2574 (amending section 111(d) by striking "112(b)(1)(A)" and replacing it with "112(b)."

The Conference Committee for the 1990 Amendments was particularly fractious.²⁰⁷ Operating on a deadline of the end of the legislative session, conferees worked until the very last minute hammering out compromises on the major pieces of legislation. This type of last minute deal making did not leave time for the legislative counsel's office, the Congressional office charged with the actual drafting of statutory text, to perform all of its normal checks to ensure accuracy and correct errors.²⁰⁸ Identifying dueling amendments like those that ended up in the final 1990 Clean Air Act Amendments is, in fact, one of the easiest for legislative counsel.²⁰⁹ This is because it is customary for the office to make a "Ramseyer," a document showing the current state of the law and any modifications that the conference committee makes to that law.²¹⁰ Due to the time constraints and the contentious negotiations, however, a Ramseyer was not completed for the 1990 Amendments.

The rushed drafting was made worse by the fact that Congress had written an incredibly detailed law, specifying many provisions in detail rather than leaving it up to the discretion of the agency.²¹¹ This both presented more opportunity for error as it required more technical and adept drafting, and it made it more difficult to correct any errors that arose after the fact because revisiting one provision, even to make technical corrections, could risk blowing up all of the intricate compromises holding the bill together. In fact, while technical corrections can be made to a bill after it is passed by both Houses but before it is signed by the President by passing a Concurrent Resolution to make changes in enrollment of a bill,²¹² legislative counsel's office was not even allowed to correct spelling mistakes for the 1990 Amendments.²¹³

As a result, the 1990 Amendments contain an abnormally large number of drafting errors, in addition to the one discussed here, which the agency and courts have had to try to resolve.²¹⁴ The closed door nature

²⁰⁷ Telephone Interview with Pope Barrow, former Legislative Counsel, United States House of Representatives (Apr. 26, 2013).

²⁰⁸ Telephone Interview with Pope Barrow.

²⁰⁹ Telephone Interview with Pope Barrow.

²¹⁰ Telephone Interview with Pope Barrow. The Ramseyer is named after Congressman Christian William Ramseyer, who originated Rule XIII, Cl. 3 of the Rules of the House of Representatives which requires that all bills reported out of committee show changes from existing law. *See* Deschler's *Precedents*, H. Doc. 94-661, Ch. 17 § 60. There is an analogous rule in the Senate known as the Cordon Rule, however it is followed less consistently. Importantly, both the Ramseyer rule and the Cordon rule can be waived by unanimous consent, and neither apply to Conference Reports.

²¹¹ *See* Craig N. Oren, *The Clean Air Act Amendments of 1990: A Bridge to the Future?*, 21 ENVTL. L. 1817 (arguing that Congress's insistence on detail increased the likelihood of drafting errors and made them harder to correct after the fact).

²¹² R. ERIC PETERSEN, CONG. RESEARCH SERV., CRS-98-826, ENGROSSMENT, ENROLLMENT, AND PRESENTATION OF LEGISLATION 2 (1998). The enrolled bill is the final bill passed by both chambers. *Id.*

²¹³ Telephone Interview with Pope Barrow.

²¹⁴ *See* Oren, 21 ENVTL. L. at 1837 ("Even hardened observers must blanch at learning that a visibility provision that was agreed to by the conferees was inadvertently left out of the final version of the 1990 Amendments..."); Bradford C. Mank, *A Scrivener's Error or Greater Protection of the Public?*, 24 VA. ENVTL. L.J. 75 (describing a

of the Conference and the passage of time make it difficult to tell whether the dueling amendments to section 111(d) were discussed in conference and left in on purpose, or if they were merely an accident. On the one hand, conferees will regularly intentionally leave provisions vague or include seemingly contradictory provisions as the only way to reach agreement, holding to the hope that the issue will get resolved in their favor by the agencies or courts.²¹⁵ This occurred for multiple provisions of the 1990 Clean Air Act.²¹⁶ On the other hand, it would be surprising if the form of the ambiguity would be such a direct conflict in provisions. This was likely a mistake rather than an intentional attempt to avoid a resolution.²¹⁷

C. Regulatory Application of Section 111(d)

EPA's regulatory implementation of section 111(d) has been rare, and when used, has largely ignored and been potentially inconsistent with the dueling amendments enacted in 1990.

The four emission guidelines issued after the 1977 Amendments to the Clean Air Act remain in place. This is despite the fact that three of the categories subject to those guidelines also are subject to NESHAPs.²¹⁸ While the standards for fluorides from aluminum reduction plants and phosphate fertilizer plants were effectively subsumed into NESHAPs,²¹⁹ EPA continues to require states to submit their plans for approval.²²⁰ Moreover, kraft paper mills remain subject to non-duplicative section 111(d) emission guidelines for total reduced sulfur²²¹ while they are also subject to section 112 standards for various

potential drafting error in section 112 relating to delisting); *Appalachian Power Company v. EPA*, 249 F.3d 1032 (2001) (resolving a scrivener's error introduced in CAA § 116).

²¹⁵ See Hon. David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1, 4 (2010) (discussing Congress's intentional ambiguity in passing complex environmental law); Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 628, 640-42 (2001-2002) (outlining "legislative incentives for ambiguity").

²¹⁶ Telephone Interview with Pope Barrow.

²¹⁷ Telephone Interview with Pope Barrow; Interview with Boyden Gray.

²¹⁸ See National Emission Standards for Hazardous Air Pollutants From Phosphate Fertilizers Production Plants, 40 C.F.R. pt. 63 subpt. BB; National Emission Standards for Hazardous Air Pollutants for Primary Aluminum Reduction Plants, 40 C.F.R. pt. 63 subpt. LL;

²¹⁹ See, e.g., [NESHAP] for Phosphate Fertilizer Plants, 64 Fed. Reg. at 31732 ("this rule specifically exempts those sources subject to its requirements from duplicate coverage by NSPS").

²²⁰ See, e.g., California State Plan for Control of Fluoride Emissions from Existing Facilities at Phosphate Fertilizer Plants, 40 C.F.R. § 62.1100.

²²¹ See EPA, Kraft Pulp Mill Compliance Assessment Guide, EPA/310-B-99-001, at A-3 (1999) (specifying that compliance with section 111(d) is required); see, e.g., 40 C.F.R. §§ 62.865-66 (detailing Arkansas's section 111(d) state plan for TRS from kraft paper mills); Approval and Promulgation of Air Quality Implementation Plans; Maine; Total Reduced Sulfur From Kraft Paper Mills, 68 Fed. Reg. 23209 (May 1, 2003).

HAPs.²²² EPA did not comment on the potential conflict between section 111(d) and section 112 when promulgating section 112 standards for paper mills.²²³

In addition to these pre-1990 emission guidelines, EPA has issued eight post-1990 emission guidelines for existing sources of designated pollutants. Six of these 111(d) standards are for sources under the specific section 129 solid waste combustion carve-out.²²⁴ As such they would not be impacted by any determination of how to resolve the dueling amendments to section 111(d) and did not require the agency to explicitly amend its regulations in 40 C.F.R. § 61.20(a) defining designated pollutants and facilities without regard to the 1990 changes. The remaining two emission guidelines are for landfill gas from municipal solid waste landfills²²⁵ and mercury emissions from coal-fired electric steam generating units.²²⁶

In 1996, EPA promulgated emission guidelines under section 111(d) for municipal solid waste landfills (MSWL). Specifically, these guidelines were based on MSWL emissions of “landfill gas,” a combination of “methane, carbon dioxide, and more than 100 different [non-methane organic compounds],” some of which have been determined to be carcinogens.²²⁷ In a prior, pre-1990 Clean Air Act proposed action, EPA had made the determination that section 111(d) was the appropriate tool to use to control these emissions.²²⁸ As the pre-1990 version of section 112 left EPA with considerable flexibility, the agency did not even explicitly consider use of section 112 at that time.²²⁹ In a revised 1991 *proposal* for MSWLs, shortly after the passage of the 1990 Amendments, EPA acknowledged that section 112 *could* be used for MSWLs, but, due to “uncertainty,” “found no reason to change that initial [pre-1990 Amendments] decision to regulate these emissions under section 111....”²³⁰ One year later, in its first action listing

²²² See National Emission Standards for Hazardous Air Pollutants from the Pulp and Paper Industry, 40 C.F.R. pt. 63 subpt. S (2012).

²²³ See National Emission Standards for Hazardous Air Pollutants for Source Category: Pulp and Paper Production, 63 Fed. Reg. 18504 (Apr. 15, 1998).

²²⁴ See Emission Guidelines and Compliance Times for Large Municipal Waste Combustors, 40 C.F.R. pt. 60 subpt. Cb; Emission Guidelines and Compliance Times for Hospital/Medical/Infectious Waste Incinerators, 40 C.F.R. pt. 60 subpt. Ce; New Source Performance Standards for Small Municipal Waste Combustion Units, 40 C.F.R. pt. 60 subpt. BBBB; Emission Guidelines for Commercial/Industrial Solid Waste Incinerators, 40 C.F.R. pt. 60 subpt. DDDD (currently subject to a No Action Assurance Letter); Emission Guidelines and Compliance Times for Other Solid Waste Incineration Units, 40 C.F.R. pt. 60 subpt. FFFF; Emission Guidelines and Compliance Times for Existing Sewage Sludge Incineration Units, 40 C.F.R. pt. 60 subpt. MMMM.

²²⁵ See Emission Guidelines for Municipal Solid Waste Landfills, 40 C.F.R. pt. 60 subpt. Cc.

²²⁶ See CAMR, 70 Fed. Reg. at 28657 (May 18, 2005) (establishing the later vacated 40 C.F.R. pt. 60 subpt. HHHH).

²²⁷ Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 61 Fed. Reg. 9905, 9906 (Mar. 12, 1996) [hereinafter 1996 MSWL Rule].

²²⁸ See Solid Waste Disposal Facility Criteria, 53 Fed. Reg. 33314, 33338 (proposed on Aug. 30, 1988).

²²⁹ *Id.*

²³⁰ Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 56 Fed. Reg. 24468, 24474 (proposed on May 30, 1991).

categories under the new section 112(c) authority established in the 1990 Amendments, EPA included “Municipal Landfills” on the list.²³¹ This listing action did not, however, *regulate* MSWLs under section 112. The first actual regulation of MSWLs, then, came 5 years after the revised proposal, in 1996. Merely citing to the 1988 and 1991 proposals, EPA announced that it “decided... to propose [emission guidelines] for existing MSW landfills under section 111(d).”²³² It did not analyze the requirements under section 112, as amended, to issue NESHAPs for “all categories” of HAPs, as it had defined the relevant “pollutant” as something that was not on the list in section 112(b) even though landfill gas constituted a combination of pollutants that *were* on that list. At this point, while EPA’s actions may have been contrary to section 112, they were not contrary to any interpretation of section 111(d) (regardless of how the agency may have resolved the dueling amendments issue) since MSWLs were listed but were not a “source category *regulated* under section 112.”

Critically, EPA made just this argument in the one document related to MSWLs which considered the section 111(d) issue. In a 382 page 1994 report, “Air Emissions from Municipal Solid Waste Landfills – Background Information for Final Standards and Guidelines,” cited as a justification for the 1996 regulation,²³³ EPA engaged in the first explicit analysis of the dueling 1990 Amendments to section 111(d).²³⁴ In the background document, EPA acknowledged that MSWLs are listed under section 112(c) and it expected to promulgate NESHAPs for that category by 2000.²³⁵ It also acknowledged the fact that the 1990 Clean Air Act contained two amendments to section 111(d).²³⁶ However, rather than trying to harmonize those two amendments, it treated section 302(a) as an error and presumed that, as printed in the U.S. Code, the only controlling amendment was in section 108(g).²³⁷ EPA justified this claim by pointing out that section 112 was changed from a pollutant-focused provision to a category-focused provision, and so section 111(d) should be consistent with this change.²³⁸ It discounted the Senate provision by pointing out that it is a “simple substitution of one subsection citation for another, without consideration of other amendments of the section in which it resides, section 112.”²³⁹ The agency did not, however, justify why it was not required to harmonize the provisions or provide evidence that the Senate

²³¹ See Initial List of Categories of Sources under Section 112(c)(1) of the Clean Air Act Amendments of 1990, 57 Fed. Reg. 31576, 31591 (July 16, 1992).

²³² 1996 MSWL Rule, 61 Fed Reg. at 9906.

²³³ 1996 MSWL Rule, 61 Fed Reg. at 9905.

²³⁴ See EPA, PUB. NO. EPA-453/R-94-021, AIR EMISSIONS FROM MUNICIPAL SOLID WASTE LANDFILLS – BACKGROUND INFORMATION FOR FINAL STANDARDS AND GUIDELINES (1994) [hereinafter MSWL BID].

²³⁵ MSWL BID, at 1-5.

²³⁶ MSWL BID, at 1-5.

²³⁷ MSWL BID, at 1-5 (“The EPA also believes that section 108(g) is the correct amendment”).

²³⁸ MSWL BID, at 1-5 (“...the Clean Air Act Amendments revised section 112 to include regulation of source categories in addition to regulation of listed hazardous air pollutants, and section 108(g) thus conforms to other amendments of section 112”).

²³⁹ MSWL BID, at 1-5.

provision was, in fact, included in error. The fact that an EPA not too far removed from the 1994 document was involved in drafting the 1990 Amendments generally, and the White House provision which was ultimately included in section 108(g) specifically, could be taken as evidence that it knew the true intent of Congress. On the other hand, because its position was ultimately rejected by the Senate, it also could be evidence that it had a self-interested position in ratifying its position after the fact through regulation. Regardless, in 1994 EPA interpreted, though not through rulemaking, that the appropriate construction of section 111(d) was to limit its application for source categories regulated under section 112. At that point, the agency's position was that if EPA went beyond listing MSWLs under section 112(c) and, in fact, *regulated* them under section 112(d), the agency would be precluded from continuing the section 111(d) emission guidelines.²⁴⁰

Almost 10 years later, in 2003, EPA finally issued NESHAPs for MSWLs.²⁴¹ It regulated a number of listed HAPs including vinyl chloride, ethyl benzene, toluene, and benzene.²⁴² However, it did not discuss in that rule,²⁴³ or the proposal to that rule,²⁴⁴ its previous position on the correct interpretation of section 111(d). Because the rule left in place the emission guidelines, it seemed to violate that previous position.²⁴⁵ In 2006 EPA revised both the NESHAPs and NSPS standards for MSWLs.²⁴⁶ At that point, however, the conflict had been implicitly resolved by the agency's interpretation of section 111(d) as

²⁴⁰ MSWL BID, at 1-5 to 1-6. The agency is actually somewhat unclear if the non-HAP pollutants for which it had issued emissions guidelines would be barred from section 111(d) regulation once it took the step to issue NESHAPs for MSWLs. On the one hand, it explicitly lists as one of the limits on "designated pollutants" those pollutants which are "emitted from a source category regulated under section 112," without mentioning any limits on whether those pollutants must be HAP pollutants. *See* MSWL Bid, at 1-5. On the other, EPA states "In addition, some components of landfill gas are not hazardous air pollutants listed under section 112(b) and thus will not be regulated under a section 112(d) emissions standard." This suggests that whether the pollutant considered is a HAP pollutant *is* a relevant question. Because EPA only discusses these issues in a background document and failed to make any changes to the actual definitions of "designated pollutant" or "designated category" in 40 C.F.R. § 60.21(a), it is somewhat unclear what it saw as the actual scope of the section 108(g) amendment.

²⁴¹ National Emission Standards for Hazardous Air Pollutants: Municipal Solid Waste Landfills, 68 Fed. Reg. 2227 (Jan. 16, 2003).

²⁴² *Id.* at 2227.

²⁴³ *Id.*

²⁴⁴ National Emission Standards for Hazardous Air Pollutants: Municipal Solid Waste Landfills, 65 Fed. Reg. 66673 (proposed on Nov. 7 2000).

²⁴⁵ The 2000 proposal would not have adopted a materially change in the emission standard set by sections 111(b), and (d) because it found that "there are no better controls than the collection and control system required by the EG/NSPS." *Id.* at 66678. The 2003 Rule also did not go beyond these requirements. 68 Fed. Reg. at 227 ("The final rule... contains the same requirements as the Emission Guidelines and New Source Performance Standards (EG/NSPS)"). However while the numeral emissions limits are the same, the emission guidelines are still in place as states are still required to meet their obligations under that section. *See* 40 C.F.R. pt. 60 subpt. Cc.

²⁴⁶ Standards of Performance, Emission Guidelines, and Federal Plan for Municipal Solid Waste Landfills and National Emission Standards for Hazardous Air Pollutants: Municipal Solid Waste Landfills, 71 Fed. Reg. 53272 (Sept. 8, 2006).

promulgated by the 2005 CAMR rule, as described below. The agency merely referred to that interpretation and change in the Code of Federal Regulations.

Finally, in 2005, the George W. Bush administration attempted to regulate mercury emissions from electric generating units under section 111 rather than, as was conventionally thought, as a hazardous air pollutant under section 112. Because mercury is listed in section 112(b), the agency was required to offer an interpretation at odds with its longstanding practice to substantively read section 111(d) as if it had not been amended in 1990.²⁴⁷ The Clinton Administration EPA explicitly thought that, based on its longstanding application, the agency did not have this legal authority.²⁴⁸ EPA acknowledged that neither it “nor commenters, have identified a canon of statutory construction that addresses the specific situation with which we are now faced, which is how to interpret two different amendments to the exact same statutory provisions in a final bill that has been signed by the President.”²⁴⁹ Nonetheless, EPA analogized the situation to a more pedestrian conflict of conflicting provisions and sought to “adopt[] a reading that gives some effect to both provisions.”²⁵⁰ It revised its definition of “designated pollutants” (those pollutants subject to section 111(d) emission guidelines) to include:

“any air pollutant, the emissions of which are subject to a standard of performance for new stationary sources, but for which air quality criteria have not been issued and that is not included on a list published under section 108(a) of the Act. Designated pollutant also means any pollutant, the emissions of which are subject to a standard of performance for new stationary sources, that is on the section 112(b)(1) list and is emitted from a facility that is not a source category regulated under section 112. Designated pollutant does not include pollutants on the section 112(b)(1) list that are emitted from a facility that is part of a source category regulated under section 112.”²⁵¹

This definition effectively harmonizes the provisions by allowing regulation under section 111(d) for *all* non-HAP, non-criteria pollutants, *and* those pollutants which are not *both* on the section 112(b)(1) list *and* emitted from a source category regulated under section 112. This makes both pollutant listing under section 112(b) and source category regulation under section 112 *necessary* conditions for a bar on section 111(d) for otherwise designated source categories.²⁵² Interestingly, it, therefore, would not have been a limit to EPA regulation of GHGs under section 111(d). In an effort to combat what they viewed as an

²⁴⁷ In fact, in line with its 1994 MSWL rule, EPA suggests that “it appears that the Senate amendment to section 111(d) is a drafting error...,” Delisting Rule, 70 Fed. Reg. at 16031, based on an entirely unpersuasive argument that the inclusion of the House-originating provision requiring EPA to consider the “imposition of the requirements of the Act” before regulating EGUs suggests that section 111(d) must have the flexibility to be one of those requirements, and so EGUs must not be precluded from regulation. This, of course, does not consider the possibility that the “other provisions” section 112(n)(1)(A) alludes to were provisions other than section 111(d).

²⁴⁸ Comment of Bob Perciasepe, Docket No. OAR-2002-0056 (Jun 28, 2004).

²⁴⁹ See Delisting Rule, 70 Fed. Reg. at 16031.

²⁵⁰ Delisting Rule, 70 Fed. Reg. at 16031.

²⁵¹ CAMR, 70 Fed. Reg. at 28649.

²⁵² This interpretation is effectively identical to the expansive interpretation proposed in Part III.C.

attempt by EPA to use an insufficiently stringent regulatory tool for the regulation of the health and environmentally dangerous pollutant mercury, states and environmental organizations sued EPA. In the proceeding litigation, environmental organizations argued that EPA's definition of designated pollutant was not a valid interpretation of section 111(d) as amended in sections 108(g) and 302(a) of the 1990 Amendments.²⁵³

As has been noted, *supra*, this rule was struck down. The D.C. Circuit's vacature of CAMR for failing to comply with the section 112(c) delisting procedure may have also had the effect of vacating EPA's interpretation reconciling the dueling amendments to section 111(d). While those provisions amending the definitional sections of 40 C.F.R. § 60.21(a) (which harmonized the dueling amendments) were not explicitly struck down,²⁵⁴ the court vacated both the existing source *and the new source* standards for EGUs, even though EPA's authority to issue new source standards for mercury was not called into question. The court reasoned that "'severance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own.'"²⁵⁵ Unlike the new source standards, however, which were promulgated on the assumption that existing sources of EGUs would also be regulated, the provisions interpreting the 1990 Amendments and amending 40 C.F.R. § 60.21(a) could easily have been adopted on its own. In fact, the court seems to rely on this interpretation in order to strike down the existing source provisions: "Under EPA's own interpretation of [] section [111(d)], it cannot be used to regulate sources listed under section 112."²⁵⁶

This issue became moot, however, during the Obama Administration. Perhaps in its zeal to erase the stain of the previous administration's CAMR scheme, in its February 2012 regulations replacing the vacated CAMR rule with specific NESHAPs for EGUs, the Obama administration revised the general regulations establishing EPA's process for issuing emission guidelines under Section 111(d).²⁵⁷ Specifically, and with no explanation in the rule, EPA amended the definition of "designated pollutant" (those pollutants which are eligible for regulation under section 111(d)) to be, word for word, what it had been before the change made in issuing the CAMR regulation: "(a) Designated pollutant means any air pollutant, the emissions of which are subject to a standard of performance for new stationary sources, but for which air quality

²⁵³ See Brief of Env'tl. Petitioners, at 20-24, *New Jersey v. EPA* 517 F.3d, at 20-24; Brief of Gov't Petitioners, at 27-29, *New Jersey v. EPA*, 517 F.3d.

²⁵⁴ See *New Jersey*, 517 F.3d at 583 (vacating "CAMR's regulations for both new and existing EGUs). Note that the regulations defining "designated pollutant" in 40 C.F.R. § 60.21(a) were *not* a regulations for existing *EGUs* but instead regulations of the emissions guidelines process generally.

²⁵⁵ *New Jersey*, 517 F.3d at 584 (internal citations omitted).

²⁵⁶ *New Jersey*, 517 F.3d at 583.

²⁵⁷ See National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed Reg. 9304, 9447 (2012) [hereinafter 2012 EGU NSPS & NESHAPs].

criteria have not been issued and that is not included on a list published under section 108(a) *or section 112(b)(1)(A) of the Act.*²⁵⁸ Because CAMR was the first time EPA had revised that section since the 1990 Amendments, the agency, perhaps inadvertently, proactively promulgated a regulation defining designated pollutants to be those pollutants not listed under section 108(a) and *not listed under a now non-existent section.*

The regulatory history of section 111(d) shows a provision that was rarely used. When used, however, EPA has been inconsistent in applying its own initial interpretation of the amendments. Moreover, it has largely ignored the issue and issued section 111(d) emissions guidelines, arguably in violation of the statute. And ironically, its one attempt to reconcile the amendments, in a way that would have allowed GHG regulation to go forward, was thwarted by litigation by environmentalists and a revision by the Obama administration.

PART III. INSTITUTIONAL CONSIDERATIONS IN RESOLVING THE CONFLICT

As with most initial interpretations of statutes, any attempt to reconcile dueling amendments will first be made by the agency tasked with implementing the underlying law. That agency will have to use both traditional tools of statutory construction and its own policy judgment in determining how best to resolve the conflict. If challenged, as most high-profile rules such as existing source regulations for GHGs are likely to be, a court will then determine whether the agency's approach is entitled to deference. If it is not, the court will have to resolve the conflict itself in a way consistent with its own institutional expertise.

This section considers which institutional actors are best positioned to tackle the difficult issue of dueling amendments. Specifically, it considers, normatively, based on the various legal theories underlying judicial deference to agencies and utilizing the section 111(d) conflict as a critical example of the general phenomenon, whether the resolution of dueling amendments is an example of when courts should defer to agency's interpretation of the law. It then applies existing judicial doctrine to evaluate whether, positively, a court is likely to be deferential to agency rulemaking on the issue of greenhouse gas regulation under section 111(d).

Because different institutional actors are better positioned to make different types of decisions, and because different institutional actors, therefore, use different interpretive tools in interpreting statutes, the choice of whether courts or agencies should be the actor to ultimately resolve dueling amendments is likely to have a large impact on *how* the conflict is resolved. The question of whether a court is likely to defer to agency interpretations resolving dueling amendments is therefore likely to be consequential in the

²⁵⁸ See 2012 EGU NSPS & NESHAPs, 77 Fed. Reg. at 9447; see also 40 C.F.R. § 60.21(2012) (emphasis added).

outcome of that resolution. The next section, therefore, evaluates *how* dueling amendments should be resolved in light of which institutional actor makes the decision.

A. Theories of Judicial Deference to Agencies as Applied to Dueling Amendments

As is now familiar to any administrative law student, the current judicial doctrine of agency deference was formulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*²⁵⁹ *Chevron* lays out a two-step inquiry: courts will generally defer to agency interpretations of the statutes which they are tasked to administer when, (step one) the provisions in question are left ambiguous by the text of the statute and, (step two) the agency interpretation is reasonable. However, while the Supreme Court in that case laid out a very concrete and easy to recount test for when a court is required to provide deference to an agency, “the *Chevron* Court’s approach was much clearer than the rationale that accounted for it.”²⁶⁰ While the court proffered a number of rationales, the lack of clarity in the doctrine’s underlying purpose has made it difficult to determine when courts will apply the framework in new circumstances.²⁶¹ And because these underlying justifications can run in different directions in a particular case, the Court’s lack of clarity also makes it difficult to normatively evaluate when delegation is appropriate.

On its face, the case of dueling amendments does not seem like the type of situation a court would be particularly deferential about. It seems unlikely that Congress *intended* to delegate to an agency when it seems it did not even realize it was making an error in the first place. The resolution of two conflicting statutory provisions requires less substantive expertise and more creative legal interpretation to fit the two texts together as well as possible. However, a closer examination demonstrates that while dueling amendments very well may not have received deference in a pre-*Chevron* world, the rationales underlying *Chevron* seem to apply just as much this type of difficult statutory interpretive problem as any other.

Implied Delegation

One significant justification for *Chevron* deference is that courts must defer to agencies because Congress has told them to do so. The Court, in *Chevron*, argued that even when Congress has not explicitly provided for agency interpretive power in a statute, “sometimes the legislative delegation to an agency on

²⁵⁹ 467 U.S. 837 (1984).

²⁶⁰ Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 197 (2006).

²⁶¹ See Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 899 (2007) (discussing quantitative studies of the Supreme Court and Circuit Court applications of *Chevron*).

a particular question is implicit rather than explicit.”²⁶² Regardless of if the delegation is implicit or explicit, courts are bound by congressional wishes as to how its laws are interpreted.

On the one hand, dueling amendments do not seem to be the type of thing that Congress actually would intend to delegate. Unlike ambiguous terms which require specification that Congress is unwilling or unable to make due to lack of expertise or political will, dueling amendments *look* like drafting errors. Congress would not reasonably have included two provisions amending the same language intentionally. Therefore, it seems unlikely that they would also have intended to delegate the construction of those provisions to an agency.

However, two factors suggest that a delegation theory may still allow for deference to agency interpretations of dueling amendments. First, it is unclear that dueling amendments are, in fact, as unintentional as they may seem. While it is unlikely that Congress intended to include two conflicting amendments to the same language, it is possible that they may not have been willing or able to resolve the conflict once it became known. For example, given the contentious nature of the Conference Committee and the inability to resolve even spelling errors after the fact, a resolution to the dueling amendments to section 111(d) was unlikely even if Congress knew about it before sending the 1990 Clean Air Act to President Bush. A conscious decision not to remove an error suggests that Congress intended *someone* to resolve the conflict. In this case, dueling amendments are not that different than other types of ambiguity. If the parties cannot come to a particular compromise to a disagreement, they will often leave terms ambiguous and hope that the issue will be resolved in their favor by agencies or the courts.²⁶³ As such, it would not be unreasonable to view the lack of a resolution as an implied delegation to another institutional actor to resolve the dispute. In the aftermath of *Chevron*, Congress at least knows that in such circumstances, these disputes are likely to be resolved by the agency rather than the courts.²⁶⁴

Second, the delegation argument is, in reality a legal fiction rather than a true account of the delegation intent of Congress.²⁶⁵ In situations where Congress has explicitly delegated power to the agency, courts have no choice but to defer. However, the background law of the Administrative Procedures Act seems to suggest that Congress intended courts, not agencies to make legal determinations.²⁶⁶ In fact, both Justices Breyer and Scalia have acknowledged that the implied delegation justification of *Chevron* is really a legal

²⁶² *Chevron*, 467 U.S. at 844.

²⁶³ Interview with Pope Barrow.

²⁶⁴ See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE. L.J. 511, 517 (“Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.”).

²⁶⁵ See David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 212 (2001).

²⁶⁶ See Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2585 (2006).

fiction.²⁶⁷ To say that implied delegation is a legal fiction is not to say that it is wrong, but merely that it is a question of judicial rather than congressional policymaking. Therefore it is insufficient to point to the legislature in justifying deference. Deference, then, must rely on other more substantive grounds.

Expertise

The purpose of the administrative state, as originally conceived in the New Deal era, was as a tool to solve social problems using technocratic expertise.²⁶⁸ From the beginning, then, a key justification for agency action has been that the agencies (contrasted with courts) are the repositories of expertise and that the “best” solutions can be developed by those with the relevant expertise.²⁶⁹ Courts have applied a similar justification as a reason to defer to agency determinations of *law*. Some questions of law are so bound-up in policy outcomes that a resolution requires more than an evaluation of the law but also of the substantive consequences of any particular interpretation. *Chevron* itself provides a good example of this type of definitional issue. In that case, the court evaluated whether the term “stationary source” in the Clean Air Act could be applied to plants as a whole, rather than to individual smokestacks as it had historically. The choice of definition was not obvious from the statute but was consequential because it impacted when construction or modifications of smokestacks within an already built plant triggered additional permitting and emissions limitations requirements.²⁷⁰ The resolution of this definitional question, then, directly tied in to substantive, technical questions of environmental impact and economic tradeoffs.²⁷¹ The Supreme Court found that, in part based on EPA’s expertise in these matters and the court’s lack thereof, it would defer to EPA’s choice between a smokestack-level or plant-level definition of source.²⁷²

It is not clear whether deference to agencies in resolving dueling amendments is appropriate under the expertise justification. On the one hand, dueling amendments are somewhat different from situations, like the one presented in *Chevron*, where an unclear congressional use of a word can be interpreted in two equally plausible ways. In that case, it was not clear that Congress had considered the policy question underlying each potential definition, and that, therefore, the best outcome would be better determined by the institutional actor with substantive expertise. Dueling amendments do not present the same type of ambiguity the resolution of which is dependent on expertise. Whereas *Chevron* involved two plausible definitions of the same term, resolving dueling amendments involves construing seemingly contradictory

²⁶⁷ See Sunstein, 115 YALE L.J. AT 2590.

²⁶⁸ See JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

²⁶⁹ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

²⁷⁰ *Chevron*, 467 U.S. at 850-51.

²⁷¹ *Id.* at 863.

²⁷² *Id.* at 865.

congressional directions. While any particular construction will almost certainly have some substantive outcome, the interpretive task is not necessarily one involving applying expertise to choose among equally plausible options, but in reconciling what Congress meant in each provision and how those provisions could be read together to create a coherent statutory framework. This, at heart, involves *legal* expertise which courts possess, rather than *substantive* expertise which agencies possess.

However, in two different ways, agencies may, at least sometimes, still be considered to hold expertise relevant to construing dueling amendments. First, unlike courts, agencies are often at the table when the statute itself is being constructed. In this sense, agencies may have a better understanding of congressional intent than courts and so may be the more appropriate institutional actor to divine congressional intent in those cases when it is most difficult to determine from the text itself or the recorded legislative history.²⁷³ The case of section 111(d) is a perfect example of when the agency may have a better vantage on the “correct” interpretation – that is, the one intended by Congress – than the courts. EPA was directly involved in writing large portions of the 1990 Amendments, including one of the two amendments ultimately included to modify section 111(d). While courts can attempt to use textual clues and statutory structure to divine the general purpose of the section 108 amendment changing the scope of section 111(d) to focus on categories, it is not obviously clear that that interpretation would be correct. EPA is in a much better position to implement a rule consistent with the original *purpose* of both provisions. This case, however, is also a prime example of why this justification is potentially problematic. First, EPA was not a disinterested party with regard to the two amendments. The most rational interpretation of section 108 is that it was included as part of the Bush Administration’s general attempt to provide flexibility to the agency in determining whether HAP categories were ultimately regulated under section 111 or section 112. That position was generally rejected by both the Senate and the House when they changed the rest of the provision in section 112 to eliminate virtually all of the flexibility. EPA’s interpretation, then might *intentionally* fail to account for the fact that the agency ultimately lost in Congress. This is a classic example of why interpretive power and legislative power are located in separate branches of government in the U.S. institutional structure.

Second, the 2013 EPA may not have the expertise it possessed in 1990 as to what Congress ultimately intended when it enacted the dueling amendments. There is direct evidence of that in this case. In EPA’s interpretation closest in time to the enactment of the 1990 amendments, the 1994 municipal solid waste landfill rule, the agency determined that Congress had actually included section 302 by accident and that the category-based approach should apply to the exclusion of the pollutant-based approach. Any

²⁷³ Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 901 (2007).

interpretation that EPA makes in 2013 which allows regulation of GHGs under section 111(d) to go forward is by definition a rejection of that initial interpretation. It is not clear why, under a rationale based on agency expertise in congressional intent, the court would give deference to the 2013 EPA interpretation in the face of the contrary 1994 interpretation.

The second way that the agency could be considered to have expertise in the face of dueling amendments is in the impact any particular construction will have on the broader statutory and regulatory scheme. While courts must resolve particular cases and controversies, agency regulations are forward looking and are made in light of the other statutes and programs that it administers. The complex interactions that resolving ambiguities in one part of a statute can have on other parts of a statute or other statutes altogether suggests that the proactive program-wide determination is more appropriate.²⁷⁴ For example, EPA is in a much better position to know how the construction of section 111(d) will impact its need and ability to list new source categories under section 112 than is the courts. Similarly, it is much more competent in choosing among and coordinating between the highly complex mix of provisions of the Clean Air Act which *can* be applied to GHGs. In fact, while substantive expertise is a justification given by the *Chevron* court, that case explicitly moved away from the previous legal standard which only gave deference to agencies for mixed questions of law and fact.²⁷⁵ By rejecting the distinction between pure questions of law and mixed questions of law and fact which had been dispositive in granting deference pre-*Chevron*, the Supreme Court acknowledged that substantive expertise was relevant even in those cases that look like pure questions of law.²⁷⁶ So long as the statutory provisions are, in fact, ambiguous, policy judgments are required and those are best left to the substantive experts even if the matter appears to be one that had historically been address by experts in legal interpretation – the courts.

Democratic Accountability

A second justification offered for deference in *Chevron* itself is the idea of democratic accountability. Though agency decision makers are often referred to, derisively, as “unelected federal bureaucrats,”²⁷⁷ this phrase is highly misleading in terms of the relative accountability of potential interpreters. As *Chevron* recognized, “[w]hile agencies are not directly accountable to the people, the Chief Executive is...”²⁷⁸ And because agencies are controlled by the President through personnel decisions, executive

²⁷⁴ See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 928 (2002-2003).

²⁷⁵ See Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2094 (1990).

²⁷⁶ See Sunstein, 90 COLUM. L. REV. at 2095-96.

²⁷⁷ See *City of Arlington v. FCC*, 569 U.S. _____, at 14 (2013) (slip. op.)

²⁷⁸ See *Chevron*, 467 U.S. at 865.

orders, and other informal means,²⁷⁹ they too are ultimately accountable to the democratic process.²⁸⁰ Moreover, while traditional explanations about agency accountability to Congress were likely too simplistic,²⁸¹ Congressional control over the purse strings, the Senate’s advice and consent powers, and Congress’s general subpoena and hearing powers allow that political branch to influence agency action. Courts, on the other hand, are, by design, not accountable to the people.²⁸² Any judicial determination of the “right” construction of dueling amendments can only be corrected through congressional action. And the reliance on *legislative action* by Congress to fix interpretive mistakes by the court is highly problematic in an era of congressional inaction. Historic increases in congressional polarization,²⁸³ combined with the emergence of institutional constraints such as a de facto sixty vote supermajority requirement in the Senate means that correction of mistakes through the legislative process is unlikely. This puts additional pressure on other forms of democratic control over substantive decision-making including informal congressional control and Presidential control. Agencies, rather than courts, are more accountable to democratically elected actors and so deferring to their judgment in areas about relative values is appropriate.

Deference to agencies in resolving dueling amendments is particularly appealing under the accountability justification. In normal statutory construction problems, the court sees its role as enforcing the intent of the democratically elected branches as expressed through bicameralism and presentment. Deference may be appropriate when that intent is unclear, but to the extent Congress has clearly spoken to the question at issue, that should trump agency policy preferences. Dueling amendments, however, exist because the democratically accountable actors in Congress and the President were unable or unwilling to resolve the particular substantive dispute between two ways of approaching the same section. Therefore, there is no surefire way to determine what the democratic branches meant when enacting two conflicting provisions. When the statutory provisions were not accountable in the first instance, the argument for deference to an accountable actor is even stronger.

Democratic accountability is particularly important and is most likely to be exercised for major substantive decisions.²⁸⁴ While there is no reason to think dueling amendments as a whole are more likely

²⁷⁹ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2255 (2000-2001).

²⁸⁰ *But see* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

²⁸¹ *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 470-71 (2003) (describing the transmission belt model and criticisms to it).

²⁸² *But see* BARRY FREIDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (Farrar, Straus and Giroux, 2009).

²⁸³ *See* SEAN M. THERAULT, *PARTY POLARIZATION IN Congress* (2008).

²⁸⁴ However, at the same time, the court has been reluctant to grant deference when the agency seems to be engaging in significant substantive policymaking far afield from the original intent of its statute. *See* *FDA v. Brown &*

to occur in substantively significant areas as opposed to small technical ones, it is certainly the case that the section 111(d) conflict involves a major decision. Regulating or not regulating existing sources of greenhouse gases is the type of action that will be written about widely, that will engage the general public as well as small groups of influential actors, and that is likely to have an impact on President Obama's legacy. The level of popular support for this type of regulation can impact the results of future congressional and presidential elections, and will likely be determinative in whether the regulations continue to be implemented and expanded. Courts should, therefore, be particularly wary of subverting the democratic process by making the determination themselves rather than deferring to a politically accountable branch of government.

Comparative Institutional Competence

Professors Cass Sunstein and Adrian Vermeule have advanced an interpretation of the underlying justifications for *Chevron* deference which depends on comparative institutional competence between courts and agencies.²⁸⁵ In their view, the judiciary and agencies have different institutional strengths when making interpretive decisions. Courts are experts in purely legal statutory interpretation and are therefore much better at making formalist judgments about the meaning of words in a grammatical and structural context than at divining congressional purpose or making value judgments.²⁸⁶ Agencies, on the other hand, are better positioned to interpret statutes when such an interpretation ultimately involves value judgments in the weighing of competing substantive considerations.²⁸⁷ In this view, deference to agencies is appropriate in circumstances where, after exhausting the legal statutory interpretive tools, ambiguity remains. In those instances, "the resolution of the ambiguity calls for an inquiry into something other than the instructions of the enacting legislature,"²⁸⁸ such as substantive preferences.

In this way, Professors Sunstein and Vermeule's approach is appealing because it incorporates both the expertise and political accountability justifications into a more coherent theory of judicial deference to agency interpretations. Statutory interpretation which calls for resolving value judgments are better made by agencies than courts because agencies have the fact-based expertise in accurately weighing the costs

Williamson Tobacco Corp., 529 U.S. 120 (2000). This belies the fact that an agency's democratic accountability may not be enough to overcome other background norms in the administrative state such as the nondelegation clear statement rule. *But see Id.* at 190-91 (Breyer, J., dissenting) (Any "decision of this magnitude—one that is important, conspicuous, and controversial" will be subject to "the kind of public scrutiny that is essential in any democracy. And such a review will take place whether it is the Congress or the Executive Branch that makes the relevant decision.")

²⁸⁵ See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2002-2003).

²⁸⁶ *Id.* at 888.

²⁸⁷ *Id.* at 928.

²⁸⁸ Sunstein, 90 COLUM. L. REV. AT 2086 (1990)

and benefits of particular interpretations and the institutional incentives to enact policy which can withstand democratic scrutiny.

In addition to the expertise and political accountability components of the institutional competence argument, agencies are institutionally more flexible interpreters as compared to courts. As Congress has become unable to reliably change statutes to address changing circumstances, it has become more important for flexible administration of the law.²⁸⁹ Given historic increases in congressional polarization,²⁹⁰ we are less and less “in a legal universe where Congress can be expected to correct... problem[s]” which would greatly reduce the pressure for agency correction.²⁹¹ While courts are constrained by *stare decisis*, agencies are able to “adopt old provisions to unanticipated problems.”²⁹²

Moreover, agencies, unlike courts, are explicitly asked, when it does not conflict with the bounds of the statutes, to pick interpretations that maximize social welfare. Executive Orders 12866 and 13563, which bind agencies, but not the courts,²⁹³ require that regulations “maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity).”²⁹⁴ These orders have, in recent years and under both Republican and Democratic administrations, pushed agencies towards statutory interpretations and policy decisions which are welfare maximizing (broadly defined). Placing the decision-making authority with the agency, rather than the courts, is an explicit decision to choose an interpretation that is welfare maximizing over one that complies with formalist rules of statutory interpretation. Thus an interpretive rule which can take advantage of agency expertise and policymaking flexibility is more likely to get to the “right” statutory scheme so long as it does not conflict with what Congress thought the “right” scheme was as determined by statutory text.

While the Supreme Court has not explicitly advanced this institutional competence justification, it fits well into the current *Chevron* jurisprudence. First, courts are more likely to utilize their own tools of statutory interpretation at step one in areas where they have better competence. For example, in areas where there are sensitive state-federal interactions, federal courts are more likely to interpret statutes in

²⁸⁹ See Jody Freeman & David Spence, *Old Statutes, New Problems, Draft* (2013).

²⁹⁰ See SEAN M. THERAULT, PARTY POLARIZATION IN CONGRESS (2008).

²⁹¹ See Sunstein, 101 MICH. L. REV. at 930.

²⁹² Sunstein, 92 VA. L. REV. at 206. In fact, agencies may even be able to overcome *past* judicial statutory constructions, provided that the language in question meets the requirements for *Chevron Deference*. See *Brand X*.

²⁹³ For additional justification for the appropriateness of different forms of statutory interpretation between agencies and courts, including that agencies are subject to these executive orders, see Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference*, 57 ADMIN. L. REV. 501, 505-507 (2005).

²⁹⁴ See Executive Order 13563 § 1(b)(3).

ways that protect state power than are federal agencies determined to fulfill their mission.²⁹⁵ Therefore, courts have incorporated federalism plain-statement rules into the *Chevron* step one inquiry as to whether Congress has spoken to the question at issue. Another relevant area where courts may have institutional interpretive advantages to agencies is in ensuring that Congress has not delegated legislative power to agencies beyond its constitutional capacity to do so. Courts have enforced a sort of non-delegation doctrine despite rejecting the widespread use of that doctrine as a means of overturning a statute. In fact, because courts would have a difficult time consistently administering the nondelegation doctrine, they can instead utilize the canon of construction at step one to ensure sufficient legislative deliberation and consideration of questionable delegation.²⁹⁶

The idea that agency statutory interpretation and judicial statutory interpretation can and should be somewhat different enterprises is not universally shared. For example, Richard Pierce has argued that at the step one inquiry, agencies should do their best in interpreting a statute to mimic how it believes a court will approach the question, if for no other reason than as a strategic attempt to avoid vacated regulations.²⁹⁷ Jerry Mashaw, to whom Pierce's argument is aimed, responds persuasively that (1) strategic considerations aside, normatively agencies and courts should be using different tools when making interpretive decisions,²⁹⁸ and (2) strategically agencies consider the extent to which judges are willing to defer at *Chevron* step one. To the extent that judges are willing to give deference beyond the particular interpretation they would have arrived at, agencies can take that into account when making policy-driven interpretations.²⁹⁹ At the step two inquiry, Pierce objects that the agency isn't actually doing interpreting but policymaking and so identifying this as a different approach to courts is beside the point.³⁰⁰ Pierce, however, relies on an untenable distinction between policymaking – action he deems as perfectly appropriate for an agency to engage in and the real basis of the *Chevron* step two inquiry – and interpretation. As Mashaw points out, however, this makes Pierce's objection a distinction without a difference.³⁰¹

²⁹⁵ See e.g., *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

²⁹⁶ See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

²⁹⁷ See Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 203 (2007) (“To the best of its ability, the agency should attempt to sue exactly the same interpretive process a court would use – any intentional variation from that judicial interpretive process would be a self-defeating exercise in futility.”)

²⁹⁸ Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 898 (2007).

²⁹⁹ *Id.* at 901.

³⁰⁰ See Pierce, 59 ADMIN. L. REV. at 199.

³⁰¹ Mashaw, 59 ADMIN. L. REV. at 898.

Dueling amendments are, in many ways, a strong candidate for judicial deference under this theory. While close-reading of statutes has been a traditional judicial job, the nature of conflicting amendments is such that parsing of enacted text may yield suboptimal results. Cases of dueling amendments are cases where more policy flexibility is needed in crafting solutions, as both the text itself and a broad conception of “congressional purpose” are unclear to the point of nonexistence. Therefore, any decision will ultimately be a value judgment.³⁰² Value choices are embedded in any interpretive act. However, as the text, and the wishes of the legislature become less clear, the act of interpretation must rely more heavily on either normative values or bright-line rules, as there is nothing else to lean on. The case for normative values is strong, as it is more likely to reach a workable solution.

The primary impact of the institutional interpretation theory, and one of its great virtues, is that the statutory interpretive tools can vary between courts and agencies. Because agencies possess substantive expertise and democratic accountability, they need not rely as heavily on formalist textual interpretations of statutes.³⁰³ Courts, on the other hand, lacking these institutional advantages, are more dependent. The ability to more flexibly interpret an area of the law which is unlikely to easily yield to formal rules, then, is a strong argument in favor of judicial deference to agency interpretations of dueling amendments. In these circumstances, Congress did not speak clearly as to text or to purpose. It becomes necessary to use other means of making a determination. Flexibly relying on agencies to maximize social welfare so long as they are within the bounds of plausible interpretations of both statutory provisions seems as good a way as any to resolve the conflict. Agencies will be able to bring their expertise to bear on this question and will be held accountable for the value judgments they make in their particular resolution of the conflict.

However, while this theory of agency deference is persuasive, courts may still feel uncomfortable deferring to agencies in what seems to be a purely legal question of conflicting text.³⁰⁴ In that case, courts will be constrained by the currently permissive *Chevron* two-step approach in determining that it is the judiciary rather than the agency that should be making the ultimate interpretive decision. Creative interpretation of the provisions of the dueling amendments, however, can provide a means for courts to overcome this doctrine. In that case, rather than relying on traditional judicial tools such as textual analysis, courts should worry less about congressional intent as expressed through text (or any other means for that matter) and instead attempt to maximize their institutional advantages of bringing

³⁰² See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 197 (2006).

³⁰³ See Sunstein, 101 MICH. L. REV. at 928; Mashaw, 57 ADMIN L. REV. at 536.

³⁰⁴ See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (“Congress may have intended not to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, say, where an unusually basic legal question is at issue.”)

coherence and predictability to the law. By implementing clear, bright-line standards, courts can provide regulated entities and other interpreters predictability and can attempt to force more considered and accountable legislative policymaking.

B. Dueling Amendments in the *Chevron* Context

While normative considerations can inform how a court should approach the first-in-time agency action of interpreting dueling amendments, actual courts are likely to apply, to the best of their ability, the existing *Chevron* framework. While it is generally conceived of as a two-step test, in fact it has become three stepped.³⁰⁵ First, courts must determine if Congress has “delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”³⁰⁶ Second, courts determine whether Congress has spoken clearly on the precise question at issue. If it has not, then the court will defer to the agency’s interpretation of the statute so long as that interpretation is reasonable.

Supreme Court and D.C. Circuit jurisprudence suggests that the case of dueling amendments does not pose any of the traditional barriers which courts have used to limit agency deference within the *Chevron* framework. So long as EPA’s determination is reasonable, current doctrine suggests that it will be EPA, rather than the courts, that ultimately decide how to reconcile the dueling section 111(d) amendments. However, given the fact that this exact situation has yet to be considered by the courts, a new carve-out at any of steps zero, one, or two is possible. This section briefly outlines current doctrine and consider how it may apply to the case of dueling amendments. Part IV considers, in more depth, the particular interpretations of section 111(d) that agencies and courts may make in light of the *Chevron* framework.

Chevron Step Zero (Mead)

The primary inquiry courts have used to determine whether deference is owed to an agency at all (regardless of if the particular question at issue is clearly resolved by Congress) has historically related to the formality of the procedure used to make an interpretation.³⁰⁷ The canonical *Chevron* step zero case, *United States v. Mead Corp.*, creates a safe harbor whereby agency interpretations of law promulgated, pursuant to statutory authority, through formal adjudication or notice-and-comment rulemaking were considered worthy of deference.³⁰⁸ Subsequent questions have largely focused on whether deference is nonetheless due for agency interpretations that do not meet this safe harbor.³⁰⁹ Despite some language

³⁰⁵ See Sunstein, 92 VA. L. REV.

³⁰⁶ *United States v. Mead Corporation*, 533 U.S. 218, 226-27 (2001).

³⁰⁷ See *Mead*, 533 U.S. at 230.

³⁰⁸ See Adrian Vermeule, *Mead in the Trenches*, at 3 (2003).

³⁰⁹ See Sunstein, 92 VA. L. REV.

suggesting there may be space for courts to question Chevron’s applicability on a case-by-case determination depending on “the nature of the question at issue,”³¹⁰ the Court has shied away from, as Justice Breyer has advocated, rejecting *Chevron* in a particular instance “because Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation...”³¹¹

In fact, the Supreme Court’s most recent agency deference case seems to put to rest the hope of a provision-by-provision inquiry into whether the underlying justifications considered in Part III.A, *supra*, are sufficiently satisfied to deem *Chevron* applicable. In that case, *City of Arlington v. FCC*,³¹² the Court considered whether the FCC’s regulatory definition of the scope of its authority should receive *Chevron* deference.³¹³ Specifically, the Telecommunications Act of 1996 “requires state or local governments to act on wireless siting applications within a reasonable period of time...,”³¹⁴ which the FCC defined as a particular 90 or 150 day timeframe. Petitioners claimed that, despite using sufficient procedures and its general rulemaking authority, the FCC lacked the authority to interpret the ambiguous phrase “reasonable period of time” because a conflicting savings clause and the text of the judicial review provision “together display a congressional intent to withhold from the Commission authority to interpret” the relevant phrase.³¹⁵ In a concurrence, Justice Breyer again attempted to move the ball forward, beyond the suggestive language he included in *Barnhart* and in concurrence in *Brand X*, to make the step zero inquiry provision-by-provision.³¹⁶ And again, Justice Scalia, writing for the majority, rejected such an approach,

³¹⁰ See *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

³¹¹ *Brand X*, 545 U.S. at 1004 (Breyer, J., concurring). For a discussion of Justice Breyer’s case-by-case preferences and the Court’s current rejection of this approach, see Sunstein, 92 VA. L. REV. at 218-19.

³¹² 568 U.S. ____ (2013).

³¹³ In an additional other holding, the Court rejected as a false premise the distinction between an agency interpretation which defines its own jurisdiction – characterized as “big, important” “interpretations” – and “simpl[e] applications of jurisdiction of jurisdiction the agency plainly has” – characterized as “humdrum, run-of-the-mill stuff.” *City of Arlington*, 568 U.S. at slip. op. 5. This rejection also seems to deal a blow to the idea that the court need not defer to EPA’s interpretation of section 111(d). The conflicting amendments raise a question as to the appropriate extent of EPA’s jurisdiction to regulate particular existing sources of pollutants under section 111(d). By holding that *Chevron* applies to interpretations of jurisdiction just as it does to other interpretations, the Court removed a potential obstacle that the D.C. Circuit had erected to granting deference in the first instance. The D.C. Circuit, where all Clean Air Act interpretations are reviewed, has seemed particularly concerned with claims of statutory interpretative power which aggrandize an agency’s role beyond the “hum-drum” interpretation of a particular statutory scheme it has been charged with implementing. In that vein, the Circuit has held that, contra *City of Arlington*, Congress has not delegated to an agency the authority to determine the scope of its own jurisdiction. See *Michigan v. EPA*, 268 F.3d 1075, 1080-82 (D.C. Cir. 2001); see also Mark E. Lebel, *Lack of Judicial Cair: Chevron Deference and Market-Based Environmental Regulations*, 20 N.Y.U. ENVTL. L.J. 277, 322 (discussing a split in circuits and, at the time of publication, a lack of Supreme Court doctrine on this issue). While the section 111(d) amendments could arguably involve an interpretation of the agency’s own jurisdiction, this limit is no longer applicable post-*City of Arlington*.

³¹⁴ *City of Arlington*, 568 U.S. at slip. op. 2.

³¹⁵ *City of Arlington*, 568 U.S., at 2 (slip. op.)

³¹⁶ *City of Arlington*, 568 U.S. (Breyer, J., concurring).

concerned that it “would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*.”³¹⁷ The majority therefore held that “the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.”³¹⁸ Given that the Clean Air Act contains an general delegation of authority to the agency to make rules “necessary to carry out [its] functions,”³¹⁹ so long as EPA satisfies the *Mead* safe harbor of notice and comment rulemaking, the court will likely move on to steps one and two of the *Chevron* test.

Chevron Step One

Constrained by the general level of the inquiry at step zero, the next place that a court might refuse to grant deference to EPA, consistent with current doctrine, is at step one. Given the analysis in Part I.C, it is hard to conceive of the dueling amendments as a case where Congress has clearly spoken to the question at issue. However, courts, have gone to different, and sometimes tortured, lengths to determine that a statute is “clear.”³²⁰

Moreover, *Chevron* specifies the inquiry at step one is not whether the terms of a statute are ambiguous to a person on the street, but whether they are ambiguous in light of “the traditional tools of statutory construction.”³²¹ If the court determines, through these tools, that Congress has clearly spoken to the question at issue, it will use that interpretation rather than any that EPA has come up with. In the case of dueling amendments, the court could come to this conclusion in a variety of ways: (1) by determining that the conflict yields unambiguous nonsense which should be interpreted to be void, (2) by specifying a judicially created canon of construction for dueling amendments (such as a decision-rule to pick the last in order) which makes the text clear, or (3) by using all of the grammatical, semantic, and contextual tools at its disposal to come to a textual resolution of the dueling amendments. Each of these possible step one resolutions are considered in Part IV.

Finally, a court could take a somewhat more radical step. In *FDA v. Brown & Williamson Tobacco Corp.*,³²² the Supreme Court effectively imported a case-by-case determination of the appropriateness of deference into the step one inquiry. FDA issued a regulation defining “drug” defined in statute as “articles

³¹⁷ *Id.* at 16 (slip. op.).

³¹⁸ *Id.*

³¹⁹ CAA § 301(a)(1).

³²⁰ *Compare* Babbitt v. Sweet Home Chapt. Comms. for Ore., 515 U.S. 687 (1995) *with* *Chevron U.S.A., Inc.*, 467 U.S.

³²¹ *Chevron*, 467 U.S. at 843 n.9.

³²² 529 U.S. 120 (2000).

(other than food) intended to affect the structure or any function of the body”³²³ to include tobacco and tobacco products. This aggressive regulatory action seemed, to the Court, far afield from that intended by Congress in the Food Drug and Cosmetics Act. Utilizing the legal fiction justification of implied delegation, the Court held that in “extraordinary cases” it should “hesitate before concluding that Congress has intended such an implicit delegation.”³²⁴ The extraordinary cases to which the Court was referring was not a strange legislative drafting but “decision[s] of such economic and political significance.”³²⁵ A court could, however, choose to expand the scope of this nondelegation canon, as applied at step one, to the case of dueling amendments and resolve the conflict on its own.

In fact, Cass Sunstein has argued that courts should include substantive canons generally manifested through clear statement rules in the list of traditional tools which can overcome *Chevron* at step one.³²⁶ Sunstein argues that these clear statement rules often “ensure legislative rather than merely administrative deliberation about constitutionally troublesome issues.”³²⁷ As outlined in Part III.A, *supra*, one such issue that the courts may be concerned with is the nondelegation doctrine. While of dubious constitutional foundation and effectively rejected as an independent reason to reject a statute, courts have used the principle that Congress must provide an intelligible principle to agencies when evaluating whether an agency interpretation is consistent with a statute. In the most famous case, commonly referred to as the *Benzene* case, the court determined that an interpretation of the Occupational Health and Safety Act which allowed the Occupational Health and Safety Administration to set a level of concentration of benzene irrespective of the costs of compliance could not be consistent with the nondelegation doctrine, even if the agency was interpreting a seemingly ambiguous statute.³²⁸ A court could similarly argue that any interpretation of the dueling amendments which allowed EPA to reconcile the conflict involves, effectively, a reading which gives EPA such discretion that there is no intelligible principle. It would be up to the court, therefore, to read the statute in a way that encourages legislative deliberation rather than relying on agency deliberation. “The comparative advantages of the agencies are not at stake when a constitutional norm that argues in favor of legislative deliberation is involved; indeed, the institutional considerations counsel against acceptance of the agency’s view.”³²⁹

Chevron Step Two

³²³ See 21 U.S.C. § 321(g)(1)(C) (1994).

³²⁴ *Brown & Williamson*, 529 U.S. at 159.

³²⁵ *Id.* at 160.

³²⁶ Sunstein, 90 COLUM. L. REV. at 2110-15.

³²⁷ *Id.* at 2111.

³²⁸ *Industrial Union Dep’t v. American Petroleum Inst.*, 448 U.S. 607 (1980). The Benzene case was, of course, before *Chevron*, however the Court has applied similar logic to the *Chevron* step one inquiry. See *Brown & Williamson*, 529 U.S.

³²⁹ Sunstein, 90 COLUM. L. REV. at 2114.

Finally, *Chevron* step two serves as a means of restricting particular agency interpretations, rather than as a requirement for any one particular interpretation. Therefore, the bounds of reasonableness will largely be considered in Part IV, *infra*. However, as a general matter, the D.C. Circuit has held that “when there are multiple ways of avoiding a statutory anomaly, all equally consistent with the intentions of the statute’s drafters (and equally inconsistent with the statute’s text), we accord standard *Chevron* step two deference to an agency’s choice between such alternatives.”³³⁰ Therefore, the relevant inquiry when evaluating individual agency interpretations of the dueling amendments to section 111(d) is to consider whether those interpretations are, in fact, equally consistent with the intentions of the statute’s drafters and equally inconsistent with the statute’s text. Given the underlying institutional expertise justification for *Chevron*, outlined in Part III.A, *supra*, EPA need not rely on the exact same statutory interpretive tools as a court would have in order for its interpretation to be deemed reasonable.

In sum, the strongest normative case for deference – that it encourages interpretations of statutes in ways that best comport with the institutional strengths of both courts and agencies – and present *Chevron* doctrine, suggest that the general resolution of dueling amendments should and will be made by agencies, and that the particular resolution of section 111(d) should and will be made by EPA. This general conclusion, however, is dependent both on the agency interpreting the statute in a way that courts consider reasonable at step two, and on the court overcoming a negative first-glance reaction to providing deference for this type of interpretation. To the extent these considerations do not manifest, the court will use its own interpretive tools to reach a resolution of the dueling amendments. While this would be, normatively, a second-best solution, as Part IV demonstrates, responsible use of those tools need not be disastrous for the doctrine of deference generally or the ability for EPA to use section 111(d) for GHGs specifically.

PART IV: INTERPRETIVE RESOLUTIONS OF THE SECTION 111(d) CONFLICT

While drafting errors and inconsistent statutes are somewhat common, the type of conflict embodied in Sections 108 and 302 of the 1990 Amendments is not. In fact, Pope Barrow, Legislative Counsel for the United States House of Representatives for 38 years can recall no other occasion where two provisions, passed concurrently, amend the same language in the US Code.³³¹ An exhaustive search found exactly zero cases, at both the federal and state levels, where a court has been forced to resolve this particular

³³⁰ *Appalachian Power Company v. EPA*, 249 F.3d 1032, n. 3 (D.C. Cir. 2001) (citations omitted).

³³¹ Telephone Interview with Pope Barrow.

type of issue. This lack of prior precedent makes a general resolution of this particular inconsistency quite difficult.

One approach could be to merely decide what is “best” in this particularized case. The rarity of this problem suggests that a resolution for how to read section 111(d) need not be terribly concerned with setting a precedent for future occurrences of this problem. In that case, a resolution which best fits the facts of this particular case may be optimal. However, both agencies and courts operate under institutional constraints that limit such a one-off approach. Courts, limited by their institutional expertise and conventions of *stare decisis*, should utilize more formalist tools of construction and avoid policymaking, all with an eye to how the resolution of this case will impact future examples of dueling amendments. Even if courts decide to defer to agency interpretations of dueling amendments, EPA will still be constrained by what the court considers a “reasonable” interpretation under *Chevron* step two.

This section considers three possible types of interpretative resolutions that agencies or the courts may reach within the bounds of these constraints.

A. Choosing Neither Section

While it would be the most radical interpretation, it is theoretically possible that either the agency or a court could determine that the conflict inherent in the dueling amendments is so irreconcilable that neither should be given force. In effect, this interpretation would require Congress to more clearly act to change the language of section 111(d). This radical interpretation is both unlikely and a bad idea. Nonetheless, as a potential interpretive option it is considered.

Judicial Interpretive Methods

Within the *Chevron* framework, a court might find that the statute is not ambiguous, but is instead unambiguous nonsense. Both textualist and purposevist modalities of interpretation have difficulty resolving two amendments that strike the same language and seek to replace it with different words. From a textual standpoint, it is not clear what the text is that should be interpreted. This is particularly true when considering the underlying justification for textualism; that it is the preferred modality because the text is what passed Article I, Section 7 constitutional muster. In this case, not only was the language barring section 111(d) for air pollutants and/or source categories regulated under section 112 passed through bicameralism and presentment, but so too were the directions to strike particular words in both the amendments in sections 108(g) and 302(a). Following these constitutionally mandated directions for how to amend existing law to their fullest extent, as a strict textualist would be forced to do, yields one of two nonsensical options. One option would be to consider struck language as immediately removed. In that case, once one amendment is effectuated, it is not possible to effectuate the other and it is merely

discarded. However, which provision is struck first, and so therefore which provision controls, is not indicated by the text itself. Therefore, both provisions would be discarded as irreconcilably inconsistent. A second option would be to effectuate both amendments directions to strike at the same time, resulting in some language which is struck twice. This would result in a nonsensical sentence: “(1) The Administrator shall prescribe regulations...for any existing source for any air pollutant (i)... which is not included on a list published under section [1]08(a) ~~or 112(b)(1)(A)~~ **or emitted from a source category which is regulated under section 112 112(b)**...” Unable to make textual sense of this limit on section 111(d), it would be discarded as unambiguous nonsense.

Relying on the purposes of the provisions can be just as problematic. The fact that there are multiple possible purposes means that any determination by a court will be highly speculative. Any finding of reconcilable purposes requires resorting to opaque legislative history. The resort to this kind of legislative history, particularly by the court, is highly vulnerable to the classic critiques of the use of legislative history as made by textualist commentators. With no discernible purpose of Congress as a whole, again, the relevant part of section 111(d), as amended, would be discarded as undeterminable.

Given this resolution, the inquiry would stop at *Chevron* Step One and the court would not provide deference to an agency. Instead, it would consider the conflict unresolvable, effectively voiding both amendments, and, at least in the interim, returning the statute to the status quo ante until Congress itself passed legislative language that could be interpreted.

While not directly on point, this approach has some doctrinal support. Many foundational statutory construction works cite the rule that when two provisions within the same statute or two acts enacted in the same legislative session are “repugnant,” courts which are unable to determine legislative intent have no choice but to treat both as void.³³²

While this rule is not infrequently cited, it seems to be very rarely applied.³³³ Courts have historically found ways of reconciling statutes even when they seem on their face irreconcilable. This is, in part, because legislatures have historically been able to avoid simultaneously enacting unavoidably and directly conflicting amendments to the same provision. However, because ballot initiatives having opposite effect can be presented to voters in the same election, and because voters do not always act rationally, the state initiative and referendum processes provide more opportunity for this type of conflict. Some states have

³³² See EARL T. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 166 (1940); REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 228 (1975).

³³³ See, e.g. *In re Interrogatories Propounded by Senate, Etc.*, 536 P. 2d 308, 315 (Colo. 1975) (discussing and rejecting relevant state case law indicating, in dicta, that if irreconcilable amendments are enacted on the same day they should both be rejected as void, noting that while this rule has been regularly stated it has not been often applied to void two amendments).

prescribed specific rules for how directly conflicting provisions, voted on by the electorate, should be resolved when they are both passed. For example, in Colorado, to the extent two amendments directly conflict, the provision with the most votes will be implemented, even if a conflicting provision receives more than 50% of the votes.³³⁴ Other states, however, recognize that the application of two amendments to the same provisions (in the case of direct democracy, often the state constitution) are not reconcilable. Reasoning that the will of the people cannot be simultaneously effectuated, some states treat both amendments as void.³³⁵

In the particular case, this outcome would not be particularly problematic for EPA's efforts to regulate GHGs. Striking both provisions would result in section 111(d) reverting back to its status quo ante text. Using the text from before 1990, given the changes to section 112, the only restriction related to hazardous air pollutants would be that section 111(d) not be used to regulate those that are on a list at section 112(b)(1)(A). Because that section does not exist, a strict reading of section 111(d) would be that there is no bar related to HAP pollutants or sources. While this is clearly not what Congress intended in 1990, it would not pose a restriction on GHG regulation.

However, while the provisions seem to directly conflict, they do not do so as a matter of formal logic; the hallmark of a "repugnant" statute.³³⁶ As outlined, *infra*, there are readings which seem to reconcile both provisions. While they do not fully effectuate the particular instructions to strike and replace embodied in the text of the amendments, they do make sense out of the two provisions. While it is not on its face what Congress intended, or even that both Houses jointly intended the same thing, this should not be a license to strike down a statute. The one thing that is clear is that Congress intended *not* to leave the statute the

³³⁴ See Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1, 6 (Colo. 1993) ("When constitutional amendments enacted at the same election are in such irreconcilable conflict, the one which receives the greatest number of affirmative votes shall prevail in all particulars as to which there is a conflict."). However, the standard for conflict is quite narrow. In re House Bill 1078, 536 P.2d 308, 314 (Colo. 1975) ("The test for the existence of a conflict is: Does one authorize what the other forbids or forbid what the other authorizes?").

³³⁵ See *McBee v. Brady*, 100 P. 97, 105 (Idaho 1909) ("Thus the first amendment contains the section with the words "probate judge" out and the word "assessor" out, while the second amendment contains the section with the words "probate judge" in, and the word "assessor" in. Both of these amendments were submitted and voted upon at the same election, and both adopted.... The provisions of the section thus amended are directly in conflict, and, taking the section as a whole as the amended section, it is impossible to determine which of these two amended sections should stand as a part of the Constitution of this state. It is impossible to reconcile the two amendments, and...both must fail."); See also *Opinion of the Governor*, 80 A.2d 165, 167 (R.I. 1951) ("In such a case the law is well settled that both amendments must fail as it is impossible to know the final will of the electors and to give it effect."); In re Senate File No. 31, 41 N.W. 981, 986 (Neb. 1889) ("The proposed amendments provide for different and contradictory modes of controlling the liquor traffic, but one of which can be effective, if adopted. The propositions being independent, however, an elector may vote for one and against the other, or for or against both. If both should receive a majority of all the votes cast, however, the amendments being irreconcilable, both would fail. Such a contingency is so remote that it scarcely need be considered.").

³³⁶ See Veronica M. Dougherty, *Absurdity and the Limits of Literalism*, 44 AM. U. L. REV. 127, 141-53 (defining "the illogic of internal contradiction" as a type of absurdity).

same as it had been before. Rejecting both provisions, then, would give no weight to the constitutionally approved legislative process. If it can be avoided, it is therefore not an attractive option. A court is better off attempting to do its best in reconciling the text, or to establish an arbitrary but consistently applied rule-based resolution.

Agency Interpretive Methods

While it would be risky, EPA could, on its own and in the first instance, determine, based on similar reasoning as the court, that there is no way to adequately resolve the dueling amendments and therefore treat them as void. All EPA need do to make this interpretation is nothing. As outlined in Part II.C, *supra*, in enacting the replacement to CAMR, it already changed the regulations defining the “designated pollutants” covered by section 111(d) to the pre-1990 Clean Air Act text. Therefore as the regulations are currently written, there is no limit on EPA’s use of section 111(d) related to pollutants or categories in section 112.

EPA is most likely to make this interpretation as a strategic choice rather than in a good faith effort to actually reach the “best” resolution. The Clean Air Act’s judicial review provisions contains a requirement that challenges to regulations occur within sixty days of promulgation.³³⁷ EPA could attempt to use the mistaken re-promulgation of the pre-1990 regulatory language to its advantage. Because the rule redefining designated pollutant as one which is not, among other things, listed under section 112(b)(1)(A) was promulgated in 2012 and so more than 60 days ago, EPA could argue in any court challenge that petitioners do not have standing to challenge EPA’s definition at this point. This would be a risky strategy, however, as it would require the administrator not to promulgate an alternative definition. Any adverse decision regarding standing,³³⁸ therefore, would be cause for vacating the entire section 111(d) rule. While novel, this type of risk is likely not worth the benefit of avoiding the possibility that a court will decide it, rather than the agency is in the best position to reconcile the provisions and that its interpretation precludes regulation of GHGs under section 111(d). Moreover, intentionally taking advantage of this error is not in line with notions of due process underlying the administrative state.

B. Choosing One Amendment

A second option for interpreting the dueling amendments would be to pick one over the other.

³³⁷ See 42 U.S.C. § 7406(b) (“Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.”).

³³⁸ The D.C. Circuit has already been reluctant to reject the arguments of regulated entities on standing on this basis for definitions made before GHG regulation was contemplated. See *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012).

Agency Interpretive Methods

Rather than trying to reconcile the two provisions, EPA could argue that only one of the provisions is the “true” legislative intent. In effect, it would treat one provision as a scrivener’s error.³³⁹

EPA has twice argued that section 108(g) was the true intended provision and that section 302(a) was included in error. As discussed in Part II.C, *supra*, EPA has explicitly made this determination both in 1994 in a report supporting the promulgation of its municipal solid waste landfill rule under section 111(d), and later in 2005 when it promulgated the CAMR rule. In both cases, however, the agency did not rely on this determination in actually issuing a regulation or provide a robust legal or legislative history argument for why only section 108(g) should be used. At best, it justified that section 302(a) was an error by pointing out that in the 1990 Clean Air Act, section 112 was changed from a pollutant-focused provision to a category-focused provision, and so section 111(d) should be consistent with this change.³⁴⁰

However, there are three reasons why EPA, should, if it decides to go down the scrivener’s error route, instead, choose section 302(a) over section 108(g) as the “true” intent of Congress. First, the admittedly opaque legislative history suggest that Congress attempted to move away from the White House proposal on this particular issue, even if it neglected to remove the provision in section 108(g). Both the Senate and the House rejected the White House’s proposal to retain significant EPA flexibility in the application of section 112, and therefore the need for the category-based restriction in section 111(d).³⁴¹

Second, a category-only restriction is inconsistent with the structure of the provisions passed. As discussed in Part II, *supra*, section 129, originating in the Senate and codified into law, directs the use of section 111(d) for solid waste incinerators “notwithstanding any restriction.”³⁴² This presupposes that there could be a restriction on the application of section 111(d) to that category. Relying only on the section 108(g) amendment, however would not pose any restriction for solid waste incinerators since another subsection of section 129 prevents that category from being a “category regulated under section 112.”³⁴³ As such, under the (fictitious in this case) presumption that Congress would not insert provisions

³³⁹ See Michael S. Fried, *A Theory of Scrivener’s Error*, 52 RUTGERS L. REV. 589, 593-94 (2000) (defining scrivener’s error as “a typographical mistake or other error of a clerical nature in the drafting of a document” and discussing other alternative definitions).

³⁴⁰ MSWL BID, at 1-5 (“...the Clean Air Act Amendments revised section 112 to include regulation of source categories in addition to regulation of listed hazardous air pollutants, and section 108(g) thus conforms to other amendments of section 112”).

³⁴¹ Note, however, that while both the Senate and the House required 100% of listed source categories to eventually get NESHAPs, White House’s proposal to *potentially* carve utilities out of that by first requiring a study was enacted into the final law. CAA § 112(n)(1)(A).

³⁴² CAA § 129(b)(1).

³⁴³ CAA § 129(h)(2).

as mere surplusage, the section 302(a) amendment has the stronger claim to being the only of the two provisions effectuated.

Finally, the Senate provision is consistent with longstanding agency practice (though not of explicit interpretation). With the exception of an interpretation that was not, at the time relevant, EPA has consistently, if implicitly, read section 111(d) to apply the section 302(a) rather than section 108(g) reading. Deciding that section 108(g) applies to the exclusion of section 302(a) would undermine the current framework and expectations of landfill gas plants and kraft paper mills which have been subject to both standards since 1994 and 1998 respectively. On the other hand, opponents to 111(d) regulation for GHGs could argue that an expectations-based rule should favor section 108(g) amendment, as it and not section 302(a) has been present in the printed and online versions of the U.S. Code since the 1994 Edition.³⁴⁴ However, the idea that this has established an expectation of the scope of section 111(d) as amended only by section 108(g) is belied by the common understanding, as reflected in the academic literature, presupposing the validity of section 111(d)'s application to GHGs.

Between treating section 108(g) or section 302(a) as a scrivener's error and only using one provision, the evidence for relying only on section 302(a) is significantly stronger. However, given the uncertainty in the legislative history, the fact that the appropriate and necessary requirement for EGUs was included in the final bill and so the category-based approach is not completely without need, and EPA's 1994 and 2005 positions that it was the *Senate* amendment that was included as an error, a court would likely not be sufficiently convinced that the inclusion of section 108 was a clear scrivener's error. Courts have historically held agencies to a high standard in demonstrating scrivener's errors which allow departure from the text.³⁴⁵

³⁴⁴ See 42 U.S.C. § 7411(d) (1994).

³⁴⁵ Bradford C. Mank, A Scrivener's Error or Greater Protection of the Public, 24 VA. ENVTL. L.J. 75, 114 ("Courts use the doctrine where there is only the remotest possibility that any such clerical mistake reflected a deliberate legislative compromise.") (internal citations omitted); see *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) ("For the sine qua non of any 'scrivener's error' doctrine, it seems to me, is that the meaning genuinely intended but inadequately expressed must be absolutely clear; otherwise we might be rewriting the statute rather than correcting a technical mistake."); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001) ("...for EPA to avoid a literal interpretation at Chevron step one, it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.") (internal citations omitted); *Independent Insurance Agents of America, Inc. v. Clark*, 955 F.2d 731, 735-37 (D.C. Cir. 1992) (holding that even substantial evidence that Congress had not meant to delete section 92 of the National Bank Act when reenacting the law in 1918 without the provision insufficient to treat the deletion under the scrivener's error doctrine); see also *Citizens to Save Spencer Cnty v. EPA*, 600 F.2d 844 (1979) ("The circumstances of the passage through Congress... indicate convincingly that Congress did not clearly resolve the issue...; this history provides no justification for implementation of only one of the two statutory sections to the exclusion of the other.")

Most likely, if the agency did decide to issue GHG regulations under section 111(d) on the theory that only section 302(a) was operative, it would be struck down at *Chevron* step two as unreasonable. Therefore, these indicia of purpose are better used in attempting to construe the provisions together rather than as an argument to accept, on the merits, one provision over the other.

Judicial Interpretive Methods

The court, however, could determine that only one provision should be operative. A court could determine that EPA's interpretation of section 111(d) is not entitled to deference at step one. Based on a clear rule of statutory construction it established, a court could determine that the proper construction of section 111(d) is in fact clear and requires the use of only one of the two amendments. Like any other canon of construction, if the court employs a rule-based canon at the *Chevron* step one inquiry, it would effectively determine that there was no ambiguity and any agency interpretation must comport with the judicially created canon.³⁴⁶

A rule-based canon of construction is somewhat appealing in the case of conflicting amendments, particularly if the court views the interpretation of dueling amendments as unworthy of agency deference. Given that amendments which repeal and replace the same language with inconsistent provisions is such a rare occurrence, a clear and easy to apply decision rule creates clarity and predictability in the law. A rule such as "pick the first provision listed in the enacting legislation" (rule of firsts) or "pick the last provision listed in the enacting legislation" (rule of lasts) would serve the purpose of predictability. Both decision rules, however, would likely suffer on accuracy. An arbitrary but clear decision rule is likely to get the "right" answer only 50% of the time. One would have to believe that alternate decision-making frameworks, such as allowing the agency to liberally construe a harmonized provision in any particular instance, would get to the "right" answer less than 50% of the time for a rule-based application to be preferable in terms of social welfare. It may be, however that reserving for the legislature the role of policymaker and a clear and consistent application of the rule of law are more important values than maximizing social welfare in the particular instance of a conflict. A clear decision rule may also be more effective in leaving the legislature and regulated parties on notice of how errors will be resolved by the court.

³⁴⁶ See Sunstein, 90 COLUM. L. REV. at 2106 ("Whether there is ambiguity – the nominal trigger for deference under *Chevron* – is a function not simply of text, but of text as it interacts with principles of interpretation, some of them deeply engrained in the legal culture or even the culture more generally. A major current task is to assign *Chevron* its place within the universe of these principles."). *Chevron* itself contemplates that in determining whether Congress has specifically spoken to the question at issue, the court should employ "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. What counts as a "traditional tool" is an issue generally defined by the court, and so could be held to include a specific decision-rule in cases of dueling amendments.

A rule-based decision rule could manifest in one of two ways. One method of justifying the rule of firsts is to use the approach taken by the Law Revision Counsel in constructing the U.S. Code. While the codifier's approach in the code is not legally binding, its *logic* could be persuasive in deciding to choose the first amendment. Incorporating the 1990 Amendments into the existing law section by section, an interpreter would first make a change to section 111(d) based on the first provision to come up which altered it: section 108(g), the House amendment. Not finding the relevant words to strike once section 302(a) is encountered, it would be merely discarded. This approach is consistent with the types of strict-textualist readings which will reject *latter enacted* provisions which amend language no longer in a statute.³⁴⁷ It is also consistent with the amendment process in Congress, which proceeds in order.

However, Statutes are not generally thought to be “read” front to back. Unlike amendments made later in *time*, earlier *placed* provisions are not more important or predicates to later provisions. Definitional sections can be placed before or after substantive provisions. Cross-references can just as easily be made to earlier placed sections as to latter placed ones. Without some additional justification, there is no particular reason to choose the arbitrary decision-rule of firsts over the arbitrary decision-rule of lasts.

The alternative would be to pick the provision which is last in arrangement. When picking between two irreconcilable provisions, it is a common rule of statutory construction to effectuate the provision enacted last *in time*. Legislatures are presumed to know the contents of existing law and while courts will construe new enactments not to impliedly repeal existing law,³⁴⁸ when there is a direct conflict, the legislative judgment of the more recent legislature is given weight. Superficially based on this latter in time presumption, there has also developed a rule of statutory construction that the last provision *in arrangement* will govern when two provisions are irreconcilable.³⁴⁹ While such a rule is “only slightly

³⁴⁷ See *e.g.*, *Dept of Revenue v. Burlington N. Inc.*, 545 P.2d 1083, 1087 (1976) (holding an amendment of a repealed act is void, even if the repeal was inadvertent); *State v. Blackwell*, 99 S.E.2d 867, 868 (N.C. 1957) (“where, as here, an entire independent section of a statute is wiped out of existence by repeal, there is nothing to amend. It is as though the statute, or section, had never been enacted”).

³⁴⁸ See *Cathedral Candle Co. v. United States ITC*, 400 F.3d 1352, 1365 (Fed. Cir. 2005) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)) (Refusing to construe an amendment that seemingly conflicts with existing law as an implied repeal).

³⁴⁹ This rule has been cited and applied most often in the state of Alabama. See, *e.g.*, *State v. Crenshaw*, 287 Ala. 139, 142, 249 So. 2d 622, 624 (1971) (“Where two sections or provisions of an act are conflicting (as in the instant case), the last in order of arrangement controls”). Other state courts have cited the rule but almost exclusively before 1950. See, *e.g.*, *State v. Tullock*, 72 Mont. 482, 234 P. 277, 278 (1925) (“It is the rule, of course, that where two provisions of an act of the Legislature are conflicting and cannot be harmonized, the last in order of arrangement controls”). *But see* *Warner v. Bd. of Trustees of Jackson Mun. Separate Sch. Dist.*, 359 So. 2d 345, 347 (Miss. 1978) (“We hold the rule applies in this case and that Section 4 of the Public School Fair Dismissal Act controls over Section 3”). Note however, that almost all cases which cite this provision claim that, in fact there is no unresolvable conflict. See *e.g.*, *In re Adoption of Chaney*, 128 Ind. App. 603, 609-10, 150 N.E.2d 754, 758 (1958) (There might be merit in this contention if the two quoted provisions of the statute were in conflict but we see none.). *But see* *United States v. Moore*, 567 F.3d 187, 191 (6th Cir. 2009) (“we find that the last in order of arrangement— §

less arbitrary than the toss of a coin,”³⁵⁰ it is less arbitrary than the first in placement rule in that it has been the more consistently applied rule.³⁵¹

This interpretive strategy could have a consequential effect on EPA’s ability to regulate existing sources of GHGs. Using the U.S. Code approach (a rule of firsts), only the House amendment would stand, preventing EPA regulation of existing sources of GHGs.³⁵² On the other hand, using the last-placed approach (a rule of lasts), only the Senate amendment would stand, opening the door to existing source climate regulation. Completely besides the fact that picking the later provision is, in this case better for social welfare, the rule of seconds should be the preferred option as the one with the most doctrinal support. Since the benefits of an arbitrary decision-rule canon lie in its predictability, picking section 302(a) over section 108(g) would be clearly preferable.

Like with the option to merely void dueling amendments, this type of approach is ultimately unsatisfying because it fails to acknowledge that Congress and the President, through the constitutionally required process, passed *both* provisions into law. If the provisions are truly irreconcilable, even given some leeway, the fact that a decision-rule provides benefits from judicial administrability, predictability and somewhat more (analogous) doctrinal support, and the fact that it enacts at least some congressional will, suggests that it is a better last-resort than voiding both provisions.

C. Harmonization

The most apt analogy to existing statutory construction doctrine may be to an area that has occupied Courts for centuries: resolving conflicts between different provisions of a law. Putting aside the specific directions in the amendments to “strike” and “insert,” an interpreter may try to, to the best of their ability, give effect to the text and purpose underlying both provisions.

The question, then, is, would there be a way to interpret the language of either the House or the Senate Amendments in a way that did not necessitate a conflict. The D.C. Circuit has considered one, somewhat analogous case that can shed light on how an interpreter might reconcile these provisions.

Citizens to Save Spencer County v. EPA dealt with a drafting error in the 1977 Clean Air Act amendments which created a conflict between two newly enacted sections of the law.³⁵³ The newly enacted PSD

3559(e)(1)—controls, there is no inconsistency and no ambiguity, and the rule of lenity does not come into operation”).

³⁵⁰ *Precon, Inc. v. JRS Realty Trust*, 45 B.R. 847, 854 (D. Me. 1985) aff’d sub nom. *In re Bagley*, 787 F.2d 578 (1st Cir. 1986)

³⁵¹ *See Lodge 1959, Am. Federation of Gov’t Emp. V Webb*, 580 F.2d 496, 510 n. 31 (1978) (citing 81 cases referencing the rule).

³⁵² *See* discussion in Part II.C, *supra*.

³⁵³ *Citizens to Save Spencer Cnty v. EPA*, 600 F.2d 844 (D.C. Cir. 1979).

program, a permitting program created in the 1977 Clean Air Act Amendments, contained a general provision keeping pre-1977 regulations until states had revised their State Implementation Plans, with the exception for a particular list of other sections of the bill, contained in Section 168(b), which were to go into effect immediately.³⁵⁴ Section 165, which Congress intended, but inadvertently failed, to include on the list, prevented any construction of any new plants after August 7, 1977 without a specific state permit.³⁵⁵ Therefore, due to the drafting error, after August 7 and until states issued new SIPs, construction of new plants was both allowed under section 168 and prohibited under 165.

In order to deal with this conflict, EPA issued regulations which effectively split the difference by rewriting the implementation date of section 165 from August 1977 to December 1978.³⁵⁶ It therefore gave effect to section 168 for 18 months, but not afterwards, in the hope that state implementation plans would be revised by then. The court ratified EPA's decision.³⁵⁷

Spencer could, of course be superficially distinguished from the present case. It involves two provisions of the same statute which conflict, not two amendments which attempt to change the same language in different ways. The similarities between the two cases are striking, however. In *Spencer*, section 165 originated in the Senate whereas section 168 originated in the House.³⁵⁸ In an attempt to enact the 1977 Clean Air Act Amendments before the end of the legislative session, these conflicting sections were never reconciled in Conference.³⁵⁹ Given the task of reconciling the provisions, the court demanded an interpretation that gave effect to each of the sections, even at the expense of adding new language not contained in the statute, rather than one which strained to reinterpret the provisions to be falsely consistent.³⁶⁰

Moreover, the court provided a powerful argument for harmonizing the sections, to the extent possible, rather than merely choosing one or rejecting both. The court argued that rewriting the conflicting provisions to reinforce a workable statutory scheme is far preferable to voiding the whole provision or arbitrarily choosing one over the other.³⁶¹ Merely waiting until Congress fixed the problem by refusing to effectuate either provision "would defeat the intent of both Houses."³⁶² Similarly, arbitrarily choosing one

³⁵⁴ *Id.* at 853.

³⁵⁵ *Id.* at 853.

³⁵⁶ This date ended up being pushed back due to regulatory delay until March 1979. *See* *Citizens to Save Spenser*, 600 F.2d at 858.

³⁵⁷ *Id.* at 889-90.

³⁵⁸ *Id.* at 866.

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 863 ("the 'plain language' arguments concerning sections 165 and 168 fail to convince us that one or the other of the two sections should control. Instead, we can only conclude that the 'plain language' of each of the sections... means what it says and that the two sections are inconsistent.").

³⁶¹ *Id.* at 872.

³⁶² *Id.*

provision over the other would fail to take account of the legislative deals that may have been necessary to pass the whole Act, “giv[ing] full rein to just one of perhaps many competing interests that in the final legislative enactment were given even weight.”³⁶³

Citizens to Save Spencer County provides a strong justification for harmonization over the previously two discussed interpretive resolutions. However, it is important that it also relied on the agency to make that determination. While that case was decided pre-*Chevron*, the D.C. Circuit also provides a strong argument for judicial deference to agency interpretations in this case:

“Without... rulemaking, EPA would have been compelled to pursue one of several equally undesirable and untenable paths of action: to enforce only section 165, in violation of section 168; to enforce only section 168, in violation of section 165; to enforce neither section, thus aborting entirely or forestalling for several years the implementation of the new program... mandated by Congress; or, by administrative fiat, to strike a compromise between the two sections. Without rulemaking or some comparable procedure, the last of these choices would have lost the ‘saving grace’ of notice, public participation, and comment by affected parties, and as a result would also have lost the legislative legitimacy that is present here.”³⁶⁴

The court implicitly acknowledged, here, by rejecting interpretations which void both provisions or pick one provision over the other, it is relying on a legislative-like determination of the optimal harmonization of the provisions. Because the agency can engage in rulemaking, it at least can provide the public with notice and the opportunity for participation in the decision making. Courts, by definition, do not possess the institutional capacity for this “saving grace.”

As argued in Part III, *supra*, when considering the possible ways to harmonize sections 108(g) and 302(a), as the rest of this section does, the appropriate outcome should be dependent on which institution is doing the harmonizing. At the same time, as articulated in *Citizens to Save Spencer County*, the use of this interpretive tool as the best one for addressing conflicting amendments itself may depend on a court determining, in the first instance, that deference is appropriate.

The “best” harmonization of these two provisions will depend on the modality of interpretation used. The provisions could be harmonized based purely on text, they could be harmonized by attempting to reconcile the purposes of the two provisions, or they could be harmonized by picking an interpretation that maximizes social welfare.

Text Based Harmonization

In this case, there are ultimately really only two text-based options for amending section 111(d) using the language from *both* the House amendment and the Senate amendment. The limit on section 111(d) related

³⁶³ *Id.*

³⁶⁴ *Id.* at 873.

to hazardous air pollutants could bar the provisions use when *either* the air pollutant is regulated *or* the category is regulated (the limiting reading). Alternatively, section 111(d) could be barred only when *both* the air pollutant *and* the category are regulated under Section 112 (the expansive reading).

Pre-1990 Language

Section 111... (d)(1) The Administrator shall prescribe regulations... for any existing source for any air pollutant (i)... which is not included on a list published under section 108(a) or section 112(b)(1)(A)

As discussed, *supra*, pre-1990, the limit to section 111(d) applied whenever the air pollutant emitted from the existing source was on either the criteria air pollutant list or the hazardous air pollutant list.

The limiting reading would amend section 111(d) to correct the reference to the air pollutant limit and add new language, sufficient on its own, to limit categories already regulated:

Limiting Reading

Section 111... (d)(1) The Administrator shall prescribe regulations... for any existing source for any air pollutant (i)... which is not included on a list published under section 108(a) or ~~112(b)(1)(A)~~ *section 112(b)*
or
emitted from a source category which is regulated under section 112.

This reading is analogous to the one identified in Part I.C as textually strongest. It would be accomplished by following section 302(a)'s direction to "strike '112(b)(1)(A)'" and replace it with "112(b)." It would then ignore section 108(g)'s direction to strike completely and insert the text "or emitted from a source category which is regulated under section 112." Under this reading, EPA would be prohibited from regulating a source category emitting an air pollutant which is on the 112(b) list *or* which is emitted from the listed source category. Either condition is sufficient to limit the use of section 111(d), and so section 111(d) would be useable in few instances. This limiting reading would not be consistent with the original purpose of section 111(d) as a gap filling measure, as air pollutants which are emitted by source categories regulated under section 112 but which are not themselves regulated elsewhere by the Clean Air Act would have no regulatory home. Whereas section 111(d) was originally intended to cover those pollutants, the limiting reading would fundamentally change the scope of the section.

The limiting interpretation would prevent EPA from regulating existing sources of greenhouse gases under section 111(d). Greenhouse gases are emitted from source categories regulated under Section 112, and are emitted from the source categories that would have been subject to emissions guidelines under

section 111(d). This satisfies the sufficient condition, barring regulation. Put another way, this reading gives independent effect to the House amendment, which on its own would be a bar to regulation.³⁶⁵

A second possible textual reading, the expansive reading, on the other hand, would make both the air pollutant listing and the source category listing necessary to bar section 111(d) regulation. If either were missing, existing source regulations would apply.

Expansive Reading

Section 111... (d)(1) The Administrator shall prescribe regulations... for any existing source for any air pollutant (i)... which is not included on a list published under section 108(a) or ~~section 112(b)(1)(A)~~ *section 112(b)* ***nor emitted from a source category which is regulated under section 112.***

This reading saves fewer words from the original “strike” and “replace” provisions in sections 108 and 302. Textually it would be accomplished in the same way as the limiting reading but requires changing a word (“nor” rather than “or”) from the original section 108 text.³⁶⁶

In fact, one might come to this reading in a slightly different way. By effectuating the direction to strike for both provisions and adding in the section 302(a) replacement reference in the middle of the section 108(g) text, the sentence comes close to grammatical clarity without the need to add a word: “(1) The Administrator shall prescribe regulations...for any existing source for any air pollutant (i)... which is not included on a list published under section [1]08(a) or ~~112(b)(1)(A)~~ **or 112(b) emitted from a source category which is regulated under section 112....**” In this case, emitted from a source category modifies the restriction on the listed pollutant. Only if a pollutant is a pollutant listed under section 112(b) emitted from a source category will EPA be barred from applying section 111(d). This would, of course, be potentially clearer with a comma after 112(b) and before emitted, though then would not be consistent with the “last antecedent rule” of statutory interpretation.³⁶⁷ This construction, however, fails to insert “112(b)” “*in lieu*” of “112(b)(1)(A),” and instead inserts it in a way that makes some grammatical sense.

In sum, under the expansive reading, section 111(d) would be inapplicable to criteria pollutants. Section 111(d) would be inapplicable to pollutants on the section 112(b) list which are emitted from a source category regulated under section 112. However, section 111(d) would be applicable to other pollutants,

³⁶⁵ See analysis at Part II, *supra*.

³⁶⁶ Another, potentially more clear, way of putting this, with the same meaning, would be to replace the word “nor” with the words “that this.” Therefore the expansive reading would allow section 111(d) regulation “for any existing source for any air pollutant (i) which is not included on a list published under section 112(b) that is emitted from a source category which is regulated under section 112.”

³⁶⁷ But see Terri Lelcercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 40 TEX. J. BUS. L. 199 (2004) (arguing that the last antecedent rule actually runs counter to historical usage of a common to modify the preceding phrase, and has not been enforced by courts).

including those listed under section 112(b) but for which the source category is not regulated under section 112.

The expansive reading, therefore, would allow EPA to regulate existing sources of greenhouse gases. Greenhouse gases are not on the list of HAPs in section 112(b). Because a bar on section 111(d) under this reading would require *both* that the air pollutant to be regulated be on the list of regulated pollutants under section 112(b) *and* the category emitting that air pollutant to be a regulated category, the fact that EGUs, petroleum refineries and other source categories emitting GHGs satisfy only the latter, is not sufficient to limit the section's use.

From a purely textualist standpoint, the limiting interpretation may be a "better" harmonization of the two amendments. It is the only approach that, on its own, makes grammatical sense. It preserves the most words from both the House and Senate amendments, adds no new words, and only fails to strike an "or." And perhaps most importantly, while section 302(a) directs the insertion of "112(b)" "in lieu" of "112(b)(1)(A),"³⁶⁸ section 108(g) merely directs the "striking" and "inserting."³⁶⁹ It is, therefore, more consistent with the text of the amendment sections to *replace* the reference to section 112(b)(1)(A) with the language from section 302(a) (so that that provision is "in lieu thereof") while adding the category-based limit to the end of the clause. The alternative, expansive reading, however, requires adding words ("nor"), which appears nowhere in either amendment or requires inserting section 112(b) on its own rather than in lieu of section 112(b)(1)(A).

The end result of all of this is two-fold: (1) it demonstrates that this entire exercise to use purely textual tools in reconstructing the statute is somewhat ridiculous, and (2) if it must be done, the best option is the limiting reading. To the extent that courts are required to work harder to effectuate a possible textually consistent meaning, and to the extent that a court would choose to do this rather than give the agency deference to more flexibly interpret the statute, it is more likely that harmonizing the amendments to section 111(d) would yield the limiting reading and that section 111(d) could not be used to regulate existing sources of GHGs.

Purpose Based Harmonization

The "right" harmonization of the purposes of the section 108(g) (White House/House) amendment and the section 302(a) (Senate) amendment depends largely on what one thinks the purposes of each amendment are. The purpose of the Senate amendment is clear. It meant to keep section 111(d) as it had been before as a gap filling measure for those pollutants not already regulated as criteria air pollutants or

³⁶⁸ 1990 CAA § 302(a), 104 Stat. at 2574 ("Section 111(d)(1) of the Clean Air Act is amended by striking '112(b)(1)(A)' and inserting *in lieu thereof* '112(b)'").

³⁶⁹ See 1990 CAA § 108(g), 104 Stat. at 2467

hazardous air pollutants. Because *all* source categories of hazardous air pollutants had to be regulated under section 112, it need not incorporate the source category language into section 111(d). The White House/House's motives, however, are less clear. Section 108 may well have been *intended* to open up a gap such that source categories regulated under section 112 did not face "double" regulation under section 111(d). These existing sources would not be subject to regulation under other provisions of the Clean Air Act and, even if it meant leaving out the regulation of some pollutants (such as GHGs), it is not irrational for lobbyists or the White House to have wanted to limit two sets of standards from different provisions on the same plants. If this was the purpose of section 108, it is unclear how one would reconcile the purposes of the House and Senate provisions. One meant to leave the gaps closed, the other intended to open up new regulatory gaps.

As outlined in Part IV.B, *supra*, another reading of the legislative history and structure of the 1990 Amendments as enacted, however, is that the House did not intend that change. Most likely, the House accidentally left the provision, located in a title of the bill it was not looking at when amending section 112, in the conference report when it adopted most of the House language for Title I. Due to the time and political constraints it was not able to remove the provision after the fact. This interpretation of section 108(g) would treat it effectively as a scrivener's error. To the extent that an interpretation attempted to harmonize both provisions rather than picking one, it is, again, unclear how one would reconcile the two.

Rather than as a loophole or a mistake, an equally probable reading of the legislative history is that the White House's original purpose in including section 108(g) was to ensure flexibility for EPA's choice of regulating listed HAPs between the stringent NESHAP standards of section 112(d) and the more flexible, state-based standards of section 111(d) in the few areas that such flexibility was still possible. The original White House proposal required flexibility to use 111(d) in lieu of 112 in three circumstances. First, the White House wanted to leave EPA discretion to propose regulation of only 50% of HAP categories. Therefore, leaving open 111(d) flexibility was needed if the remaining categories were to be regulated at all. This need for flexibility was eliminated when the House overruled that proposal and required regulation of 100% of HAP categories.

Second, flexibility to use section 111(d) for pollutants listed under section 112 was needed to allow EPA to go forward with its in-the-works municipal solid waste emissions regulations. Without the flexibility of the category-based approach, EPA would have to scrap its prior work and regulate municipal solid waste emissions under 112; which would result in less environmental protection while the rules were rewritten. However, the Senate eliminated the need for this flexibility when it included section 129 authority in Conference, which explicitly carved out municipal solid waste emissions as a separate category of 111(d) regulation which was not limited in scope by regulation under section 112.

Even after these changes, however, legislative compromise resulted in one possible remaining place that EPA could flexibly *choose* section 111(d) over section 112(d). That was for the EGU category, which had retained the House provision mandating a study and appropriate and necessary finding before regulation under section 112. Therefore, had EPA found that regulation of EGUs was *not* appropriate and necessary, it would have been stuck not regulating existing sources of HAPs from EGUs at all. Under this reading, the purpose of the section 108(g) “category” language was a way of allowing regulation under section 111(d) *for HAPs*, and was not intended to affect a material change to the scope of section 111(d) for non-HAP pollutants. The fact that, on its own, section 108(g) would have limited the use of section 111(d), under this purposive reading, was a result of bad draftsmanship rather than intention. And under this reading, if the White House authors of section 108(g), who wanted this limited flexibility, and the Senate authors of section 302(a) had actually sat down in the conference committee to resolve the dueling amendments, harmonization would be possible. In fact, the expansive reading of section 111(d) would likely be where they ended up. This reading would ensure, in line with the Senate’s purpose, that there were no more gaps in the regulation of air pollutants after 1990 than there were before, and that for the vast majority of cases, section 112 would be used to regulate hazardous air pollutants. The expansive reading, however, would also ensure that, in the limited set of cases where hazardous air pollutants were listed, but were not actually being regulated by certain source categories, EPA had sufficient flexibility to use section 111(d) rather than leave the emissions unregulated completely. By requiring that *both* the listed category be regulated under section 112 and the air pollutant be regulated under section 112(b) for EPA to be barred from using section 111(d), the underlying purposes of both section 108(g) and 302(a) of the 1990 Amendments can be effectuated.

Welfare Maximization

Finally, the expansive reading is the interpretive resolution which yields the best policy outcome. The limiting reading would result in one of two policy responses from EPA. Barred from using section 111(d), EPA could decide not to regulate existing sources of these pollutants at all.³⁷⁰ This gap, however, would decrease incentives to build new efficient plants, and could potentially lead to more emissions in the long run.³⁷¹ Moreover, regulation of new sources will not be sufficient to meet the climate challenge. And as a more general matter, it is hard to see how leaving some pollutants completely unregulated would be

³⁷⁰ A third option could be a decision not to regulate a particular pollutant at all, including new sources under section 111(b). At least some regulation, particularly when the pollutants are a danger to public health and welfare, is likely to be welfare maximizing. Moreover, for categories already listed in section 111(b) and for pollutants that EPA has already determined poses a threat to public health and welfare, EPA may, in fact, have a nondiscretionary duty to act. *SEE INST. FOR POLICY INTEGRITY, THE ROAD AHEAD* at 50-52.

³⁷¹ Jonathan Remy Nash & Richard L Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 N.W. U. L. REV. 1677 (2007).

welfare maximizing when EPA has significant discretion under section 111(d) as to the stringency of the standards it requires states to set, and the ability to encourage states to use low-cost market-based solutions.³⁷²

Alternatively, an entrepreneurial agency might look for other provisions in the Clean Air Act that would allow it to control existing sources of air pollutants such as GHGs that could otherwise have been covered by section 111(d). The two most attractive candidates, because they are the best understood, would likely be section 109 and section 112. Determining that GHGs are criteria or hazardous air pollutants will result in more stringent standards than that which is required under section 111. EPA is required to set NAAQS at a level “requisite to protect public health” with an “adequate margin of safety,”³⁷³ and is not permitted to take costs into account when setting that level.³⁷⁴ Emissions standards from hazardous air pollutants must require the “maximum degree of reduction...achievable.”³⁷⁵ While costs can be a consideration in these factors, they are considered to be much more stringent than the requirements under the NSPS provisions.³⁷⁶ These provisions would provide EPA with less flexibility in calibrating the regulatory response to the particular costs and benefits of pollutants that would be better regulated under section 111(d). To the extent EPA has chosen to go down the section 111 route, foreclosing the regulation of existing sources under section 111(d) by adopting the limiting interpretation of the dueling amendments would necessarily force EPA into a non-optimal regulatory response.

On the other side is the idea that the expansive interpretation may provide EPA with too much flexibility such that they abuse their discretion. This was the argument that state petitioners specifically made in the CAMR case.³⁷⁷ By effectively adopting the expansive interpretation, EPA opened the door for regulating mercury under section 111(d), a statutory provision petitioners felt was ill suited to the task. This concern should not be enough to consider the limiting interpretation preferable. The D.C. Circuit found, in the case striking down CAMR, that EPA had already made the determination that regulation of EGUs under section 112 was appropriate and necessary, foreclosing the most prominent option for which EPA sought flexibility.³⁷⁸ Without EGUs, there are no other source categories left for which EPA retains flexibility in determining whether section 111 or section 112 are more appropriate. To open up room for the use of

³⁷² See Wannier, PREVAILING ACADEMIC VIEW.

³⁷³ See CAA § 109(b)(1).

³⁷⁴ *Whitman v. American Trucking Assoc., Inc.*, 531 U.S. 457 (2001).

³⁷⁵ CAA § 112(d)(2).

³⁷⁶ See Daniel Brian, *Regulating Carbon Dioxide Under the Clean Air Act as a Hazardous Air Pollutant*, 33 COLUM. J. ENVTL. L.J. 368, 407 (2008).

³⁷⁷ See Brief of State Petitioners, at 14, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (“...the context of the 1990 amendments to the Act indicate that Congress – far from providing implied authority and discretion to EPA – moved to limit the agency’s discretion to promote rapid regulation of HAPs.”) (internal citations omitted).

³⁷⁸ *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008).

section 111(d) in this way, it would have to go through the onerous section 112(c)(9) delisting procedure, which requires finding that *no* source in the category emits enough HAPs to endanger public health.³⁷⁹ Therefore, it is unlikely that EPA could use the expansive interpretation to shirk its regulatory duty.

The most textual reading of text is strained and unclear. The classic purposivist critique of textualism, as overly formalistic, relying on grammatical rules and textual canons not in mind as the legislature constructed a statute it wanted to be workable, is apt. At the same time, the purpose of the provisions is speculative, leading credence to the textualist critique of purposivism. Picking among these possible purposes allows unelected judges to, in an attempt to divine the true legislative purpose, enact their own policy preferences rather than honor the deals made through the legislative process.³⁸⁰ Finally, both the purposivist and textualist modalities of interpretation would reject judicial determinations based on what the welfare maximizing outcome in any particular case may be. It is not the role of unelected judges to make policy. Under the Sunstein and Vermeule theory of judicial deference, this is a prime example of why courts should not be struggling to make this decision. Their legal tools exhausted without a *clear* meaning (though a possible one if forced), and without the democratic accountability or expertise to evaluate the true purpose of the change, it is more appropriate to let EPA decide how to resolve the conflict itself so long as that resolution is within the bounds of reasonableness. Agencies, on the other hand, should not be as constrained as courts to rely on the textual modality of interpretation. They are free, and in fact, required, to take into account social welfare when choosing between plausible interpretations.

The decision about whether dueling amendments is the type of ambiguity which gives rise to judicial deference of agency interpretations, therefore, may be dispositive in the outcome of whether section 111(d) is a policy mechanism that can be applied to existing sources of greenhouse gases. Using every textualist tool, and saving every word in both the House and Senate amendments will likely yield a construction which bars this section as a tool for GHG regulation. However, reading the amendments somewhat more flexibly, in light of the original purpose of section 111(d) as a gap filling measure, opens the door to GHG regulation from existing sources. *Citizens to Save Spencer County*, at least, was willing to give EPA flexibility in its interpretation even when “the only arguable ‘ambiguity’ in the two sections is the lack of consistency between the two.”³⁸¹ In fact, rejecting a too-clever attempt by the agency to stick with the current regulatory definition of “designated pollutant” and finding insufficient evidence that one

³⁷⁹ CAA § 112(c)(9).

³⁸⁰ See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts* in INTERPRETING THE CONSTITUTION AND LAWS, IN A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 18 (Amy Gutmann ed., 1997).

³⁸¹ *Citizens to Save Spencer Cnty*, 600 F.2d at 870.

of the provisions is, in fact, a scrivener's error, an EPA interpretation which harmonizes the provisions may be the only type of agency interpretation that can pass *Chevron* step two. In that case, EPA should take advantage of its comparative institutional advantage and adopt the expansive interpretation harmonizing the two provisions. To the extent that EPA is the institutional actor making the decision, then, GHG regulation is more likely, and entirely appropriate

PART V. CONCLUSION

Ultimately, in policing the bounds of statutory interpretation, it will be up to the court to be the final arbiter of who decides the resolution to the particular question of what to do with sections 108 and 302 of the 1990 Amendments. This does not suggest, however, that the court need reserve that resolution to itself. The ultimate determination of who decides should be driven, in part, by first resolving the question of what *type* of resolution is most appropriate. By this I do not mean a resolution of what the right interpretation is, but merely what right category of interpretation. If the court determines that these statutory conflicts are not resolvable through interpretation at all – that the conflict inherent in two amendments to the same language, particularly when there is little convincing evidence of what each or both amendments were trying to accomplish, is just not resolvable by an act of “interpretation” – the court should place the ultimate resolution of the question with Congress. By rejecting both amendments and returning the statute to the status quo ante, the court can force Congress to resolve the conflict on its own.

If courts are unwilling to effectively strike down provisions of a law passed through the constitutional process, and are unwilling to maintain the legal fiction of congressional delegation to agencies to fix this type of drafting error, the court should find that an arbitrary but predictable decision-rule leaves the appropriate interpretation of dueling amendments unambiguous at *Chevron* step one. Using the longstanding, though somewhat unprincipled justification developed by courts that the amendment placed later in the bill should be given priority over amendments placed earlier in a bill, the court can endorse an arbitrary but bright-line rule which provides predictability to those reading the law, and to lower courts who have to interpret the law. Given the longstanding doctrine in this area, the appropriate arbitrary rule would be to pick the Senate amendment in section 302(a) over the House amendment in section 108(g). This resolution, best left to the courts, as the institution in the best position to “lend coherence to the general legal order,”³⁸² is also the best option for the courts to the extent deference is inapplicable for dueling amendments.

Finally, and most persuasively, if the court determines that amendments striking the same language are sufficiently analogous to more typical conflicts among provisions of a law, it should let the agency

³⁸² See Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference*, 57 ADMIN. L. REV. 501, 507 (2005).

resolve the conflict in the way that best serves the purposes of the particular law. Courts should, of course, police the edges of what is an acceptable agency interpretation, and through the two step *Chevron* doctrine already have the tools to do so. In order to survive at *Chevron* step two, an agency interpretation would have to reconcile both provisions, for example, rather than picking the one that it liked the best. Agencies are free to make decisions that maximize social welfare in the particular circumstances, without being bound by the need to apply a consistent rule across all statutory frameworks. Agencies are also accountable and somewhat more flexible, such that if a particular interpretation becomes unworkable in application in the future, that interpretation can be changed. Finally, particularly, as here, when agencies are involved in the legislative drafting process, they may have a better sense of the purpose of the conflicting provisions than what is discoverable by the court in the existing legislative record or broad readings of purpose.³⁸³ Agencies, then, are in a better position to actually reconcile the principles behind the provisions enacted by Congress rather than merely their words.

In the case of the applicability of section 111(d) to greenhouse gases, however, the particular resolution may not matter. Any of these options leave room for EPA to continue to, as it has planned, apply section 111(d). Striking down both provisions will merely yield a restriction that is not possible to meet. GHGs are not pollutants listed in section 112(b)(1)(A) if only because that section no longer exists. As such, regulation of GHGs would meet all of the remaining conditions required for regulation under section 111(d). Alternatively, the best arbitrary decision rule that the court could apply would be one that, by happenstance in this case, kept the provision which continued to allow regulation of GHGs. Section 302(a), later in placement in the 1990 Amendments, merely bars the use of section 111(d) for pollutants listed under section 112(b). GHGs are not, and are unlikely to be, listed. Regulation, therefore, again, can go forward. And finally, if the court accepts the proposition that the agency is best able to harmonize the provisions, and so accords EPA *Chevron* deference on the matter, the agency will be relatively free to promulgate a rule that does not restrict the use of section 111(d) for GHGs. Given the lack of resolution at Conference, Congress has not spoken directly to the question at issue. So long as the agency attempts to effectuate the text and purpose of *both* sections 108(g) and 302(a) of the 1990 Amendments courts would likely, and should, determine that the agency's reading is reasonable at *Chevron* step two and accord the position deference. EPA's best option for meeting these requirements is to promulgate a rule implementing an expansive interpretation of the 1990 Amendments. So long as *both* the pollutant regulated is not a HAP and the source category is not listed, EPA should be free to use section 111(d). Meeting what appears to be the underlying goals of both sections 108(g) and 302(a), this is a reasonable

³⁸³ See Peter Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 6660 CHI.-KENT L. REV. 321 (1990); see also Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference*, 57 ADMIN. L. REV. 501, 511 (2005).

interpretation of what the White House and Senate would have agreed to had they actually been forced to resolve their differences. Given that GHGs are not a listed pollutant, GHG regulation would be appropriate.