

# Disempowering the EPA: How Statutory Interpretation of the Clean Air Act Serves the Trump Administration’s Deregulatory Agenda

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## Introduction

As the Environmental Protection Agency (EPA) and the Clean Air Act reach their respective 50<sup>th</sup> anniversaries, President Donald Trump’s administration is bending the historic trajectory of both the agency and the Act. For most of its existence, EPA’s path has been “progressive” in that the statutes EPA implements, including the Clean Air Act (CAA), obligate the agency to advance its regulations as science and technology progress. EPA’s CAA rulemaking must integrate advances in our understanding of the effects of air pollution on the environment and on public health, as well as new methods to curb pollution.

Provisions of the CAA together ensure a continual and comprehensive response to the threats posed by air pollution.<sup>1</sup> These include EPA’s obligation to periodically update pollution control technology standards and to review the National Ambient Air Quality Standards so that the standards reflect the latest science. The CAA specifies many of these mandates explicitly. Where the Act is vague in whether and how it applies to emerging understandings of air quality

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<sup>1</sup> In 2017, the Office of Management and Budget estimated that rules under EPA’s Office of Air and Radiation resulted in 180.5 to 665.4 billion dollars of annual benefits. See OFFICE OF MANAGEMENT AND BUDGET, 2017 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT, 10 (2017), [https://www.whitehouse.gov/wp-content/uploads/2019/12/2019-CATS-5885-REV\\_DOC-2017Cost\\_BenefitReport11\\_18\\_2019.docx.pdf](https://www.whitehouse.gov/wp-content/uploads/2019/12/2019-CATS-5885-REV_DOC-2017Cost_BenefitReport11_18_2019.docx.pdf) (“Across the Federal government, the rules with the highest estimated benefits as well as the highest estimated costs come from [EPA] and in particular its Office of Air and Radiation. Specifically, EPA rules account for 71 percent to 80 percent of the monetized benefits and 55 percent to 64 percent of the monetized costs. Of these, rules that gave a significant aim to improve air quality account for over 95 percent of the benefits of EPA rules.”).

challenges, EPA has read the language to be capacious enough to require or authorize the agency to take the actions needed to solve new problems. To do so, EPA evaluates new science to find CAA-based solutions to meet the emission-reduction goals of the Act. EPA has also generally understood the CAA as granting the agency the authority to allow compliance flexibility for regulated sources while still meeting the required emissions reductions. The courts have mostly ratified EPA's interpretive approach. This bolsters the agency's understanding that the CAA contains the necessary tools for EPA to achieve continual air quality improvement.

The Trump EPA is working to change the agency's progressive trajectory through a series of rule rollbacks based on interpretations of the CAA that narrow the agency's legal authority. EPA is no longer conducting rigorous empirical analysis to understand and solve air quality problems and is instead interpreting the Act to establish that it lacks the authority to act. In so doing, the Trump administration is reaching the conclusion that EPA is directly or indirectly bound by the Act to do less to control air pollution. The Trump EPA is also discarding the balance between compliance flexibility and air quality goals. It is deregulating to provide leniency to regulated sources and to preclude the agency from re-embracing the progressive meaning of the CAA in the future. Through these actions, EPA is defying its own mission as well as the language and logic of the statute.

If successful, the Trump EPA will curtail the agency's long-term ability to effectively regulate sources of pollution, including greenhouse gas emissions. The administration is advancing this deregulatory goal through two primary methods: imposing a static interpretation of the statutory text to limit its power to regulate, and undermining the structure of key provisions of the Act that contemplate a comprehensive strategy to reducing pollution. Through the latter strategy, the Trump EPA defeats the comprehensive nature of the CAA's pollution abatement programs by disaggregating pollution sources and pollution reductions, and sub-categorizing benefits when the agency must determine whether to regulate. By looking narrowly at each problem, EPA is preemptively justifying its conclusion that no action is warranted. In two recent rulemakings, EPA acknowledges that the regulatory change will have negligible impacts on pollution levels.<sup>2</sup> Instead, the rulemakings emphasize the agency's new legal interpretations, strongly suggesting that their purpose is to hamstring EPA's future efforts to use the CAA to address emissions, especially of climate pollutants.

This article proceeds in three parts. First, we provide an overview of the foundation of the CAA, its progressive logic, and the judiciary's affirmation of EPA's broad authority to address evolving air quality problems. Second, we detail four actions by the Trump EPA that exemplify the agency's strategy of undermining its own statutory authority: the repeal of the Clean Power Plan and the promulgation of the Affordable Clean Energy rule, the revocation of the waiver for California's regulation of greenhouse gas tailpipe emissions and the zero emissions vehicle program, the proposed revocation of the "appropriate and necessary" finding for regulating hazardous air pollutant emissions from power plants, and the proposed New Source Performance Standards for the oil and natural gas sector. Third, we conclude by describing the consequences of these actions.

## **I. The Clean Air Act's Progressive Nature**

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<sup>2</sup> See Affordable Clean Energy Rule, 84 Fed. Reg. 32,520 (July 8, 2019); see also Amendments to New Source Performance Standards for Oil and Natural Gas Sector, 84 Fed. Reg. 50,244, 50,257 (Sept. 24, 2019).

Congress designed the CAA to make continuous progress towards cleaner air. The CAA's first purpose is "to protect *and enhance* the quality of the Nation's air resources so as to promote the public health and welfare."<sup>3</sup> The Act's following subsection states that "a primary goal of this Act is to encourage or otherwise promote reasonable Federal, State, and local governmental actions...for pollution prevention."<sup>4</sup> The logic of the CAA is that EPA must effectively protect the environment and public health in a manner that is reasonable for each specific pollution control provision. As Senator Muskie affirmed during the 1970 debate on the Act, "These, then, are the commitments that the Congress should make – commitment to meaningful environmental protection; effective protection of the health of all Americans; and the early achievement of these goals."<sup>5</sup> Though the goals have proven more difficult to meet, Congress did successfully enact such a statute and task EPA with continually working toward achieving its purposes. The courts have reinforced EPA's statutory mandates and mostly upheld stringent pollution control requirements based on the agency's statutory interpretations. The courts allow the agency to implement the statute in a less demanding manner only when the judiciary finds it is authorized by statute to do so.

#### **a. The Clean Air Act's Clear Statutory Mandate for Progress**

Congress wove throughout the CAA a mandate for progress, not through sweeping aspirational language found in other environmental statutes, but by requiring recurrent standard-setting and upgrades to pollution control techniques. The CAA demands that every five years EPA determine whether the latest science compels a revision of the National Ambient Air Quality Standards (NAAQS).<sup>6</sup> If it does, then the Administrator must revise the NAAQS accordingly. The Act further requires that every eight years EPA determine whether technological advances warrant tightening emission standards for new and modified stationary sources of pollution.<sup>7</sup> Congress complemented those tasks with mandates that EPA act when states fail to meet regulatory obligations triggered by the updates to the air quality standards. In addition to the mechanisms designed to result in continually declining pollution, Congress suffused the Act's language with calls for continuous air pollution reduction. Maximalist adjectives are the foundation of the various technological standards: *best* available control technology, *maximum* achievable control technology, *best* system of emission reduction, and *lowest* achievable emission rate, for example.<sup>8</sup>

The Act's central science-based, technological-diffusion mechanism begins with EPA's mandatory review of the NAAQS. The Administrator must "complete a thorough review" of each ambient air standard at five-year intervals and "make such revisions...and promulgate such new standards as may be appropriate"<sup>9</sup> to ensure the NAAQS "accurately reflect the latest

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<sup>3</sup> CAA §101(b)(1), 42 U.S.C. §7401(b)(1) (emphasis added).

<sup>4</sup> CAA §101(c), 42 U.S.C. §7401(c).

<sup>5</sup> 116 CONG. REC. 32,903 (daily ed. Sept. 21, 1970).

<sup>6</sup> CAA §109(d)(1), 42 U.S.C. §7409(d)(1).

<sup>7</sup> CAA §111(b)(1)(B), 42 U.S.C. §7411(b)(1)(B); CAA §112(f)(2)(A), 42 U.S.C. §7412(f)(2)(A).

<sup>8</sup> CAA §169(3), 42 U.S.C. §7477(3) (Best Available Control Technology); CAA §112(d)(3), 42 U.S.C. §7412(d)(3) (Maximum Achievable Control Technology); CAA §111(a)(1), 42 U.S.C. §7411(a)(1) (Best System of Emission Reduction); CAA §171(3), 42 U.S.C. §7481(3) (Lowest Achievable Emissions Rate).

<sup>9</sup> Section 109(d)(1), 42 U.S.C. §7409(d)(1).

scientific knowledge”<sup>10</sup> To fulfill this mandate, EPA conducts a comprehensive review of the existing science through an extensive multi-step process that involves the agency’s expert staff and contributions from an independent expert review committee.<sup>11</sup> After EPA receives public input and advice from experts, the agency decides whether to revise the allowable level of pollution in the ambient air. This decision must be based solely on public health considerations and may not take into account other concerns such as cost or feasibility.<sup>12</sup>

Because of the increasing understanding of air pollution’s impact on human health, the NAAQS review process frequently results in EPA tightening the existing standards. This triggers a chain of obligations for EPA and for states that results in new actions requiring further pollution reductions. EPA first designates counties as either meeting the new standards (in attainment) or exceeding the standards (non-attainment).<sup>13</sup> States must then develop State Implementation Plans requiring sources to reduce pollution to levels needed to ensure that non-attainment counties reach attainment and to “prevent significant deterioration” in areas that are already in attainment.<sup>14</sup> These plans rely on diffusion of pollution abatement technology across sources and statutory programs. They include requirements that newly constructed or renovated facilities install and operate up-to-date technology.<sup>15</sup> The installation and operation of those technologies foster further pollution control innovations that inform future requirements for new sources. Thus Congress created a mechanism to continually incorporate the latest public health science into CAA programs in part for the purpose of constant improvement of pollution control methods across the United States.<sup>16</sup>

The NAAQS setting and implementation processes are not the only CAA features that embed scientific and technological advancement in EPA’s obligations. Prior to the enactment of the CAA, California established the first automobile tailpipe emissions standards to combat its serious smog challenges.<sup>17</sup> While Congress established a program for national tailpipe emissions in the 1970 Clean Air Act, it also recognized California’s uniquely severe air quality problems and ratified the state’s role as an ongoing leader in forcing technology advancements by the auto industry. CAA §209 preempts states from establishing tailpipe emissions standards, but it authorizes EPA to grant California a preemption waiver if California establishes that the standards are at least as protective as the national standards and if the state meets certain criteria.<sup>18</sup> Congress built a presumption into the statute that EPA will grant California a

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<sup>10</sup> Section 108(a)(2), 42 U.S.C. §7408(a)(2).

<sup>11</sup> Congress chartered The Clean Air Scientific Advisory Committee to advise EPA on the adequacy of the existing standards and whether revisions are needed. Historically, EPA has also formed auxiliary committees focused on certain pollutants, such as the Particulate Matter Review Panel to assist the chartered Clean Air Scientific Advisory Committee.

<sup>12</sup> *Whitman v. American Trucking*, 531 U.S. 457, 471 (2001).

<sup>13</sup> CAA §107(d), 42 U.S.C. §7407(d).

<sup>14</sup> CAA §110, 42 U.S.C. §7410 (State Implementation Plans).

<sup>15</sup> CAA §110(a)(2)(C), 42 U.S.C. §7410(a)(2)(C); CAA §165, 42 U.S.C. §7475; CAA §173, 42 U.S.C. §7502.

<sup>16</sup> William Boyd, *The Clean Air Act’s National Ambient Air Quality Standards* in *LESSONS FROM THE CLEAN AIR ACT 15 – 55* (Ann Carlson & Dallas Burtraw eds., 2019) (“By design, the NAAQS program is always in motion, but the goals and overall direction of the program are clear, and there are procedural mechanisms in place that continue to push the program forward.”).

<sup>17</sup> *History*, CALIFORNIA AIR RESOURCES BOARD, <https://ww2.arb.ca.gov/about/history> (last visited Dec. 19, 2019).

<sup>18</sup> CAA § 209(b)(1), 42 U.S.C. § 7543(b)(1) (“The Administrator shall...waive application of this section to any State which has adopted standards...for the control of emissions from new motor vehicles or new motor vehicle engines

preemption waiver by placing on EPA or opponents of the waiver the burden to demonstrate that one of three criteria for denying a waiver has not been met.<sup>19</sup> Only then may EPA deny the request. Ratifying California's role as a technology leader and conferring a presumption in its favor shows the lengths Congress went to bolster the technology-forcing and emissions-reductions goals of the statute.

For decades, California has carried out that role by adopting a series of tailpipe emissions programs and seeking and receiving §209 waivers to enforce its requirements for innovative automotive pollution control technology. For example, in 1990, California established its Zero-Emission Vehicle regulation requiring auto-manufacturers to produce and offer to sale a specific number of cars with the most advanced emissions technology.<sup>20</sup> EPA granted a waiver for the program in 1993.<sup>21</sup> In 2004, years before the Federal government began regulating greenhouse gas tailpipe emissions, California set standards for automotive greenhouse gas emissions, and in 2009 EPA issued a waiver for the program.<sup>22</sup> Furthermore, under CAA §177, other states have the authority to adopt California's standards once a waiver is granted. While CAA §209 encourages technology development, CAA §177 facilitates technology dissemination and emissions-reductions on a broad scale.

The history of greenhouse gas regulation under the CAA provides another example of the foundational features of the Act. Once Congress or EPA determines that a pollutant poses a threat to public health or the environment, EPA and the states are charged with carrying out a network of mandates to solve the problem comprehensively and to advance technology development. In 2003, a coalition of environmental organizations, states, and cities sued EPA for failure to regulate greenhouse gases after EPA denied their petition seeking regulation and determined it lacked the statutory authority to do so.<sup>23</sup> In 2007, the Supreme Court found in *Massachusetts v. EPA* that greenhouse gases “fit well within the Clean Air Act’s capacious definition of ‘air pollution’” and that EPA did have the authority to regulate these pollutants.<sup>24</sup> This decision compelled the agency to conduct an analysis to determine whether greenhouse gases emitted by automotive sources endangered public health and welfare. Ultimately, the

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prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.”).

<sup>19</sup> CAA §209(b)(1)(A)-(C), 42 U.S.C. § 7543(b)(1)(A)-(C); *see also* Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emissions Standards for New Vehicles, 74 Fed. Reg. 32,744, 32,745 (July 8, 2009) (“Congress recognized that California could serve as a pioneer and a laboratory for the nation in setting new motor vehicle emission standards. Congress intentionally structured this waiver provision to restrict and limit EPA’s ability to deny a waiver, and did this to ensure that California had broad discretion in selecting the means it determined best to protect the health and welfare of its citizens.”).

<sup>20</sup> *See* 58 Fed. Reg. 4,166 (July 13, 1993); *Zero Emission Vehicle Program*, CALIFORNIA AIR RESOURCES BOARD, <https://ww2.arb.ca.gov/our-work/programs/zero-emission-vehicle-program/about> (last visited Dec. 19, 2019).

<sup>21</sup> California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption; Decision, 58 Fed. Reg. 4166 (July 13, 1993).

<sup>22</sup> Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emissions Standards for New Vehicles, 74 Fed. Reg. 32,744, 32,745 (July 8, 2009); *See also* Jody Freeman, The Obama Administration’s National Auto Policy: Lessons from the “Car Deal,” 35 Harv. Envtl. L. Rev. 343, 349 – 351 (2011) (Describing the history of Federal and state regulations of greenhouse gas tailpipe emissions).

<sup>23</sup> Petition for Review, Docket No. 03-1361 (D.C. Cir. 2003).

<sup>24</sup> *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

agency determined simultaneously that they did and that new motor vehicles “cause and contribute to” greenhouse gas pollution.<sup>25</sup> These two findings triggered a statutory requirement under CAA §202 to regulate greenhouse gas tailpipe emissions for vehicles. Regulation of emissions from mobile sources meant, in turn, that greenhouse gases were generally “subject to regulation” under the CAA, triggering other statutory provisions related to greenhouse gas emissions from stationary sources.<sup>26</sup> The cascade of new regulations reflects the progressive nature of the CAA.

The Act’s language clearly demonstrates Congress’ intention that EPA become an agency reliant on and helping aid the advancement of science and technology. Congress mandated for EPA a permanent, ongoing agenda defined and driven by the advances made by science and technology. Over time, EPA actions in following this agenda have made practical contributions to scientific and technological advancement, resulting in a virtuous cycle supporting continual air quality improvement.

Congress balanced this demand with constraints that guide the agency and ensure feasible regulatory requirements. One of the explicit purposes of the act is to promote reasonable pollution prevention strategies.<sup>27</sup> Accordingly, as appropriate, Congress explicitly instructs EPA to consider costs and other consequences of requiring certain pollution control technologies.<sup>28</sup> In turn, the courts have interpreted provisions in the CAA as having sufficient latitude to allow the agency to offer compliance flexibility to regulated sources.<sup>29</sup> This expansive reading of the agency’s authority in matters of compliance mirrors the capacious authority granted the agency through the progressive elements of the statute. Though these feasibility requirements constrain the agency in the sense that EPA cannot mandate unreasonable pollution control programs, even if those programs would result in large emissions reductions, they align with the progressive air quality goals of the statute. The limitations ensure the regulated community can meet the statute’s pollution reduction requirements – a prerequisite for successful implementation of the CAA.

### **b. EPA’s Understanding of its Mandate**

Since the passage of the 1990 CAA amendments, EPA has understood the Act as containing the tools necessary for adapting the statute to confront newly discerned air quality issues. Many commenters point to Congressional inaction on climate change as driving EPA’s

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<sup>25</sup> 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).

<sup>26</sup> See e.g. The Affordable Clean Energy Rule, 84 Fed. Reg. 32,520 (July 8, 2019) (EPA regulates greenhouse gas emissions from power plants under CAA §111(b) and §111(d)); *but see* UARG v. EPA, 134 S. Ct. 2427 (2014) (Holding that EPA may regulate greenhouse gases from already-regulated sources, but it cannot read the regulation of greenhouse gases under CAA §202 as triggering Title V and Prevention of Significant Deterioration permitting requirements).

<sup>27</sup> CAA §101(c), 42 U.S.C. § 7401(c).

<sup>28</sup> E.g. CAA §169(3), 42 U.S.C. §7477(3) (“The term ‘best available control technology’ means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act...which the permitting authority...taking into account energy, environmental, and economic impacts and other costs, determines is achievable....”).

<sup>29</sup> See e.g. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (“We hold that the EPA’s definition of the term ‘source’ is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth.”)

expansive understanding of its statutory authority.<sup>30</sup> Regardless of the impetus, the way in which CAA authorities have created EPA's need to address modern air quality problems, and facilitated EPA's responses, reinforces the statute's progressive design. EPA under the George W. Bush and Barack Obama administrations adopted an expansive reading of the CAA to accomplish the agency's goals. The Bush administration generally privileged low regulatory costs when identifying the issue to be addressed, and as a result, read its authorities as sufficiently expansive to promote compliance flexibility.<sup>31</sup> The Obama EPA, however, read the Act as providing the agency with the latitude to design innovative pollution control programs as newly understood air quality challenges reached levels of urgency sufficient to demand solutions.

EPA's effort to address the long-range transport of air pollution, which spanned three administrations, crystallizes EPA's, and the courts', progressive reading of the CAA. EPA put in place a multi-state emissions trading program relying entirely on the authority granted to the agency in CAA §110(a)(2)(D) and CAA §110(c)(1), which help ensure all states implement plans to meet the NAAQS. The text of those sections reads:

Each implementation plan submitted by a State<sup>32</sup>...shall...contain adequate provisions prohibiting...any source or other type of emissions activity within the State from emitting any air pollutants in amounts which will *contribute significantly to* nonattainment in, or interfere with maintenance by, any other state....<sup>33</sup>

The administrator *shall promulgate a Federal implementation plan* at any time within 2 years after the Administrator finds that a state has failed to make a required submission or finds that the plan or plan revision submitted...does not satisfy the minimum criteria...or disapproves a State implementation plan submission in whole or in part.<sup>34</sup>

Notably, both provisions are silent as to the type of action they require EPA to take. From the words "adequate provisions" and "contribute significantly," and the mandate to implement Federal plans when states do not meet the minimum criteria, EPA designed a multi-pollutant emissions trading program affecting 27 states, which the Supreme Court ultimately upheld.<sup>35</sup> Building on an effort that began during the Clinton presidency,<sup>36</sup> in 2005, the Bush administration promulgated the Clean Air Interstate Rule (CAIR) to address pollution from upwind states that was preventing downwind states from meeting the NAAQS.<sup>37</sup> The rule required statewide emissions reductions in order to meet the obligations of CAA 110(a)(2)(D) and included EPA-administered voluntary cap and trade programs. States could require power

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<sup>30</sup> As Jody Freeman and David B. Spence write, "during periods of congressional dysfunction, agencies must adapt aging statutory authority to new problems, shifting the locus of policymaking first to agencies and then to the courts." Jody Freeman and David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 42 (Dec. 2014).

<sup>31</sup> The Bush administration, however, denied a petition to regulate greenhouse gas emissions from motor vehicles, determining that the agency lacked the statutory authority to do so. Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003).

<sup>32</sup> CAA §110(a)(2), 42 U.S.C. 7410(a)(2).

<sup>33</sup> CAA §110(a)(2)(D), 42 U.S.C. 7410(a)(2)(D).

<sup>34</sup> CAA §110(c)(1), 42 U.S.C. 7410(c)(1).

<sup>35</sup> EPA v. EME Homer City Generation L.P., 572 U.S. 489, 524 (2014).

<sup>36</sup> 1998 NO<sub>x</sub> SIP Call, 62 Fed. Reg. 25,902, 25,904 (May 11, 1998).

<sup>37</sup> Clean Air Interstate Rule, 70 Fed. Reg. 25,161 (May 12, 2005).

plants to join the cap and trade programs in order to meet CAIR's requirements "in a flexible and cost-effective manner."<sup>38</sup>

The D.C. Circuit invalidated CAIR in 2008 for multiple reasons, including that the agency set region-wide caps rather than state-specific caps. The court determined that the statute called for state-specific emissions reduction obligations.<sup>39</sup> The court based its objection to CAIR on the determination that the features of the program violated the CAA by failing to sufficiently address the long-range pollution impact on downwind air quality.<sup>40</sup> Notably, the court did not even consider whether EPA lacked the authority to establish such a comprehensive regulatory program under the statute's express terms.<sup>41</sup> Rather, the court accepted the premise that the statute authorized EPA to create a program more elaborate than CAIR and even more elaborate than the Title IV acid rain trading program – a highly prescriptive regulatory program that Congress wrote into the text of the CAA.<sup>42</sup>

Under the Obama administration, EPA promulgated the Cross-State Air Pollution Rule (CSAPR), which sought to remedy the flaws the D.C. Circuit identified in CAIR.<sup>43</sup> CSAPR included an intricate four-part science-based test through which EPA allocated emissions budgets to each state, using federal implementation plans to implement each state's emissions reductions requirements.<sup>44</sup> CSAPR was even more complex than CAIR. It included a mechanism that allowed sources to rely on interstate trading while maintaining state-specific emissions budgets. The program also specified four different regional trading markets, covered two different pollutants, and operated through both annual and seasonal budgets for each pollutant. The Supreme Court ultimately upheld CSAPR as a proper exercise of EPA's authority under CAA §110.<sup>45</sup>

What characterized the progressive interpretation at the foundations of CAIR and CSAPR is the elevation of empiricism that is common to all of the CAA's standard-setting provisions. Though interstate air pollution presented a more complex challenge than Congress likely recognized when it drafted CAA §110(a)(2)(D), EPA interpreted its authority under the CAA as suitable for solving the problem as the agency understood it. Through rigorous analysis of a broad range of scientific research, EPA understood that pollutants emitted in large quantities and transported over long distances contributed significantly to air quality problems in local air sheds. EPA recognized that fossil fuel-fired power plants were substantially responsible and that significantly cutting their emissions would improve downwind air quality. Since acid deposition was also the result of the long-range transport of pollution, EPA followed Congress' lead and identified the multi-state cap and trade model as highly effective for addressing the long-range pollution transport that degraded downwind air quality. EPA used this analysis to give meaning

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<sup>38</sup> *Id.* at 25,162.

<sup>39</sup> *North Carolina v. EPA*, 531 F.3d 896, 930 (2008).

<sup>40</sup> *Id.* at 908.

<sup>41</sup> *Id.* at 906 ("North Carolina challenges the lawfulness of CAIR's trading programs for SO<sub>2</sub> and NO<sub>x</sub>. North Carolina contests the lack of reasonable measures in CAIR to assure that upwind states will abate their unlawful emissions...but does not submit that any trading is per se unlawful.").

<sup>42</sup> *See id.* at 902 – 903 (2008) (Describing Title IV of the Clean Air Act).

<sup>43</sup> *Cross-State Air Pollution Rule*, 76 Fed. Reg. 48,207 (Aug. 8, 2011).

<sup>44</sup> *See Wisconsin v. EPA*, Docket No. 16-1406, slip op. at 5-10 (D.C. Cir. Sept. 13, 2019) (Describing the components of CSAPR).

<sup>45</sup> *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 479, 524 (2014).

to the terms “adequate provision” and “contributes significantly,” intertwining statutory interpretation, empirical analysis, and fact-finding.

The Bush EPA pioneered a similar expansiveness in the interpretation of its authorities under CAA §111 (standards of performance for new and existing stationary sources). Section 111 contains the following provisions:

(a)(1): The term ‘standard of performance’ means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of *the best system of emission reduction* which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.<sup>46</sup>

(d): The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant.<sup>47</sup>

Building on CAIR, the Bush EPA implemented the Clean Air Mercury Rule (CAMR), which interpreted “best system of emission reduction” in CAA §111(a)(1) as authorizing the agency to design a nationwide emissions trading program for power plant mercury emissions.<sup>48</sup> In the final rule promulgating the cap-and-trade program, the agency explained, “The term “standard of performance” is not explicitly defined to include or exclude an emissions cap and allowance trading program. ...EPA interprets the term ‘standard of performance’ as applied to existing sources, to include a cap-and-trade-program. This interpretation is supported by a careful reading of the section 111(a) definition of the term.”<sup>49</sup> EPA then determined that a cap-and-trade program, as opposed to a technology performance standard under §112, represented the best system of emissions reduction for mercury emissions. Ultimately, EPA garnered significant criticism for CAMR’s substantive qualities and the rulemaking process.<sup>50</sup> The D.C.

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<sup>46</sup> CAA §111(a)(1), 42 U.S.C. §7411(a)(1)(emphasis added)

<sup>47</sup> CAA §111(d), 42 U.S.C. §7411(d).

<sup>48</sup> Clean Air Mercury Rule, 70 Fed. Reg. 28,606, 28,616 (May 18, 2005) (“The term ‘standard of performance’ is not explicitly defined to include or exclude an emissions cap and allowance trading program. In the final rule, EPA interprets the term ‘standard of performance,’ as applied to existing sources, to include a cap-and-trade program. [...] A requirement for a cap-and-trade program (i) constitutes a “standard for emissions of air pollutants;’ (i.e., a rule for air emissions), (ii) ‘which reflects the degree of emission limitation achievable’ (i.e., which requires an amount of emissions reductions that can be achieved), (iii) ‘through application of (a) \* \* \* system of emission reduction’ (i.e., in this case, a cap-and-trade program that caps allowances at a level lower than current emissions”).

<sup>49</sup> *Id.*

<sup>50</sup> See Andrew Carter, *Alchemical Rulemaking and Ideological Framing: Lessons from the 40-Year Battle to Regulate Mercury Emissions from Electric Power Plants*, 50 NAT. RESOURCES J. 125, 158 (Winter 2018) (“Members of the Senate Environment and Public Works Committee were suspicious of the process resulting in the 2004 proposed CAMR, and requested analyses of the proposed rule from EPA’s Office of Inspector General (OIG), and from the Government Accountability Office (GAO), both of which released reports highly critical of the Proposed CAMR and the process by which it was created.”).

Circuit struck down the final rule, but it did so without reaching issues related specifically to the agency's interpretation of section 111(a).<sup>51</sup>

Like CAIR in the case of §110(a)(2)(D) and CAA §110(c)(1), CAMR anticipated to an extent the Obama EPA's interpretation of §111(d) and the definition of best system of emissions reduction.<sup>52</sup> When the Obama EPA began constructing the Clean Power Plan, the agency again engaged in an empirical investigation to give meaning to the terms "best system of emission reduction." CAA §111(d) requires that states submit plans establishing "standards of performance" for power plants. Subsection (a)(1) defines "standards of performance" as standards reflecting the "best system of emission reduction." Pursuant to the President's instruction, the agency undertook a robust process of public engagement to determine the "best system of emission reduction" and develop guidelines for states in establishing standards of performance for power plant carbon-dioxide emissions under section 111(d).<sup>53</sup> EPA acquired extensive information and observed that the demands of the networked electricity grid dictated the operation of power plants and that shifting generation from higher emitting to lower emitting sources was a well-established, widely-used strategy within the power sector for complying with pollution control programs. EPA then issued guidelines that offered states a broad menu of standard-setting options so that power plant emissions standards fully reflected EPA's determination that generation-shifting constituted the best system of emission reduction. In doing so, EPA rejected a reading of subsection (d) that would bar states from adopting standards that encompassed generation-shifting. Instead, the agency recognized that since there were a variety of ways in which states could define standards of performance, subsection (d) conferred on the states flexibility sufficient to set standards that matched EPA's determination of the "best system of emission reduction."

CSAPR and the CPP illustrate an additional aspect of the CAA's progressive character. The same provision requiring periodic review of technology standards, section 111, requires that those standards reflect the "best system of emission reduction...the Administrator determines has been adequately demonstrated." Making that determination is an inherently empirical exercise. Like other CAA provisions, the language of section 111 conveys a directive to search for new information to provide the answer to a question. It does not convey an inherent, static meaning that can be determined solely through textual analysis. Rather, the language must be interpreted to reflect or incorporate the empirical results of the agency's investigation.

### **c. Judicial Backing of a Progressive Clean Air Act**

The judiciary has consistently found that Congress gave EPA the authority to continually address previously unknown air quality problems. This has remained true for the nearly three

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<sup>51</sup> The court struck down the Delisting Rule, which removed coal and oil-fired power plants from the list of sources whose emissions are regulated under section 112 - a prerequisite to implementing CAMR. *See New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. Feb. 8, 2008) ("EPA thus concedes that if EGUs remain listed under section 112, as we hold, then the CAMR regulations for existing sources must fall. EPA promulgated the CAMR regulations for new sources under 111(b) on the basis that there would be no section 112 regulation of EGU emissions and that the new source performance standards would be accompanied by a national emissions cap and a voluntary cap-and-trade program. Given that these vital assumptions were incorrect, the court must vacate CAMR's new source performance standards and remand them to EPA for reconsideration....").

<sup>52</sup> Clean Power Plan, 80 Fed. Reg. 64,661 (Oct. 23, 2015).

<sup>53</sup> Presidential Memorandum, Power Sector Carbon Pollution Standards (June 25, 2013).

decades that have passed since the most recent CAA amendments. Recent decisions on the merits by the Supreme Court, in particular, as well as lower court decisions, continue to back this progressive understanding of the CAA’s logic. The Court’s endorsement is most apparent in the seminal case *Massachusetts v. EPA*, which challenged the Bush administration’s determination that it lacked the CAA authority to regulate greenhouse gas tailpipe emissions.<sup>54</sup> Writing for the majority, Justice Stevens explained Congress’ awareness that only through enacting a statute that tracked scientific progress would Congress be able to empower EPA to face the nation’s air quality challenges:

While the Congress that drafted §202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.<sup>55</sup>

Justice Stevens underscores the importance of reading the CAA dynamically so as to not make a statute of the breadth and ambition of the CAA “obsolete.” Ultimately, even though the Court acknowledged that Congress did not specifically contemplate applying the CAA to greenhouse gas emissions, it rejected EPA’s denial of its own statutory power. Instead, it held that the CAA required EPA to treat greenhouse gases as “air pollutant(s),” as defined by the statute, to determine whether they presented a threat to public health or the environment, and if so, to use the tools Congress granted the agency to regulate air pollution.<sup>56</sup>

Similarly, in *EPA v. EME Homer City Generation L.P.*, the Supreme Court upheld CSAPR.<sup>57</sup> In CSAPR, EPA contemporaneously promulgated emissions budgets for each upwind state and Federal implementation plans that applied the emissions budgets to affected states after finding that the states failed to promulgate adequate plans.<sup>58</sup> The D.C. Circuit vacated the rule, in part finding, without identifying any statutory basis for its conclusion, that EPA needed to allow states extra time to develop implementation plans following EPA’s promulgation of the emissions budgets.<sup>59</sup> The Supreme Court overturned this decision in *EPA v. EME Homer City Generation L.P.*<sup>60</sup> In describing CAA §110(a), Justice Ginsburg writes that “the statute speaks without reservation.”<sup>61</sup> She proceeds to hold that “The D.C. Circuit...had no warrant...to revise the CAA’s *action-ordering prescriptions* by placing an additional burden on EPA.<sup>62</sup> The Court thus interprets the Act’s “action-ordering prescriptions” as authorizing EPA to implement a far-reaching, complex program based on a mandate for “adequate provisions” to address the “significant[] contribut[ion]’ of upwind states’ pollution on downwind air quality.

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<sup>54</sup> 549 U.S. 497, 532 (2007).

<sup>55</sup> 549 U.S. 497, 532 (2007).

<sup>56</sup> *Id.*; see also William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L. J. 1509, 1582 (May 2019).

<sup>57</sup> 572 U.S. 489 (2014).

<sup>58</sup> 76 Fed. Reg. 48,208 (Aug. 2011).

<sup>59</sup> *EME Homer City Generation L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. Aug. 21, 2012).

<sup>60</sup> *EPA v. EME Homer City Generation L.P.*, 572 U.S. 489, 524 (2014).

<sup>61</sup> *Id.* at 509.

<sup>62</sup> *Id.* at 510 (emphasis added).

The judiciary has also upheld the agency’s responsibility to meet Congress’ ambition for widespread dissemination of leading pollution control technology, even when EPA itself shies away from that responsibility. In 2018, the D.C. Circuit reviewed EPA’s establishment of Maximum Achievable Control Technology (MACT) standards for emissions from newly constructed brick kilns. MACT standards are set by identifying the best performing existing sources and establishing a floor – or minimum stringency requirement – at or above which EPA must set the standards.<sup>63</sup> EPA’s rule allowed sources to choose between three emissions limits expressed in different measurement units, all of which the EPA defined as representing the “best” performing sources.<sup>64</sup> EPA sought to offer industry compliance flexibility, arguing that sources’ ability to comply differed based on the unit of measurement.<sup>65</sup> The D.C. Circuit held that while EPA could choose the proper unit of measurement, “EPA’s discretion [did] not extend to defining several different ‘best’ metrics within the same category and allowing emitters to comply with the most favorable standards.”<sup>66</sup> EPA could not contradict the statute’s clear language inducing dissemination of advanced pollution control technology.

Similarly, in *New York v. EPA*,<sup>67</sup> the D.C. Circuit invalidated an EPA rule that allowed facilities to avoid more stringent regulations for modified sources by broadening the routine maintenance, repair, and replacement exclusion to include non-*de minimis* modifications.<sup>68</sup> Under the CAA’s New Source Review program, when a source’s emissions will increase because of a modification, it must meet stringent pollution control requirements.<sup>69</sup> While EPA has historically excluded *de minimis* component part replacements from triggering the review program, in 2003, EPA finalized a rule that categorically excluded replacements under a certain value without considering the resulting emissions change.<sup>70</sup> The court reasoned, “Given Congress’s goal...of establishing a balance between economic and environmental interests, it is hardly ‘farfetched,’ for Congress to have intended [New Source Review] to apply to any type of physical change that increases emissions. [...] EPA’s interpretation would produce a ‘strange,’ if not an ‘indeterminate,’ result: a law intended to limit increases in air pollution would allow sources operating below applicable emissions limits to increase significantly the pollution they emit without government review.”<sup>71</sup> The D.C. Circuit made clear that EPA could not provide flexibility to regulated industry if it would contradict the CAA’s pollution control purpose.

At times, the Court has allowed EPA to use its capacious authority to design flexible compliance mechanisms for industry or has cabined EPA’s authority. These cases are not counter to a progressive reading of the statute. In *Utility Air Regulatory Group (UARG) v. EPA*,<sup>72</sup> the Supreme Court upheld EPA’s regulation of greenhouse gas emissions from sources already within the CAA’s permitting program, while invalidating only the section that made greenhouse

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<sup>63</sup> *Sierra Club v. EPA*, 895 F.3d 1, 8 (D.C. Cir. 2018).

<sup>64</sup> *Sierra Club v. EPA*, 895 F.3d 1, 15 (D.C. Cir. 2018).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 15–16.

<sup>67</sup> 443 F.3d 880 (D.C. Cir. 2006).

<sup>68</sup> *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006).

<sup>69</sup> *Id.* at 883.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 886 (D.C. Cir. 2006) (internal citations omitted).

<sup>72</sup> 573 U.S. 302 (2014).

gas emissions a trigger for additional permitting requirements under the Act.<sup>73</sup> The rule in question in *UARG* would have required CAA permits, solely based on carbon dioxide emissions, for thousands of entities never before subject to permitting requirements. Justice Scalia, writing for the majority, distinguished between the statutory text in the permit-triggering provisions<sup>74</sup> and the provision applicable to already-regulated sources.<sup>75</sup> According to Justice Scalia, the “breadth” of the phrase “any air pollutant” in the permit-triggering provision did not allow a “transformative expansion in EPA’s regulatory authority.”<sup>76</sup> At the same time, he interpreted the statute’s language mandating that permitting requirements apply to “each pollutant subject to regulation under this chapter,” as compelling EPA to impose pollution control requirements on already-regulated sources.<sup>77</sup>

Perhaps surprisingly, Justice Scalia’s decision in *UARG* is an enlightening example of a progressive reading of the CAA. It does not afford the agency unlimited discretion but rather recognizes Congress’ intention for EPA to address previously unknown problems in a “context-appropriate”<sup>78</sup> manner that aligns with the statutory mandates. Where EPA oversteps and attempts to rewrite the statute to significantly expand its authority, the Court invalidates the rule. Where EPA accepts its statutory mandate and regulates greenhouse gases from already-regulated sources, the Court upholds the program as a reasonable interpretation of the CAA given the new realities revealed by science.

In the same vein, in *Michigan v. EPA*, the Court required that EPA consider costs when making an “appropriate and necessary” determination for regulating hazardous air pollutant emissions from power plants. At issue in *Michigan* was CAA §112(n)(1)(A), which requires EPA to study available pollution control technology and the public health impacts of power plants’ hazardous air pollutant emissions after other CAA programs are implemented and to determine, based on the results of that inquiry, whether it is “appropriate and necessary” to regulate those emissions.<sup>79</sup> In making the “appropriate and necessary” determination in 2012, EPA did not consider the cost of regulation.<sup>80</sup> While the Court invalidated this approach, it also expressly stated that it was entirely up to the agency to determine the proper method for cost

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<sup>73</sup> *Id.* At 333 – 334.

<sup>74</sup> *Id.* at 316 (Describing EPA’s historic interpretation of “any air pollutant” in Prevention of Significant Deterioration provisions and Title V.).

<sup>75</sup> *Id.* at 329 (Describing the requirements of 42 U.S.C. 7475(a)(4), “To obtain a PSD permit, a source must be ‘subject to the best available control technology’ for ‘each pollutant subject to regulation under [the Act]’ that it emits.”).

<sup>76</sup> *UARG v. EPA*, 573 U.S. 302, 324 (2014).

<sup>77</sup> *Id.* at 331-332 (“Whereas the dubious breadth of ‘any air pollutant’ in the permitting triggers suggests a role for agency judgment in identifying the subset of pollutants covered by the particular regulatory program at issue, the more specific phrasing of the [Best Available Control Technology (BACT)] provision suggests that the necessary judgment has already been made by Congress. The wider statutory context likewise does not suggest that the BACT provision can bear a narrowing construction: There is no indication that the Act elsewhere uses, or that EPA has interpreted, ‘each pollutant subject to regulation under this chapter’ to mean anything other than what it says.”)

<sup>78</sup> *Id.* at 317 (“It takes some check for EPA to insist that it cannot possibly give ‘air pollutant’ a reasonable, context-appropriate meaning in the PSD and Title V contexts when it has been doing precisely that for decades.”).

<sup>79</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2704 (2015).

<sup>80</sup> *Id.* at 2705.

consideration.<sup>81</sup> By stopping short of prescribing a strict cost-benefit analysis, the Court did not corner EPA into concluding that such regulation was not appropriate if it did not find that benefits outweighed costs. With this judgment, the Court preserved EPA's authority to carry out the clear intent of Congress to ensure that that hazardous air pollutant emissions from power plants were reduced – either as a result of compliance with other CAA programs or through regulation under section 112.

The judiciary's limitations on EPA's authority, which tend to focus on the manner in which EPA exercises it, do not undermine the overarching progressive interpretation of the CAA. On the whole, the courts have upheld this understanding, expecting the agency to address newly discovered air quality challenges in a manner that reflects advancements in science and technology.<sup>82</sup>

## II. The Trump Administration's Actions to Restrict the Agency's Authority

The Trump EPA is using its regulatory rollbacks to limit the agency's statutory authority to effectively confront current and future air pollution challenges. Rather than de-regulating by changing its policy judgments to favor compliance flexibility or more lenient emissions requirements, the administration is attempting to undermine EPA's ability to progressively implement the statute by offering interpretations that read its progressive elements out of the statute. The administration is pursuing this mission through two general methods. First, the Trump EPA is imposing a static interpretation of the statutory text to curtail its overall power to regulate. This strategy interprets the statute in a narrow way, allowing EPA to ignore current science and technological capabilities, and shielding EPA from the obligation to effectively mitigate harmful air pollution. Second, EPA is increasing its use of disaggregation of air pollution, sources, and regulatory benefits in order to find that further regulation is unwarranted or to extend and delay the regulatory process. By arbitrarily separating the various aspects of air pollution control, the agency attenuates its regulatory authority to justify its own deregulation. The following four regulatory developments exemplify the administration's efforts to counter a progressive reading of the statute and integrate these longer-term deregulatory strategies into CAA rulemakings. In two of the relevant rollbacks, EPA itself has acknowledged the changes would have little impact on emissions levels, begging the question of why the agency would pursue such rollbacks if not for a broader agenda of novel legal interpretations that would unravel EPA's regulatory authority.

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<sup>81</sup> *Id.* at 2711.

<sup>82</sup> This observation remained true at least until February 9, 2016, when the Supreme Court, without issuing an opinion on the merits, stayed the Clean Power Plan, after a unanimous 3-judge panel of the DC Circuit Court of Appeals denied a motion for a stay. Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016); Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (S. Ct. Feb. 9, 2016). Petitioners argued, *inter alia*, that that the Clean Power Plan was an unlawful transformation of EPA's statutory authority and that Section 111(d) unambiguously precluded the agency from requiring generation shifting. The Trump EPA adopted these arguments in its Repeal of the Clean Power Plan.

In *Mexichem Flour v. EPA*, 866 F.3d 451, 454 (D.C. Cir. Aug. 8, 2017) then Judge Kavanaugh writing for a split panel vacated an EPA rule regulating hydrofluorocarbons. The majority's analysis, relying on Merriam-Webster's dictionary for its statutory interpretation, rejected an interpretation of CAA §612, which the EPA had taken to mean that Congress intended the agency to periodically update the list of approved and disapproved chlorofluorocarbon substitutes as new chemicals with improved environmental impacts became available.

**a. The Affordable Clean Energy Rule**

EPA’s legal justification for repealing the Obama Administration’s Clean Power Plan and promulgating the Affordable Clean Energy Rule (ACE) relies on a static interpretation of the CAA that bars EPA from taking account of the realities of the electricity grid. In the final rules promulgating the Repeal and ACE, EPA interprets the standard of performance that applies through CAA §111(d), the “best system of emissions reduction,” as encompassing only site-specific pollution controls for power plant emissions.<sup>83</sup> This ignores the realities of power plant operations. In the Clean Power Plan, EPA used a robust factual record to determine that the best system of emission reduction for coal- and natural gas-fired power plants included generation shifting from coal-fired sources to natural gas and renewable energy sources and from natural gas-fired sources to renewable energy sources.<sup>84</sup> Yet the Trump EPA’s interpretation would prohibit the agency from adopting this broader, more effective understanding of sections 111(a)(1) and (d) when determining the best system of emission reduction. The final rule states that “CAA section 111 unambiguously limits the [best system of emissions reduction] to those systems that can be put into operation at a building, structure, facility, or installation. Such systems include, for example, add-on controls (e.g., scrubbers) and inherently lower-emitting processes/practices/designs.”<sup>85</sup> The rule does not include shifting generation from higher- to lower-emitting sources, notwithstanding that generation-shifting is a mainstay of power plants’ compliance with a number of other pollution control programs. ACE also decreases implementation flexibility for states and compliance flexibility for sources by prohibiting reliance on any but the narrow menu of options listed in the rule.<sup>86</sup>

Rather than interpreting the CAA’s broad language as providing EPA with the tools to adequately curb coal-fired power plant emissions, the Trump Administration adopts a statutory interpretation that turns section 111 into an internally self-contradicting provision; after following the requirement to identify the full set of options for reducing emissions, the EPA must select only the least effective options. EPA’s interpretation curtails its own, and states’, authority to issue guidelines and set emissions standards that reflect the thorough assessment the agency made of how power plants operate in making a determination of the best system of emission reduction. That, in turn, takes away the agency’s capacity to regulate effectively. This process is counter to a progressive reading of the Act, which would compel EPA to fully examine the changing circumstances and implement the statutory provision accordingly.

In contrast to the Clean Power Plan, the rule appears to serve a purpose unrelated to the CAA’s emissions reduction purpose; EPA’s analysis shows that ACE will achieve virtually no

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<sup>83</sup> Repeal of the Clean Power Plan and Finalization of the Affordable Clean Energy Rule, 84 Fed. Reg. 32,520, 32,521 (July 8, 2019).

<sup>84</sup> Clean Power Plan, 80 Fed. Reg. 64,661, 64,665 (Oct. 23, 2015) (“The result of our following Congress’ recognition of the interdependent operation of [electric generating units] within an interconnected grid is the incorporation in the [Best System of Emissions Reduction] of measures, such as shifting generation to lower-emitting [natural gas combined cycle] units and increased use of [renewable energy], that rely on current interdependent operation of [electric generating units].”).

<sup>85</sup> Repeal of the Clean Power Plan and Finalization of the Affordable Clean Energy Rule, 84 Fed. Reg. 32,520, 32,524 (July 8, 2019)

<sup>86</sup> See Joseph Goffman and Caitlin McCoy, *EPA’s House of Cards: the Affordable Clean Energy Rule*, HARV. L. SCHOOL’S ENVTL. & ENERGY L. PROGRAM 10 (Oct. 23, 2019).

reductions in carbon-dioxide emissions.<sup>87</sup> In the Repeal, EPA relies entirely on its claim that the relevant language in CAA §111 is unambiguous. Should EPA prevail on this argument in litigation challenging the rule, EPA will win a precedent barring future administrations from reinterpreting section 111 more broadly.<sup>88</sup> This appears to be EPA's ultimate goal, and the agency is taking an avoidable litigation risk to achieve it.

Unlike the Trump EPA, agencies often seek deference from courts for reasonable interpretations of their statutes, rather than advancing solely the argument that a statute is unambiguously clear. The framework for seeking judicial deference was established in *Chevron v. Natural Resources Defense Council*.<sup>89</sup> Following *Chevron*, courts use a two-step process to determine whether to uphold an agency's statutory interpretation. Under *Chevron* step 1, courts will affirm the agency's interpretation if "Congress has directly spoken to the precise question at issue" and the agency's definition "[gives] effect to the unambiguously expressed intent of Congress."<sup>90</sup> If the statute is ambiguous, then under *Chevron* step 2, courts will defer to agency interpretation if it is "a permissible construction of the statute."<sup>91</sup> *Chevron* Step 2 is more favorable for agencies, as it requires the court only to ask whether the interpretation is reasonable even if the court disagrees with the agency at Step 1.<sup>92</sup> The Trump administration, however, has offered no *Chevron* Step 2 argument in the final ACE rule. Instead, EPA states:

The definition of 'standard of performance,' and the scope of the 'best system of emission reduction' contained within, confers considerable discretion on the EPA to interpret the statute and make reasonable policy choices pursuant to *Chevron* step two as to what is the best system to reduce emissions of a particular pollutant from a particular type of source. However, by making clear that the 'application' of the [best system of emissions reduction] must be to the source, *Congress spoke directly in Chevron step one terms to the question of whether the [best system of emissions reduction] may contain measures other than those that can be put into operation at a particular source: It may not.* The approach to the [best system of emissions reduction] in the [Clean Power Plan] is thus unlawful and the [Clean Power Plan] must be repealed.<sup>93</sup>

Given the breadth of "best system of emissions reduction," the fact that standards of performance can be defined in a variety of ways, and the flexibility of the state-federal

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<sup>87</sup> Office of Air Quality Planning and Standards, U.S. EPA, Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, EPA-452/R-19-003, ES-6 (June 2019) (Estimating less than a one percent reduction in carbon-dioxide emissions).

<sup>88</sup> See *National Cable & Telecommunications Ass'n v. Brand X*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

<sup>89</sup> *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 – 843 (1984). An argument that the statute is unambiguous need not be considered under the *Chevron* framework.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 843.

<sup>92</sup> See e.g. William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L. J. 1509, 1556 (May 2019).

<sup>93</sup> ACE Final Rule, 84 Fed. Reg. 32,530, 32,532 (July 8, 2019) (emphasis added).

partnership structure of section 111(d), EPA took a legal risk by insisting that the applicable statutory language is unambiguous. It could have mitigated that risk by offering an additional argument that the agency's interpretation was reasonable and entitled to the court's deference under the *Chevron* framework if the court concluded the statute was ambiguous.<sup>94</sup> The D.C. Circuit will hear the pending challenges to the Repeal and ACE. Unlike other federal circuit courts, which will uphold agency interpretations if they infer that they are reasonable, the D.C. Circuit tends to afford deference to agencies only when they explicitly make a *Chevron* Step 2 argument to supplement their claims that the statute is unambiguous.<sup>95</sup>

EPA's foregoing the *Chevron* step 2 argument suggests that the agency is willing to risk the court remanding the Repeal and ACE for the chance to secure a binding judicial decision restricting the agency's legal authority.<sup>96</sup> If EPA were to prevail against a challenge only under *Chevron* step 2, a future administration could reinterpret the statute to encompass a broader type of performance standards and defend that interpretation as an alternative permissible reading of the statute. If EPA wins with an argument that the statute is unambiguous, however, a future administration would be precluded from interpreting the statute more broadly and arguing in litigation that the statutory language is ambiguous. EPA adopted a narrow interpretation of the statute not just for the purpose of rolling back a single Obama administration rule, but also, it seems, to garner a lasting restriction on EPA's power to regulate carbon-dioxide emissions from coal-fired power plants.

#### **b. Withdrawal of California's Waiver for Automotive Emissions Standards**

In 2019, EPA revoked California's waiver to enforce the state's vehicle emissions standards by yielding regulatory authority to another agency and, in the alternative, adopting a narrow interpretation of the CAA that separates conventional pollutants and greenhouse gases and defies the Act's technology innovation imperative. The CAA establishes a national program to set emissions standards for motor vehicles, generally preempting the states' right to set state-specific standards.<sup>97</sup> CAA §209(b)(1), however, permits California to request a preemption waiver from EPA to set more stringent vehicle emissions standards.<sup>98</sup> CAA §177 allows other states to adopt California's standards approved under the waiver provision.<sup>99</sup> The statute creates a presumption for granting California a waiver, as Congress explicitly stated that EPA "shall...waive application of this section..." unless it makes one of three findings to deny a

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<sup>94</sup> For a longer analysis of EPA's legal strategy in ACE and its shortcomings given the D.C. Circuit's approach to *Chevron* review, see Joseph Goffman and Caitlin McCoy, *EPA's House of Cards: the Affordable Clean Energy Rule*, HARV. L. SCHOOL'S ENVTL. & ENERGY L. PROGRAM (Oct. 23, 2019); see generally William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L. J. 1509, 1562 (May 2019) ("[The] self-constraining agency that relies on a statutory-abnegation claim heightens risks of judicial reversal and also limits its future flexibility.").

<sup>95</sup> See Joseph Goffman and Caitlin McCoy, *EPA's House of Cards: the Affordable Clean Energy Rule*, HARV. L. SCHOOL'S ENVTL. & ENERGY L. PROGRAM (Oct. 23, 2019).

<sup>96</sup> See *id.*

<sup>97</sup> CAA §202, 42 U.S. C. § 7521; CAA §209, 42 U.S. C. § 7543.

<sup>98</sup> CAA §209(b)(1), 42 U.S. C. § 7543(b)(1).

<sup>99</sup> CAA §177, 42 U.S. C. § 7507.

waiver.<sup>100</sup> One of those findings is that California “does not need such State standards to meet compelling and extraordinary conditions.”<sup>101</sup>

In an unprecedented action, the Trump EPA withdrew the waiver previously granted to California for the regulation of greenhouse gas emissions and its zero emissions vehicle (ZEV) program. EPA included two alternative justifications for this action: (1) that, per a determination made by the Department of Transportation via the National Highway Traffic Safety Administration (NHTSA), the standards were preempted by EPCA, which governs fuel economy standards,<sup>102</sup> and (2) that CAA §209(b)(1)(B) does not apply to greenhouse gases, because California’s standards are not needed to meet extraordinary conditions, as EPA now interprets that provision.<sup>103</sup>

EPA ceded its air quality related authority by noting NHTSA’s determination that EPCA preempts California’s tailpipe emissions regulations regardless of the prerogative afforded the state under the CAA. NHTSA establishes nationwide fuel economy standards for motor vehicles under EPCA, which preempts state and local laws “...related to fuel economy standards.”<sup>104</sup> Because automakers generally comply with lower carbon-dioxide emissions limits by increasing fuel economy, NHTSA concluded that California’s greenhouse gas emission standards are “related to fuel economy standards” and thus preempted by EPCA.<sup>105</sup> EPA adopted NHTSA’s reasoning and relied on its preemption determination as an independent basis to withdraw California’s waiver. The final rule states, “Considering that California cannot enforce standards that are void *ab initio*, even assuming *arguendo* that there existed a valid grant of waiver under CAA section CAA §209(b), NHTSA’s determination renders EPA’s prior grant of a waiver for those aspects of California’s regulations that EPCA preempts invalid, null, and void...EPA hereby withdraws the prior grant of a waiver on that basis.”<sup>106</sup>

EPA departed from precedent and abandoned its CAA obligations and authority under section 209 without undertaking the analysis Congress mandated. In contrast to EPA’s interpretation in ACE to narrow its authority, here the agency abdicated its authority entirely. The result is to stymie the continual development and deployment of innovative technology, which is one of the CAA’s foundational imperatives. By revoking California’s waiver, EPA is impeding the progress of advanced automotive technology that eliminates greenhouse gas emissions and pollutant emissions that harm air quality and public health directly. As the Supreme Court noted in *Massachusetts v. EPA*, “The fact that [the Department of Transportation’s] mandate to promote energy efficiency by setting mileage standards may overlap with EPA’s environmental responsibilities in no way licenses EPA to shirk its duty to

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<sup>100</sup> CAA §209(b)(1)(A)-(C), 42 U.S.C. §7521(b)(1)(A)-(C) (“No such waiver shall be granted if the Administrator finds that – (A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with [CAA §202(a)]”).

<sup>101</sup> CAA §209(b)(1)(B), 42 U.S.C. §7521(b)(1)(B).

<sup>102</sup>The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310, 51,338 (Sep. 27, 2019).

<sup>103</sup> *Id.* at 51,328.

<sup>104</sup> 49 U.S.C. 32919(a); *See also* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 51,312 (Sep. 27, 2019) (explaining NHTSA implementation of EPCA).

<sup>105</sup> SAFE Vehicles Rule Part One, 84 Fed. Reg. 51,310, 51,313 (Sep. 27, 2019).

<sup>106</sup> *Id.* at 51,338.

protect the public “health” and “welfare.”<sup>107</sup> In the 2019 revocation of California’s waiver, EPA does little to explain why the two agencies cannot both administer their respective obligations while avoiding inconsistency. EPA also does little to explain why it accepts NHTSA’s position on the ZEV component of the California program, whose impact is greatest on local air quality.

In the alternative, the Trump EPA interprets CAA §209(b)(1)(B) and §177 as narrowly applying only to criteria pollutants,<sup>108</sup> not greenhouse gases. EPA first determines that “it is appropriate to review California’s [greenhouse gas] standards separately from the remainder of the State’s motor vehicle emission control program for purposes of CAA section 209(b)(1)(B).”<sup>109</sup> By separating greenhouse gases from conventional pollutant emissions, EPA positions itself to defend its conclusion that the statute does not authorize California to regulate greenhouse gases. EPA concludes that “In order for a waiver request to pass muster under CAA section 209(b)(1)(B)...a particularized, state-specific nexus must exist between sources of pollutants, resulting pollution, and impacts of that pollution.”<sup>110</sup> EPA’s new interpretation narrows the CAA’s broad language of “compelling and extraordinary conditions,” to restrict it from applying to global pollutants like greenhouse gases, regardless of their unique impact on California. In contrast, in 2013, EPA concluded that “This single [Advanced Clean Cars] program combines the control of smog-causing pollutants and [greenhouse gas] emissions into a coordinated package of amendments and requirements...to address near and long term smog issues within California and identified [greenhouse gas] emission reduction goals.”<sup>111</sup> Trump’s EPA is choosing to ignore the connections between greenhouse gas emissions, climate change, and California’s air quality challenges. EPA now separates conventional pollutants and greenhouse gases, and reads CAA §209(b)(1)(B) in a static manner that defeats the CAA’s technology innovation imperative, which is equally applicable to greenhouse gas and conventional pollutant emissions under the state’s ZEV program.

The Trump EPA goes one step further and constrains the technology dissemination aspect of CAA §177 by finding that other states cannot use the section to adopt California’s greenhouse gas standards and ZEV programs. The final rule explains:

“[The] text, placement in Title I, and relevant legislative history are all indicative that CAA section 177 is in fact intended for NAAQS attainment planning and not to address global air pollution. [...] This construct also comports with our reading of CAA section 209(b)(1)(B) as limiting applicability of CAA section 209(b) waiver authority to state programs that address pollutants that affect local or regional air quality and not those relating to global air pollution like GHGs.”<sup>112</sup>

By making this determination, EPA is blocking the dissemination of effective pollution control technology, including innovation through the ZEV program that addresses both NAAQS attainment and climate pollution. The agency is frustrating the role that Congress intended

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<sup>107</sup> 549 U.S. 497, 501 (2007).

<sup>108</sup> Criteria pollutants are the six pervasive air pollutants regulated under the NAAQS program. They are: carbon monoxide, ground level ozone, nitrogen dioxide, sulfur dioxide, particulate matter, and lead.

<sup>109</sup> SAFE Vehicles Rule Part One, 84 Fed. Reg. 51,310 51,347 (Sep. 27, 2019).

<sup>110</sup> *Id.* at 51,348.

<sup>111</sup> 2013 Grant of Waiver, 78 Fed. Reg. 2112, 2114 (Jan. 9, 2013).

<sup>112</sup> SAFE Vehicles Rule Part One, 84 Fed. Reg. 51,310 51,351 (Sep. 27, 2019).

California and the states to play. This definitive statement is indicative of EPA's new perspective on the CAA, alleging that it was not written to address unknown challenges like climate change and that it does not compel the agency to undertake the most effective means of improving air quality. By engineering an interpretation that ignores the local impact and sources of greenhouse gas emissions, EPA once again constrains the agency and states' authority to act under the CAA.

### **c. Proposed Withdrawal of the Appropriate and Necessary Finding for the Mercury and Air Toxics Standards**

The Trump EPA's proposal to withdraw the agency's 2016 Supplemental Finding pursuant to section 112(n)(1)(A),<sup>113</sup> that it was "appropriate and necessary" to regulate mercury emissions from power plants,<sup>114</sup> reads into the CAA a limitation on the agency's authority and something akin to a loophole in the CAA's mandate to control mercury and other hazardous air pollutants (HAPs) from power plants. CAA section 112(n)(1)(A) provides that EPA must set pollution control standards for power plant HAP emissions if the agency finds it "appropriate and necessary" to do so following a study of (1) "the hazards to public health reasonably anticipated to occur" from such emissions after implementation of other CAA pollution control programs, and (2) available pollution control strategies.<sup>115</sup> In 2012, EPA issued a final rule finding that it was appropriate and necessary to regulate HAP emissions from power plants and establishing pollution control standards, known as the Mercury and Air Toxic Standards (MATS).<sup>116</sup> In *Michigan v. EPA*, the Supreme Court considered whether it was reasonable for EPA to not consider costs when making the appropriate and necessary determination.<sup>117</sup> While the Court held that the agency must consider the costs of regulation as part of the "appropriate" determination, it deferred to EPA to decide the proper way to consider costs.<sup>118</sup> The Court did not mandate that EPA conduct a formal cost-benefit analysis, nor did the Court bar an appropriate and necessary finding if EPA found that the costs of regulation outweighed the benefits.<sup>119</sup> EPA then issued a Supplemental Finding in 2016, which considered costs and confirmed the agency's 2012 appropriate and necessary determination.<sup>120</sup>

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<sup>113</sup> CAA § 112(n)(1)(A), 42 U.S.C. 7412(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.").

<sup>114</sup> EPA originally issued an "Appropriate and necessary" finding in 2000, rescinded that finding in 2005, reinstated the finding in 2012, and then issued a supplemental finding in 2016, following the Supreme Court's requirement that the agency consider the costs of regulating as part of the "appropriate" determination in *Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015).

<sup>115</sup> CAA §112(n)(1)(A), 42 U.S.C. 7412(n)(1)(A).

<sup>116</sup> Mercury and Air Toxic Standards, 77 Fed Reg. 9304 (Feb. 16, 2012).

<sup>117</sup> 135 S. Ct. 2699, 2699 (2015).

<sup>118</sup> *Id.* at 2711 ("The agency must consider cost – including, most importantly, cost of compliance – before deciding whether regulation is appropriate and necessary. We need not and do not hold that the law unambiguously required the Agency, when making this preliminary estimate, to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value. It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost.").

<sup>119</sup> *Id.*

<sup>120</sup> Supplemental Finding, 81 Fed. Reg. 24,419, 24,420 (Apr. 25, 2016).

In the 2016 Supplemental Finding, EPA integrated the explicit provisions of section 112(n)(1)(A) and the Supreme Court’s holding in *Michigan* to ensure the agency carried out Congress’ intention that HAPs emitted by power plants be substantially reduced. EPA explained its preferred approach to considering cost, stating that it was “one of several factors that must be considered and the statutory text [did not] support a conclusion that cost should be the predominant or overriding factor.”<sup>121</sup> EPA did not rely on a formal benefit-cost analysis primarily because of Section 112’s objectives, subsection (n)(1)(A)’s emphasis on the required studies, “Congress’ determination that HAP emissions are inherently harmful, and the instruction from Congress to protect the most sensitive populations from those harms.”<sup>122</sup> EPA affirmed its 2012 finding that it was appropriate to regulate mercury and other HAP emissions under section 112, because they “pose hazards to public health,” and “because of the [their] magnitude..., environmental effects..., and the availability of controls to reduce HAP emissions from [power plants].”<sup>123</sup> Basing its conclusion on the emissions’ hazardous nature and the availability of pollution control techniques aligns with the statutory mandates that EPA study those two factors before regulating under section 112. Finally, EPA concluded it was “necessary” to regulate, because the hazards to public health from power plant HAPs emissions were reasonably anticipated to remain after implementation of other CAA provisions.<sup>124</sup>

Justice Kagan anticipated this approach in her dissent in *Michigan v. EPA* in which she explained that Congress crafted the appropriate and necessary determination in Section 112, “because the 1990 amendments established a separate program to control power plant emissions contributing to acid rain, and many thought that just by complying with those requirements, plants might reduce their emissions of hazardous air pollutants to acceptable levels.”<sup>125</sup> As Justice Kagan writes, “[t]hat prospect counseled a “wait and see” approach, under which EPA would give the Act’s acid rain provisions a chance to achieve that side benefit before imposing any further regulation.”<sup>126</sup> She concluded that following an appropriate and necessary determination, the CAA dictates that “EPA is to regulate power plants as it does every other stationary source....”<sup>127</sup>

EPA’s proposed rescission, in contrast, adopts reasoning that treats that imperative as optional, subject to EPA’s application of cost-benefit analysis. EPA justifies its proposal through a misinterpretation of the Supreme Court’s holding in *Michigan*, and by performing an improperly narrow cost-benefit analysis.<sup>128</sup> EPA extends the holding in *Michigan* by narrowly comparing the direct cost of compliance with the monetized benefits from reductions in HAPs (ignoring all other real, but generally non-monetizable benefits), and concludes on that sole basis that it is not appropriate and necessary to regulate power plants under CAA §112(d). In so doing, EPA elevates the importance of cost and effectively erases from section 112(n)(1)(A) the express mandates to examine and to account for the threat posed by power plant HAP emissions and the availability of control strategies. Neither section 112(n)(1)(A) nor the decision in *Michigan*

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<sup>121</sup>*Id.* at 24,424 (Presenting the agency’s view of the statutory scheme of which section 112(n)(1)(A) is a part).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 24,423.

<sup>124</sup> *Id.*

<sup>125</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2715 (2015).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 2716.

<sup>128</sup> See Withdrawal of Appropriate and Necessary finding for EGUs, 84 Fed. Reg. 2670, 2670 (Feb. 7, 2019).

mandates that elevation, and, as Justice Kagan’s dissent suggests, EPA does not have that authority. By combining a determination that section 112(n)(1)(A) gives EPA the option *not* to regulate with an appropriate and necessary finding based solely on a narrow cost-benefit comparison, EPA essentially concludes that the CAA allows the agency to not regulate power plant emissions under §112, even if the agency concludes that control technologies are available and “hazards to public health [are] reasonably anticipated to occur as a result of emissions by [power plants]” – the original findings Congress required in the CAA.<sup>129</sup>

EPA’s rescission of the Supplemental Finding and its determination that it is not appropriate and necessary to regulate power plant HAP emissions under CAA §112 could ultimately result in the removal of the current emissions standards. The withdrawal makes the rulemaking vulnerable to legal challenges by opponents of the rule,<sup>130</sup> and EPA sought comment in the proposed withdrawal on whether the agency has the authority to or is obligated to rescind the MATS rule if it withdraws the finding.<sup>131</sup> If EPA concludes it does have this authority and exercises it, the agency would, of its own volition, stop regulating emissions from power plants, despite the negative impacts HAP emissions have on public health. This conclusion is antithetical to the purpose of the CAA and of section 112(n)(1)(A) in particular.<sup>132</sup> Section 112(n)(1)(A) embodies the principal elements of the Act: a focus on studying the anticipated health benefits of reducing emissions and applicable pollution control strategies. The rescission proposal, in contrast, negates those two empirical factors and places cost-benefit analysis in the position of being the sole deciding factor, putting the existing pollution control standards in jeopardy.

Additionally, the proposed withdrawal rejects the standard approach to cost-benefit analysis, long-endorsed by the Office of Management and Budget, of calculating the benefits resulting from reductions in the full suite of power plant pollutants, including particulate matter and sulfur dioxide, in addition to HAPs.<sup>133</sup> The standard approach of accounting for all benefits aligns with the scientific understanding of the health impacts of air pollution and the CAA’s

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<sup>129</sup> CAA §112(n)(1)(A)-(B), 42 U.S.C. §7412(n)(1)(A)-(B) (“The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units...after imposition of the requirements of this Act. [...] 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.”); *c.f.* Withdrawal of Appropriate and Necessary finding for EGUs, 84 Fed. Reg. 2670, 2676 (Feb. 7, 2019) (“In this action, the EPA proposes to conclude that it is not appropriate and necessary to regulate [hazardous air pollutants] from [power plants] under CAA section 112 because the costs of such regulation grossly outweigh the [hazardous air pollutant] benefits.”).

<sup>130</sup> Joseph Goffman, *Rolling Back the Mercury and Air Toxic Standards: Proposed Withdrawal of “Appropriate and Necessary*, HARV. L. SCHOOL’S ENVTL. & ENERGY L. PROGRAM (March 14, 2019), <https://eelp.law.harvard.edu/2019/03/rolling-back-the-mercury-and-air-toxics-standards-proposed-withdrawal-of-appropriate-and-necessary/>.

<sup>131</sup> Withdrawal of Appropriate and Necessary finding for EGUs, 84 Fed. Reg. 2670 2679 (Feb. 7, 2019).

<sup>132</sup> EPA itself acknowledges that “Congress wanted the Administrator’s appropriate and necessary determination to be focused on the health hazards related to HAP emissions and the potential benefits of avoiding those hazards by reducing HAP emissions.” Withdrawal of Appropriate and Necessary finding for EGUs, 84 Fed. Reg. 2670, 2677 (Feb. 7, 2019).

<sup>133</sup> See OMB Circular A-4, Section E, subsection headed “Ancillary Benefits and Countervailing Risks,” (Sept. 17, 2003) (“Your analysis should look beyond the direct benefits and direct costs of your rule-making and consider any important ancillary benefits and countervailing risks.”).

progressive scientific imperatives.<sup>134</sup> Performing cost-benefit analysis while ignoring important co-benefits of a program not only departs from the methodology prescribed by the Office of Management and Budget, but it also lies outside of the economic mainstream.<sup>135</sup> By abandoning the agency's, and the Executive Office of the President's, long-standing cost-benefit methodology, EPA aggravates its departure from the CAA's imperatives.

EPA also disregards the CAA's emphasis on scientific progress by failing to update the value it attributes to reductions in mercury emissions.<sup>136</sup> In its cost-benefit analysis, EPA uses the same benefits value for mercury emissions reductions that it used in 2011, ignoring significant scientific developments showing that the benefits are likely magnitudes larger than EPA estimated in 2011.<sup>137</sup> The proposed withdrawal improperly alleges, without support, that the agency must use the now-outdated information supporting the issuance of MATS to justify its current action. This assertion explicitly contradicts EPA's mandate to account for advances in science.

As in ACE, EPA appears aimed at undercutting its CAA authority by asserting a specific, new legal interpretation and repudiating an earlier interpretation of the same provision. Here it goes further, potentially encumbering what should be its commitment to incorporating the latest science by not only applying an out-of-the-mainstream methodology to cost-benefit analysis, but also eschewing the use of up-to-date scientific information. The proposal exhibits EPA's determination to avoid the overriding imperatives of the CAA by finding new limitations on its power to act.

#### **d. New Source Performance Standards for the Oil and Gas Sector**

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<sup>134</sup> See *CleanLaw: Joe and Kathy Fallon Lambert on MATS/PPP/ACE and Public Health*, Harvard Law School's Environmental & Energy Law Program (Mar. 7, 2019), <https://soundcloud.com/user-995691545/joe-and-kathy-fallon-lambert-on-matscppace-and-public-health/s-YASTo> ("If the goal is to be protective of human health and ecosystem health, you must consider the fact that we breathe air that integrates all of these pollutants. We don't get to breathe air that just responds to one policy at a time or reflects one pollutant at a time. Air integrates all of these. That's what we breathe, and that's what the environment receives. When we consider how to analyze a particular policy path or trajectory or outcome, it's logical ... to consider the full range of pollutants as best we're able.").

<sup>135</sup> For example, in a 2017 report to Congress, the Office of Management and Budget considered the full suite of reductions and estimated the annual benefits of MATS ranging from \$28 billion to \$77 billion, which "far exceed the estimated costs" of \$8.2 billion per year. OFFICE OF MANAGEMENT AND BUDGET, 2017 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT, 10 (2017).

<sup>136</sup> Withdrawal of Appropriate and Necessary finding for EGUs, 84 Fed. Reg. 2670, 2678 (Feb. 9, 2019).

<sup>137</sup> See e.g. Elsie M. Sunderland et al., *Benefits of Regulating Hazardous Air Pollutants from Coal and Oil-Fired Utilities in the United States*, 50 ENVTL. SCIENCE & TECH. 2117, 2117 (Feb. 5, 2016), [http://eelp.law.harvard.edu/wp-content/uploads/Sunderland\\_Benefits-Regulating-Haz-Air-Pollutants-1.pdf](http://eelp.law.harvard.edu/wp-content/uploads/Sunderland_Benefits-Regulating-Haz-Air-Pollutants-1.pdf) ("[We] elaborate upon three key points: (1) Recent research demonstrates that quantified societal benefits associated with declines in mercury deposition attributable to implementation of MATS are much larger than the amount estimated by EPA in 2011. (2) As-yet-unquantified benefits to human health and wildlife from reductions in [power plant] mercury emissions are substantial. (3) Contributions of [power plants] to locally deposited mercury have been underestimated by EPA's regulatory assessment."); see also *Mercury Matters 2018: A Science Brief for Journalists and Policymakers*, Harvard University Center for the Environment (Dec. 17, 2018), <https://www.hsph.harvard.edu/cchange/news/mercury-matters-2018-a-science-brief-for-journalists-and-policymakers/> ("The societal costs of neurocognitive deficits associated with methylmercury exposure in the U.S. were estimated in 2017 to be approximately \$4.8 billion per year.").

The Trump EPA is making it more difficult for the agency to regulate methane emissions under the CAA. CAA §111(b) directs EPA to establish New Source Performance Standards (NSPS) for listed categories of new or modified stationary sources. To list a source category under CAA §111, the Administrator must determine that emissions from the source category “[cause], or [contribute] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare” (known as a significant contribution finding).<sup>138</sup> Once NSPS is set for emissions from a source category under subsection (b), EPA is obligated to issue guidelines under subsection (d) to address emissions of the pollutant in the same source category if the pollutant is not subject to regulation by other CAA provisions.<sup>139</sup> This relationship reflects Congress’ characteristic approach in the CAA to address air pollution challenges in a comprehensive manner.

In 2016, EPA took two actions to address methane emissions from the oil and gas sector. First, the agency set NSPS under CAA §111(b) for methane emissions from the production, processing, transmission, and storage segments within the already-listed “crude oil and natural gas production” source category.<sup>140</sup> EPA also issued an Information Collection Request in 2016 designed to collect the data needed to develop emissions guidelines under subsection (d) for methane emissions from the oil and gas sector.<sup>141</sup>

The Trump EPA, in turn, has deployed various strategies aimed at attenuating EPA’s ability to regulate methane emissions by failing to acquire the necessary information and proposing additional prerequisites for promulgating standards for sources within the oil and natural gas sector. In 2017, EPA cancelled the Information Collection Request.<sup>142</sup> In 2019, the agency published a proposed rule to repeal NSPS for the transmission and storage segment, which the agency previously regulated within the “crude oil and natural gas production” source category, and to rescind methane regulations for the remaining sources within the oil and gas sector.<sup>143</sup> EPA also solicits comment on a new interpretation of the CAA that would require EPA to make a pollutant-specific, as opposed to source category-wide, significant contribution finding before regulating emissions of additional pollutants.<sup>144</sup> Each of these three proposals individually, and potentially in combination, would defy the logic of section 111’s comprehensive structure, which addresses all pollution from a category of sources, both new and existing. They would also increase methane and other HAP emissions. EPA estimates that

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<sup>138</sup> CAA §111(b)(1)(A), 42 U.S.C. §7411(b)(1)(A).

<sup>139</sup> *Id.*

<sup>140</sup> Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016).

<sup>141</sup> See *Background on the Information Request for the Oil and Natural Gas Industry*, EPA, <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/final-information-collection-request-oil-and> (last visited Dec. 20, 2019).

<sup>142</sup> See *Background on the Information Request for the Oil and Natural Gas Industry*, EPA, <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/final-information-collection-request-oil-and> (last visited Dec. 20, 2019).

<sup>143</sup> Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 84 Fed. Reg. 50,244, 50,257 (Sept. 24, 2019).

<sup>144</sup> *Id.* at 50,261.

methane emissions between 2019 and 2025 will increase by about 350,000 to 370,000 short tons under the proposed rule.<sup>145</sup>

EPA defends its proposal to rescind NSPS for the transmission and storage segment by claiming that these segments do not fall within the source category and can only be regulated after the agency makes a separate finding for those segments as a distinct source category. By restricting EPA’s authority to regulate additional sources of emissions within a listed source category, EPA is encumbering the agency’s ability to regulate those sources at all. Many individual segments may be found to not contribute significantly to air pollution when not considered as part of the larger industrial sector.

When EPA established standards for the transmission and storage segment, the agency found that crude oil and natural gas production “broadly [covered]” this segment of the industry.<sup>146</sup> Though EPA concluded that the agency had the legal authority without issuing a significant contribution finding, EPA included such a finding, determining that the source category as a whole (oil and natural gas production, processing, transmission, and storage) “contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>147</sup> EPA is now proposing to find that this action was improper, arguing that the transportation and storage segment are “sufficiently distinct” from the larger source category and must be regulated as an independent source category.<sup>148</sup> The proposal explains that “[EPA is] proposing that the EPA was required to make a finding that *the transmission and storage segment in and of itself* ‘contributes significantly to air pollution...’ not simply that the source category... ‘oil and natural gas production, processing, transmission, and storage’... ‘contributes significantly.’”<sup>149</sup> EPA argues that the piecemeal approach is appropriate, “because the natural gas that enters the transmission and storage segment has different composition and characteristics than the natural gas that enters the production and processing segments.”<sup>150</sup> Yet together the four segments constitute a single sectoral enterprise that encompasses the full array of equipment that brings the product from its underground residence to the point of commercial transaction in a more or less continuous flow. The differences in the composition of the product, which by design differs as it is being processed, have no bearing on the question of whether the ensemble of equipment the source category comprises contributes significantly to air pollution.

EPA’s proposed interpretation of the statute would result in segmented regulations on a drawn out and procedurally challenging timeline contrary to the design of section 111 and the fundamental comprehensive approach of the CAA overall. In the proposal, EPA does not offer a finding related to the emissions from the transmission and storage segment. Rather, EPA determines only that the agency’s previous rulemaking was invalid bringing the regulatory process to a halt at a point the leaves a residual set of incomplete regulations, and emissions

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<sup>145</sup> *Id.* at 50,277 – 78 (EPA compared emissions relative to two baselines, one of which estimated an increase of 350,000 short tons, and the other of which estimated an increase of 370,000 short tons).

<sup>146</sup> 2016 Rule, 81 Fed. Reg. 35,824, 35,833 (June 3, 2016).

<sup>147</sup> *Id.*

<sup>148</sup> Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 84 Fed. Reg. 50,244, 50,257 (Sept. 24, 2019).

<sup>149</sup> *Id.*

<sup>150</sup> Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 84 Fed. Reg. 50,244, 50,257 (Sept. 24, 2019).

increases, in place. The incompleteness of the proposal indicates its underlying purpose to avoid regulating through arbitrary subcategorization.

The proposal introduces an additional element of regulatory delay and avoidance; EPA is soliciting comment on whether the agency should require a pollutant-specific significant contribution finding prior to establishing NSPS for each pollutant, notwithstanding well-established findings that the source category contributes significant levels of pollution overall.<sup>151</sup> As EPA itself concedes in the proposal, “[in 2016] EPA asserted that CAA section 111 authorizes it to regulate a source category’s emissions of an air pollutant without a pollutant-specific [significant contribution finding] as long as the EPA has a ‘rational basis’ for doing so.”<sup>152</sup> The agency then offers a variety of ill-founded reasons for how it may be reasonable to conclude the exact opposite: that CAA §111 requires a pollutant-specific significant contribution finding.<sup>153</sup> Though the proposed rule does not incorporate this transformation of the agency’s statutory interpretation, EPA solicits comments and provides multiple pages of legal argument to support the proposition, suggesting that the agency is seeking to bolster the record in favor of reaching this determination following public comments on the proposed rule.<sup>154</sup> Much like the compartmentalization of the source category, enacting this change would, at a minimum, delay EPA’s regulations of harmful pollutants by requiring an extra step. In some instances, it could make it significantly more difficult for EPA to regulate emissions of certain pollutants at all.

Finally, EPA argues that methane regulations for new and modified sources under section 111(b) are redundant to the standards for volatile organic compounds (VOCs) since compliance with the latter will result in reductions in methane. This masks the significant effect of EPA’s proposed rescission of methane regulations under subsection (b): to delay indefinitely the regulation of methane emitted at much higher levels from existing sources.<sup>155</sup> Methane regulations for existing sources would not be redundant to the regulation of VOCs, because VOCs are not covered by section 111(d), which excludes pollutants from existing sources covered by other CAA provisions. Only under section 111(d), in contrast, does EPA have the authority to set comprehensive guidelines for existing sources of methane.<sup>156</sup>

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<sup>151</sup> *Id.* at 50,266.

<sup>152</sup> *Id.* at 50,262.

<sup>153</sup> *See e.g. id.* at 50,266 (“CAA Section 111(b)(1)(A)’s [significant contribution finding] provision, when read in isolation, may appear to require a [significant contribution finding] for the source category as a prerequisite for listing the source category. However, should the EPA instead conclude that Congress could not have intended that the EPA promulgate NSPS without a pollutant-specific [significant contribution finding] (1) the fact that Congress adopted at the same time and subsequently amended at the same time similarly phrased CAA provisions that do contemplate a pollutant-specific finding prior to regulation, (2) the inherent vagueness of the rational basis approach, and (3) the indications in the legislative history that Congress did intend that the EPA make a pollutant specific SCF under CAA section 111?”).

<sup>154</sup> *See id.*

<sup>155</sup> *See* 84 Fed. Reg. 50,244, 50,271 (Sep. 24, 2019) (“[T]he EPA has, to date, assumed that methane, if subjected to a standard of performance for new sources, would trigger the application of CAA section 111(d). Accordingly, given this assumption, the EPA recognizes that rescinding the applicability of the NSPS to methane emissions for the sources in the Crude Oil and Natural Gas Production source category that are currently covered by the NSPS will mean the existing sources of the same type in the source category will not be subject to regulation under CAA section 111(d).”).

<sup>156</sup> *Id.* at 50,259.

In section 111, Congress included two features characteristic of the CAA's overall approach of providing a comprehensive solution to pollution: authorizing regulation by source category based on the overall level of pollution it emits and requiring EPA to issue guidelines for pollution from existing sources once it sets pollution standards for new sources. The proposal undermines these features and its own legal authority. By removing NSPS for methane, EPA would remove the predicate for regulating existing sources of methane in the oil and gas sector. This operates in tandem with EPA solicitation of comment on requiring a pollutant-specific endangerment finding in place of its current authority to consider pollution from the sector as a whole. The proposal aggravates the damage it would do to section 111's comprehensive pollution control strategy by dividing the source category into covered and uncovered segments on the basis of an arbitrary, pretextual argument that bears little connection to how the sector operates.

Finally, the proposal ignores section 111's technology dissemination purpose. The proposal acknowledges that EPA's position that methane standards are redundant to VOC standards reflects the performance of *existing* pollution control technology and that new technology applicable to methane emissions is being developed. The proposal explains:

The NSPS requirements as applied to VOCs will reduce methane in the same amounts as those requirements, as applied to methane, would as long as OGI [optical gas imaging] with current levels of sensitivity to methane continue to be used. The EPA is aware that several new technologies are under development that would detect speciated fugitive emissions from oil and natural gas operations.<sup>157</sup>

This admission is in stark contrast to the technology-promoting provisions of the CAA. EPA essentially abandons its role in technology diffusion by deregulating, despite the potential of new technology that could further control emissions of a harmful pollutant. Such an action by the agency is counter to its all but explicit CAA mandate.

## Conclusion

What unites these four actions by the Trump EPA is not just that they roll back individual environmental protections and could result in emissions increases; they also each rely on a new legal interpretation that diminishes EPA's CAA regulatory authority. Ultimately, the courts may uphold each of them and confirm them as consistent with the CAA's meaning and intent. Currently, however, there are at least two reasons to question EPA's purpose and to view its statutory interpretations as not aimed at understanding the meaning of specific provisions and fulfilling the purposes of the CAA.

First, each interpretation reverses or rejects EPA's previous position on the same air quality challenge. Each offers a version of the CAA that is ill-designed for solving the relevant problem and impervious to scientific, technological, and practical change. The Repeal of the Clean Power Plan relies on simple textual analysis and reaches a conclusion that disempowers EPA. The agency denies the authority to engage in effective problem-solving that would account for the realities of the electricity grid. Similarly, the proposed rescission of the MATS Adequate

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<sup>157</sup> *Id.* at 50,260.

and Necessary Finding distorts both section 112(n)(1)(A) and *Michigan* to offer a logic that thwarts Congress' intent that power plant HAP emissions be reduced by regulation if compliance with other CAA provisions does not result in adequate reductions. To rescind the California Waiver, EPA abdicated its CAA authority, and in the alternative, read section 209(b) and section 177 as non-responsive to current understanding of air pollutants. To defend its proposed amendments to the 2016 Oil and Gas NSPS, EPA primarily relied on an irrelevant observation about the content of natural gas to disaggregate emissions and to avoid reducing emissions in a comprehensive manner.

Each replaces an interpretation that understood the CAA and the individual statutory provisions in exactly the opposite way. Each previous interpretation prioritized successfully addressing an air quality problem and discerning Congress' meaning and intent. Each responded to the statutory language and construction of the relevant provision, incorporating their alignment with the Act's overall structure and purpose. EPA's success in developing the Cross-State Air Pollution Rule remains instructive. The agency approached the rulemakings that are now the target of the current reversals with the same imperative: adapting the CAA to current realities and finding within its language the tools to adequately meet the air quality challenge.

Second, since its beginning the Trump administration has prioritized deregulation as an end in itself. In early 2017, then presidential advisor Steve Bannon's promised to "deconstruct the administrative state."<sup>158</sup> President Trump issued two executive orders delivering on the promise. One executive order required that any new regulation be paired with the repeal of two existing regulations.<sup>159</sup> The second, styled as promoting energy independence, directed the EPA to "review" the Clean Power Plan and the 2016 Oil and Gas NSPS as part of a policy of alleviating the "burden" on energy production.<sup>160</sup> EPA has also taken steps to weaken the NAAQS review process by undercutting its robust scientific foundation, which, following the express language of the CAA, has been a key driver of EPA's ongoing regulatory agenda.<sup>161</sup> These actions are instrumental to EPA's deregulatory approach given the range of CAA provisions that are triggered by tightening the standards.

In this context, the four new legal interpretations emerge as instruments to achieve the administration's broader deregulatory agenda, rather than efforts to perfect EPA's understanding of the CAA. If each of these interpretations is confirmed, either as fixed precedent or strong presumption, then EPA's course will be re-directed from that of the past several decades. At the very least, these interpretations reflect an agency that approaches its legal authorities as static rather than "progressive" and that works to find limitations in its mandates rather than

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<sup>158</sup> Max Fisher, *Stephen K. Bannon's CPAR Comments, Annotated and Explained*, THE NEW YORK TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/us/politics/stephen-bannon-cpac-speech.html> (Quoting Mr. Bannon as stating, "the third, broadly, line of work is deconstruction of the administrative state.").

<sup>159</sup> Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017).

<sup>160</sup> Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

<sup>161</sup> See Joseph Goffman & Laura Bloomer, *Legal Consequences of EPA's Disruption of the NAAQS Process*, HARV. L. SCHOOL'S ENVTL. & ENERGY L. PROGRAM (Sept. 30, 2019), <http://eelp.law.harvard.edu/wp-content/uploads/Legal-Consequences-of-NAAQS-Changes.pdf>; *CleanLaw: Laura Bloomer Speaks with Gretchen Goldman about EPA Science Advisory Panels*, HARV. L. SCHOOL'S ENVTL. & ENERGY L. PROGRAM (Dec. 18, 2019), <https://soundcloud.com/user-995691545/epa-science-advisory-panel-changes-with-gretchen-goldman-and-laura-bloomer>.

imperatives to continually respond to ongoing threats to air quality, public health and the environment.