

Joseph Goffman

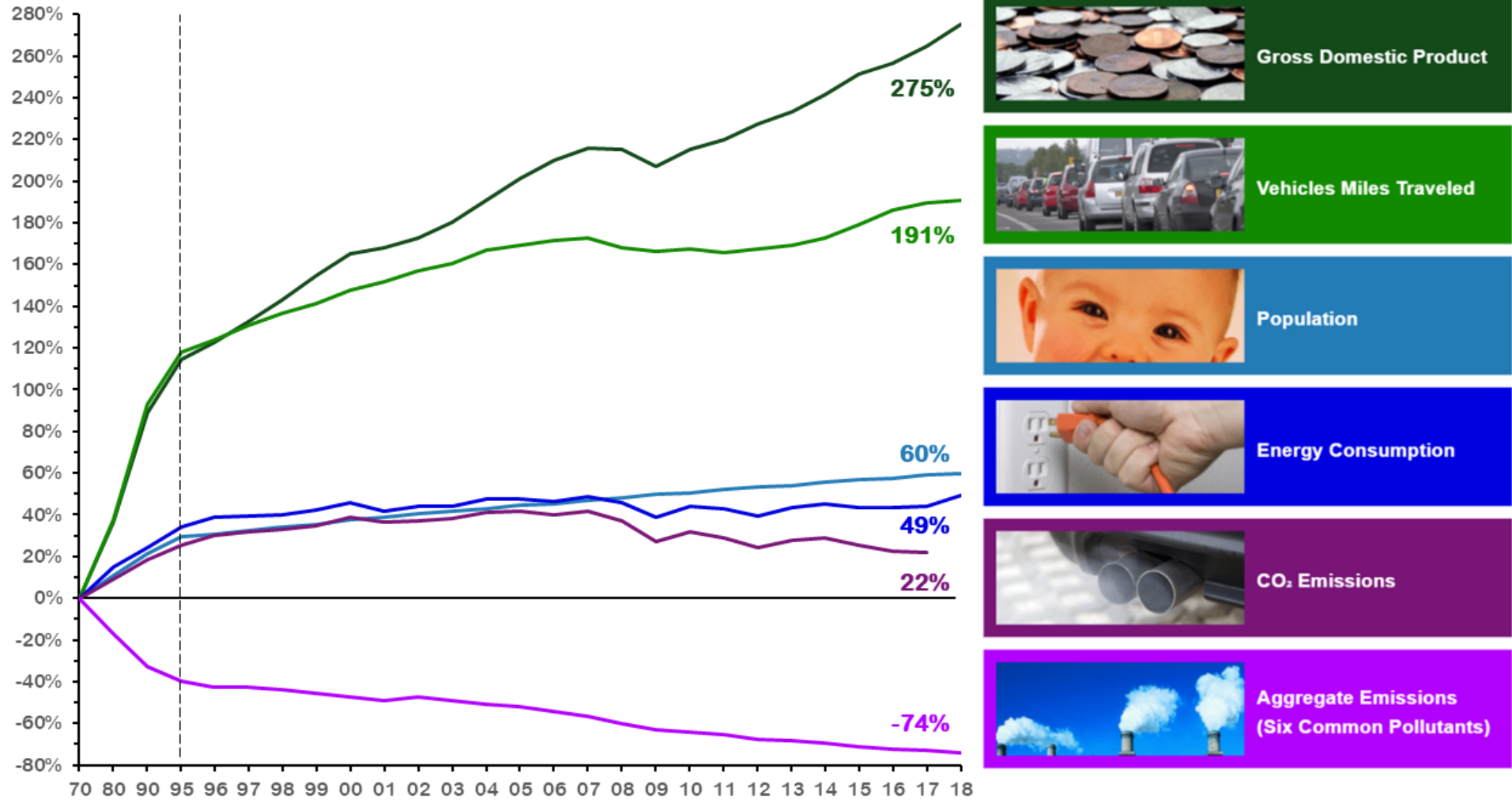
# Punishing Success: Why Is EPA Ground Zero in “Deconstructing the Administrative State”?



HLS

ENVIRONMENTAL &  
ENERGY LAW PROGRAM

# Comparison of Growth Areas and Emissions, 1970-2018



Source: <https://www.epa.gov/air-trends/air-quality-national-summary>

# The Progress Imperative: Science and Technology as Pillars of the Clean Air



# 3

## EPA's Mission & the CAA

“Despite its complexity, for pollution control purposes the environment must be perceived as a single, interrelated system.” Reorganization Plan No. 3 of 1970

### Clean Air Act

**101(b):** The **purposes** of this title are –

- (1) to protect and enhance the quality of the Nation’s air resources so as to **promote the public health and welfare** and the productive capacity of its population;
- (2) to **initiate and accelerate a national research and development program** to achieve the prevention and control of air pollution
- (3) to **provide technical and financial assistance** to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and
- (4) to **encourage and assist** the development and operation of **regional air pollution prevention and control programs.**

**(c) POLLUTION PREVENTION.** – A **primary goal** of this Act is **to encourage or otherwise promote reasonable Federal, State, and local governmental actions**, consistent with the provisions of this Act, for pollution prevention.



# 4

## A Law and An Agency that Evolves with Science and Technology

### NAAQS

**108(a)(2):** Air quality criteria for an air pollutant **shall accurately reflect the latest scientific knowledge** useful in indicating the kind and extent of all identifiable effects on public health or welfare...

**109(d)(1):** [At **five-year intervals**], the Administrator shall **complete a thorough review** of the criteria published under section 108 and the national ambient air quality standards..and **shall make such revisions...and promulgate such new standards** as may be appropriate.

### NSPS

**111(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...has been adequately demonstrated.

**111(b)(1)(B):** The Administrator shall, at least **every 8 years, review and, if appropriate, revise** such standards....

### MACT

**112(d)(3):** **The maximum degree of reduction** in emissions that is deemed achievable for new sources in a category or subcategory **shall not be less stringent than** the emission control that is achieved in practice by **the best controlled similar source....**

**112(f)(2)(A):** [The] Administrator shall, **within 8 years** after promulgation of standards ... **promulgate standards [if required] in order to provide an ample margin of safety to protect public health....**



# 5

## Court Reinforcement of a "Progressive" Statute

### **Whitman v. American Trucking**

“Section 109(b)(1) of the CAA, which to **repeat we interpret as requiring the EPA to set air quality standards at the level that is ‘requisite’** that is, not lower or higher than is necessary – to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent.”

### **Massachusetts v. EPA**

“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.**”

### **Sierra Club v. EPA (Brick MACT)**

“EPA has the discretion to determine what metric to use in defining the ‘best’ source, so long as it is reasonable. However, the EPA’s discretion **does not extend to defining several different ‘best’ metrics** within the same category and allowing emitters to comply with the most favorable standard.”  
*(internal citations omitted)*



# 6

## Science-informed, technology forcing

### Clean Air Act Incorporation of Best Available Science

Conduct comprehensive review of existing health and environmental science every five years



### Statutory Health-Based Mandate for Air Quality Standards

Revise (and generally tighten) the NAAQS based solely on \*latest\* public-health considerations



### Federal and State Responses to Revised NAAQS

Designate areas as attainment or non-attainment

Develop and approve State Implementation Plans



### Technology Diffusion and Forcing Across Sources and Programs

PSD and NA permit requirements

New Source Performance Standards

Motor vehicle standards



# 7

## Innovation, Dissemination, Integration

California Sets the First Tailpipe Emissions Standards (1966)



Air Quality Act (1967) and Clean Air Act (1970) Authorize CA to Set Auto Standards



Section 177 Gives States Authority to Adopt CA Standards (1977)



EPA Grants Waivers for ZEV and GHG Standards (1990-2013)

ZEV Waiver in 1990

GHGs in 2009

Advanced Clean Car Program in 2013





# 8

Auto Emissions Technology:  
Innovation, Dissemination, Integration

## 2013 Grant of Waiver for CA's Zero Emission Vehicle (ZEV) Program

- i) "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.** The **provision was designed to ensure California's broad discretion** to determine the best means to protect the health and welfare of its citizens....
- ii) This single **ACC program combines the control of smog-causing pollutants and GHG emissions** into a coordinated package...to address **near and long term smog issues** within California and identified GHG emission reduction goals." 78 Fed. Reg. 2112, 2113-2114 (Jan. 9, 2013)

## CAA §177

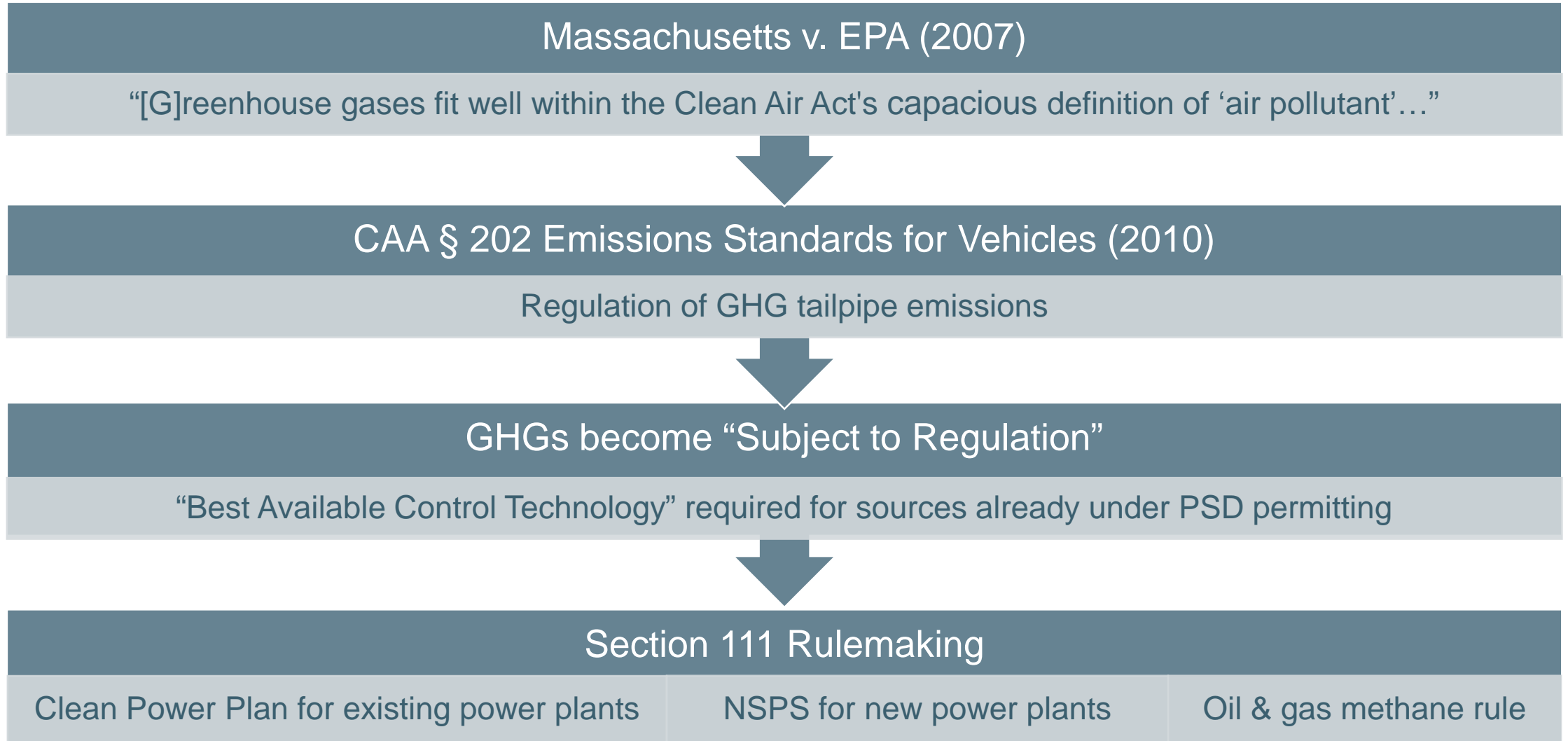
**[Any] state** which has plan provisions approved under this part **may adopt and enforce for any model year standards** relating to control of emissions from new motor vehicle engines and take such other actions as are referred to in section 209(a) respecting such vehicles if –

**(1)** such standards are identical to the California standards for which a waiver has been granted for such model year...



# 9

## Interconnected nature of CAA



# 10 Built-In Redundancies: Authorities and Citizen Suits

Environmental groups sue EPA for failure to regulate GHGs (2006)

"[Any] person may commence a civil action...against the Administrator where there is alleged a failure...to perform."

Settlement Agreement (2010)

Schedule for New Source Performance Standards and 111(d) standards for existing power plants

Presidential Memorandum - Power Sector Carbon Pollution Standards

Directs EPA to use its 111(b) and 111(d) authority

Section 111 Rulemaking

Clean Power Plan for existing power plants

New Source Performance Standards for new power plants

## Implementation Plans & Cross-State Air Pollution

**110(a)(2): Each implementation plan** submitted by a State...shall –

(D) **Contain adequate provisions—**

(i) **Prohibiting...any source or other type of emissions activity** within the State from emitting any air pollutants in amounts which will—

(I) **Contribute significantly to nonattainment** in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard...

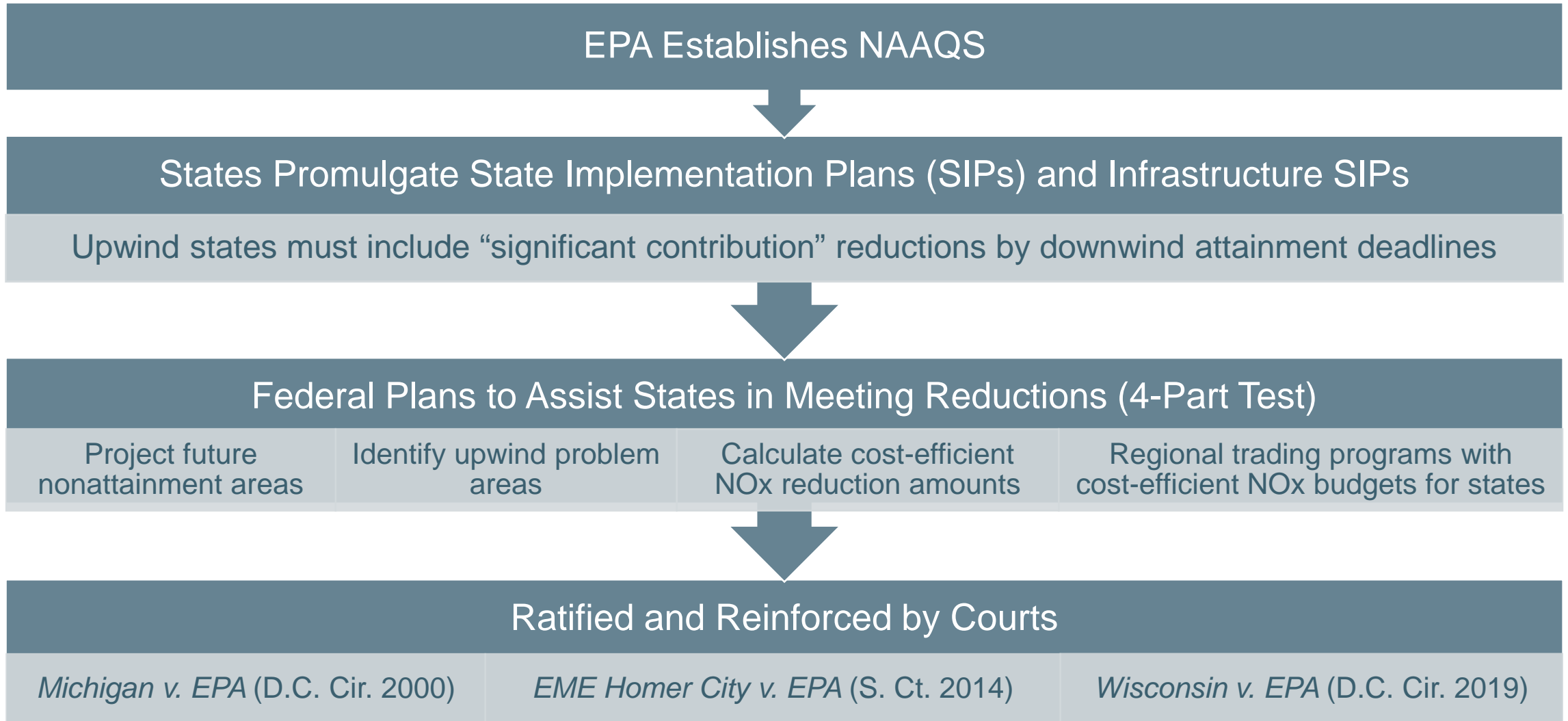
**110(c)(1): The administrator shall promulgate a Federal implementation plan** at any time within 2 years after the Administrator —

(A) **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

(B) Disapproves a State implementation plan submission in whole or in part



# 12 NAAQS and Cross-State Pollution



# 13 From “Contributes Significantly” to Cap and Trade

## 1998 NOx SIP Call

“EPA **encourages States to consider** electric utility and large boiler controls under **a cap-and-trade program** as a cost-effective strategy.” 63 Fed. Reg. 25902, 25904 (May 11, 1998)

“EPA’s authority to cooperate with and assist the States in the implementation of the trading program resides in both State law and the CAA. [...] One purpose of title I of the CAA is to offer assistance to States in implementing title I air pollution prevention and control programs (42 U.S.C. 101(b)(3)). In keeping with that purpose, section 103(a) and (b) **generally authorize EPA to cooperate with and assist State authorities in developing and implementing pollution control strategies**, making specific note of interstate problems and ozone transport. Finally, section 301(a) **grants EPA broad authority to prescribe such regulations as are necessary** to carry out its functions under the CAA. Taken together, **EPA believes that these provisions of the Act authorize EPA to cooperate with and assist the States in implementing the NOX Budget Trading Program** in the ways set forth in the model rule.” *Id.* at 25918



# 14 Bipartisan Understanding of CAA Imperatives



# Federal Register

---

Thursday,  
May 12, 2005

Bush: Clean Air  
Interstate Rule

---

Part II

## Environmental Protection Agency

40 CFR Parts 51, 72, et al.

Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call; Final Rule



Obama: Cross-  
State Air  
Pollution Rule

# FEDERAL REGISTER

---

Vol. 76                      Monday,  
No. 152                     August 8, 2011

Book 2 of 2 Books  
Pages 48207–48712

---

Part II

## Environmental Protection Agency

---

40 CFR Parts 51, 52, 72 et al.  
Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals; Final Rule

## 2005 Clean Air Mercury Rule

“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.** This interpretation is supported by a careful reading of the section 111(a) definition of the term...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).” 70 Fed. Reg. 28605, 28616 (May 18, 2005)

“Having interpreted the term “standard of performance” to include a cap-and-trade program, EPA must next “determine” that such a system is “the best system of emissions reductions which ... has been adequately demonstrated.” (See CAA section 111(a)(1).) EPA has determined that **a cap-and-trade program based on control technology available in the relevant timeframe is the best system for reducing Hg emissions** from existing coal-fired Utility Units.” *Id.* at 28617





# 16 Clean Power Plan

## Best System of Emission Reduction

“Certain characteristics of the utility power sector are of central importance for understanding why the measures of building blocks 2 and 3 qualify as **part of the system of emission reduction**. As discussed above, electricity is highly substitutable and **the utility power sector is highly integrated, so much so that it has been likened to a “complex machine.”** Specifically, the utility power sector is characterized by physical, as well as operational, interconnections between electricity generators themselves, and between those generators and electricity users” 80 Fed. Reg. 64662, 64768 (Oct. 23, 2015)

## BSER: Building Blocks

1. Improved efficiency at power plants
2. Shifting generation from higher-emitting steam EGUs to lower-emitting natural gas power plants
3. Shifting generation to clean energy renewables



# The EPA's War on Progress

# 18 Decommissioning the Clean Air Act's "Progressive" Elements

## Strategies

- Undermine agency's scientific expertise and process
- Pursue enormous deregulatory agenda
- **Interpret Clean Air Act as static law by constraining its meaning**

## Consequences

- Weaken health-based National Ambient Air Quality Standards
- Dismantle EPA's regulatory structure
- **"Deconstruct the administrative state"**



“Despite its complexity, for pollution control purposes the environment must be perceived as a single, interrelated system.” Reorganization Plan No. 3 of 1970

## **Trump EPA’s Methods for Reading EPA Authority out of the CAA**

1. Increase compartmentalization
2. Impose static interpretation of the statutory text
3. Manipulate cost-benefit

# 20 Four Examples

Action	CAA	Trump EPA's Interpretation
Proposed: Revocation of the Appropriate & Necessary Finding for Mercury Emissions from EGUs	§112(n)(1)(A)	<p>i)When determining whether a rule is justified, EPA should only minimally consider pollution reductions not directly targeted by the regulation.</p> <p>ii)EPA has implicit option to permit power plant mercury emissions to remain uncontrolled.</p>
Final Rule: Affordable Clean Energy Rule	§111(d)	CAA's "Best System of Emissions Reduction" only allows site-specific pollution controls for power plants. EPA cannot consider energy market and grid options notwithstanding record support.
Proposed: NSPS for Oil and Natural Gas Sector (Methane)	§111(b)	CAA requires a "segment"-specific finding to regulate new aspects of an already-regulated sector. CAA may require pollutant-specific significant contribution findings.
Final: Revocation of California's Clean Cars Waiver	§209(b)(1)(B)	CAA does not allow California a waiver for climate pollutants. Section 177 may only be read to address NAAQS attainment. Preemption by another agency is sufficient to deny a waiver, even for measures that have air quality benefits.



# Appropriate & Necessary Finding

“CAA section 112(n)(1)(A)...sets a unique process by which the Administrator is to determine **whether** to establish CAA section 112(d) standards for EGUs.” 84 Fed. Reg. 2670, 2673 (Feb. 7, 2019)

“The primary, fatal flaw of the 2016 Supplemental Finding’s ‘preferred approach’ was its disregard for the *Michigan* Court’s suggestion that, under CAA section 112(n)(1)(A), the **Agency must meaningfully consider cost within the context of a regulation’s benefits.**” *Id.* at 2675

“”We propose to find that the EPA’s equal reliance on the [PM] air quality co-benefits projected to occur as a result of the reductions in HAP was flawed as the focus of CAA section 112(n)(1)(A) is HAP emissions.” *Id.* at 2676

# Affordable Clean Energy Rule



“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 BSER must be to the source, Congress spoke directly** in Chevron step one terms to the question of whether the BSER may contain measures other than those that can be put into operation at a particular source: It may not. The approach to BSER in the CPP is thus unlawful and the CPP must be repealed.” 84 Fed. Reg. 32520, 32532 (July 8, 2019)

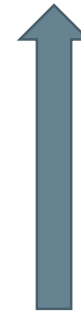
“CAA section **111 unambiguously limits the BSER to those systems that can be put into operation at a building, structure, facility, or installation.** Such systems include, for example, add-on controls (e.g., scrubbers) and inherently lower-emitting processes/practices/designs.” *Id.* at 32524.



**Table ES-4 Projected CO<sub>2</sub> Emission Impacts of Illustrative Policy Scenario, Relative to Baseline in 2025, 2030, and 2035**

	CO <sub>2</sub> Emissions (MM Short Tons)			CO <sub>2</sub> Emissions Change (MM Short Tons)			CO <sub>2</sub> Emissions Change Percent Change		
	2025	2030	2035	2025	2030	2035	2025	2030	2035
Baseline	1,774	1,743	1,719	-	-	-	-	-	-
Illustrative Policy Scenario	1,762	1,732	1,709	(12)	(11)	(9.3)	(0.7%)	(0.7%)	(0.5%)

Source: Regulatory Impact Analysis for the ACE rule, page ES-6



# NSPS for Oil and Gas (Methane)

“While CAA section 111(b)(1)(A) and (B), respectively direct the EPA to ‘revise,’ where warranted, both the ‘list of source categories’ and the ‘standards of performance’ that the EPA has promulgated, nothing in CAA section 111 **expressly authorizes or directs the EPA to ‘revise’ a ‘source category’ by altering its scope**, once the EPA has listed that source category.” 84 Fed. Reg. 50244, 50256 (Sept. 24, 2019)

“[We] are 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.’” *Id.* at 50257

“EPA solicits comment on whether CAA section 111(b)(1)(A) **should be interpreted to require it to make a pollutant-specific [significant contribution finding (SCF)] as a prerequisite for promulgating an NSPS** for that pollutant. CAA section 111(b)(1)(A)’s SCF provision, when read in isolation, may appear to require a SCF 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 SCF....?” *Id.* at 50266

# Revocation of California's Waiver

“EPA concludes that it is appropriate **to review California’s GHG standards separately from the remainder of the State’s motor vehicle emission control program** for purposes of CAA section 209(b)(1)(B)” 84 Fed. Reg. 51,310 51,347 (Sept. 27, 2019)

“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.” *Id.* at 51,348

“[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.”  
*Id.* at 51,351

## 30 Preemption

“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 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.” 84 Fed. Reg. 51,310 51,338 (Sept. 27, 2019)

“NHTSA continues to believe that preemption of the programs such as the ZEV mandate will not have a significant effect, as **California remains free to revise its LEV program to reduce ozone-forming emissions and seek a waiver of Clean Air Act preemption from EPA**, as described above, while not violating NHTSA’s preemption authority, and other States and local governments would continue to be allowed to take other actions so long as those are not related to fuel economy and are consistent with any other relevant Federal law.” *Id.* at 51,353

“This single ACC program **combines the control of smog-causing pollutants and GHG emissions into a coordinated package** of amendments and **requirements...to address near and long term smog issues** within California and identified GHG emission reduction goals. The program also includes amended ZEV regulations and a Clean Fuels Outlet regulation.”  
2013 Grant of Waiver, 78 Fed. Reg. 2112, 2114 (Jan. 9, 2013)

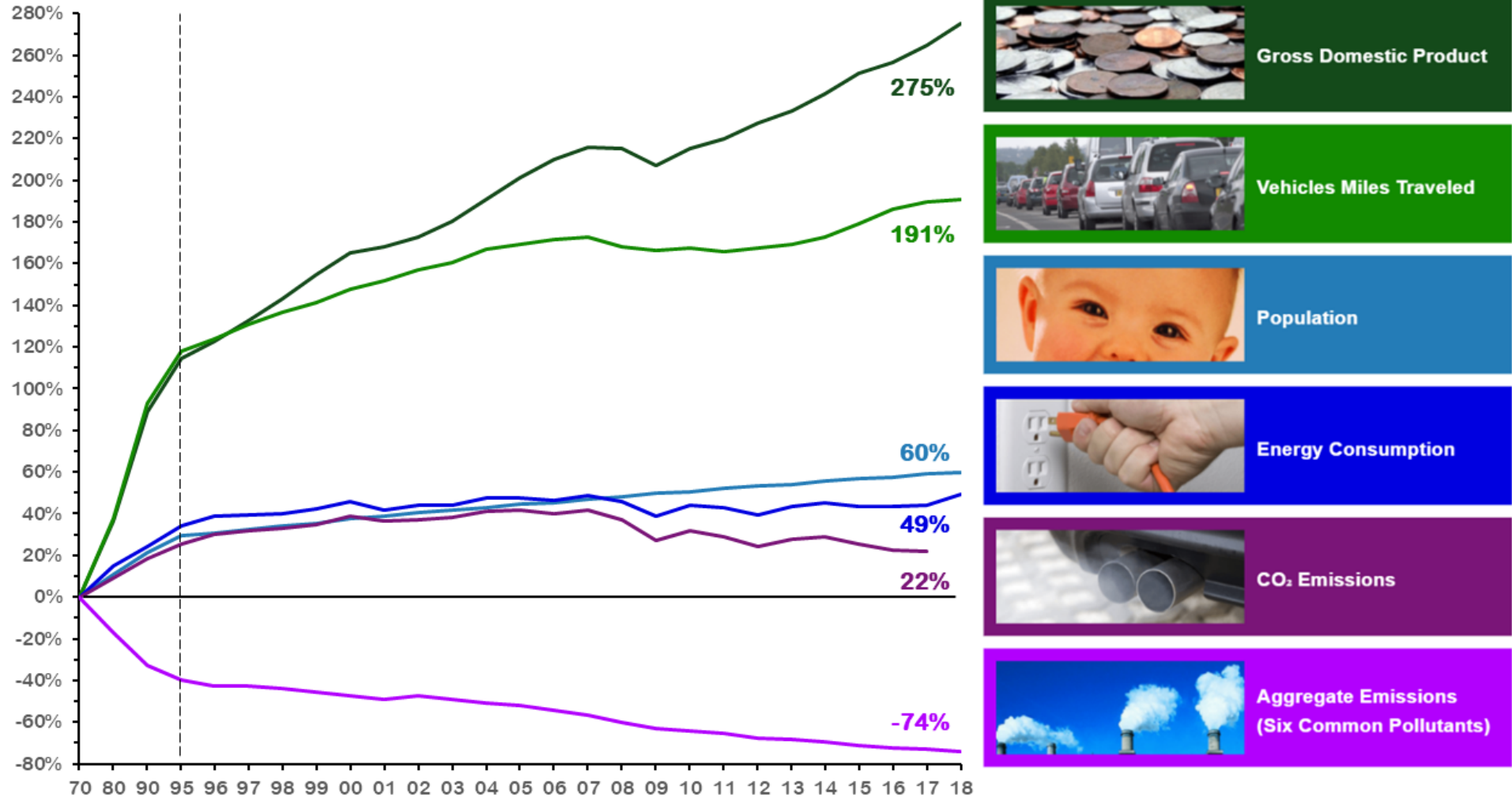


# Consequences



Action	CAA	Trump EPA's Interpretation	Significance
Proposed: Revocation of the Appropriate & Necessary Finding for Mercury Emissions from EGUs	§112(n)(1)(A)	<p>i)When determining whether a rule is justified, EPA should only minimally consider pollution reductions not directly targeted by the regulation.</p> <p>ii)EPA has implicit option to permit power plant mercury emissions to remain uncontrolled.</p>	<p>Bootstraps ad hoc application of cost-benefit analysis to subvert Congressional intent by creating option *not* to regulate power plant mercury emissions.</p> <p>See EELP white paper, <a href="#">Rolling Back the Mercury and Air Toxics Standards: Proposed Withdrawal of "Appropriate and Necessary"</a></p>
Final Rule: Affordable Clean Energy Rule	§111(d)	CAA's "Best System of Emissions Reduction" only allows site-specific pollution controls for power plants. EPA cannot consider energy market and grid options notwithstanding record support.	Writes rulemaking record out of consideration of "best system of emission reduction" to attenuate authority to address power plant carbon dioxide emissions.
Proposed: NSPS for Oil and Natural Gas Sector (Methane)	§111(b)	CAA requires a "segment"-specific finding to regulate new aspects of an already-regulated sector. CAA may require pollutant-specific significant contribution findings.	Compartmentalizes "source category"/operations to attenuate EPA's ability to regulate oil/gas sector emissions. Attenuates link between regulatory authority and air pollution science.
Final: Revocation of California's Clean Cars Waiver	§209(b)(1)(B)	CAA does not allow California a waiver for climate pollutants. Section 177 may only be read to address NAAQS attainment. Preemption by another agency is sufficient to deny a waiver, even for measures that have air quality benefits.	<p>Yields <i>air quality-related</i> regulatory authority to another agency and prohibits CA from regulating greenhouse gas emissions from automobiles – one of the largest sources of climate pollution – and defeats technology innovation imperative.</p> <p>See EELP's <a href="#">Clean Cars Page</a> for more information.</p>

### Comparison of Growth Areas and Emissions, 1970-2018



Source: <https://www.epa.gov/air-trends/air-quality-national-summary>