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CARBON POLLUTION
EMISSION GUIDELINES FOR EXISTING STATIONARY SOURCES:
ELECTRIC UTILITY GENERATING UNITS

COMMENTS ON THE PROPOSED RULE

SUBMITTED BY

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INTRODUCTION

The National Federation of Independent Business (“NFIB”) respectfully submits these comments to assist the agency in evaluating its proposal to regulate power plant emissions in the rulemaking styled, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*. See 79 Fed. Reg. 34,830 (June 18, 2014) (to be codified at 40 C.F.R. pt. 60). As the Agency would agree, it is best to carefully evaluate legal questions before proceeding with regulatory initiatives. These comments are intended to assist in such an evaluation process.

EPA’s Interest in Legal Compliance

The Agency’s authority to regulate emissions of air pollutants is a creature of the Clean Air Act (“CAA” or the “Act”). EPA’s legal authority is therefore confined in type and scope by the terms of the Act. If the Agency exceeds the bounds of its statutory authority, its rulemaking is “plainly contrary to law and cannot stand,” *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001), for the Act itself expressly disallows all “agency action . . . in excess of statutory jurisdiction, authority, or limitations,” 42 U.S.C. § 7607(d)(9)(C).

As further explained below, the Agency’s current proposed rulemaking exceeds its statutory authority in a variety of ways, which these comments discuss under two overall groupings of issues.

First, while the proposed rulemaking purports to implement Section 111(d) of the Act, the current proposal, if finalized, would exceed the Agency's constitutional and statutory authority and break new legal ground in several respects. In particular, the proposal breaks new ground and exceeds the agency's authority in the type of pollutant it would regulate; the methods to be employed in such regulation; and the magnitude of the consequences for our nation's economy. No previous Section 111(d) rulemaking has construed that statute as the current rulemaking proposes to do. In fact, several courts and the Agency have previously construed the CAA to say something close to the opposite of the Agency's current Section 111(d) interpretation. The analysis below of the Act's text, structure and prior applications confirms that the Agency's novel interpretation is not a lawful interpretation. (*See Sections I - VII, infra.*)

Second, while the publication of the proposed rule was accompanied by an analysis of costs and benefits, this analysis fails to comply with standard practices for producing such analyses and the Clean Air Act's requirements. In particular, the Agency's cost-benefit analysis improperly relies on foreign benefits to justify domestic costs; improperly relies on alleged co-benefits—especially reductions in emissions of fine particulate matter (PM_{2.5}); and fails to account for “carbon leakage,” which is the practical certainty that energy-intensive domestic industries

will relocate plants and activities abroad in response to EPA finalizing this proposed rule. (*See Sections VIII - X, infra.*)

NFIB's Interest in This Rulemaking

Founded in 1943, and headquartered in Nashville, Tennessee, the National Federation of Independent Business is America's leading small-business advocacy association. A nonpartisan, nonprofit association, NFIB's membership consists of approximately 350,000 small and independent business owners located across the nation. NFIB's members look to NFIB to represent their interest on a broad range of public policy issues, including the important issue of maintaining access to the affordable energy they need to run their businesses. NFIB's members are drawn from many sectors of the economy, including agriculture, forestry, fishing, construction, manufacturing, wholesale trade, retail trade, transportation, finance, insurance, real estate, and professional services, among others. The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

Despite this diversity, an important commonality across practically all NFIB members is their purchase of energy, including electric energy, as a cost of doing business. According to the NFIB Research Foundation report entitled *2012 Small Business Problems and Priorities*, the cost of electricity ranked number 12 out of

75 problems facing small businesses, ahead of major financial challenges like poor earnings performance. This ranking is not surprising. Increases in electricity costs disproportionately impact small businesses, which typically lack pricing power in their respective markets. Unable to absorb increases in electricity costs the way some larger companies can, small businesses must increase the price of their own products and services in response to electricity price hikes, and, as these prices go up, demand for their products and services goes down, lowering sales volumes and revenues. According to NFIB's Energy Consumption poll, energy costs overall are one of the top three business expenses in 35% of small businesses.

EPA's Notice of Proposed Rulemaking recognizes that its proposed rule, if finalized, would lead to significant increases in electricity costs that would harm small businesses. Specifically, the Notice states that "average nationwide retail electricity prices are projected to increase by roughly 6 to 7 percent in 2020 relative to the base case, and by roughly 3 percent in 2030." 79 Fed. Reg. at 34,934. And it recognizes that such "[c]hanges in price . . . can impact markets for goods and services produced by sectors that use these energy inputs in the production process" and that "[c]hanges in cost of production may result in . . . changes in profitability of firms affected." *Id.* at 34,935.

Against this backdrop, NFIB offers these comments to assist the Agency in evaluating the legality of its proposed regulation, and, more particularly, in hopes

of triggering a candid reassessment of its current proposal. Many NFIB members have made substantial investments in plant, equipment, and business processes in reliance on continued supplies of affordable electricity. Because of the legal deficiencies identified below, and because the profitability of many small businesses could be affected by increases in electricity prices as a result of the proposed rule (if finalized), NFIB urges the Agency withdraw its current proposal.

DISCUSSION: STATUTORY AND CONSTITUTIONAL DEFECTS

I. GREENHOUSE GASES ARE NOT THE TYPE OF POLLUTANT THAT MAY BE REGULATED UNDER SECTION 111(D).

The Clean Air Act uses the term “pollutant” frequently, but with varying meaning depending on context. While greenhouse gases (“GHGs”) are pollutants for some purposes, they fall outside that term at other points in the statutory scheme. As for the current rulemaking, GHGs are not pollutants for purposes of Section 111(d) New Source Performance Standards.

The Supreme Court first recognized that greenhouse gases might qualify as pollutants within the Clean Air Act’s general definition in *Massachusetts v. EPA*, 549 U.S. 497 (2007). At issue in *Massachusetts* was the Act’s overarching definitional provision in 42 U.S.C. § 7602(g). The EPA interpreted that definition to exclude greenhouse gases and, in 2003, denied a rulemaking petition on that basis. *Id.* at 511. The Court disagreed, reasoning that, should the EPA reach a judgment that GHGs contribute to global warming, the Agency might, consistent

with the statute, invoke its powers under Section 202(a)(1) of the Act to regulate emissions from automobiles and other non-stationary sources. *Id.* at 528-29 (interpreting 42 U.S.C. § 7521(a)(1) (“any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air”). Because the Agency had denied the *Massachusetts* petitioner’s request for rulemaking based on the belief that Section 202(a)(1) did not permit such regulation, the Court interpreted only the general definition.

Massachusetts’s interpretation of the Act’s general definition does not mean that no further interpretive work is needed under specific provisions of the Act. *See generally Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2439 (2014) (“*UARG*”). In *UARG*, the Supreme Court expressly rejected the notion that “the air pollutants referred to in the permit-requiring provisions . . . are the same air pollutants encompassed by the Act-wide definition as interpreted in *Massachusetts*.” *Id.* The question for subsequent GHG rulemaking proceedings is, therefore, whether greenhouse gases are pollutants of the type “referred to” in the relevant provision of the CAA.

The structure of Section 111, which the Agency invokes as the basis for its proposed rulemaking, confirms that greenhouse gases are not covered by the provision. Section 111 is home to the New Source Performance Standards (“NSPS”) regulatory scheme. It requires that States submit to the EPA “a

procedure for implementing and enforcing standards of performance for new sources located in such State.” 42 U.S.C. § 7411(c)(1). The procedure for existing sources is analogous but follows “a procedure similar to that provided by section 7410,” under which the States develop performance standards and implementation plans for a covered “air pollutant,” taking into account the “remaining useful life of the existing source.” *Id.* § 7411(d)(1).

Section 111’s procedures are inconsistent with the regulation of GHGs. Specifically, the focus on State-by-State regulation is an important indication that Section 111 is best interpreted as applicable only to pollutants with localized effects. This feature is especially apparent in Section 111’s cross-reference to Section 110. As the District of Columbia Circuit has explained, Section 110 “provides the framework” for States to adopt plans for implementing National Ambient Air Quality Standards (“NAAQS”). *Texas v. EPA*, 726 F.3d 180, 183 (D.C. Cir. 2013). That framework is inherently and pervasively focused on localized harms. *Id.* (citing Section 110 to explain how States “determine, based on *local conditions and needs*, how to implement the NAAQS *and related requirements*” (emphasis added)). Elsewhere, Section 111 confirms the analogy to the NAAQS structure and its focus on localized pollutants. In describing the process for prioritizing pollutants, Section 111 instructs EPA to consider “the extent to which each such pollutant may reasonably be anticipated to endanger

public health or welfare.” 42 U.S.C. § 7411(f)(2)(B). This language mirrors the charge in Section 109 to consider “anticipated” harm to “public health or welfare” in setting NAAQS standards. *Id.* § 7409(b). Given the textual parallel between Sections 109 and 111, which is more meaningful than the CAA’s “profligate use” of “air pollutant,” *UARG*, 134 S. Ct. at 2441, the two provisions should be read to address the same type of pollutant. As the NAAQS guidelines make plain, those are pollutants with localized impact on health and welfare, not globally-dispersed pollutants like greenhouse gases.

Reliance on structure to clarify which pollutants fall within a CAA provision is a technique drawn directly from *UARG*. 134 S. Ct. at 2240-41 (citing examples of EPA narrowing the meaning of “pollutant,” including in the context of NSPS regulations under Section 111). After *UARG*, the Agency cannot simply rely on its existing GHG regulations promulgated under Section 202(a)(1) to assert a similar scope of authority under Sections 110 or 111.

The *UARG* decision is also relevant in several further respects. *First*, *UARG* held that EPA cannot invoke the general Prevention of Significant Deterioration (“PSD”) provisions of the Act to regulate “millions” of existing facilities that simply draw electricity from the grid. *Id.* at 2444 (holding that such expansive regulation “falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text.”); *id.* at 2448 (explaining that

regulation under the PSD program “may not be used to require reductions in a facility’s demand for energy from the electric grid.” (quotation omitted)). This holding regarding the PSD program is important for establishing structural limitations on the regulation of pollutants under Section 111 as well. PSD permits are required for pollutants regulated under the NAAQS provision in Section 110, and Section 111 expressly borrows from the NAAQS provision. Given this statutory family tree, the *UARG* Court’s “reluctan[ce]” to authorize bold new regulatory structures should apply with equal or even greater force to the current proposed rulemaking.

Second, the *UARG* Court identified several obstacles based on factual differences between global pollutants like GHGs and traditional localized pollutants. The Court quoted the Agency’s recognition that regulating GHGs would effect an “unprecedented expansion of EPA authority” due to the gases’ ubiquity. *Id.* at 2436 (quoting 79 Fed. Reg. at 44,355). Moreover, because the Agency’s factual premise for regulating greenhouse gases is that they operate on a global scale—combining from sources around the world and with effects on the entire planet’s climate—the Court highlighted the Agency’s recognition that regulation would be “relatively ineffective at reducing greenhouse gas concentrations.” *Id.* (quoting 79 Fed. Reg. at 44,355). As a result, the Court noted the difficulty of applying the Best Available Control Technology (“BACT”)

provisions of the CAA to greenhouse gases, based on the requirement that the regulator consider “ambient air quality *at the proposed site* and in *areas which may be effected* by emissions.” *Id.* at 2449 n.9 (quoting 42 U.S.C. § 7475(e)(1); emphasis added). While the Court reserved judgment on that topic, the obstacle it identified is at the forefront of this case, and it weighs heavily against stretching the location-specific program in Sections 110 and 111 to include a pollutant that is inherently global, not local, in character.

The Agency’s proposal fails to explain how Section 111(d) allows the regulation of greenhouse gases at all. While GHGs are a pollutant under the Act’s most general definition, *UARG*’s central holding is that they do not therefore automatically fall within every other use of the term “pollutant” in the statute. Because Section 111 specifically refers to the location-specific scheme for enforcing NAAQS standards, which expressly involves the States in regulating the conventional pollutants to which it applies, it is best interpreted to exclude all regulation of GHGs. These features confirm that the Supreme Court’s reluctance to discover an “unheralded power to regulate a significant portion of the American economy” in long-standing statutes prevents the cornerstone statutory discovery underlying the current proposal. *UARG*, 134 S.Ct. at 2444 (quotation omitted).

II. SECTION 111(D) AUTHORIZES REGULATION OF INDIVIDUAL SOURCES, NOT THE ENERGY SECTOR, OR THE ECONOMY AS A WHOLE.

Section 111(d), the statute on which EPA relies in this rulemaking does not bear the massive weight the Agency would place on it. The proposed rule would extend regulation well beyond any a single category of emitters to encompass every electricity generator and consumer in the country, displacing the regulation of the Federal Energy Regulatory Commission (“FERC”) along the way. The CAA does not authorize this extension of EPA authority, and EPA has never previously said that it does.

Section 111(d) authorizes EPA to “prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title.” 42 U.S.C. § 7411(d). Specifically, the Section 110 model includes cooperation with the States, which submit plans specifying performance standards and methods for implementation and enforcement. *Id.* By its terms, this provision applies only to “existing sources,” which it defines to include “any stationary source other than a new source.” 42 U.S.C. § 7411(a). “Stationary source” is also a defined term, meaning “any building, structure, facility, or installation which emits or may emit any air pollutant.” *Id.* This definition is crucial, and its meaning begins with ordinary dictionary definitions. *Smith v. United States*, 508 U.S. 223, 228-29 (1993). Each noun defining the “stationary sources” subject to regulation under

Section 111(d) refers to a single location. Webster's II New College Dictionary, 149 (defining building as “[a] structure that is built”); 1120 (structure: “[s]omething constructed, such as a building”); 409 (facility: “[s]omething created to serve a particular function <a new mental health *facility*>”); 588 (installation: “[a]n apparatus, as a system of machinery, set up for use.”). None of the definitions sweeps widely enough to allow regulation of the national *network* of electricity-producing, transmitting, and consuming entities and locations. Instead, they refer to individual buildings, or other constructed equipment that emits pollution. Accordingly, in order to properly rely on Section 111(d), regulations must take a form that applies to an individual “building, structure, facility, or installation.”

If anything, the dictionary definitions underlying Section 111(a) represent the outer limit of how broad those terms might be. Canons of interpretation serve to narrow further the meaning of “building, structure, facility, or installation,” and achieving a reasonable reading of the statute under *Chevron* requires the Agency to employ those canons. *Bell Atlantic Telephone Co. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

The *noscitur a sociis* canon of statutory interpretation is particularly relevant. In its simplest form, the canon mandates that “words grouped in a list should be given related meaning.” *Third Nat’l Bank in Nashville v. Impac Ltd.*,

432 U.S. 312, 322 (1977). Or, in a more faithful translation, “a word is known by the company it keeps.” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). However expressed, the canon’s purpose is to narrow the universe of meanings that may permissibly attach to statutory text. *Id.* (explaining that the canon serves to avoid “giving unintended breadth to the Acts of Congress”). Here, the canon’s application is straightforward. Each of the nouns in the definition of “stationary source” reinforces the fact that the law applies only to individual locations. If they appeared alone, the Agency might have some claim to ambiguity based on an expansive reading of a dictionary definition. But by enacting this particular four-word provision, Congress conveyed additional information about the type of “sources” it intended to bring within Section 111(d).

Comparison with neighboring provisions also provides a contextual clue to the range of “stationary sources” covered by Section 111(d). Despite cross-referencing Section 112 for exclusionary purposes, Section 111(d) does not incorporate the definition of “major source” from this neighboring Clean Air Act provision. That term, as used in Section 112, expressly allows the aggregation of sources “within a contiguous area” and is thus more broad than the disaggregated stationary sources referred to in Section 111(d). *See* 42 U.S.C. § 7412(a)(1). This contextual comparison bolsters the conclusion that Congress did not intend to authorize regulations aimed at the entire network of energy-producing, -

transmitting, and -consuming entities and locations as such. Instead, regulations must target a category of similar, individual sources and speak in terms of what they must do to reduce emissions.

Furthermore, Section 111(d)'s instruction that regulations "take into consideration, among other factors, the remaining useful life of the existing *source* to which such standard applies," 42 U.S.C. § 7411(d) (emphasis added), shows that regulations must speak in terms of individual sources. There is, after all, no single "useful life" of the power grid or nationwide set of power plants as a whole.

In this case, the proposed rulemaking sets aside the long-recognized meaning of Section 111(d) and seeks to regulate the entire network of energy production, transmission, and consumption. *See, e.g.*, 79 Fed. Reg. at 34,925 ("Instead, the EPA is proposing to establish state emission performance goals for the *collective group* of affected EGUs in a state" (emphasis added)); *id.* at 34,833 ("this proposal lays out *state-specific* CO₂ goals" (emphasis added)). These proposed regulations say nothing about the "performance standards" and methods for implementation and enforcement at individual stationary sources.

Also illustrative of the mismatch between the statutory authorization and the proposed rule is the Notice's lack of any discussion of each source's "useful life." The proposed rulemaking notes the "general" rule that "remaining useful life and other facility-specific factors are relevant for emission guidelines in which the EPA

specifies a presumptive standard of performance that must be fully and directly implemented by each individual existing source within a specified source category.” *Id.* at 34,925. Despite acknowledging that standard approach for complying with the terms of Section 111(d), “[i]n these proposed guidelines . . . the agency does not take that approach.” *Id.* Instead, because EPA reinterprets the statute to allow regulation aimed at “the collective group” of power plants, the Agency would defer all consideration of remaining useful life to the States as they implement EPA’s mandate. *Id.* at 34,925-26. In this fashion, when considered against the text and context of Section 111(d), the Agency’s proposed rulemaking emerges as an unprecedented expansion of the statute, and one largely divorced from text and past practices.

Recognizing that context can limit the scope of a statutory term to prevent an expansion of federal law has become routine at the Supreme Court. *E.g., Bond v. United States*, 134 S.Ct. 2077, 2091 (2014) (“We are reluctant to ignore the ordinary meaning of ‘chemical weapon’ when doing so would transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish.”). Moreover, the Court recently emphasized that long-standing agency practice weighs against reading a statute in a novel way to expand regulatory power: “When an agency claims to discover a long-extant and unheralded power to regulate ‘a significant portion of

the American economy’ . . . we typically greet its announcement with a measure of skepticism.” *UARG*, 134 S.Ct. at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

If anything, the newly discovered powers on which the current proposed rulemaking relies are more sweeping than those at issue in *UARG*. By seeking to regulate the entire network of electrical production, transmission, and consumption as a single unit, the proposed regulations would use a limited provision of the CAA to reach every producer, transmitter, and consumer in 49 States over the coming 16 years. The instant proposed rulemaking threatens precisely the type of expansion beyond congressional authorization that the Court has declined to allow.

III. THE PROPOSED RULE DOES NOT REFLECT THE BEST SYSTEM OF EMISSIONS REDUCTION AND THEREFORE VIOLATES SECTION 111.

Even if the statute was unclear about the meaning of “stationary sources,” the type of regulations it allows—those based on the “best system of emission reduction”—exclude the proposal now under review.

Simply put, the proposed rule fails to specify the requisite “system.” Instead, it takes a much different approach, announcing aggregate state-level emissions limits unrelated to any system for reducing emissions at individual sites. This method of regulation is not offered by Section 111(d). Any authority that Congress does not offer, the Agency may not award to itself.

The “standards of performance” to be promulgated under Section 111 must “reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction . . . (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements).” 42 U.S.C. § 7411(a)(1). Within this definition, the “best system of emission reduction” (“BSER”) is itself a term of art. It refers to source-specific technology that modifies existing facilities and makes their operations more efficient. *See, e.g., Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973) (“The essential question was whether the technology would be available for installation in new plants.”). This understanding flows from the text itself. Section 111(d) instructs States to submit a plan that “establishes standards of performance for any existing *source*” 42 U.S.C. § 7411(d)(1)(A) (emphasis added). The statute’s definition of a stationary source likewise focuses on individual sites: “any building, structure, facility, or installation.” *Id.* § 7411(a)(3). Courts have interpreted this definition to reject a “bubble” concept that would treat even a contiguous plant as a “source” for purposes of Section 111. *ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978); *cf. See Alabama Power Co. v. Costle*, 636 F.2d 323, 397-403 (D.C. Cir. 1979) (distinguishing the Section 111 context and allowing the “bubble” approach for regulations under a different provision of the CAA). If the Agency cannot bring all of the facilities comprising

a single plan within a “bubble” for Section 111 regulation, it certainly cannot apply the same reasoning on an even larger scale to treat the entire network of electricity generation as a single source.

Structural features of Section 111’s regulatory scheme confirm that performance standards must apply to individual sources. As an initial matter, the Agency must identify a source category before it can issue any regulations under Section 111. 42 U.S.C. § 7411(b)(1). The next step is to promulgate performance standards for new sources. *Id.* Those standards are inherently source-specific. For example, the Agency’s BSER regulations for aluminum plants require those facilities to achieve “efficient removal [of fluoride] by dry scrubbers or by wet scrubbers.” 45 Fed. Reg. 26,294. Prescribing the types of scrubbers that a facility must use is consistent with the definitions in Section 111 and EPA’s own long-standing practice of issuing facility-level BSER. *See, e.g.*, 61 Fed. Reg. 9919-20 (prescribing BSER systems for municipal landfills, including open flares, enclosed combustors, or other “control systems” that can be employed on site); 41 Fed. Reg. 48,706 (prescribing three types of fiber mist eliminators for sulfuric acid plants); 42 Fed. Reg. 12.022 (similar site-level BSER for phosphate fertilizer plants).

In the PSD context, *UARG* confirms a similar principle. That is, *UARG* notes that PSD BACT requirements generally refer to “end-of-stack” technologies rather than approaches to reducing “demand for energy from the electric grid.”

134 S. Ct. at 2447-48. Directing BSER regulations to pollution sources is a faithful implementation of the statutory language calling for EPA to “establish[] standards of performance for any existing *source* for any air pollutant.” 42 U.S.C. § 7411(d)(1)(a) (emphasis added).

Here, because greenhouse gases do not fit the machinery of Section 111 (*see supra* Part I), EPA attempts to prescribe “BSER” for aggregate emissions at the State level. One of the two “main elements” in the proposed rule are “state-specific emission rate-based CO₂ goals.” 79 Fed. Reg. 34,833. These state-level “goals”—which, in fact, are binding limits—quickly change labels in the proposed rule, however, and become “systems” that constitute part of the proffered BSER. *Id.* at 34,836 (“the proposed BSER, expressed as a numeric goal for each state”); *see also id.* at 34,835 (describing “the goal that EPA has defined as representing the BSER”). This conflation of overarching “goals” that are in fact emissions limits with the “best system of emission reductions” is unconventional, to say the least. The Agency itself highlights why the current rulemaking is an improper use of Section 111. In describing the differences between Sections 110 and 111, the Agency admits that a “section 110 [state implementation plan] must be designed to meet the NAAQS for a criteria air pollutant for a particular *area - not for a source category* - within a timeframe specified in the CAA. . . . By contrast, a CAA section 111(d) state plan must be designed to achieve a specific level of emission

performance that has been established *for a particular source category.*” *Id.* at 34,834 (emphasis added). But EPA’s proposed rule pivots away from regulating source categories and identifying true systems for reducing emissions, both of which are mandatory under Section 111(d). Aggregate state-level emissions limits—even if called “goals”—are no substitute for the statutorily mandated BSER.

Almost nowhere does the proposed rule announce performance standards applicable to individual sources. The lone exception is a discussion in Block 1 of equipment upgrades. *E.g., id.* at 34,905 (discussing “plant operations and maintenance (O&M) and engineering solutions used to improve heat rates”); *cf. id.* at 34,875 (excluding end-of-stack carbon-capture technologies from BSER). But those systems for improving efficiency—even assuming the Agency’s hopes for them are well founded—are not the proposed rule’s BSER: “while heat rate improvements qualify as a system of emission reduction, they are not in themselves the BSER.” *Id.* at 34,877. Instead, EPA has bound those site-level improvements with more sweeping objectives divorced from end-of-stack technologies. *E.g., id.* at 34,859 (“establishing the BSER as a combination of approaches that includes not only heat rate improvements but also approaches that will encourage reductions in electricity demand or increases in generation from lower- or zero-emitting EGUs”). In a perverse twist, part of the reason for lumping

together traditional BSER for coal plants with more sweeping regulation of the entire energy grid is the fear that the BSER will work: “increased efficiency of coal-fired steam units would provide incentives to operate those EGUs more, leading to smaller overall reductions in CO₂ emissions.” *Id.* at 34,877. This concern has been true of every facility for which BSER reduces future costs, but it has never justified a departure from the text of the CAA.

For existing power plants, a “system of emission reduction” must identify emissions controls that can apply at each covered EGU. The proposed rulemaking violates this principle. That violation is unsurprising in light of the incongruity between greenhouse gases and the local pollutants which are properly the subject of Section 111. That provision’s calculus—based on measurable, localized effects and the remaining life of existing facilities—does not translate to global pollutants and macro-level emissions goals. Whatever the explanation, however, regulations that do not fit the BSER format are not authorized by Section 111. Simply put, statutory text and agency precedent require that “standards of performance” promulgated under Section 111(d) address pollution using operational improvements and end-of-stack controls at the source level. A proper BSER does not include a broad approach for controlling emissions across multiple sites or the economy as a whole.

IV. THE CLEAN AIR ACT FORECLOSSES DUPLICATIVE REGULATION OF POWER PLANTS, ENTRUSTING AUTHORITY FOR SUCH REGULATION TO SECTION 112 ALONE.

In text and history, the Clean Air Act honors its cornerstone finding that “air pollution control at its source is the primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3). Consistent with this congressional directive, the Act has long confined the principal authority to regulate existing sources to Section 110, which is administered by States, and to Section 112. Deviating from this structure to allow duplicative regulation under Section 111 runs contrary to statutory text and legislative history.

A. The Plain Language of Section 111(d) Excludes Regulation of Sources Covered by Section 112.

Regulation of existing power plants is nothing new. The Clean Air Act has long provided a mechanism for regulating emissions from plants that antedate the law itself. The relevant CAA provision includes its own scope of regulation, a process for modifying regulations and constraints that Congress chose to apply to existing sources. Congress also exempted the sources covered by this provision from the rules governing new sources. This exemption, which appears in Section 111(d)—the very provision on which the current proposed rulemaking purports to rely—removes any doubt that duplicative regulation is indeed unlawful.

In relevant part, Section 111(d) requires the Administrator to prescribe regulations akin to those under Section 110 for pollution from “any existing source:”

- (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408 (a) of this title *or emitted from a source category which is regulated under section 7412 of this title* but
- (ii) to which a standard of performance under this section would apply if such existing source were a new source

42 U.S.C. § 7411(d)(1) (emphasis added).

Turning to Section 112, the CAA requires the Administrator to identify categories of “major sources” and “area sources,” *id.* § 7412(c), and to “promulgate regulations establishing emission standards” for those sources, *id.* § 7412(d). Consulting the definitions within Section 112 leaves no doubt that existing power plants fall within the scope of that section. 42 U.S.C. §§ 7412(a)(1) (“The term ‘major source’ means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.”); 7412(a)(2) (“The term ‘area source’ means any stationary source of hazardous air pollutants that is not a major source.”).

Significantly, not only does Section 112 authorize the regulation of power plants, but EPA has also exercised this authority. *National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units*, 77 Fed. Reg. 9,304 (Feb. 16, 2012). In its 2012 rulemaking, the Agency expressly invoked Section 112 as the statutory authorization for its regulations. *Id.* at 9,304 (“Pursuant to CAA section 112, the EPA is establishing NESHAP that will require coal- and oil-fired EGUs to meet hazardous air pollutant (HAP) standards reflecting the application of the maximum achievable control technology.”). Because the Agency has regulated these sources under Section 112, they are exempt from regulation under Section 111(d).

Against this backdrop, EPA’s lack of authority to promulgate a second round of regulation under Section 111(d) is clear. “When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). As the Supreme Court has recently affirmed, “traditional rules of statutory interpretation” do not “change because an agency is involved.” *POM Wonderful LLC v. Coca-Cola Co.*, 134 S.Ct. 2228, 2235 (2014). Not only does the language of Section 112 unambiguously encompass existing power plants, but the exclusion in Section

111(d) unambiguously withholds authority to regulate those sources under the latter provision. *See American Elec. Power Co. v. Conn.*, 131 S.Ct. 2527, 2537 n.7 (2012) (“There is an exception: EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408–7410, or the ‘hazardous air pollutants’ program, § 7412.” (citing 42 U.S.C. § 7411(d)(1))). This feature of the CAA is alone sufficient to foreclose the proposed rulemaking as it would apply to any existing EGU covered by Section 112.

B. The History of Section 111 Amendments Buttresses the Plain Meaning of the Statute.

Although the combination of statutory text and controlling Supreme Court precedent needs no additional reinforcement, the history of Section 111(d) confirms what the text establishes and *American Electric Power* recognizes.

For the first two decades of its existence, the exclusion in Section 111(d) applied to “any existing source for any air pollutant . . . not included on a list published under section 108(a) or 112(b)(1)(A)” Pub. L. 91-604 § 4(a), 84 Stat. 1684. The Clean Air Act amendments of 1990 then shifted the relevant portion of the exclusion to focus on sources rather than pollutants: “any existing source for any air pollutant . . . not included on a list published under section 7408(a) of this title *or emitted from a source category which is regulated under section 7412 of this title*” 42 U.S.C. § 7411(d) (emphasis added).

Both before and after the 1990 amendments, the exclusion based on Section 108 (the NAAQS regime) focused on the pollutant itself—that is, the exclusion turned on whether the pollutant was already covered by a NAAQS. The exclusion for Section 112, however, pivoted from focusing on the list of pollutants in Section 112(b) to asking whether a particular *source* is subject to Section 112 regulation, regardless of whether the pollutant in question is part of those regulations or not.

EPA has recognized this statutory shift, which is important in part because the 1990 amendments emerged from a drafting process in which the Senate and House of Representatives passed somewhat different bills. The House bill provides the current text of 42 U.S.C. § 7411(d). *See* 104 Stat. 2467. The Senate, attempting to pass a conforming amendment, simply changed the cross-reference from “112(b)(1)(A)” to “112(b).” *See* 104 Stat. 2574. It did not add the crucial language—“a source category”—that accomplished the purpose of the House amendment. As a result, the Statutes at Large include both amendments, joined by “or:” “any air pollutant . . . which is not included on a list published under section 7408(a) or 112(b) [Senate amendment] or emitted from a source category which is regulated under section 112 [House amendment]”

While the codification in the United States Code embodies the House amendment in preference to the Senate amendment, the Statutes at Large would control in the event this codification decision were ever determined to be in error.

See Stephan v. United States, 319 U.S. 423, 426 (1943). The Statutes at Large, using the disjunctive “or,” reflects both the House and Senate exceptions. *See also United States Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993) (refusing to follow a codification that misstated congressional intent).

If one or the other amendment must prevail, however, EPA has long maintained that the Senate amendment was a “drafting error.” 70 Fed. Reg. at 16,031. EPA has also argued this reading of the statute in court: “under EPA’s own interpretation of the section [111(d)], it cannot be used to regulate sources listed under section 112.” *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008). Courts disregard drafting errors of this type when interpreting statutes. *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013). Accordingly, under EPA’s own interpretation, the controlling law is precisely what appears in the United States Code. And as explained above, that language unambiguously exempts existing power plants that are major sources or area sources under Section 112.

After years of correctly interpreting the statute, EPA now describes it as an “ambiguous provision” and argues that the Agency is free to disregard the controlling House Amendment. *See* Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units (“Legal Memorandum”) at 21. Not only is EPA impermissibly changing its

position, *cf. FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317-18 (2012) (holding that agency’s reversal of position violated fair notice), but its interpretation is indefensible. At bottom, it relies on divination of congressional intent rather than traditional tools of interpretation. *E.g.*, Legal Memorandum at 26 (explaining that Congress “desire[d] . . . to require the EPA to regulate more substances,” an imagined purpose that is unrelated to source-based rules like the House Amendment). The Legal Memorandum also ignores the fact that the Senate was attempting to pass only a “conforming amendment.” Pub. L. 101-549 § 302, 104 Stat. 2399 (1990); *see also* 70 Fed. Reg. 15,994, 16,030 (noting that the Senate Amendment was a “conforming amendment” and that, in any event, the Statutes at Large control). Hence, even considered in light of loosely defined legislative history and intent, the Agency’s new interpretation cannot withstand scrutiny.

In the alternative, however, even assuming EPA now wishes to depart from its previous, established, and correct view that the Senate amendment is a drafting error, its new section 111(d) interpretation remains fatally flawed. Any such change in agency position—even if such an alternative interpretation were permissible, which it is not—would still have to give effect to each disjunctive clause appearing in the Statutes at Large. *See Watt v. Alaska*, 451 U.S. 259, 267 (1981). Hence, under such an alternative construction, the House amendment would remain operative and would still prohibit EPA from regulating any

emissions from a *source* regulated under Section 112, while the Senate amendment (which would become newly operative) would further prohibit EPA from regulating any *pollutant* covered by that Section. Under an alternative construction, then, the provisions would operate in tandem and would together prohibit EPA from establishing standards of performance under Section 111(d) if either the source category *or* the pollutant in question were regulated under Section 112. In other words, embracing an alternative construction that gives substantive effect to the Senate's amendment, even assuming such a construction were permissible, would further *restrict* EPA's authority; such a construction could do nothing to *broaden* the Agency's authority beyond the limits described under a proper Clean Air Act construction as set forth above.

C. Any Reading of Section 111(d) to Allow Regulation of Facilities Covered by Section 112 Is Contrary to Law and Would Not Be Afforded *Chevron* Deference upon Review.

EPA's current Section 112 interpretation, which is foundational to the proposed rulemaking, is that the dueling amendments allow the Agency to depart from the plain meaning of the statute. This view is not only incorrect as a matter of statutory interpretation, but it also represents a reversal of EPA's past practice without providing a legitimate reason for doing so. *See Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996) ("An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for

failing to do so.”). EPA has never before regulated, under Section 111, an existing source already subject to regulation under Section 112. It has no statutory basis for changing that position now. To the contrary, the statute remains as clear today as it was in 1990: for existing sources, an air pollutant “emitted from a source category which is regulated under section 112” is exempt from regulation under Section 111.

More importantly, EPA’s new reading of the law would not be afforded deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). At the first step in *Chevron*’s two-part analysis, the Agency must exhaust all traditional canons of statutory construction to determine whether Congress’ intent with respect to a statutory provision is unambiguous. *See Bell Atlantic*, 131 F.3d at 1047. As discussed above, the exemption for pollution “emitted from a source category which is regulated under section 7412 of this title” is unambiguous on its face. If some ambiguity existed, resort to legislative history and past agency practice would confirm that the Agency’s novel proposed interpretation of the statute is impermissible. As the Supreme Court has recently explained, “[a]gencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always ‘give effect to the unambiguously expressed intent of Congress.’” *UARG*, 134 S. Ct. at 2445. Section 111(d) contains no interstices

when it comes to the exemption for existing sources covered by Section 112. There is therefore no discretion for EPA to exercise.

V. THE PROPOSED RULE UNLAWFULLY TREATS CLOSURE OF FACILITIES AS A “SYSTEM OF EMISSION REDUCTION.”

The recurring tension that arises from extending Section 111(d) to unprecedented lengths continues in the “best system of emission reduction” (“BSER”) that the Agency would require.

As text, context and history indicate, such a “system” includes technology or procedures that improve the efficiency of a facility’s ongoing operations. In contrast, closing a facility or reducing its use is not a “system of emission reduction” within the meaning of the statute. The fact that non-use has the effect of reducing emissions to zero does not make it a “system of emission reduction” any more than homicide is a system for reducing blood pressure. The Agency’s regulations aimed at eliminating emissions by eliminating altogether the generation of electricity reflects a departure from Section 111.

Section 111(d) requires the States to propose “standards of performance” for existing sources of pollution. 42 U.S.C. § 7411(d)(1). Importantly, those standards of performance must “reflect[] the degree of emission limitation achievable through the application of the *best system of emission reduction*” that is “adequately demonstrated” after “taking into account the cost of achieving such reduction *and* any nonair quality health and environmental impact *and* energy

requirements.” *Id.* § 7411(a)(1) (emphasis added). Here, the Agency interprets “system” to include the non-use of certain EGUs. *See, e.g.*, 79 Fed. Reg. 34,858 (“substituting generation at [carbon-intensive] EGUs with generation from less carbon-intensive affected EGUs (including NGCC units under construction)”); *id.* (“substituting generation at those EGUs with expanded low- or zero-carbon generation”). Both versions of the so-called BSER in this rulemaking include “reduced utilization of the affected EGUs.” *Id.* at 34,977 (explaining that the BSER could include either all four building blocks or only the first block plus reduced utilization).

Plain meaning and context confirm the error in reading “system” to encompass reducing or eliminating the use of certain generating facilities. At the most basic level, a system is a “group of interrelated, interacting, or interdependent constituents forming a complex whole . . . [a] group of interacting mechanical or electrical components.” Webster’s II, *supra*, at 1146. The dictionary definition alone points to the traditional understanding of emission-reducing technologies rather than simple non-use of facilities.

Equally relevant, is the context in which the BSER mandate appears. Section 111(a)(1) requires the Administrator to “tak[e] into account the cost of achieving such reduction.” 42 U.S.C. § 7411(a)(1). Weighing the cost of a BSER makes no sense if the “system of emissions reduction” is simply not using a certain

facility. Likewise, non-use renders nonsensical the requirement that a regulator “take into consideration, among other factors, remaining useful lives of the sources” 42 U.S.C. § 7411(d). Under the normal understanding of BSER, a facility’s remaining useful life is an important consideration in determining whether retrofitting the facility with new technology requires additional time for compliance or meets cost-benefit standards. Remaining useful life is largely or totally irrelevant if the “system” for reducing pollution is partially or totally closing the plant.

By rendering portions of Section 111 superfluous, the Agency transgresses an established canon of interpretation: “we must give effect to every word that Congress used in the statute.” *Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985). Under the Agency’s construction, the entire analysis of cost and remaining useful life is surplusage because a regulator can choose partial or complete closure as the “best system of emissions reduction.” Just as fundamentally, treating non-use as an available BSER upends the entire purpose and structure of Section 111(d). That purpose is to enable existing sources to continue in operation *rather than closing* as a result of the CAA.

Also instructive is the omission of any such accommodation in other sections of the CAA. *See, e.g.*, 42 U.S.C. § 7412 (allowing no consideration of remaining useful life). An interpretation that ignores this accommodation for

existing sources “would produce an absurd and unjust result which Congress could not have intended,” and requires an alternative reading of the statute. *Clinton v. City of New York*, 524 U.S. 417, 429 (1998). The Agency’s construction of Section 111 thus ignores both statutory text (references to cost and remaining useful life), as well as structure and purpose (the separate treatment of existing sources so that they need not close). That reading violates fundamental rules of statutory construction and thus would be afforded no deference under *Chevron*. *Kingdomware Techs., Inc. v. United States*, 754 F.3d 923, 931 (Fed. Cir. 2014) (interpreting *Chevron* to require “traditional tools of statutory construction, including the statute’s text, structure, legislative history, **and the relevant canons of interpretation**” (quotation omitted; emphasis added)).

As with other aspects of the proposed rulemaking, EPA again departs from its own previous understanding of Section 111(d) to treat non-use as a BSER. In a background document explaining the Section 111 process, EPA notes that BSER-based performance standards are “based on the effectiveness of one or more specific technological systems of emissions control” EPA, “Background on Establishing New Source Performance Standards (NSPS) Under the Clean Air Act,” *available at* <http://tinyurl.com/obdanjm> (last accessed Nov. 6, 2014) (hereafter “EPA Backgrounder”); *see also id.* (noting that Section 111(d) allows accommodations for existing sources based on, *inter alia*, “process design at a

particular facility [or] physical impossibility of installing necessary control equipment”). Outside of the current proposal, even the Agency recognizes that BSER refers to “technological systems,” “control equipment” and similar mechanical or technological improvements.

The text and structure of Section 111(d) simply do not allow the Agency to construe “system of emissions reduction” to embrace compelled non-use of certain sources. Instead, the forced closure of existing facilities was an evil Congress identified and sought to avoid.

VI. AUTHORITY TO REGULATE THE NETWORK OF ELECTRICITY GENERATION AND TRANSMISSION BELONGS TO FERC, NOT EPA.

An additional reason for rejecting EPA’s expansive reading of Section 111(d) is the conflict it creates with other federal statutes. Among those is the Federal Power Act (“FPA”), which regulates the interstate electricity market and assigns responsibility for that market to either the Federal Energy Regulatory Commission (“FERC”) or the States. The FPA does not authorize EPA to regulate which producers may sell electricity and in what quantity.

The FPA designates FERC as the agency responsible for regulating interstate trade in electricity. 16 U.S.C. § 824. As the DC Circuit has explained, “[u]nder the Federal Power Act . . . the [Federal Energy Regulatory] Commission is generally charged with regulating the transmission and sale of electric power in

interstate commerce.” *Electric Power Supply Ass’n v. Fed. Energy Reg. Comm’n*, 753 F.3d 216, 219 (D.C. Cir. 2014). It shares that authority only with the States, which retain authority to regulate retail transactions in electricity under the FPA. *Id.* at 221 (“States retain exclusive authority to regulate the retail market.”). Accordingly, the Supreme Court has recognized that FERC has “*exclusive* authority” over the wholesale power market, and its “exclusive jurisdiction applies not only to rates but also to *power allocations that affect wholesale rates.*” *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 371 (1988) (emphasis added).

EPA’s proposed rule disregards the FPA’s assignment of authority. The focus of the proposed rule’s so-called BSER is on changing the supply of energy, with the recognized effect of changing its price. The very premise for EPA’s proposed rule is that “[t]he electricity system is physically interconnected . . . and operated on an integrated basis,” 79 Fed. Reg. 34,857, thus allowing the Agency to alter the entire supply of electricity through seemingly abstract rules imposed at the highest level of generality. As the proposal’s routine references to substitution between EGUs (including non-use) reveal, the proposed rule’s essence is regulation of the entire “electricity system” of generation, transmission, and consumption. For example, EPA anticipates that “construction and operation of *new* NGCC capacity will be undertaken as a method of responding to the proposal’s requirements,” *id.* at 34,876 (emphasis added), and it also recognizes

that this change to electricity generation will raise the cost of electricity, *id.* at 34,876-77. At the very least, FERC must confirm that EPA's proposed rule will not have a negative impact on grid reliability and the supply of electricity. EPA has attempted no such coordination, preferring instead to rely on an overly generous interpretation of Section 111(d).

Where federal statutes confer authority on one agency, others may not functionally usurp it through ambitious interpretations of their own governing statutes. *See, e.g., Hunter v. FERC*, 711 F.3d 155, 157-60 (D.C. Cir. 2013) (rejecting FERC's attempt to regulate matters committed to the CFTC's exclusive jurisdiction); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1333-34 (D.C. Cir. 1996) (rejecting agency action purportedly based on the Procurement Act when it conflicted with the longer-standing and more topical National Labor Relations Act). This is particularly true where the assertion of new power allegedly lies in a later-enacted law that does not expressly repeal or curtail the older provision. *Hunter*, 711 F.3d at 160; *see also Traynor v. Turnage*, 485 U.S. 535, 547 (1988) (citing the "cardinal rule . . . that repeals by implication are not favored"). In the current situation, the "cardinal rule" is in full effect: Congress enacted the FPA in 1920, and the CAA in 1955. The two laws can coexist peacefully, and they have for decades. Only EPA's new interpretation of Section 111(d) threatens to encroach on FERC's responsibility for regulating the electricity market. *Cf.*

Hunter, 711 F.3d at 160 (“But [the latter-enacted statute’s] text fails to answer the question whether FERC may intrude upon the CFTC’s exclusive jurisdiction. Because FERC is free to prohibit manipulative trading in markets outside the CFTC’s exclusive jurisdiction, there is no ‘irreconcilable conflict’ between the two statutes and therefore no repeal by implication”). This unnecessary conflict within the federal government is further evidence that EPA lacks authority to administer a system of state-level regulations governing the production, transmission, and consumption of electricity.

In addition to creating a different federal agency charged with regulating the nation’s electricity supply, the FPA poses another obstacle to EPA’s current proposal: it expressly preserves States’ authority to regulate the consumer energy market. 16 U.S.C. § 824(a) (confining federal regulation of the electricity market “only to those matters which are not subject to regulation by the States”). Like the Clean Air Act, the FPA creates a federal-state partnership for the accomplishment of its goals. The FPA gives to the federal government (FERC) control of the wholesale market for electricity, while States retain authority to regulate consumer-level transactions. *Id.* (citing 16 U.S.C. § 824(b)(1)).

In *Electric Power Supply*, the federal government attempted to regulate consumers’ decisions regarding electricity consumption by “luring” additional electricity to market with subsidies funded by additional charges during peak

hours. *Id.* at 223. Despite FERC’s effort to fit within its regulatory mandate, the court concluded that the “lures” at issue were “part of the retail market” because they “involve[d] retail customers . . . and the levels of retail electricity consumption.” *Id.* The same reasoning applies to EPA’s effort to regulate the actions of retail electricity customers by encouraging them to buy less electricity. In fact, the proposed rule aims to accomplish its goals through the same mechanism as *Electric Power Supply*, namely creating regulatory burdens intended to entice energy producers to supply electricity from different EGUs. *E.g.*, 79 Fed. Reg. 34,857. While the earlier case involved luring additional energy onto the grid at certain times of day, the current rule attempts to lure energy from preferred sources. In both instances, that conduct encroaches on States’ regulatory domain under the FPA, and if not the domain of state regulators then certainly the domain of FERC. Indeed, EPA recognizes that its proposed rule duplicates measures already taken by the States. *E.g.*, *id.* at 34,858 (admitting that “[m]ore than half the states already have established some form of state-level renewable energy requirements,” 30 States have nuclear EGUs, and “[m]ore than 40 states already have established some form of demand-side energy efficiency polices”); *id.* at 34,851 (describing the purpose of “block 4” as “increasing state *demand-side* energy efficiency efforts” (emphasis added)). The proposed rulemaking therefore crosses lines not only between EPA and FERC but also between the federal and

state governments. Where, as here, such lines are drawn by statute, they cannot be redrawn via agency regulations.

Under the Federal Power Act, States have the primary authority to regulate the generation and sale of electricity to consumers. Where the federal government is involved, its authority runs through FERC, not EPA. The latter agency must confine itself to traditional end-of-stack BSER rather than imposing macro-level regulations that functionally usurp authority left to FERC and to the States.

VII. FEDERALISM CONCERNS PRECLUDE THE DISCOVERY OF NEW AND EXPANSIVE REGULATORY POWER IN A DECADES-OLD STATUTE.

Beyond the federalism concerns built into the Federal Power Act, general principles of retained state authority preclude the Agency's new reading of Section 111(d).

A. The Agency Cannot Use Section 111 to Compel the States to Do What the Federal Government Cannot Do Directly.

Unlike traditional exercises in “cooperative federalism,” the proposed rule seeks to accomplish—through the States—regulatory actions that Congress has not granted authority to the federal government to undertake. Through the mechanism of state-level emissions caps, the proposed rule regulates every aspect of the electricity market, which is well beyond the authority granted to EPA by Congress.

As discussed above, the Clean Air Act requires cooperation between the federal government and the States. That cooperative structure is especially evident

in Section 111(d), with its regulatory process adapted from Section 110. 42 U.S.C. § 7411(d) (establishing a “procedure similar to that provided by section 7410,” whereby States develop their own plans for reducing emissions); *see also EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1594 (2014) (explaining the “cooperative activities” Congress sought to promote in Section 110).

For their part, state plans under Section 111(d) must be source-based. The provision refers three times to the “existing source” that is the subject of a State’s plan under Section 111(d). 42 U.S.C. § 7411(d)(1). It also requires the Agency to allow States to consider “remaining useful life” and “other factors,” which are inherently source-specific. *Id.* The States’ role facilitates cooperation, but it only makes sense for traditional BSER technologies, which are themselves source-specific and thus translate naturally to the state plans and the States’ discretion to accommodate specific sources. *See generally* EPA Backgrounder at 2.

The CAA’s provisions are consistent with constitutional standards protecting the authority of States. The Supreme Court has interpreted the Tenth Amendment to hold that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.” *New York v. United States*, 505 U.S. 144, 188 (1992). This concern applies equally to federal edicts demanding States enact legislation and to measures requiring state officials to enforce federal laws. *Printz v. United States*, 521 U.S. 898, 927-28 (1997); *see also NFIB v. Sebelius*,

123 S. Ct. 2566, 2602-03 (2012) (noting that the anti-commandeering concerns in *New York* and *Printz* are “heightened” when Congress acts under the Spending Clause). Systems of cooperative federalism like Sections 110 and 111(d) have survived Tenth Amendment challenges by allowing States considerable latitude, “within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.” *Hodel v. Va. Surface Min. & Reclamation Ass’n*, 452 U.S. 264, 289 (1981).

In *UARG*, the Court drew on its holding in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). *UARG*, 134 S. Ct. at 2443-44. That case addressed the question of whether the Food and Drug Administration has authority to regulate nicotine as a drug under the Food, Drug, and Cosmetic Act. The Court held that the significance of the issue—there, tobacco regulation—weighs against deference to an agency’s interpretation. *Brown & Williamson*, 529 U.S. at 159. Because the statute was not consistent with regulation of tobacco short of a ban, and because the tobacco industry “constitut[es] a significant portion of the American economy,” the Court refused to allow such a broad expansion of federal power without clear statutory authorization. *Id.* (quoting Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) (“A court may also ask whether the legal question is an important one. Congress is more likely to

have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration”)).

UARG reached a similar conclusion in the context of greenhouse gases. 134 S. Ct. at 2444. If the tobacco industry qualifies as a “significant portion of the American economy,” then GHG-emitting industries surely also qualify as significant. Like *Brown & Williamson*, therefore, GHG regulation “is hardly an ordinary case.” 529 U.S. at 159. In cases like these, statutory interpretations that “claim[] to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’” deserve “skepticism.” *UARG*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 159); *see also Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions”).

Even less likely is an assumption that Congress embedded in Section 111(d) authority to regulate transactions that it expressly reserved to the States in the FPA. *See supra* Part VI. Where cooperative federalism allows Congress to influence state decision-making, it does so on the assumption that Congress could regulate the conduct in question directly. In *Hodel*, for example, the Court noted that “Congress could constitutionally have enacted a statute *prohibiting any state regulation* of surface coal mining.” 452 U.S. at 290 (emphasis added). The

possibility of federal preemption was instrumental to the *Hodel* Court’s conclusion that lesser regulations must be constitutional. That reasoning does not apply here. Even assuming that Congress could constitutionally mandate emissions reductions and consumer demand reductions, Congress has both declined to do so and affirmatively protected State’s primacy in the area of consumer transactions. *See Electric Power Supply*, 753 F.3d at 221; *see also supra* Part IV.

This background distinguishes the current proposed rule from the one upheld in *Hodel*. Here, the relevant federal actor—EPA—lacks statutory authority to directly regulate the conduct that it now demands that the States regulate. But *Hodel* confirms that States must, at the very least, have policy-making discretion within the parameters of an otherwise lawful federal program as an essential prerequisite to avoiding invalidity under the Tenth Amendment. *See, e.g., United States v. Vazquez*, 145 F.3d 74, 84 (2d Cir. 1998); *AT&T Commc’ns v. BellSouth Telecomms., Inc.*, 238 F.3d 636, 658 (5th Cir. 2001) (Smith, J., dissenting) (noting that voluntary action “may solve Tenth Amendment problems raised in *Printz*”). As a result, the Agency’s proposal lacks the essential features of a permissible regime of cooperative federalism.

B. As Further Evidence of Congressional Intent, EPA Lacks Resources to Develop and Administer the Expansive Plans Required Under the Proposed Rule.

In the event that States do not or cannot propose their own plans, Section 111(d) tasks EPA with developing those plans instead. 42 U.S.C. § 7411(d)(2). Traditional end-of-stack BSER require only limited resources for EPA to stand in a State's shoes and prepare a plan for the existing sources of pollution subject to a particular BSER. Here, however, the state plans contemplated by the Agency differ in kind from those contemplated by the statute.

The proposed rule recognizes that “the power sector is made up of a diverse range of companies that own and operate fossil fuel-fired EGUs, including vertically integrated companies in regulated markets, independent power producers, rural cooperatives and municipally-owned utilities, all of which are likely to have different ranges of opportunities to reduce GHG emissions while facing different challenges in meeting these reductions.” 79 Fed. Reg. at 34,834. This variety of existing EGUs and the varied circumstances in each State requires resource-intensive analysis and the wise exercise policy discretion in deciding which commercial activities will be advantaged and disadvantaged. Beyond lacking legal authority, EPA simply does not have the staff or expertise or legitimacy to complete these tasks for all 50 States. That fact that EPA is itself

subject to these practical constraints is further proof that Congress did not intend to sanction economy-wide regulation of GHGs through Section 111(d).

C. The Proposed Rule Does Not Identify Any Intelligible Principle within the Clean Air Act for Establishing State-Level Emissions Targets.

The enormity of the regulatory authority assumed by EPA under the proposed rule reveals another way in which the proposed rule cannot legitimately rest on the Clean Air Act as enacted. Construing Section 111(d) to allow “State-specific emission rate-based CO₂ goals,” 79 Fed. Reg. at 34,833, is to construe it to violate the non-delegation doctrine.

The lack of any statutory basis for either (i) the Agency-selected, State-level emissions targets or (ii) the potential Agency-prescribed means for meeting those targets constitutes both additional affronts to state sovereignty and indicia of an unconstitutional delegation of law-making power. Thankfully, the CAA itself avoids these constitutional pitfalls, if it is properly interpreted in the manner set forth above. Accordingly, should the Agency ignore the CAA’s statutory limits and proceed with its program as proposed, its program would be rendered unconstitutional.

First, the proposed rule reaches every corner of the economy. Specifically, EPA acknowledges that achieving the emissions reductions it demands will impact every producer and consumer of electricity. *E.g.*, 79 Fed. Reg. at 34,934 (“average

nationwide retail electricity prices are projected to increase by roughly 6 to 7 percent in 2020 relative to the base case, and by roughly 3 percent in 2030.”). This regulatory scope is a further indication of the legislative work EPA aims to accomplish through the executive branch.

Second, the unconventional BSER—defined in terms of outcomes—is not an intelligible principle to guide agency action. The non-delegation doctrine requires that Congress “provide an intelligible principle” to guide agency action. *Whitman*, 531 U.S. at 472. EPA would interpret Section 111(d), however, to lack any such limiting and guiding principle from Congress. That absence is evident in EPA’s outcome-based BSER: “a state could choose to achieve more reductions from one measure encompassed by the BSER and less from another, or it could choose to include measures that were *not part* of the EPA’s BSER determination, *as long as the state achieves the CO₂ reductions* at affected EGUs necessary to meet the goal EPA has defined as representing the BSER.” 79 Fed. Reg. at 34,835 (emphasis added). By merely setting a required outcome in terms of an overall emissions level, while allowing States to impose any BSER or no BSER at all, EPA casts Section 111(d) as itself unguided by the principles that Congress actually embodied in the statute (*e.g.*, BSER, consideration of useful life). A desired outcome plus *carte blanche* on the means for achieving it (“as long as the state achieves the CO₂ reductions”) is not an intelligible principle to channel the

Agency's exercise of discretion. Without such principles, however, what remains is simply EPA-crafted legislation. That is precisely what the proposed rule suggests Congress has done in Section 111(d), and the doctrine of constitutional avoidance means that a reviewing court would construe the CAA to avoid such constitutional invalidity. *Skilling v. United States*, 561 U.S. 358, 406 (2010); *see also Virginia v. EPA*, 116 F.3d 499 (D.C. Cir 1997) (construing CAA provision to avoid possible constitutional infirmity).

Third, it is no response that the Agency is claiming legislative authority only to assign it to the States. Even if state regulators agree to submit plans under the proposed rulemaking, their involvement does not minimize the foregoing unconstitutional delegation of legislative power to the executive branch. To the contrary, the transformation of state officials with the necessary policy-making power into agents of the federal government only compounds the constitutional difficulty. The lack of conventional BSER leaves the States with considerable latitude in developing their plans, "as long as the state achieves the CO₂ reductions . . . to meet the goal EPA has defined as representing the BSER." 79 Fed. Reg. at 34,835. Weighing the universe of available technologies and possible cooperation with other States, *e.g.* 79 Fed. Reg. at 34,833, implicates policy choices at the state level. This type of federally-mandated State legislation under the Clean Air Act has previously been recognized as constitutionally invalid by the federal

government. *EPA v. Brown*, 431 U.S. 99, 103 (1977) (declining to review regulations after the government conceded that it could not require “legally adopted regulations” from the States).

Because the EPA’s interpretation of Section 111(d) rests on an assumption that Congress has violated the non-delegation doctrine, it cannot stand. This flaw is especially evident in the Agency’s attempt to shift policy-making decisions to the States. To avoid these constitutional pitfalls, a narrower reading of the statute and, particularly, the BSER definition must prevail.

* * *

EPA’s proposed expansion of federal power is a wide-angle lens through which an observer can see numerous problems with the rulemaking simultaneously. *First*, the proposed rule does not lend itself to the type of state participation that the Clean Air Act requires. This is an inevitable consequence of regulating something that is not a pollutant for Section 111 purposes and prescribing so-called BSER completely unconnected to source-level pollution. *Second*, state officials must accept EPA’s dictated level of emissions reductions and dictated review of the state plans for meeting them. They therefore have little latitude “to enact and administer their own regulatory programs, structured to meet their own particular needs” within the confines of pre-existing and state-neutral statutory requirements. *Hodel*, 452 U.S. at 289. Combined with the more recent

concern with forcing States to enact and enforce federal mandates in *Printz* and *New York*, the Agency’s all-encompassing proposal threatens a new type of commandeering as an end-run around the existing allocation of authority under the Clean Air Act. *Third*, the sweep of regulations aimed at a ubiquitous target—emissions of greenhouse gases—proves that the Agency has over-extended its interpretive license. GHGs are more pervasive than the tobacco products in *Brown & Williamson*, justifying even sharper skepticism that Congress has for decades concealed such a massive elephant inside the mousehole of Section 111(d).

VIII. THE AGENCY IMPROPERLY DUCKED ITS OBLIGATIONS FOR A PROPOSED RULE THAT WILL SIGNIFICANTLY IMPACT MANY SMALL BUSINESSES.

The Regulatory Flexibility Act requires federal agencies proposing new rules subject to notice-and-comment rulemaking to publish an “initial regulatory flexibility analysis,” which “describe[s] the impact of the proposed rule on small entities.” 5 U.S.C. § 603(a). The “small entities” for whose benefit Congress enacted this provision include small businesses like those that comprise the membership of NFIB. *Id.* § 601(3),(6). The only exception for conducting the analysis required by the RFA is when an agency head “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” *Id.* § 605(b).

Surprisingly, the EPA Administrator announced precisely that conclusion with respect to the proposed rule: “this action will not have a significant economic impact on a substantial number of small entities.” 79 Fed. Reg. at 34,946. The justification for this conclusion is that the emissions caps do not apply directly to individual entities. *Id.* at 34,947. As with many of the other legal problems facing the proposed rule, this misinterpretation depends on the notion that the Agency has satisfied its BSER obligations by announcing high-level emissions standards, thus leaving selection of actual “systems of emission reduction” to the States: “states establish standards on existing sources, and it is those state requirements that could potentially impact small entities.” *Id.* This interpretation is mistaken for the same reason the Agency is incorrect about characterizing emission goals as BSER—namely, those goals are not BSER, but the “state requirements that could potentially impact small entities” are. The Agency has therefore not only failed to meet the CAA requirement of identifying BSER but, in so doing, has also failed to comply with the RFA.

The Agency’s reliance on *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, 1043-44 (D.C. Cir. 1999), is inapt. 79 Fed. Reg. at 34,947. *American Trucking* concerned the NAAQS system, which specifically calls for local emissions caps, accompanied by State Implementation Plans (“SIPs”); it does not include a BSER requirement. *See* 42 U.S.C. § 7409. Under the NAAQS regime,

therefore, the Agency has a reasonable argument that the CAA itself creates a buffer between Agency actions and the regulated entities. That argument does not apply to Section 111(d) with its insistence on BSER. *See supra* Part III. Even the proposed rule acknowledges its impact for small businesses, including higher energy prices. *See, e.g.,* 79 Fed. Reg. at 34,934 (“[A]verage nationwide retail electricity prices are projected to increase by roughly 6 to 7 percent in 2020 relative to the base case, and by roughly 3 percent in 2030.”). Moreover, EPA’s argument assumes that States will play along and submit their own plans for implementing the proposed rule. That was not a concern for the NAAQS in *American Trucking* because of the looming threat that non-participating States could lose the federal highway funding or face other penalties. 42 U.S.C. § 7509. Again, the situation is different here. Presumably, in instances where States decline to submit a plan, the Agency itself will impose the very “requirements that could potentially impact small entities,” but for which no RFA study has occurred. 79 Fed. Reg. at 34,947.

The Agency was incorrect in concluding that it could sidestep the requirements of the RFA by denying any “significant economic impact on a substantial number of small entities.” 5 U.S.C. § 605(b). Premising that conclusion on an interpretation of CAA Section 111(d), in particular its BSER requirement, that allows emissions “goals” to pass as a “system of emission

reduction” is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A).

DISCUSSION: COST-BENEFIT DEFECTS

Unlike other sections of the Clean Air Act, Section 111(d) requires that the Agency take costs of compliance into account. 42 U.S.C. § 7411(a)(1). The Agency recognizes that making this calculation in the conventional way leads to domestic costs in excess of domestic benefits. *See infra* Part IX.F; *see also* 79 Fed. Reg. at 34,839. To overcome this conclusion, the Agency resorts to novel but unacceptable methods of calculating costs and benefits. The remainder of this comment addresses three structural defects in the proposed rule’s cost-benefit analysis: its use of foreign benefits to justify domestic costs; its reliance on alleged co-benefits—especially reductions in emissions of fine particulate matter (PM_{2.5}); and its failure to account for “carbon leakage,” which is the risk that energy-intensive domestic industries will move plants and activities abroad in response to EPA finalizing its proposed rule. *See generally* C. Boyden Gray, *A Cost-Benefit Analysis from EPA Lacking in Common Sense*, Washington Times, July 29, 2014, available at <http://www.washingtontimes.com/news/2014/jul/29/gray-a-cost-benefit-analysis-from-epa-lacking-in-c/print/>.

The President has rightly ordered federal agencies to use “the best available techniques to quantify anticipated present and future benefits and costs as

accurately as possible.” E.O. 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011). When such techniques are used to correct EPA’s cost-benefit analysis, the proposed rule’s extremely high and excessive cost in relations to likely benefits becomes evident. If EPA’s analysis is amended to focus on domestic benefits and to remove consideration of co-benefit pollutants that the agency already controls under different regulations, the adjusted benefits of the proposed rule would fall significantly short of its acknowledged costs. Furthermore, this excess of costs over likely benefits becomes even clearer once carbon leakage effects, which will inevitably pressure U.S. industry to relocate—and continue polluting—overseas, are taken into account. The President has mandated that federal agencies “propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs.” *Id.* Using the “best available techniques” of cost-benefit analysis, the Clean Power Plan fails to satisfy this standard.

IX. EPA’S RELIANCE ON FOREIGN BENEFITS UNDERMINES THE PURPOSE OF THE CLEAN AIR ACT, VIOLATES FEDERAL POLICY, AND OBSCURES THE COSTS OF THE PROPOSED RULE.

EPA’s cost-benefit analysis is predicated on an apples-to-oranges comparison of domestic costs and global benefits. Although all of the costs of reducing carbon emissions will be borne by U.S. entities, EPA’s accounting of the

rule's benefits is based on a global estimate of the "social cost of carbon" (SCC).¹ The United States' share of the SCC is only a fraction of the total—between 7 and 10 percent, according to one source cited by the Interagency Working Group that produced the SCC.² Hence, the vast majority of the projected benefits of the proposed rule are foreign benefits that do not accrue to the United States or its citizens. As *The Economist* recently put it, "the question is, should America be passing regulations that primarily pass the cost-benefit test based on benefits to non-Americans?" *The Novel Accounting of Greenhouse Gas Regulations: We Are the World*, *The Economist*, June 3, 2014, available at <http://www.economist.com/blogs/freeexchange/2014/06/novel-accounting-greenhouse-gas-regulations>.

The answer, based on long-standing agency practices, is a resounding 'no.' Congress's explicit statement of purpose for the relevant subchapter of the Clean Air Act leaves no doubt that global benefits are not germane. And sound

¹ See EPA, Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and Emission Standards for Modified and Reconstructed Power Plants (hereinafter "Proposed Rule RIA"), at ES-23 note b (noting that the agency's climate benefits calculation "reflects global impacts from CO₂ emission changes").

² Interagency Working Group on Social Cost of Carbon, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866, at 11 (February 2010) [hereinafter "2010 Social Cost of Carbon TSD"], available at <http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf> (citing the FUND (Climate Framework for Uncertainty, Negotiation, and Distribution) model, developed by Richard Tol in the early 1990s). Even if the U.S. fraction of the social cost of carbon is calculated according to GDP, a method that EPA does not defend, the U.S. share would be only 23 percent. *Id.*

principles of regulatory analysis, and executive branch directives, require that a rule's national costs be compared to its national benefits.

A. The Clean Air Act's Domestic Purpose Precludes Consideration of Global Benefits.

The Interagency Working Group's global social cost of carbon was developed as a multi-purpose tool for a wide range of regulatory applications. The Working Group opined that a global estimate would suffice for most purposes because “[a]s a matter of law, consideration of both global and domestic values is *generally* permissible; the relevant statutory provisions are *usually* ambiguous and allow selection of either measure.” 2010 Social Cost of Carbon TSD, *supra* note 2, at 10 (emphasis added). Implicit in this general statement, however, is the Working Group's recognition that its global methodology must yield to specific statutory provisions that contemplate exclusively domestic impact analysis for certain regulations.

Section 111(d) of the Clean Air Act is just such a provision. In a statutory purpose statement accompanying the subchapter of which Section 111(d) is a part, Congress made clear that its purpose is to benefit the *national* environment—not the world at large. Congress enacted subchapter 1 of the Act:

(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.

42 U.S.C. § 7401(b) (emphasis added).

The domestic purposes of the subchapter could hardly be more clear. Congress's purpose statement repeatedly refers to national, state, and local air quality and makes no mention of promoting air quality beyond U.S. borders. When Congress identifies an express purpose in a statute, another purpose is not to be "lightly infer[red]." *Sofamor Danek Grp., Inc. v. Gaus*, 61 F.3d 929, 935 (D.C. Cir. 1995) ("In light of that express purpose . . . the court will not lightly infer any other purpose."); *cf. El Paso Natural Gas Co. v. United States*, 632 F.3d 1272, 1278 (D.C. Cir. 2011) (refusing to apply the "canon of statutory interpretation directing courts to liberally construe statutes in favor of Native Americans," "where the Act's statement of purpose reveals that Congress passed the statute to protect public health in general rather than tribal health in particular."). Accordingly, unless a regulation under Section 111(d) can be justified according to its effect on domestic air quality, it cannot be justified at all. EPA's reliance on global benefits thus exceeds its authority under the Clean Air Act.

If there were any ambiguity about Congress's purpose for Section 111(d), the presumption against extraterritoriality would counsel against inclusion of

global benefits in the agency’s cost-benefit analysis. “[U]nless there is the affirmative intention of the Congress clearly expressed’ to give a statute extraterritorial effect, ‘we must presume it is primarily concerned with domestic conditions.’” *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

The Working Group claims the presumption against extraterritoriality does not apply because “use of a global measure for the SCC does not give extraterritorial effect to federal law and hence does not intrude on [the] interests [of foreign sovereigns].” *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918). But the presumption’s logic applies no less to a statutory application that depends on foreign effects than it does to a statutory application that purports to govern foreign conduct. Both exceed the presumptively domestic scope of Congress’s concern, and thus both tend to arrogate to the agency power beyond “the limits over which the law-making power has jurisdiction.” *Id.*

B. Relying on Global Benefits is Inconsistent with EPA’s Past Practice.

EPA’s reliance on global climate change effects to justify its rule is inconsistent with the agency’s former acknowledgement that for rulemaking under the Clean Air Act, foreign effects are not relevant in themselves but only insofar as they impact the United States. In response to EPA’s proposed Endangerment Finding, which empowered the agency to regulate greenhouse gas emissions from

mobile sources, some commenters contested EPA’s reference to the international effects of greenhouse gases, observing that “[t]he purpose of CAA section 202(a) . . . is to protect the quality of the nation’s air resources and to protect the health and welfare of the U.S. population.” Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496, 66514 (2009). EPA accepted the premise of these comments, acknowledging “the CAA’s stated purpose of protecting the health and welfare of *this* nation’s population.” *Id.* (emphasis added). The agency clarified that it was “looking at international effects solely for the purpose of evaluating their effects on the U.S. population.” *Id.* EPA explained that it was “*not* considering international effects to determine whether the health and welfare of the public in a foreign country is endangered. *Id.* (emphasis added).

EPA’s proposed Clean Power Plan takes the opposite approach, weighing the foreign benefits on the same scale as domestic benefits, without regard to whether those foreign effects have any measurable impact on the United States. EPA gives no explanation for repudiating the Endangerment Finding’s focus on domestic effects.

C. Relying on Global Benefits Violates Applicable Statutory and Regulatory Principles.

The Interagency Working Group responsible for the global social cost of carbon estimate expressly departed from guidance of the Office of Management

and Budget (OMB), which requires a regulatory impact analysis to “focus on benefits and costs that accrue *to citizens and residents of the United States.*” Office of Management and Budget, Circular A-4, at 15 (emphasis added). OMB’s Office of Information and Regulatory Affairs gives the same instruction in its Primer on regulatory impact analysis.³ The Interagency Working Group noted OMB’s guidance,⁴ and acknowledged that using a global estimate “represents a departure from past practices, which tended to put greater emphasis on a domestic measure of SCC.” 2010 Social Cost of Carbon TSD, *supra* note 2, at 10. Nevertheless, the Working Group expressly declined to follow OMB’s instructions, calculating at a global level the benefits of carbon reductions, even though the relevant regulatory costs will be borne exclusively by domestic entities. *Id.*

In its recently updated SCC, the Working Group went even further, omitting any calculation of domestic benefits. *See* 2013 Social Cost of Carbon Update

³ Office of Information and Regulatory Affairs, Office of Management and Budget, Regulatory Impact Analysis: A Primer 5 [hereinafter “OIRA, RIA Primer”], *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

⁴ Interagency Working Group on Social Cost of Carbon, Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866, at 14-15 (May 2013) [hereinafter 2013 Social Cost of Carbon Update TSD], *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/social_cost_of_carbon_for_ria_2013_update.pdf (“Under current OMB guidance contained in Circular A-4, analysis of economically significant proposed and final regulations from the domestic perspective is required, while analysis from the international perspective is optional.”).

TDS, *supra* note 4 at 3, 13. This omission directly contradicts OMB’s instruction that any reported effects “beyond the borders of the United States . . . should be reported separately” from domestic effects. OMB, Circular A-4, at 15; *accord* OIRA, RIA Primer. The proposed rule does nothing to correct these defects in the Working Group’s SCC. The RIA notes that “the SCC estimates incorporate the worldwide damages caused by carbon dioxide emissions,” but does not even report the United States’ share of the SCC. Proposed Rule RIA, at ES-14; *see also id.* at ES-23, note b (estimate “reflects global impacts from CO₂ emission changes”).

D. Relying on Global Benefits Violates the Economic Principles Underlying Cost-Benefit Analysis.

The federal policy that cost-benefit analysis of United States regulations should compare United States costs against United States benefits is common sense, and it comports with the economic theory behind cost-benefit analysis. As Ted Gayer and W. Kip Viscusi explain in a recent article, “[e]conomic guidelines for policy assessment routinely urge that one should select policies to maximize social welfare. The main analytical tool for assessing which policies advance social welfare is benefit-cost analysis.” Ted Gayer and W. Kip Viscusi, The Brookings Institution, *Determining the Proper Scope of Climate Change Benefits 3* (2014), *available at* <http://tinyurl.com/lkx5bmn>. This demands an answer to the question of “[w]hose social welfare matters” for purposes of the policy in question “and whose benefits should be included in a benefit-cost assessment.” *Id.* at 1.

The principle of economic standing answers that question based in part on who within society is entitled to the policy's benefits: "[S]tandard benefit-cost practice sums the benefits across the political jurisdiction consisting of the citizens who are bearing the costs of the policy." *Id.* at 2. Hence, "[a] benefit-cost analysis is more likely to suggest an optimal policy response when the political jurisdiction defining who will bear the cost of the policy matches the economic jurisdiction of who will reap the benefits." *Id.* It follows that foreign entities that do not bear a share of the burdens of a given policy "should not have [economic] standing within a benefit-cost analysis of a U.S. regulation," and foreign benefits should therefore be excluded. *Id.* at 4.

E. Relying on Global Benefits Undermines Political Accountability.

Measuring global benefits against domestic costs also deceives the public about the relative benefits of the proposed rule. As Viscusi and Gayer note, "Imposing a global perspective on benefits will increase the apparent desirability of the policy but will overstate the actual benefits to the American people." *Id.* at 13. In the interest of maintaining the Government's political accountability to the People, EPA should clearly identify the proposed rule's domestic benefits.

F. EPA's Rationale for Using a Global SCC Is Unfounded.

EPA attempts to justify its reliance on foreign benefits by the observation that "we expect other governments to consider the global consequences of their

greenhouse gas emissions when setting their own domestic policies.” Proposed Rule RIA, at ES-14. But of course EPA has no power to control whether foreign countries regulate greenhouse gas emissions at all, much less how they calculate the benefits of their own regulation. And EPA’s stated expectation reveals the absurdity of justifying domestic greenhouse gas regulations according to global benefits: EPA anticipates an unrealistic degree of international magnanimity, and takes on responsibility that it cannot justify for the welfare of other nations. As former Administrator of OIRA, Susan Dudley, has explained,

In the absence of . . . reciprocal action by other nations, . . . the global benefits in the SCC cannot be regarded as a legitimate entry in the benefit-cost ledger. Basing unilateral domestic action on the global SCC would put U.S. government agencies in the impossible position of acting contrary to the interests of U.S. citizens, using the excuse that they are acting as representative agents of foreign countries. Moreover, since the actual representative agents of those foreign countries have declined to take comparable action to constrain carbon emissions, U.S. agencies would be making the implausible argument that they are better representatives of foreign interests than are the governments of those countries.

Susan E. Dudley & Brian F. Mannix, *The Social Cost of Carbon*, Engage, February 2014, at 17.

The Interagency Working Group also explained its calculation of a global SCC on the ground that climate change “involves a global externality: emissions of most greenhouse gases contribute to damages around the world even when they are emitted in the United States.” 2013 Social Cost of Carbon Update TSD, *supra*

note 4 at 10. This proves too much. All significant U.S. regulations have international externalities. And the global benefits of adopting policies designed to benefit the world at large would invariably outweigh the costs of those policies to U.S. citizens. *See Gayer & Viscusi, supra*, at 21-22. EPA’s decision to measure global benefits “represents a dramatic shift in policy, and if applied broadly to all policies, would substantially shift the allocation of societal resources.” *Id.* at 21. Taking foreign benefits into account for every rule with international effects would justify any degree of costly regulation with relatively small benefits for the American people.

G. The Proposed Rule’s Costs Exceed its Domestic Climate Change-Related Benefits.

When foreign benefits are eliminated from EPA’s calculus, the annual monetized climate benefits of the rule are not \$17 billion in 2020 and \$30 billion in 2030, as EPA projects, *see* 79 Fed. Reg. at 34,839, but about \$1.7 billion and \$3 billion, respectively—substantially less than EPA’s estimated annual compliance costs of \$5.5 billion and \$7.3 billion in the same years. Costs of this magnitude—all of which would be borne by domestic industry—cannot be justified on the basis of the proposed rule’s relatively small domestic benefits.

X. EPA'S RELIANCE ON CO-BENEFITS UNREALISTICALLY INFLATES THE RULE'S BENEFITS.

Although the proposed rule is directed at reducing emissions of greenhouse gases, 79 Fed. Reg. at 34,832, most of the rule's projected benefits come from avoiding premature mortalities through projected reductions of other pollutants, namely PM_{2.5} and ozone, *see* Proposed Rule RIA at ES-21 to ES-23. EPA's reliance on PM_{2.5}- and ozone-related benefits to justify the proposed rule violates the provision of Section 111(d) that expressly excludes these pollutants from the scope of the statute's delegation of rulemaking authority. EPA's reliance on incidental PM_{2.5} and ozone reductions also overstates the benefits of the proposed rule by valuing all emissions reductions equally, even in areas that have already attained EPA's PM_{2.5} and ozone NAAQS, below which it is impossible to measure significant health effects. Moreover, the rule's valuation of mortality avoidance is fundamentally flawed, and any use of co-benefits in a cost-benefit analysis raises practical and theoretical problems.

A. Counting PM_{2.5} and Ozone Reductions as Benefits Violates the Clean Air Act.

Section 111(d) excludes regulation of NAAQS pollutants, like PM_{2.5} and ozone. According to the statute, EPA must require States to submit plans establishing "standards of performance," but only for "any pollutant . . . for which air quality criteria have not been issued," or which is not included on a list [of

NAAQS pollutants] published under section [108(a)] or emitted from a source category which is regulated under section [112]. 42 U.S.C. § 7411(d)(1); *see also supra* Part IV. PM_{2.5} and ozone are NAAQS pollutants and appear on the list in Section 112. 42 U.S.C. § 112(b)(1). There can be no dispute, therefore, that they are improper subjects for regulation under Section 111(d).

Although the proposed rule does not purport to regulate PM_{2.5} and ozone directly, a significant majority of the projected benefits of the proposed rule come from reducing those NAAQS pollutants. Out of \$26 billion to \$49 billion in projected annual net benefits in 2020, for example, \$15 billion to \$37 billion, or approximately 57 to 76 percent come from the PM_{2.5} and ozone effects of the rule. The percentage is even higher if foreign climate change benefits are eliminated from the estimate. *See supra* Part VIII. A vast majority of those co-benefits represent monetized mortality reductions. *See Proposed Rule RIA*, at ES-16 (“PM_{2.5}-related premature mortality . . . accounts for 98 percent of the monetized PM_{2.5} health co-benefits.”).

Counting PM_{2.5} and ozone reductions as benefits of the rule violates the statutory prohibition on regulating NAAQS pollutants through Section 111(d). Because sources of air pollution inevitably emit multiple pollutants indiscriminately, air pollution regulations necessarily affect multiple pollutants. The only meaningful way to enforce the prohibition on regulating NAAQS

pollutants through Section 111(d), therefore, is to prohibit EPA from counting PM_{2.5}, ozone, and other NAAQS pollutants as benefits.

Otherwise, the Agency may, as it has attempted to do here, simply sidestep the statutory bar on regulating NAAQS pollutants by purporting to regulate CO₂ or other non-NAAQS pollutants that are emitted along with PM_{2.5} and ozone.

B. All PM_{2.5} and Ozone Co-Benefits Result from Either Double-Counting or Counting Insignificant Emissions Reductions.

Despite some ambiguity about the baseline against which EPA measured the projected benefits of its Clean Power Plan, the agency asserts unambiguously that it included in its benefits calculation reductions of PM_{2.5} both above and below the NAAQS for that pollutant. *Id.* at ES-16 to ES-17 (“Thus, the estimates include health co-benefits from reducing fine particles in areas with varied concentrations of PM_{2.5}, including both areas that do not meet the fine particle standard and those areas that are in attainment, down to the lowest modeled concentrations.”). Regulating against the backdrop of the PM_{2.5} NAAQS, the asserted co-benefits are illegitimate, whether above or below that the existing regulatory threshold.

1. PM_{2.5} Reductions Above 12.0 µg/m³ (and Ozone Reductions Above 75 ppb) Are Mandated by the NAAQS, So Using them as Co-Benefits Amounts to Double-Counting.

It is for good reason that the Clean Air Act expressly excludes NAAQS pollutants from those that can be regulated under § 111(d). *See supra* Part IX.A. These pollutants are already regulated under Section 109 of the Act at a level EPA

deems “requisite to protect the public health” with “an adequate margin of safety.” 42 U.S.C. § 7409(b)(1). Under the 2013 PM_{2.5} NAAQS, the states are held to a 12.0 µg/m³ standard. National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3,086 (Jan. 15, 2013). The 2008 ozone NAAQS imposes a standard of 75 parts per billion (ppb), 73 Fed. Reg. 16,436, and on and on November 25, 2014, EPA proposed a more stringent standard within the range of 65 to 70 ppb. Proposed Rule, National Ambient Air Quality Standards for Ozone, EPA-HQ-OAR-2008-0699 (Nov. 25, 2014), *available at* <http://www.epa.gov/airquality/ozonepollution/pdfs/20141125proposal.pdf>. The benefits of reducing emissions of these pollutants to these levels have already been quantified and used to justify EPA’s costly NAAQS regulations.

EPA’s RIA asserts that its benefits calculation “include[s] health co-benefits from reducing fine particles in areas with varied concentrations of PM_{2.5}, including . . . areas that do not meet” the PM_{2.5} NAAQS. Proposed Rule RIA at ES-16 to ES-17. The extent of this problem is unclear, because EPA fails to estimate the portion of the projected emissions reductions that will occur in nonattainment areas. *See id.* at 4-40 (“[I]t is not feasible to estimate the proportion of co-benefits occurring in different locations, such as designated nonattainment areas.”). *But see id.* at 4-43 (“As a surrogate measure of mortality impacts, we provide the percentage of the population exposed at each PM_{2.5} concentration in the baseline of

the source apportionment modeling used to calculate the benefit-per-ton estimates.”). To whatever extent the proposed rule counts in its cost-benefit analysis the effects of reducing PM_{2.5} and ozone to the levels already required by their respective NAAQS, the agency is improperly double-counting those benefits to justify two sets of regulations. *See* Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. Rev. 1184, 1267 note 347 (2014) (“To guard against double counting the ancillary benefits, one needs to make sure that after each regulation is promulgated, a new baseline level of pollution is computed. Then, the further benefits from subsequent regulations need to be determined by reference to this baseline.”). The benefits of achieving the NAAQS standards cannot rationally be counted as benefits of other rules.

2. PM_{2.5} and Ozone Reductions Below the NAAQS Are Insignificant.

In addition to counting benefits from PM_{2.5} and ozone reductions already mandated by the relevant NAAQS, the proposed rule counts benefits of reducing emissions of these pollutants even below the level required by the NAAQS. Specifically, the RIA asserts that its benefits “estimates include health co-benefits from reducing fine particles in . . . areas that are in attainment [with the PM_{2.5} NAAQS], down to the lowest modeled concentrations.” Proposed Rule RIA at ES-16 to ES-17. Including these benefits is contrary to the NAAQS regulations’ premise that these “benefits” are inconsequential.

It is improper for the proposed rule to count PM_{2.5} and ozone reductions below the NAAQS as benefits, because the NAAQS represent the level of pollution control EPA deems “requisite to protect the public health” with “an adequate margin of safety.” 42 U.S.C. § 7409(b)(1). Reducing PM_{2.5} and ozone emission even further is not “requisite to protect the public health,” and therefore cannot possibly produce the health benefits that the proposed rule claims. As a former Chairman of the Texas Commission on Environmental Quality has explained,

Particulate matter is itself a criteria pollutant listed under the Clean Air Act, and the EPA must set a national air quality standard for particulate matter to protect public health. If reducing particulate matter had the enormous benefits that EPA’s analysis claims, it has a legal responsibility to lower the national ambient standard to a level that is actually protective of human health. The fact that it has not done so suggests that the EPA does not really believe its own numbers. The EPA set the new NAAQS for annual PM_{2.5} at 12 µg/m³, an ambient level still far above the lowest measured levels (LMLs) that the EPA used to identify risk of death in cost-benefit analyses. . . . This . . . gives a misleading picture of the relative costs and benefits of EPA regulations.

Kathleen Hartnett White & Josiah Neeley, WHO REGULATES THE REGULATOR?: COST-EFFECTIVENESS ANALYSIS IN TEXAS STATE AGENCY RULEMAKING, 14 Tex. Tech. Admin. L.J. 401, 412 (2013).

To avoid the implication that the proposed rule is claiming benefits from reducing emissions of pollutants below the levels at which they have a significant effect on human health, the RIA improperly jettisons the assumptions and models on which EPA relied in setting the NAAQS. The RIA explicitly “assume[s] that

the health impact function for fine particles is log-linear without a threshold in this analysis.” Proposed Rule RIA at ES-16. This assumption violates the best available science on which EPA relied when it updated the PM_{2.5} NAAQS in 2013. In that rulemaking, the agency selected a threshold of 12.0 µg/m³ because “it was somewhat below the lowest long-term mean concentration shown by certain key epidemiologic studies to cause adverse health effects.” *Nat’l Ass’n of Mfrs. v. EPA*, 750 F.3d 921, 924 (D.C. Cir. 2014) (citing 78 Fed. Reg. 3086, 3158-59, 3161 (Jan. 1, 2013)). By counting PM_{2.5} reductions in areas that are already in attainment with the NAAQS, “down to the lowest modeled concentrations,” the proposed rule assigns mortality-avoidance benefits to reducing PM_{2.5} below the level at which that pollutant has a measurable effect on mortality. Proposed Rule RIA at ES-17.

The proposed rule contradicts the 2013 PM_{2.5} NAAQS rule’s determination that “an annual standard level of 12 µg/m³ would be requisite to protect the public health with an adequate margin of safety from effects associated with long- and short-term PM_{2.5} exposures,” because that level is “somewhat below the lowest long-term mean concentration in the full set of studies considered.” 78 Fed. Reg. at 3,161. In the PM_{2.5} NAAQS rule, EPA explicitly considered and rejected proposals to mandate lower levels of PM_{2.5}, because such a standard is not necessary to adequately protect human health. *See id.* (“[A] standard set at a lower level would not be warranted to provide requisite protection that is neither more

nor less than needed to provide an adequate margin of safety.”). The proposed rule ignores these conclusions and treats all emissions reductions alike, whether or not they occur below the NAAQS level.

EPA provides no adequate explanation for its decision to count PM_{2.5} mortality benefits all the way down to the lowest measured level (“LML”). That decision contradicts the PM_{2.5} NAAQS rule’s conclusion that the limited evidence of PM_{2.5}’s contribution to adverse health effects at low concentrations “does not justify” a more stringent standard.⁵

In the proposed rule, EPA throws out a controlling premise of the 2013 PM_{2.5} NAAQS and asserts that the agency is “unable to estimate the percentage of

⁵ See 78 Fed. Reg. at 3162 (“[T]he available evidence interpreted in light of the remaining uncertainties does not justify a standard level set below 12 µg/m³ as necessary to protect public health with an adequate margin of safety.”); *id.* (“[A] lower annual standard level . . . would reflect placing essentially as much weight on the relatively more limited data providing evidence suggestive of a causal relationship for effects observed in some at-risk populations (e.g., low birth weight) as on more certain evidence of effects classified as having a causal or likely causal relationship with PM_{2.5} exposures. In the Administrator’s view, while it is important to place some weight on such suggestive evidence, it would not be appropriate to place as much weight on it as the commenters would do. . . . [U]sing this type of information to set a standard level of 11 µg/m³ or below would assume too high a degree of confidence in the magnitude and significance of the associations observed in the lower part of the distributions of health events observed in these studies.”); *see also id.* at 3158 (“[I]n the absence of any discernible population-level thresholds” for any health effect based on the currently available evidence “it is appropriate to consider the relative degree of confidence in the magnitude and significance of the associations observed in epidemiological studies across the range of long-term PM_{2.5} concentrations in [the relevant] studies.”); *id.* (“[T]he Administrator deems it reasonable not to draw further inferences from air quality and health event data in the lower part of the distribution.”); *id.* (“[T]here is significantly greater confidence in the magnitude and significance of observed associations for the part of the air quality distribution corresponding to where the bulk of the health events evaluated in each study have been observed, generally at and around the long-term mean concentrations.”).

premature mortality associated with the emission reductions at each PM_{2.5} concentration, as we have done for previous rules with air quality modeling.” Proposed Rule RIA at 4-43. EPA offers no explanation for why it lacks the modeling data it used in the 2013 NAAQS rule, but this omission has an enormous benefit-inflating effect. In a major understatement, the agency admits that it is “less confident in the risk we estimate from simulated PM_{2.5} concentrations that fall below the bulk of the observed data in the[relevant] studies,” *id.* at 4-42, and acknowledges that “these results are not consistent with results from RIAs that had air quality modeling.” *Id.* at 4-43; *see also id.* at 4-44 (“we have lower levels of confidence in levels below the [lowest measured level] for each study”); *id.* at 4-41 (“Use of these benefit-per-ton values to estimate co-benefits may lead to higher or lower benefit estimates than if co-benefits were calculated based on direct air quality modeling.”); *id.* at 4-43 (“The most important aspect, which we are unable to quantify without rule-specific air quality modeling, is the shift in exposure anticipated by implementing the proposed guidelines.”). Because the agency lacks “the necessary air quality modeling input and/or monitoring data to run the benefits model,” the proposed rule’s RIA also lacks “the type of detailed uncertainty assessment found in the PM_{2.5} and ozone] NAAQS.” *Id.* at 4-40.

C. Misguided Invocations of Co-Benefits Tends to Justify Unjustifiable Regulations and Misinform the Public.

The point of cost-benefit analysis is to ensure that regulations are efficient. Including incidental reductions of emission of non-target pollutants (especially where those non-target pollutants are directly regulated by separate rules) undermines efficient regulation, because it fails to consider whether the non-target pollutant may be regulated more efficiently by different means. *See* Anne E. Smith, NERA Economic Consulting, *An Evaluation of the PM_{2.5} Health Benefits Estimates in Regulatory Impact Analyses for Recent Air Regulations* (2011). In the case of PM_{2.5}, EPA has already determined that an “annual standard is the most effective and efficient way to reduce total population risk associated with both long- and short-term PM_{2.5} exposures.” 78 Fed. Reg. at 3,163.

Including co-benefits obscures the impact of the rule on the targeted pollutant (CO₂) and hinders both the public’s ability to understand the Agency’s policies and to hold the Agency accountable for those policies. It also hinders EPA’s own ability to improve the analysis underlying its regulatory initiatives.

XI. EPA’S COST ESTIMATE FAILS TO ACCOUNT FOR CARBON LEAKAGE.

In setting the “standard of performance” for existing sources, EPA must “tak[e] into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements.” 42 U.S.C. §

7411(a)(1) (defining “standard of performance”); *see also id.* at § 7411(d) (requiring EPA to “take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.”); *accord Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011) (“Each ‘standard of performance’ EPA sets must ‘tak[e] into account the cost of achieving [emissions] reduction and any nonair quality health and environmental impact and energy requirements.” (citing 42 U.S.C. § 7411(a)(1), (b)(1)(B), (d)(1))). The agency cannot satisfy this requirement unless it correctly assesses the major costs of the rule.

As economists have long understood, one important effect of regulating carbon emissions is that energy-intensive industries will move to countries where carbon emissions are not regulated and the price of energy is lower. This migration away from the United States, known as “carbon leakage,” results in both a drain on the United States economy and a reduction in the rule’s projected carbon benefits. The economy suffers when industry moves abroad because jobs and revenue follow, and relocating energy-intensive businesses undermine the greenhouse gas benefits of the rule, because foreign and domestic carbon emissions have exactly the same effect on climate change.

Carbon leakage is an inevitable consequence of the proposed rule because, as EPA acknowledges, it will raise the cost of electricity to the detriment of

energy-intensive businesses. Specifically, EPA reported that “average nationwide retail electricity prices are projected to increase by roughly 6 to 7 percent in 2020 relative to the base case, and by roughly 3 percent in 2030.” 79 Fed. Reg. at 34,934. The agency recognized that such “[c]hanges in price . . . can impact markets for goods and services produced by sectors that use these energy inputs in the production process” and that “[c]hanges in cost of production may result in . . . changes in profitability of firms affected.” *Id.* at 34,935. It is surprising then that EPA’s cost-benefit analysis fails entirely to take carbon leakage into account.

A. Carbon Leakage Is a Known Side Effect of Carbon Regulation.

The carbon leakage phenomenon has been thoroughly studied by other government agencies. As the Congressional Research Service noted in 2008,

[C]oncerns have been raised that if the United States adopts a carbon control policy, industries ... that find their ... energy bills rising because of costs passed-through by suppliers may be less competitive and may lose global market share (and jobs) to competitors in countries lacking comparable carbon policies. In addition, this potential shift in production could result in some of the U.S. carbon reductions being diluted by increased production in more carbon intensive countries.

Larry Parker & John Blodgett, “Carbon Leakage” and Trade: Issues and Approaches (2008), *available at* <http://fas.org/sgp/crs/misc/R40100.pdf>.

The Congressional Budget Office acknowledged carbon leakage as recently as last year:

The higher costs [associated with “any policy to reduce carbon dioxide (CO₂) emissions that does not provide for subsidies sufficient to offset the cost of the reductions”] would also make some U.S. producers less competitive relative to producers in countries that do not impose comparable emission-reduction policies. Therefore, some domestically produced goods would be displaced by foreign goods, and that displacement would cause some of the reduction in U.S. emissions to be offset by increases in foreign emissions that would not otherwise have occurred, a phenomenon known as carbon leakage.

Bruce Arnold, International Trade and Carbon Leakage (Congressional Budget Office Working Paper 2013-08, at 1 (2013), available at <http://tinyurl.com/kopyz2c>.

Similar statements abound from economists and think tanks.⁶ Additionally, The European Union’s less onerous emissions trading system has offered economists a platform for measuring and predicting the carbon leakage effects of an economy-wide carbon price, with mixed results. VIVID ECONOMICS & ECOFYS, *supra* at 6 (explaining that some industries saw production fall by as much as 20% with carbon prices of €15 per ton of CO₂).

In denying the relevance of carbon leakage, the proposed rule neglects this robust body of research and analysis.

⁶ See Carolyn Fischer & Alan K. Fox, RESOURCES FOR THE FUTURE CLIMATE POLICY AND FISCAL CONSTRAINTS: DO TAX INTERACTIONS OUTWEIGH CARBON LEAKAGE 2 (2012), available at <http://www.rff.org/rff/Documents/RFF-DP-12-19.pdf>; Joel S. Yudken & Andrea M. Bassi, High Road Strategies & Millennium Institute, CLIMATE POLICY AND ENERGY-INTENSIVE MANUFACTURING: IMPACTS AND OPTIONS 21 (2009), available at http://bipartisanpolicy.org/sites/default/files/ncep_apr%2009%20full%20report_0.pdf.

B. Congress Has Opposed Carbon Regulation Because of Carbon Leakage.

The Senate's opposition to the Kyoto Protocol, was based on its concerns about carbon leakage. The Senate resolved not to ratify any greenhouse gas treaty that exempted developing countries, because "the disparity of treatment between Annex I Parties and Developing Countries and the level of required emission reductions, could result in serious harm to the United States economy, including significant job loss, trade disadvantages, increased energy and consumer costs, or any combination thereof." S. Res. 98 (105th Cong.) (1997).

An unelected agency should not neglect the concerns that have informed Congress's climate change policy.

C. The Proposed Rule Fails to Account for Carbon Leakage, Because it Misunderstands Basic Economics.

The agency's only mention of leakage in the RIA is its cursory statement that "EPA does not anticipate significant leakage in the EGU sector to occur from this regulation because the nature of electricity transmission does not lend itself to significant imports or exports of electricity." Proposed Rule RIA at 5-5. In other words, EPA assumed that carbon leakage could only occur if electricity generators themselves relocated to less regulated jurisdictions across the border.

This assumption is false. Carbon leakage is not limited to electricity generators. Consumers of energy and the goods and services that use it will feel the

economic effects of the proposed rule just as certainly as the energy producers themselves. Hence, as carefully explained by the experts quoted above, raising the cost of energy by regulating power plants puts pressure on energy-intensive industries—not just energy generators—to move overseas where energy is cheaper. EPA’s cost-benefit analysis fails to account for these important implications of its rule.

CONCLUSION

For the foregoing reasons, NFIB encourages the Agency to withdraw its proposed rule.