Clean Power Plan Outline

**~Primer and Recent Air Act Precedent~**

Granting Cert:

* There is no reason to grant cert if
* The case isn’t exciting;
  + When filing an opposition to a Cert Petition, the goal is to take it down, minimize its importance, make the Ct think, “boring and uninteresting.”
* There is no Circuit Split; or
* No binding opinion below.

***MA v. EPA***: (2007)

Methane was already an air pollutant; GHGs being pollutants is an easy argument, the tough argument is that EPA ***HAD*** to make an endangerment finding.

If standing had to be addressed the Ct will usually add the questions before the case begins but the Ct didn’t add it here.

**RL**: The gov’ts textual argument was its weakness

C.J. Roberts asked for a limiting principle, how long can EPA put off regulation? Don’t they have discretion? If so, is it unlimited?

* Answer: They can give all sorts of reasons but the reason cannot be that EPA doesn’t want to do it how Congress required them to do it — this is not a policy choice left to EPA. REASON GIVING!!

When the EPA rejected the petition it said that in light of the foregoing “consideration**s**” they could not/would not make a finding 🡪 J. **Breyer** latched on to this, said that if one of the considerations was invalid then remand was required.

J. Stevens changes the narrow (read: procedural) into a broad (read: substantively groundbreaking) opinion on climate change. **LR**: Questions whether the reasons for inaction must be based in the statute; what about political or enforcement priorities (the answer, we learn from admin, is YES but there is some wiggle room there).

The irony is that EPA refused to act because to do so would lead to the problems that we see in UARG (PSD Kicker; but could EPA have dealt w/ this through non-enforcement?)

Cts v. Legislation:

While MA is trying to solve Climate change through the CAA; CT is trying to do so via federal interstate (the only kind) nuisance law. Legislation died because, even with majorities in both chambers, there was no democrat vote on the issue.

***AEP v. CT***: (2011)

CAA addresses climate change (via MA) therefore nuisance law is displaced (precluded). Sotomayor was recused because she heard the case on the 2d Circuit, the circuit held the opinion until she was confirmed. Because of this recusal, the Ct split 4-4 on standing (avoiding a further precedent strengthening MA on standing grounds).

DICTA: FN 7 discusses 111(d) as the way to regulate GHGs but notes (and puts in a majority opinion) the controversial language for the “112 problem” of the CPP.

\*Parallel statutory track of *MA* displaces *CT* nuisance (common law) track.

**RL**: Sweeping displacement.

***UARG***: (2013)

DC Cir upheld the Tailoring Rule, from that ruling 9 cert petitions were filed:

* Issues (25 total but here is a sample):
  + Endangerment Ruling (that GHG’s are dangerous)
  + PSD (BACT) 🡪 Are GHGS an air pollutant under this §?
  + Tailoring Rule
  + MA v. EPA 🡪 Overrule it!
* Ct grants just **1** issue: **RL**: Mistake to go after 25, should have focused efforts
  + “Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles **triggered** permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.”
* Endangerment finding and Motor Vehicle regs become instantly safe!

Concerns:

* Lost at *Chevron* Step 2
* Bad Language for CPP:
  + “When an agency claims to discover in a **long-extant** statute an **unheralded** power to regulate a significant portion of the American economy . . . .”
    - § 111(d) has been a round a long time and EPA has rarely used it and certainly not for “beyond the fenceline” kind of regulation
* § by § determination of the definition of “Air Pollutant”
* SoP issues 🡪 Rewrote a clear statute, a potential § 112 problem
* Fenceline 🡪 how far can EPA go with all of this gratuitous language “also unreasonable . . .”
  + EPA is expanding power its power without clear congressional authorization
  + **RL**: Shot across the bow

***Michigan***: (2015)

Appropriate and Necessary ruling under Clinton administration to regulate EGUs for mercury rule but not under Bush because they were going to regulate under 111(d) (cap and trade). But Bush is challenged because mercury is not amenable to cap and trade because the effects of mercury pollution are localized.

Cert was granted on “Whether the [EPA] unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities.” Essentially, did the meaning of A&N include cost considerations.

* Precedent up to this point indicated that ambiguity favored cost considerations but it was still up to the agency

**RL**: Lost at Step 2 (KJW: did they??)

**RL**: Redux of *Whitman*’s “Elephants in mouse holes”

***King v. Burwell***: (2015)

Concerns about the future of Chevron as it applies to the CPP:

* “We often” apply *Chevron*
* Where a regulation has extraordinary economic consequences/the agency is not expert 🡪 No *Chevron* (as an application of Step 0)
  + In the CPP there are extraordinary economic consequences and as to energy regulation, EPA may not be considered expert

**~CPP: How It Works~**

EPA sets performance rates that the States will apply through SIPs (But aren’t the states supposed to set the performance rates under § 111(d)??):

* “Each *State* shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant . . . and (B) provides for the implementation and enforcement of such standards of performance.”

EPA creates and sets this standard using **3 Building Blocks**:

1. Heat Rate Improvement (at coal-fired power plants)
   1. Better efficiency by improving the structure of the EGUs themselves
2. Generation Shifting
   1. Shifting energy production from coal-fired to natural gas-fired
3. Zero Emission Generation
   1. What can states do via siting, etc. with clean energy
4. ~~End-use Energy Efficiency~~
   1. EPA wanted to take into account the measures that could be taken by consumers to conserve energy (more efficient appliances, etc.) that would happen naturally over time as energy improved
      1. Thrown out after UARG
      2. Also politically unpopular because it looks like the gov’t is telling individuals what do to with their own stuff (as apposed to telling Corps what to do)

Putting the Building Blocks Together:

**Step 1:** Compute 2012 coal and gas-fired emission rates for each region

**Step 2:** Apply Heat Rate Improvements to coal-fired units in each region

**Step 3:** Apply BB3 to each region

**Step 4:** Apply BB2 to each region

EPA applied these building blocks to the three “interconnects” (energy grids) in the country and came out with performance rates for each one. Then EPA applied the most lenient performance rate (eastern interconnect) to the whole country:

Coal: 1,305

Gas: 771

This would achieve a 32% reduction in GHG emissions by 2030.

When this rule was being made they had a number in mind and were going to find a way to get to it but the **Administrator** didn’t want an expensive rule that was going to “cause the lights to go out.” This was the balancing act that is the CPP.

***Note on Litigation Strategy***: EPA (like all agencies surely) has an advantage that it can compile a huge record and then point to it in the brief, saving words in its brief that it would otherwise have to spend (this is how you defend against 10+ opposition briefs with a limited word count).

State Obligations:

* State Implementation Plans
  + Due Sept 2016
  + Extension to Sept 2018
  + First Compliance Period begins 2020
* Federal Implementation Plan if states don’t file plans

State Options:

* Apply EPA’s uniform emission rates

**OR**

* Use Flexibility of State Specific Targets
  + Allocate burden by rate
  + Allocate burden by mass
  + Set up cap and trade system

**OR**

* Do Nothing (Federal Plan)

**~CPP: Legal Issues Raised During RM~**

1. **§ 111(d) Threshold Authority**

Does EPA have Authority to Regulate EGU CO2 emissions under § 111(d)?

* Two Threshold Requirements:
  + (1) The source of CO2 emissions (here EGUs) must be one that would be regulated if it were a new source
    - EPA promulgated, concurrently with the CPP, a new regulation under § 111(b) that regulates CO2 emissions from “new, modified, and reconstructed EGUs”
  + (2) CO2 must not be regulated as a criteria pollutant under § 108 nor as a hazardous pollutant under § 112
    - The meaning of the § 112 exclusion is disputed because of two, seemingly conflicting, 1990 Amendments, one from the House, the other from the Senate
      * EPA claims that the two can be reconciled in a way that does not jeopardize EPA’s authority to regulate EGU CO2 emissions via the CPP

EPA’s Approach to the § 112 Exclusion Dispute:

1. The Structure of the CAA and the Pre-1990 § 111(d) Language
   * Regulation of Criteria Pollutants under §§ 108-110, Hazardous Air Pollutants under § 112 and the regulation of source categories under § 111 creates a “comprehensive scheme for air pollution control.”
   * The Pre-1990 language in § 111(d) makes this clear, permitting EPA to regulate those pollutants which are neither listed as criteria pollutants or HAPs. § 111 is a **gap-filler**.
   * The 1990 amendments, ostensibly, were about correcting a now obsolete cross-reference, not changing the meaning of the statute.
   * The questions going forward is not about which amendment applies, they both do. Rather, the question is how can they be reconciled.
2. The Senate Amendment Language
   * This language has the advantage of producing the same effect as pre-1990 § 111(d).
   * The legislative history indicates that choosing this language was not a “mindless ministerial decision.”
3. The House Amendment Language
   * Ambiguity
     1. Clause 2 “**or**” Clause 3
     2. The Missing Negative
     3. A Negative Presumed brings along Ill-intentioned Friends
     4. Assuming Good Intentions gets Us Nowhere (a Return to EPA’s 2005 Interpretation)
   * EPA’s Interpretation and *Chevron* Deference
     1. Having established that the House Amendment language is ambiguous, EPA will get *Chevron* deference if its interpretation of the language is reasonable
     2. EPA interprets “source category which is regulated under § 112” to be limited to the pollutants § 112 regulates, namely HAPs. This allows the same source category to be regulated under § 111(d) for different pollutants.
        1. It is reasonable because it 1) determines the scope; 2) supports the overall and longstanding structure of the CAA, avoiding gaps; and 3) harmonizes the amendments, avoiding conflicts within the act
4. **Building Blocks 2 and 3 as Parts of a “System”**

The problem with Building Blocks 2 and 3 is that they are not things that an be done to the EGU itself. EPA says that is fine because the statute requires that EPA use the best SYSTEM and the building blocks constitute a system.

EPA’s Big Three Justifications for Blocks 2 and 3:

1. **Plain meaning** of “system” broad enough to include Blocks 2 and 3, because “they consist of measures that the owners/operators of the affected EGUs can implement to achieve their emission limits.” (SM2-292)
2. **Legislative history** supports this interpretation: “the phrase ‘system of emission reduction’ appears to blend the broad spirit of [the Senate version] . . . With the cost concerns identified in [the House version]. This history strongly suggests that Congress intended to authorize the EPA to consider a wide range of measures in calculating a standard of performance for stationary sources.” (SM2-294)
3. **Overall structure of CAA**: “The CAA section 111(d) requirements are broadly phrased, include procedural requirements but no more than very general substantive requirements, and give broad discretion to the EPA to determine the basis for the required emission limits and to the states to set the standards.” (SM2-296)
4. **Logical Outgrowth**

Significant Changes:

1. **BSER and Building Blocks**
2. Building block 4: Removed
3. §111: Approach is not to limit the amount of production
4. Regional approach
5. Measures are quantified regionally: Eastern, Western, Texas Interconnections
   1. A) Building block 1
      1. Used to calculate a nationwide rate improvement (6%).
      2. Now, calculate potential heat rate improvements regionally.
   2. B) Building block 2
      1. Regional limit informed by historical growth rates.
      2. No longer based on states.
   3. C) Building block 3
      1. Renewable energy generating capacity based on Interconnections.
      2. Then, apply the least stringent standard nationwide.
6. **Uniform, performance-based CO2 emission rates**
7. Nationwide standards for two subcategories (electric utility steam generating units and stationary combustion turbines)
8. But not requirements– States still decide on their goals and plans.
9. **Creation of Clean Energy Incentive Program (CEIP)**
   1. Designed to incentivize early investment in energy efficiency.
   2. CEIP was not part of the proposed rule at the outset – no notice.

Other changes:

* Removing nuclear generation components, considering continuing increases in renewable energy deployment
* Time frame, etc.

1. **Emission Levels vs. Performance Standards, Arbitrary and Capricious, and Other Issues**

Emissions Levels vs. Performance Standards:

* § 111(d) requires EPA to set procedures so that states can set standards performance
* Not only does EPA not let the states set them, the “them” aren’t performance standards, they are emissions levels.
* EPA Response:
  + Emphasizes that these are flexible guidelines (used flexible A LOT)
  + Building Blocks aren’t required (just guideposts)
  + Industry wanted these options (generation shifting, etc.)

APA: Arbitrary and Capricious:

* Questions Raised:
* Where did these numbers come from?
* How did EPA set an interim rate?
* How were these rates calculated?
* Can EPA rely on their own arbitrary building blocks to define these rates?
* The BBs also rely on numerical limits (e.g. BB2 calls for shifting to NG up to 75% of net summer basis) – are these numbers arbitrary?
* Why apply the same standard nationally?

Chevron Deference vs. Elephants in Mouseholes:

Overreach:

* EPA is trying to regulate energy sector

Commandeering in Violation of 10th Amendment:

EPA only has Procedural Authority:

111(b) Stringency:

* Weird that 111(d) looks more stringent than 111(b), the latter for NEW sources

Remaining Useful Life:

**~Initial Challenges to the CPP: Mandamus and Stay Requests~**

Outline of Arguments in Favor of the Stay:

* Standard for granting a stay
* *Michigan v. EPA* highlights the need for a stay in this case
  + EPA extracted “nearly 10 billion a year” in compliance costs from power plants before the Supreme Court could even review the rule.
  + EPA boasted in a blog post following the decision that the practical effect on the plan was minimal, because “the majority of power plants were already in compliance or well on their way to compliance”.
  + Upon remand, the D.C. Circuit declined to vacate the rule, despite the fact that the Supreme Court had declared it unlawful.
  + Supreme Court should avoid allowing the EPA to “bake in” its federal energy policy goals while the legality of the Power Plan is being determined.
* Merits Arguments:
  + EPA’s vast assertion of authority in the CPP fails *UARG’s* clear statement rule
    - Here, for the first time in the Clean Air Act’s 45-year history, the EPA is using “generational shifting” to reshape America’s energy .
    - Unquestionably an unprecedented attempt by EPA to make “decisions of ‘vast economic and political significance’” which would require a clear Congressional statement.
    - By the same logic present in the Clean Power Plan, the EPA could extend their authority to other aspects of the American economy.
  + 10th Amendment: CPP unconstitutionally coerces and commandeers the States
    - Clear Congressional authorization is required when an agency action treads upon an area of traditional state regulation. Here the Clean Power Plan is impinging State’s traditional authority over the intrastate generation and consumption of energy.
    - Additionally, the Power Plan unconstitutionally commandeers and coerces the states into carrying out Federal Energy Policy.
    - Even if a State chooses to have a Federal Plan implemented, State legislatures and other regulatory bodies will have to take action to meet the emissions goals of the plan. For example, the federal government doesn’t have siting authority over transmission lines.
    - Highlights the ongoing irreparable harm to the States.
  + Section 111 Exclusion Prohibits the CPP
    - Section 112 Exclusion in the U.S. Code prohibits EPA from regulating source category under §111(d) that is already regulated under §112
      * Plain meaning of §111(d) is “straightforward and unambiguous”
      * Literal reading is consistent with statutory and legislative history of 1990 amendment
    - EPA’s attempts to escape the literal meaning of the statute are unavailing
      * EPA’s new assertions of ambiguity lack merit
        + EPA has no authority to “rewrite clear statutory to suit its own sense of how the statute should operate” *UARG*, at 2446.
      * Senate’s failed “clerical amendment” is irrelevant
        + Senate version is conforming amendment
        + Even if there are two versions, EPA needs to give effect to both
        + *Chevron* does not allow EPA to decide which “version” to make legally operative
* Without a Stay, the States will suffer substantial Irreparable Harms
  + States, which are already taking steps to plan compliance, have suffered and will continue to suffer harms to their **sovereignty**
    - States will need to enact transformative legislative and regulatory changes, undermining state ability to maintain own sovereign priorities
    - Invasion of state’s 10th amendment rights is an irreparable harm
  + States & industry have expended and will continue to expend **significant and unrecoverable resources**
    - States: efforts to begin planning will “cost tends of thousands of unrecoverable hours and millions of refundable dollars.”
    - Industry: “the near-term shutdowns represent tens of millions of tons of lost coal production, thousands of lost jobs in the mining industry, and rippling unemployment effects for those dependent on the coal industry.”
  + *Michigan v. EPA*: “The Court’s decision finding that EPA had improperly adopted the rule was a practical nullity.”
* The Equities and Relative Harms Favor a Stay
  + Absent a stay, power plan will have massive and immediate impacts on both sides of the generation shifting equation, none of which is in public interest
  + Stay would preserve the status quo, allowing states to maintain their authority

Standard for Granting Stay (at SCOTUS Level):

* 5 U.S.C. § 705 states that the Supreme Court “may issue all necessary and appropriate process to postpone the effective date of an agency action”.
* There must be:
  + **(1)** A reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari.
  + **(2)** A fair prospect that a majority of the court would vote to reverse a judgment below [upholding the power plan]
  + **(3)** A likelihood that irreparable harm will result from the denial of a stay.
    - *Hollingsworth v. Perry,* 558 U.S. 183, 190 (2010)
    - Also, the Court should **(4)** “[balance] the equities and [weigh] the relative harms to the applicant and the respondent”. *Id*

**RL**: He is highly skeptical that this is actually the test he says it is:

* Likelihood of Prevailing on Merits (“Fair Prospect”)
* Irreparable Harm
* Balancing of the Equities:
  + Harm to Other Parties
  + Public Interest

Petitioners assert the former standard; EPA and DC Cir assert the latter.

Outline of Argument in Opposition of the State:

* Likelihood of Prevailing on Merits (“Fair Prospect”)
  + Statutory Authority (§ 111(d)):
    - § 112 Issue:
      * Textual Argument:
        + The disjunctive “or” means that as long as they aren’t both bet EPA has authority
      * Purposive Argument:
        + 7411 is a gap filler and petitioners reading creates a gap 111(d) is gap filler: CAA regulates existing sources through NAAQS, HAPs, and 111(d). Senate report says that CAA “should permit no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or Welfare.” Petitioners reading would strip S. 111(d) of nearly all effect b/c EPA has regulated more than 140 source categories for HAPs. Petitioners argue that 1990 amendments switched focus from pollution oriented to source category oriented, but the program remains pollution oriented in that it only allows EPA to regulate HAPs. Congress would not have made such a fundamental change without some mention in the legislative history (Elephants in mouse holes)
      * Inconsistent Amendments:
        + Petitioners respond to difficult problem by ignoring unfavorable amendment. 1990 Amendments § 108(g) is part of “Miscellaneous Guidance” provision. 1990 Amendments S. 302(a) is part of “conforming amendments” provision. § 108(g) appears earlier in the statute, and Law Revision Council uses it because the two are irreconcilable. This is irrelevant because they simultaneously became law (cite to Scalia). Also, Law Revision council’s guidance provides no guidance because this is not a cumulative amendment. Petitioners argue that the Court should apply both, which would restrict EPA’s authority, but counter is that this is a *grant of authority* so applying both would give EPA larger authority. Should read these provisions in light of the purpose of the statute
* CPP is BESR
  + - * CPP Meets Statutory Factors:
        + “System of Emission Reduction”

Building Blocks

* + - * + “Adequately Demonstrated”

Electricity is fungible

* + - * + “Best”

Cost, health and environmental impacts, and energy needs

* + - * + “Achievable”

Builds on trends already occurring

* + - * Generation Shifting is Permissible:
        + Grid is interconnected, so generation is achievable and cheapest option
        + Rules can only “apply” to the people in charge of facilities, facilities alone cannot comply
        + No reason that new source rule must be more stringent that existing source rule
        + CPP is not an “elephant in a mouse hole” (*UARG*)
  + Constitutional Authority:
    - No violation of the 10th Amendment or federalism principles
      * “Textbook” Cooperative Federalism
        + States can decide not to develop their own plan
        + States retain traditional authority over energy markets
    - No commandeering state officials as “implements of regulation”
      * If states do nothing, EPA will manage sources directly through federal plan
      * *Printz* and *New York v. United States* are inapposite
        + Statute in *Printz* required state officers to conduct federally-mandated background checks
        + *New York* presented a situation where states had no true choice
    - No coercion of the states into compliance
      * *NFIB v. Sebelius* does not apply here
        + In *Sebelius*, states would lose substantial federal funding for declining to expand its Medicaid program
        + States face no sanctions for failing to submit a plan
        + CPP expressly prohibits EPA from withholding “any existing federal funds” for non-compliance
* Irreparable Harm:
  + States:
    - CPP does not intrude on sovereign interests
    - Compliance costs do not constitute irreparable harm
    - States’ obligations have not been shown to be particularly onerous
  + Industry:
    - Claims of adverse economic effects are speculative; stay applicants cannot “simply show some possibility of irreparable injury” *Nken v. Holder*
      * Emission reductions are not required until 2022 at the earliest
      * Specific obligations won’t be clear until states submit their plans in 2018
* Balancing of the Equities:
  + Climate change is a serious problem
    - Atmospheric CO2 is cumulative and long-lived. The harms of climate change are lasting and irreversible. A stay would compound these harms.
  + Granting a stay would create an obvious incentive for delay
  + There are *no* imminent compliance obligations
  + *Michigan v. EPA* does not apply
    - *Michigan v. EPA* does not apply because MATS took effect immediately and applied directly to sources, rather than to state plans. Here, compliance with the rule is impossible currently because no state plans have been submitted, so no one knows what they have to do.

**~The Tenth Amendment and Logical Outgrowth Issues~**

**Tenth Amendment**:

**RL**: “This argument was stronger than I thought”

The Biggest Obstacle for the Petitioners:

* There is always flexibility b/c of FIPs (Textbook Cooperative Federalism)
  + “Approved” of in *New York*
* Response: CPP doesn’t need to create a legal requirement (to say build clean energy, etc.) b/c of its strong practical effect
  + If the states don’t comply there will be an energy deficiency; States can’t actually just sit back, this is really *Printz*
  + This (potential lack of energy) is a “Gun to the Head”
  + **RL**: This argument is that this is different in KIND (different in degree is always weaker because it makes line drawing hard); EPA will surely argue that it is only a matter of degree, not kind
* Other Response: We bear the political burden, citizen complaints, etc. This forces us to act
  + Potential EPA Response: All Co-Fed would be in jeopardy if this was the rule; it precludes other, future regulation. Where is the limititing principle? Can we still regulate mining, etc?
    - It is best to characterize the argument/legal theory as saying that if a Fed actor takes and EGU offline then it violates the 10th Amendment b/c that can’t be right

From **RL** Slide:

* Practical Effect is Compulsion -> Unless States act loss Reliable Electricity
* Plan Assumes All Kinds of State Actions to Increase Other Electricity Sources (permits, regulations, decommissioning coal sources…)
* States Will Receive Brunt Citizen Complaints

**RL**: Even if there is no 10th violation, these arguments could create “headwind” for *Chevron* and, if nothing else, make J. Kennedy nervous.

**Logical Outgrowth**:

Changes from the Proposed Rule:

* Uniform National Rates
* Emission Limits Applicable to Individual units (instead of states)
* Units Covered expanded
* Interconnects (instead of states) as Basis
* New Explanation of Threshold Authority (§ 112 issue)??
* *See also* the section on Logical Outgrowth *supra*

The strange thing about LO for the CPP is **§ 307(d)**. Petitioners have to deal with it, if they don’t want to use it they have to explain why it isn’t there preferred tool. They have embraced it for that reason but it has the nasty effect of allowing the rule to stay in place if the Ct uses it to remand (Used in part to give Dem appointees a chance to take it back and still have the rule live again).

* This is taken care of by the SCOTUS stay
  + But if that happens cert will be petitioned and that could get the stay overturned

LO requires:

1. Change (we have many of those)
2. Nature of the change? **RL**: There are serious gaps in the CPP (vis-à-vis the proposed rule)
3. Harm caused by change 🡪 do we have that?
   1. Lack of Comment could be enough (Procedural injury)

**~The § 112 Issue~**

**RL**: This is the death Penalty Issue

There is presumption in favor of using the language of the U.S. Code.

Petitioner’s Arguments:

1. *AEP* establishes that U.S.C. (not statutes at large) is the proper language (used in SCOTUS opinion!)
2. EPA has interpreted § 111(d) according to the U.S.C. for 20 yrs! (4 administrations – actually said it 5 times in official docs?)
   1. EPA Response: Chevron allows us to change interpretations over time as long as they are reasonable
   2. P Response: But this is unreasonable!

Concludes positive arguments w/o mentioning other potential language (what conflicting language?”

1. EPA attempts to find ambiguity actually read new words into the statute (REWRITE)
   1. They compare this to the Tailoring Rule from *UARG* (OUCH!)
2. EPA tried to delist EGUs (from § 112) before regulating under § 111(d)
   1. This is not a gap at all, just a way to prevent double regulation
3. Distinction between Substantive and Conforming Amendments
   1. Has EPA briefs explaining this this was a substantive change (Both Clinton (1995) and Bush (2007))
4. EPA’s claim that the Law Revision Counsel erred is inconsistent with actual procedure
   1. DC Cir Case: These kind of amendments doesn’t create ambiguity
5. Even if EPA is right, cts should give effect to BOTH amendments, every word (DC Cir case)
6. They explain that “***receding***” means that the Senate is allowing house amendment to control
7. No *Chevron* for putative ambiguity b/c no delegation to choose which statues applies
   1. Potential EPA Response: We assume both apply, we should get deference
      1. Petitioner Response: Still no *Chevron*, major question & lack of expertise (*King*)

**RL**: This brief tells SUCH a compelling story, the Senate intended to do this! This is there strongest argument. Essentially, there is no gap at all, you don’t need § 111(d), use § 112 to regulate GHGs, you made your choice when you listed EGUs as a category under § 112.

* EPA doesn’t think § 112 is the way to do it, so it are going beyond the fenceline

From **RL** Slides:

* U.S.C. Plain Meaning
* EPA Longstanding Interpretation U.S.C. Language
* Legislative History Section 112 Expansion Story
* Implausibility EPA Interpretation U.S.C. Language
* Failed Clerical Amendment Rightly Jettisoned
* No Chevron Deference
* Separation of Powers

Respondent’s Arguments:

(the arguments in the stay briefs were almost all purposive arguments)

**~The Fenceline Issue~**

Petitioners start with the ***plain meaning***: they move through the statute; procedure 🡪 the standard of performance 🡪 for + to 🡪 a (particular) source 🡪 facility, building 🡪 separate definition for owner/operator…

Petitioner’s Arguments:

1. Applying Standard of performance cannot go beyond the physical source (§ 111(d) on its own terms)
2. “Performance” is how to do something, it cannot be a complete exclusion of activity
   1. Similar to *MCI* and *NFIB*
3. Shifting generation is an “intermittent control”, precluded by Stan. of Performance definition
   1. Response: No a shift is permanent and continuous (or better yet, not a SoPerformance)
4. No Authority to reorganize the energy gird w/o clear statement from Congress (*UARG*, *B&W*)
   1. DC Cir case says gird is not for EPA under CAA
5. Intrastate Energy Production is not even delegated to FERC, EPA needs a clear statement
   1. Traditional State Regulatory Domain
6. EPA can only accomplish the BBs by rewriting the meaning of “source” to include owners and operators (BEYOND THE FENCELINE)
   1. B/c of the § 111(b) requirement for § 111(d), both must regulate the same source but with the reinterpretation of “source,” it means different things in these two provisions
   2. Owners/operators are not regulated under § 111(b)
   3. *ASARCO* says EPA may not “embellish the definition of “stationary source”
7. Departs from longtime agency practice – 45 yrs(??)
8. This is essentially a cap and trade program but congress rejected that!
9. These policy decisions are beyond EPA’s expertise, should be reserved for Congress (MQD?)
10. Slippery slope 🡪 If upheld they can mandate shifting between industry in any field

From **RL** Slides:

* Plain Meaning
  + “Procedure” “Plans” “Performance”
  + “Source” “For” “To”
  + “Useful Life” “Continuous Emission Reduction”
* EPA Longstanding Contrary Practice
  + Contrast Section 110
  + CADC Precedent “Source”
* Inconsistenty/Absurdity of Contrasting New Source Regulation
* No Chevron Deference
  + Transformative
  + No EPA Expertise
  + Raises Serious Constitutional Issues
* Hurts Poor/Minorities

Respondent’s Arguments:

(In stay briefs, EPA points out that some of the movants advocated for “cross-boundary” measures like cap and trade in the mercury rule)

**~Litigation Status Report & Summing Up~**

Respondent Brief:

Fenceline Issue:

* *AEP* (helps b/c) fed common law is precluded b/c EPA has power under § 111(d) to regulate
* Yes, the CPP has indirect effects on energy, that can’t be helped but it regulates no other area of energy production, markets, etc., just emissions.
* Generations Shiftin is a “System”
  + EPA acknowledges restraints on or limiting principles for “system” (uses dictionary not CPP definition of system…problematic?)
    - Must apply to sources (planting trees is no good)
    - Must be action sources can implement themselves
    - Must target supply side (rather than consumer) activity (BB4?)
* Generation Shifting is adequately demonstrated, EGs are already doing it for various reasons (including reducing GHG emissions)
  + Other CAA programs rely on G-S
    - Cross-wind rule (Transport Rules)
      * Potential Response: they rely on them in practice but where they considered when making the rules? The question is not whether industry can do it but whether EPA can consider it.
    - Acid Rain
    - HAPS (installation controls)
    - Mercury Rule
* G-S is the “best” system
  + EPA rejected sequestration and co-firing 🡪 too expensive
    - Also rejected because EGUs wouldn’t have done it . . . is that relevant?
  + BB1 by itself would have been are inferior (in fact it might have made things worse)
* G-S gives an “achievable” degree of emissions limitations
  + Achievable by everyone b/c 77% of coal-fired plants are affiliated w/ gas units
  + These guidelines are following industry trends
    - The change to cleaner energy is already happening
      * It may be costly and be a push (asking for running, not walking) but it is not a reorganization of the energy system
* Petitioners are wrong when they say we can’t consider G-S
  + Ct should apply *Chevron*
    - King is inapplicable, we have expertise
    - UARG is inapplicable; not rewriting a clear numerical threshold and we are regulating a long time polluters, not new polluters
  + Interpretation is reasonable
    - Practical arguments 🡪 Energy industry is going to do this anyway
    - Context:
      * Petitioners want it both ways, say states can require it but say EPA can’t consider it
        + Has to be a reasonable interpretation is states can require it
      * BSER is broader than language used elsewhere in CAA
        + Congress can be stingier when they want to be
    - EPA has necessary expertise
      * No central planning
      * EPA has done similar things before
    - Petitioners view would forbid indirect effects (thus any regulation of EGUs)
    - Cooperative Federalism 🡪 lots of flexibility in “how” to apply BSER
    - Text:
      * “For” & “applicable to” is about performance standards not emissions limitation, the latter is what EPA set for states so they can set the former
      * No conflation of statutory source & owner/operator
      * Push back on ASARCO
        + Decided before Chevron and actually cuts the other way
      * Consistent with definition of stationary source b/c SoPer is about emissions, not production
      * Continuous arguments fail because of conflation of emission limitation and SoPer
    - Consistent with past previous/preexisting implementation
      * EPA’s interpretation has not changed
    - New & Existing source guidelines nor not incompatible
      * No conflict in SoPer
        + Stringency can’t be directly compared

They go into effect at different times and new sources “rachet-up” (this is only temporary)

New sourse standards apply to sources directly

Either way, nothing in stautes says “new must be more stringent

Example used by petitioners is wrong

* + EPA did not usurp state authority to set SoPer
    - Administrator must set BSER, then sates us that for SoPer

From **RL** Slides:

**Petitioner’s Arguments**:

* Plain Meaning
  + “Procedure” “Plans” “Performance”
  + “Source” “For” “To”
  + “Useful Life” “Continuous Emission Reduction”
* EPA Longstanding Contrary Practice
  + Contrast Section 110
  + CADC Precedent “Source”
* Unreasonable EPA Interpretation
* Inconsistency/Absurdity of Contrasting New Source Regulation
* No Chevron Deference
  + Transformative
  + No EPA Expertise
  + Raises Serious Constitutional Issues

**Respondent’s Arguments**:

* Plain Meaning: “Procedure” “Plans” “Performance” “Source” “For” “To” “Useful Life” “Continuous”
  + *EPA Authority Determine When Plans Satisfactory*
    - *State Plans Must Establish Standards of Performance*
    - *Standards of Performance Must Reflect BSER*
    - *EPA Administrator Determines What BSER Has Been Adequately Demonstrated*
    - *Best Includes “Cost” “Energy Requirements” and “Achievable*
  + *Generation Shifting Is A “System of Emission Reduction”*
    - *One Way to Reduce Emissions*
    - *Has Limiting Principles*
      * *Can Be Done By Sources Themselves*
      * *Not offsets*
      * *Not Reducing Demand*
  + *Generation Shifting Has Been Adequately Demonstrated*
    - *Power Plants Do All The Time -> Not Fundamentally Restructuring Grid*
    - *Essential Part of EPA’s Past Rulemakings*
    - *Grid Allows*
    - *Many Petitioners Supported in Past*
  + *Generation Shifting “Achievable”*
    - *Most Already Do*
    - *Most Coal Fired Affiliated With Other Power Sources (Natural Gas, Renewable)*
  + *Textual Snippets*
    - *“For” “Applicable” “Individual Sources”* 
      * *Do Not Limit Basis for BSER*
      * *Requires Only Ultimate Limits Be Individual and Are Here Just That*
    - *“Performance” -> Refers to “Emissions Performance”*
    - *“Continuous” -> Need Not Be Continuous (1990 Delete) But Must Comply Continuously*
    - *“Useful Lives” ->* 
      * *States Still Can Do So In Own Plans If Want To*
      * *Statute Nowhere Says EPA Must Allow States To Relax Standards Based on Useful Lives*
* No Chevron Deference : Transformative, No EPA Expertise, Raises Serious Const Issues
  + No Question EPA Delegated Authority Regulate Power Plants
  + Not Transforming Grid; Just Regulating Pollution Emissions -> Core EPA Authority
  + Not Ignoring Unambiguous Text
  + Not Sweeping In Millions of Unregulated Sources
  + Just Regulating Single Largest Source of CO2 Polluters
  + EPA Expertise: “Energy Requirements” and Just Pollution Control; Not Central Energy Planning
  + Not Interfere With State Electricity Regulation or FERC
    - Pollution Regulation Always Affects Electricity Price: Not Interference
    - State Retain Authority Decide Rates
    - Not Supplant FERC Authority Interstate Rates
  + Unreasonable EPA Interpretation
  + *EPA Interpretation Reasonable*
  + *System*
  + *Sources Already Do*
  + *Will Be Much Less Expensive*
  + *Does Involve “Production Process” and “Design and Operations”*
  + *Grid Network Part of Plant’s Operations and Processses*
  + *Symmetry: If States Can Do, EPA Can Interpret to Require*
* Inconsistency/Absurdity of Contrasting New Source Regulation
  + *Not Different Definition of System*
  + *Just Different Considerations Prompted Not Use Generation Shifting For New*
    - *Different Lead Times: New Apply Immediate; Existing Do Not*
    - *Already Making New Adopt Very Expensive Measures (Partial CCS)*
    - *New Sources Limits Can Be Revisited in 8 Years; Might Well Become More Stringent Then*
    - *New Sources Don’t Have Advantage of Emission Rates Credits; Existing Do*

§ 112 Exclusion Issue:

* Language is ambiguous and EPA interpretation is reasonable
  + House language by itself is ambiguous because it used “or” not “and”
    - RL: They are doing this to say that no one has the “plain meaning” high ground but it is problematic because there is no ambiguity if everyone agrees that this is an unreasonable interpretation
    - Read literally any non-criterion pollutant may be regulated under § 111(d)
    - Look at WHAT is regulated not just WHO (*Rush Prudential*)
  + Language taken together:
    - Cite *UARG* for proposition that “any pollutant” should be read w/ “reasonable context, appropriate meaning”
    - Statutory Purpose: 1990 amendment was to strengthen, not weaken scheme
    - Context: When taken in scope of statutory scheme (King) petitioners reading creates gaps
      * § 112(d)(7): if EPA had regulated EGUs in the opposite order then they wouldn’t be precluded from regulating this way
      * It is true that we have a choice between 111 and 112 for EGUs but petitioner’s reading would apply to all source categories and such a choice does not exist from many of them
    - Leg History: No word from congress they intended big change
      * No intention to dramatically change scope, just update
      * There would be no “double regulation” because the two provisions regulate different pollutants.
        + Double Regulation can’t mean same source b/c some sources are subject to **four** provisions under CAA, that is why Title V permits exist, to manage all of the SoPer at once.
  + Senate Amendment Plainly allows for CO2 regulation at EGUs
    - BLL that USC does not trump statutes at large
    - After textual argument, rejects idea that this is a conforming amendment
      * Even if it is, cts have given effect to such amendments
    - Receding was to broad objections to the amendment, not to the amendment itself
  + EPA’s interpretation avoids a conflict in the amendments
    - Canon that statutes should be read as coherently as possible
    - If read cumulatively (as petioners want) then it would be a disjunction; either not hazardous or not a source category under § 112
    - If they truly cannot be reconciled, disregard both (Scalia)
    - No reason to throw out *Chevron* due to a conflict, this creates a gap (via ambiguity) that the agency can and should have the power to fill (*Scialabba* – truly conflicting provisions create ambiguity which agencies get to interpret)
  + This interpretation is not foreclosed by AEP (it is the only interpretation consistent with AEP)
    - Wasn’t briefed
    - AEP sees §§ 108 & 112 functioning identically (about pollutants, not sources)
    - Petitioners in AEP said we could regulate under § 111(d) even though EGU’s were already listed in § 112
  + Interpretation is consistent with past rulemakings
    - First. We can change interpretations (*Chevron*, *Brand X*)
    - No Change (petitioners agreed w/ this same position in the past)

From **RL** Slides:

* U.S.C. Plain Meaning
  + *No Plain Meaning -> “Or” Means Any Non-Criteria*
  + *House Amendment Ambiguity -> “Regulated” Could Refer to “Any Pollutant”*
  + *EPA Interpretation Reasonable*
    - *Petitioner’s Interpretation Would Nullify 111(d) Because 140 Section 112 Source Categories*
    - *Power Plants Only Category EPA Given Option; All Other Categories Eliminated From 111(d)*
    - *Frustrate Regulation of Dangerous Pollutants*
    - *Senate Amendment Clearly Allows*
    - *Absurdity of Which One Comes First: Section 111(d) or Section 112*
    - *At Least Give Effect to Both Means EPA Interpretation Permissible*
* EPA Longstanding Interpretation U.S.C. Language
  + *Not (So) True; Taken Out of Context*
  + *EPA Can Change Mind*
  + *Petitioners Previously Took Other View*
* Legislative History Section 112 Expansion Story
  + *No Double Regulation of Pollutants; Source Overlap Part of CAA*
  + *Complete Legislative History Silence*
* Failed Clerical Amendment Rightly Jettisoned
  + *Office of Code Revision Cannot Trump Statutes At Large*
  + *No Legitimate Distinction that One “Technical” and Other “Substantive”*
  + *Any Senate “Recede” Not to Senate Amendment*
* No Chevron Deference
  + *Scialabba v. Cuellar De Osorio*
* *AEP* 
  + Not Briefed/Argued; Not Petitioners View In That Case
  + If True, No 111(d) Then, Because 112 Already Underway

Logical Outgrowth Issue:

From **RL** Slides:

* Uniform National Rates Not Proposed
  + *Supplemental Noticed Regional*
  + *Uniform National Logical Outgrowth Regional*
    - *Uniform National Less Stringent*
    - *Uniform National Longstanding Agency Practice*
* Emission Limits Applicable to Individual Units Not Proposed
  + *Not True; Notice Given*
* Units Covered Expanded
  + *Notice Provided by Cross Reference New Source Rulemaking*
* Building Block Basis Shifted from States to Regional Grids
  + *Supplemental Notice Provided*

*🡪 No Substantial Likelihood Rule Would Have Significantly Changed*

10th Amendment Issue:

* This is Cooperative Federalism
  + Always free to not file a plan
* No commandeering/Coercsion
* No Const. Avoidance Canon

From **RL** Slides:

* Practical Effect is Compulsion -> Unless States Act Loss Reliable Electricity
  + *Textbook Cooperative Federalism*
  + *No Funding Denial*
  + *No required State Actions*
  + *Reliable Electricity (no record support)*
* Plan Assumes All Kinds of State Actions to Increase Other Electricity Sources (permits, regulations, decommissioning coal sources…)
  + *State Decision to Regulate, Tax Activities Not Commandeering*
  + *EPA Not Telling States To Regulate or How To Regulate*
* States Will Receive Brunt Citizen Complaints

**~Exam Issues~**

Fenceline Issue:

* System
* Standard of Performance

§ 112 Exclusion:

10th Amendment:

The reason I didn’t think the 10th amendment arguments were strong at first is because I didn’t understand the plan. The better I understand it the more concerned I become.

I think this the one I want to talk about most. I am extremely curious about the fact that this looks like a case in which a FIP could not actually do a SIP can do because a FIP would not have the power to site renewable energy facilities nor the needed additional natural gas facilities. Now this highlights many issues and maybe none of them are the actual 10th Amendment issue but the 10th amendment question is a limiting factor.

First, this gets to the question of achievability. For a cooperative federalism program to be achievable it would have to be achievable even if the states wished to take no part. So, it may not be enough to show that there is enough state land to cite the soon-to-be-needed facilities, or that states have the (wo)man-power to take care of all of the permitting, etc. EPA has to show that they could do it all by themselves and it isn’t clear to me that the record addresses this. If the record is deficient it could get sent back as A/C because there is not a rational connection between the facts found and the decision made. Thus, the 10th amendment and the cooperative federalism scheme bleeds heavily into, in fact it sets the parameters of, the achievability inquiry.

Second, it gets to the question of reasonableness of EPA’s interpretation of “System” and “Source.” Again, the CAA is premised on idea of cooperative federalism. Is it reasonable to interpret System to mean a system that necessarily dictates actions that only the states can take? While EPA argues that System can be reasonably be interpreted to mean generation shifting, that shifting has taken into account facilities that do not yet exist. Additionally, it is by defining sources and systems this way that new facilities must be built and therefore that states must get involved. No headwind though because it isn’t the interpretation that raises a significant const. issue, it is the lack of evidence in the record that the CPP is achievable without state action.

This brings us back to the questions of coercion. As I mentioned before, this is a strange version of cooperative federalism because it is TRULY dependent on cooperation. By the same token, the traditional understanding of coercion may not be the best indicator of a 10th amendment violation. Truly there is no *NFIB* or *New York* type coercion but because of the interdependent nature of the CPP on both state and federal action, if the federal gov’t proceeds with its “half” of the responsibility it will put the states in such a position as to make them act. EPA will have to decommission coal power plants or at least severely limit the amount of power produced at such units. This means that there has to be power created somewhere else. In some states, on some grids, there may be enough gas powered units to pick up the slack but in others there will not be (otherwise building block three would not be essential to the plan). Yet, this problem too might be resolved by nearby states just citing more renewable and gas facilities and passing that power through the grid but my question then is, is that contingency handled in the record? It is possible that the states could simply refuse to do their parts and let the lights go out but even EPA seems to think that they have a responsibility to maintain reliable energy and making a state choose between keeping the lights and not participating in a federal program seems to be the very definition of coercion, even if no case has addressed it before.

All that being said, it may be the case that the Court will determine that the chance that enough states refrain from acting that it causes the plan to be unachievable is so remote that there is no coercion with regard to a facial challenge to the plan and therefore let the plan go forward and wait for as applied challenges of coercion (but this is one area in which having 28 states opposing the plan really hurts, what if they all demanded to be FIPed?).

Logical Outgrowth:

EXAM Thoughts:

How do the *Chevron* arguments differ between Fenceline and § 112 exception?

UARG problem with the “major source” limitation (10, 25 tpy) Bring in too much so transformative

* Why no 112 besides this? Well MACT – technology only

Achievable as a cost matter, as a technology/science matter, as a statutory matter

How will the DC Cir Rule? (Memo)

EPA’s greatest vulnerabilities?

* How could the CPP be improved (if you could re-pass it for example)

What are the X# of questions that EPA will be asked in oral argument? How would you answer them?

Questions:

Logical Outgrowth:

* Do you know of any other cases where a ct has found notice provided by past rulemakings?
  + Possible that this cuts the other way for notice; it is significant that EPA was departing from past practice and so more, not less, notice needed to indicate a return to normal practice
* Are there any States that the final rule is more stringent for than was the proposed rule?
  + If so, how is this “harmless error”?
    - Response: There is no state for which the national standard it is more stringent vis-à-vis the regional standard
* Wouldn’t you say that given EPA’s explicit assertion that there would not be a national rate that implicit notice would not be enough, that is, that there is a presumption against national rates unless explicitly notified otherwise?

10th Amendment:

* What does 10th Amendment mean?
  + Just legal coercion (as in *NFIB*, taking away funds) or is practical coercion enough?
* (Other questions that get to EPA’s legal theory, *see* Fenceline)

§ 112 Exclusion:

* Doesn’t “any air pollutant” answer the “what” question? If so, how is there ambiguity?
* Can GHG’s be regulated under § 112?
* If only one reasonable interpretation of amendments, how is § 111(d) ambiguous?
  + EPA is engaging in sleight of hand
* Do you get deference for Choosing between statutes?

Fenceline:

* RL: What is your legal theory?
  + When is something transformative? How doe we tell?
    - If this is transformative, is there a clear statement?
      * If there isn’t a clear statement, can you still regulate? (Probably no)
  + Could EPA set an emissions rate of zero?
  + Could EPA do BB4?
    - *I.e.*, Did you get rid of it for legal or political reasons?
    - (Maybe cite FERC v. Energy Power Supply for why you could – could regulate demand response)

**Procedure**:

* Does having a more lenient final standard necessarily mean that the final rule is a logical outgrowth of the proposed? Even if you said that you wouldn’t implement national standard?
* Can you give me any precedent for the past rulemaking notice? Especially when you said you wouldn’t?
* Can you give me an example of a cross-reference to a different proposed rule?
* Can you provide a case in which a direct reversal was acceptable?
  + The ones in which they found no logical outgrowth, complete reversal of the position, is this enough like those cases?
* Exhaustion issue: if there’s no notice, how are you supposed to exhaust the issues?

**Tenth Amendment**

* Can you give me other examples of a program of “cooperative federalism” wherein the federal government could not implement all aspects of a program in a FIP?
  + Does that make it different in kind?
  + State PUCs have exclusive domain over siting.
* Is it the EPA’s position that there’s only a 10th amendment problem when there’s a legal obligation for the States to act?
* NFIB, there’s no legal requirement, however the States will have to act in order to keep the lights on, and keep energy prices low.

**§ 112 Exclusion**

* Could you regulate CO2 under Section 112?
* If so then where’s the gap?
  + If we had instead regulated EGUs as a source category under 111(d) first, and then regulated them under 112, there wouldn’t be an issue. Illogical structure of the act.
    - The laws can coexist, the double regulation
    - § 112(d)(7): shows congress didn’t intend to prevent double regulation
* Has your interpretation of the Section 112 exclusion changed from the final rule?
* How can the “or” from the previous sentence create ambiguity 30 words later?
* Is this contrary to the EPA’s previous position on § 112 exclusion?

**Fenceline Issue:**

* Is this transformative or not EPA?
* What is the petitioners’ view of the transformational cannon?
* Is generation shifting a standard of performance?
  + This seems different in kind from other standards in the act.
* Would your legal theory allow for building block 4? Was your motivation for removing it political?
* Does EPA lack expertise in this area?
  + *Gonzales, Buwell*
  + EPA’s expertise includes pollution control…here pollutant is CO2.
* If the rule is just following market trends, then why have it at all?
* Are you interfering with FERC or the states authority in promulgating this rule?
* If the EPA determined that zero emissions was “achievable” could it require that of the sources?

***Interesting Topics***:

* 112 issue and whether they could regulate under that provision
  + They probably can’t because of the *UARG* “major source” issue
  + If they say they can, where is the gap? They are free to
* BB4: whether it could be included
  + If EPA says it can, this is beyond the Fenceline+!
* What is a source? (owner/operator (53-54, 68) 🡪 Looks like they are dodging the question
* Transformative or not
  + Best argument is that the problem is, the solution is not; EPA does not need a clear statement to go beyond the Fenceline.
* NB: ALWAYS plan on discussing the difficulty of mapping the law to nature (especially a problem as complex as climate change – there are things about Climate Change that make the CPP easier (and more constitutional) (e.g., fungibility of CO2 emission) and there are things that make it more difficult (intimate ties between pollution and energy production).
* How interrelated the Fenceline, 10th Amendment, and § 112 Exception issues are.
  + *Chevron* is definitely implicated via the specter of coercion. Likely there isn’t a violation but this is a question that needs more investigation because the CPP is just a different kind of beast.
    - In fact, the it would be fascinating to consider what the 10th Amendment theory is in this case and should it be the same?
      * Know your role: This is an appellate ct, it isn’t within its purview to create a new 10th amendment doctrine. Should be flagged though.
    - But is *Chevron* really at issue? Do either of the interpretations lead to the potential 10th Amendment violation? The Fenceline interpretation can be read two ways: If read broadly, they should get Chevron because it isn’t the “beyond the fenceline” interpretation that leads to the const issue, trading is certainly not coercive. If read narrowly as to generation-shifting itself, it becomes a closer question but also becomes fact intensive. As to § 112, there is nothing specifically about regulating under § 111 that implicates the 10th amendment except to the extent that it allows EPA to use BSER and THEN interpret system to go beyond the fenceline (and that leads us back to the above).
  + Complex interactions between the statutory requirement of achievability, the legal theory that allows for generation shifting (and therefor the possibility of a 0 emissions rate), and the constitutional backstop that cooperative federalism not commandeer/ coerce state actors. Trading would become obsolete because no amount of trading can take a source that emits pollution and make it count as 0 emissions.
    - Possibly the strongest response to the 10th Amendment issue is that the question is really about achievability and therefore is fact intensive. This means that it may be better to handle this problem as an as applied challenge, rather than a facial challenge. Then the ct can see if there is coercion in applying the CPP in an “achievable” way.
      * Any claim that there is irreparable harm is belied by the fact that States can always opt for a FIP, and the FIP would then be the measure for the 10th amendment violation.