Institution **Harvard Law School**
Course **S16 Lazarus - Adv Enviro Law**

Event **NA**

Exam Mode **TAKEHOME**

Exam ID **410962**

Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	**2496**	**12898**	**15371**
Total	**2496**	**12898**	**15371**

Answer-to-Question-_II(a)_

Question II(A), Part (1):

Respondents, Attorney for the Department of Justice:

Your Honors, and May it please the Court,

The importance of the climate change crisis that the Clean Power Plan seeks to address cannot be overstated. It is not just the greatest environmental and national security threat of our time but perhaps of all time. The effects of what we do today to address this crisis will echo into the future, ameliorating or exacerbating the challenges that must be faced by the generations to follow.

While there is no question that Climate Change itself is transformative, of both the natural world and of society, the steps taken by EPA to address this problem, simply, are not. The Clean Power Plan follows a time-honored model of cooperative federalism, consistent with the text, structure, and purpose of the Clean Air Act, to control pollution. It is an instantiation of the aspirational character of the Clean Air Act programs, grounded in the statutory requirement that any promulgated standard be achievable. As such, it gives industry and states flexibility to meet the requirements of the Plan in the their own way. For these reasons, the Clean Power Plan should be upheld.

As with all cooperative federalism programs, the ideal scenario is for the states and

industry to work with EPA to maximize the potential of the Clean Power Plan. But states are not required to take any action, if they so choose. The Plan can be implemented by EPA via Federal Implementation Plans, allowing the states to remove themselves from the process, freeing them from any political or financial obligations associated with the Plan. EPA will then work directly with industry to carry the Plan into effect.

Like cooperative federalism, the Clean Power Plan features other typical emissions-reducing tools, familiar to both EPA and industry. EPA's interpretation of "System" to allow for consideration of generation shifting as part of building blocks two and three is consistent with current industry trends and the system of regional grids that determine the ebb and flow of the country's energy. EPA's consideration of such a factor in no way requires that either the states or industry actually participate in generation shifting. As with most Clean Air Act standards, EPA uses relevant factors to determine the achievable emissions rate. Once determined, the regulated parties are free to apply those same methods, or not; they have the flexibility to meet the standard in the manner that is best suited to them. For example, under the Clean Power Plan, states could eschew generation shifting in favor of trading emissions credits. The fungibility of CO2 creates a nation-wide market for such credits, allowing states with diverse modes of energy production to complement each other's needs.

Furthermore, EPA's interpretation of § 111(d) is consistent with the purpose and structure of the Clean Air Act. § 111, which regulates, first and foremost, new sources of pollution contains a gap filling function in § 111(d). §§ 108-10 create the National Ambient Air Quality Standards for a few select criteria pollutants. Such pollutants are

regulated by region and not by source. § 111(b) provides for source-directed regulation of new sources. § 112 has a list of Hazardous Air Pollutants that it regulates from both new and existing sources. There is then a gap in which non-hazardous, non-criteria pollutants emitted from existing sources are not regulated. Enter § 111(d) and the 1990 amendments to § 112. Congress, unhappy with the limited headway that EPA was making with hazardous air pollutants, decided to strengthen the CAA. It directly listed more than 180 pollutants and lowered the bar for listing additional hazardous air pollutants. When the House and Senate corrected the §112 reference in § 111(d), they were not trying to undue what they had just done, but assure that § 111(d) acted consistently with its original purpose, to act as a gap-filler.

Any argument that the amendments to § 111(d) were to prevent double regulation of sources are unavailing, the structure of the CAA contradicts this. §§ 108-10 are focused on particular pollutants. Regions are in attainment or nonattainment according to each individual criteria pollutant. The standards set forth in §§ 111(b) and 112, while providing subcategories for sources and applying to sources directly, are indexed on each pollutant emitted. It is in this context what the Court should read § 111(d)'s gap-filling purpose, not to avoid double regulation of sources but double regulation of pollutants. This is supported further by the Title V permit, which organizes and harmonizes the different standards that apply to a single source. Such a tool would be largely unnecessary if Congress meant for a single source to be regulated by only a single program.

The Clean Power Plan demonstrates EPA's expertise in applying a traditional approach to a transformative problem. At bottom, the Clean Power Plan is a regulation

about reducing emissions. As would be true of any industry, regulating emissions from power plants has indirect effects on their production and distribution. These effects are incidental to the role that EPA plays. The Plan utilizes current and emerging industry practices to seamlessly incorporate emission reductions into the everyday operations of the energy industry, allowing the free market to distribute the allowable emissions where they will be most valuable. EPA has overseen innumerable cooperative federalism programs regarding emission reduction. The publicity surrounding this Rule is different than many of those in the past, but the model, mode, and method are not. This Court should allow EPA to apply its considerable accumulated expertise here, giving dereference to its legal interpretations and upholding its ultimate conclusions.

Question II(A), Part (2):

#1. Could EPA regulate GHGs under § 112?

While we believe that the text of § 112 would allow EPA to regulate GHGs, we believe that recent Supreme Court precedent may foreclose such an option. § 112(b)(2) gives the EPA Administrator the authority to list, and thus regulate, pollutants "which present, or may present . . . a threat of adverse human health effects . . . or adverse environmental effects." Even if the threat posed by GHGs to human health is too attenuated (we do not believe it is), there is no question that GHG emissions, via their contribution to Climate Change, present a threat to the environment. As such, GHGs may be regulated under § 112.

But, in the recent UARG case, the Supreme Court disallowed the regulation of GHGs under the PSD program by reading them out of the term "pollutant". It did this

because the major source threshold for PSD regulated pollutants (100 tpy) when applied to GHGs would allow for the regulation tens-of-thousands of otherwise non-regulable sources. The major source threshold is even lower for pollutants listed under § 112: 10 tpy for any single pollutant and 25 tpy when aggregating all pollutants from an individual source. What's more, the standard of performance is even more strict under § 112 than under § 165, subjecting these newly-regulable sources not just to regulation but a heightened standard of regulation. We believe it still may be possible to regulated GHG's under § 112 by indexing GHGs on something other than CO2, but it remains uncertain. The inability to regulate GHGs under § 112 is consistent with the gap-filling function of § 111(d), and highlights the need to be able to regulate GHGs under that provision.

~Follow-up Question (Judge Srinivasan): It looks like your theory creates a gap not from the structure or purpose of the Act but from judicial precedent. From what you just told us, if not for UARG, you would be permitted to regulate GHGs under § 112. If that is the case, where is the gap?

There are two things that I would say in response, Your Honor. First, however the gap is created, EPA can only work with the legal framework before it. Whether that gap was created by the statute or by judicial precedent, the law leaves a gap for § 111(d) to fill.

Second, we do not understand anything in the Clean Air Act to create a requirement that any pollutant that can be regulated under a provision must be regulated under that provision. Ammonia, for example, could easily be regulated under § 112 and yet is regulated under §§ 108-10 as a precursor to particulate matter. Where a pollutant may be regulated under more than one program of the Clean Air Act, we believe the Administrator has discretion to determine under which of these programs such a pollutant

will be regulated. Such is the case for GHGs: even if judicial precedent does not foreclose their regulation under § 112, EPA has discretion to regulate them under § 111(d). This does not undermine our claim that § 111(d) serves a gap-filling purpose. The statutory scheme is still the source of the gap: non-criteria, non-hazardous pollutants emitted from existing sources. Congress provided § 111(d) to give EPA the option to regulate such pollutants without using §§ 108 and 112.

#2. Would your interpretation of § 111(d)'s "System" permit EPA to require a 0 emissions rate?

Our interpretation does allow for such an emissions limit in theory. However, a 0 emissions limit is not currently achievable and thus would not be permitted by the statute, not because "System" is not sufficiently capacious but because the statute indexes "System" on what is achievable in reality.

~Follow-up Question (Judge Henderson): But wouldn't the only way to achieve an emissions limit of 0 be to shift generation? No amount of trading credits can zero-out coal or gas GHG emissions. If generation shifting is required, isn't the 10th amendment implicated?

You are correct, Your Honor, generation shifting would be required to achieve an emissions limit of 0 with our current mix of energy sources. But we disagree that this implicated the 10th amendment. Coercion and commandeering are about legal requirements: in New York the Court found coercion because the statute at issue required the states to take legal title for the waste. In Printz, there was a provision in the statute that required state authorities to take specific action. In NFIB, if new legal requirements were not met, previously allotted funds would be denied to the state. As discussed above,

the states are always welcome to opt-out and allow EPA to use a federal implementation plan; they are not legally required to do anything.

Furthermore, this question, at bottom, gets at achievability and not the interpretation of "System." The limit in the scenario you present, Your Honor, would not be the 10th Amendment, but achievability; whether EPA's theoretical 0 emissions rate could be met without creating new sources of energy production in a non-participating state. As I said, such a system does not exist currently but it is possible that in the future it would not only be achievable but would be achievable without generation shifting, it would depend on our mix of energy production.

It is true that on a certain set of facts, the Clean Power Plan is more than just nominally about cooperation between the states and the federal government. A federal implementation plan cannot do all that a state implementation plan can do, namely, site new gas and renewable energy sources. It is possible that if every state refused to act that a FIP would not be enough to carry the Clean Power Plan into effect. However, there are 18 states that have written on EPA's behalf, such a scenario of total-non-participation is implausible.

Finally, questions of achievability are not well suited for facial challenges as they are fact dependent and our burden here is simply to show that the emissions rate is achievable through constitutional means in at least one scenario. We have more than met that burden. If states are still concerned about "the lights going out," such a challenge should be brought when the Clean Power Plan is applied to an individual state. The achievability question and the facts intimate to it can be fully and more competently litigated at that time.

#3. Given the scope of the Clean Power Plan, its effects on the production of electricity, and the specter of a 10th Amendment violation, how can you expect this Court to get to Chevron step-2, let alone grant you deference if we get there?

Your Honor, we believe the term "System" to be capacious enough to be reasonably interpreted to allow EPA to regulate "beyond the fenceline" by considering factors such as generation shifting when setting the emissions rate for power plants under § 111(d). "Beyond the fenceline" programs have been used from the very beginning of § 111: President Nixon's EPA calculated BSER by considering "precombustion cleaning of coal" which owners and operators paid third parties to do offsite. (Brief, Institute for Policy Integrity). For these and other reasons we believe our interpretation of "System" to be reasonable.

We also believe our interpretation of the § 112 exclusion to be reasonable. Under Scialabba, the putatively conflicting amendments create ambiguity and our interpretation harmonizes them, consistent with the canon that provisions of a statue should be read harmoniously. It also gives effect to § 111(d)'s gap-filling purpose and the overall structure of the act. These reasonable interpretations should not be ignored due to claims that the Clean Power Plan is transformative, that it violates the 10th Amendment, or that EPA lacks expertise. All such claims are incorrect.

As mentioned above, there is no serious constitutional issue. The Clean Power Plan neither coerces nor commandeers the states. As textbook cooperative federalism, it provides states with the flexibility to fully participate or allow EPA to handle implementation. Therefore the canon of constitutional avoidance does not apply. Any serious 10th Amendment question is better handled as a statutory question of achievability. This satisfies both Chevron and the canon of constitutional avoidance as

well as the Court's interest in hearing and resolving fact-laden questions at the as-applied stage.

Additionally, the Clean Power Plan is squarely within the expertise of EPA. All regulation of emissions will have some effects on the industry doing the emitting, but these indirect effects to not remove the regulation from EPA's wheelhouse. To say that EPA lacks expertise to regulate emissions because those emissions come from power plants implies that when EPA is regulating any industry, it must either promulgate joint rules with other expert agencies or should be absorbed into such other agencies, which will carry out environmental regulation on an industry by industry basis. In addition to providing an absurd notation of the administrative state, it is completely inconsistent with the Congressional delegation of environmental protection issues to EPA.

Finally, the Clean Power Plan is not transformative. While it addresses a transformative problem, one for ages, it itself uses traditional tools and modern industry trends to address that problem. Because EPA's interpretations are reasonable and because the Clean Power Plan is not transformative, does not raise serious 10th Amendment issues, and is within EPA's expertise, this Court should defer to the Plan interpretations of § 111(d).
