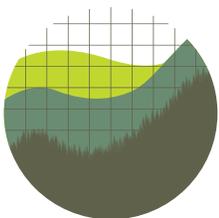




# Setting the Record Straight on the Clean Power Plan

What the Challengers Got Wrong  
at the D.C. Circuit Oral Argument



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On September 27, opponents of the U.S. Environmental Protection Agency’s (EPA) Clean Power Plan presented their case against the rule in a hearing before the U.S. Court of Appeals for the D.C. Circuit. Promulgated pursuant to the Clean Air Act, the Clean Power Plan aims to reduce carbon dioxide (CO<sub>2</sub>) emissions from the nation’s existing power plants to 32% below 2005 levels by 2030.<sup>1</sup> A coalition of states, utilities, coal companies, and other industry groups have sought to block the rule since it was first proposed in June 2014. (Multiple early suits were dismissed as premature.<sup>2</sup>) A competing group of states, municipalities, power companies, environmental and public health organizations, and clean energy producers have intervened to support EPA.

Over the course of the seven-hour hearing, the Petitioners challenging the Clean Power Plan asserted and implied a number of things that don’t stand up to scrutiny. In this report, we set the record straight on eleven of their more notable misstatements.

## (1) The Clean Power Plan’s use of generation shifting is not unprecedented

A central issue in the case is whether EPA permissibly interpreted the phrase “best system of emission reduction” in section 111 of the Clean Air Act to encompass “generation shifting”—that is, increasing the proportion of electricity that is generated at relatively cleaner sources of electricity and decreasing generation at relatively dirtier sources.<sup>3</sup> Typically, a court will defer to an agency’s reasonable interpretation of an ambiguous statutory phrase like “system of emission reduction.” This is known as *Chevron* deference, after the Supreme Court case in which it was first described.<sup>4</sup> But a more recent line of Supreme Court decisions have suggested that agencies can be subjected to a more stringent standard of review when a rule represents an “enormous and transformative expansion” of an agency’s regulatory authority.<sup>5</sup> In these cases, agencies have been asked to point to clear congressional authorization for their actions.<sup>6</sup> Legal scholars call this the “major questions” doctrine.<sup>7</sup>

Petitioners contend that setting standards based on generation shifting is an “enormous and transformative” expansion of EPA’s power that is not entitled to *Chevron* deference.<sup>8</sup> But the truth is that there are multiple regulatory precedents for the Clean Power Plan’s reliance on generation shifting. EPA cited one of these examples at the oral argument, the Cross-

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<sup>1</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,665 (Oct. 23, 2015).

<sup>2</sup> See, e.g., Ann Carlson, *As Predicted, Premature Suit to Block Clean Power Plan Implementation Fails*, LEGAL PLANET (Sept. 9, 2015), <http://legal-planet.org/2015/09/09/as-predicted-premature-suit-to-block-clean-power-plan-implementation-fails>.

<sup>3</sup> See 42 U.S.C. § 7411(a) (explaining that a standard of performance under section 111 must reflect “the degree of emission limitation achievable through the application of the best system of emission reduction which . . . the [EPA] Administrator determines has been adequately demonstrated”).

<sup>4</sup> *Chevron v. NRDC*, 467 U.S. 837, 844 (1984) (holding that “a court may not substitute its own construction of [an ambiguous] statutory provision for a reasonable interpretation made by the administrator of an agency”).

<sup>5</sup> *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) [hereinafter UARG]; see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000) (“In extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation.”).

<sup>6</sup> UARG, 134 S. Ct. at 2444.

<sup>7</sup> See, e.g., Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2196–02 (2016); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 236–47 (2006).

<sup>8</sup> See Transcript of Oral Argument at 8, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Sept. 27, 2016) [hereinafter Oral Argument Tr.] (Elbert Lin, on behalf of state petitioners, arguing that the rule is transformative because “the emission rates that EPA has set and required under the rule are rates that cannot be met by any individual existing power plant”); *id.* at 10–11 (Lin arguing that Congress did not implicitly “delegate . . . the authority to pass a rule that requires emission rates that can only be met by restructuring the mix of electricity generation”).

State Air Pollution Rule (more commonly known as the Transport Rule).<sup>9</sup> In that rule, which was upheld by the Supreme Court in 2014,<sup>10</sup> EPA expressly took into account the possibility of generation shifting when establishing state emissions budgets for sulfur dioxide and nitrogen oxides.<sup>11</sup>

At the hearing, Petitioners dismissed this example, because section 110, under which the Transport Rule was issued, specifically authorizes the use of marketable permit schemes (also known as emission trading programs), whereas section 111 does not.<sup>12</sup> But the Clean Power Plan does not impose a trading program.<sup>13</sup> It sets targets based on an assumption of generation shifting. While generation shifting *can* be accomplished through trading of emission permits, trading is not the *only* way to accomplish it. For example, a vertically integrated utility with a diversified portfolio of generating facilities can re-allocate generation among them without participating in a formal trading market. Similarly, a plant owner could invest directly in cleaner generation sources rather than purchasing credits from such sources on a trading market.

EPA also took the potential for generation shifting into account when determining the stringency of its 2005 Clean Air Mercury Rule, which, like the Clean Power Plan, was under section 111(d).<sup>14</sup> The rule was ultimately struck down by the D.C. Circuit, but on grounds unrelated to generation shifting.<sup>15</sup> Many more rules have been promulgated with the expectation that they would *result* in generation shifting, even when their stringency was not directly linked to the practice, such as the 2012 Mercury and Air Toxics Standards and various National Ambient Air Quality Standards.<sup>16</sup>

Finally, EPA has relied on practices analogous to generation shifting when regulating pollution sources other than power plants, even in the absence of express congressional authorization. As EPA noted at oral argument, for example, in 1983, the D.C. Circuit upheld a rule limiting the lead content of gasoline that some refiners would be able to satisfy only by buying blending components or lead credits from other facilities.<sup>17</sup> A more comprehensive accounting of this and other Clean Power Plan precedents is available in our prior publication *Familiar Territory*.<sup>18</sup>

As EPA pointed out at oral argument, in prior major questions doctrine cases, the “transformative” aspect of the challenged rule was the industry or entity it sought to regulate. In *FDA v. Brown & Williamson Tobacco Corporation*, for

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<sup>9</sup> Oral Argument Tr., *supra* note 8, at 49 (Eric Hostetler, counsel for EPA, noting that “in the Transport Rule[,] generation shifting played a very important part in the level of the standards”).

<sup>10</sup> *EPA v. EME Homer City Generation, LP*, 134 S. Ct. 1584 (2014).

<sup>11</sup> Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208, 48,252 (Aug. 8, 2011) (explaining that the emission-reduction cost curves used to set state budgets included “increased dispatch of lower-emitting generation” as a reduction technique).

<sup>12</sup> Oral Argument Tr., *supra* note 8, at 37.

<sup>13</sup> It is also worth noting that section 111, the provision under which the Clean Power Plan was issued, contains an explicit cross-reference to section 110, instructing EPA to use similar procedures to establish emission limits under both sections. 42 U.S.C. § 7411(d)(1).

<sup>14</sup> Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606, 28,632 (May 18, 2005).

<sup>15</sup> *New Jersey v. EPA*, 517 F.3d 574, 577–78 (D.C. Cir. 2008).

<sup>16</sup> EPA, REGULATORY IMPACT ANALYSIS FOR THE FINAL MERCURY AND AIR TOXICS STANDARDS 3-16 tbl.3-6 (2011) [hereinafter MATS RIA], available at <https://www3.epa.gov/tncas1/regdata/RIAs/matsriafinal.pdf>; Press Release, EPA, EPA Sets National Air Quality Standards (Apr. 30, 1971) (quoting Administrator Ruckelshaus as saying that “meeting the [ambient standard for particulates] in the time allowed by the law in [seven major] cities will require increasing our total national use of natural gas by about 15 percent”); EPA, LEGAL MEMORANDUM ACCOMPANYING CLEAN POWER PLAN FOR CERTAIN ISSUES 93–94 (2015) (noting that multiple states have included renewable energy installations in their state implementation plans for ambient standards).

<sup>17</sup> Oral Argument Tr., *supra* note 8, at 55–56.

<sup>18</sup> Richard L. Revesz, Denise A. Grab & Jack Lienke, *Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan*, 46 ENVTL. L. REP. 10,190 (2016).

example, the U.S. Food and Drug Administration sought to regulate the tobacco industry for the first time.<sup>19</sup> In *Utility Air Regulatory Group v. EPA*, EPA interpreted its permitting power as capable of reaching millions of previously unregulated sources (though it had no intent of fully exercising that power).<sup>20</sup> Here, Petitioners cannot deny that EPA has already regulated power plants for decades.<sup>21</sup> Instead, they contend that, by basing the Clean Power Plan’s emission guidelines on an assumption of generation shifting, EPA is regulating a familiar source in a transformative *manner*.

It’s not clear that the major questions doctrine can or should be applied when a rule is transformative in design (as opposed to scope). Certainly the case law doesn’t compel this result, which would have the perverse effect of discouraging EPA and other agencies from using innovative regulatory approaches to achieve statutory goals at the lowest possible cost. But even if the court were to accept the Petitioners’ reading of the doctrine, the fact remains that generation shifting has been used in prior EPA regulations and thus cannot be deemed transformative.

To be fair, the generation shifting contemplated by the Clean Power Plan is of a greater magnitude than that caused by previous rules. In its Regulatory Impact Analysis, EPA projects that, in the absence of the Plan, coal-fired plants would account for 32.8% of total electricity generation in 2030.<sup>22</sup> With the plan, the agency projects that coal’s market share will fall to 27.4% (assuming rate-based implementation), a decline of just over 5 percentage points.<sup>23</sup> By contrast, when EPA issued the Transport Rule in 2011, it projected that the rule would cause coal-fired generation’s market share to decrease by 0.9 percentage points relative to a business-as-usual “base case” projection.<sup>24</sup> Similarly, in 2012, the agency projected that the Mercury and Air Toxics Standards would cause coal’s market share to fall by 0.6 percentage points below the base case.<sup>25</sup> But at the oral argument, Petitioners did not argue that the Plan is transformative because it will cause *too much* generation shifting. Instead, they argued (incorrectly) that generation shifting is entirely unprecedented. In any event, it is hard to support the proposition that the dividing line between an agency’s receiving and not receiving *Chevron* deference lies somewhere between a 1 and 5 percentage-point change in the nation’s energy mix.

## (2) Prior EPA rules created a need for state regulators to take affirmative steps to maintain electric reliability

Petitioners’ primary constitutional argument is that the Clean Power Plan commandeers state officials in violation of the 10th Amendment.<sup>26</sup> At the oral argument, counsel for the government pointed out that, while states have the *opportunity*

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<sup>19</sup> 529 U.S. at 159–60.

<sup>20</sup> 134 S. Ct. at 2442–44.

<sup>21</sup> See Oral Argument Tr., *supra* note 8, at 6–7 (Judge Tatel noting that power plants are “well regulated” sources under the Clean Air Act).

<sup>22</sup> EPA, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE 3-27 tbl.3-11 (2015) [hereinafter CPP RIA] (market share calculated by dividing projected 2030 coal-fired generation under “Base Case” column by projected 2030 total generation under “Rate-Based” column).

<sup>23</sup> *Id.* (market share calculated by dividing projected 2030 coal-fired generation under rate-based policy case by projected 2030 total generation under rate-based policy case).

<sup>24</sup> EPA projected that, in 2014, coal-fired generation would have a 49.1% market share under the base case and a 48.2% share under the Transport Rule. See EPA, REGULATORY IMPACT ANALYSIS FOR THE FEDERAL IMPLEMENTATION PLANS TO REDUCE INTERSTATE TRANSPORT OF FINE PARTICULATE MATTER AND OZONE IN 27 STATES; CORRECTION OF SIP APPROVALS FOR 22 STATES 261 tbl.7-13 (2011) (market shares calculated by dividing 2014 coal-fired generation by 2014 total generation for both “Base” and “TR” columns).

<sup>25</sup> EPA projected that, in 2015, coal-fired generation would have a 48.3% market share under the base case and a 47.7% share under the Mercury and Air Toxics Standards. See MATS RIA, *supra* note 16, at 3-16 tbl.3-6 (market shares calculated by dividing 2015 coal-fired generation by 2015 total generation for both “Base Case” and “Policy Case” columns).

<sup>26</sup> See Opening Brief of Petitioners on Core Legal Issues at 5–6, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 22, 2016) [hereinafter Petitioners’ Core Issues Brief].

to design customized plans to meet the Plan’s guidelines, they are not *required* to do so.<sup>27</sup> If a state declines to submit a plan, EPA will step in and regulate the state’s sources directly.<sup>28</sup> Petitioners maintain, even with direct federal regulation of the plants, state officials would still need to take affirmative actions to ensure that the Plan does not compromise electric reliability.<sup>29</sup> These actions include decommissioning retiring plants and reviewing siting decisions in order to issue permits for new ones.<sup>30</sup> But the same has undoubtedly been true of past EPA regulations that led to shifts in states’ generation mixes, whether those rules were explicitly premised on generation shifting, like the Cross-State Air Pollution Rule, or merely resulted in generation shifting, like National Ambient Air Quality Standards and the Mercury and Air Toxics Standards.<sup>31</sup> No one suggests that those rules pose commandeering problems.

### (3) The Clean Power Plan does not require states to engage in generation shifting

Throughout the day, Petitioners repeatedly suggested that the Clean Power Plan *requires* states to engage in generation shifting,<sup>32</sup> but the truth is that section 111(d) does not require states to use the “best system of emission reduction” identified by EPA so long as their preferred strategies achieve equivalent cuts in CO<sub>2</sub> pollution.<sup>33</sup> Thus, if a state wants to pursue other pollution abatement techniques, like retrofitting coal plants to co-fire with natural gas or encouraging demand-side energy efficiency (as many power companies already are), it is free to do so.<sup>34</sup>

### (4) The statutory text addressing the scope of section 111(d)’s coverage does not unambiguously support Petitioners’ position

As discussed at length during the argument, in 1990, Congress mistakenly passed two separate amendments to section 111(d) of the Clean Air Act, under which the Clean Power Plan was promulgated. One amendment originated in the House, and another in the Senate, but both wound up in the conference bill that was passed by both chambers and signed by the President.<sup>35</sup> During the argument, Petitioners asserted that the House amendment unambiguously supports their position in the case,<sup>36</sup> which is that EPA cannot regulate CO<sub>2</sub> from power plants under section 111(d) because it has already regulated mercury from those plants under section 112.

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<sup>27</sup> Oral Argument Tr., *supra* note 8, at 206 (Amanda Berman, counsel for EPA, explaining that “states have the classic cooperative federalism choice of regulating power plants’ carbon dioxide emissions themselves through a state plan, or declining to do so, in which case EPA regulates private sources directly through a federal plan”).

<sup>28</sup> *Id.*

<sup>29</sup> *See, e.g., id.* at 184 (David Rivkin, on behalf of state petitioners, arguing that “state regulators have a responsibility to ensure sufficient fuel diversity . . . so as to be resilient to future changes in prices” and to ensure “that there’s a sufficient balance between close to [load] generation, versus long distance generation, because transmission is inherently [unreliable]”).

<sup>30</sup> Petitioners’ Core Issues Brief, *supra* note 26, at 82.

<sup>31</sup> *See* discussion of past generation-shifting rules *supra* at pp. 1–3.

<sup>32</sup> *See, e.g.,* Oral Argument Tr., *supra* note 8, at 15–16 (Peter Keisler, on behalf of non-state petitioners, stating that “it forces owners of those existing sources to subsidize the building of new wind and solar facilities”); *id.* at 91 (Lin stating that “what we have here is a rule that requires a different mix of electricity generation”).

<sup>33</sup> 80 Fed. Reg. at 64,755 (noting that the Clean Power Plan “does not limit the measures that affected [electric generating units] may use for achieving standards of performance to measures that are included in the [“best system of emission reduction”]).

<sup>34</sup> *Id.* at 64,755–58 (discussing reduction techniques beyond those included in the “best system of emission reduction”); *see also id.* at 64,725 n.366 (noting that the power sector’s use of demand-side energy efficiency measures has increased in recent years).

<sup>35</sup> *Id.* at 64,710–15.

<sup>36</sup> *See, e.g.,* Oral Argument Tr., *supra* note 8, at 119 (Lin arguing “that’s what the text says . . .”).

Petitioners' assertion that the House amendment unambiguously supports their position is misguided. The text reflecting the House amendment has many possible readings that are inconsistent with Petitioners' preferred approach. As EPA explains in its brief, read literally, the text instructs the agency to regulate any pollutant that is not a criteria pollutant.<sup>37</sup> In order to read the text as Petitioners would prefer, one must read the word "or" in the statute as "and."<sup>38</sup>

Moreover, EPA concluded that the House amendment's reference to air pollutants emitted by source categories "regulated" under section 112, in context, is most reasonably understood to refer to hazardous pollutants that are actually regulated under section 112, not pollutants like CO<sub>2</sub>, which are not. Thus, "EPA's interpretation recognizes that source categories 'regulated under section 112' are not regulated by [Clean Air Act] section 112 with respect to all pollutants, but only with respect to [hazardous air pollutants]."<sup>39</sup> EPA's interpretation recognizes that section 112 "regulates" source categories only as to their hazardous pollutants, and avoids the irrational result produced by Petitioners' reading, which would immunize dangerous (but non-hazardous) pollutants from regulation based on the unrelated fact that the sources happen to emit hazardous pollutants.

Several of the judges made it clear that they questioned Petitioners' position that the House amendment is unambiguous. For example, Judge Millett indicated "even with the House amendment," she "find[s] the meaning of 111(d)'s exclusion inscrutable, ambiguous."<sup>40</sup> Judge Kavanaugh noted that he is "struggling with what the House amendment means."<sup>41</sup> Any ambiguity matters because under traditional principles of administrative law, courts defer to agencies' reasonable interpretations of ambiguous statutory provisions.<sup>42</sup>

Petitioners' interpretation would create perverse results. Because almost all significant industrial sources are regulated for at least some hazardous air pollutant emissions, reading the House amendment the challengers' way would eviscerate the core purpose of section 111(d), which is to protect against dangerous pollutants that are not regulated under the criteria or hazardous pollutant programs. It would yield a truly perverse outcome: sources of dangerous pollutants would be exempted from regulation because they happened to emit other dangerous pollutants, potentially with different health and environmental harms. As others have noted, this would be like exempting a restaurant from food safety requirements because it is subject to the fire code.<sup>43</sup> Further, as EPA concluded in the Rule, "it is not reasonable to interpret the Section 112 Exclusion in section 111(d) to mean that the existence of CAA section 112 standards covering hazardous pollutants from a source category would entirely eliminate regulation of non-hazardous emissions from that source category under section 111(d)."<sup>44</sup>

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<sup>37</sup> See Final Brief for Respondent at 79, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 22, 2016).

<sup>38</sup> See 42 U.S.C. § 7411(d)(1) ("The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (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 . . .") (emphasis added) (reflecting the House amendment in the U.S. Code).

<sup>39</sup> 80 Fed. Reg. at 64,714.

<sup>40</sup> Oral Argument Tr., *supra* note 8, at 150.

<sup>41</sup> *Id.* at 123; see also *id.* (Judge Kavanaugh noting that "[t]his language is so convoluted, though."); *id.* at 124. It remains unclear whether Judge Kavanaugh will agree with EPA's interpretation, but his questions indicated that he finds the text of the House amendment to be unclear.

<sup>42</sup> See *Chevron*, 467 U.S. at 842–45.

<sup>43</sup> See Tomás Carbonell, *The Legal Case for the Clean Power Plan — in a Nutshell*, AMERICAN CONSTITUTION SOCIETY BLOG (Sept. 26, 2016), <https://www.acslaw.org/acsblog/the-legal-case-for-the-clean-power-plan-%E2%80%94-in-a-nutshell>.

<sup>44</sup> 80 Fed. Reg. at 64,714.

The 1990 Amendments contain an express provision stating that section 112 standards shall not be “interpreted, construed or applied to diminish or replace” requirements under section 111 of the Act.<sup>45</sup> As EPA explained, that language demonstrates that Congress did not want regulation of hazardous air pollutants under section 112 to have the effect of weakening regulation of other pollutants under section 111. Clearly, Congress was not concerned with regulation of the same source under both section 111(d) and section 112.

Furthermore, Petitioners’ approach inappropriately ignores the existence of the Senate version of the provision and focuses solely on the House version of the provision.<sup>46</sup> Both provisions were passed by both houses and signed by the president and are therefore law, and the Senate version clearly provides authority for EPA to regulate greenhouse gases under section 111(d).<sup>47</sup>

## (5) Footnote 7 from the *AEP v. Connecticut* case does not support opponents’ position

West Virginia’s Solicitor General, Elbert Lin, also argued that a footnote in a 2011 Supreme Court opinion, *AEP v. Connecticut*,<sup>48</sup> explicitly adopts the Petitioners’ preferred reading of section 111(d).<sup>49</sup> But this assertion, too, is untrue.

As we have discussed extensively in an earlier blog post, Footnote 7 is dicta from the *AEP* case and describes the limited circumstances under which section 111(d) does not permit regulation.<sup>50</sup> As our earlier post explains, Footnote 7 does not support Petitioners’ reading:

The footnote discusses two categories of other regulations that may prevent EPA from promulgating a section 111(d) rule: the National Ambient Air Quality Standards (NAAQS) program under sections 108-110 and the section 112 hazardous air pollutant program. No one has argued that regulation under the NAAQS program precludes section 111(d) rules, even though power plants have had their NAAQS pollutants regulated for decades. In contrast, Petitioners think that the section 112 program should operate in a different way, precluding section 111(d) regulation if power plants are regulated at all, even for entirely different pollutants. . . .

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<sup>45</sup> 42 U.S.C. § 7412(d)(7).

<sup>46</sup> Petitioners argued that because the Senate amendment is labeled a “conforming” amendment, it should not be given the same weight as the House amendment. See Oral Argument Tr., *supra* note 8, at 108. But the House amendment is not labeled as “substantive”; it is instead labeled as “miscellaneous.” Moreover, these labels do not control the weight given to provisions in statutory interpretation. See *Burgess v. United States*, 553 U.S. 124, 135 (2008); *Washington Hosp. Ctr. v. Bowen*, 795 F.2d 139, 149 (D.C. Cir. 1986).

<sup>47</sup> For further discussion on this point, see EPA’s CO<sub>2</sub> Regulations for New and Existing Power Plants: Legal Perspectives: Hearing Before the Subcomm. on Energy & Power, H. Comm. on Energy & Commerce (Oct. 22, 2015) (testimony of Richard Revesz), available at <http://docs.house.gov/meetings/IF/IF03/20151022/104065/HHRG-114-IF03-Wstate-ReveszR-20151022.pdf>; Kate Konschnik, EPA’s 111(d) Authority – Follow Homer and Avoid the Sirens, LEGAL PLANET (May 28, 2014), <http://legal-planet.org/2014/05/28/guest-blogger-kate-konschnik-epas-111d-authority-follow-homer-and-avoid-the-sirens/>; Tomás Carbonell, *Misguided Legal Attacks on Clean Power Plan Seek to Undermine Clean Air Act, Public Participation*, EDF CLIMATE 411 BLOG (Feb. 13, 2015), <http://blogs.edf.org/climate411/2015/02/13/misguided-legal-attacks-on-clean-power-plan-seek-to-undermine-clean-air-act-public-participation/>.

<sup>48</sup> 564 U.S. 410, 424 n.7 (2011).

<sup>49</sup> Oral Argument Tr., *supra* note 8, at 174.

<sup>50</sup> See Richard L. Revesz, Denise A. Grab & Jack Lienke, *Footnote 7 and the Clean Power Plan*, AMERICAN CONSTITUTION SOCIETY BLOG (Sept. 27, 2016), <https://www.acslaw.org/acsblog/footnote-7-and-the-clean-power-plan>.

The footnote treats the NAAQS and section 112 programs in the same way with respect to their impact on section 111(d). For both programs, the applicability of section 111(d) is tied to whether the pollutant in question (here, carbon dioxide) is regulated under that program.<sup>51</sup>

The Supreme Court footnote refers to “existing sources of the pollutant in question” and is therefore consistent with EPA’s conclusion that even the House-originated language is best read in a pollutant-specific fashion.

Moreover, Petitioners’ counsel made statements in the *AEP v. Connecticut* and *Utility Air Regulatory Group* oral arguments that support EPA’s reading of both the scope of section 111(d) and Footnote 7.<sup>52</sup> For example, even though the oral arguments in the *AEP* case took place a month after EPA had proposed its section 112 mercury rule for power plants, Petitioners’ counsel Peter Keisler argued on behalf of the coal companies that EPA could still regulate the greenhouse gas emissions of existing power plants under section 111.<sup>53</sup>

And, in 2014, at oral argument in *Utility Air Regulatory Group*, Keisler (representing a coalition of industry trade associations that are also among the Petitioners in the Clean Power Plan case), invoked the *AEP* holding as having affirmed EPA’s authority “to regulate greenhouse gas emissions from stationary sources” under section 111.<sup>54</sup> This oral argument took place more than two years after EPA had finalized its hazardous air pollution standards for power plants.

At the Clean Power Plan’s September 27 oral argument, Judge Millett noted that Petitioners were shifting their position on the scope of coverage of section 111(d) for the Clean Power Plan, commenting that Petitioners were conducting a “[b]ait and switch with *AEP*.”<sup>55</sup>

## **(6) It would not be a simple matter for EPA to delist power plants from coverage under section 112 and regulate them under section 111(d)**

During the argument, the judges asked Petitioners what alternatives would be left for EPA if the court found that EPA lacked authority to regulate power plants under section 111(d). Lin stated that EPA could decide to drop its mercury rule and “delist” power plants from coverage under section 112.<sup>56</sup> This process would not be as simple as Lin would have the Court believe—and indeed the findings required for delisting likely could not be made given available science concerning the health impacts of hazardous air pollutants from power plants.

In 1990, Congress instructed EPA to determine by 1993 whether it is “appropriate and necessary” to regulate air toxics from power plants under section 112.<sup>57</sup> In 2012, after decades of delay, the agency promulgated the final Mercury and

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<sup>51</sup> *Id.*

<sup>52</sup> *See id.*; Tomás Carbonell & Ben Levitan, *Clean Power Plan: Opponents Have Already Conceded that EPA Has Authority to Regulate*, EDF CLIMATE 411 BLOG (Sept. 13, 2016), <http://blogs.edf.org/climate411/2016/09/13/clean-power-plan-opponents-have-already-conceded-that-epa-has-authority-to-regulate/>.

<sup>53</sup> *See* Revesz et al., *supra* note 50.

<sup>54</sup> Transcript of Oral Argument at 22, *UARG*, 134 S. Ct. 2427 (2014) (No. 12-1146).

<sup>55</sup> Oral Argument Tr., *supra* note 8, at 172.

<sup>56</sup> *Id.* at 170.

<sup>57</sup> 42 U.S.C. § 7412 (n)(1)(A).

Air Toxics Standards, in response to a court-ordered deadline.<sup>58</sup> Delisting power plants from section 112 would not be a simple matter and might not even be allowed.

The standard for delisting plants from section 112 coverage is more demanding than simply deciding that coverage is no longer “appropriate and necessary.”<sup>59</sup> In order to delist power plants from coverage under section 112, EPA would first need to determine that no source’s emissions “exceed a level which is adequate to protect public health with an ample margin of safety” and also that “no adverse environmental effect will result from emissions from any source.”<sup>60</sup> With respect to carcinogenic hazardous air pollutants, EPA would have to find that such emissions pose a lifetime cancer risk of less than 1 in 1,000,000 to the most exposed individual<sup>61</sup>—a standard that EPA has determined could not be met in the case of power plants’ emissions of carcinogens.<sup>62</sup>

Given that power plants are the largest single source category in the United States of mercury and other hazardous air toxins that are associated with serious adverse health effects,<sup>63</sup> it is unlikely that the stringent statutory standard for delisting could be met.

Indeed, in 2012, EPA denied a petition by the Utility Air Regulatory Group to delist power plants, concluding that in light of the large quantities of multiple toxic pollutants that are emitted by power plants, the stringent statutory standards could not be satisfied.<sup>64</sup> EPA certainly could not ignore the scientific facts concerning the harms associated with toxic pollutants simply because it did not want to regulate them under section 112. In the absence of a dramatic shift in the science concerning the health impacts of mercury and other toxins emitted by power plants, it is very unlikely that the agency would be able to successfully do so on an additional attempt.

## **(7) EPA does not have a duty to make sure plants do not prematurely close under the “remaining useful life” provision**

Peter Keisler, representing the industry groups challenging the Clean Power Plan, argued that, because the rule will result in coal plants closing “prematurely,” it violates the requirement that EPA allow a state to consider a source’s “remaining useful life” when setting performance standards.<sup>65</sup>

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<sup>58</sup> 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. 9304, 9308 (Feb. 16, 2012).

<sup>59</sup> Under President George W. Bush, EPA tried to remove power plants from section 112 coverage using the “appropriate and necessary” standard, and the D.C. Circuit held that EPA would instead need to satisfy the more demanding delisting factors and had failed to do so. *See New Jersey v. EPA*, 517 F.3d 574, 581–83 (D.C. Cir. 2008).

<sup>60</sup> 42 U.S.C. § 7412(c)(9)(B)(ii); *see New Jersey*, 517 F.3d at 578–79, 581–83 (discussing requirements for delisting power plants from section 112 coverage).

<sup>61</sup> 42 U.S.C. § 7412 (c)(9)(B)(i).

<sup>62</sup> *See National Emission Standards for Hazardous Air Pollutants*, 77 Fed. Reg. at 9364–65 (denying a petition to delist power plants in part on this basis); *see also id.* at 9319.

<sup>63</sup> *See, e.g., id.* at 9310–19 (summarizing findings concerning serious health and environmental hazards associated with hazardous air pollutant emissions from power plants).

<sup>64</sup> National Emission Standards for Hazardous Air Pollutants, 77 Fed. Reg. at 9364–65. That denial was unanimously upheld by the D.C. Circuit. *See White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1248 (D.C. Cir. 2014), cert. granted on other grounds *sub nom. Michigan v. EPA*, 135 S. Ct. 702 (2014), *rev’d in part*, 135 S. Ct. 2699 (2015).

<sup>65</sup> *See Oral Argument Tr.*, *supra* note 8, at 105–06.

Petitioners have framed the remaining useful life provision backwards. As EPA explained in its legal memorandum accompanying the Clean Power Plan, remaining useful life is an inquiry focused on reducing expensive capital expenditures for plants that will soon be closing, not a provision that guarantees indefinite life support for faltering plants.<sup>66</sup> Under the statute, EPA must simply allow states some way to take into account the variation of plants' remaining useful lives. The option to allow trading in the rule does precisely that. As explained in our earlier report, trading allows

a source approaching the end of its useful life [to] “avoid excessive up-front capital expenditures that might be unreasonable for a facility with a short remaining useful life.” In addition or as an alternative to allowing sources the flexibility of trading, a state could specifically design laxer standards for older sources, so long as it ensured that its overall emission reductions would be consistent with EPA's guidelines.<sup>67</sup>

## (8) EPA conducted a cost-benefit analysis of the Clean Power Plan

In one of the day's most blatantly incorrect assertions, Petitioners' counsel William Brownell asserted that EPA did not do a cost-benefit analysis of the rule.<sup>68</sup>

Brownell's assertion is patently false. EPA conducted a thorough Regulatory Impact Analysis of the Clean Power Plan, which projected that, under a rate-based implementation approach, the rule would result in \$26 to \$45 billion in net benefits per year by 2030.<sup>69</sup> More specifically, the agency projected combined climate and health benefits of between \$34 and \$54 billion per year and costs of \$8.4 billion per year.<sup>70</sup> Petitioners even cite EPA's benefit-cost analysis in their briefs.<sup>71</sup>

## (9) The Clean Power Plan is not an attempt to enact Congress's failed 2009 cap-and-trade bill through executive action

Petitioners characterized the Clean Power Plan as an attempt by the Obama Administration to implement Congress's 2009 cap-and-trade bill (also known as Waxman-Markey)—which passed the House but never received a vote in the Senate<sup>72</sup>—through executive action. They suggested that this legislative background supports their claim that EPA exceeded its legal authority in issuing the Clean Power Plan.<sup>73</sup> But this argument is fatally flawed in multiple respects. For one thing, Waxman-Markey and the Clean Power Plan differ in fundamental ways. Waxman-Markey would have

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<sup>66</sup> See EPA, LEGAL MEMORANDUM ACCOMPANYING THE CLEAN POWER PLAN FOR CERTAIN ISSUES 44–45, <https://www.epa.gov/sites/production/files/2015-11/documents/cpp-legal-memo.pdf>.

<sup>67</sup> Richard L. Revesz, Denise A. Grab & Jack Lienke, Bounded Regulation: How the Clean Power Plan Conforms to Statutory Limits on EPA Authority 9 (Sept. 12, 2016) (quoting 80 Fed. Reg. at 64,870-71), available at [http://policyintegrity.org/files/publications/Bounded\\_Regulation\\_Policy\\_Brief.pdf](http://policyintegrity.org/files/publications/Bounded_Regulation_Policy_Brief.pdf).

<sup>68</sup> Oral Argument Tr., *supra* note 8, at 315 (“EPA considered costs, not benefits, they concede they didn't do any cost-benefit analysis.”).

<sup>69</sup> 80 Fed. Reg. at 64,679. EPA projected a similar net benefits range of \$26 to \$43 billion under a mass-based implementation approach. *Id.*

<sup>70</sup> *Id.* For more detailed information on the agency's estimates of costs and benefits, see CPP RIA, *supra* note 22, at ES-22–23 tbls.ES-9 & ES-10.

<sup>71</sup> See, e.g., Petitioners' Core Issues Brief, *supra* note 26, at 15, 22.

<sup>72</sup> See Bryan Walsh, *Cap and Trade is Dead (Really, Truly, I'm Not Kidding)*. *Who's to Blame?*, TIME (July 22, 2010), <http://science.time.com/2010/07/26/why-the-climate-bill-died>.

<sup>73</sup> Oral Argument Tr., *supra* note 8, at 228–29 (Laurence Tribe, on behalf of non-state petitioners, suggesting that EPA is “trying to shoehorn something that Congress couldn't do into a little used provision that for more than a quarter of a century has been understood differently from the way the Government now asks you to understand it”).

applied to the entire economy, whereas the Clean Power Plan applies only to the electric utility sector.<sup>74</sup> And while the type of mass-based interstate emission trading contemplated by Waxman-Markey is one possible method of complying with the Clean Power Plan, it is by no means mandatory.<sup>75</sup> Most importantly, the cap-and-trade bill's nationwide emissions cap was a political calculation, whereas EPA's emission guidelines for power plants were calculated through rigorous application of the requirements of section 111(d) of the Clean Air Act.<sup>76</sup>

Furthermore, the Supreme Court has held that congressional inaction generally “deserve[s] little weight” when interpreting statutes.<sup>77</sup> And even if the D.C. Circuit *were* to consider Congress's 2009 inaction on Waxman-Markey when deciding this case, it would also need to take into account more recent, unsuccessful efforts by congressional Republicans to strip EPA of its carbon-regulating powers under the Clean Air Act. After all, if the failure to pass cap-and-trade can be taken as evidence that EPA *lacks* power to issue the Clean Power Plan, Congress's more recent inaction on bills attempting to block the Plan should constitute even more persuasive proof that the agency *has* authority to issue it. Legislation to strip EPA of authority to regulate CO<sub>2</sub> has been repeatedly introduced since 2009, and it has invariably failed to pass.<sup>78</sup> In this light, the current attacks on EPA's authority can be seen as an effort to accomplish through the courts a Clean Air Act rollback that opponents of greenhouse gas regulation could not secure through legislative means.

Finally, it bears noting that, by the time EPA proposed the Clean Power Plan in 2014, the agency had no choice but to regulate power plants' CO<sub>2</sub> emissions. In 2007, the Supreme Court held in *Massachusetts v. EPA* that CO<sub>2</sub> was a pollutant susceptible to regulation under the Act and that EPA could decline to regulate it “only if it determine[d] that greenhouse gases do not contribute to climate change or if it provide[d] some reasonable explanation as to why it [could not or would not] exercise its discretion to determine whether they do.”<sup>79</sup> The Court further held that uncertainty surrounding certain aspects of climate change could justify a refusal to regulate only if it was “so profound that it preclude[d] EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming.”<sup>80</sup>

Two years later, citing extensive evidence of greenhouse gases' contribution to climate change and of the risks that climate change posed to public health and welfare, EPA made a formal “endangerment finding” for CO<sub>2</sub> and five other

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<sup>74</sup> Waxman-Market Short Summary, Center for Climate and Energy Solutions, <http://www.c2es.org/federal/congress/111/acesa-short-summary> (last visited Oct. 14, 2016) (discussing scope of bill).

<sup>75</sup> 80 Fed. Reg. at 64,734 (“The EPA's reliance on trading in its [best system of emission reduction] determination does not mean, however, that states are required to establish trading programs . . . . Nor does it mean that trading is the only transactional approach that we could have considered in setting the [best system of emission reduction] or that states could use to effectuate the building blocks were they to decide that they did not want to take on the responsibility of running a trading program.”).

<sup>76</sup> See generally Revesz et al., *supra* note 67.

<sup>77</sup> Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994).

<sup>78</sup> H.R. 4808, 113th Cong., Sec. 2 (2014) (amending the Clean Air Act as follows: “the [EPA] Administrator may not promulgate any regulation or guidance that limits or prohibits any new carbon dioxide emissions from a new or existing power plant, and no such regulation or guidance shall have any force or effect, until” various certifications were made by other executive branch agencies, the Federal Energy Regulatory Commission, and the congressional Budget Office); H.R. 3895, 113th Cong., Sec. 402 (2014) (removing greenhouse gases from the Clean Air Act's definition of “air pollutant” and explicitly barring “regulation of climate change or global warming”). For other examples, see H.R. 4036, 114th Cong. (2015); H.R. 1487, 114th Cong. (2015); H.R. 4304, 113th Cong. (2014); H.R. 4850, 113th Cong. (2014); H.R. 4286, 113th Cong. (2014); H.R. 910, 112th Cong. (2011); H.R. 4344, 111th Cong. (2009).

<sup>79</sup> 549 U.S. 497, 533 (2007).

<sup>80</sup> *Id.* at 534.

greenhouse gases.<sup>81</sup> This endangerment finding was ultimately upheld by the D.C. Circuit, and the Supreme Court declined to hear an appeal.<sup>82</sup>

In the wake of its endangerment finding, EPA had no reasonable basis for declining to regulate CO<sub>2</sub> from the power sector, which, as of 2012, was the nation's largest source of greenhouse gas pollution.<sup>83</sup> Accordingly, in December 2010, the agency settled a lawsuit brought by states and environmental groups seeking to force it to issue section 111 CO<sub>2</sub> standards for both new and existing power plants.<sup>84</sup> Thus, EPA was ultimately obligated by both the text of the Clean Air Act *and* a legal settlement to issue a rule limiting existing power plants' CO<sub>2</sub> emissions.

## (10) The Clean Power Plan is not primarily responsible for coal's decline

Listening to Petitioners' arguments about the Clean Power Plan's effects on states' energy mixes, one could easily get the impression that, in the absence of the Plan, coal-fired power plants would be thriving. Indeed, when the Petitioners requested a stay from the Supreme Court in February, coal companies Peabody Energy and Murray Energy suggested in their brief that the Clean Power Plan was driving coal companies into bankruptcy.<sup>85</sup>

The reality is that, even without the Clean Power Plan, coal plants would be retiring in large numbers because of the low price of natural gas and the declining cost of renewable generation technology. A recent analysis by the Energy Information Administration estimated that, even without the Clean Power Plan in effect, about 57 gigawatts of coal-fired generation capacity will retire between 2015 and 2020. With the Clean Power Plan, that number climbs only to 62 gigawatts.<sup>86</sup>

Notably, when Peabody Energy *did* file for bankruptcy in April, its filings didn't devote so much as a footnote to the Clean Power Plan. Instead, the filings attributed the company's financial troubles primarily to increased domestic competition from "low priced alternative energy sources" and to declining demand for coal in international markets.<sup>87</sup> This narrative is consistent with the findings of a recent independent report by Sue Tierney of the Analysis Group, which found that, even without the Clean Power Plan, "trends already underway in the industry are pointing to lower overall demand for coal in the future."<sup>88</sup>

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<sup>81</sup> Press Release, EPA, EPA Finds Greenhouse Gases Pose Threat to Public Health, Welfare (Apr. 17, 2009), available at <https://yosemite.epa.gov/opa/admpress.nsf/0/0ef7df675805295d8525759b00566924>.

<sup>82</sup> Joanne Spalding, *Supreme Court Denies Polluters' Challenge to EPA Finding that Greenhouse Gases Endanger Public Health*, THE PLANET (Oct. 15, 2013), <http://blogs.sierraclub.org/planet/2013/10/supreme-court-denies-polluters-challenge-to-epa-finding-that-greenhouse-gases-endanger-public-health.html>.

<sup>83</sup> EPA, Learn About Carbon Pollution From Power Plants, <https://www.epa.gov/cleanpowerplan/learn-about-carbon-pollution-power-plants> (last updated July 17, 2015) (showing that electricity generation accounted for more U.S. greenhouse gas emissions in 2012 than any other sector).

<sup>84</sup> EPA SETTLEMENT AGREEMENT (Dec. 2010), available at <https://www.epa.gov/sites/production/files/2013-09/documents/boilerghg-settlement.pdf>.

<sup>85</sup> Coal Industry Application for Immediate Stay of Final Agency Action Pending Judicial Review at 32–33, *West Virginia v. EPA*, No. 15A773 (U.S. Jan. 27, 2016) ("From the time EPA first proposed the Rule and condemned the coal industry to a greatly diminished future, coal company share prices have plummeted and coal companies have declared bankruptcy.").

<sup>86</sup> LAURA MARTIN & JEFFREY JONES, ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2016, ISSUES IN FOCUS: EFFECTS OF THE CLEAN POWER PLAN (2016), [http://www.eia.gov/forecasts/aeo/section\\_issues.cfm](http://www.eia.gov/forecasts/aeo/section_issues.cfm).

<sup>87</sup> Mot. of Debtors for an Order (I) Confirming the Protections of Sections 362, 365, and 525 of the Bankruptcy Code and (II) Granting Certain Related Relief, at 3, *In re Peabody Energy Corp.*, No. 16-42529-0017 (Bankr. E.D. Mo. Apr. 13, 2016).

<sup>88</sup> Sue F. Tierney, Analysis Group, *The U.S. Coal Industry: Challenging Transitions in the 21st Century* 28 (Sept. 26, 2016), available at <http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/tierney%20-%20coal%20industry%20-%2021st%20century%20challenges%209-26-2016.pdf>.

Thus, at least in the near-term, the Clean Power Plan's impacts on the financial health of the coal industry and coal-fired power plants appear to be marginal.

## (11) There is no reason to believe that certain states cannot achieve the Clean Power Plan's emission guidelines

At oral argument, Petitioners contended that EPA failed to satisfy the statutory requirement that its emission guidelines be “achievable,” because it is conceivable that some states will find themselves unable to satisfy the guidelines if neighboring states are not willing to engage in emission trading with them.<sup>89</sup> In reality, the Clean Power Plan explicitly accounts for this possibility, noting that “[i]f such a situation arises . . . [EPA] will work with the state or states to ensure that there is a mechanism that the state or states can include in their state plans” to allow their sources to achieve compliance.<sup>90</sup> Given the availability of this safety valve, the Petitioners' challenge to the achievability of the guidelines is, at best, premature.

But, as EPA notes in the plan, it is “extremely unlikely” that a state would find itself without access to sufficient emission reduction credits.<sup>91</sup> For one thing, a state need not enter into formal trading agreements with other states in order to take advantage of emission reductions beyond its borders. Instead, sources may obtain emission rate credits by contract with or direct investment in renewable energy generation (and other eligible sources of credits) located anywhere in the contiguous United States, regardless of where that generation is located.<sup>92</sup>

Additionally, EPA relied on a variety of conservative assumptions in calculating its guidelines, specifically to allay achievability concerns. The agency noted that it deliberately avoided defining its “best system of emission reduction” at the “maximum possible degree of stringency” and instead allowed “compliance headroom that ensures that the [Plan's] emission limitations . . . are achievable.”<sup>93</sup>

Finally, Petitioners' claims of unachievability are at odds with current trends in the power sector. Recent estimates show that, in 2015, CO<sub>2</sub> emissions from electricity generation were already 21% below 2005 levels.<sup>94</sup> In other words, power plants have already achieved approximately two-thirds of the 32% reduction that is projected to result from the Clean Power Plan.<sup>95</sup>

## Conclusion

In the oral argument before the D.C. Circuit, the Clean Power Plan's opponents relied on a number of questionable contentions to support their arguments that the Plan is an unprecedented assertion of EPA's regulatory authority that violates the Clean Air Act and the U.S. Constitution. As this report has explored, the Clean Power Plan is consistent with the Constitution, as well as the text of the Act and decades of efforts to implement it.

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<sup>89</sup> Oral Argument Tr., *supra* note 8, at 277, 280.

<sup>90</sup> 80 Fed. Reg. at 64,732 n.377.

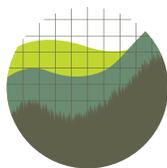
<sup>91</sup> *Id.*

<sup>92</sup> 40 C.F.R. § 60.5800(a)(3); 80 Fed. Reg. at 64,733-35, 64,897 n.942.

<sup>93</sup> 80 Fed. Reg. at 64,718.

<sup>94</sup> Energy Info. Admin., Carbon Dioxide Emissions from Electricity Generation in 2015 Were Lowest Since 1993 (May 13, 2016), <http://www.eia.gov/todayinenergy/detail.cfm?id=26232>.

<sup>95</sup> 80 Fed. Reg. at 64,665 (describing Clean Power Plan's projected impacts on CO<sub>2</sub> emissions).



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