

**U.S. Senate Committee on Environment and Public Works**  
**Hearing on State Regulators' Perspectives on the Clean Power Plan**  
**March 11, 2015 10 a.m.**

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Thank you for this opportunity to submit testimony on the Environmental Protection Agency's proposed Clean Power Plan rule. The New York Attorney General's Environmental Protection Bureau is working with other Attorneys General and with state regulators to evaluate legal issues concerning the proposed rule. Our office has successfully defended New York's participation in the Regional Greenhouse Gas Initiative and is now involved in litigation in the D.C. Circuit Court of Appeals opposing challenges to the proposed Clean Power Plan.

My written testimony will focus on the following four points:

- EPA is required under the Clean Air Act to regulate greenhouse gas emissions from existing power plants under section 111(d);
- EPA's regulation of toxic mercury emissions from power plants under section 112 of the Act does not somehow preclude it from regulating greenhouse gas emissions from power plants under section 111(d);
- EPA has the authority to establish substantive emission limitations for state emission guidelines under section 111(d); and
- EPA has the authority under section 111(d) to interpret the "best system of emission reduction" to reflect the various ways states have successfully reduced greenhouse gas emissions from the power sector.

## **Background**

Eight years ago, the Supreme Court noted that "[t]he harms associated with climate change are serious and well recognized." *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007). As the recent U.S. Climate Action Report prepared by the Department of State succinctly stated: "The scientific consensus . . . is that anthropogenic emissions of greenhouse gases are causing changes in the climate that include rising average national and global temperatures, warming oceans, rising average sea levels, more extreme heat waves and storms, extinctions of species, and loss of biodiversity."<sup>1</sup> According to the National Oceanic and Atmospheric Administration, 2014 was the hottest year on record globally.

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<sup>1</sup> U.S. Dept. of State, *United States Climate Action Report 2014* (2014), available at <http://www.state.gov/e/oes/rls/rpts/car6/index.htm>.

The continued emissions of greenhouse gases, primarily carbon dioxide, lock in further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts to people and ecosystems. Limiting anthropogenic climate change requires substantial and sustained reductions in greenhouse gas emissions which, together with adaptation, can limit climate change risks.<sup>2</sup> Carbon dioxide emissions from human activities also cause ocean acidification, which harms ecosystems and marine biodiversity, in turn impacting food security and the economy.<sup>3</sup>

New York has begun to experience adverse effects from climate change. Our rate of sea level rise is much higher than the national average and could account for up to 6 feet of additional rise by 2100 if greenhouse gas emissions are not abated. The approximately 12 inches of sea level rise New York City has experienced since 1900 may have expanded Hurricane Sandy's flood area by about 25 square miles, flooding the homes of an additional 80,000 people in New York and New Jersey alone.<sup>4</sup> A recent analysis of the frequency and intensity of damaging extreme rainfall events in New York found such events are increasing, consistent with scientists' predictions.<sup>5</sup> Additional anticipated harms in New York include increased ozone pollution in the New York City area, resulting in worsening asthma rates, and the loss of cold water fisheries like native brook trout in the Adirondack Park.

Significant long-term reductions in greenhouse gas emissions must occur to avoid or reduce these harms. Existing fossil-fueled power plants are the largest U.S. source of greenhouse gases, representing about one-third of those emissions, so we must aggressively curb these emissions to address harms from climate change.

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<sup>2</sup> Intergovernmental Panel on Climate Change (IPCC), *Fifth Assessment Synthesis Report* (Nov. 2014), available at [http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR\\_AR5\\_SPM.pdf](http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_SPM.pdf).

<sup>3</sup> International Geosphere-Biosphere Programme et al., *Ocean Acidification Summary for Policymakers, Third Symposium on the Ocean in a High-CO<sub>2</sub> World* (2013), available at <http://www.igbp.net/publications/summariesforpolicymakers/summariesforpolicymakers/oceanacidificationsummaryforpolicymakers2013.5.30566fc6142425d6c9111f4.html>.

<sup>4</sup> New York City Panel on Climate Change 2015 Report, Chapter 2: Sea Level Rise and Coastal Storms. Ann. N.Y. Acad. Sci. ISSN 0077-8923, available at <http://onlinelibrary.wiley.com/doi/10.1111/nyas.12593/full>

<sup>5</sup> *Current & Future Trends in Extreme Rainfall Across New York State, A Report from the Environmental Protection Bureau of New York State Attorney General Eric T. Schneiderman* (Sept. 2014) (based on data from the 2014 National Climate Assessment and the National Oceanographic and Atmospheric Administration's Northeast Regional Climate Center), available at [http://www.ag.ny.gov/pdfs/Extreme\\_Precipitation\\_Report%209%202%2014.pdf](http://www.ag.ny.gov/pdfs/Extreme_Precipitation_Report%209%202%2014.pdf).

A number of states, including New York, have moved forward with programs to reduce greenhouse gas emissions from fossil-fueled power plants. For example, New York and the other eight states that are part of the Regional Greenhouse Gas Initiative (RGGI) reduced regional carbon dioxide emissions from the electricity sector by 40 percent from 2005 levels. The RGGI states have shown that by a combination of encouraging shifts to less carbon-intensive fossil fuel generation, increasing reliance on renewable energy, and reducing the demand for generation through energy efficiency, substantial reductions in carbon dioxide emissions are possible over a relatively short period, while supporting economic goals and maintaining grid reliability. An independent analysis found that in the first three years of the RGGI program, the reinvestment of allowance auction proceeds is reducing total energy bills across the region by \$1.3 billion and adding \$1.6 billion to the regional economy, creating an estimated 16,000 jobs in the process.<sup>6</sup>

EPA's Clean Power Plan would build off the successful efforts of leading states, but require *all* states to take action to reduce power plant greenhouse gas emissions. For the first time, each state would have to cut greenhouse gas emissions from existing fossil-fueled power plants (coal, oil, and natural-gas fired plants). With every state taking steps to reduce this pollution, the Clean Power Plan is expected to result in the reduction of 730 million metric tons of greenhouse gases by 2030, equivalent to the annual emissions of about 150 million cars.

Just as the leadership of New York and other states has facilitated national action, so too leadership on the part of the United States in reducing greenhouse gas emissions will encourage international action. We will need to work together with other nations to curb emissions to achieve a level of greenhouse gas concentrations that scientists say is necessary to avoid the worst impacts of climate change. The Clean Power Plan marks a critical step in demonstrating that leadership by putting the U.S. on a path to confront and address this challenge.

### **1. EPA is Required Under the Clean Air Act to Regulate Greenhouse Gas Emissions from Existing Power Plants Under Section 111(d).**

The Clean Air Act requires EPA to regulate categories of stationary sources that cause or contribute significantly to air pollution that may reasonably be anticipated to endanger public health and welfare. 42 U.S.C. § 7411(b). Once EPA lists a source category pursuant to section 111(b), it must establish standards of performance for emissions of air pollutants from new (and modified) sources in that category. *Id.*, § 7411(b)(1)(B). At least every eight years, EPA must review, and as necessary, revise the standards. *Id.* "Standard of performance" is "a standard for emissions of air pollutants which reflects the degree of emission limitation

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<sup>6</sup> Analysis Group, The Economic Impacts of the Regional Greenhouse Gas Initiative on Ten Northeast and Mid-Atlantic States (Nov. 15, 2011), available at: [www.analysisgroup.com/uploadedfiles/publishing/articles/economic\\_impact\\_rggi\\_report.pdf](http://www.analysisgroup.com/uploadedfiles/publishing/articles/economic_impact_rggi_report.pdf)

achievable through the application of the best system of emission reduction . . . the Administrator determines has been adequately demonstrated.” *Id.*, § 7411(a)(1).

With certain exceptions discussed below, EPA’s regulation of new sources under section 111(b) triggers its obligation to proceed with rulemaking under section 111(d) for existing sources. Section 111(d) requires EPA to issue regulations that establish a procedure similar to section 110 of the Act under which each state submits to EPA a plan establishing, implementing and enforcing standards of performance for such sources.

It has been New York’s position for more than a decade that EPA must regulate greenhouse gas emissions from new and existing fossil-fueled power plants under section 111(b) and (d). In 2003, New York and six other states notified EPA of their intent to sue the agency for failing to update standards from power plants under section 111(b)(1)(B), including establishing standards for carbon dioxide.<sup>7</sup> As explained in the notice letter, EPA must establish emission standards for pollutants like carbon dioxide that endanger public health and welfare. In 2006, after EPA revised the performance standards for power plants under section 111(b) without establishing standards for carbon dioxide, New York, Connecticut, California, Delaware, Maine, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Washington, the District of Columbia and the City of New York filed a petition seeking judicial review of that failure. *New York v. EPA* (D.C. Cir. No. 06-1322).

And because at that time it was EPA’s position that it lacked authority under the Act to regulate greenhouse gas emissions, New York had separately filed suit, along with other states and nonprofit groups, against the owners of the largest fossil-fueled power plants in the country. In *Connecticut v. American Elec. Power Corp.*, we alleged that the greenhouse gas emissions from those plants were substantially contributing to global warming, and that in the absence of a remedy under the Clean Air Act, we could seek injunctive relief under common law public nuisance. The Supreme Court held, however, that section 111 of the Act “speaks directly” to carbon dioxide emissions from existing power plants and that therefore, the Act “and the EPA actions it authorizes” displaced any federal common law right of action to abate those emissions from those plants. *American Elec. Power Corp. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (*AEP*).

Subsequent to the Supreme Court’s decision in *AEP* (and the parties’ settlement of *New York v. EPA*), President Obama issued a Climate Action Plan in June 2013. At the same time, the President issued a memorandum in which he directed EPA to fulfill its statutory duty under sections 111(b) and 111(d) of the Act to regulate power plant greenhouse gas emissions by “build[ing] on State efforts to move toward a cleaner power sector.” The memorandum set forth a schedule for

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<sup>7</sup> Letter from Attorneys General of New York, Connecticut, Maine, Massachusetts, New Jersey, Rhode Island, and Washington to EPA Administrator Whitman (Feb. 20, 2003)

EPA to propose and promulgate rules concerning standards for greenhouse gas emissions for new and existing power plants.

Subsequently, EPA proposed performance standards for greenhouse gas emissions from new power plants in September 2013. That proposal triggered EPA's obligation under section 111(d) to proceed with a rulemaking under section 111(d) concerning the regulation of greenhouse gases from existing power plants. EPA then issued its proposed Clean Power Plan rule in June 2014.

## **2. EPA's Regulation of Toxic Mercury Emissions from Power Plants Under Section 112 Does Not Somehow Preclude It from Regulating Power Plant Greenhouse Gas Emissions Under Section 111(d).**

Some opponents of the Clean Power Plan have sued to block EPA from even finalizing it, contending that EPA lacks the authority to regulate greenhouse gas pollutants from existing power plants under section 111(d) of the Act because EPA is regulating toxic pollutants from some of those same plants under a different provision of the statute, section 112.<sup>8</sup> Not only does such an interpretation defy common sense, it is erroneous as a matter of law.

Section 111(d) plays an important role in the Act's comprehensive structure for regulating air pollutants from stationary sources by enabling EPA and states to control pollution from existing stationary sources that is not regulated under the National Ambient Air Quality Standards (NAAQS) program (sections 108-110) or the hazardous air pollutant program (section 112). Together, these three programs were designed to ensure that there were "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. No. 91-1196, at 20 (1970).

Before Congress's 1990 amendments to the Act, section 111(d) required standards for "any air pollutant which is not included on a list published under Section 7408(a)," *i.e.*, NAAQS, "or 7412(b)(1)(A) of this title," a cross-reference to the previous version of section 112's hazardous air pollutant program. *See* 42 U.S.C. § 7411(d) (West 1977). Section 111(d) thus mandated regulation of air pollutants from existing stationary sources that were not otherwise covered by the NAAQS or the hazardous air pollutant program. In 1990, after EPA's delays in regulating hazardous air pollutants "proved to be disappointing," *Sierra Club v. EPA*, 353 F.3d 976, 979–80 (D.C. Cir. 2004), Congress extensively amended section 112. Rather than relying on EPA's listing of air pollutants to trigger their regulation under section 112, Congress listed 189 hazardous air pollutants and directed EPA to list categories of major and area sources for each of these pollutants and to establish emission standards for each source category. 42 U.S.C. §§ 7412(b)(1), (c)(1), (d)(1).

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<sup>8</sup> *In Re: Murray Energy Corp.*, No. 14-1112 (D.C. Cir.) and *West Virginia et al. v. EPA*, No. 14-1146 (D.C. Cir.).

As part of the 1990 amendments, Congress amended section 111(d)'s existing reference to section 112. However, different conforming language from the House and Senate bills amending section 111(d) was included in different sections of the final legislation without being reconciled in conference. The Senate amendment replaced the former cross-reference to § 112(b)(1)(A), which was eliminated by the 1990 amendments, with a cross-reference to that section's replacement, § 112(b): it thus requires section 111(d) standards 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 108(a) or section 112(b)." Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). The House amendment replaced the section 112 cross-reference with different language: it requires section 111(d) standards 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 108(a) or emitted from a source category which is regulated under section 112." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990). Both amendments were signed into law by the President and appear in the Statutes at Large, but only the House amendment appears in the U.S. Code.

There is no evidence in the legislative history that either house of Congress intended to substantively change section 111(d)'s role in the comprehensive statutory scheme. Indeed, when the Congressional Research Service compiled the legislative history of the 1990 amendments shortly after their enactment, it transcribed the amended Act by including both the House and Senate amendments to section 111(d), noting that the amendments were "duplicative" and simply used "different language [to] change the reference to section 112." *A Legislative History of the Clean Air Act Amendments of 1990*, Vol. 1, at 46 & n.1 (1993).

Nevertheless, some opponents of the Clean Power Plan contend that section 111(d), as amended, cannot be used to regulate greenhouse gas emissions from existing fossil-fueled power plants because EPA is regulating mercury and other toxic emissions from some of those plants (coal and oil-fired plants) under the hazardous air pollutant program. Focusing on the House amendment to section 111(d) only, they contend that because power plants are "a source category which regulated under section 112," the use of section 111(d) to regulate carbon dioxide (and other non-hazardous pollutants) from those plants is barred.

This argument is wrong. As explained below, it is founded on the erroneous premise that the duly-enacted Senate amendment, which would indisputably authorize the use of section 111(d) here, must be ignored. Further, opponents' interpretation is not even a reasonable construction of the House amendment, much less one that is compelled.<sup>9</sup> As the Supreme Court recently stated in another greenhouse gas regulation case, it is a "fundamental canon of statutory construction

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<sup>9</sup> See, e.g., Nordhaus and Zevin, *Historical Perspectives on Section 111(d) of the Clean Air Act*, 44 Environmental Law Rep. 11096 (Dec. 2014), Appendix A (identifying six plausible readings of the House amendment, under four of which section 111(d) could be used to regulate carbon dioxide emissions from existing power plants)

that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *UARG v. EPA*, 134 S. Ct. 2427, 2441 (2014).

Here, the language of the House amendment, properly read in light of the statutory purpose, structure and legislative history, preserves section 111(d)’s function to regulate emissions of air pollutants not regulated under the NAAQS or hazardous air pollutant programs. For example, the phrase “which is regulated under section 112” is more reasonably read either as referring to the phrase “any air pollutant” or to the combination of “any air pollutant” and “a source category.” Indeed, under the structural change to section 112 in the 1990 amendments, it is pollutant and source category combinations that are “regulated” under section 112. Either of these interpretations is in keeping with the Supreme Court’s holding in the *AEP* case and its reference to the pollutant-specific focus of the language in section 111(d). *See* 131 S. Ct. at 2538, n. 7 (observing that section 111(d) would not apply if the existing sources were regulated for the “pollutant in question” under the NAAQS or hazardous air pollutant programs). So read, EPA’s regulation of power plant mercury emissions under section 112 would not have the counterintuitive result of precluding the use of section 111(d) to regulate carbon dioxide.

There is simply no evidence that when Congress amended the statute in 1990 to strengthen section 112’s hazardous air pollutant program, it intended at the same time to weaken the role of section 111(d) in the statute’s comprehensive structure. To the contrary, in section 112(d)(7), Congress explicitly provided that EPA’s regulation of emissions under section 112 must not impair section 111 requirements for different emissions from the same sources. 42 U.S.C. § 7412(d)(7).

By contrast, the interpretation of section 111(d) urged by some opponents of EPA’s Clean Power Plan would create a large gap in the Act’s comprehensive coverage of emissions from stationary sources. Because sources that emit hazardous air pollutants also emit numerous other harmful pollutants, including carbon dioxide, the implication of opponents’ interpretation is that EPA faced an untenable choice: *either* address dangers associated with power plants’ hazardous air pollutants like mercury under section 112 *or* use section 111(d) to address the “serious and well recognized” climate-change harms caused by power plants’ carbon dioxide emissions. Given the Act’s fundamental purpose “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population,” 42 U.S.C. § 7401(b)(1), it is difficult to imagine Congress intended EPA to have to make such a choice.

And because the language of section 111(d) is not specific to power plants, opponents’ reading would disable a vital tool for achieving cost-effective emission reductions from many *other* types of sources as well, since the other large stationary sources of greenhouse gases—*e.g.*, oil and gas production facilities, petroleum refineries, and chemical plants—are regulated under section 112 for their hazardous emissions, as required by the statute. Their interpretation also would preclude EPA from using section 111(d) to limit existing sources’ emission of other

harmful pollutants, such as sulfuric acid mist and fluoride compounds, due to the fortuity that sources of those pollutants are also regulated under section 112.

Nothing in the legislative history of the 1990 amendments suggests that Congress intended such a radical result when it replaced section 111(d)'s cross-reference to section 112. Silence in legislative history accompanying a subtle legislative change indicates that Congress did not intend to alter significantly the preexisting scheme. *United States v. Neville*, 82 F.3d 1101, 1105 (D.C. Cir. 1996). Or, as the Supreme Court has stated, Congress “does not . . . hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

The opponents' interpretation of section 111(d) is erroneous for an additional reason: it fails to give legal effect to the duly-enacted Senate amendment. The evidence concerning enactment of the final legislation shows that the Senate amendment was not inadvertently included. After the House amended the Senate's bill and deleted the Senate's seven “Conforming Amendments” (including the revision to section 111(d)), the Conference Committee added the Senate's conforming amendments back into the final bill, and the President signed it into law. *Compare* S. 1630, 101st Cong. (as passed by House, May 23, 1990) *with* Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990).

It is well-established that the text of the Statutes at Large (which here contains both amendments to section 111(d)) governs if there is a conflict with the language in the U.S. Code. *United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 448 (1993) (“[D]espite its omission from the Code [a provision] remains on the books if the Statutes at Large so dictates.”). Here, there is no question that the Senate amendment would authorize section 111(d) regulation of existing power plant greenhouse gas emissions, thereby yielding a different result than the opponents' interpretation of the House amendment.

Under the scenario in which the two amendments are inconsistent, EPA must have an opportunity to consider both and to try to harmonize them. *See Citizens to Save Spencer Co. v. EPA*, 600 F.2d 844, 872 (D.C. Cir. 1979) (where Congress “drew upon two bills originating in different Houses and containing provisions that, when combined, were inconsistent in respects never reconciled in conference . . . it was the greater wisdom for [EPA] to devise a middle course . . . to give maximum possible effect to both.”). EPA's proposed interpretation in the Clean Power Plan, which would allow for continued regulation under section 111(d) of non-hazardous air pollutants from sources regulated under section 112, is consistent with Congressional intent and EPA's historic regulation under section 111(d). *See* EPA Proposed Rule, Legal Memorandum 26-27.<sup>10</sup>

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<sup>10</sup> For example, EPA regulates methane and non-methane organic compounds from landfills under section 111(d) while regulating emissions of vinyl chloride, ethyl benzene, toluene, and benzene from those same sources under section 112, 61 Fed. Reg. 9,905 (Mar. 12, 1996) & 40 C.F.R. pt. 63, subpt. AAAA; and regulates fluorides from phosphate fertilizer

### 3. EPA Has Authority to Establish Substantive Emission Limitations in Emission Guidelines for States Under Section 111(d).

Section 111(d)'s framework gives EPA and states distinct but complementary roles to regulate air pollution from existing sources. EPA issues regulations that establish a procedure similar to section 110 in which each state submits to EPA a plan establishing, implementing and enforcing "standards of performance" for such sources. "In compliance with those guidelines and subject to federal oversight, States then issue performance standards for stationary sources within their jurisdiction." *AEP*, 131 S. Ct. at 2537-38.

EPA must also evaluate the content of state plans under section 111(d) and "prescribe a plan for a state in cases where the state fails to submit a satisfactory plan." 42 U.S.C. § 7411(d)(2). To fulfill its statutory responsibilities, EPA must establish substantive emission limitations. Otherwise, EPA would lack a benchmark against which to evaluate the adequacy of state plans under section 111(d)(2), as the statute requires it to do. Thus, like the section 110 framework and procedure, section 111(d) directs EPA to work hand-in-hand with the states to ensure that each state—through its plan—achieves the reductions that EPA has determined are achievable through the application of the best system of emission reduction that has been adequately demonstrated. This cooperative federalism allows EPA to establish the amount of reductions required, while giving the states flexibility to determine how to achieve, or even exceed, those reductions.

EPA's longstanding interpretation of its authority, as set forth in its implementing regulations, further affirms that it is, at a minimum, *allowed* to establish substantive guidelines. As EPA has explained, if it lacked authority to set minimum substantive guidelines, there is a risk states could set "extremely lenient standards" for those air pollutants subject to regulation only under section 111(d), which would leave "a gaping loophole in a statutory scheme otherwise designed to force meaningful action." *Id.* at 53,343. But EPA does have that authority and has exercised it in establishing substantive requirements in emission guidelines issued pursuant to section 111(d) for states to include in their respective plans.<sup>11</sup>

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plants under section 111(d) and hydrogen fluoride and other pollutants from those sources under section 112, 42 Fed. Reg. 12,022 (Mar. 1, 1977) & 40 C.F.R. pt. 63, subpt. BB.

<sup>11</sup> See, e.g., 40 C.F.R. § 60.30d (establishing emission guideline for sulfuric acid production units at 0.25 grams sulfuric acid mist per kilogram of sulfuric acid produced); "Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, Final Rule," 61 Fed. Reg. 9905, 9907 (Mar. 12, 1996); "Primary Aluminum Plants; Availability of Final Guideline Document," 45 Fed. Reg. 26,294 (Apr. 17, 1980); "Phosphate Fertilizer Plants; Final Guideline Document Availability," 42 Fed. Reg. 12,022 (Mar. 1, 1977); "Kraft Pulp Mills, Notice of Availability of Final Guideline Document," 44 Fed. Reg. 29,828 (May 22, 1979).

At the end of the day, although it is EPA's job to quantify the level of emission reduction required in state plans, the statute leaves it up to the states to design their plans to achieve those reductions based on their own circumstances. Indeed, it is in the interest of each state to have its own plan (rather than having to operate under a federal plan) because EPA might not have available all the tools a state would to achieve the necessary reductions in the most cost-effective manner.

#### **4. EPA Has the Authority to Interpret the “Best System of Emission Reduction” to Reflect the Various Ways States Have Successfully Reduced Greenhouse Gas Emissions from the Power Sector.**

EPA has the authority to determine a “best system of emission reduction” that recognizes the various ways states have successfully reduced greenhouse gas emissions from the utility sector. As EPA recognized in the proposed rule, more than half the states now have renewable portfolio standards (RPS) that support specific levels of renewable power generation, in turn displacing generation from existing fossil fuel-fired sources. States also have achieved significant cost-effective emission reductions and saved ratepayers money through efforts to reduce demand for electricity. More than half of the states require utilities to adopt energy efficiency resource standards, reducing demand by a specified amount each year.<sup>12</sup> Other state efforts include energy efficiency standards for consumer products and commercial and industrial equipment, efficiency components within residential and commercial building codes, incentives for consumers to adopt more efficient technologies, and investments in energy efficiency projects.

States' innovative programs provided EPA with valuable data and experience in determining the proposed best system of emission reduction adequately demonstrated for existing power plants. These states have demonstrated that it is possible to obtain substantial reductions in CO<sub>2</sub> emissions in a manner that is cost-effective and maintains grid reliability. EPA's “building block” approach in the proposed rule properly recognizes and builds upon these successful state programs.

The statutory language supports EPA's building block approach. Because the Act does not define the word “system,” the assumption is that “the ordinary meaning of that language accurately expresses the legislative purpose,” *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252-53 (2004) (quotations and citations omitted). And that meaning is quite broad: At the time Congress created the new source performance standards program in 1970, “system” was defined as “a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose.” Webster's Third New Int'l Dictionary of the English Language Unabridged 2322 (1968). This definition is sufficiently

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<sup>12</sup> See Am. Council for an Energy-Efficient Econ., *The 2014 State Energy Efficiency Scorecard 21* (2014), available at <http://www.aceee.org/sites/default/files/publications/researchreports/u1408.pdf>.

broad to embrace not just systems employed at the physical source to limit emissions, but also systems that are not on the plant site but similarly result in emission reductions from the same sources (here, fossil-fueled power plants).

Congress's repeated use of the term "system" in Title IV of the Act in the context of referring to the acid rain cap-and-trade program is further evidence that EPA's interpretation in the proposed rule is lawful. *See, e.g.*, 42 U.S.C. §§ 7651(b) (describing purpose of Title IV as reducing acid-rain causing emissions from fossil fuel power plants and recognizing "emission allocation and transfer system" as a method of compliance), 7651b(b) (providing for "Allowance transfer system") & (d) (providing for "Allowance tracking system"); and 7651c(h)(1)(C) (referring to unit that is subject to emissions limitation requirement that is part of a "utility system").

EPA's approach is further authorized by section 111(d)'s specific reference to section 110. Under section 110, EPA uses its expertise to set NAAQS for designated criteria pollutants that states must attain through implementation of emission limits set forth in their state implementation plans. EPA does not set source-specific emission limitations; that is left to the states. Similarly, in the proposed Clean Power Plan, EPA sets statewide emission goals that represent the best system of emission reduction for each state, and leaves it to each state to determine how to allocate individual emission limitations to meet those goals.

The interpretation of "best system of emissions reduction" in the Clean Power Plan's also would not "rewrite clear statutory terms" or otherwise "alter" statutory requirements in any way. *Cf. Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445-46 (2014). Instead, EPA has given meaning to the statute's text by considering the "best" ways to reduce emissions by properly accounting for the approaches states and utilities are using to achieve those reductions. *Cf. Massachusetts*, 542 U.S. at 532 (Congress chose sufficiently broad language in the Act "to confer the flexibility necessary to forestall . . . obsolescence."). It is ultimately states, rather than EPA, that have the authority and discretion to determine the emission reduction measures actually adopted. As EPA specifically recognizes in the proposed rule, under section 111(d), states are free to adopt measures other than those the EPA has determined comprise the best system of emission reduction.

EPA's authority to interpret "system" in section 111 is also not unbounded. Not only must EPA work within the word's ordinary meaning, but the qualifiers "best" and "adequately demonstrated" place important limits on EPA's authority. A body of case law compiled over the past forty years interpreting section 111(b) sets forth criteria EPA must use in determining whether a system is "best" and "adequately demonstrated." So, for instance, the system selected by EPA must be technically feasible and of reasonable cost.<sup>13</sup> The structure of the proposed Clean Power Plan adheres to these principles.

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<sup>13</sup> *See, e.g., Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427,433-34 (D.C. Cir. 1973); *see also* cases cited in 79 Fed. Reg. at 34,879 n. 194-198.

EPA's proposed approach to determining the best system of emission reduction and the flexibility EPA has provided to states in meeting their state emission goals, are not only authorized, but arguably compelled by what is already happening on the ground. EPA's approach reflects existing state and regional programs that have successfully demonstrated that electric power sector-based approaches are practical and effective means of cost-effectively reducing CO<sub>2</sub> emissions. These approaches include reducing electricity demand through demand-side energy efficiency measures, shifting generation away from higher emitting sources to lower or zero-emitting sources (including through RPS), and cap-and-trade programs such as those implemented under California's Global Warming Solutions Act and RGGI. These mechanisms have evolved in response to the integrated nature of the power grid and the fact that this grid is fed by a diversity of fuel sources. Indeed, the Utility Air Regulatory Group previously endorsed a cap-and-trade program to satisfy states' compliance obligations under section 111(d).<sup>14</sup>

In short, the interconnectedness and diversity of the electric grid provide unique opportunities to obtain cost-effective emissions reductions while meeting consumer demand and reliability needs, and give regulators significant flexibility in determining how best to meet their specific emission-reduction targets. Nothing in the statute prohibits EPA from using its discretion to harness these attributes, and, in fact, the agency is required to consider demonstrated systems that reduce emissions, as it has done here.

## **Conclusion**

If we are to address harms from climate change, it is critical to reduce greenhouse gas emissions from the largest source: existing fossil fuel power plants. EPA's proposed plan to require all states to reduce emissions from the electricity sector under section 111(d) of the Clean Air Act is lawful. The Clean Power Plan would also properly draw on the experience of states like New York that have successfully reduced greenhouse gas emissions from the power sector by allowing each state to use a variety of tools to achieve these reductions in a way that best suits its particular circumstances.

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<sup>14</sup> See Br. of Pet'r Utility Air Regulatory Group (UARG) in *New Jersey v. EPA* (D.C. Cir. No. 05-1097) (Jan. 12, 2007). In that case, not only did UARG argue that nationwide cap-and-trade programs constituted the best system of emission reduction, they contended states should be *required* to adopt such programs to satisfy section 111(d).