

D I A L O G U E

The Oklahoma Attorney General's Plan: The Clean Air Act §111(d) Framework That Preserves States' Rights

Summary

On May 20, 2014, the Federalist Society Environmental Law and Property Rights Practice Group convened at the National Press Club to discuss the form of the appropriate federalism model for regulating CO₂ emissions under §111(d) of the Clean Air Act. The event featured Oklahoma Attorney General Scott Pruitt, who discussed his recent paper, "The Oklahoma Attorney General's Plan: The Clean Air Act Section 111(d) Framework That Preserves States' Rights." Under that plan, EPA would design procedures and emission guidelines, and then states would determine the legally enforceable emission standard that is as stringent as the applicable guideline, unless the state determines a less-stringent emission standard is warranted. Attorney General Pruitt's presentation was then followed by a panel discussion of the plan's merits, its understanding of CAA §111(d), and its implications for state compliance. Below, we present a transcript of the event, which has been edited for style, clarity, and space considerations.

Jeffrey Bossert Clark (moderator) is chair of the Federalist Society's environmental law and property rights practice group executive committee, and a partner at Kirkland & Ellis LLP.

Scott Pruitt is Oklahoma's Attorney General.

F. William Brownell is chair of the executive committee and former head of the administrative law and environmental practice groups at Hunton & Williams LLP.

Patrick McCormick III is Republican Chief Counsel for the U.S. Senate Energy and Natural Resources Committee.

David Doniger is director and senior attorney for the Natural Resources Defense Council's climate and clean air program.

Jeffrey Bossert Clark: Good afternoon, everyone. We'd like to begin the program with our distinguished guest, Attorney General Scott Pruitt of the state of Oklahoma. Attorney General Pruitt has one of those multifaceted resumes to envy: Georgetown University followed by law school at the University of Tulsa, then a stint in private practice, later a senator in the Oklahoma Legislature for eight years, with four years as the Republican floor leader—and for seven years, he was owner and managing general partner of the Oklahoma City Redhawks, a AAA baseball team.

Attorney General Pruitt established the first federalism unit in Oklahoma's Office of the Solicitor General to combat unwarranted regulation and overreach by the federal government. He is a national leader in the cause to restore the proper balance of power between the states and the federal government, and has led or is still leading charges on that front against not only the U.S. Environmental Protection Agency (EPA), which is our subject today, but also on the Affordable Care Act¹ and Dodd-Frank.² Additionally, Attorney General Pruitt has not hesitated to break with his fellow state attorneys general when necessary; for instance, when he secured, consistent with law, millions of dollars in relief for Oklahomans harmed by unfair foreclosure practices in the mortgage industry. He's also acted to protect the most vulnerable child citizens of Oklahoma by negotiating a landmark settlement designed to dramatically improve foster care in the state.

It is the Federalist Society's honor and pleasure to have the attorney general here, to speak about his plan³ concerning §111(d) of the Clean Air Act (CAA).⁴ So, give a good welcome to Attorney General Pruitt.

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119-1025.
 2. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010).
 3. OKLAHOMA ATTORNEY GENERAL'S PLAN: THE CLEAN AIR ACT SECTION 111(D) FRAMEWORK THAT PRESERVES STATES' RIGHTS (Apr. 2014), available at http://documents.nam.org/ERP/OK_AG_Pruitt_Plan_05.20.14.pdf.
 4. Clean Air Act (CAA), 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

Scott Pruitt: “Multifaceted” experience; that’s right—baseball to law. It’s a wonderful life that I’ve been able to be a part of. I played baseball at the University of Kentucky, and sometimes the mistake is made that folks introduce me by saying that I played *basketball* at the University of Kentucky. Then, I step out from behind the podium and people see my very imposing stature and they say, “You didn’t play basketball at the University of Kentucky,” and that is a true statement.

It’s been a wonderful year for me. On a personal note, my daughter has gone on to college and done very well. She’s back home, so we’re excited about that. I hear all these stories about kiddos who go away to school and don’t stay in touch. They don’t e-mail, they don’t write, they don’t call. McKenna has stayed in touch because she needs money, so it’s gone very well. But I read with interest a story last year about a young lady who had gone off who didn’t stay in touch, and then she wrote a little missive to her dad toward the end of the year, saying: “It’s been a great year, Dad. Things have gone really well. The dorm did burn down and I did lose all my personal effects and textbooks, but I found a new place off campus to live, with a new roommate, Jim, and Jim is doing extraordinarily well. He’s been in recovery for almost six months now, and I know that we’ve not stayed in touch and I’ve not written, and I fully understand why you didn’t make it to the wedding, but I know that you’re not going to miss the impending birth of your new grandchild.” And she signs it and says, “Sincerely,” but adds a P.S.: “Everything above is untrue. I did flunk chemistry. I just wanted you to keep things in perspective.”

In the life that I live as attorney general, particularly on these issues we’re going to talk about today, we’ve got to keep things in perspective because they are very difficult issues from a state vantage point, and these are very adversarial, uncertain times for the states. I’m going to talk about that today. I want to say, first and foremost, thank you to the Federalist Society for hosting this event. It’s very kind of them to do that. This is going to be a very engaging and, I believe, thoughtful and productive discussion.

One of my favorite books recently—well, when I say recently, I mean in the past six or seven years—one of my favorite historians is Joseph Ellis. He’s written several books, and one is called *Founding Brothers*. There’s a chapter that I want to call to your attention just briefly, as kind of a narrative for my comments today. It’s a chapter dedicated to something called “The Dinner.” That was a dinner that took place among Alexander Hamilton, James Madison, and Thomas Jefferson. If you study history, which many of you in this room do very closely, you know that Alexander Hamilton and Thomas Jefferson were not the best of friends. They did not trust each other a great deal, but they particularly distrusted each other on policy issues.

An important issue being debated in the early 1790s, after the American Revolution, concerned all the debt the colonies faced. The federal government was contemplating consolidating all that debt at the national level, at the federal level. Alexander Hamilton, as Secretary of the

Treasury, was pushing for that, advancing that idea, and as you might imagine, Jefferson and Madison were very concerned about consolidation of power in the federal government, so they opposed it.

The three men had a dinner. They got together, which doesn’t happen very much these days in Washington, D.C. They got together as adversaries, as competitors, as individuals who were dealing with some very consequential issues. And they worked it out. The bargain they struck was that Madison and Jefferson would not oppose the Assumption Bill, as it was called, in exchange for . . . what? That the capital of the United States would be not New York City, but instead built on the banks of the Potomac River. That’s why our capital is here today.

There are big, consequential issues that we’re dealing with as a country in the energy/environmental space. Many of you know that Oklahoma is very active in oil and natural gas. We do have wind sweeping down the plains, as you know, so we’re very involved with renewables, but we also have coal, and we have the production and development of coal in southeast Oklahoma. We’re very vertical with respect to our energy development and production.

One of the important things about our state is that, historically, it has provided very low energy costs on electricity to our manufacturers, residents, and consumers. In fact, low energy costs has been one of the primary things that has allowed us to grow our economy, compared to Texas and others around us, because their tax rates are higher, and that’s been a marked advantage for us.

These are issues that we’re dealing with, with respect to energy, environment, and EPA’s role, and the state’s role—or as micro as what it cost to turn on the lights here today. I have a responsibility as attorney general to represent ratepayers before the Oklahoma Corporation Commission. The demands upon utility companies are substantial. They’re facing environmental mandates, along with all the other issues they deal with, and the combination is presenting—I don’t want to say a perfect storm—but it’s presenting a rather difficult situation for consumers, not only in Oklahoma, but across the country.

But I don’t want you to feel that our challenges in Oklahoma are somehow unique to Oklahoma. I think many states across the country are facing exactly what Oklahoma is facing. My purpose in being here today—these gentlemen are going to discuss the merits (very few demerits, David) of the Oklahoma plan—but in my remarks, I want to provide more of a big picture on the plan as a whole.

To start with, it’s important to recognize that there are some global issues up-front that I don’t endeavor to yield to. Our discussion about the procedure or §111(d) and the role of the states and the role of EPA, doesn’t necessarily mean that I or others yield to the fact that you take *Massachusetts v. EPA*⁵ and somehow extrapolate that CO₂ [carbon dioxide] is considered an air pollutant under that case. Does that necessarily link with it being nonstationary sources to stationary sources and existing sources? What

5. 549 U.S. 497, 37 ELR 20075 (2007).

authority and power does EPA have? That's a fundamental question that I'm not going to get into today, but it's a question that perhaps will be litigated, will be discussed, will be a source of contention on a going-forward basis.

Even more than that, globally, I think there is a significant interplay between §111(d) and §112. As you know, §111(d) says that EPA cannot regulate categories of facilities regulated under §112, and these existing stationary sources are regulated under §112. So, the weather, I think, has been resolved on CO₂ and whether it's a hazardous air pollutant or not. But *how* [to regulate], I think is what we're here to talk about today. What is the procedure? What are the steps that EPA should and shall go through as it relates to cooperative federalism and the role of the states?

In that regard, Oklahoma is a bit sensitive in light of our experience under the CAA with the regional haze situation. The regional haze statute just unpacked that briefly. In fact, we're seeking certiorari at this moment before the U.S. Supreme Court. We're hoping to hear [the Court's decision to grant or deny certiorari] very soon.⁶ But that section of the CAA is very specific as it relates to the authority of the states in setting up a state implementation plan.

Oklahoma did that in 2010. As you know, under the regional haze statute, we have obligations that have to be met by the year 2064. Oklahoma met those obligations, but despite its meeting the obligations, EPA swept into Oklahoma, [former EPA Administrator] Lisa Jackson swept into Oklahoma, within three months after [I was] sworn in as attorney general, and rejected the state plan, and simultaneously issued a federal plan for one reason and one reason only—EPA disagreed with the methodology, the decisions made by the state of Oklahoma. Not with the results, not with the outcomes, not whether there was compliance with the statute, but simply based upon an attitude that says we [EPA] know best.

EPA, in my estimation, is using its regulatory power to pick winners and losers, to elevate certain energy sources at the expense of others, particularly fossil fuels and, in this instance, coal. That is not the proper use of regulatory authority. EPA has an attitude. It's almost like elevating form over substance. [They take the position that] so long as we [EPA] agree with the state's decisionmaking, so long as we agree with the state's methodology as it reforms its responsibilities in the statute, so long as we agree with that, the state can put it in the state implementation plan. But if we [EPA] disagree with that, we're going to FIP [federal implementation plan] the respective states. EPA is going to force itself upon the respective states across the country, and I believe, in certain instances, exceed its authority under the statute. That's what we're here to talk about.

That theme is very evident as it relates to §111(d), and it's very timely for us to be gathering here in the beautiful month of May [2014] in Washington, D.C., because you know, on June 2d, there is going to be an unveiling by the

president himself, of what EPA is going to pursue under §111(d), the “how to do it” portion of CO₂ regulation.

There are two or three things I want to draw your attention to with respect to Oklahoma's plan. It's intended to be a counterpoint to the plan offered by the commonwealth of Kentucky.⁷ (You notice that I said the *commonwealth* of Kentucky. Having been born in Kentucky and growing up there, a commonwealth just as Virginia is, I recognize these things.) The Kentucky plan is something that has been put in the marketplace within the last three or four months, and it is intended to address the proposals that are going to come out of the Climate Action Plan⁸ by the president. It's a view from a state's perspective of the relationship between the state and the federal government under the §111(d) umbrella.

The primary thing that I find objectionable and that our plan deals with, with respect to the Kentucky plan versus our plan, is that it takes a mass emissions approach, as opposed to a unit-by-unit analysis from a state perspective. It effectively establishes a capitated or a cap and trade without the trade. It says to the states across the country: Here's what the emissions standards should be for your state. Now, you figure it out from there.

As that occurs, as a capitated objective is defined on a state-by-state basis, it seems to run counter specifically to the language in the statute. The U.S. Congress has been very specific, since the 1970s as these environmental laws were passed and signed into law, that it is very important to have the involvement, the partnership of the states in the regulatory process. In November of last year, I testified before Congress. Ms. Janet McCabe,⁹ who heads the air division of EPA, testified ahead of me and said all of the right things about the respect that EPA has for the states, and the role of the states in each of these key areas that we're talking about.

I followed Ms. McCabe in testifying. Shortly thereafter, Energy and Power Subcommittee Chairman Ed Whitfield (R-Ky.) asked me “How is that working for you?” My answer was, “Not very well.” This elevation of form over substance, this attitude that says we [EPA] know best, this dictatorial attitude that says so long as you agree with us then everything is kosher and everything is okay, is exactly the opposite of what Congress has said repeatedly in the role of the states. The states have a meaningful role. It's not an administrative role. The states are not a vessel to carry out the desires of EPA. The states are actually there to make important decisions, balancing factors between industry and consumers and meeting the obligations of air and water quality in their respective states. That's important to

6. The Supreme Court denied certiorari. See *Oklahoma v. EPA*, No. 13-921, *cert. denied* (U.S. May 27, 2014).

7. COMMONWEALTH OF KENTUCKY ENERGY & ENVIRONMENT CABINET, GREENHOUSE GAS POLICY IMPLICATIONS FOR KENTUCKY UNDER SECTION 111(D) OF THE CLEAN AIR ACT (Oct. 2013), available at <http://eec.ky.gov/Documents/GHG%20Policy%20Report%20with%20Gina%20McCarthy%20letter.pdf>.

8. EXECUTIVE OFFICE OF THE PRESIDENT, PRESIDENT'S CLIMATE ACTION PLAN (June 2013), available at <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

9. Janet McCabe is Acting Assistant Administrator for EPA's Office of Air and Radiation.

recognize. I think the attitude here in this city, and the attitude amongst the regulators, and the attitude at times amongst those who come into our states, is that [they are] going to change that and review that, and make sure that the states are acting merely in an administrative fashion.

Let's go to a quote by Justice Felix Frankfurter, because the statutes are clear here, in many instances. Justice Frankfurter said this: "Standards must be enforced to be respected. If they are merely left as something on paper, they might as well be written on water."¹⁰ That's what we're facing, as a collection of states. We're trying to give meaning and life to the words as drafted by Congress, and making sure that our responsibilities are protected and we can actually do our job as provided for by statute.

This mass emissions, unit-by-unit review is something that is, I think, the primary point, the primary distinction between the Kentucky plan and the Oklahoma plan. It's an arbitrary emissions baseline that's made upline at the state level and then it affects all decisions downline, on a unit-by-unit basis. It takes away the discretion from the states. You find that [discretion] in our plan.

The second point that I wanted to highlight for you in the distinction between the Kentucky plan and Oklahoma's plan is the way that it relates to §111(d). That distinction, which emanates from the mass emissions approach versus an inside-the-fence approach, is where the approach takes discretion away from the states as far as making decisions about more or less stringent standards on a unit-by-unit basis. The applicable regulations say very clearly that "states may prescribe, on a case-by-case basis, for particular designated facilities, or classes of facilities, less stringent emissions standards, upon unreasonable cost of control, physical impossibility, and other factors specific to the facility."¹¹ Now, how do you do that as a state if you have a mass emissions approach and a capitated approach, as presented by the Kentucky plan? We're hopeful that EPA is more persuaded by our position in the plan.

The third point I would mention to you as central to our proposal is that it maintains the primacy of the states. I reject—in fact, I find it offensive—that regulators in Washington believe that regulators in the states somehow aren't interested in the air we breathe and the water we drink in our respective places that we call home. I reject that utterly. In fact, I would say to you that Washington, D.C., EPA, and other agencies that are involved in these areas could learn a lot with respect to the expertise of the states.

Let me add this as an aside: Hydraulic fracturing—its regulation, our involvement as a state—in certain sections of the country, they think that's a new technology or a new phenomenon. We've been regulating hydraulic fracturing since the late 1940s in the state of Oklahoma. We have a very robust regulatory regime, tremendous expertise, and I think that this attitude that regulators at the state level are somehow dismissive or disregard the importance of

air quality is something that I find unfortunate. The federal government and EPA, through its §111(d) proposal, can recognize the importance of the states as it relates to primacy. Primacy is not something that is editorial. It's not something that we're asserting. It is something that is maintained and protected by the statutory constructs that Congress has put out.

So, these areas are important on primacy, and we need to make sure that we protect them, and that's what brings litigation to the bearer, Jeff. I've kidded [Texas Attorney General] Greg Abbott. When I came into office, I think he had roughly 13 lawsuits against EPA. I'm trying to catch up; we only have, I think, six or seven. I met him the other day in Oklahoma—we were having an event for him in Oklahoma—and [I learned that] he's up to 31 lawsuits. Now, let me say to you, as I share that with you, I don't want you to hear that we at the state level are simply trying to find ways to challenge or sue EPA. There are multiple examples. We have to prioritize, unfortunately, and it is in response to this attitude of command and control, as I talked about earlier, a D.C.-centric viewpoint that states cannot be trusted to exercise the authority given to them by Congress to meet the objectives and goals established under the environmental laws.

Oklahomans care about their air quality. They care about their water. We want clean air and we want clean water, and we've done it very, very well for decades. That balance between consumers and industry, and meeting the demands of environmental regulations by Congress, is something that we will continue to do in a responsible way. Our proposal, which will be discussed today, is an effort to establish guidelines for EPA. As the proposed rule comes out June 2, I'm hopeful that our proposal will find persuasion with EPA, and that as the rule is finalized in June of 2015, EPA will recognize that a mass emissions approach is not the way to go, that a cap and trade without the trade is not the way to go, that a unit-by-unit, inside-the-fence strategy that gives discretion, maintains discretion to the states to balance these factors, to evaluate cost, to make sure that all factors at the site are considered, will be maintained.

It is a pleasure to present that to you today, and I'm hopeful that the discussion we have together will be instructive. Thank you, Jeffrey, for the time to make the opening comments, and I wish the panelists well as they discuss the Oklahoma plan. Thank you.

Jeffrey Bossert Clark: Thanks, Attorney General Pruitt. I wanted the attorney general to be the star of the show. Let me at this point introduce myself and the other panelists. I'm Jeff Clark from Kirkland & Ellis, and I'm the chair of the Federalist Society environmental law and property rights practice group. We have two panelists with us to discuss the attorney general's paper, and we're hoping to be joined by a third. He is a staffer in the U.S. Senate and he's held up by a hearing there, but we hope he'll be joining us later.

10. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 537 (U.S. 1957) (Frankfurter, J., dissenting).

11. 40 C.F.R. §60.24(f).

One panelist we have is David Doniger. He is director of the Natural Resource Defense Council (NRDC) climate change and clean air program. He previously served as an attorney at the NRDC, and was an advisor in the Clinton Administration, primarily as director of the climate change policy issues at EPA, where he helped to negotiate the storied Kyoto Protocol. He's been involved in numerous high-profile lawsuits and policy initiatives related to carbon emissions, dating back to that time and going forward into the present.

We also have Bill Brownell, the chair of Hunton & Williams LLP, where he previously led the administrative law group and the environmental law team. His practice covers a broad range of environmental issues involving proceedings before federal and state agencies, courts, and Congress. He has represented the utility industry in proceedings under the CAA for over 30 years.

I will also introduce our third panelist, although he is not here yet. That third panelist is Patrick J. McCormick III. Pat McCormick is Republican chief counsel to the Senate Committee on Energy and Natural Resources. Prior to assuming his current role in 2011, he was a partner at Hunton & Williams, specializing in energy regulation and infrastructure development. Earlier in his career, he served as an attorney with the Federal Energy Regulatory Commission (FERC), and in the private sector at the Potomac Electric Power Company.

We're going to hear from each of our panelists in turn for about eight to 10 minutes, and then we will take questions.

F. William Brownell: Thank you, Jeff, and thank you to the Federalist Society for making this forum available. This is an interesting and timely topic. As you all know, there has been a lot of policy debate on the issue of §111(d) regulation over the past year. I thought that I would look at the statutory language, because that ultimately is what defines the scope of EPA's authority.

One of the things I remember from law school was from a comparative law course on the difference between a common-law country and a civil-law country. The professor said, "In common-law countries, everyone is worried about precedent. In civil law, you look at the statute. You look at the regulations." What's important, even in the common-law country, is to read the statute, read the statute, read the statute. I think that's really important here, as we go into the §111(d) rulemaking.

First, §111(d) talks about standards of performance for existing sources. It talks about the performance of sources, not about what other sources do, not about demand-side management, but about what is the performance of the regulated source. Second, in terms of EPA's regulatory responsibility, the statute says that EPA must provide by regulation a procedure similar to that under CAA §110, the state implementation plan (SIP) provision, for developing state plans. The regulations that EPA is to develop are procedural, they address the procedure for states to develop state plans. The states, however, develop the plans.

Third, the statute goes on to say that state plans must address two things. First, they address the performance standards for the existing sources. Second, they address implementation and enforcement of those performance standards.

Now, what guidance does the statute provide for plan content, both the performance standards and the implementation and enforcement provisions of the state plan? A standard of performance is defined in §111 as a standard for emissions of air pollutants that reflects the degree of emissions limitation achievable, using the best system of emission reduction that the EPA Administrator determines has been adequately demonstrated. So, the EPA Administrator has a role. The Administrator determines what systems of emission reduction have been adequately demonstrated. But then the state formulates the plan, defines the standard, and takes into account the systems of emission reduction that have been adequately demonstrated to define a performance standard that's achievable—an important role for the state.

As important, and perhaps more importantly, §111(d) then goes on to provide that, in formulating these plans, the states are to take into account the remaining useful life of sources in defining the performance standards for individual sources, among other factors. This is very interesting: remaining useful life, *among other factors*. Well, what are those other factors? They are the factors that states commonly consider when they develop SIPs; for example, factors that reflect the local and state considerations and conditions that inform commonsense regulation. So, that's all for the state in developing the state plan.

Now, if a state does not adopt a plan, EPA has what's called FIP [federal implementation plan] authority under §111(d). EPA can impose a FIP if it finds that the state plan is not satisfactory. This is not an equivalency test. Instead, the statute asks: Is the state plan satisfactory? Similar to the law that's developed under §110, which is the starting point of the procedural regulations that EPA issues, the determination of what is "satisfactory" is established by consideration of the range of factors under §111(d) considered in formulating the plan, the factors that we've talked about. If the state considers the factors, then its plan is satisfactory.

There are other limitations on EPA's authority with respect to §111(d) standards. Some of them were referred to by Attorney General Pruitt. For example, as he mentioned, if a pollutant is regulated under §108 and §109, the national ambient air quality standards (NAAQS) program, or under §112, you don't regulate it under §111(d) as well. If the source category is regulated under §112, you don't regulate it under §111(d).

Further, there has to be a new source performance standard in place for the source category. Section 111(d) talks about applying performance standards to existing sources that would be subject to a standard if the source were a new source. That, of course, raises a range of additional issues. There is a proposal out there right now—the comment period just closed last week—on new source performance

standards for greenhouse gases for the electric utility industry.¹² There are lots of issues with respect to whether, at the end of the day, that proposed rule will go into place, including the very important issue of the Energy Policy Act (EPAAct),¹³ which limits the authority of EPA and others to rely on U.S. Department of Energy (DOE)-funded projects as the basis for an adequately demonstrated technology determination. All of that is being debated in the context of this rulemaking and related litigation.

There are other considerations that we can talk about during the discussion, but I wanted to lay out the statutory structure for you because I think it provides important context for the discussion. The statutory structure very clearly delineates, I think, the roles of EPA and the roles of the state in developing plans and regulating under §111(d).

Finally, I want to quote a sentence from a brief that NRDC filed in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit on emissions trading—and I'm sure David will have something to say about this—under §111(d). This was in the context of the Clear Air Mercury Rule, an issue never ultimately addressed by the D.C. Circuit because they vacated the program on other grounds.¹⁴ “Trading is unlawful. The statute mandates that each state plan, under 111(d), apply the best system of emission reduction to any existing source, on a source-specific basis.”¹⁵ That's §111(d). Jeff, those are my remarks, and I'm happy to take questions later.

Jeffrey Bossert Clark: Thanks, Bill, for those remarks. Now, it is David's turn.

David Doniger: Thank you very much for inviting me into the lion's den. I have to confess that the first time I spoke in front of the Federalist Society, I was under the misimpression that I was going to be addressing the World Federalist Society, and I came rather unprepared, but I hope I'm a little better prepared this time. I thought, what is Boyden Gray doing in a meeting of the World Federalist Society, and suddenly I realized what was going on.

I want to stipulate, at least for the purposes of today—nobody else has put this point in play—I want to stipulate, at least for my purposes, that climate change is a very real problem. The science is strong. The threat is real. Many of you are familiar with the reports that have come out in the last few months. They are just icing on the cake, further scientific studies showing that the problem is real and the impacts are already on us. So, our goal [at NRDC] is to do something to abate this pollution, to abate it in the United States, in concert with a program of negotiation with other

countries to get them to take on their roles. But now let me just talk about the U.S. role.

The CAA is an important tool, a law already on the books, for addressing the climate change problem, and that's not just my opinion. That actually has been determined three times by the Supreme Court already, once in *Massachusetts v. EPA*, with respect to vehicles. In 2011, also, the Supreme Court held that the CAA empowers EPA to regulate CO₂ from power plants,¹⁶ and that was part of its disposition of a tort suit on the climate issue, so you can't bring a federal common-law case because this is EPA's job under the CAA.

More recently, after EPA issued the endangerment determination and the motor vehicle standards, there was litigation to challenge those, as well as some permitting regulations that follow from the motor vehicle standards. The Supreme Court pointedly denied the certiorari petitions on all matters except the permitting issues, saying “We're not going back there.” And in oral argument in *Utility Air Regulatory Group*, Chief Justice John Roberts in essence said, “We're not going back over that again.”¹⁷ Justice Anthony Kennedy, to paraphrase, said, “This is settled law,” citing *American Electric Power*¹⁸ and *Massachusetts*. And the *American Electric Power* case is a riff on §111 and §111(d). So, this is not virgin territory to the Supreme Court.

The Obama Administration issued landmark vehicle regulations in 2010 and 2012. The car industry is currently making cars that comply with these standards, which go out to 2025, so at that point, the vehicles will be getting twice the mileage and emitting one-half the CO₂ and other greenhouse gases that they did just a few years ago. This is a major achievement, and the auto industry is prospering under the standards. The power plants are the only source larger than the transportation sector. Forty percent of the CO₂ in the country comes from power plants. You can't address the problem of climate change unless we address power plants.

So, let's put aside for a moment the new source rule. I'm happy to answer questions about that, but we're here to talk about the coming approach to existing sources. EPA has been engaged in an outreach, a stakeholder process, direct engagement with states, with air regulators, with public utility commissions, with utilities, with environmental stakeholders, and others all across the country, since August of last year, on the proposed rule coming out in June [2014]. This is the most massive pre-proposal stakeholder outreach and engagement process that EPA has ever held, to my knowledge, and they have solicited and received lots of input from states.

My favorite piece of input is a letter from the Texas Environmental Agency and the Public Utility Commis-

12. Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1429 (Jan. 8, 2014).

13. Energy Policy Act of 2005 (EPAAct), Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 7, 10, 15, 16, 22, 26, 30, 40, and 42 U.S.C.).

14. *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

15. Opening Brief of Environmental Petitioners in *New Jersey v. EPA*, at 25-29 (filed Jan. 12, 2007).

16. *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 41 ELR 20210 (2011).

17. *Utility Air Reg. Grp. v. EPA*, Nos. 12-1146 et al., 44 ELR 20132 (U.S. 2014) (for a transcript of oral arguments, visit http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1146_768c.pdf).

18. *American Elec. Power Co.*, 131 S. Ct. 2527.

sion. The first two or three pages say, “Go away. Forget it. We hate you. Don’t do this.” The last seven or eight pages say, “When you do this, please structure your regulations to give us credit for all the good things we’ve been doing on energy efficiency, wind energy, and the transition from coal to gas.” I thought that letter was really interesting because the proposals in the latter half of the letter closely mirror the thinking that NRDC has put forward about how the power plants standards should be set, could be set, to achieve the most carbon reductions at the lowest cost, and with the most flexibility for the industry and for the states.

The first thing in our plan, which we published in 2012—we updated it in March of this year—the first element of our plan is the recognition that the power sector is different in every state. The mix of generation, coal versus gas, for example, is different in every state. And since this part of the CAA calls for federal standards implemented through state plans, it makes sense to account for the diversity of the starting point that the states have in the structure of the standards. So, we recommended that every state be given a baseline, which could be in 2005 or 2008. What were its emissions at that point, and what was the mix of coal versus gas in that state? There’s been a lot of transition toward gas, toward renewables, buildup of energy efficiency, and every reduction that came from those transitions, no matter whether they were induced by regulation or by markets or by happenstance—everything counts, including, for example, under our plan, increases in output from nuclear plants.

Any kind of zero-emitting generation counts for credit toward reducing the emissions of the system of power plants in a state. We don’t think it makes sense to limit the view to the relatively minor modifications that a plant could make on its own site. Why should it not have more compliance options than just that? It should have the option of getting credit, in effect, for switching the dispatch between the units in a company’s fleet more toward the cleaner ones, away from the dirtier ones. This is happening already. Why shouldn’t they get credit for it, and then why shouldn’t that be built into the further improvements that a standard might require, looking out to 2020 or 2025?

The cheapest way to reduce emissions—and it results in lower consumer bills, not higher consumer bills—is to emphasize energy efficiency in buildings and in the machinery, the appliances, all the goodies we use that consume electricity. If they’re more efficient, you don’t need as much electricity. Therefore, you need less generation. That less generation results in less pollution. There should be a way to get credit for that, so we propose formulas in which increases in efficiency become a compliance option for the operator of a coal plant or a gas plant. I’ll be happy to take further questions about how all that stuff works. It’s not overly difficult. It’s complicated, but it’s not hard. There’s a difference.

So, we propose a standard that takes into account those opportunities, differentiated state by state, graduated over time. We ran the proposals that we came up with through

the same model that the utility industry uses and EPA uses (the integrated planning model of the ICF Corporation), to see what it would cost and how much emission reduction you would get if you posited this set of standards or that set of standards, and we proposed combinations of standards that can achieve as much as 35–40% reduction in the total fleet carbon emissions by 2020. Really dramatic reductions, and yet they would cost less than the Mercury and Air Toxics Standard.¹⁹

When you do cost-benefit analysis, in which you take into account the benefits of achieving carbon reductions—again, if you accept the science, which as I stipulated at the beginning I do—and when you take into account the public health benefits that come from further reducing sulfur dioxide and nitrogen oxide emissions, you end up with \$30–60 billion in quantifiable dollar-value benefits, against roughly \$10 billion in costs to comply with these standards.

So, we think this is a massively good deal on a cost-benefit basis. It’s legal under the CAA. The question, by the way, whether §111(d) can’t be used because power plants are regulated for other pollutants under §112, I predict that will take the courts less than five minutes to dispose of, and I’ll explain why if you have questions about that. It’s a classic *Chevron*²⁰ ambiguity question, and it will go away very quickly.

EPA has been upheld, most recently in the *Homer City*²¹ case. It’s not exactly on point, but it does involve analogous provisions, analogous problems. It’s a very ringing affirmation of EPA’s authority and responsibility to solve problems that come up, even if they were not entirely, precisely anticipated, because that’s the way the CAA is written. It gives EPA that authority and responsibility, so long as the Agency does it reasonably and rationally. That opinion was joined by Chief Justice Roberts and Justice Kennedy.

So, we think EPA is operating from a very strong position. They have a serious responsibility and a big opportunity, but at the same time, we want to see every state have proper differentiation and proper access to flexible compliance. We want to do this as cheaply and as reasonably as possible, and NRDC is very eager to talk to anybody about how to do this in a sound way. Thank you very much.

Jeffrey Bossert Clark: Thank you, David. We have been joined by our fourth panelist, Patrick McCormick, who is chief counsel to the Senate Energy and Natural Resources Committee.

Patrick McCormick III: Thank you very much for having me, and I apologize for my being late. When I was in practice and used to come to events such as this one, it always annoyed me that the guy from the Hill showed

19. Mercury and Air Toxics Standard (MATS), 77 Fed. Reg. 9304 (Feb. 16, 2012) (codified at 40 C.F.R. pts. 60, 63).

20. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 14 ELR 20507 (1984).

21. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 44 ELR 20094 (2014).

up late, didn't listen to the material, and had things to say that were so ephemeral I could read them in the trade press tomorrow.

So, I apologize for fitting the bill. I also want to commend the Federalist Society for engaging this debate, and thanks obviously to the attorney general for writing that very thoughtful paper, and especially to David for coming and being part of this discourse. On our committee, the senators on both sides of the dais have a real commitment to discourse about the subjects that divide us. It's good to be with you.

I should also say by way of disclaimer that obviously my views here are my own. They're not the views of any senator, certainly not of Sen. Lisa Murkowski (R-Alaska), who is our ranking member, and as much as I would welcome the opportunity to be the chief counsel of the committee, I am in fact the minority chief counsel, a situation that may change imminently, but we don't know.

With that having been said, I should note that my colleague Margaret Caravelli is here, and the committee for which she is a staff person has jurisdiction over the CAA. While it is true that I was once a partner of Bill Brownell's, I really don't pretend to know even the things he has forgotten about the CAA.

F. William Brownell: A little bit more each year.

Patrick McCormick III: In any case, I will leave to the discourse you have already had the proper reading of §111 and all of that.

Something that might be worth considering, as part of this conversation, is that from the time of—I think it's called the Ash Council Memo,²² which is the memorandum that went to President Richard Nixon, outlining the case for EPA (and if you haven't read that memo, I really commend it to you)—from that time, there has been a real concern about balance and the rule of law and not having environmental regulation completely swallow regulations of other kinds. That concern is one that's been wrestled with by Congress and the courts over time.

As we think about §111(d) and how it might be implemented in the next year, or two years, or five years, we really do go back to those fundamental questions. The fundamental question for the senators on our side of the dais on the Energy Committee—and I think also for Sen. Joe Manchin (D-W. Va.) and some others on the other side of the dais—is how do we ensure what Senator Murkowski says repeatedly and has written on extensively: abundant, affordable, clean, diverse, and secure energy; specifically with respect to electricity. The key to that is electric reliability and the affordability of electricity. Those issues are very squarely within the jurisdiction of our committee.

The reason I was late is that I came from the confirmation hearing for two nominees to FERC, one of whom is

already serving there. Although we disagree with her on policy grounds on many things, including the administration of FERC's authorities as they relate to the administration of EPA's authority, she is a very studious, very fine, and balanced commissioner whom Senator Murkowski strongly supports.²³

I tell you that because in the hearing I just came from, §111(d) was indeed a subject of discussion. That's not surprising because the Kentucky plan—and David, I apologize, I have not read your paper, which is cited in the attorney general's paper—the Kentucky plan essentially calls for, I think the attorney general called it a mass emissions approach, and that approach is very similar to cap and trade, for which the Waxman-Markey bill²⁴ was jurisdictional to our committee, and Congress never moved on that. In fact, in the Senate, it's interesting to recall that the Waxman-Markey bill—well, the Senate variant—was on the calendar for months, almost one year, at a time when the current majority commanded a greater than 60-vote margin, and yet it never came to a vote.

The points that the attorney general makes, I think, are very consistent with the overall themes that Senator Murkowski and the senators on our side of the dais have taken, which is that although we don't have jurisdiction over the environmental laws, we want to see that the environmental laws are administered according to their terms and are not supplanting the energy policy of the United States. I thought some of the points in the Oklahoma plan were really right on target in terms of trying to get back to that balance, and although I like the idea of flexibility, and I seem to recall—David or Bill, you can correct me—I seem to recall that the idea of mass emissions or a sort of overall cap was a Republican idea originally.

I like the flexibility that it affords, and I credit David for wanting to work within that flexibility. But as the attorney general's paper points out—and I'm sorry I don't have the quotation right at hand—the flexibility offered under the Kentucky plan is a [mere] guise of flexibility because of the vast authority that it would cede to EPA. So, that's my reaction from my perspective, and I hope that it's helpful.

Jeffrey Bossert Clark: Let's proceed this way: With Attorney General Pruitt's indulgence, if I could ask for your reactions to the panelists, first, and then I'd like to exercise my prerogative as the moderator to toss out the first question to the panel. Attorney General Pruitt?

Scott Pruitt: Thanks, Jeffrey. I appreciate the comments by all the panelists. Here's one of the things, David, that I did want to ask you about: You made the reference to emissions baselines based upon historical—you pick a year, 2008, 2010—that recognizes the steps that states have taken

22. Letter from Roy L. Ash, Chairman, President's Advisory Council on Executive Organization, to Executive Office of the President (Apr. 29, 1970), available at <http://www2.epa.gov/aboutepa/ash-council-memo>.

23. The Senate confirmed Chairman Cheryl A. LaFleur for a second term on July 15, 2014. See <http://www.ferc.gov/media/news-releases/2014/2014-3/07-15-14.asp#.VD1mFVeaUW4>.

24. American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009). The bill was approved by the House on June 26, 2009, by a vote of 219-212, but was defeated in the Senate.

historically. How do you reconcile that emissions baseline approach, which would be defined on a state basis, with the language that Bill cited in his comments? Just to reiterate, the language was: “Congress explicitly required the EPA to allow the states to permit the state, in applying the standard of performance to any particular source, under a plan to take into consideration, among other factors, the remaining useful life of the existing source to which the standard applies.” Clearly, Congress contemplated that the states were going to look at unit-by-unit basis, with that type of language, at least from my perspective. Do you not see any kind of conflict between that language and an emissions standard that’s based at the state level?

David Doniger: That’s a good question. Thank you. The language “remaining useful life” doesn’t have a definition. I can think of a number of different ways to define it. The focus might be on how old a facility is, or its economic value, how much economic value it still has left. Whichever way you think about that, I do believe in the approach that we’re suggesting the states have—and in fact the power companies have—the ability to take into account the remaining useful life of a facility. For example, under the proposal that we’ve launched, it turns out that Oklahoma is a 50/50 state. It’s the state that had an equal dependence on coal and gas-fired power in the baseline period that we looked at, just hypothetically, which was an average of 2008-2010.

So, if Oklahoma had that distribution, and then a standard was established, and it’s essentially a formula—this much for gas, this much for coal, and in your case, it would be equally balanced—but there’s a lot of flexibility in how to achieve that. So, if you wanted to keep a particular coal asset or a particular gas asset running longer, you would be able to use the mechanisms I described of crediting, basically of doing something else, in order to cover the emissions of that plant to the extent it was over the limit. There would be total flexibility at the state level, or at the corporate level, to decide how long to run each facility, so long as its emissions were properly covered.

If I may, let me just say that our proposal is not a cap-and-trade proposal. There is no cap in the NRDC proposal. We proposed an emission rate. It would be a rate, as I said, differentiated from state to state. But it would mean that if power demand went up in a particular fast-growing region of the country, the rate could still be met. Mass emissions might go up, but it wouldn’t be required to meet a given cap.

What our proposal does include is an option, at the state level, for states that want to use cap-and-trade approaches, that want to use mass-based approaches, to choose to do that and to convert from the rate-based—you multiply the rate by the expected electric demand in the year 2020, and you end up with a number of tons, and if the state wants to manage its situation under a cap-and-trade-based formula, so be it. Now, the eastern states and California already have those kinds of programs. Kentucky has expressed some

interest in it, but it would be a Kentucky choice. Montana has expressed some interest in it, but it would be a Montana choice. And other states, under our proposal, could continue to operate with no caps, although there would be these emission rates, and averaging and trading between sources, in order to achieve the most reduction feasible at a reasonable cost.

Jeffrey Bossert Clark: Thank you, David. You’re going to be a popular panel member, because the first question that I want to put is to you. So, that’s giving you a lot of the speaking time. First, in terms of your remarks, I do think that the science is contestable, and I also think that your interpretation of cases like *American Electric Power* are contestable, but we’re not here for that purpose. Let me stipulate that they’re just not on the agenda for today.

The issue for today, it seems to me, and you’ve been addressing it, is compliance with §111(d)’s terms. You said that it would take the Supreme Court or any court all of five minutes to reject an argument that what the EPA is doing here, or we suspect that they will be doing, is improper.

I think there are three textual limitations. First, the last time I checked, there’s still a Step One in *Chevron*—it’s not all *Chevron* Step Two—embedded in §111(d). One of those that you’ve been talking about is the useful life reference, which I think is inconsistent with the whole notion of picking winners and losers that Attorney General Pruitt was talking about. I think you’re going to have problems there, but let’s put that one to the side because you spent so much time talking about it already.

The other two key textual limitations are the fact that the statute is structured to give EPA the power to create procedure, not substance; and the second one is the source category limitation, which was your jumping-off point for your claim of the five minutes it would take a court to reject that. It seems to me that those two limitations in the statute are very strong. They’re framed in mandatory and very clear terms. Why, in your view, would they be rejected as *Chevron* Step One grounds for a challenge?

David Doniger: Well, my glib remark about five minutes was about the second one, the source category limitation, so let me address that. The basic idea of the *Chevron* case is that if Congress settles on one form of word formulation and it is crystal clear, then that crystal-clear meaning has to be observed; but if there are gaps or ambiguities in it, the Agency gets considerable discretion to resolve those ambiguities. (And by the way, I argued and lost the *Chevron* case. I sometimes feel it’s better to be really unhappy 30 years ago and pretty satisfied now, rather than the other way around.)

That’s the principle of the *Chevron* case. Now, when you look at this particular statute, it turns out that Congress really kind of screwed up in 1990. They adopted two provisions, in two different sections of the 1990 CAA Amendments, that both modified the same sentence in §111. The codifiers didn’t know what to do, so

they tried to pick one version of it and put it into the *U.S. Code*. But what really is the law of the land is found in the *Statutes at Large*. So, you have to reconcile these two inconsistent amendments adopted at the same time to a single sentence of the CAA.

If there ever was a place where the *Chevron* doctrine applies, it's got to be that: where the statute is a mutation in the process of dividing and combining between the U.S. House of Representatives and the Senate, and the Agency is going to end up with the leeway to resolve that. EPA did produce a resolution of that in—I believe it was the mercury regulations, or maybe it was the more recent ones—and I think the federal Circuit Court and the Supreme Court will literally spend, together, maybe 10 minutes resolving that one.

As for your other textual limitation, the question is what does the term “procedure” mean? What §111(d) does is it says: Think about how it came to be. In 1970, they were writing this law, and there was a section on ambient air quality standards, so there are these concentration values in the atmosphere and state plans to implement them. EPA sets the former. States do the plans. EPA judges whether the state plans are going to meet those concentration values, approves or disapproves them, and issues FIPs if the state plans don't.

Bump over to §111. They wrote a section that said we should have new source performance standards, standards for new plans. Bump over to §112, which actually was carved out of §111 during the legislative process. It said that for special pollutants called hazardous air pollutants, we're going to have not only new source standards, but also existing source standards set by EPA. Very near the end of the legislative process in 1970, the drafters realized that they had a gap. They hadn't provided for regulation of existing sources of pollutants that are neither the ones for which the air quality standards are set nor the hazardous air pollutant standards, but they are dangerous. Those pollutants have been determined to endanger. So, §111(d) was written to fill the gap by providing that EPA would set a performance standard and the states would write implementation plans through a procedure like the one used to meet the air quality standards. That's it. That's how it came to be.

It's quite clear that it also says EPA has the same authority to approve and disapprove FIPs and to write federal plans as it does under the program to meet the air quality standards. It says that, very explicitly. The state plans have to be satisfactory to be approved. If they're not satisfactory, they have to be disapproved, and then there is a requirement issue of federal plans. So, again, I don't think there's much ambiguity there. If there is, then it's going to get resolved, so long as EPA is reasonable about the way it's interpreted, in the Agency's favor.

Jeffrey Bossert Clark: Before we open it to questions from the audience, are there any panelists who want to make remarks, especially about the issue of the Senate and House amendments that were both adopted in conference,

whether they conflict or not, and how any conflict would be resolved?

Patrick McCormick III: Yes. I can't speak to the legislative history that you've outlined, but you are outlining my worst nightmare as someone who works in Congress. Of course, it wouldn't be a nightmare to be actually legislating on subjects such as these. I think that would be very important.

There is one part of the paper and one aspect of the debate as outlined in the paper that is jurisdictional to our committee. I'm reminded of it by your comment, because I think that in the EAct, Congress went the extra mile to be very specific about certain demonstrations for purposes of §111(d). On page 8 of the paper there is a good discussion, a long paragraph that raises the issue we're engaged with here, the question of whether carbon capture and sequestration is adequately demonstrated. Congress, in sort of the opposite situation to the one you're describing, was trying to harmonize laws and said very clearly in EAct that for purposes of §111(d), you couldn't say that a technology was adequately demonstrated if it was a technology that was receiving assistance from the DOE's Clean Coal Power Initiative.

I mention that as a mere footnote to the much broader and important question you're raising, but the point is that Congress doesn't always get it wrong. And I'm not suggesting you were wrong.

David Doniger: I love the CAA. You talked about the founding brothers. I think of the people who wrote the CAA as a kind of second set of founding brothers. That may scare you; I don't know.

Patrick McCormick III: I will disclose that one of my children is named after the first general counsel at EPA.

David Doniger: On the point you raised, what those provisions say is that, first of all, I don't anticipate any reliance by EPA in the §111(d) rule on carbon capture and storage, but that has to do with the new source rule, the subsection (b) rule. What those provisions say is that you cannot rely solely—*solely*—on a federally supported project to support the demonstration of a technology. EPA's position is that they have not relied solely. They have a solid basis in facts that flow from projects and experience that has no EAct support, that is sufficient to demonstrate that carbon capture and storage is demonstrated achievable technology for the new plants, and the EAct plants would provide a kind of verification. But if you didn't have that, if it didn't exist, there is still a basis for the standard.

F. William Brownell: Jeff, if I could just jump in, because there's a different side of the story on each of the points that David and others have discussed. Just very briefly: On the §111(d) limitations on EPA's authority under the clauses on regulation of pollutants under other sections, including reg-

ulation of source categories under §112, the other side of the story is that there are two limitations on EPA's authority. At the end of the day, they're both there in the statute, and they both should be applied. No pollutant that's regulated under §108, §109, or under §112, and no source category regulated under §112, gets regulated under §111(d).

On procedure, you know, the response is: Procedure is procedure, substance is substance. Congress knew what it was talking about when it talked about procedures. Look at CAA §307(d), which provides different standards for judicial review of substantive and procedural decisions. And in EPA's Act, "solely" does appear, but it appears in only one of the clauses that limits EPA's authority with respect to consideration of technologies as adequately demonstrated: "No technology, no level of emission reduction achieved solely by that technology, or no level of emission reduction achieved shall be considered as a basis for an adequately demonstrated determination." "Solely" is confined to one clause, and that clause does not modify technology. So, that's the other side of the debate on this, and that's what may take—

Scott Pruitt: That's why it may take a bit more time than five minutes.

Jeffrey Bossert Clark: On the point that Bill was talking about, in terms of the Senate version and the House amendments, and the fact that both should be given effect, there's a paper that I'll commend to you that's up on the Federalist Society website, written by William Hahn, I believe. It covers the legislative history and basically takes the position that both the Senate and House amendments are directionally deregulatory. I think his prediction would be that it's going to be tough going for EPA and the courts if they try to say that because the House and the Senate amendments are not identical (even though in conference they adopted both), then that somehow creates ambiguity and EPA can do whatever it wants and ignore the deregulatory purposes of both of those amendments. That would be pretty dicey for the Agency to try. So, take a look at that paper, if you would.

With that, let's kick it open to the first question from the audience. Sir?

Attendee: Greetings and thank you very much to the panel. It was wonderful. Quick question: I'm having a tough time wrapping my head around what an FIP would look like under a beyond-the-fence, mass emissions §111(d) regime for greenhouse gases. Utilities normally plan on four-year horizons with these integrated resource plans. Would an FIP, under the Kentucky plan or the NRDC plan, would it empower EPA to impose a de facto IRP [integrated resource plan], and is that within the Agency's technical and functional expertise?

David Doniger: I'm glad I came. My view is that what a state plan will provide, if it's developed by the state as it

should be, it will impose an emission rate—I mean, this is the plain vanilla version—impose an emission rate on the sources. Those that are over the limit would have a compliance obligation. Those that are under it, the state could choose to turn them into credit generators. The plan would also provide what the compliance tools are that a source above the standard is entitled to use, and at least in our proposal, that would be things they do to ratchet down the emission rate of the source itself by improvements to the physical plant. But it would also count credits through the kinds of approaches that we describe in our report, to move toward cleaner dispatch order, and credit for wind plants, the zero-emission generation of wind plants built after the baseline. That would count. Uprates of nuclear plants would count, and, as I explained, credit for the reduction in power demand by making our buildings, homes, and appliances more efficient.

Now, if the state chose not to do that, the question is, what would the federal government's plan provide? It might provide only that same emission limit and at that point, as it is under the CAA, there is always the prerogative of the state to resume the lead. I'm not speaking for EPA. I don't know how they're going to do this, but this is just our idea. The federal plan would specify the emission limit. If the tools to bring all of those compliance measures into play are really state tools, well, that's the state's option. Bring them into play if you want.

F. William Brownell: Let me answer that a little differently. Under the Federal Power Act, FERC doesn't have authority to override, to dictate integrated resource planning at the state level, much less EPA, so that's the first point. The second point is that this whole discussion illustrates the difficulty you get into if you go beyond the source-focused performance standards authorized by §111(d). If you're focusing on what the performance of a source is, based on best adequately demonstrated technology for that source, then theoretically, if the state doesn't adopt a plan and EPA has to, EPA can then determine what's adequately demonstrated technology for the source in the source category, by looking at what's the appropriate performance standard for the source, taking into account, as the statute says, things like remaining useful life of the individual facility.

Now, as David says, that might not be as flexible as something the state could do in implementation. The state could always come back with its own §111(d) plan after that. But if you confine it to the proper statutory authority, what is the performance standard for the source, I think you avoid some of those problems you raise.

Patrick McCormick III: I would like to add that not only does FERC not have the power to impose integrated resource planning under the Federal Power Act, but the Federal Power Act specifically ousts FERC of any jurisdiction over electricity generation. It's very clear in the Federal Power Act that electricity generation is a state matter, and

that, I think, goes along nicely with an inside-the-fence §111(d) analysis consistent with the Oklahoma plan.

Scott Pruitt: David, your comments have been constructive as far as our discussion here today, but it seems to me that the NRDC's approach (hopefully not EPA's approach) is that this section provides substantive authority to EPA, not procedural, which has a direct corollary effect on what the state can do. It converts the state's role from a substantive position to an administrative or procedural position. It takes away the authority of the states to contemplate the useful life that Bill made reference to, in addition to these other factors on less-stringent standards for a unit-by-unit designation. The statute clearly contemplates that.

David Doniger: Actually, the explanations are in the regulations and were created by EPA, but could be changed by EPA.

Scott Pruitt: But you're dismissing those factors. If you could reconcile that, it would be helpful, because I'm trying to understand the reconciliation.

David Doniger: The statute says—and there's no denying this—that there needs to be consideration of remaining useful life. What I've argued is that in a flexible structure, which has a limit for each source, but doesn't command that the limit has to be met all by itself at that source, it has other tools available—then the state and the source operators have flexibility to decide how long they believe it's valuable to operate that plant and continue doing that by use of the flexible compliance methods. That should be welcome rather than—

Scott Pruitt: If states have the ability and authority to determine a less-stringent rate on a facility-by-facility basis, based upon a physical impossibility, based on factors at the site, how do you achieve that if you are starting from the top down, with a mass emissions approach? How do you achieve that?

David Doniger: I don't expect EPA to set the standard in terms of mass emissions. I expect them to set the standard in terms of rate of emissions, and I've explained that. Here's another way to look at it: In the 1975 regulations that you're referring to, EPA was thinking of standards that were set in a way that most of you are recommending: in other words, a uniform standard that's the same for every plant of a given type. Then, the Agency contemplated, in accordance with the remaining useful life language, that maybe there would be something different about the economic position of one of those plants, so you need a variance. If you're going to have a uniform standard, you need a variance. That's the way EPA interpreted the statute to read. The regulations flesh out the procedures and the considerations that go into the variance provisions that EPA was thinking about at that time.

But if you think about the standards differently, that they're not set on the basis that every single plant is the same and every single plant has to meet this by itself, then you have other mechanisms of compliance and other ways to take into account the underlying concern, which is that when plants have a different cost structure or a different situation, there needs to be a way to recognize that. So, built into this flexible emission rate standard approach that we are recommending is consideration of remaining useful life.

F. William Brownell: If I could just follow up on that—and this is a discussion that could go on the entire afternoon, quite easily—when I look at the Oklahoma plan and others who have come out and emphasized that it's the state's responsibility to develop the plan, it's not about imposing a uniform standard of performance across a source category under §111(d). It's about looking at the technologies that EPA has determined are adequately demonstrated for the source category in determining, first, what is achievable at specific sources, using adequately demonstrated technology? Then, what is best in light of the statutory considerations? What is appropriate for the source in light of the remaining useful life? And other factors that are particularly relevant at the state and local level. So, the plan, far from providing uniform regulation of sources in the source category, would provide for tailored regulation of individual sources, depending on the factors that I've discussed.

Jeffrey Bossert Clark: Before we go to another question, let me just hop in here because I think some of these questions—and I'm a specialist in the CAA, as well—can get very abstruse, so let me try to tie it to something that a more lay audience would understand. President Obama very famously said that, "Oh, you can build coal-fired power plants but if you do so, you will be bankrupt," and that approach seems to be running through all of the greenhouse gas regulations. Certainly, I think that will be part of industry's argument in challenging the rules, if EPA goes in the direction of making existing coal-fired power plants impracticable.

Isn't the self-evident purpose of that language in the statute, about considering the remaining useful life of plants, something that was designed specifically, David, by Congress to ensure that preexisting investments in any technology, but in this case primarily coal-fired power plants, would not be effectively rendered useless or have their life cut short by a stringent regulatory regime? Wasn't that the purpose of Congress in 1990?

David Doniger: That dates from 1970, I think, but no, I don't think there is a guarantee in the CAA that all the sources continue to remain in the same economic position that they would be if they were allowed to continue discharging dangerous pollution without any restrictions. The whole point of pollution control legislation is to internalize the cost of pollution that is being imposed on the

rest of us. Again, it's important, and I'm sure there's disagreement in the room about whether this is a serious kind of pollution, but I stipulate that it is at least from NRDC's vantage point.

So, when any kind of source is required to limit its pollution, its cost of operating changes. Sometimes, actually, it goes down. The car regulations have the fortunate impact of making cars cheaper to own and operate than they would have been if there were no standards, because of the payback in savings on the gas you don't have to buy. But sometimes, and probably most of the time, pollution regulations raise the cost of operating a source that is emitting pollution, and that's going to shorten its economic life, reduce its economic value. The question always is how much or what is the right balance. But you can't start with a proposition that Congress didn't want anything to change.

Patrick McCormick III: I'm going to show my ignorance here. I'm not a CAA lawyer, so please correct me, but I thought that the purpose of the CAA was to protect the public health and to reduce pollution. I don't think that it's an economic statute whose purpose is to internalize the cost of pollution. That may be a consequence of pollution control, but from my point of view as a Power Act lawyer who works for the Energy Committee, that's precisely the kind of assertion about the reach of the environmental laws that is problematic from our point of view as people who are responsible for safeguarding the energy system and making sure that it's balanced. I'm all for public health, and I wasn't kidding when I said one of my children is named after the first general counsel of the EPA. I admire the work that was done in the early '70s, and I'm all for pollution control, but internalizing the cost of pollution, while it may be a consequence, is not a purpose.

David Doniger: Please don't mistake me. I didn't say it was a purpose; I said it was a consequence. It is a necessary consequence of controlling pollution to meet a health or environmental objective, because that's done to protect public health and welfare, which includes the climate. That's explicit in the statute, and the Supreme Court has so held. But when you do that, you cannot do that without—let me put it this way—you cannot do that and have a purpose or a principle limitation where you hold harmless the economic position of a polluting source. So, I'm not saying that it's our purpose to change the economic position. It's not. Our purpose is to control the pollution.

F. William Brownell: That's why you have that language in the statute.

Jeffrey Bossert Clark: Yes. We realize we've gone over a little, but Attorney General Pruitt has prevailed on me to take one last question from the back.

Scott Pruitt: You've been very persistent.

Attendee: Gentlemen, thank you all for a wonderful discussion, including you, my dear cousin. David is always very sharp and very—

David Doniger: He claims to be my cousin.

Attendee: I'm trading on that. It's really helped my career a lot, such as it is. Look, the original carbon pollution rule, which came out in April 2012, was deeply weird because in that rule, EPA decided that the performance standard for new coal power plants would be based on the emissions profile of a natural gas plant, and, in effect, EPA defined a gas turbine as an adequately demonstrated system of emission reduction for a coal boiler. So, it was a blatant fuel-switching mandate, and I think that may be the main reason why they pulled it, why they needed a do-over, because it is so obviously contrary to congressional intent.

But it seems to me that these other options that are being discussed, for existing power plants, are very much in the same spirit. In other words, you're not going to require an existing coal plant to meet the emissions profile of the natural gas plant, but you're going to propose a performance standard, or a performance standard guideline, which basically says that each coal plant must split the difference between itself and a natural gas-combined cycle plant. It's still very much a fuel-switching mandate, it seems to me, that's being talked about here. In fact, David, that was one of the options that you said states could use in order to come into compliance.

The question I would raise is: Do you really think, does the panel really think, that Congress intended that the §111(d) provision would be used to set standards for existing sources that no existing source in that category can meet, and that the only way that it can meet it is by reducing its operation, maybe even going out of business, and having the covered entity shift to a different type of facility? Does anyone think that that's a plausible reading of congressional intent?

F. William Brownell: My answer is probably shorter than David's. It's no.

David Doniger: Well, yes is about the same length.

Jeffrey Bossert Clark: Any last remarks before we close out? Thanks to all of our panelists, to Attorney General Pruitt, to Bill and David and Patrick, and to all of you and your patience.