
ENVIRONMENTAL LAW — CLEAN AIR ACT — EPA INTERPRETS THE CLEAN AIR ACT TO ALLOW REGULATION OF CARBON DIOXIDE EMISSIONS FROM EXISTING POWER PLANTS. — The Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

On August 3, 2015, President Obama announced the finalization of the Clean Power Plan¹ (CPP), a regulation he described as “the single most important step America has ever taken in the fight against global climate change.”² The CPP marks the Environmental Protection Agency’s (EPA’s) first foray into regulating carbon dioxide emissions from existing power plants and, with the simultaneous enactment of regulations setting carbon dioxide emissions standards for new power plants,³ represents an unprecedented exercise of the EPA’s jurisdiction over the energy sector.⁴ While some argue that the changes the EPA is asking states to make are beyond the bounds of its statutory authority,⁵ the EPA’s first fight appears to be over whether the agency has the authority to regulate greenhouse gas emissions from existing power plants at all. Whether the EPA has such authority will come down to the reading of one provision of the Clean Air Act: section 111(d).⁶

In the year between issuing its proposed (Proposed Rule) and final (Final Rule) versions of the CPP, the EPA substantially altered its approach to interpreting section 111(d). While both readings reach the same conclusion and result in the EPA regulating the same universe of sources, the new legal analysis reveals the EPA as an agency responding to *King v. Burwell*,⁷ the Affordable Care Act (ACA) case decided some five weeks before the Final Rule was announced. As one of the first major pieces of regulation released post-*King*, the CPP may serve

¹ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) [hereinafter Final Rule] (to be codified at 40 C.F.R. pt. 60).

² Remarks Announcing the Environmental Protection Agency’s Clean Power Plan, 2015 DAILY COMP. PRES. DOC. 546, at 2 (Aug. 3, 2015).

³ Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98).

⁴ See Jody Freeman, *Why I Worry About UARG*, 39 HARV. ENVTL. L. REV. 9, 12, 17 (2015) (predicting that CPP opponents will frame the EPA as acting more like “an energy regulator rather than a pollution regulator,” *id.* at 17).

⁵ See, e.g., Laurence H. Tribe & Peabody Energy Corp., Comment on Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, at 3 (Dec. 1, 2014), [http://www.masseygail.com/pdf/Tribe-Peabody_111\(d\)_Comments_\(filed\).pdf](http://www.masseygail.com/pdf/Tribe-Peabody_111(d)_Comments_(filed).pdf) [<http://perma.cc/4QSQ-ARR5>] (criticizing the proposed version of the CPP).

⁶ 42 U.S.C. § 7411(d) (2012).

⁷ 135 S. Ct. 2480 (2015).

as an early example of how agencies will justify their statutory interpretations in a time of uncertain relations between courts and agencies.

On June 25, 2013, President Obama issued a memorandum directing the EPA “to use [its] authority under sections 111(b) and 111(d) of the Clean Air Act to issue standards, regulations, or guidelines, as appropriate, that address carbon pollution from modified, reconstructed, and existing power plants and build on State efforts to move toward a cleaner power sector.”⁸ On June 18, 2014, the EPA proposed a rule in the *Federal Register* to regulate emissions from existing power plants.⁹ The Proposed Rule aimed to reduce carbon dioxide emissions from the power sector thirty percent from 2005 levels by 2030 and to achieve net climate and health benefits of between \$48 and \$82 billion.¹⁰ These benefits were to be achieved through the enforcement of “[s]tate-specific emission rate-based CO₂ goals” as permitted by section 111(d), with states free to use an array of policy tools to meet their targets,¹¹ including energy efficiency and renewable portfolio standards.¹²

The public response was immense and immediate. The EPA received more than 4.3 million comments on the proposal.¹³ What is more, industry members “champing at the bit to challenge EPA’s anticipated rule” sought to prevent the rule from being finalized by bringing a claim in the D.C. Circuit, which dismissed the claim as premature.¹⁴ When the EPA announced the Final Rule on August 3, 2015, it took only ten days for a group of states to petition the D.C. Circuit for an emergency stay of the rule, even before the rule had been published in

⁸ Power Sector Carbon Pollution Standards, Memorandum for the Administrator of the Environmental Protection Agency (June 25, 2013), in 78 Fed. Reg. 39,535, 39,535–36 (July 1, 2013). Section 111(b) of the Clean Air Act regulates pollutants from new sources. See Clean Air Act § 111(b), 42 U.S.C. § 7411(b) (2012). Section 111(d) regulates pollutants from existing sources. See *id.* § 7411(d).

⁹ See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (proposed June 18, 2014) [hereinafter Proposed Rule] (to be codified at 40 C.F.R. pt. 60).

¹⁰ See *id.* at 34,832.

¹¹ *Id.* at 34,833. Thus, although the CPP establishes emission performance rate standards for power plants, states need not rely solely on directly reducing emissions from their power plants to achieve their reduction goals.

¹² Renewable portfolio standards “require retail electricity suppliers to supply a minimum percentage or amount of their retail electricity load with electricity generated from eligible sources of renewable energy.” *Id.* at 34,849.

¹³ Final Rule, *supra* note 1, at 64,704.

¹⁴ *In re Murray Energy Corp.*, 788 F.3d 330, 333 (D.C. Cir. 2015); see also *id.* at 333–34. These claims gave the EPA a rather unusual opportunity to preview challenges to the CPP before it had actually been finalized. The EPA’s final brief in *In re Murray Energy* shows the agency beginning its shift toward the analysis of section 111(d) found in the Final Rule. See Final Brief for Respondents at 34–54, *In re Murray Energy*, 788 F.3d 330 (Nos. 14-1112, 14-11151).

the *Federal Register*.¹⁵ This petition was also dismissed as not meeting the “stringent standards” required for extraordinary relief.¹⁶

The final Clean Power Plan differs in many substantive respects from the Proposed Rule, including, notably, its removal of consumer-side energy efficiency standards as a factor in the calculations used to set target emission rates.¹⁷ In the Final Rule, the EPA also “reconsidered its previous interpretation” of section 111(d)¹⁸: instead of finding section 111(d) contradictory, and therefore ambiguous, as argued in the Proposed Rule, the Final Rule attempted to reconcile the potentially conflicting texts. While the EPA reached the same conclusion about the breadth of its jurisdiction as in the Proposed Rule, the analytical shift between the Proposed and Final Rules is pronounced.

Section 111 of the Clean Air Act regulates air pollution from stationary sources.¹⁹ The section provides the EPA with a logical progression: First, the Administrator is required to create a list of categories of stationary sources that “cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.”²⁰ Next, the Administrator must develop “standards of performance for new sources” within the listed categories.²¹ Then, and of particular interest here, the Administrator must establish regulations for states to submit their own “standards of performance for any *existing* source for any air pollutant,” subject to a few key restrictions.²² Whether those restrictions preclude the EPA from regulating carbon dioxide emissions from power plants is the interpretive question addressed in both the Proposed and Final Rules.

In the Proposed Rule, the EPA described the somewhat odd status of section 111(d). In 1990, the Senate and House both passed amendments to the section, and both versions were included in the conference package, approved by both chambers, and signed into law with-

¹⁵ See Emergency Petition for Extraordinary Writ, *In re West Virginia*, No. 15-1277 (D.C. Cir. Sept. 9, 2015) (per curiam).

¹⁶ See *In re West Virginia*, slip op. at 1.

¹⁷ See Jody Freeman, *How Obama Plans to Beat His Climate Critics*, POLITICO, <http://www.politico.com/agenda/story/2015/08/how-obama-plans-to-beat-his-climate-critics-000186> [<http://perma.cc/QN57-93TA>]; see also *Fact Sheet: Clean Power Plan Key Changes and Improvements*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/cleanpowerplan/fact-sheet-clean-power-plan-key-changes-and-improvements> (last updated Aug. 13, 2015) [<http://perma.cc/KM9F-HBLM>]. The Final Rule also foresees a slightly greater decrease in carbon dioxide emissions — now thirty-two percent below 2005 levels by 2030 instead of thirty percent. Compare Proposed Rule, *supra* note 9, at 34,832, with Final Rule, *supra* note 1, at 64,679.

¹⁸ Final Rule, *supra* note 1, at 64,710.

¹⁹ See 42 U.S.C. § 7411 (2012).

²⁰ *Id.* § 7411(b)(1)(A).

²¹ *Id.* § 7411(b)(1)(B).

²² *Id.* § 7411(d) (emphasis added).

out being reconciled.²³ The Senate version “would exclude the regulation of any pollutant which is ‘included on a list published under [Clean Air Act section] 112(b),”²⁴ the Clean Air Act’s hazardous air pollutant program. The House version “would exclude the regulation of any pollutant which is ‘emitted from a source category which is regulated under section 112.’”²⁵ In the Proposed Rule, the EPA argued that both versions were good law, but that the provisions were contradictory: the Senate version would allow regulation because carbon dioxide was not a pollutant listed under section 112(b), but the House version would preclude regulation because the *sources* in question, power plants, were already being regulated for other pollutants under section 112.²⁶ In justifying its Proposed Rule, the EPA found these conflicting texts created ambiguity and argued that choosing the permissive Senate version was “both reasonable and entitled to deference.”²⁷ Thus, the EPA found it had authority to regulate carbon dioxide from power plants, even though the plants were already regulated for other pollutants.²⁸

In the Final Rule, though the outcome remains the same, the legal analysis is quite different. Instead of finding the two amendments contradictory and therefore ambiguous, the Final Rule asserts that each authorizes the EPA to regulate carbon dioxide from power plants.²⁹ As in the Proposed Rule analysis, the Senate version is described as unambiguously permissive of the EPA’s rulemaking authority.³⁰ However, the Final Rule describes the House version, previously seen as unambiguously precluding this regulation, as “ambiguous and subject to numerous possible readings.”³¹ The EPA then proceeds through a text-centric analysis of three of these possibilities,³² includ-

²³ See EPA, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units 21–23 (June 18, 2014) [hereinafter Legal Memorandum for Proposed Rule] <http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf> [<http://perma.cc/HPZ5-RCXJ>].

²⁴ Proposed Rule, *supra* note 9, at 34,853 (alteration in original) (citing Act of Nov. 15, 1990, Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574).

²⁵ *Id.* (quoting Act of Nov. 15, 1990 § 108(g), 104 Stat. at 2467).

²⁶ See *id.* For a discussion of whether both provisions are in fact good law, compare Laurence H. Tribe, *Why EPA’s Climate Plan Is Unconstitutional*, HARV. L. TODAY (Mar. 20, 2015), <http://today.law.harvard.edu/why-epa-climate-plan-is-unconstitutional> [<http://perma.cc/2VSH-V73J>] (arguing that only the House version is law), with Jody Freeman & Richard Lazarus, *A Rebuttal to Tribe’s Reply*, HARV. L. TODAY (Mar. 21, 2015), http://today.law.harvard.edu/a_rebuttal_to_tribe_reply [<http://perma.cc/HKE2-CTAD>] (arguing that both versions are law).

²⁷ Legal Memorandum for Proposed Rule, *supra* note 23, at 12; see also *id.* at 26 (“[I]t is not reasonable to give full effect to the House language.”).

²⁸ See Proposed Rule, *supra* note 9, at 34,853.

²⁹ Final Rule, *supra* note 1, at 64,710–11.

³⁰ See *id.* at 64,712.

³¹ *Id.* at 64,713.

³² See *id.* at 64,712–14.

ing the reading from the Proposed Rule, before determining that each is unreasonable in light of the Act's "comprehensive scheme."³³ The reading the EPA settled on, which the agency found to be the only reasonable option, is that the exclusion precludes only duplicitous regulation: section 111(d) cannot be used to regulate hazardous air pollutants (which are enumerated elsewhere) from source categories described in section 112, but it can be used for the regulation of other pollutants from those same source categories, including carbon dioxide.³⁴

It is not unheard of for an executive agency to change its analysis of its own statutory authority.³⁵ And in fact, this isn't even the first time the EPA has revised its interpretation of this particular section of the Clean Air Act.³⁶ But the change here seems less an example of a statute being reread to fit new circumstances and more an act of defense in anticipation of future judicial review. After the Supreme Court decided *King v. Burwell* on June 25, 2015, some commentators predicted trouble for the CPP.³⁷ Although Chief Justice Roberts's opinion had upheld the Internal Revenue Service's reading of the ACA, the Court offered no deference to the agency's interpretation and foreclosed any alternative reading.³⁸ While the *King* decision was released only some five weeks before the CPP was finalized, the Final Rule cites *King* four times.³⁹ The CPP provides an early look at how agencies may justify their statutory interpretations in the shadow of *King*: with more careful legal analysis in the face of greater uncertainty over whether *Chevron* will apply, with an attempt to read texts to harmonize rather than conflict even in cases of presumptive statutory error, and with a resulting preference for definitive answers rather than retained agency flexibility.

In *King*, the Court provided two reasons for not applying *Chevron* deference to its analysis of the ACA. First, the Court noted that the

³³ *Id.* at 64,714.

³⁴ *See id.* This reading, the EPA noted, was also endorsed by the Supreme Court in 2011. *See id.* at 64,778; *see also* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2537 n.7, 2539–40 (2011) (finding that federal common law nuisance actions for greenhouse gas emissions were precluded by the EPA's authority to regulate greenhouse gases from power plants under the Clean Air Act).

³⁵ *See, e.g.,* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.").

³⁶ *See* Legal Memorandum for Proposed Rule, *supra* note 23, at 26 (citing Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the Section 112(c) List, 70 Fed. Reg. 15,994 (Mar. 29, 2005)).

³⁷ *See, e.g.,* Jonathan H. Adler, *Could King v. Burwell Spell Bad News for the EPA?*, WASH. POST: VOLOKH CONSPIRACY (July 3, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/03/could-king-v-burwell-spell-bad-news-for-the-epa> [<http://perma.cc/NZL2-APUF>].

³⁸ *See* *King v. Burwell*, 135 S. Ct. 2480, 2489, 2496 (2015).

³⁹ *See* Final Rule, *supra* note 1, at 64,712, 64,715, 64,769 n.519, 64,775.

provision at issue raised a major question of the sort involved in *FDA v. Brown & Williamson Tobacco Corp.*⁴⁰ — “a question of deep ‘economic and political significance’ that is central to this statutory scheme,” which requires a clearer signal from Congress than was present in *King*.⁴¹ The Court seemed to find this question particularly worthy of attention because of both the significance of the ACA itself and the significance of the particular interpretive question at issue to the fate of the ACA as a whole.⁴² Second, the Court looked at the qualifications of the agency invoking deference, noting that “the IRS . . . has no expertise in crafting health insurance policy of this sort.”⁴³

The Court’s jettisoning of *Chevron* based on its interpretation of *King* as an “extraordinary case[.]”⁴⁴ leaves agencies with real uncertainty about whether *Chevron* will apply to their statutory interpretations. In the case of the CPP, the *King* considerations point in different directions. The CPP is certainly a big undertaking — while the EPA estimates the regulation will generate substantial net benefits, the estimates for total compliance costs range from \$5.1 to \$8.4 billion by 2030.⁴⁵ However, no reading of section 111(d) would have as significant an effect on the Clean Air Act as a contrary reading in *King* would have had on the ACA, where a different interpretation could have led to a “death spiral” in health insurance markets.⁴⁶ Agency expertise would also seem to point firmly toward deference to the EPA: Congress specifically authorized the EPA “to prescribe such regulations as are necessary” under the Clean Air Act,⁴⁷ and has long recognized the EPA as its expert in the field of environmental regulation.⁴⁸

Still, with new uncertainty about when *Chevron* deference will apply, agencies may be encouraged to support their interpretive positions more thoroughly. The Proposed Rule relied almost exclusively on the existence of *Chevron* deference: the EPA found two conflicting read-

⁴⁰ 529 U.S. 120, 160 (2000) (finding that the FDA did not have authority to regulate tobacco because “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion”).

⁴¹ *King*, 135 S. Ct. at 2489 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *Id.* at 2488 (quoting *Brown & Williamson*, 529 U.S. at 159).

⁴⁵ Final Rule, *supra* note 1, at 64,679.

⁴⁶ *See King*, 135 S. Ct. at 2493. This difference seems significant. While a contrary reading of section 111(d) would clearly have enormous impact on the continued existence of the CPP, the *King* Court was concerned with the *statutory*, not *regulatory*, framework. The Clean Air Act has existed without the CPP for this long and presumably could continue to do so even if the CPP were struck down.

⁴⁷ 42 U.S.C. § 7601(a)(1) (2012).

⁴⁸ *See, e.g., Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011) (“It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions.”).

ings and chose one that it found to be “both reasonable and entitled to deference.”⁴⁹ The Final Rule spends more time with the text, analyzing all possible readings as carefully as a court might, and finding ambiguity in the House version where none had been found before.

The analysis in *King* also injects uncertainty into the question of whether possible statutory errors create ambiguity worthy of deference. While the Court in *King* made only oblique reference to some “inartful drafting” within the ACA,⁵⁰ “the possibility of a drafting error is a cloud that hangs over the opinion.”⁵¹ By foreclosing *Chevron* deference from the outset in *King*, the Court sidestepped its fractured 2014 holding in *Scialabba v. Cuellar de Osorio*,⁵² which did address how to handle interpretation in a case of possible statutory error. In that case, a plurality of the Court deferred to the Board of Immigration Appeals’s interpretation of a seemingly contradictory immigration statute.⁵³ Chief Justice Roberts concurred in the judgment, but offered a strong critique of the plurality’s deference: “Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice. *Chevron* is not a license for an agency to repair a statute that does not make sense.”⁵⁴

In light of uncertainty over whether courts will give more or less deference to agency readings of conflicting texts, the EPA’s Final Rule reads the competing versions of section 111(d) as reconcilable rather than necessarily contradictory. In the Proposed Rule, the EPA read the two versions as mutually exclusive, ambiguous precisely because the EPA had to choose one version or the other.⁵⁵ The Final Rule, though, reads the two versions as pointing in the same direction, citing not to *Scialabba*’s plurality, which supported agency deference in the face of conflict, but to Chief Justice Roberts’s concurrence and Justice Sotomayor’s dissent, both of which were able to find coherent readings of the provisions at issue.⁵⁶ However, in the case of section 111(d), although it seems unlikely, Congress really could have been legislating in contradictory terms: this isn’t an issue of inconsistencies in a single document, but of two distinct amendments with distinct authorship.

⁴⁹ Legal Memorandum for Proposed Rule, *supra* note 23, at 12.

⁵⁰ *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015).

⁵¹ Abbe R. Gluck, *The Supreme Court, 2014 Term — Comment: Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 101 (2015).

⁵² 134 S. Ct. 2191 (2014).

⁵³ *Id.* at 2203 (plurality opinion).

⁵⁴ *Id.* at 2214 (Roberts, C.J., concurring in the judgment).

⁵⁵ Proposed Rule, *supra* note 9, at 34,853 (“The two versions conflict with each other and thus are ambiguous.”).

⁵⁶ See Final Rule, *supra* note 1, at 64,713 (citing *Scialabba*, 134 S. Ct. at 2214 (Roberts, C.J., concurring in the judgment); *id.* at 2219–20 (Sotomayor, J., dissenting)).

One possible outcome of these post-*King* approaches to justifying a chosen interpretation is a shift away from asserted statutory ambiguity and toward a position that would foreclose the availability of a different interpretation. The EPA's analysis in the Final Rule not only presents its reading as reasonable, but also attempts to show that no other reading could be reasonable — a marked shift from its earlier finding of two opposed but possible solutions. In fact, the EPA may even prefer not to receive deference here: if *Chevron* deference is dispositive of how the CPP is reviewed, future administrations could undo the entire basis for the CPP with a change in interpretation. At the oral argument for *King*, the Chief Justice asked if relying on *Chevron* “would indicate that a subsequent administration could change [the agency’s] interpretation.”⁵⁷ By foreclosing alternative readings, the *King* Court prevented future administrations from fundamentally dismantling the ACA. In its final legal analysis, the EPA may be trying to achieve the same effect: preventing future backsliding by staking a position of no ambiguity that it hopes a reviewing court will endorse.⁵⁸

In the end, the fate of the CPP will almost certainly be determined by the Supreme Court. While it is impossible to forecast whether the Court will use the CPP to announce new sweeping theories of agency deference, or resolve the issue on a much narrower basis, in the meantime, concerned agencies will likely follow the EPA's interpretive lead. That may not be cause for concern. If an agency more thoroughly analyzes its statutory text up front — not just looking for ambiguity and a reasonable resolution, but ambiguity and the best resolution — it may arrive at an interpretation whose textual grounding is more clearly articulated and better supported. Moreover, if one presumes that coherence is an important principle in interpreting the law,⁵⁹ it seems preferable for agencies to read their statutes as such. Justice Sotomayor's dissent in *Scialabba*, quoted in the Final Rule, discussed what she called “a fundamental tenet of statutory interpretation: We do not lightly presume that Congress has legislated in self-contradicting terms.”⁶⁰ These two considerations suggest that uncertainty about deference after *King* may motivate more robust agency interpretation.

⁵⁷ Transcript of Oral Argument at 76, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114), http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-114_1b02.pdf [<http://perma.cc/74B3-ZQRT>].

⁵⁸ Just one week after *King*, in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the Court, using legal analysis similar to that conducted by the EPA in the CPP Final Rule, determined that a different provision of the Clean Air Act was not ambiguous, *see id.* at 2707. While Justice Scalia's majority opinion purported to give deference to the EPA's interpretation of the statute, the Court found that only one reading (not the EPA's) was actually reasonable. *Id.*

⁵⁹ RONALD DWORKIN, *LAW'S EMPIRE* 19–20 (1986).

⁶⁰ *Scialabba*, 134 S. Ct. at 2220 (Sotomayor, J., dissenting), *quoted in* Final Rule, *supra* note 1, at 64,713.