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Regulating Existing Power Plants under the Clean Air Act

WORKING DRAFT: Why EPA is not only Authorized but Required to Regulate Toxic Pollutants and Greenhouse Gases from Existing Power Plants

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Introduction

In 2012, about 39% of total U.S. energy-related emissions of carbon dioxide (CO₂) were produced by the electric power sector. Of those 2,039 million metric tons (MMT) of CO₂, coal plants emitted about 74%; gas plants contributed another 24%.¹ It is necessary to address these existing sources of pollution, to achieve meaningful CO₂ reductions.

The New Source Performance Standards (“NSPS”) program in the Clean Air Act (“Act”) provides one potential mechanism. Once EPA sets performance standards for pollutants emitted by *new* sources in a particular source category, Section 111(d) of the Act requires EPA to establish guidelines for *existing* sources of the same type. States then write enforceable standards that track these guidelines.²

Some have suggested that the wording of Section 111(d) may deprive EPA of the authority to regulate CO₂ and other greenhouse gases (collectively, GHGs) from existing power plants³. The confusion stems from a conflict in the text of the 1990 Clean Air Act Amendments (“1990 Amendments”). EPA has proposed a rule to establish GHG guidelines for existing power plants; opponents may use this conflict to block the rule.

This white paper turns from debates about *how* EPA and the states should structure performance standards for existing power plants⁴ to answer the threshold question about *whether* EPA can require states to set these standards. The paper concludes that EPA can regulate GHGs at existing power plants under Section 111(d), while regulating mercury and other hazardous pollutants from many of the same sources under Section 112.



Summary

This paper begins by describing a number of changes made to the Act in 1990, including a conflict in the drafting instructions for Section 111(d) in the 1990 Statutes at Large. The paper then explores ways to interpret Section 111(d). First, I explain how EPA has interpreted the provision, and consider whether a court might defer to the agency’s interpretation under Chevron U.S.A., Inc. v. NRDC. Next, I take an independent look at Section 111(d) and propose ways a court might interpret Section 111(d), if it did not apply Chevron deference: finding a plain text meaning for Section 111(d) that avoids a conflict between the two amendments and harmonizes Section 111(d) with other provisions in the Act; reconciling the

amendments based on the scope of their overlap; finding the text intelligible and therefore inoperative; applying the mechanical “last in order” rule of statutory interpretation; and applying the presumption against implied repeals. Each approach would enable EPA to regulate existing power plants under Section 111(d) after regulating some of the same sources for different pollutants under Section 112.

Background

In 2006, several states and environmental groups sued EPA for failing to control GHGs from power plants under the NSPS program.⁵ EPA settled the lawsuit in 2010, agreeing to propose GHG standards for new and existing power plants within six months, and to finalize standards thereafter.⁶ EPA proposed new source standards but never finalized them, and took no action on existing source rules. Then, in a June 2013 speech on climate change, President Obama directed EPA to re-propose new power plant standards⁷ by September 20, 2013, and to propose existing plant guidelines by June 1, 2014.⁸ With this pronouncement, NSPS returned to center stage.

Academics, environmental organizations, and industry groups are debating EPA’s policy options for regulating the power sector under Section 111(d).⁹ However, some commentators suggest that the wording of Section 111(d) deprives EPA of the authority to regulate these existing sources¹⁰ or at the very least, creates uncertainty about EPA’s jurisdiction.¹¹ The confusion stems from a conflict in Section 111(d), as amended in the 1990 Amendments.

Prior to 1990, Section 111(d) directed EPA to guide states in setting emission standards for “any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under Section 108(a) or 112(b)(1)(A)” once standards are set for new sources of the same type.¹² Section 108 covered pollutants emitted from numerous or diverse sources and which, in EPA’s judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.¹³ EPA has listed and set air quality standards for six “criteria” pollutants under Section 108(a) – nitrogen oxides, sulfur dioxides, ozone, particulate matter, carbon monoxide, and lead. Section 112 governed “hazardous air pollutants,” including substances “which in the judgment of [EPA] may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.”¹⁴ Sections 108 and 112, then, called for the regulation of specific types of pollutants.

All other pollutants fell within the purview of Section 111(d). EPA explained in rulemaking that Section 111(d) “assure[s] a nationwide strategy for control of any air pollutants which are not on lists published pursuant to §108(a) or 112(b)(1)(A).”¹⁵ In plain terms, Congress had intended Section 111(d) to capture pollution that might otherwise go unregulated under the Act. During the 1970s, EPA invoked Section

In the 1990 Clean Air Act Amendments, the Senate and the House passed conflicting amendments to Section 111(d). The Conference Committee submitted a Conference Report containing both amendments to the House and Senate for final passage. On November 15, 1990, President George H.W. Bush signed both conflicting amendments into law.

111(d) several times, directing states to set standards for existing sulfuric acid plants,¹⁶ primary aluminum smelters,¹⁷ Kraft pulp mills,¹⁸ and phosphate fertilizer plants.¹⁹ When states proposed standards for these sources, they echoed EPA's interpretation of the role of Section 111(d) as a provision that addressed existing source pollution not covered under other Clean Air Act programs.²⁰

Congress made no changes to Section 111(d) in the 1977 Clean Air Act Amendments.²¹

1990 Clean Air Act Amendments

The 1990 Amendments added three new titles to the Act. Title 4 established the Acid Rain Program, a trading program to limit sulfur dioxide emissions (a Section 108 criteria pollutant) from existing power plants. Title 5 created a "master" permit program for major stationary sources of air pollution. Title 6 directed EPA to regulate ozone-depleting chemicals, to meet international obligations under the Montreal Protocol. These new titles were ambitious, far-reaching, and demanded much of the time and attention paid to this landmark piece of legislation.

However, Congress also amended existing programs. For instance, Congress "restructured" the hazardous air pollutants (HAPs) program under Section 112.²² These changes are highly relevant to the central issue in this paper - the meaning of Section 111(d) in relation to Section 112. Before 1990, once EPA determined that a pollutant was a HAP, stringent health-based standards automatically applied to every new and existing source of the HAP. Often, the only defensible health-based standard was zero, a limit that threatened to shut down many sources.

In twenty years, EPA had identified just eight HAPs; Congress now listed nearly 200 HAPs for regulation. At the same time, Congress recognized EPA's reluctance to use Section 112 was due to the fact that "when literally interpreted - [Section 112] could require standards that would be potentially very costly."²³ To meet this concern, in 1990 Congress shifted the focus of Section 112 from HAPs to HAP sources.

The 1990 version of Section 112 directed EPA to list all major sources²⁴ and most minor sources²⁵ of HAPs. EPA was then required to set source-specific HAP standards based on what was achievable for each category of sources (rather than on what was required to protect public health).²⁶ Existing sources were subject to less stringent standards.²⁷



Other Requirements Preserved. No emission standard or other requirement promulgated under this section shall be interpreted, construed, or applied to diminish or replace the requirements of a more stringent emission limitation

With nearly 200 new HAPs listed, regulation under Section 112 was likely to increase. However, Congress took steps to limit application of Section 112 where it might duplicate regulation under other programs. Several 1990 provisions seek to avoid Section 112 regulation of the same *pollutants* under this and other Clean Air Act programs, for instance by preventing:

- the listing of criteria pollutants as HAPs under Section 112;²⁸
- regulation of ozone-depleting chemicals under Section 112, if they are regulated by Title VI;²⁹ and
- the listing of lead, a criteria pollutant that is also clearly “hazardous,” as a HAP.³⁰

Similarly, if HAPs are incidentally controlled when a source installs controls to comply with other programs under the Act, the statute exempts that source from applicable Section 112 standards for five years.³¹

Congress also limited Section 112 regulation of particular *sources* controlled under other parts of the Act. Initially, the House proposed language that would have enabled EPA to “decide not to list a source category or subcategory” under Section 112 whenever EPA believed the source was “already adequately controlled under this Act or any other Federal statute or regulation.”³² This broad provision was dropped by the House Energy & Commerce Committee without comment.³³ Ultimately, Congress directed EPA to conduct a similar analysis for two types of sources:

- Electric Utility Steam Generating Units. Section 112(n)(1)(A) directs EPA to study “the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of [HAPs] after imposition of the requirements of [the Act].” EPA could only regulate utilities under Section 112 if EPA found “such regulation is appropriate and necessary.”³⁴
- Incinerators. Section 129(h)(2) directs EPA to regulate solid waste combustors under Sections 111 and 129, instead of Section 112(d). Congress authorized EPA to study incinerators under its residual authority in Section 112; however, EPA could only respond to the study results by setting standards for specified pollutants under Sections 129 and 111.³⁵

Finally, Congress included a savings provision, to clarify that other Clean Air Act programs would continue to apply as they had alongside a restructured Section 112. The provision states that “[n]o emission standard or other requirement promulgated under this section shall be interpreted, construed, or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to Section 111 [and other programs]....”³⁶ This catch-all provision, drafted on top of the six more specific provisions directing EPA to prevent or delay Section 112 action when there is possible overlap with another Clean Air Act program, emphasizes Congress’ concerted effort not to impede on other programs with the restructured Section 112 program.

The structural changes made to Section 112 required an updated cross-reference in Section 111(d). Initially, the House and Senate passed different versions of the updated cross-reference. The Conference Committee did not debate the language, and submitted a Conference Report containing both amendments to the House and Senate for final passage. On November 15, 1990, President George H.W. Bush signed both amendments into law. The amendments “provide different standards to the scope of EPA’s authority to regulate under § 111(d).”³⁷

- As noted above, the pre-1990 text of Section 111(d) directed EPA to guide states in setting emission standards for “any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under Section 108(a) or 112(b)(1)(A).”

- The **1990 House Amendment**, found in the Statutes at Large under Section 108, “Miscellaneous Guidance,” stated that, “Section 111(d)(1)(A)(i) of [the Act] is amended by striking “or 112(b)(1)(A)” and inserting “or emitted from a source category which is regulated under section 112.”³⁸
- The **1990 Senate Amendment**, located 107 pages later in the Statutes at Large under the “Conforming Amendments” section immediately following the changes to Section 112, stated that, “Section 111(d)(1) of [the Act] is amended by striking “112(b)(1)(A)” and inserting in lieu thereof “112(b).”³⁹

Notably, there is virtually no legislative history on these amendments. There is no discussion in the committee reports on each Chamber’s bill, no floor debate, and no mention in the Conference Committee report of these amendments. Not a single legislator voiced an intention to alter the reach of Section 111(d) over non-HAP, non-NAAQS pollutants. Nor was there any discussion of changes to the legal force of existing Section 111(d) standards, in the likely event that sources subject to these standards would be regulated under Section 112. (When EPA published its first list of HAP sources in 1992, the list included sources previously regulated under Section 111(d), primary aluminum production plants and pulp mills.)⁴⁰

When the Office of Law Revision Counsel transcribed the 1990 Clean Air Act Amendments into the U.S. Code, the staff encountered the House amendment to Section 111(d) first. The staff struck “112(b)(1)(A)” and replaced it with the House language. Later, when the staff encountered the Senate Amendment to Section 111(d), they noted that it “could not be executed, because of the prior” House Amendment.⁴¹ Specifically, there was no more “112(b)(1)(A)” to strike and replace. The conflict between statutory directives in the Statutes at Large belies the theory that “Congress acted with intelligible and distinct intent in 1990 in enacting both the Senate and House amendments to Section 111(d).”⁴² The conflict has required EPA to interpret the provision based on statutory context. A court may apply Chevron to this conflict and defer to EPA’s reasonable interpretation of Section 111(d), or it may apply traditional rules of statutory interpretation to reach a legal conclusion on any challenge.

This paper discusses the applicability of Chevron and traditional rules for interpreting the text of Section 111(d). I conclude that EPA is authorized to proceed under Section 111(d) to regulate CO₂ from existing power plants.

EPA’s Post-1990 Interpretations of Section 111(d)

EPA has interpreted Section 111(d) as amended by the 1990 Amendments in several rulemakings. The first opportunity arose in 1995, when EPA proposed regulating pollutants from existing medical waste incinerators. At that time, EPA explained that, “[i]n most cases, ... control under section 111(d) is appropriate when the pollutant may cause or contribute to endangerment of public health or welfare but is not known to be ‘hazardous’ within the meaning of section 112 and is ... not emitted from ‘numerous or diverse’ sources as required by section 108.”⁴³

The second occasion for EPA’s interpretation arose in the regulation of mercury pollution from power plants. As noted in the previous section, the 1990 Amendments directed EPA to regulate HAPs from power plants under Section 112 if the agency found it was “appropriate and necessary.” EPA made this determination in 2000.⁴⁴ In 2005, EPA reversed this determination,⁴⁵ and promulgated the Clean Air

Mercury Rule (CAMR)⁴⁶ establishing a Section 111 mercury trading program for power plants (and setting a weaker standard than Section 112 would require).

In the rule reversing its “appropriate and necessary” determination, EPA discussed the conflicting amendments in Section 111(d). Although only the House amendment appeared in the U.S. Code, EPA focused on the text in the Statutes at Large, because the Statutes at Large “constitute the legal evidence of the laws where, as here, Title 42 of the United States Code, which contains the CAA, has not been enacted into positive law.”⁴⁷ EPA interpreted the House amendment to mean that once a source category was regulated under Section 112, EPA could not regulate any pollutant from that source category under Section 111(d). EPA interpreted the Senate amendment to reflect the “Senate’s intent to retain the pre-1990 approach of precluding regulation under CAA Section 111(d) of any HAP.”⁴⁸ To give some meaning to both amendments, EPA reconciled the conflict by reading Section 111(d) to mean if EPA regulates a source category under Section 112, a Section 111(d) standard may not be set for any HAP emitted from that source category.⁴⁸ On the other hand, in EPA’s view, the agency could use 111(d) to regulate non-HAPs from any source category, and HAPs from a source category EPA opted not to regulate under Section 112. The reconciled text comported with “the general thrust of the 1990 amendments, which, on balance, reflects Congress’ desire to require EPA to regulate more substances, not to eliminate EPA’s ability to regulate large categories of pollutants like non-HAP.”⁴⁹

States challenged both rules (referred hereinafter as “the CAMR litigation”), and in 2008, the D.C. Circuit vacated EPA’s rule reversing the “appropriate and necessary” determination.⁵⁰ The Court did not reach the interpretation of Section 111(d), except to say that under EPA’s interpretation, if “coal-fired EGUs are listed sources under section 112, regulation of existing coal-fired EGUs’ mercury emissions under section 111 is prohibited, effectively invalidating CAMR’s regulated approach.”⁵¹

The third time EPA interpreted post-1990 Section 111(d) was in the 2008 Advanced Notice of Proposed Rulemaking, setting forth EPA’s plan for regulating greenhouse gas pollution under the Clean Air Act.⁵² Here, the agency repeated the interpretation it set forth in 2005:

When EPA establishes a NSPS for a pollutant, section 111(d) calls upon states to issue a standard for existing sources in the regulated category except in two circumstances. First, section 111(d) prohibits regulation of a [criteria] pollutant. Second, ‘where a source category is being regulated under section 112, a section 111(d) standard of performance cannot be established to address any HAP ... that may be emitted from that particular source category.’⁵³

EPA echoed this interpretation in 2012, when issuing Section 112 rules for oil- and coal-fired power plants.⁵⁴

¹ In recent litigation, parties argue that the Senate amendment should carry less weight than the House amendment because it was a “conforming” amendment. *Murray Energy Corp. v. EPA*, No. 14-1112, Pet for Extraordinary Writ (D.C. Cir. 2014). Parties have also pointed to EPA’s use of the term “conforming” to characterize the Senate’s amendment, in EPA’s 2005 mercury rule, as evidence that EPA agreed this amendment was less important. In re: *Murray Energy Corp.*, No. 14-1112, Br. of the States of West Virginia, Alabama, Alaska, Kentucky, Nebraska, Ohio, Oklahoma, South Carolina, and Wyoming (June 25, 2014), at 3. This is not an accurate portrayal of EPA’s position in that rule. EPA used the word conforming to confirm the Senate’s intent to update a cross-reference while opting to maintain the pre-1990 scope of Section 111(d). The agency accorded no less weight to this amendment as a result of it not reflecting a substantive *change* to Section 111(d). 70 Fed. Reg. 15994, 16030-32.

Chevron Deference

In the CAMR litigation, EPA argued that “the differing text of the two amendments reflects a genuine substantive conflict,” that the wording of the House Amendment was ambiguous, and that a court should therefore defer to EPA’s reasonable interpretation of Section 111(d) under Chevron U.S.A., Inc. v. NRDC.⁵⁵

Deference under Chevron is warranted when a court finds that a “statute is silent or ambiguous with respect to the specific issue.”⁵⁶ On the other hand, “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁵⁷ Therefore, a court may not apply Chevron deference if the court believes there is a plain text answer to the question raised by the litigation.

In addition, not all judges and justices may view a textual conflict as an “ambiguity” that gives rise to Chevron deference.⁵⁸ This may be why in the CAMR litigation, EPA sought deference for its interpretation of a House amendment it characterized as “ambiguous,” separate and apart from any conflict with the Senate language.

If a court applied Chevron deference to EPA’s post-1990 interpretations, the Agency’s interpretations would likely be upheld. Under Chevron:

a reviewing court cannot ‘simply impose its own construction o[f] the statute. Rather, the agency is charged with filling the ‘gap left open’ by the ambiguity. Because ‘a full understanding of the force of the statutory policy ... depend[s] upon more than ordinary knowledge’ of the situation, the administering agency’s construction is to be accorded ‘controlling weight unless . . . arbitrary, capricious, or manifestly contrary to the statute.’”⁵⁹

Following this standard, the Supreme Court has upheld agency interpretations even where the text of the statute might suggest a different outcome. For instance, the Court has ruled that EPA could set state pollution budgets based on cost, when the Clean Air Act called for regulation of “amounts” of pollution interfering with air quality in downwind states;⁶⁰ and issue variances for toxic effluent limitations despite the Clean Water Act’s prohibition on modifying toxic effluent limitations.⁶¹

If a Court did not apply Chevron, it might apply any of the following methods to interpret Section 111(d). (For instance, in the CAMR litigation, EPA invoked a pre-Chevron case where the D.C. Circuit endorsed EPA’s reconciliation of a conflict in the 1977 Clean Air Act Amendments.⁶² More detail is provided under Statutory Interpretation Method #2, below.)

Statutory Interpretation Method #1: Find a Plain Text Meaning that Avoids the Conflict

Courts have “an obligation to construe ... two statutory provisions ... in such a way as to avoid conflicts between them, if such a construction is possible and reasonable.”⁶³ Moreover, “every part of the statute must be construed in connection with the whole,”⁶⁴ so that the statute operates “as a symmetrical and coherent regulatory scheme.”⁶⁵ Therefore, a court should attempt to find a construction that avoids conflict between the Senate and House amendments, and results in an interpretation of Section 111(d) that comports with the rest of the Act.

The Senate Amendment is plain; there is only one way to interpret this amendment. By changing the statutory reference to Section 112’s list of HAPs, from “112(b)(1)(A)” to “112(b),” the Senate reflected the rearrangement of text in Section 112. Otherwise, the Senate Amendment preserves the scope of Section 111(d) authority that has existed since 1970. Moreover, the Senate Amendment harmonizes with other amendments to Section 112 and 129, which specified where Section 112 authority should give way to other programs in the Act and clarified that nothing in Section 112 “shall be interpreted, construed, or applied to diminish or replace” applicable requirements under Section 111 and other programs.⁶⁶

The House Amendment is open to multiple interpretations. It requires action under Section 111(d) at “any existing source for any air pollutant ...[not] *emitted from a source category which is regulated under section 112*” once standards are set for new sources.

As noted above, in the 2005 rule reversing the power plants determination and the CAMR litigation, EPA interpreted the House Amendment to mean that:

- (1) Section 111(d) could be used to regulate *any* pollutant from a source category, unless that source category was already regulated for HAP emissions under Section 112. Once the source was regulated for HAPs under Section 112, it could not be regulated for *any* pollutant under Section 111(d).⁶⁷

Meanwhile, environmental groups in the CAMR litigation interpreted the House Amendment to mean that:

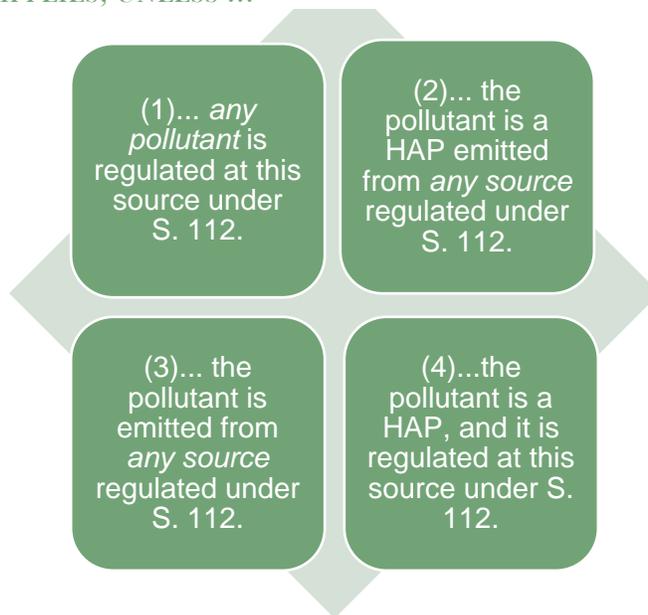
- (2) Section 111(d) could be used to regulate any pollutant, except for any HAP regulated at *any* source category under Section 112. In other words, Section 111(d) could regulate any non-HAP at any source.⁶⁸

These interpretations differ in two ways: whether EPA’s ability to use Section 111(d) to regulate a pollutant turns on Section 112 regulation of a particular source category, or *any* source category that emits the pollutant in question; and whether Section 112 regulation limits EPA’s use of Section 111(d) to regulate HAPs or *any* pollutant. From these interpretations, at least two others may be derived, suggesting that Section 111(d) can regulate:

- (3) *any* pollutant from a source category , unless *any* source category that emits this pollutant is already regulated under Section 112; or
- (4) a HAP from a source category if EPA is regulating HAPs from that source category under Section 112.

Table I, to the right, describes the different scope of Section 111(d) authority under these four interpretations. As an example, suppose EPA considers regulating methane from steel mills. Under these different interpretations of the House Amendment, whether EPA could regulate methane from steel mills under Section

UNDER DIFFERENT INTERPRETATIONS OF THE HOUSE AMENDMENT, SECTION 111(D) APPLIES, UNLESS ...



111(d) turns on: whether EPA is regulating other pollutants at steel mills under Section 112 (1); whether methane is a HAP (2); whether EPA is regulating any source that emits methane under Section 112 (3); or whether methane is a HAP already regulated at steel mills under Section 112 (4). Note that under the first three of these scenarios, Section 112 need not address methane at steel mills to curtail Section 111(d) regulation. The second interpretation prohibits HAP regulation under Section 111(d); however, the first and third nullify Section 111(d)'s pre-1990 role and leave some pollution entirely unregulated.

If the House Amendment is amenable to multiple interpretations,⁶⁹ a court would look to the interpretation that avoids a conflict with the Senate Amendment and with the post-1990 text of Sections 112 and 129.⁷⁰

Under this analysis, the first and third interpretations of the House Amendment fall quickly. Under the first interpretation, so long as one of 200 HAPs was controlled at a source, that source would be immune from Clean Air Act regulation for its non-HAP pollutants. This interpretation would conflict with the Senate amendment and repeal the pre-existing and long-standing scope of Section 111(d).

Aside from one reading of the ambiguous House Amendment, no textual evidence supports this conclusion. Not only did the Senate Amendment clearly preserve the pre-1990 scope of Section 111(d), but for the vast majority of sources, Congress allowed and expressed no concern about simultaneous regulation under Section 111(d) and Section 112. Congress required EPA to consider whether regulation under Section 111(d) and 112 was necessary for power plants and municipal waste combustors, but in both cases would have limited application of Section 112 while allowing Section 111 to proceed as it had before 1990.⁷¹ More generally, Congress included a savings clause to clarify that nothing about Section 112 should be construed to “diminish or replace” requirements under other parts of the Act, including Section 111.⁷²

Aside from the textual clues, the legislative history includes no mention of, let alone raises concerns about, EPA's use of Section 111(d) for pollutants not covered by Section 112.⁷³ Given all of this, a court would be disinclined to read the House Amendment to repeal or severely restrict Section 111(d) as it existed prior to 1990. (See also Statutory Interpretation Method #5, at 12)

The third, broader interpretation of the House Amendment – barring Section 111(d) action to address any pollutant emitted by *any* source regulated under Section 112 – likewise conflicts with the Senate Amendment and renders Section 111(d) worthless.

The fourth interpretation – contemplating use of Section 111(d) to regulate non-HAPs, as well as HAPs not regulated under Section 112 – would give meaning to Section 111(d) and fit more comfortably alongside the other textual changes in the 1990 Amendments. Moreover, it explains why the House Amendment was initially drafted – it made sense to authorize HAP regulation under Section 111(d) when the Amendment was paired with language that granted discretion to EPA to regulate – or not regulate – a source under Section 112.⁷⁴ However, the interpretation must fail under the “avoid conflict” approach because it conflicts with the Senate Amendment, which prohibits HAP regulation under Section 111(d).⁷⁵ (This interpretation works under a reconciliation approach, see Statutory Interpretation Method # 2, at 10.)

Some have suggested that the amendments should be interpreted to have cumulative effect – that EPA is prohibited from regulating pollutants regulated under Section 108 and 112 **and** sources regulated under Section 112 – as another way to avoid conflict. However, a cumulative interpretation does not mesh with the actual text in the Statutes at Large, where each amendment strikes the same language and replaces it with different phrasing. For this reason, the Office of Law Revision Counsel reported that it could not add both amendments to the Act. Moreover, a cumulative reading of the amendments conflicts with the affirmative command in the provision – that EPA “shall prescribe regulations” under Section 111(d) – and with contemporaneous changes made to Section 112 and Section 129. Finally, this reading would drastically shrink the scope of Section 111(d) despite the absence of any legislative history to indicate this intent.

Only the second interpretation remains. This interpretation is consistent with the Senate Amendment and dovetails with other 1990 Amendments, in that it retains Section 111(d) authority over all pollutants not listed under Section 108 or 112. While some could argue that this interpretation makes the House amendment somewhat superfluous, this is not fatal to the interpretation. Faced with text that is ambiguous or superfluous, the Supreme Court has ruled that it is more important to read ambiguity out of the statute.⁷⁶

The interpretation could give meaning to each word in the House Amendment. Again, the House Amendment authorizes action under Section 111(d) at “any existing source for any air pollutant (i) ... *emitted from a source category which is regulated under section 112.*” The term “source category” is not defined by the Act; however, Section 112 defines three types of “sources.” Section 112 begins by adopting the Section 111 definition of “stationary source”⁷⁷ and directs EPA to list “consistent” (notably, not identical) source categories under Section 111 and 112 where “practicable.”⁷⁸ Section 112 then defines “major source” and “area source” based solely on their level of HAP emissions.⁷⁹ One could argue that reference to regulation of a *source category* under Section 112 necessarily means regulation of those sources for their HAP emissions. This interpretation would avoid irreconcilable conflict between the Senate Amendment and House Amendment, and preserve the scope of Section 111(d). Thus, EPA could proceed with regulating GHGs from existing power plants.

Statutory Interpretation Method #2: Reconcile the Conflict

While all effort should be made to give meaning to each word in the text, there are times when this is not possible due to an irreconcilable conflict. To review, there are two ways the Senate and House Amendments might be found to conflict. First, as drafted in the Statutes at Large, each amendment strikes the same text and replaces it with different language. Second, as described above, some of the possible interpretations for the underlying House Amendment language could create irreconcilable conflict.

For instance, an interpreter might feel compelled to read the House Amendment to mean that Section 111(d) may not be used to control any pollutant at a source category if those sources are regulated under Section 112. Courts could find this interpretation poses an irreconcilable conflict with the Senate Amendment, because applying each amendment to the same set of facts results in a different conclusion.⁸⁰ President Obama has directed EPA to regulate a non-HAP - CO₂ - from existing sources - coal-fired power plants⁸¹ - which are regulated for their HAP emissions under Section 112. Under the Senate Amendment, EPA must use Section 111(d) to set emissions guidelines for CO₂ from these power plants. Under some interpretations of the House Amendment, EPA could not use Section 111(d). Thus, the two provisions pertain to the same conduct and are irreconcilably inconsistent, because they cannot reasonably stand together.⁸²

Where a textual conflict exists, courts have approved or used the method of reconciliation, for instance to determine when a new Clean Air Act program was to become effective;⁸³ whether a civil service employee could appeal a downgrade in pay;⁸⁴ and how heavy a sentence could be levied in a probation revocation proceeding.⁸⁵

The court may engage in reconciliation or, if Chevron applies, a court may be reviewing EPA’s attempt to reconcile the two amendments. For instance, in the CAMR litigation EPA invoked a pre-Chevron decision endorsing EPA’s reconciliation of a conflict in the 1977 Clean Air Act Amendments.⁸⁶ That conflict created confusion about the effective date for new major source construction permitting requirements. Section 165 of the Act stated that no construction of a major stationary source could take place after August 7, 1977 without adherence to the new requirements. However, Section 168 delayed implementation of new

requirements until approval of the applicable state implementation plan (SIP). The Court rejected arguments that one amendment should take precedence over the other,⁸⁷ chalking up the inconsistency to oversight (the Conference Committee “worked very fast and without the usual attention to coordinating all provisions fully”).⁸⁸ The Court observed:

The present controversy can be traced directly back to the fact that sections 165 and 168 were conceived in separate Houses and their provisions never reconciled when the Act as a whole was given birth in Conference.⁸⁹

The Court also observed that despite the conflict, both amendments pointed in the same direction – that the regulations “should eventually take effect.”⁹⁰ The Court then approved of EPA’s effort to reconcile the two amendments by promulgating federal construction permitting rules and establishing an “interim” effective date (based on publication of the federal rules) for the new requirements in advance of SIP approval. “Under the circumstances of the present case, it was the greater wisdom for the agency to devise a middle course between inconsistent statutes so as to give maximum possible effect to both.”⁹¹

Under the first approach set forth in this paper, where one attempts to “avoid the conflict” and give full meaning to both amendments,⁹² the ambiguous House Amendment yields to the Senate Amendment, to reflect the meaning in that clear directive. However, if a court is not convinced by the plain text argument for interpreting the House Amendment, it might still reconcile the Senate amendment, an ambiguous House amendment, and the rest of the Act in similar fashion. The *Spencer County* facts are echoed here – the two amendments seem to be the result of a hastily crafted Conference bill, and both amendments point in the same direction – each retained the language that “EPA shall prescribe regulations” under Section 111(d) when certain conditions are met. Reconciliation could look like the plain text approach in Statutory Interpretation Method #1 – the interpretation of the House amendment that would match the Senate amendment and retain the scope of Section 111(d) that existed before 1990. Or, reconciliation might construe the House Amendment as modestly expanding EPA’s authority under Section 111(d) (the third interpretation of the House amendment described in the previous section, at the top of page 9). Either interpretation would result in Section 111(d) regulation of GHGs from existing power plants.

Statutory Interpretation Method #3: Void Language that is Unintelligible

Clear, mechanical rules have been developed to guide statutory interpretation in the face of irreconcilable conflict.⁹³ One little-used but recognized approach is that “if a text contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect.”⁹⁴ A related rule is that that unintelligible language is inoperative.⁹⁵ Under these rules, a court could opt to treat the conflicting amendments as “neutraliz[ing] and repeal[ing] each other.”⁹⁶ In 1999, Justice Souter noted the existence of this rule in a dissent,⁹⁷ observing that the rule had been used by the Tennessee Supreme Court 70 years prior.

If the “unintelligible text is inoperative” rule applied here, both 1990 amendments would be voided and Section 111(d) would revert to its pre-1990 text. Under that text, EPA could proceed with GHG rulemaking for existing power plants under Section 111(d).

Statutory Interpretation Method #4: Apply the Last in Order Rule

Another mechanical rule states that “[i]f conflict between provisions in the same act is resolvable no other way, the last provision in point of arrangement within the text of the act is given effect.”⁹⁸ This rule, like the

related rule that a later enactment trumps an earlier conflicting statute, derives from the theory that “the latest expression of legislative will prevails.”⁹⁹ The D.C. Circuit Court of Appeals¹⁰⁰ and other federal circuit courts¹⁰¹ have applied the “last in order” rule after exhausting attempts to avoid the conflict. State supreme courts have applied this rule as well.¹⁰² Congress is well aware of this rule – both the House and Senate drafting guides recommend that when composing a statute, the drafter should assume that earlier portions of the same statute have already been codified into law.¹⁰³

In the CAMR litigation, environmental petitioners suggested application of the “last in order” rule to the conflict in Section 111(d).¹⁰⁴ The Department of Justice dismissed summarily the “last in order” rule:

There is no merit to the Petitioners’ attempt to invoke a competing canon stating that in the event of conflict between different provisions in the same Act, ‘the last provision in point of arrangement must control.’ *Env’tl Br.*, at 24 (citing *Lodge 1858*, 580 F.2d 496, 510 n. 31 (D.C. Circ. 1978)). As EPA correctly explained [in rulemaking], this canon is inapplicable here, as it applies to discrete sections of the same Act, not competing amendments to the same section of an Act, as is the case here. 70 Fed. Reg. 16031-32.¹⁰⁵

However, a number of courts have applied the “last in order” rule to conflicting language *within the same statutory provision*.¹⁰⁶ Therefore, this rule could apply to Section 111(d).

If the “last in order” rule were applied here, the Senate Amendment would prevail. As discussed previously, that amendment clearly preserves the jurisdiction of Section 111(d) as it existed before the 1990 Amendments. Under this reading of Section 111(d), EPA could regulate non-HAPs from existing power plants under Section 111(d), whether or not those same power plants are regulated for their HAP pollution under Section 112.

Statutory Interpretation Method #5: Presumption against Implied Repeal.

Courts have also created a presumption against the repeal of prior laws by implication.¹⁰⁷ The rule does not mean an implied repeal is never possible, but speaks to “the evidence necessary to support one.”¹⁰⁸ Courts have refused to sanction interpretations that “would divorce the ... provision from the specific historical and statutory context in which it had developed, and give it a tenor not responsive to the purpose for which it was enacted.”¹⁰⁹

Here, the question for the court would be whether Congressional intent existed to cripple EPA’s pre-1990 mandate under Section 111(d). The Senate Amendment was characterized in the Statutes at Large as a “conforming” amendment; the House Amendment was listed among several “miscellaneous” amendments. There was no discussion of Section 111(d) in the committees of jurisdiction in either chamber, on the floor of either chamber, or in the committee and conference reports for the 1990 Clean Air Act Amendments. The House Amendment, as originally proposed, was paired with language in Section 112 which would have authorized EPA not to regulate source categories under Section 112. Alongside that language, the House Amendment could be read to expand EPA’s authority under Section 111(d), to address not only non-HAPs but HAPs emitted from sources EPA had opted not to regulate under Section 112. Given these facts, a court is far more likely to interpret Section 111(d) as enabling regulation of GHGs and other non-HAPs

from power plants, than to interpret Section 111(d) as conflicting with the Senate Amendment and repealing the pre-1990 scope of the provision.

Conclusion

Congress passed the 1990 Amendments with two conflicting instructions amending Section 111(d). A court may find that the House Amendment or the combination of this amendment with the Senate amendment is ambiguous and defer to EPA's reasonable interpretation of the provision. Alternatively, a court might rely on a number of traditional canons of statutory interpretation to derive meaning from Section 111(d). Each approach would enable EPA to regulate existing power plants under Section 111(d) after regulating some of the same sources for different pollutants under Section 112.

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¹ United States Energy Information Administration (EIA), "How much of U.S. carbon dioxide Emissions are Associated with Electricity Generation?," available at <http://www.eia.gov/tools/faqs/faq.cfm?id=77&t=11>.

² 42 U.S.C. § 7411(d).

³ See, e.g., *HD Bush Counsel Says EPA Lacks Power to Set GHG NSPS at Existing Plants*, ENERGY WASHINGTON WEEK (Dec. 19, 2012); William Haun, *The Clean Air Act as an Obstacle to the EPA's Anticipated Attempt to Regulate Greenhouse Gas Emissions from Existing Power Plants*, THE FEDERALIST SOCIETY (March 2013).

⁴ See, e.g., Daniel A. Lashof et al., *Closing the Power Plant Carbon Pollution Loophole: Smart Ways the Clean Air Act Can Clean up America's Biggest Climate Polluters*, NRDC REPORT (December 2012); *GHG New Source Performance Standards for the Power Sector: Options for EPA and the States*, Pew Center on Global Climate Change (Mar. 17, 2011), available at <http://www.c2es.org/docUploads/EPA-HQ-OAR-2011-0090-2950.1.pdf> (last visited June 16, 2013); Jeremy M. Tarr et al., *Regulating Carbon Dioxide under §111(d) of the Clean Air Act: Options, Limits, and Impacts*, DUKE NICHOLAS INSTITUTE REPORT (Jan. 2013).

⁵ See *New York v. EPA*, No. 06-1322 (D.C. Cir. 2007).

⁶ See EPA, Proposed Settlement Agreement, Clean Air Act Citizen Suit, 75 FR 82392 (Dec. 30, 2010) ("Under the proposed settlement agreement, EPA will sign by July 26, 2011 ... a proposed rule under §111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 CFR part 60, subpart Da if they were new sources.").

⁷ EPA had previously proposed greenhouse gas standards for new power plants, but had never finalized the proposal. See *Standards of Performance for GHGs for New Stationary Sources: Electric Utility Steam Generating Units*, 77 Fed. Reg. 22392 (Apr. 13, 2012).

⁸ The White House Office of the Press Secretary, "Memorandum for the Administrator of the EPA, re: Power Sector Carbon Pollution Standards," June 25, 2013, at 2.

⁹ See, e.g., Nathan Richardson, *EPA's Forthcoming Performance Standards for Regulating Greenhouse Gas Pollution from Power Plants (Clean Air Act §111)*, (Sept. 2011); Jonas Monast, Tim Profeta, et al., *Regulating Greenhouse Gas Emission From Existing Sources: §111(d) and State Equivalency* (2012); M.J. Bradley & Associates, *Structuring Power Plant Emissions Standards Under Section 111(d) of the Clean Air Act – Standards for Existing Power Plants* (October 2013).

¹⁰ See, e.g., *HD Bush Counsel Says EPA Lacks Power to Set GHG NSPS at Existing Plants*, ENERGY WASHINGTON WEEK (Dec. 19, 2012); William Haun, *The Clean Air Act as an Obstacle to the EPA's Anticipated Attempt to Regulate Greenhouse Gas Emissions from Existing Power Plants*, THE FEDERALIST SOCIETY (March 2013).

¹¹ See Adam M. Kushner, Judith E. Coleman, *Lessons from Mercury*, supra, note 4.

¹² Clean Air Act Amendments, Pub. L. 91-604, § 111(d), 84 Stat. 1676, 1684 (1970).

¹³ 42 U.S.C. § 7408(a).

¹⁴ Clean Air Act Amendments, Pub. L. 91-604, 84 Stat. 1676, 1685 (1970). In 1990, Congress changed the definition of "hazardous air pollutants" to mean pollutants "known to be, or may reasonably be anticipated to be,

carcinogenic ... neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic.” 42 U.S.C. § 7412(b)(2).

¹⁵ *Standards of Performance for New Stationary Sources: Proposed Rule for Primary Aluminum Plants*, 39 Fed. Reg. 37730 (Oct. 23, 1974); *see also Standards of Performance for New Stationary Sources: State Plans for the Control of Certain Pollutants from Existing Facilities*, 40 Fed. Reg. 53340 (Nov. 17, 1975).

¹⁶ “Final Guideline Document: Control of Sulfuric Acid Mist Emissions from Existing Sulfuric Acid Production Units,” EPA-450/2-77-019 (Sept. 1977).

¹⁷ “Primary Aluminum: Guidelines for the Control of Fluoride Emissions from Existing Primary Aluminum Plants,” EPA/2-78-0496.

¹⁸ “Kraft Pulping: Control of TRS Emissions from Existing Mills,” EPA-450/2-78-003b (March 1979).

¹⁹ “Control of Fluoride Emissions from Existing Phosphate Fertilizer Plants,” EPA-450/2-77-005.

²⁰ *See, e.g.*, 1989 Texas Air Control Board Plan for the Control of Sulfuric Acid Mist, Total Reduced Sulfur, and Fluoride Emissions from Existing Facilities, at

http://www.tceq.texas.gov/assets/public/implementation/air/sip/sipdocs/1989-SUL/89_sulfur.pdf (noting that, “section 111(d) emission limits are set for pollutants not controlled as criteria pollutants under section 108(a) of the FCAA or as hazardous air pollutants under section 112(b)(A)”).

²¹ *See Clean Air Act Amendments*, Pub. L. 95-95, 91 Stat. 685 (1977).

²² *See Senate Debates on the Clean Air Act Amendments of 1990 Conference Report* (Oct. 27, 1990), at 1029.

²³ *See id.*

²⁴ 42 U.S.C. § 7412(c)(1).

²⁵ 42 U.S.C. § 7412(c)(3) (directing EPA to list “sufficient categories of area sources to ensure that area sources representing 90% of the area source emissions of the 30 HAPs that present the greatest threat to public health in the largest number of urban areas are subject to regulation”).

²⁶ 42 U.S.C. § 7412(d).

²⁷ 42 U.S.C. § 7412(d)(3).

²⁸ 42 U.S.C. § 7412(b)(2).

²⁹ *Id.*

³⁰ 42 U.S.C. § 7412(b)(7).

³¹ 42 U.S.C. § 7412(i)(6) (exempting sources that have installed BACT under the Prevention of Significant Deterioration program, or LAER under the Non-Attainment New Source Review program).

³² Sec. 112(c)(3), H.R. 3030 (as introduced), 2 Environment and Natural Resources Policy Division, Library of Congress, A Legislative History of the Clean Air Act of 1990 3740, 3932-33 (1998).

³³ 2 Environment and Natural Resources Division, Library of Congress, A Legislative History of the Clean Air Act Amendments of 1990 3021, 3106 (1998), Report of the Committee on Energy & Commerce, U.S. House of Representatives on H.R. 3030.

³⁴ 42 U.S.C. § 7412(n)(1)(A).

³⁵ 42 U.S.C. § 7429(h)(3).

³⁶ 42 U.S.C. § 7412(d)(7).

³⁷ *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, 16031 (Mar. 29, 2005).

³⁸ Clean Air Act Amendments, Pub. L. 101-549, Sec. 108(g), 104 Stat. 2399, 2467 (1990).

³⁹ Clean Air Act Amendments, Pub. L. 101-549, Sec. 302(a), 104 Stat. 2399, 2574 (1990).

⁴⁰ Initial List of Categories of Sources under Section 112(c)(1) of the Clean Air Act Amendments of 1990, 57 FED. REG. 31576 (July 16, 1992).

⁴¹ Historical and Statutory Notes following 42 U.S.C. § 7411 (2006), page 521.

⁴² William J. Haun, *The Clean Air Act as an Obstacle to the Environmental Protection Agency’s Anticipated Attempt to Regulate Greenhouse Gas Emissions from Existing Power Plants*, The Federalist Society (March 2013), at 12. As an aside, the Haun article implies, mistakenly, that the Conference Committee flagged to the President that the law contained conflicting amendments. *See* Haun, at 10, n.46-47. However, the bracketing and notation about “duplicative” amendments was done later in time by the Office of Law Revision Counsel; the reference in the Haun article to 1 Legislative History of the Clean Air Act Amendments of 1990, at 46 refers to the version of the 1990 Clean Air Act Amendments in the U.S. Code.

⁴³ *See, Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Medical Waste Incinerators*, 60 Fed. Reg. 10654, 10657 (Feb. 27, 1995).

⁴⁴ See, *Regulatory Finding on the Emissions of HAPs from Electric Utility Steam Generating Units*, 65 Fed. Reg. 79825 (Dec. 20, 2000).

⁴⁵ *Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units*, 70 Fed. Reg. 15994, 16031-32 (Mar. 29, 2005).

⁴⁶ See *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units*, 70 Fed. Reg. 28606 (May 18, 2005).

⁴⁷ See *Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units* 70 Fed. Reg. 15994, 16030 (Mar. 29, 2005) (citing 1 U.S.C. § 204(a); *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964); *Washington-Dulles Transportation Ltd. v. Metropolitan Washington Airports Auth.*, 263 F.3d 371, 378 (4th Cir. 2001)).

⁴⁸ See 70 Fed. Reg. 15994, 16031.

⁴⁹ 70 Fed. Reg. 15994, 16032.

⁵⁰ See, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

⁵¹ See, *New Jersey*, 517 F.3d 574, 578. Later in the decision, the Court stated that “under EPA’s own interpretation of [Section 111(d)], it cannot be used to regulate sources listed under section 112, EPA thus concedes that if EGUs remain listed under section 112, as we hold, then the CAMR regulations for existing sources must fall.” *Id.*, at 583. One commenter has suggested this broader statement could stymie EPA’s efforts to regulate greenhouse gases at existing power plants. See Adam M. Kushner, Judith E. Coleman, *Lessons from Mercury*, supra at note 4. However, given the Court’s more precise characterization of EPA’s interpretation earlier in the decision, this should not pose an obstacle.

⁵² See *Regulating Greenhouse Gas Emissions Under the Clean Air Act, Advance Notice of Proposed Rulemaking*, 73 Fed. Reg. 44354 (July 30, 2008).

⁵³ *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44354, 44417-18 (quoting 70 Fed. Reg. 16029-32).

⁵⁴ See *National Emission Standards for Coal and Oil Fired Electric Utility Steam Generating Units*, 77 Fed. Reg. 9304, 9308, n.6 (Feb. 16, 2012).

⁵⁵ See *New Jersey v. EPA*, No. 05-1097, Initial Br. of Respondent, May 4, 2007, at 111-118.

⁵⁶ *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

⁵⁷ *Chevron*, 467 U.S. at 842-43.

⁵⁸ See, e.g., *Scialabba v. Cuellar de Osorio*, 134 S.Ct. 2191, 2214 (2014) (Chief Justice Roberts, concurrence) (finding “[d]irect conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice”) but see *Scialabba*, 134 S.Ct. 2191, 2196 (Justice Kagan, for a plurality) (applying *Chevron* to a conflict); see also *id.* at 2219, n.3 (Justice Sotomayor, dissent) (illustrating that some conflicts “can make deference appropriate”).

⁵⁹ *EPA v. EME Homer City Generation, L.P.*, 134 S.Ct. 1584, 1603 (2014) (quoting *Chevron*, 467 F.2d at 843-44, 866).

⁶⁰ *EME Homer*, 134 S.Ct. 1584.

⁶¹ *Chemical Manufacturers Ass’n v. NRDC*, 105 S.Ct. 1102 (1985).

⁶² *Citizens to Save Spencer County v. EPA*, 600 F.2d 844 (D.C. Cir. 1977).

⁶³ *Precision Industries, Inc. v. Qualitech Steel*, 327 F.3d 537, 544 (2003) (quoting *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executive’s Ass’n*, 491 U.S. 490, 510 (1989)); see also *New Process Steel L.P. v. Nat’l Labor Relns Bd.*, 560 U.S. 674 (2010) (reading an ambiguous clause in the “only way to harmonize and given meaningful effect to all of the provisions in the section at issue”).

⁶⁴ 2A Sutherland Statutory Construction § 46:5 (7th ed.); *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013); *Koons Buick Pontiac GMC, Inc. v. NIGH*, 543 U.S. 50, 61 (2004); *Washington Market Co. v. Hoffman*, 101 U.S. 112, 116 (1899) (cited with approval in *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *United States Nat’l Bank of Oregon v. Independent Insurance Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993); see also *Richards v. U.S.*, 369 U.S. 1 (1962) (observing that “a section of a statute should not be read in isolation from the context of the whole Act.”)

⁶⁵ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 134 (2000) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).

⁶⁶ 42 U.S.C. § 7412(d)(7).

⁶⁷ *Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units*, 70 Fed. Reg. 15994, 16031 (Mar. 29, 2005); see also, *Bush Counsel Says EPA Lacks Power to Set GHG NSPS at Existing Plants*, ENERGY WASHINGTON WEEK (Dec. 19, 2012).

⁶⁸ See *New Jersey v. EPA*, No. 05-1162 (D.C. Cir.), Proof Opening Br. of Env'tl Petitioners (Jan. 12, 2007), at 20-22. Notably, environmental petitioners were focused on the extent of Section 111(d) control over HAPs and did not purport to interpret the House Amendment's effect on non-HAP regulation under Section 111(d). See Proof Opening Br. of Env'tl Petitioners, at 24.

⁶⁹ Courts have held that a provision is "ambiguous" when it is capable of being understood by reasonably well informed persons or two or more different senses. 2A Sutherland Statutory Construction § 45:2 (7th ed.) (citing *United Services Auto Ass'n v. Perry*, 92 F.3d 295, 298 (5th Cir. 1996), superseded on other grounds, 102 F.3d 144 (5th Cir. 1996); *In re: W. Iowa Limestone, Inc.*, 538 F.3d 858, 863 (8th Cir. 2008).

⁷⁰ See, *supra*, at [redacted] for discussion of amendments made to Sections 112 and 129 in the 1990 Clean Air Act Amendments.

⁷¹ 42 U.S.C. § 7412(n)(1)(A), § 7429(h)(3).

⁷² 42 U.S.C. § 7412(d)(7).

⁷³ See *United States v. Neville*, 82 F.3d 1101, 1105 (D.C. Cir. 1996) (silence in legislative history accompanying subtle legislative changes suggests that no significant alterations to preexisting scheme were intended).

⁷⁴ Sec. 112(c)(3), H.R. 3030 (as introduced), 2 Environment and Natural Resources Policy Division, Library of Congress, A Legislative History of the Clean Air Act of 1990 3740, 3932-33 (1998). In fact, the House Amendment is likely a vestige of this as-introduced framework.

⁷⁵ Note that this does not mean EPA's construction in its 2005 rulemaking was necessarily wrong. This section attempts to read the House Amendment in a way that is consistent with the Senate Amendment, Section 111(d), and the Act. If it is determined that there is no way to read these consistently – and that in fact, we are faced with an irreconcilable difference – than other methods of statutory interpretation, including reconciliation of the text, may come into play. See *infra*, at [redacted].

⁷⁶ *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004); *Perry v. First Nat'l Bank*, 459 F.3d 816, 821-22 (7th Cir. 2006).

⁷⁷ 42 U.S.C. § 7412(a)(3).

⁷⁸ 42 U.S.C. § 7412(c)(1).

⁷⁹ 42 U.S.C. § 7412(a)(1), (2).

⁸⁰ See, e.g., *Rutter v. Rutter*, 2013 WL 5508512 (Ga. 2013) (finding irreconcilable conflict between two statutes enacted during the same legislative session, where one statute added a curtilage exemption to a prohibition on surreptitious videotaping, and the next amended the same provision but failed to include the curtilage exemption); *State v. District Court of Oklahoma Cty.*, 154 P.3d 84 (Cr. App. OK) (207) (finding irreconcilable conflict between two laws enacted minutes apart, with different cut-off ages for when teenagers must be tried as adults); *State v. Conyers*, 87 Ohio St.3d 246, 249 (1999) (finding "an express prohibition in one provision of an act that another provision allows is not necessary for a conflict to exist. It suffices that two provisions provide for inconsistent and irreconcilable results on a particular issue").

⁸¹ The Mercury Air Toxics Rule does not apply to natural gas-fired plants. It is unclear how Section 111(d) would be applied to gas plants, an unregulated subcategory of the source category regulated under Section 112.

⁸² See, *Rutter v. Rutter*, 2013 WL 5508512, at *2.

⁸³ *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 870 (D.C. Cir. 1979).

⁸⁴ *Atwell v. Merit Systems Protection Bd.*, 670 F.2d 272 (D.C. Cir. 1981).

⁸⁵ *US v. Gordon*, 961 F.2d 426, 431 (3d Cir. 1992).

⁸⁶ *Citizens to Save Spencer County v. EPA*, 600 F.2d 844 (D.C. Cir. 1977).

⁸⁷ *Citizens to Save Spencer County*, 600 F.2d at 860-61.

⁸⁸ *Id.*, at 867.

⁸⁹ *Id.*, at 866 (italics in original).

⁹⁰ *Id.*, at 872.

⁹¹ *Id.*, at 870.

⁹² *Supra*, at [redacted].

⁹³ For instance, another rule is that the more specific of the two conflicting provision trumps the more general. See *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 141 (6th Cir. 1989); *Wingerberg v. Transp. Ins. Co.*, 72 F.3d 318, 324 (3d Cir. 1995) (relying on Pennsylvania statute).

⁹⁴ See Antonin Scalia, Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXT* (2012), at 56-58.

⁹⁵ Scalia, Garner, *READING LAW*, at 134-39.

⁹⁶ 2A Sutherland Statutory Construction § 23:18 (7th ed.).

⁹⁷ See, *Reno v. American-Arab Anti-Discrimination Comm'n*, 525 U.S. 471, 509 and note 3 (1999) (citing *Maddux v. Nashville*, 158 Tenn. 307, 312 (1929)). This rule is applied in the context of “irreconcilably inconsistent” special verdicts, as well. See 89 C.J.S. Trial § 992 at 603 (2001).

⁹⁸ 2A Sutherland Statutory Construction § 46:5 (7th ed.).

⁹⁹ 2A Sutherland Statutory Construction § 23:18 (7th ed.).

¹⁰⁰ See, e.g., *Edwards v. Carter*, 580 F.2d 1055, 1080 n. 16 (D.C. Cir. 1978); *Lodge 1858, Am. Fed'n of Gov't Emp. v. Webb*, 580 F.2d 496, 510 and note 31 (D.C. Cir. 1978).

¹⁰¹ See, e.g., *United States v. Daniels*, 279 F. 844, 849 (2d Cir. 1922); *Merchants' Nat'l Bank of New Haven, Conn., v. United States*, 214 F. 200, 205 (2d Cir. 1914); *United State v. Moore*, 567 F.3d 187, 189-90 (6th Cir. 2009); *In re Richards*, 96 F. 935, 939 (7th Cir. 1899); *United States v. Jackson*, 143 F. 783, 787 (9th Cir. 1906).

¹⁰² See, e.g., **add AL cite**; *State v. City of Hialeah*, 109 So. 2d 368, 370 (Fla. 1959); *State v. Bd. of Com'rs of Marion Cty.*, 170 Ind. 595, 85 N.E. 513, 515 (1908); *Howard v. Bangor & A.R. Co.*, 86 Me. 387, 29 A. 1101, 1102 (1894); *Gentry v. Blinn*, 84 P.2d 27, 29 (1938); *State v. Taylor*, 186 Mo. 608, 85 S.W. 564, 567 (1905); *State v. Stedman*, 141 N.C. 448, 54 S.E. 269, 270 (1906); *Kirby v. Waterman*, 17 S.D. 314, 96 N.W. 129, 131 (1903); *Hightower's Lessee v Wells*, 14 Tenn. 249 251 (1834); *State ex rel. Adjustment Dept. of Olympia Credit Bureau v. Ayer*, 9 Wash. 2d 188, 194, 114 P.2d 168, 171 (1941).

¹⁰³ Office of Legislative Counsel, U.S. Senate, Legislative Drafting Manual § 126(d)(1), 33 (1997), available at http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual%281997%29.pdf; Office of the Legislative Counsel, U.S. House of Representatives, House Legislative Counsel's Manual on Drafting Style § 332(d), 42 (1995), available at http://www.llsdc.org/attachments/files/94/Manual_on_Drafting_Style.pdf.

¹⁰⁴ See *New Jersey v. EPA*, No. 05-1162 (D.C. Cir.), Proof Opening Br. of Env'tl Petitioners (Jan. 12, 2007), at 24. This was a secondary argument; the environmental petitioners relied heavily on an interpretation that would read away the conflict. See *supra*, n. .

¹⁰⁵ Initial Brief of Respondent United States Environmental Protection Agency, *New Jersey v. EPA*, No. 05-1097 (May 4, 2007) at 103, n.33; see also 70 Fed. Reg. 15994, 16032 note 64.

¹⁰⁶ See *City of Mobile v. GSF Properties, Inc.*, 531 So.2d 833, 835-36 (Ala. 1988); *In re State of Alabama et al. v. F.W. Crenshaw*, 287 So.2d 139, 141-42 (Ala. 1971).

¹⁰⁷ 1A Sutherland Statutory Construction § 23:10 (7th ed.).

¹⁰⁸ Scalia, Garner, *READING THE LAW*, at 327.

¹⁰⁹ *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1147 (D.C. Cir. 1987) (citing *City of Greenwood, Miss. v. Peacock*, 384 U.S. 808, 815-24 (1966)). The issue in *CNA Financial Corp.* was a codification of prior legislation, but the case it cited related to subsequent amendments to a federal statute, a fact pattern more closely resembling the issue addressed in this paper.