

THE OKLAHOMA ATTORNEY

GENERAL'S PLAN



***The Clean Air Act Section 111(d) Framework that
Preserves States' Rights***

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I. Executive Summary

President Obama's Climate Action Plan (CAP) directed the Environmental Protection Agency ("EPA" or the "Agency") to regulate carbon dioxide (CO₂) emissions from new and existing fossil-fuel fired generation units. The CAP has no legal basis or force of law, and EPA in regulating these units remains subject to the Clean Air Act (CAA) – a law passed by Congress and signed by the President consistent with principles of democratic governance. EPA is unlawfully regulating through and to the principles outlined in the CAP, and in doing so is engaging in energy rationing that will first eliminate coal-fired generation from each State's fuel mix, then target and eradicate natural gas-fired generation.

EPA has proposed a New Source Performance Standard (NSPS) for new power plants, which includes performance standards that are not achievable in the real world. Even more problematic, pursuant to Section 111(d) of the CAA, EPA will issue standards for existing power plants mid-year 2014 that will create immediate problems and higher electricity costs for consumers nationwide, including in Oklahoma. Because the existing generation fleet was neither built nor designed to control CO₂ emissions, the EPA approach will seek to set a State by State budget using a baseline for allowed emissions resulting from electricity generation in each state. However, EPA's ambition is restrained by Section 111(d), which gives the States the authority to determine achievable emission standards for its fossil-fuel fired units. Despite President Obama's directives to EPA in the Climate Action Plan, EPA cannot exceed its legal authority under Section 111(d). The CAA governs EPA's actions – not the CAP. Furthermore, the legality of EPA's purported authority to regulate CO₂ emissions for existing power plants under Section 111(d) has been questioned, and the Agency's very ability to promulgate regulations is only assumed to be legal here for purposes of this discussion.

The Oklahoma Attorney General's Plan ("OKAG Plan") counters the recently released white paper entitled *Greenhouse Gas Implications for Kentucky under Section 111(d) of the Clean Air Act* (Kentucky Plan)¹, which promotes a "mass-emissions" approach – conceptually indistinguishable from cap-and-trade. This approach removes the significant authority and discretion left to the States under Section 111(d); instead, it embraces CAP-driven energy rationing, despite the fact that there is no legal basis for the CAP. The Kentucky Plan's proposed framework erroneously gives EPA maximum flexibility with its Section 111(d) authority and minimum flexibility to the States in crafting emission standards. This is the antitheses of the Section 111(d) regulatory scheme.

The Kentucky Plan borrows from environmental and academic literature that argues for the wholesale shift of Section 111(d) into a national cap-and-trade regime. A Natural Resources Defense Council (NRDC) white paper argues for constraints on emissions of carbon under Section 111(d) as part of an "optimization process," which will be specified on the basis of "cap-

¹ Commonwealth of Kentucky Energy and 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>.

and-trade policies” and applied to individual generating units or groups of units.² Academic papers argue for using Section 111 to implement a cap-and-trade program to drive Greenhouse Gas (GHG) emission reductions, even if that means “jamming a square peg through a round hole.”³

The OKAG Plan properly construes Section 111(d): EPA designs a procedure and emission guidelines, and States determine the legally enforceable emission standard that is as stringent as the applicable guideline – *unless* the State determines that circumstances justify imposition of a less stringent emission standard. The OKAG Plan institutes a unit-by-unit, “inside the fence” approach to determining State emission standards, and accounts for the practical reality that air quality impacts differ from State to State, as do costs and opportunities for CO₂ emission reductions. With the OKAG Plan, the resource planning function is *not* usurped by an allocation system or CO₂ budget and instead remains where it belongs – “inside the fence” in the hands of state regulators with specialized expertise and a focus on ratepayer impacts and protection of the public interest. Furthermore, the “inside the fence” model ensures that emissions reductions are limited to the engineering limits of each facility. The OKAG Plan preserves State primacy and does not turn over management of local generation fleets to EPA under the guise of “flexibility.”

II. Background and Regulatory Concerns

The EPA is poised to again propose new regulations that venture well beyond the limits of the law. Through the recent CAP, which has no force of law or legal basis, President Obama has called upon EPA to propose CO₂ emission guidelines for existing power plants by June 1, 2014, and to finalize those rules by June 1, 2015 under Section 111(d).⁴ Accordingly, individual States⁵, such as the State of Kentucky, have begun offering proposed “frameworks” to provide “input” to EPA in developing guidelines under Section 111(d). The OKAG Plan serves as a counterproposal that is more faithful to the law as written; gives States the significant discretion and authority reserved to them under Section 111(d); and keeps the EPA from dictating standards it has no authority to impose. It properly leaves the appropriate amount of emissions reductions to the State on an “inside the fence” basis.

Simply put, EPA does not have the authority to impose a state-by-state “cap and trade” CO₂ emissions policy.. This “outside the fence” approach ignores the States’ primary authority to devise Section 111(d) State Implementation Plans (SIPs) that are: flexible; cognizant of the

² See, e.g., Daniel A. Lashof, Starla Yeh, David Doniger, Sheryl Carter & Laurie Johnson, *Closing the Power Plant Carbon Pollution Loophole: Smart Ways the Clean Air Act Can Clean Up America’s Biggest Climate Polluters*, Natural Res. Def. Council (Dec. 2012), available at <http://www.nrdc.org/air/pollution-standards/files/pollution-standards-report.pdf>.

³ James Salzman & Barton H. Thompson, Jr., *Environmental Law and Policy* 87-88 (3d ed. 2010); see also, M. Rhead Enion, *Using Section 111 of the Clean Air Act for Cap-and-Trade of Greenhouse Gas Emissions: Obstacles and Solutions*, 30 UCLA J. Envtl. L. & Pol’y 1, 34-45 (2012).

⁴ 42 U.S.C. § 7411(d).

⁵ On December 16, 2013, officials from 15 states submitted a paper entitled *States’ §111(d) Implementation Group Input to EPA on Carbon Pollution Standards for Existing Power Plants* to EPA. See Mary D. Nichols, et al., *States’ §111(d) Implementation Group Input to EPA on Carbon Pollution Standards for Existing Power Plants*, (Dec. 16, 2013) available at http://www.georgetownclimate.org/sites/default/files/EPA_Submission_from_States-FinalCompl.pdf.

particular circumstances of the given state; and will not imperil the families and businesses of the state with ruinous electricity rate increases.

i. EPA has, at best, circumscribed authority under Section 111(d).

EPA's authority to promulgate a CO₂ emission guideline for *existing* electric generating units (EGUs) has been questioned.⁶ CO₂ is not among the types of pollutants that can be regulated explicitly under Section 111(d). Therefore, EPA has no authority *at all* to require States to adopt CO₂ performance standards for existing EGU CO₂ emissions.⁷ Despite our belief that EPA has no authority to promulgate a CO₂ emission guideline for existing EGUs, it is clear that EPA believes that it has that authority and will attempt to exercise it.⁸ In line with EPA's anticipated action claiming CO₂ emission authority, the OAG Plan at least strikes the appropriate balance on the "cooperative federalism" scale, emphasizing State primacy under Section 111(d) of the Clean Air Act.

Unchecked, EPA will continue to implement regulations that exceed its statutory authority to the detriment of the States. Under the CAA, Congress has vested authority to the States, whose citizenry and businesses ultimately pay the price of costly and ineffective regulations. EPA's authority under the Section 111(d), at best, is limited to developing a procedure for States to establish emissions standards for existing sources.

Indeed, Section 111(d) materially differs from Section 111(b), the NSPS provision, and it is well-established that "**Section 111(d) grants a more significant role to the states in development and implementation of standards of performance than does [Section] 111(b).**"⁹ The Supreme Court itself recognizes the extensive State authority under Section

⁶ See 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 (Mar. 2013), available at <http://www.fed-soc.org/publications/detail/the-clean-air-act-as-an-obstacle-to-the-environmental-protection-agencys-anticipated-attempt-to-regulate-greenhouse-gas-emissions-from-existing-power-plants>.

⁷ EPA's proposed CO₂ NSPS rule for new EGUs pursuant to Clean Air Act (CAA) Section 111(b) is a separate matter, under a separate section of the Clean Air Act.

⁸ Section 111(d) does not authorize EPA to adopt regulations for a particular category of facilities where that source category "is regulated under section [112] of this title." See 42 U.S.C. § 111(d)(1)(A)(i). Indisputably, coal plants are regulated under Section 112. EPA listed coal plants for regulation under Section 112 in 2000 and recently established Section 112 pollution standards in its 2012 Mercury and Air Toxics Standards (MATS) rule. See 77 Fed. Reg. 9304 (Feb. 16, 2012); 65 Fed. Reg. 79,825 (Dec. 20, 2000). Thus, having regulated coal plants under Section 112, EPA has no power under Section 111(d) to adopt regulations governing coal-plant CO₂ emissions. Because EPA has not yet proposed Section 111(d) CO₂ performance standards for existing coal plants, EPA's exact rationale for its authority to do so is not known with certainty. Nevertheless, based on past EPA statements, EPA is expected to claim that Section 111(d) is ambiguous on this point and that its interpretation of the provision as allowing for CO₂ regulation is entitled to deference. The claimed ambiguity stems from language in the House and Senate versions of the 1990 Clean Air Act Amendments. But as has recently been explored at length, EPA's interpretation depends on not giving effect to all of the language Congress adopted. See Haun, *supra* note 2. Including all of Congress' language inevitably leads to the conclusion that CO₂ emissions from coal-fueled EGUs cannot be regulated under Section 111(d). See, e.g., Brian H. Potts, *The President's Climate Plan for Power Plants Won't Significantly Lower Emissions*, 31 YALE J. ON REG. 1A, 9A (2013)(concluding in part that "it is highly questionable whether EPA can even regulate existing power plants at all using Section 111(d).")

⁹ Jonas Monast, Tim Profeta, Brooks Rainey Pearson, and John Doyle, *Regulating Greenhouse Gas Emissions From Existing Sources: Section 111(d) and State Equivalency*, 42 ENVTL. L. 10206, 10206 (2012).

111(d); Section 111(d) allows “each State to take the first cut at determining how best to achieve EPA emissions standards within its domain.”¹⁰

The cornerstone of the OKAG Plan is State primacy under the CAA. The way in which EPA has overreached in interpreting its legal authority under the CAA to promulgate a NSPS for *new* EGUs portends a similarly aggressive and unlawful approach to the Section 111(d) regulation of *existing* EGUs. EPA’s unambiguous policy goal in establishing its new source standards is to prevent the construction of new fossil-fuel fired plants. For example, EPA’s proposed EGU NSPS would foreclose the construction of new coal-based electric generation absent carbon capture and storage (CCS), yet CCS is likely to remain commercially infeasible for a decade or more. The elimination of coal as a fuel for new electric generation would have severe implications for electricity prices; the economy and job-creation in general; and the competitiveness of American manufacturing. Importantly, States that have already eliminated or reduced coal-fired generation or have planned or carried out turnover of their generation fleet to natural gas are not immune from Section 111(d). Under these circumstances, gas plant emissions will be the first target for emission reduction – and the result is the same: elimination of gas as a generating resource. The eradication of all fossil-fueled generation, *including natural gas*, is the inevitable result of EPA’s current course of action over time and will only be counteracted when States assert their statutory authority through proper balance and implementation of a Section 111(d) SIP.

ii. The Kentucky Plan.

Even though it says all the right things, the Kentucky Plan does not strike the proper balance in its proposed framework. It references the “flexibility” provided to the States under Section 111(d); recognizes the fact that States “submit a plan to establish standards of performance”; argues that CCS “is not yet commercially proven in the primary large-scale for which it is envisioned”; and argues that “the transition to lower emission sources should not be a sole trade-off between one type of carbon fuel (coal) for another (natural gas).” Unfortunately, by advocating for a “mass-emissions approach,” the Kentucky Plan in practice does not support these statements.

The Kentucky Plan provides a framework centered on mass emissions, or an emission cap, which would result in standards “expressed as a percent reduction of the mass (tons) of pollutant (CO₂).” The framework is not tied to an emission standard based upon adequately demonstrated and achievable systems of emission reductions; rather, the Kentucky Plan predefines its goal and regulates to the lawless CAP by setting an emission baseline and mandating CO₂ reduction levels for 2020 (17 percent), 2025 (28 percent), 2030 (38 percent), and 2050 (80 percent). This involves no unit-by-unit analysis of achievable reductions or consideration of whether emission reduction technologies are adequately demonstrated. It simply sets a cap then forces compliance, divesting the States of their significant discretion and authority under Section 111(d).

¹⁰ *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011). The Court further recognized that EPA merely promulgates guidelines, while States determine performance standards: “For existing sources, EPA issues emissions guidelines; in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction, § 7411(d)(1).” *Id.* at 2537-38.

The “mass-emissions approach” is legally tenuous and *will* result in wholesale turnover of the generation fleet at ratepayer expense through the mandated CO₂ reductions. Indeed, the threat posed by the significant reductions contemplated by the Kentucky Plan is not limited to coal and equally portends drastic reductions in natural gas-fired generation. The Kentucky Plan threatens all fossil-fuel fired generation and in turn the economic recovery and ratepayers because diverse resource portfolios keep risk low and reliability high.

iii. States are the driver of Section 111(d) regulation, and the OKAG Plan recognizes this authority.

States, and not EPA, have primary authority over Section 111(d) planning. Resource planning will have to comply with state-created and -implemented plans for CO₂ reductions. Properly construed Section 111(d) SIPs will require achievable reductions, not wholesale turnover of the generation fleet. In fact, Section 111(d) explicitly recognizes cost, and States have flexibility to keep low cost generation running.¹¹

The OKAG Plan offers an alternative framework that is consistent with the State primacy entrenched in Section 111(d). As contemplated by Section 111(d), States possess the authority and discretion to define emission reduction requirements through unit-specific analyses. The OKAG Plan eschews the mass-emissions model because this approach subsumes resource planning processes traditionally left to the States into mandatory CO₂ budgets. Instead, the OKAG Plan allows for a unit-by-unit analysis and considers affordable electricity.. In addition, the framework holds EPA to its recent public pronouncements regarding regulation of existing EGUs. In a December 2, 2013 speech before the Center for American Progress, EPA Administrator Gina McCarthy pledged that EPA would be “really flexible” with States regarding Section 111(d).¹² The OKAG Plan embraces the “significant flexibility” left to the States under Section 111(d).

III. The Statutory and Regulatory Framework For Developing Performance Standards For Existing Sources

i. Emission guidelines versus emission standards and EPA’s confined authority to promulgate a “guideline document.”

The difference between EPA and State authority in the Section 111(d) regulatory framework is illustrated by the difference between an “emission guideline” and an “emission standard.” An emission guideline must reflect emissions reduction achievable by “the best system of emission reduction (taking into account the cost of such reduction) ... [that] has been adequately demonstrated for designated facilities.”¹³ Promulgation of a “guideline” is consistent with EPA’s statutory duty to “establish a procedure” for State submission of Section 111(d)

¹¹ See, e.g. 40 C.F.R. § 60.24(f)(1) (providing that States may provide for less stringent emissions standards based on “[u]nreasonable cost of control resulting from plant age, location or basic process design ...”)

¹² See Laura Barron-Lopez, EPA to be ‘flexible’ on carbon standards, The Hill (Dec. 2, 2013), *available at* <http://thehill.com/blogs/e2-wire/e2-wire/191743-epa-to-be-flexible-with-states-on-carbon-standards>.

¹³ 40 C.F.R. § 60.21(e).

SIPs.¹⁴ Guidelines may be established for different types, sizes and classes of facilities if costs of control, physical limitations, geographic locations or similar factors render sub-categorization appropriate.¹⁵ Under Section 111(d) regulations, EPA’s guideline document is meant to “provide information for the development of State plans.”¹⁶

The definition of an “emission standard” is indicative of the States’ more substantive role. An emission standard is a “*legally enforceable regulation* setting forth an allowable rate of emissions into the atmosphere, establishing an allowance system, or prescribing equipment specifications for control of air pollution emissions.”¹⁷ Each SIP must include emission standards, and “emission standards shall be no less stringent than the corresponding emission guideline(s).”¹⁸ However, States retain the discretion to prescribe *less stringent* emissions standards under certain circumstances, including if the cost of control is “unreasonable ... resulting from plant age, location, or basic process design.”¹⁹

In sum, a guideline is general and suggestive, while a standard is specific and prescriptive – and the Section 111(d) implementing regulations reflect this difference. EPA designs a procedure and emission guidelines, and States determine the legally enforceable emission standard that is as stringent as the applicable guideline – *unless* the State determines that circumstances justify imposition of a less stringent emission standard after evaluating the factors set forth at 40 C.F.R. § 60.24(f). More simply, the standard must satisfy the guideline unless enumerated circumstances, *in the States’ estimation*, exist. This invokes the principle of cooperative federalism, with roles clearly delineated for both EPA and the States. The cooperative federalism principle is illustrated by EPA’s general procedural regulations relating to the States’ adoption and submittal of SIPs, while the State-driven SIPs establish the legally enforceable emission standards for existing sources. EPA may only promulgate legally enforceable emission standards if (1) a State fails to submit a SIP, or (2) a State submits a SIP that does not comply with Section 111(d) regulations.

ii. States have primacy and discretion in formulating Section 111(d) plans.

As discussed above, States have significant discretion in formulating Section 111(d) SIPs. Although the “emission standards” are to be “no less stringent than the corresponding emission guideline(s),” the States may make a case-by-case determination that a specific facility or class of facilities are subject to a less-stringent standard or longer compliance schedule due to: (1) cost of control; (2) a physical limitation of installing necessary control equipment; and (3) other factors making the less-stringent standard more reasonable.²⁰ Moreover, States may

¹⁴ 42 U.S.C. § 7411(d)(1).

¹⁵ 40 C.F.R. § 60.22(b)(5).

¹⁶ 40 C.F.R. § 60.22(b). Section 111(d) requires the existence of a performance standard for new sources as a condition precedent to the development of such standards for existing sources. Thus, the legality of the final version of EPA’s EGU NSPS rule has significant implications for EPA’s ability to require regulation of existing EGUs.

¹⁷ 40 C.F.R. § 60.21(f) (emphasis added).

¹⁸ 40 C.F.R. § 60.24(c).

¹⁹ 40 C.F.R. § 60.24(f).

²⁰ 40 C.F.R. § 60.24(f).

establish equipment specifications rather than emissions rates where allowable emission rates are “clearly impracticable.”²¹

EPA’s authority, on the other hand, is limited to evaluating compliance with the guideline document and not promulgating and implementing substantive performance standards. After submittal of a SIP, EPA has four months to determine whether the plan meets the requirements discussed above. If EPA disapproves the plan, the State may correct the deficiencies or, under EPA’s construction, the Agency may issue its own plan within six months of the original submission deadline.²²

iii. Systems of emissions reduction must be adequately demonstrated.

Fundamentally, Section 111(d) requires that emission reductions be achievable through adequately demonstrated systems of emission reduction technology. Under Section 111(d), EPA establishes procedures for States to submit plans containing “performance standards.” The term “standard of performance” is defined in Section 111(a):

The term “standard of performance” means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health environmental impact and energy requirements) the Administrator determines *has been adequately demonstrated*.²³

EPA’s guideline document must “reflect[] the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated.”²⁴ The crux of this requirement thus is that the emission reduction system be, in fact, adequately demonstrated.

Specifically with regard to coal plants, States and EPA have limited options in determining systems of CO₂ emission reduction that have been adequately demonstrated as achievable. EPA itself has acknowledged on several occasions that CCS would not qualify as a performance standard for existing coal plants. The only way to achieve cost-effective emission reductions for a coal generator would be to improve the efficiency of the unit, since increased efficiency translates into reduced CO₂ emissions per unit of electric output. Existing coal plants differ widely in terms of the combustion technologies they use, their ages, maintenance histories,

²¹ 40 C.F.R. § 60.24(b)(1).

²² 40 C.F.R. § 60.27(c)-(d). The State of North Carolina, through the North Carolina Department of Environment and Natural Resources, recently submitted a policy paper entitled “North Carolina §111(d) Principles” to EPA. Given the certain litigation regarding Section 111(d), coupled with recent vacations by the D.C. Circuit and other courts of key EPA rules, North Carolina believes that “EPA should require each State to submit a §111(d) plan within three years following the expiration of the legal litigation process – a ‘legal trigger approach.’” The Oklahoma Attorney General’s Plan also advocates for this approach because it will protect States from allocating limited resources to comply with another rule that is ultimately vacated by the courts. *See* North Carolina Department of Environment and Natural Resources, *North Carolina §111(d) Principles*, at 14. (Jan. 27, 2014), available at http://www.ncair.org/rules/EGUs/NC_111d_Principles.pdf.

²³ 42 U.S.C. § 7411(a) (emphasis added).

²⁴ 40 C.F.R. § 60.22(b)(5).

and how they operate. There is no “one-size-fits-all” method of improving unit efficiency that would apply to all units in the coal fleet. As a result, CO₂ performance standards must be based on unit-by-unit evaluations of available cost-effective efficiency. This approach, which is grounded squarely in the language and history of the Section 111 program, would not require coal plants to retire or curtail operation; they would only require more efficient operation, to the extent it is cost-effective to do so.

EPA’s current approach regarding CCS is cause for grave concern. In the recently proposed CO₂ NSPS for new sources, EPA contends that CCS technologies have been adequately demonstrated; however, this conclusion conflicts with existing law, specifically the Energy Policy Act of 2005 (EPAAct). EPA maintains that CCS technologies for coal-fired power plants have been “adequately demonstrated” based on three government-funded projects receiving assistance under the Department of Energy’s Clean Coal Power Initiative (CCPI) and a fourth project funded by the Canadian government. EPA Acting Assistant Administrator Janet McCabe confirmed the Agency’s use of these projects as the basis for its determination at a November 14, 2013 hearing. The EPAAct prohibits EPA from considering technology used at CCPI projects as being “adequately demonstrated” for purposes of Section 111(d). This legal issue was raised with EPA in a November 15, 2013 letter to Administrator McCarthy from Congressman Fred Upton (R-MI), the chairman of the House of Representatives Committee on Energy and Commerce, and other legislators; the committee leaders ultimately concluded that “[u]nder these provisions of the Energy Policy Act of 2005, EPA’s consideration of CCPI projects to determine that CCS for coal-fired power plants is ‘adequately demonstrated’ is prohibited.” The Office of Management and Budget within the Obama Administration raised similar concerns: “EPA’s assertion of the technical feasibility of carbon capture relies heavily on literature reviews, pilot projects, and commercial facilities yet to operate. We believe this cannot form the basis of a finding that CCS on commercial-scale power plants is ‘adequately demonstrated.’”²⁵

A working group within EPA’s Science Advisory Board (SAB) also raised concerns with EPA’s conclusion that CCS has been adequately demonstrated.²⁶ The working group concluded “that the scientific and technical basis for carbon storage provisions is new science and the rulemaking would benefit from additional review”²⁷; it necessarily follows that new science is

²⁵ EPA, *Summary of Interagency Working Comments on Draft Language under EO12866 Interagency Review*, at 9 (Aug. 19, 2013), available at http://www.eenews.net/assets/2014/02/04/document_daily_02.pdf. The Center for Regulatory Effectiveness has also raised concerns about compliance with the Data Quality Act. See Letter from Jim J. Tozzi, Center for Regulatory Effectiveness, to Administrator Gina McCarthy, EPA (Feb. 3, 2014), available at http://www.eenews.net/assets/2014/02/04/document_daily_01.pdf.

²⁶ Memorandum from SAB Work Group on EPA Planned Actions for SAB Consideration of the Underlying Science to Members of the Chartered SAB and SAB Liaisons, Nov. 12, 2013, available at [http://yosemite.epa.gov/sab/sabproduct.nsf/18B19D36D88DDA1685257C220067A3EE/\\$File/SAB+Wk+GRP+Memo+Spring+2013+Reg+Rev+131213.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/18B19D36D88DDA1685257C220067A3EE/$File/SAB+Wk+GRP+Memo+Spring+2013+Reg+Rev+131213.pdf). The memorandum’s findings regarding the existing basis for the conclusion that CCS has been adequately demonstrated as achievable is equally troubling: “The EPA has stated that U.S. Department of Energy National Energy Technology Laboratory (NETL) studies as well as existing EGUs under construction and in advanced stages of development were used as the basis for the BSER assumptions for new natural gas and coal fuel sources for new EGUs. EPA staff explained that the NETL studies were all peer reviewed and EPA did not conduct additional peer review(s). However, based on additional information provided to the Work Group from NETL, the peer review appears to be inadequate.” *Id.* (emphasis added).

²⁷ *Id.*

not established science. In a recent meeting, however, an EPA official argued that CCS does not require SAB peer review because the proposed new NSPS rule *does not cover how CO2 emissions are stored* and instead the rule only covers the control technology. In other words, the CCS conclusion does not include the “storage” component of CCS. The notion that storage is not legally relevant to the NSPS is illogical.²⁸

Natural gas is similarly threatened by EPA overreach regarding “adequately demonstrated” emission control technologies. If the EPA determines CCS is “adequately demonstrated” as achievable and the practical effect is the mass closure of coal plants, only natural gas emissions remain to achieve reductions to comply with Section 111(d). The unachievable technologies will influence the emission baseline that is set, and natural gas will be eliminated from the resource mix through the incremental reductions.

These significant concerns compel the proposal of the OKAG Plan framework. The proposed framework contemplates States and the EPA working together, but it also requires good faith and legal action on the part of the Agency. The issues discussed above, particularly the CCS adequate demonstration conclusion, merits further involvement of and discussion with the States and other stakeholders.

IV. The Kentucky Plan – State Cap and Trade

The Kentucky Plan is tethered to three improper premises, specifically that: (1) EPA effectively dictates performance standards; (2) allowance systems are permissible as an “emission standard”; and (3) fossil-fuel fired EGUs should account for the bulk of CO₂ emissions reduction. It amounts to express or de facto cap and trade. These deficiencies underscore the need for a unit-by-unit, State-driven plan like the OKAG Plan.

First, Section 111(d) implementing regulations provide that each State compliance plan shall include emission standards and compliance timelines, *as determined by each State*.²⁹ This is consistent with the text of Section 111(d) itself, which provides that States shall establish “standards of performance for any existing source”³⁰ The Kentucky Plan misappropriates authority under Section 111(d) and precludes the extensive role and authority given to the States under Section 111(d).

Second, the Kentucky Plan makes clear that the “proposed framework sets a statewide mass-emission limit that could be the foundation for an allocation program.” In other words, the mass-emissions model appears solely based on the use of an “allowance system” under the regulations. The regulatory definition of “emission standard” appears at 40 C.F.R. § 60.21(f) and includes the term “allowance system,” and this term appears later in the implementing regulations at 40 C.F.R. § 60.24(b)(1). Notably, the term “allowance system” did not appear in these regulations when promulgated by EPA in 1975; rather, it was added 30 years later in 2005

²⁸ North Carolina raises similar concerns and “does not believe that CCS is ‘adequately demonstrated’ for purposes of 111(d).” It further states that “sound science, rather than speculation, should be relied upon to develop §111(d) emission guidelines and plans.” See North Carolina Department of Environment and Natural Resources, *North Carolina §111(d) Principles*, at 12-13.

²⁹ 40 C.F.R. § 60.24(a)-(b)

³⁰ 42 U.S.C. § 7411(d)(1).

when EPA promulgated the Clean Air Mercury Rule (CAMR) because the CAMR featured a mercury allowance trading program.³¹ The CAMR changes to these regulations included a new subparagraph (k) at 40 C.F.R. § 60.21, this established a new definition for the term “allowance system.” However, the D.C. Circuit Court of Appeals vacated the CAMR regulations in 2008.³² Despite the ruling, no change was made to the regulations until 2012 when EPA promulgated the MATS rule and removed the “allowance system” definition at 40 C.F.R. § 60.21(k).³³ While EPA purported to also be “revising” 40 C.F.R. § 60.21(f) and 40 C.F.R. § 60.24(b)(1) in the MATS rule, it did not remove the reference to “allowance systems” notwithstanding that the term’s definition was removed from the regulations. Accordingly, reliance on an “allowance system” as a valid “emission standard” in a SIP is precarious at best and likely illegal, given the term was added through a rule vacated by the D.C. Circuit.

Commentators continue to promote “credit systems” and other regulatory models premised on the legality of allowance systems as Section 111(d) compliance mechanisms.³⁴ Absent from these proposals, with purpose as it nullifies the entire regulatory model, is the legislative history outlined above. Assuming for the sake of argument that allowance systems are permissible, there is reason to question the entire “market basis” of allowance system proposals in the first place – these are not markets in a traditional sense, but regulatory constructs without the Pareto outcomes of real markets. Furthermore, market-based systems cannot justify imposition of emission reduction requirements that are not “achievable” through “adequately demonstrated” systems of emission reduction. Any such emission guideline runs facially afoul of 40 C.F.R. § 60.22(5).

A recent NRDC proposal provides a relevant example of the impacts of such an “outside the fence” regulatory framework. NRDC’s proposal is a CO₂ emissions cap for each state reflecting the level of total CO₂ emissions from all generation resources that would occur if EPA imposed an emission limit of 1,500 lb CO₂/MWh on all generators. Since that level of emissions is unachievable at an individual coal plant, for example (most existing units emit greater than 2,000 lb/MWh), the only means through which a state could demonstrate compliance with the cap would be to decrease the use of coal plants and increase the use of other resources. As the emissions caps ratchet downwards, *all generation resources with targetable emissions* are at risk, including natural gas. This proposal contradicts the language and history of Section 111(d). A further perversion of this model would be the ultimate squeeze put on states that are natural gas-fired centric in generation. If coal is eliminated, a given state’s CO₂ “budget” can only be met by the retirement or carbon capture of natural gas-fired assets.

Third, the Kentucky Plan provides that “[e]ach major GHG emissions sector will contribute proportionately to any overall emissions reduction strategy.” This notion is neither developed nor supported; rather, the plan states that CO₂ from the transportation sector will be handled through Corporate Average Fuel Economy Standards and “[p]roportionate GHG emissions from other non-electric generating unit (EGU) emitting sources will be handled under

³¹ 70 Fed. Reg. 28,606, 28,649 (May 18, 2005).

³² *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008).

³³ 77 Fed. Reg. 9304, 9447 (Feb. 16, 2012).

³⁴ *See, e.g., Steven Michel, A State Model CO₂ Emissions Standard for Power Plants*, THE ELECTRICITY JOURNAL (2013).

other EPA-proposed regulations.” These latter regulations are not specified. Kentucky uses this unsupported conclusion to justify placing the entire burden of CO₂ emission reduction on EGUs, specifically coal-fired and natural gas-fired generation. Because this means, in practice, that the *entire* CO₂ reduction from a given state must come from only a portion of its CO₂ emitters, namely, power plants, it follows that the cost and regulatory burden of Section 111(d) disproportionately affects the electric sector and rates. As discussed, no fossil fuel is safe under the Kentucky Plan because the reduction targets increase over time – 17% in 2020, 28% in 2025, and 38% in 2030. Once coal-fired generation is taken off-line, the natural gas plants will be targeted next to achieve these reductions.

V. The OKAG Plan

The OKAG Plan avoids the pitfalls outlined above and instead tracks Section 111(d) and its implementing regulations. It keeps the EPA function ministerial in reviewing submitted SIPs and tied to procedure, *i.e.* promulgating emission guidelines, unless and until a State fails to submit an adequate SIP.³⁵

Beyond its basis in law, the OKAG Plan recognizes and accounts for the practical reality that air quality impacts differ from State to State, as do costs and opportunities for CO₂ emission reductions. With the OKAG Plan, the resource planning function is *not* usurped by an allocation system or CO₂ budget and instead remains where it belongs – “inside the fence” in the hands of state regulators with specialized expertise and a focus on ratepayer impacts and protection of the public interest. Furthermore, the “inside the fence” model ensures that emissions reductions are limited to the engineering limits of each facility. The OKAG Plan preserves State primacy and does not turn over management of local generation fleets to EPA under the guise of “flexibility.”

The OKAG Plan is simple and contemplates the following approach:

- ***State involvement throughout the Section 111(d) process.*** States have a role and input in EPA’s promulgation of emission guidelines *before and after* the draft guidelines are published. State officials have detailed knowledge about their respective generation fleets and EPA benefits from taking this into account in the guideline drafting process. This contemplates incorporating the input of *all interested States* – not just States whose leadership shares the same vision of EPA and the Obama Administration.
- ***Unit-by-unit analyses.*** Each State will undertake a unit-by-unit analysis to determine achievable and legally enforceable emission standards and compliance schedules that do not require New Source Review. States will not, as in the Kentucky Plan, set an arbitrary emission baseline and haphazard reduction percentages that dictate all subsequent resource planning decisions. The analysis will instead relate directly to the nature and characteristics of the generation fleet.
- ***Promulgation of appropriate “inside the fence” measures.*** Each State will determine appropriate “inside the fence” measures, and ensure that the practical effect of any

³⁵ *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012).

emission guideline is not mandating a best system of emission reduction that completely transforms a generating unit into a different source category.

- ***Consideration of the remaining useful life of existing sources.*** Each State may consider the remaining useful life of an existing source and other factors in determining and implementing a performance standard. EPA is required by statute to allow for this consideration. The remaining useful life may, under certain circumstances, justify a regulatory exclusion or application of a less stringent standard of performance.
- ***Consideration of each State’s unique economic and environmental attributes.*** This model and its individualized, deferential approach allows States to plan and compensate for varying circumstances and factors that face the generation sector and ratepayers in each State.
- ***Consistency with Section 111(d) and the contemplated regulatory scheme.*** The OKAG Plan, is consistent with Section 111(d) and its implementing regulations. States are left to make, without limitation, the following decisions based on a detailed and exhaustive “inside the fence” analysis:
 - States may prescribe, on a case-by-case basis for particular designated facilities or classes of facilities, less stringent emission standards based upon (1) unreasonable cost of control; (2) physical impossibility; and (3) other factors specific to the facility.³⁶
 - States, where appropriate, may defer select decision-making to local jurisdictions provided the emission standards are enforceable by the State.³⁷
 - States may extend any individual unit’s compliance schedule more than 12 months after SIP submittal so long as the SIP included legally-enforceable increments of progress.³⁸
 - States may formulate compliance schedules after plan submittal for individual sources or categories of sources.³⁹
 - States may adopt more stringent emission standards or require final compliance at earlier times.⁴⁰

In sum, the State discretion inherent in the Section 111(d) regulatory scheme and State primacy principle demand a unit-by-unit, “inside the fence” analysis to make all of the determinations and exercise the authority conferred by Section 111(d). The OKAG Plan reflects the plain fact that States, not EPA or the Obama Administration, are in the best position to exercise Section 111(d) authority in the best interest of citizens and to balance relevant factors including costs, which will ultimately be paid by local citizens and businesses. If EPA, in recognition of its narrow Section 111(d) authority, were to embrace the OKAG Plan, the Agency may be surprised by the aptitude of the States. The OKAG Plan’s “inside the fence” model

³⁶ 40 C.F.R. § 60.24(f).

³⁷ 40 C.F.R. §§ 60.24(b)(3), 60.26(e).

³⁸ 40 C.F.R. § 60.24(e)(1).

³⁹ 40 C.F.R. § 60.24(e)(2).

⁴⁰ 40 C.F.R. § 60.24(g).

would result in States serving as incubators for diverse, *achievable* CO₂ reduction strategies that can be implemented on a unit-by-unit basis in a cost-effective manner without ruinous economic consequences. Further, the OKAG Plan does not take a major policy and political issue, the imperative and timing of reductions in CO₂ emissions, and delegate it to the arcane and obscure workings of a regulatory process into which the public has little input. An anti-carbon agenda should not be forced upon the public through executive or administrative fiat.⁴¹

VI. Conclusion

EPA's approach to Section 111(d) regulation raises serious concerns. EPA's aggressive course of action with regard to new sources indicates a similarly aggressive approach to existing sources. While EPA is authorized to require States to submit SIPs containing performance standards, EPA may not dictate those performance standards. Nor may EPA attempt to force States to adopt performance standards that are not based on adequately demonstrated technology or that mandate, in the guise of "flexible approaches," the retirement or reduced operation of still-viable coal-based EGUs and subsequent curtailment and elimination of natural gas-fired generation as well.

These concerns are serious as EPA overreach under Section 111(d) may harm the developing economic recovery. Moreover, the federalist system of government, as set forth in the CAA, requires that EPA recognize the rights and prerogatives of States. The OKAG Plan, led by States "inside the fence" rather than EPA in the form of an artificially created CO₂ budget, recognizes those State rights.. It does not rely on a dubious allowance system or pin its legitimacy and achievability on EPA's disputed, even by its own SAB, determination that CCS is adequately demonstrated as achievable at this time. The CCS determination is technically and legally specious.

The fundamental principle underlying the OKAG Plan does not implicate complicated CO₂ trading systems – it simply complies with Section 111(d) and gives States the authority and discretion they are entitled to under the CAA. States serve in the primary role under the proposed framework and devise and control the destiny of their own generating systems, as well as the associated impacts on ratepayers and citizens.

⁴¹ The emissions reductions achievable through an "inside the fence" approach, even if *numerically* less than an "outside the fence" approach, are sound from a policy perspective. Due to other EPA regulations, there are numerous EGUs, primarily older and less efficient, that are already either retired or committed to be retired. If further emission reductions are mandated, then emission reductions would be achieved from newer and more efficient units. These latter forced retirements are inequitable and compromise system reliability.