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For the Greatest Good of the Greatest Number: Mitigating Climate Change Through Carbon Dioxide Emission Regulation

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**FOR THE GREATEST GOOD OF THE
GREATEST NUMBER: MITIGATING
CLIMATE CHANGE THROUGH CARBON
DIOXIDE EMISSION REGULATION**

JANELL MIDDLETON*

*Conservation means the wise use of the earth . . . for the
greatest good of the greatest number for the longest time.¹*

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1. GIFFORD PINCHOT, BREAKING NEW GROUND 505 (1998).

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I. INTRODUCTION

Try to imagine a world where people do not have to see or experience the consequences of their actions for immense lengths of time. A world where children can eat candy and treats with every meal, and adults can live frivolously, consuming resources as if there were no tomorrow—a world where everyone has access to electricity and can thrive without a care. A time where everyone could turn a blind eye to the costs and wastes that accumulate because of their lifestyles and live with blissful ignorance to the inevitable problems or issues that are somewhere around the bend.

While this world may seem foreign, in many ways it reflects a reality people throughout the world face. With environmental issues on the rise throughout the world, along with the vast environmental revolution this country has experienced, it is imperative that society continues to progress forward rather than turning a blind eye to the consequences of our actions, such as accumulating nuclear reactor wastes or greenhouse gas emissions.²

2. See generally U.S. GOV’T ACCOUNTABILITY OFFICE, *Disposal of High-Level Nuclear Waste*, http://www.gao.gov/key_issues/disposal_of_highlevel_nuclear_waste/issue_summary (last visited Feb. 2, 2015); see generally ENVTL. PROT. AGENCY, *Climate Change Science*

From rivers catching on fire to killer smog events,³ this country has witnessed catastrophic disasters resulting from society's actions. Despite these disastrous experiences, this country has taken steps forward assuring that these disasters will not happen again.⁴ Learning from these environmental adversities, Congress enacted legislation to adequately protect the environment, Americans' health, and general welfare.⁵ By choosing to take action, rather than remaining complacent and continuing to live in ignorant bliss, this country can continue moving forward in a more sustainable direction that ensures good health for both people and the environment.

With climate change becoming a growing and complex issue, with the potential to initiate catastrophic disasters, governments and leaders from all over the world are acknowledging and addressing it as the existential problem threatening our existence.⁶ Therefore, it is no surprise that the government here in the United States is taking action to combat it. The Obama Administration and the Environmental Protection Agency (EPA) took drastic action to propel this country's efforts to reduce greenhouse gas emis-

Overview, EPA <http://www3.epa.gov/climatechange/science/overview.html> (last updated Nov. 4, 2015) (on June 22, 1969, the Cuyahoga River caught fire and ignited the desire and need to get the Clean Water Act passed).

3. See generally Jennifer Latson, *The Burning River That Sparked a Revolution*, TIME (June 22, 2015), <http://time.com/3921976/cuyahoga-fire/>; see generally Jen Carlson, *Flashback: The City's Killer Smog*, GOTHAMIST (Nov. 24, 2009), <http://gothamist.com/2009/11/24/smog.php#photo-1> (within eleven years, starting in November of 1953, smog killed between 539 and 629 people in New York City).

4. See generally 33 U.S.C. §§ 1251–1274 (2015) [hereinafter Clean Water Act] (amended, became known as Clean Water Act in 1972); 42 U.S.C. §§ 7401–7431 (2015) [hereinafter Clean Air Act] (Clean Air Act, enacted 1970).

5. See, e.g., Clean Air Act, *supra* note 4; Clean Water Act, *supra* note 4; 7 U.S.C. § 136 (2015) (Federal Environmental Pesticide Control Act); 42 U.S.C. §§ 4321–4370m-12 (2015) (National Environmental Policy Act).

6. See Kurt Cobb, *Climate Change is Our Grand Narrative Now*, RESOURCE INSIGHTS (Nov. 29, 2015), <http://resourceinsights.blogspot.com/2015/11/climate-is-our-grand-narrative-now.html>; see also COP21, *Find Out More About COP21*, <http://www.cop21paris.org/about/cop21> (last visited Feb. 2, 2016).

sions by focusing on potential reductions of carbon dioxide emissions.⁷ In doing so, the executive branch chose to focus chiefly on the electric power sector within the energy sector.⁸ This is primarily because the electric power sector emits the most carbon dioxide emissions, in comparison to the transportation, industry, residential, commercial, and agricultural sectors.⁹

The Clean Power Plan (“the Plan”) was published in the Federal Register on October 22, 2015, initiating a wave of lawsuits fueled by state opposition to the Plan.¹⁰ The majority of states are outraged by the new regulation.¹¹ The opposing states specifically and primarily argue that the Plan infringes upon their sovereign

7. See Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64, 510 (Oct. 23, 2015) [hereinafter Standards of Performance]; see also EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT’S CLIMATE ACTION PLAN (June 2013), <https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

8. See Presidential Memorandum -- Power Sector Carbon Pollution Standards to the Environmental Protection Agency (June 25, 2013), <https://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards>.

9. See ENVTL. PROT. AGENCY, *Learn About Carbon Pollution From Power Plants*, EPA, <http://www.epa.gov/cleanpowerplan/learn-about-carbon-pollution-power-plants> (last updated July 27, 2016).

10. See Standards of Performance, *supra* note 7; see also E&E PUBL’G, LLC, *The Fate of the Obama Administration’s Signature Climate Change Rule is in the Hands of the Courts*, http://www.eenews.net/interactive/clean_power_plan/fact_sheets/legal (last visited Sept. 07, 2016).

11. Primarily, the states are opposed to the existing stationary electric power plant standards for carbon dioxide emissions. See generally Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review, *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (No. 15A773). The Clean Power Plan has standards for both new and modified stationary electricity generating units, and for existing stationary electricity generating units, but this article will only be focusing on the existing stationary electric power plant standards for carbon dioxide emissions. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64, 662. For more information on the new and modified stationary electric power plant standards, please see Standards of Performance, *supra* note 7; see also EPA, *Carbon Pollution Standards for New, Modified and Reconstructed Power Plants*, <http://www.epa.gov/cleanpowerplan/carbon-pollution-standards-new-modified-and-reconstructed-power-plants> (last updated Nov. 24, 2015).

rights and authority to regulate their electricity-generating facilities and general electricity services.¹²

However, despite this power battle between the states and the EPA, there are vast benefits in the carbon dioxide emission reductions that could be achieved by the Clean Power Plan.¹³ With this in mind, and the idea that this country cannot continue along the path of least resistance by not regulating carbon dioxide emissions, one must ask whether the states should continue relying on electric facilities that meet consumers' needs without regard for their harmful environmental impacts. Can the states have their cake and eat it too?

In answering this question, Part II of this article describes the origins and progression of authority over time for both the states, in energy regulation, and the EPA, in the promulgation of the Clean Power Plan.¹⁴ Part III explores the current struggle between the states and the EPA for regulatory authority over power plants and endeavors to evaluate the strength of the power positions for each.¹⁵ Part IV looks beyond the current power struggle, offering guidance if the Plan is validated and offering a solution if the Plan is invalidated while still promoting the underlying purpose of the Plan: mitigating climate change through carbon dioxide emission regulation.¹⁶ Finally, Part V concludes with a declaration to act

12. See State Petitioner's Motion For Stay And For Expedited Consideration of Petition For Review, at 10–11 (2015) (No. 15-1363) (consolidated to *West Virginia v. EPA*, 136 S. Ct. 1000 (2016)); see also Joint Reply of West Virginia, et al., Oklahoma, et al., North Dakota, and Mississippi in Support of Motions for Stay and for Expedited Consideration, at 13–16 (2015) (No. 15-1363) (consolidated to *West Virginia v. EPA*, 136 S. Ct. 1000 (2016)).

13. The Clean Power Plan aims to reduce carbon dioxide emissions from the power sector by 32 percent below 2005 levels of carbon dioxide emission in order to mitigate the impacts of climate change. See ENVTL. PROT. AGENCY, *Fact Sheet: Overview of the Clean Power Plan Cutting Carbon Pollution from Power Plants*, EPA, <http://www.epa.gov/cleanpower-plan/fact-sheet-overview-clean-power-plan> (last updated Aug. 6, 2016). Climate change is recognized as one of the greatest environmental and public health challenges we face, due to its impacts on Americans, and people throughout the world, via “stronger storms [and] longer droughts, increased insurance premiums, food prices, and allergy” and asthma issues. See *id.*

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Part IV.

now.¹⁷ The states cannot always have it their way. They, as well as the EPA, are charged with a duty to protect the health and welfare of the people. Climate change will be confronted with carbon dioxide emission regulation, even if it means that society has to change its business-as-usual course of actions within the energy sector.

II. TRADITIONAL SOURCES OF REGULATORY POWER

The battle for regulatory authority of electricity services began as early as the eighteenth century. From borrowing some of the ideals of English common law when first attempting to regulate the distribution and access to electricity back in 1877,¹⁸ to state regulatory commissions experimenting with regulatory authority during the nineteenth century, energy regulation in the United States has been developed through an evolution of experience.¹⁹ This evolution of experience began with predominant state regulation of electricity services with the federal government finally getting involved in 1920, via the Federal Water Power Act.²⁰ Therefore, the states were initially the labs of democracy and regulatory creation until the federal government felt it was necessary to intrude and assure that electricity services were fair.²¹

This evolution of regulation, with authority unevenly split between the state and federal level, and the current status of regulatory authority, has further fueled the dispute between the states and the EPA. The source of both the states' and EPA's power to regulate will reveal the underlying federalism and power issues, which are crucial to the states' argument that the Clean Power Plan is arbitrary and capricious and the EPA is overstepping its regulatory bounds.

17. See *infra* Part V.

18. See *Munn v. Illinois*, 94 U.S. 113, 126 (1876) (citing Lord Chief Justice Hale, *De Portibus Maris*, 1 Harg. Law Tracts, 78).

19. See RICHARD F. HIRSH, *THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM*, 21–22, 29–31 (1999).

20. See *generally* Water Power Act, 66 P.L. 369, 41 Stat. 1353 (1921). For further information and an overview in regards to electricity regulation, with it entirely originating in state regulation then progressing to federal regulation stepping in for interstate matters, see HIRSH, *supra* note 19, at 9–31 (Ch.1: The Utility Consensus and Initial Challenges it Faced).

21. See *generally* HIRSH, *supra* note 19.

A. State Authority and the Origin of Energy Regulation

Ultimately, the states have a crucial source of power that originates from the Constitution.²² This source of state sovereignty is found within the Tenth Amendment.²³ The Supreme Court has dealt with numerous cases that aid in defining what values or benefits federalism provides, via protecting state governments.²⁴ The three benefits typically provided by the protection of state governments are: “decreasing the likelihood of federal tyranny, enhancing democratic rule by providing government that is closer to the people, and allowing states to be laboratories for new ideas.”²⁵ Although these are not the only benefits that federalism provides, these are typically the most commonly noted ones.

As the Tenth Amendment has been interpreted and analyzed through numerous cases, an important principle of regulatory authority has been established. Congress cannot impermissibly commandeer state legislatures, agencies, or officials to implement federal mandates or regulations.²⁶ Thus, it is unconstitutional for Congress to conscript state governments or compel affirmative mandates coercively in an area that was traditionally regulated by the states.²⁷

The Tenth Amendment has also been interpreted to provide the states with a unique inherent power. This power is commonly

22. U.S. CONST. amend. X.

23. *Id.* The Tenth Amendment provides, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *Id.*

24. See, e.g., *Printz v. United States*, 521 U.S. 898, 919 (1997); *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991); *New York v. United States*, 505 U.S. 144, 155-56 (1992).

25. ERWIN CHEMERINKSY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 320 (4th ed. 2011).

26. *New York*, 505 U.S. at 166-67.

27. See *Ashcroft*, 501 U.S. at 460; see also *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981).

known as state police power.²⁸ In the 1800s, the United States Supreme Court began resolving some conflicts over the power of the states versus the power of the federal government.²⁹ In 1847, Chief Justice Taney explained the broad scope of the police power:

But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its powers to pass health laws, except insofar as it has been restricted by the Constitution of the United States.³⁰

By acknowledging the breadth of the police power as the power to govern, Chief Justice Taney set an early precedent for supporting state rights.³¹ In later cases the Supreme Court referred to the police power as the vast authority for states to do what was necessary for the public good.³² By 1954 the Court indicated that terms like “public health, safety, . . . and welfare” were merely examples of the police power and were not intended to limit its scope.³³ “Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they

28. Chief Justice John Marshall was first credited with using this term in 1827 as a descriptive term to aid in categorizing state powers not delegated to the federal government. *See generally* *Brown v. Maryland*, 25 U.S. 419 (1827).

29. *See generally* *Thurlow v. Massachusetts*, 46 U.S. 504 (1897).

30. *Id.* at 583.

31. *See generally id.*

32. *See* *Bacon v. Walker*, 204 U.S. 311 (1907).

33. *Berman v. Parker*, 348 U.S. 26, 31–32 (1954).

merely illustrate the scope of the power and do not delimit it.”³⁴ As a result, while the Tenth Amendment leaves to the states what residual or left over powers that have not been reserved to the federal government, these leftovers are quite substantial. This power and sovereign right provides the states with broad authority to ensure the protection of public health, safety, and welfare of their respective citizens.

Early on, the model of state regulation was greatly supported as the proper mechanism for overseeing and controlling the natural monopoly power of electric utilities.³⁵ The police powers given to the states to be used “for the protection of the health, safety, morals, and general welfare” of their respective citizens has been supported and referenced by the Supreme Court since 1827, and is applicable to utilities providing electricity services today.³⁶

A unique feature of energy regulation in this country that supports states protecting its citizens’ general welfare, which is traceable to English common law,³⁷ is that it is governed by a traditional “regulatory compact.”³⁸ This compact was designed to ensure that reliable and consistent power supply was established for consumers at prices that are both just and reasonable.³⁹ As a general assertion, one could simply state that utilities and their investors “are provided a level of stability in earnings and value less likely

34. *Id.*

35. *See* Hirsh, *supra* note 19, at 15.

36. *See id.*

37. English law provided significant guidance for the United States in deciding how to regulate utilities. The idea of common businesses, or business serving the general public, became entrenched during the sixteenth century when the English government gave exclusive franchises to providers of certain services. These monopoly grants were given in exchange for the requirement that providers, here utilities, charge reasonable rates and offered those services to all citizens without discrimination. *See id.* at 15–16.

38. *See* Johnathan A. Lesser & Leonardo R. Giacchino, *Fundamentals of Energy Regulation*, 35 ENERGY L. J. 219, 222 (2014).

39. *See* Jersey Cent. Power & Light Co. v. FERC, 810 F.2d 1168, 1189 (D.C. Cir. 1987); *see also* Lincoln L. Davies, *Power Forward: The Argument for a National RPS*, 42 CONN. L. REV. 1339, 1392 (2010) (explaining the underlying purpose of regulatory compact as the need for “a consistent power supply at a reasonable price”).

to be attained” in the absence of regulation, and “in turn, ratepayers are afforded universal, non-discriminatory service and protection from monopolistic profits.”⁴⁰ This regulatory compact principle was approved of back in 1887, when the Supreme Court in *Munn v. Illinois* found that “when private property is ‘affected with a public interest, it ceases to be *juris privati* only’” and thus is “subject to public regulation.”⁴¹ The Court also went on to establish two criteria that aid in deciding whether a company’s services fall within this category of needing to be regulated.⁴² First, the business and service provided must be a necessity for society,⁴³ and second, the business has to constitute a natural monopoly.⁴⁴ Thus, as a quid pro quo for being provided a monopoly status within a particular vicinity for the provision of electricity services, utilities are subject to regulation by the states, via state commissions. The commissions ensure that the utilities are prudent in their investments and revenues so that the most efficient and best service possible will be provided to their consumers.

Even as federal regulation has developed in the area of energy regulation, Congress has hinted that the states still have discretion and authority over deciding energy profiles or electricity generation compositions. For example, when Congress was creating

40. *Jersey Cent. Power & Light Co.*, 810 F.2d at 1189; see also Office of Pub. Util. Counsel v. Pub. Util. Comm’n, 104 S.W. 3d 225, 227–28 (Tex. App. 2003) (“[A]n electricity utility enters into a ‘regulatory compact’ with the public: in return for a monopoly over electricity service in a given area; the utility agrees to provide service to all requesting customers and to charge only the retail rates set by the [Regulatory] Commission.”).

41. 94 U.S. 113, 126, 130 (1876) (internal quotation by Lord Chief Justice Hale).

42. See *id.* at 127–28, 145.

43. Electricity services are extremely important for peoples’ health and general welfare. This is illustrated by the high correlation of electricity with important and beneficial things like nutrition, literacy, population stability, life expectancy and infant survival; which can be found in the United Nations Human Development Index reports. Over time it has been established that a good indicator of a country’s level of development is its per capita use of electricity. See Jude Clemente, *The Statistical Connection Between Electricity and Human Development*, POWER, (Sept. 1, 2010), <http://www.powermag.com/the-statistical-connection-between-electricity-and-human-development/>; see generally Benjamin Attigah & Lucius Mayer-Tasch, *The Impact of Electricity Access on Economic Development: A Literature Review*, PRODUSE (2013), http://www.produce.org/imglib/downloads/PRODUSE_study/PRODUSE%20Study_Literature%20Review.pdf.

44. See *Munn*, 94 U.S. at 127–28.

the Federal Water Power Act,⁴⁵ one of the members of the House committee drafting the 1920 Act stated, “[w]e are earnestly trying not to infringe the rights of the States. If possible we want a bill that can not [sic] be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States.”⁴⁶ When drafting the Federal Power Act, Congress attempted to carefully confine the Federal Power Commission, now the Federal Energy Regulatory Commission, to “only . . . fill a hiatus which might otherwise exist in the absence of state regulation,” and limited the Federal Power Commission to “regulating only in the absence of state regulation.”⁴⁷ Therefore, it is apparent that early on Congress was proactive in seeking to highlight and preserve regulatory authority for the states in their traditional rights and powers over energy regulation.

This bright-line distinction between what the states can regulate versus what the federal government can regulate has been further illuminated over time. In 1927, the Supreme Court found in *Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Company* that the states maintain jurisdiction over business which is essentially local, while under the Commerce Clause, Congress has the authority to regulate interstate sales of electricity.⁴⁸ The Court also went on to emphasize the differences between state and federal regulation of electricity: the states have the power to govern intrastate actions, including the generation of electricity and its sale at retail to consumers, while the federal government has the power to regulate interstate issues, including the transmission of electricity and wholesale electricity markets.⁴⁹ By 1935, Congress enacted the Federal Power Act which further established the bright line barriers of authority by providing that states retained jurisdiction “over facilities used for the generation

45. 66 Pub. L. 369, 41 Stat. 1353 (enacted March 3, 1921).

46. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 174 (1946) (quoting 56 Cong. Rec. 9810).

47. *FPC v. S. Cal. Edison Cop.*, 376 U.S. 205, 218 (1964).

48. *See* 273 U.S. 83, 85–86 (1927).

49. *See id.*

of electric energy or over facilities used in location distribution[,] or only for the transmission of electric energy in interstate commerce, [and] over facilities for the transmission of electric energy consumed wholly by the transmitter,” while the federal government retained jurisdiction over only “those matters which are not subject to regulation by the states.”⁵⁰ Therefore, the states retain authority and regulatory control over electricity-generating facilities that provide power to their states’ citizens, along with the transmission to end users and the retail rates charged to electric customers; whereas the Federal Energy Regulatory Commission⁵¹ retains regulatory control over transmission lines, gas pipelines, wholesale electric rates, and other things that are interstate affairs within the electric industry realm.⁵²

States have intrastate responsibilities when it comes to regulating electricity for its people. Typically, utility commissions or state public utility commissions have the discretion over which new power facilities receive certificates of public convenience and necessity.⁵³ State laws can restrict this discretion by providing guidelines or requirements when siting new electric generating facilities; like taking into consideration whether or not the facility is needed for base, intermediate, and peak loads, or if it is the lowest cost system to provide for energy demand.⁵⁴ It is also important

50. 16 U.S.C. § 824(a)–(b)(1) (2015).

51. The Federal Energy Regulatory Commission, previously known as the Federal Power Commission, is an independent agency. *See* Department of Energy Organization Act, Pub. L. 95-91, § 204, 91 Stat. 565 (1977); *see generally* FERC, What FERC Does, <http://www.ferc.gov/about/ferc-does.asp>, (last updated June 24, 2014).

52. *See* FERC v. Mississippi, 456 U.S. 742, 755 (1982) (the federal regulation of intrastate power transmission is proper because of interstate nature of generation and supply of electricity); *see also* JOEY LEE MIRANDA, AMERICAN BAR ASSOCIATION SECTION OF STATE AND LOCAL GOVERNMENT LAW, SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES, CAPTURING THE POWER OF ELECTRIC RESTRUCTURING, 6–8 (2009).

53. *See* AMERICAN BAR ASSOCIATION, *The Need for Power and the Choice of Technologies: State Decisions on Electric Power Facilities*, 3 (June 1981).

54. *See id.* at 2–3. Base, intermediate, or peaking load refers to the overall time of day demands and level of demands that consumers place on electricity generating facilities. These categories are based on load factors which refers to the percentage of hours a power plant can operate at its maximum capability in a given time. Base load facilities typically have a load factor exceeding 75% and are typically heavily depended upon to provide constant reliable service; a coal burning facility would fall into this category. Intermediate load plants typically have load factors between 40% and 60%, like a hydroelectric plant. Peak load generators

that state utility commissions, regulators, and utilities attempt to plan ahead and forecast for future needs of certain electric generators to ensure a diverse energy portfolio.⁵⁵ This is significant because a diverse energy mix has the potential to assure a continued supply of electricity in the event of “a renewed oil embargo . . . [or] shutdowns in nuclear plants,” while also ensuring that states remain self-sufficient in their ability to provide electricity services for its people.⁵⁶ Thus, state utility commissions have the ultimate authority and discretion to choose whether or not to approve a utility’s new electric generating facility proposal and, therefore, to decide exactly what sources it deems necessary and sufficient to cost effectively provide its citizens with electricity.

As a result, for the past one hundred or so years, states have continued to control economic aspects of electricity generation, such as “regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns.”⁵⁷ This authority has been consistent with the traditional obligations and responsibilities of the states, while federal energy regulators have had the authority to regulate “the need for and pricing of electrical power transmitted in interstate commerce.”⁵⁸

B. EPA Authority and the Clean Power Plan

The Constitution may not expressly mention the existence of agencies, but Congress has created numerous agencies through their legislative power.⁵⁹ In the last century, Congress has routinely delegated quasi-legislative power to federal agencies like the

typically operate at low load factors between 5% and 15%, like photovoltaic solar panel generators. See John Hynes, *How to Compare Power Generation Choices* (Oct. 29, 2009), <http://www.renewableenergyworld.com/articles/print/rewna/volume-1/issue-1/solar-energy/how-to-compare-power-generation-choices.html>.

55. See AMERICAN BAR ASSOCIATION, *supra* note 53, at 3.

56. *Id.*

57. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 205–06 (1983).

58. *Id.*

59. See U.S. CONST. art. I.

Federal Communication Commission, the Securities and Exchange Commission, the Environmental Protection Agency, and many others.⁶⁰ With this Congressional delegation, these agencies have rule making power carrying the force of law.⁶¹ Congress has allowed this for many reasons, but a significant one is that Congress often delegates legislative power to administrative agencies in areas of complex regulation that require specific expertise and knowledge to solve specific problems.⁶² For example, figuring out what standards ensure that water quality or air quality is healthy is left to the EPA since Congress does not have the specific expertise to handle such complex and scientific topics.⁶³ Agencies also have executive and judicial power provided to them when Congress creates them and thus they can enforce the regulations they promulgate and adjudicate violations of their rules.⁶⁴

The EPA is an independent agency with an interesting history. The agency is led by an Administrator, who is appointed by the President and thus has cabinet-level status. The EPA, uniquely, was not actually statutorily created.⁶⁵ President Nixon submitted an executive order to Congress on July 9, 1970, calling for the establishment of the EPA in response to increasing concerns about the inefficiency and inability of the existing agencies to combat the country's growing environmental issues.⁶⁶ Congress approved a plan to reorganize existing agencies to form a new, centralized agency for the environment, and, as a result, formed the EPA on December 4, 1970.⁶⁷

60. See CHEMERINSKY, *supra* note 25, at 333.

61. See *id.* at 333-34.

62. See RICHARD H. SEAMON, ADMINISTRATIVE LAW, 22-24 (2013).

63. *Id.*

64. See CHEMERINSKY, *supra* note 25, at 334.

65. Agencies are commonly "creatures of statute" because they are primarily created by statute. See SEAMON, *supra* note 63, at 12.

66. See ENV'T PROT. AGENCY, REORGANIZATION PLAN NO. 3 OF 1970 (July 9, 1970), <http://www.epa.gov/aboutepa/reorganization-plan-no-3-1970>; see generally ENV'T PROT. AGENCY, EPA HISTORICAL PUBLICATION, THE GUARDIAN: ORIGINS OF THE EPA (1992), <http://www.epa.gov/aboutepa/guardian-origins-epa>.

67. See ENV'T PROT. AGENCY, EPA ORDER 1110.2, INITIAL ORGANIZATION OF THE ENVIRONMENTAL PROTECTION AGENCY (Dec. 4, 1970), <http://www.epa.gov/aboutepa/epa-order->

During this creation period, and essentially ever since, the EPA has been a very active agency. The EPA has broad authority to enact regulations in accordance with the laws and orders it is charged with administering, which are commonly designed to protect human health and the environment.⁶⁸ Even in its early years, the EPA placed approximately 1,500 rulemaking notices in the Federal Register annually.⁶⁹ The EPA promulgates all of these regulations, and the national standards within them, to ensure that the citizens of this country are protected from significant risks to human health and to reduce environmental risks.⁷⁰

In enacting the Clean Air Act, a comprehensive regulatory scheme for addressing the problem of air pollution, Congress did not delegate authority to the EPA to carry out the administration of the Act until 1970.⁷¹ In 1970, Congress enacted a comprehensive set of amendments to the Clean Air Act that shifted the responsibility of administering it to the EPA, whereas before it was delegated to the Department of Health, Education, and Welfare.⁷² The amendments provided the EPA with the authority to establish National Ambient Air Quality Standards, develop New Source Performance Standards for new and modified sources of pollution, and develop regulatory guidance for states to use in developing their State Implementation Plans.⁷³

11102. For more historical information on the EPA and its creation, see generally Phil Wisman, *EPA History (1970-1985)* (Nov. 1985), <http://www.epa.gov/aboutepa/epa-history-1970-1985>.

68. See generally ENV'T PROT. AGENCY, *Laws and Executive Orders*, <http://www.epa.gov/laws-regulations/laws-and-executive-orders> (last updated Sept. 11, 2015).

69. See Wisman, *supra* note 67.

70. See ENV'T PROT. AGENCY, *Our Mission and What We Do*, <http://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last updated Aug. 18, 2016).

71. See Clean Air Act Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676 (1970); see also Paul G. Rogers, *EPA History: The Clean Air Act of 1970*, <http://www.epa.gov/aboutepa/epa-history-clean-air-act-1970> (last updated Feb. 10, 2016).

72. See *id.*

73. See Rogers, *supra* note 71.

Then, in 1990 Congress added further amendments to clarify and advance the Clean Air Act's purpose.⁷⁴ In doing so, the 1990 amendments divided the Clean Air Act into six titles.⁷⁵ Title I deals with preventing and reducing air pollution from stationary sources, which is the main focus of the Clean Power Plan.⁷⁶

The Clean Air Act, like other environmental statutes, successfully establishes a cooperative federalism regime.⁷⁷ Congress delegated the task of setting National Ambient Air Quality Standards for harmful air pollutants to the EPA while requiring the states to devise State Implementation Plans to achieve those standards.⁷⁸ If the EPA disapproves of a state's plan, it may substitute it with a federal implementation plan.⁷⁹ Therefore, Congress designed the Clean Air Act with authority and responsibilities divided between

74. The purposes outlined by the Clean Air Act are:

to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its populations; to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution; to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and to encourage and assist the development and operation of regional air pollution prevention and control programs.

42 U.S.C. § 7401(b) (2015).

75. See 42 U.S.C. §§7401–7671 (2015).

76. Stationary sources are all sources of air pollution, which result from immobile facilities. These include, but are not limited to, power generation facilities, industrial facilities, schools, and government facilities. See 42 U.S.C. § 7411(a)(3) (2015).

77. Cooperative federalism refers to a concept in which the state governments and the federal government share responsibility in the governance of the people for a common goal or purpose. See *Cooperative Federalism Law & Legal Definition*, USLEGAL.COM, <http://definitions.uslegal.com/c/cooperative-federalism/> (last visited Sept. 7, 2016). Here, under the Clean Air Act, the common goal or purpose would be to ensure good air quality to protect the peoples' health and general welfare. See 42 U.S.C. § 7401(b) (2015).

78. See 42 U.S.C. §§ 7401–7431, (2015).; see also *Appalachian Power Co. v. EPA*, 249 F.3d 1032 (D.C. Cir. 2001) (the Clean Air Act establishes a commitment to cooperative federalism).

79. See *Appalachian Power Co.*, 249 F.3d at 1037; see also *Hodel v. Virginia Surface Min., & Reclamation Ass'n. Inc.*, 452 U.S. 264, 288–89 (1981) (if the state elects not to submit a plan, the regulatory burden will fall onto the EPA, thus the states have freedom to choose).

federal and state governments to advance air pollution mitigation and establish an interdependent partnership that ensures emission reductions.

Specifically under the Clean Air Act, the EPA's Administrator is delegated the responsibility of establishing air quality standards, within section 111, for new and modified stationary sources of air pollutions which must meet the New Source Performance Standards for their particular industrial source category.⁸⁰ These New Source Performance Standards are "technology based" standards developed individually for industrial source categories, like electric generation facilities.⁸¹ These standards set forth maximum allowable emission levels and are based on the best level of pollution control currently demonstrated by sources within the specific industry.⁸² Technology based New Source Performance Standards are developed in an effort to reflect "the degree of emission limitation achievable through the application of the best system of emission reduction," which has been "adequately demonstrated" in the relevant industrial sector.⁸³ While evaluating the best system of emission reduction applications, the EPA administrator must consider the "cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements."⁸⁴

Under section 111, the administrator of the EPA is required to develop a New Source Performance Standard for a source category if that source "causes, or contributes significantly to, air pollution which may reasonable be anticipated to endanger public health or welfare."⁸⁵ Once it is found that a source greatly impacts air quality

80. See 42 U.S.C.A. § 7411(b) (2015).

81. See *id.* § 7411(d)(1).

82. See *id.* § 7411(a)(1). For example, carbon sequestration technologies have been viewed as the best method to reduce emissions that have been adequately demonstrated by the electric industry, even though it is not one of the most cost-effective measures. See Standards of Performance, 80 Fed. Reg. at 64, 727–28.

83. *Id.* § 7411(a)(1).

84. *Id.*

85. *Id.* § 7411(b)(1)(A).

via a certain air pollutant, like carbon dioxide, the administrator will conduct and issue an endangerment finding which may find that the source threatens the public health and welfare.⁸⁶ Once this finding is completed and published into the Federal Register, the administrator can move forward in deciding how to regulate that source for the pollutant at issue.⁸⁷

The EPA was in a unique situation when it was propelled into the position of regulating carbon dioxide, a greenhouse gas, from stationary sources. In *Massachusetts v. EPA*, the Supreme Court decided that the EPA has authority to regulate greenhouse gases from motor vehicles under § 202(a)(1) of the Clean Air Act.⁸⁸ The Court also decided that carbon dioxide, which is the most prevalent and aggregately harmful greenhouse gas, qualifies as an “air pollutant” under § 302(g) of the Act.⁸⁹ This determination that carbon dioxide qualifies as an air pollutant within the Act’s regulatory scheme allows for the EPA to regulate it via endangerment findings and promulgated standards under other sections of the Act.⁹⁰ As a result, this extension of regulatory capability has propelled

86. See generally ENV’T PROT. AGENCY, *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, EPA, <http://www3.epa.gov/climatechange/endangerment/> (last updated Aug. 9, 2016) [hereinafter *Greenhouse Gases*] (EPA’s endangerment finding for greenhouse gases instigated by the Supreme Court’s holding in *Massachusetts v. EPA*).

87. *Id.*; See also *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*; Final Rule, 70 Fed. Reg. 239 (Dec. 15, 2009) (to be codified at 40 C.F.R. pt. 1).

88. See *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497, 532–33 (2007). The EPA endangerment finding that followed this decision, to regulate greenhouse gases from new motor vehicles or new motor vehicle engines (i.e. mobile sources), established that greenhouse gases emitted from mobile sources may reasonably be anticipated to endanger public health or welfare. See *Greenhouse Gases*, *supra* note 86. Here, in regards to stationary sources like power plants, the EPA had a foundation to establish that a given category of sources, power plants, may reasonably be anticipated to endanger public health or welfare. Although these are two separate endangerment findings, the initial Section 202 endangerment finding established after this case was decided created a platform for the Section 111 endangerment finding for power plants emitting greenhouse gases. *Cf.* 42 U.S.C. §§ 7421, 7411(b)(1); see also generally *Greenhouse Gases*, *supra* note 86.

89. *Massachusetts*, 549 U.S. at 532.

90. *Id.* at 533.

the EPA to regulate carbon dioxide emissions from electric generating facilities, under section 111 of the Act, through its Clean Power Plan regulation.⁹¹

III. DEBATING THE GREATEST GOOD: THE CURRENT STRUGGLE FOR REGULATORY AUTHORITY

Due to the official publication of the EPA's Clean Power Plan, there is a growing debate as to who has the proper authority in regulating energy. Proponents of state regulation claim that the EPA has overstepped its bounds by attempting to regulate electricity generation at the state level and thus the regulation should be repealed.⁹² However, the EPA, its supporters, and supporters of the Plan claim that the EPA is well within its bounds in regulating carbon dioxide as an air pollutant, and is making great strides towards mitigating climate change as well as serving the overarching purposes of the Clean Air Act.⁹³ The ultimate issue underlying these arguments and claims is whether the EPA, through its promulgation of the Plan, has overstepped its regulatory authority under the Clean Air Act by establishing a policy that sets emission standards and essentially provides for how states should generate electricity.

91. See Standards of Performance, *supra* note 7; see also *Regulatory Actions- Developing carbon pollution standards for power plants under the Clean Air Act*, EPA, <http://www.epa.gov/cleanpowerplan/regulatory-actions> (last updated Feb. 11, 2015).

92. See generally Joint Reply of West Virginia, et al., Oklahoma, et al., North Dakota, and Mississippi in Support of Motions for Stay and for Expedited Consideration (2015) (No. 15-1363) (consolidated to West Virginia v. EPA, 136 S. Ct. 1000 (2016)); see also Naveena Sadasivam, *Congress Launches Legislative Assault on Obama Administration's Clean Power Plan*, INSIDE CLIMATE NEWS (Oct. 28, 2015), <http://insideclimate-news.org/news/28102015/congress-legislative-assault-obama-administration-clean-power-plan-mitch-mcconnell>.

93. See generally Respondent EPA's Opposition to Motions to Stay Final Rule, West Virginia v. EPA, 136 S. Ct. 1000 (2016) (No. 15-1363); see also *Legal Analysis: Strong Likelihood EPA Climate Plan Will Stand Up in Court*, ENVTL. DEFENSE FUND (July 30, 2015), <http://www.edf.org/media/legal-analysis-strong-likelihood-epa-climate-plan-will-stand-court>.

A. The Clean Power Plan: the EPA's Strategy to Combat Carbon Dioxide Emissions

The Clean Power Plan is a vast effort by the EPA to reduce carbon dioxide emissions released by stationary electric generating facilities.⁹⁴ The goal of the Clean Power Plan is to reduce carbon dioxide levels by 32 percent, from 2005 levels, by 2030.⁹⁵ The rule provides applicable carbon dioxide emission standards, or standards of performance, to new, modified, and existing stationary power plants via its authority under the Clean Air Act, section 111.⁹⁶

The Plan requires that states develop and submit their own plans to the EPA, providing their methods and strategies to comply with their state specific goals set by the EPA.⁹⁷ If a state fails to do this, the EPA will step in with their own federal plan.⁹⁸ Moreover, if the state submits a plan that is not deemed satisfactory by the EPA, the EPA will promulgate a federal plan that directly limits emissions from the state's existing sources until the state submits a satisfactory plan.⁹⁹ However, it is important to note that the

94. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,665 (Oct. 23, 2015) [hereinafter 80 Fed. Reg. 64,665].

95. *Id.*

96. *Id.* at 64,510, 64,662–65.

97. For example, the EPA's carbon dioxide emissions goals for the state of Idaho is 771 pounds per megawatt-hour by 2030. See EPA, *Clean Power Plan: State at a Glance: Idaho* (Aug. 3, 2015), <https://www3.epa.gov/airquality/cpptoolbox/idaho.pdf>. Since all state goals fall in a range between 771 pounds per megawatt-hour to 1,305 pounds per megawatt-hour, Idaho has one of the more stringent state goals compared to other state goals in the Clean Power Plan; i.e. Washington, Idaho's neighboring state, has a goal of 983 pounds per megawatt-hour by 2030. See EPA, *Clean Power Plan: State at a Glance: Washington* (Aug. 3, 2015), <http://www3.epa.gov/airquality/cpptoolbox/washington.pdf>.

98. 80 Fed. Reg. 64,665, *supra* note 96, at 64,942.

99. See 42 U.S.C.A. § 7411(d)(2).

Clean Power Plan is intended to be phased in gradually, over an extended period of time.¹⁰⁰

Although the regulation directs the states to provide a plan or an initial submission by September 2016,¹⁰¹ the EPA is only requiring the states, through this submission, to request and obtain an extension to complete their plans until September 2018.¹⁰² Or the states may provide “minimal information” concerning the status of the state’s planning and development efforts in the alternative of requesting an extension.¹⁰³ This “minimal information” requirement specifically requires the states to identify their planning methods under consideration, including any progress to date, a description of opportunities for public input on their strategies to implement the regulation, and, if necessary, a sufficient explanation for why the state needs an extension.¹⁰⁴ Therefore, the states have potentially up to two years to submit satisfactory plans to the EPA.¹⁰⁵

Within the Plan, the EPA has provided three building block strategies for carbon dioxide emission reductions, or in other terms, three best systems for emission reductions.¹⁰⁶ These methods of emission reductions are: improving efficiency at power plants, primarily coal burning plants, through modification and/or partial carbon sequestration technologies; shifting energy generation from higher emitting coal to lower emitting natural gas power plants; and shifting energy generation to zero emitting power

100. See *Fact Sheet: Overview of the Clean Power Plan Cutting Carbon Pollution from Power Plants*, EPA, <http://www.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan> (last updated Aug. 6, 2016).

101. This deadline is delayed now due to the Supreme Court’s order to stay the Plan. See *infra* note 170 for more information.

102. 80 Fed. Reg. 64, 665, *supra* note 96, at 64, 947.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 64, 667.

plants, i.e. renewable energy generators.¹⁰⁷ The states also have the option of purchasing emission rate credits from other states that have low to zero emitting power plants via trading based emission programs.¹⁰⁸

This is where the authority battle arises. By regulating and thus attempting to recommend and implement these specific building blocks, the EPA is essentially establishing a policy of how each state should regulate and design its energy generation portfolio. Typically, the choice of what energy generation portfolio or mix states have for electricity generation has been up to state energy regulators. This attempt by the EPA, to establish a policy of preferable electricity generation options to reduce carbon dioxide emissions, is an indirect method of manipulating the states' traditional energy regulatory authority.

B. The Resultant Power War: States versus the EPA

In the pursuit of reducing carbon dioxide emissions while influencing the regulatory regime of electricity production, the EPA and the states are in unique positions, authoritatively speaking. Whereas one has congressionally delegated authority to regulate air pollutants to protect and benefit this country's welfare and health, the other has both congressionally recognized and traditional sovereign authority over its decisions in electricity generation regulation.¹⁰⁹ While the EPA has authority to regulate air pollutants under the Clean Air Act, the states argue that the manner in which it is doing so here, through the promulgation of the Clean Power Plan, is a far reaching step into their territory.

Although this is not the first attempt the EPA has made in regulating power plants, this is the first of its kind that directs the states to plan and implement methods of emission reductions that extend beyond the fence line.¹¹⁰ This is chiefly why so many states

107. *Id.*

108. See 80 Fed. Reg. 64, 665, *supra* note 96, at 64, 709, 64, 834–35.

109. See 42 U.S.C.A. § 7401 (2015) (Clean Air Act findings and declaration of purpose); *see also* 16 U.S.C.A. §§ 824(a), (b)(1).

110. *Beyond the fence line* can be understood by a comparison to methods of emission reductions that can be achieved *within the fence line* of a power plant. For example, with a coal burning power plant, a within the fence line emission reduction would be to modify it with technological devices that increase heat rate (essentially increasing the plant's efficiency) so it

and utilities are challenging this regulation as being an abuse of the EPA's discretion—it exceeds the EPA's authority under the Clean Air Act, and it is arbitrary and capricious.¹¹¹ As the EPA ventures into this new territory of regulation, it is necessary to establish regulatory fence posts demarking the limit of states and EPA influence within this dilemma.

1. The States' Power Position: Arguments for State Authority

Over forty years ago, in *District of Columbia v. Train*, the D.C. Circuit Court blocked a similar rulemaking by the EPA.¹¹² This decision signified an important milestone in the evolving constitutional doctrines prohibiting “commandeering,” “entrenchment,” and “coercion.”¹¹³ In its decision, the court found that Congress did not delegate to the EPA the power to require states to adopt and enforce the legal changes the agency wanted them to implement.¹¹⁴ The Court further found that the EPA could not achieve its purposes by requiring states to lend their police power.¹¹⁵

reduces carbon dioxide emissions, or to implement carbon capture sequestration which would further reduce carbon dioxide emissions. These are both examples of within the fence line emission reduction methods. Beyond the fence line methods of emission reductions are the latter two building blocks that the Clean Power Plan recommends, which are switching generation to low-emitting natural gas burning power plants or zero emitting power plants like wind or solar power generation. See *infra* Sections III.B.2.

111. See generally States Petitioners' Motion for Stay & for Expedited Consideration of Petition for Review, *W. Va. v. EPA*, USCA Case No. 15-1363 (Oct. 23, 2015); see generally Joint Reply of West Virginia, et al., Oklahoma, et al., North Dakota, and Mississippi in Support of Motions for Stay and for Expedited Consideration (2015) (No. 15-1363) (consolidated to *West Virginia v. EPA*, 136 S. Ct. 1000 (2016)). That motion for stay was denied by the D.C. Circuit Court of Appeals on January 21, 2016. See Gavin Bade, *DC Circuit Court denies stay on EPA Clean Power Plan*, UTILITYDIVE (Jan. 21, 2016), <http://www.utilitydive.com/news/dc-circuit-court-denies-stay-on-epa-clean-power-plan/412514/>.

112. *District of Columbia v. Train*, 521 F.2d 971, 974 (D.C. Cir. 1975).

113. See *id.*

114. *Id.*

115. *Id.*

Less than forty years later, the Supreme Court heard a case that resulted in a blockade and rejection of a regulation implemented by the EPA that had the purpose of regulating carbon dioxide emissions.¹¹⁶ The Court revisited its earlier *Massachusetts v. EPA* decision and read it as authority for Clean Air Act regulation of carbon dioxide, but not necessarily for programmatic regulation, understanding that the EPA may, under certain circumstances, use best available control technology to force improvements in energy efficiency at plant levels.¹¹⁷ This can likely allow for regulation of power plants at the “end-of-stack[s]” but not necessarily beyond the fence lines, or beyond the power plant itself, essentially.¹¹⁸ The Court also held that “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.”¹¹⁹ Under review, this provides some insight as to how apprehensive regulators and courts should be when analyzing whether the EPA has the authority to step in to regulate the electric generating industry.

It is well established that federal agencies are to regulate within their delegated realms of specialty or expertise.¹²⁰ No federal agency may exercise regulatory jurisdiction not delegated to it by Congress, especially if it has been already delegated to a different federal agency or reserved by the Constitution to the states.¹²¹ As discussed earlier, after many years of regulatory evolution, the lines of authority in the energy regulatory realm are sufficiently clear. The regulation of utilities “is one of the most important of the functions traditionally associated with the police power of the States.”¹²² Although there is a distinct federal role in regulating the interstate affairs of electricity generation and transmission of wholesale power, Congress delegated that authoritative role to the

116. See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

117. *Id.* at 2444–46.

118. See *id.* at 2447.

119. *Id.* at 2444 (internal quotation and citation omitted).

120. See SEAMON, *supra* note 62, at 22–24.

121. See *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006).

122. *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n.*, 461 U.S. 375, 377 (1983).

Federal Energy Regulatory Commission, not the EPA.¹²³ Thus, technically speaking, the EPA has no regulatory authority over intra or interstate generation, transmission, or dispatch of electricity.¹²⁴

Generally speaking, through the promulgation of the Clean Power Plan, the EPA believes it has the authority to regulate outside of the electric generator's fence line, induce states to exercise their legislative power, and subject their regulatory officials to design satisfactory electricity generation plans.¹²⁵ To the states, this in and of itself is a coercive action in that it reduces state authority in its traditional role of electricity generation planning.¹²⁶ To protect the states and ideals of federalism, the Supreme Court has prohibited the federal government from usurping the authority of the states as well as prohibited state officers from being forced to administer federal programs.¹²⁷ Therefore, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."¹²⁸

In relation to EPA state implementation plans, which the EPA essentially requires in the Clean Power Plan, in 2012 the Sixth Circuit applied these "anti-commandeering principles" to hold that state officials could not be enjoined to enforce, or penalized for lack of enforcement, the provisions of a state implementation plan.¹²⁹ Accordingly, although a state might propose and submit a satisfactory plan to the EPA, it could later alter its actions and not follow

123. See Federal Power Act, 16 U.S.C. §§ 792, 797 (2015).

124. See *id.*

125. See generally Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64, 662; see generally Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review, *W. Va. v. EPA*, No. 16 (U.S. Jan. 26, 2016).

126. See *Printz v. United States*, 521 U.S. 898, 925 (1997); see also *New York v. United States*, 505 U.S. 144, 188 (1992).

127. See *Printz*, 521 U.S. at 925; *New York*, 505 U.S. at 188.

128. *New York*, 505 U.S. at 188.

129. See *Sierra Club v. Korleski*, 681 F.3d 342, 348–50 (6th Cir. 2012) (the state elected to not enforce its plan since the EPA rejected its request to amend).

through with its plan.¹³⁰ Once a state has submitted a satisfactory plan, the EPA can only induce a state to comply with its plan and the EPA's overarching carbon dioxide reduction goals through non-coercive means.¹³¹ However, the EPA has specifically chosen to direct the states to incorporate state plans assuring that they meet certain carbon dioxide reduction levels via the states' own policing powers because the EPA itself lacks the regulatory authority to police power generation and distribution. This makes it more apparent that ultimately the rule may not work as efficiently the EPA had intended since it is relying on cooperative federalism establishing partnerships between itself and the states. This intrepid regulatory endeavor is facing hurdles due to its attempt to influence and dictate how states generate their electricity.

2. The EPA's Power Position: Arguments for EPA Authority

Despite these challenges and state energy regulatory hurdles, the EPA has its sources for its regulatory authority, generally, as well as for its promulgation of the Clean Power Plan. First and foremost, it is important to note that the EPA has gone through proper administrative procedures in promulgating the Clean Power Plan regulation¹³² and has referenced section 111(d) as its ultimate authority for regulating stationary electric generating facilities.¹³³ Although the text of section 111 has been interpreted as applying only to end-of-stack technology, here the end-of-stack emission reduction technology for electric generating units, this does not strictly mean that it only applies to within the fence line technologies.¹³⁴ In fact, there is important precedent for incorporating beyond the fence line methods in section 111 standards and

130. *Id.*

131. *Id.* at 352–53.

132. See generally ENV'T PROT. AGENCY, *Clean Power Plan for Existing Power Plants: Rule History*, EPA (last updated Feb. 11, 2016), <https://www.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants#rule-history>; see also 42 U.S.C. §§ 7411(b), (d) (2015) (the EPA Administrator shall, after designating air pollutants, establish and promulgate regulations and standards for those air pollutants through informal rulemaking; such standards are effective upon promulgation). For more information on informal rulemaking, please see SEAMON, *supra* note 62, at 243–82 (Chapter 12- Informal Rulemaking).

133. See Standards of Performance, *supra* note 7.

134. See *Sierra Club*, 657 F.2d at 372; see also *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 534–36 (D.C. Cir. 1983) (upheld another beyond the fence line

thus establishing authority for the EPA to allow beyond fence line measures for emission reductions.¹³⁵

In the 1977 Clean Air Act Amendments, Congress established that section 111 standards could and should reflect the availability of fuel pretreatment measures that could lower emissions of regulated air pollutants, like coal washing.¹³⁶ Congress recognized that these strategies were typically implemented at offsite facilities since they did not distinguish between onsite and offsite measures of pretreatment capabilities.¹³⁷ Rather, Congress instructed the EPA to “give credit for accepted minemouth and other precombustion fuel cleaning processes, whether they occur at, or are achieved by, the source or by another party.”¹³⁸ Two years after these amendments were established, the EPA created a sulfur dioxide standard for coal fired power plants that included a fuel pretreatment requirement. In *Sierra Club v. Costle*, the sulfur dioxide standard was challenged but the court upheld it after explaining that the standard was based on the idea that “utilities would enter into contract arrangements with their suppliers to obtain and guarantee that coal supplies meet the needed treatment criteria,” which the court viewed as a lawful exercise of EPA’s authority under section 111, and thus upheld a beyond the fence line measure of pretreating coal supplies before they are sent to power plants.¹³⁹ Thus, establishing early precedent for the availability of EPA’s authority to establish beyond the fence line measures of emission reductions.

Although two of the three building blocks recommended to be implemented by the EPA require beyond the fence line measures, Congress and the courts have both allowed the EPA to establish such measures. However, it is important to recognize, according to

measure in order for small refiners to meet lead concentration standards); *see also* H.R. REP. NO. 95-564 at 130 (1977) (Conf. Rep.) (reprinted in 1977 U.S.C.C.A.N. 1502, 1510–11).

135. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, title I, §109(b) (1977).

136. *See id.*

137. *Id.*

138. H.R. REP. NO. 95-564, *supra* note 134, at 130.

139. 657 F.2d 298, 372–73 (D.C. Cir. 1981); *See also Small Refiner Lead Phase-Down*, 705 F.2d 506, 534–36.

the text of section 111, that such measures must be adequately demonstrated.¹⁴⁰ Demonstration is likely not a concern for the EPA here, considering switching to natural gas burning generating facilities and renewable energy generation are technologies that have been demonstrated as effective methods for reducing emissions for a long time.¹⁴¹ For example, the ability to transform an electric generating facility from burning coal to burning natural gas is becoming more efficient, and the dependence upon renewable electricity generating facilities is on the rise with more states implementing renewable energy portfolio standards.¹⁴² Therefore, the EPA likely has legitimate authority in stating that these building block strategies of emission reductions have been sufficiently adequately demonstrated.

In addition, the Clean Air Act itself provides a broad policy of regulatory authority delegated specifically to the EPA. In promulgating the Clean Power Plan, the EPA is addressing one of the most important and urgent environmental challenges experienced throughout the world. By attempting to reduce carbon dioxide emissions, the EPA can mitigate the significant “threat to Americans’ health and welfare” caused by long enduring changes in our climate, which potentially could result “in an array of severe negative effects.”¹⁴³ These effects include, but are not limited to, “drought, disease, increasingly serious weather events, and rising

140. See 42 U.S.C. § 7411(a)(1) (2015).

141. See Kennedy Maize, *Tricky Business: Taking Down Old Coal Plants*, POWER MAGAZINE (Dec. 1, 2014), <http://www.powermag.com/tricky-business-taking-down-old-coal-plants/?pagenum=1>; see also Warren Leon, THE STATE OF STATE RENEWABLE PORTFOLIO STANDARDS, CESA STATE-FEDERAL RPS COLLABORATIVE, 4–5 (June 2013), <http://www.cesa.org/assets/2013-Files/RPS/State-of-State-RPSs-Report-Final-June-2013.pdf>; see also *Energy sources have changed throughout the history of the United States*, EIA (July 3, 2013), <https://www.eia.gov/todayinenergy/detail.cfm?id=11951>. To view the most updated or recent information about state renewable energy programs and how much renewable energy state programs specifically require, see generally DSIRE, U.S. DEP’T OF ENERGY, RENEWABLE PORTFOLIO STANDARD POLICES (Aug. 2016), <http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2014/11/Renewable-Portfolio-Standards.pdf>.

142. See Maize, *supra* note 141; see also U.S. Energy Information Administration, *Idaho State Profile and Energy Estimates, Analysis*, EIA (last updated Nov. 19, 2015), <http://www.eia.gov/state/analysis.cfm?sid=ID#64> [hereinafter U.S. Energy Information Administration].

143. See Respondent EPA’s Opposition to Motions to Stay Final Rule, USCA Case 15-1363, at 1 (Dec. 3, 2015).

sea levels.”¹⁴⁴ In addition to reducing carbon dioxide emissions, the Plan will also be able to reduce existing power plants’ emissions of smog and soot forming pollutants like sulfur dioxide, nitrogen oxides, and fine particles.¹⁴⁵ These pollution reductions have the potential to lower the rates of asthma attacks, respiratory disease, heart attacks, and premature deaths that occur each year due to the exposure of these pollutants.¹⁴⁶ The EPA has valued the climate and health benefits of implementing the Clean Power Plan in the tens of billions of dollars.¹⁴⁷ Therefore, these potential emission reductions have the vast potential to not only improve the environment for future generations, through mitigating future emissions of carbon dioxide and thus alleviating some of the effects of climate change, but to also improve the present health and welfare of Americans. This significantly furthers the Clean Air Act’s purposes of protecting and enhancing air quality so as to promote public health and welfare.¹⁴⁸ As a result, when considering the significant impacts and benefits the EPA’s promulgation of this Plan has, and its overarching goal of carrying out the Clean Air Act’s regulatory purpose, the EPA has the authority to regulate carbon dioxide emissions from stationary electricity generating facilities.

To further analyze whether the EPA has proper authority to promulgate the Clean Power Plan under the Clean Air Act, comparing the Plan to the EPA’s lead reduction program provides insights as to how far the EPA’s regulations may reach. Lead emissions have historically been attributed to fuels in on-road motor vehicles, such as cars and trucks, and industrial processes, like

144. *Id.*

145. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,670, 64,680–81 (Oct. 23, 2015).

146. *See* EPA, EPA-452/R-15-003, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE, at 4-31, table 4-24 (Aug. 2015), <http://www.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf> (summarizing health benefits associated with anticipated reduction in ozone and fine particle pollution).

147. *See id.* at 4-45, table 4-31.

148. *See* 42 U.S.C. § 7401(b).

lead smelters.¹⁴⁹ Once ingested through the air or water, lead can accumulate in a person's blood and bones which can adversely impact their nervous system, kidney function, and immune system.¹⁵⁰ Due to this highly negative impact to human health, the EPA has promulgated standards for lead emissions under the National Ambient Air Quality Standards.¹⁵¹ The first lead regulation was promulgated by the EPA in 1978 and it was updated to a stricter standard in 2008.¹⁵²

Under the National Ambient Air Quality Standards program in the Clean Air Act, if a state fails to submit an implementation plan for achieving the lead standards, it could likely face a loss of highway funds or other sanctions.¹⁵³ Also, if a specific state plan item is not met, in furtherance of achieving lead emission reductions, the Administrator of the EPA has the discretion to issue sanctions.¹⁵⁴ Sanctions like these which can appear to be coercive in nature within cooperative federalism programs like this, have been upheld in numerous cases that involve Tenth Amendment challenges claiming that the EPA is being overly coercive.¹⁵⁵

149. See ENV'T PROT. AGENCY, *Basic Information about Lead Air Pollution: How Does Lead Get in the Air?*, EPA, <https://www.epa.gov/lead-air-pollution/basic-information-about-lead-air-pollution#how> (last updated March 30, 2016).

150. See ENV'T PROT. AGENCY, *Basic Information about Lead Air Pollution: What are the Effects of Lead on Human Health*, EPA, <https://www.epa.gov/lead-air-pollution/basic-information-about-lead-air-pollution#health> (last updated March 30, 2016).

151. See 40 CFR § 50.12 (2009); see also 42 U.S.C. § 7409 (2015).

152. See 43 Fed. Reg. 46,246 (Oct. 5, 1978); see also 73 Fed. Reg. 66,964 (Nov. 12, 2008). The lead standard was decreased from 1.5 micrograms per cubic meter of air to 0.15 micrograms per cubic meter of air.

153. See 42 U.S.C. § 7410(m); 42 U.S.C. § 7509(b).

154. See 42 U.S.C. § 7509(a)–(b).

155. *Compare* Miss. Comm'n on Envtl. Quality v. EPA, 790 F.3d 138, 177-79 (D.C. Cir. 2015) (state is not at risk of losing all federal funds if it refuses to submit SIP; sanction is a "relatively mild encouragement to the states"), *with* *New York*, 505 U.S. 144, 176 (1992) (a choice between regulating under one federal instruction or forcing the state to submit to another instruction if it declines the first is no choice at all), *and* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2634 (2012) (finding unconstitutional a monetary inducement that was so coercive it compels the states to act).

Compared to this program of regulation, the Clean Power Plan appears to be relatively harmless. Unlike the penalty provision under section 110(m) for states implementation plans for specific air pollutants, like lead, regulated under the National Ambient Air Quality Standards section, the Clean Power Plan does not impose any penalties for states.¹⁵⁶ If a state chooses to not submit a plan the EPA will implement a federal plan itself.¹⁵⁷ The states can also agree to work with the EPA, implementing certain aspects of the Clean Power Plan while leaving the others to the EPA to implement.¹⁵⁸ Therefore, in comparison to other regulations of air pollutants, like lead, where the EPA has the potential to impose penalties for noncompliance, the Clean Power Plan involves minimal coercion.

C. The Current Battle: Ensuing Litigation Between the States and the EPA

Less than twelve hours after the Clean Power Plan was published in the Federal Register on October 22, 2015, twenty-six states and numerous industry associations filed over fifteen separate cases challenging the EPA regulation.¹⁵⁹ The lawsuits have been consolidated into one case, led by West Virginia and other states in opposition to the regulation, at the United States Court of Appeals for the District of Columbia Circuit.¹⁶⁰ So far twenty-six of the fifty states have joined in opposition to the Plan, along with

156. See generally Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,942.

157. See *id.* at 64,669, 64,947.

158. See *id.* at 64,942.

159. See E&E Publishing, LLC, *supra* note 10.

160. See Andrew Childers, *States Ask Supreme Court to Review Clean Power Plan Stay*, INTERNATIONAL ENVIRONMENT REPORTER (Jan. 27, 2016), <http://www.bna.com/states-ask-supreme-n57982066591/>. The states and state agencies joining in opposition of the EPA's Clean Power Plan are: Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, Wyoming, Mississippi Department of Environmental Quality, Mississippi Public Service Commission, North Carolina Department of Environmental Quality, and Oklahoma Department of Environmental Quality. *Id.*

coal industry members, utilities, and the United States Chamber of Commerce.¹⁶¹ While the D.C. Circuit denied the motions made to stay the rule or block the standards while litigation ensues, it also announced its desire for the case to proceed quickly by scheduling oral arguments for June 2, 2016.¹⁶² However, on February 9, 2016, after the states applied for a stay with the Supreme Court,¹⁶³ the Court ordered a stay on the Clean Power Plan in a five to four vote.¹⁶⁴ Shortly after this decision, the D.C. Circuit announced that it would hear the case en banc on September 27, 2016.¹⁶⁵ Therefore,

161. See *id.*; see also Geoffrey Barnes & Danelle Gagliardi, *How Challengers Obtained the Stay that Put US EPA's Clean Carbon Plan on Hold*, FRESH (Feb. 10, 2016),

<http://www.freshlawblog.com/2016/02/10/how-challengers-obtained-the-stay-that-put-us-epas-clean-carbon-plan-on-hold/>.

162. See E&E Publishing, LLC, *supra* note 10.

163. See generally States Petitioners' Motion for Stay & for Expedited Consideration of Petition for Review, *W. Va. v. EPA*, USCA Case No. 15-1363 (Oct. 23, 2015) (Application by 29 states and state agencies for immediate stay of final agency action during pendency of petitions for review).

164. This is an unusual and significant course of action that the Court has not taken before, which emphasizes how controversial and critical this regulation is, and has led some commentators to believe the Court is reacting to its previous dealings with the EPA's MATS case. In that case, by the time the rule was partially invalidated by the Court, numerous power plants had already invested lots of money and complied with the rule, specifically up to 80% complied with the rule. Therefore, this could have influenced the Court in a concern for equity to stay the status quo and not allow the same course of action occur again. See Emily Holden, Elizabeth Harball & Ellen M. Gilmer, *SCOTUS halts Clean Power Plan, stuns states planning carbon cuts*, E&E PUBLISHING (Feb. 10, 2016), www.eenews.net/stories/1060032137; see also, Patrick Parenteau, *Supreme Court Plays Politics with the Clean Power Plan*, ACSBLOG (Feb. 10, 2016), <http://www.acslaw.org/acsblog/supreme-court-plays-politics-with-the-clean-power-plan>; Greg Stohr & Jennifer A. Dlouhy, *Obama's Clean-Power Plan Put on Hold by U.S. Supreme Court*, BLOOMBERGPOLITICS (Feb. 9, 2016), <http://www.bloomberg.com/politics/articles/2016-02-09/obama-s-clean-power-plan-put-on-hold-by-u-s-supreme-court>; Lyle Denniston, *Carbon Pollution Controls Put On Hold*, SCOTUSBLOG (Feb. 9, 2016) (five to four vote with Justices Stephen Breyer, Ruth Ginsburg, Elena Kagan, and Sonia Sotomayor dissenting), <http://www.scotusblog.com/2016/02/carbon-pollution-controls-put-on-hold/#more-238111>.

165. See Jonathan H. Adler, *Clean Power Plant to get unanticipated en banc review*, THE WASHINGTON POST (May 16, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/16/clean-power-plan-to-get-unanticipated-en-banc-review/>; Andrew Childers, *Full D.C. Circuit to Hear Clean Power Plan Argument*, BLOOMBERG BNA (May 16, 2016), <http://www.bna.com/full-dc-circuit-n57982072479/>. The D.C. Circuit heard oral arguments over the Clean Power Plan on September 27, 2016, bypassing the usual hearing before a three-judge panel. See Jonathan H. Adler, *The en banc D.C. Circuit meets the Clean Power Plan*, THE

until the D.C. Circuit finishes its review and the Supreme Court has finished its likely review, the deadlines within the Plan are delayed and the rule is overall at a standstill.

Generally speaking, the challengers of the EPA regulation argue that the EPA is overstepping its authority under section 111(d) of the Clean Air Act by regulating broadly in the area of electricity generation, which impacts a vast part of the economy, traditionally regulated by the states.¹⁶⁶ The challengers' argument further concludes that the EPA is barred from using section 111(d) to regulate stationary power plants and that it is an unconstitutional invasion of sovereign state rights.¹⁶⁷

V. BALANCING THE POWER POSITIONS: A SOLUTION FOR THE GREATEST NUMBER

No matter how the ensuing litigation results, the EPA will regulate carbon dioxide emissions in some way or another. With executive approval, along with Supreme Court decisions that support the EPA's ability to regulate carbon dioxide emissions under the Clean Air Act, there is no question that the EPA can regulate this air pollutant.¹⁶⁸ The significant question to consider is how the EPA *should* regulate carbon dioxide emissions and what methods can the EPA prescribe without overstepping its regulatory bounds under the Clean Air Act. In addition, although the Clean Power

WASHINGTON POST (Sept. 28, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/28/the-en-banc-d-c-circuit-meets-the-clean-power-plan/?utm_term=.f24e392966b0.

166. See generally Joint Reply of West Virginia, et al., Oklahoma, et al., North Dakota, and Mississippi DEQ in Support of Motions for Stay & For Expedited Consideration, *W. Va. v. EPA*, USCA Case No. 15-1363 (Dec. 23, 2015).

167. *Id.*

168. See Office of the Press Secretary, The White House, *Power Sector Carbon Pollution Standards*, Memorandum for the Administrator of the Environmental Protection Agency (June 25, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards>; see also *Massachusetts*, 549 U.S. 497, 532 (2007); see also *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014).

Plan is so expansive it will inevitably transform the electricity sector,¹⁶⁹ the Supreme Court has taken note of this through its decision to stay the Plan and is also concerned about the vast impact of the Plan in action.¹⁷⁰ Thus, it is necessary and imperative to consider a potential alternative solution the EPA could promulgate if the Supreme Court invalidates the rule.

A. A World with the Clean Power Plan

The EPA appears to be within its regulatory bounds in its current promulgation of the Clean Power Plan. By establishing state specific guidelines and standards of performance for existing stationary electricity generating facilities, under section 111 of the Clean Air Act, the EPA is simply providing a backdrop of requirements and recommendations that the states need to consider in developing their state implementation plans.¹⁷¹

Although the EPA sets out three specific building block strategies that the states can choose from while establishing their state plans, this list is not exhaustive.¹⁷² Nor is it a hard-line set of requirements that the states are obligated to choose from.¹⁷³ The EPA primarily utilized these three emission reduction methods as a guide to illustrate adequately demonstrated measures.¹⁷⁴ Therefore, the states have flexibility in choosing whatever emission reduction methods they desire when developing their state plans so long as they can show a satisfactory attempt to achieve their state specific emission reduction targets.¹⁷⁵

169. *See Util. Air Regulatory Group*, 134 S. Ct. at 2437–38 (an agency cannot exercise significant and transformative power unless it has clear congressional authorization).

170. *Id.*

171. *See* 42 U.S.C §7411(d)(1); 40 C.F.R. §60.23–24; *see also* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,662, 64,667.

172. *See generally* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,667–69, 64,966.

173. *See id.* at 64,710.

174. *See id.* at 64,709.

175. *Id.*

Thus, although the states may feel as though their regulatory territory is being intruded upon, it is ultimately their choice whether or not they let the EPA micromanage their energy resource choices or they regulate it themselves in a manner that complies with the EPA's emission reduction goals.¹⁷⁶ The states generally have a sufficient amount of flexibility in deciding how to comply and achieve their emission reduction targets. For example, besides the three building block strategies set out by the EPA in the Clean Power Plan, states can achieve their emission reduction targets through promoting energy efficiency measures or demand response energy efficiency programs,¹⁷⁷ or by participating in an emissions trading program by selling or purchasing credits¹⁷⁸ from other states.¹⁷⁹ Since twenty-nine states have well established re-

176. As previously mentioned, if states do not choose to submit a plan that is satisfactory to the EPA or they elect not to submit a plan at all, the EPA will initiate a federal implementation plan for the state. However, even if a state has a federal implementation plan applied to it, the state still has the option to go back to the drawing board and develop a state plan to submit to the EPA. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64, 669, 64, 947; see also 42 U.S.C. §7411(d)(2).

177. Energy efficiency programs are promulgated to reduce energy used by specific end-use devices and systems without affecting the services provided, like energy efficient light bulbs, heat recovery systems, and efficient heat pumps. See Definition of Energy Efficiency, Electricity, U.S. ENERGY INFORMATION ADMINISTRATION, <http://www.eia.gov/tools/glossary/index.cfm> (select the letter "E" within the search form; then scroll down to "Energy Efficiency, Electricity"). Whereas demand response programs are incentive based programs encouraging electric power consumers to temporarily reduce their demand for power at certain times of the day in exchange for a reduction in their electric bills. Definition of Demand Response Programs, U.S. ENERGY INFORMATION ADMINISTRATION, <http://www.eia.gov/tools/glossary/index.cfm> (select the letter "D" within the search form; then scroll down to "Demand Response Programs"). Both of these options aid in lowering carbon dioxide emissions through reductions in energy consumption. See *id.*

178. Credits are determined based on the amount of emission reductions that can be achieved through methods that shift energy generation to lower emitting resources, like gas burning power plants or renewable energy power plants, or methods that generally reduce energy demand. See *e.g.*, Memorandum from Brian McLean, Office of Atmospheric Programs, to the Regional Air Division Directors (Aug. 5, 2004) (example of credit determinations and formulas for state implementation plans utilizing renewable energy and energy efficiency measures).

179. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,927 (June 18, 2014) (to be codified at 40 C.F.R.

renewable portfolio standards and eight states have renewable portfolio goals, there is a very high chance that states will have the ability to utilize market-based trading programs, like cap and trade.¹⁸⁰ This will help states that, while developing their compliance plans, cannot necessarily switch to lower emitting electric generating facilities easily or within the near future.¹⁸¹ As a result, despite these indirectly intrusive attempts at regulating carbon dioxide emissions through regulating stationary electricity generating facilities, the states still have the flexibility and freedom to choose how they will comply with their state emission targets.

Therefore, to reach a well-suited compromise that allows the EPA to regulate carbon dioxide emissions emitted from electricity generating facilities but also allows the states to continue maintaining their authority to choose what electricity generation facilities produce energy within their geographical bounds, it is imperative that the EPA's regulation provides standards with which states have the freedom to comply. Section 111 of the Clean Air Act requires that the EPA promulgate standards based on the best methods of emission reductions taking into consideration measures that are adequately demonstrated, which it has done in

pt. 60); *see also* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,709, 64,834–37.

180. DSIRE & U.S. DEPT. OF ENERGY, *Renewable Portfolio Standard Policies* (Aug. 2016), <http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2014/11/Renewable-Portfolio-Standards.pdf>. For example, although Idaho does not have a renewable portfolio standard policy, its neighboring states Washington, Oregon, Montana, and Nevada have these policies which could aid Idaho if it had the need to buy or sell emission credits from or to any of these states that are encouraging renewable energy development. *See id.*

181. States allege that shifting energy generation will be burdensome due to stranded costs, and not being able to take full advantage of the useful life of fossil fueled power plants. With an emission credit trading system, these states could take advantage of the opportunity to buy credits from states that have the capability to shift to lower emitting or zero emitting electric power plants while using their fossil fueled power plants. *See Fact Sheet: Clean Power Plan, The Role of States- States Decide How They Will Cut Carbon Pollution*, EPA, <http://www.epa.gov/sites/production/files/2014-05/documents/20140602fs-states-role.pdf>. (last updated May 11, 2015). However, if these stranded costs of investments made years ago for fossil fuel burning facilities are abandoned or incorporated into other costs of shifting electricity generation, electricity customers' rates will likely be negatively impacted. *See generally Commissioner Tony Clark Statement, Environmental Protection Agency 111(d) Regulations*, FED. ENERGY REG. COMM'N (Aug. 3, 2015), <http://www.ferc.gov/media/statements-speeches/clark/2015/08-03-15-clark.asp#.VrAoFNDFvid>.

its Clean Power Plan.¹⁸² However, by its emphasis on the three building block strategies, it appears that the states take the EPA's approach as a direct requirement or instruction that they must utilize such building blocks to be in compliance with the Act. Since this is not necessarily the case, due to the flexibility provided by the Plan, the EPA should have made it clear in their regulation that the states are still able to retain authority and discretion in their energy generator diversity. For example, with the flexibility inherent in the Plan and its current and future opportunities to expand potential carbon dioxide emission reductions, Idaho is an exemplary state to evaluate with the Plan's primary goal of reducing emissions in mind.

1. Idaho's Victory in Reducing Emissions

With or without the Clean Power Plan, Idaho will still likely meet, and potentially go beyond, its emission reduction goals set out by the EPA with its unique electricity generation portfolio, and its future trajectory trends and opportunities. According to the EPA's estimates, Idaho's 2012 historic level of carbon dioxide emission rate is 858 pounds per megawatt hour.¹⁸³ In the Plan, Idaho's final goal for 2030 and beyond is 771 pounds per megawatt hour.¹⁸⁴ The EPA projects that even without the Plan, Idaho could reduce its carbon dioxide emissions down to 766 pounds per megawatt hour.¹⁸⁵

For a typical red state, Idaho is unique in that its readily available energy resources are very green. Although Idaho does not have a renewable portfolio standard program or goal, it does not necessarily need one due to its high reliance on renewable energy resources. Overall, the balance of Idaho's net electricity generation

182. See 42 U.S.C. § 7411(d)(1) (1990); see also 40 C.F.R. §§ 60.23–24 (1995).

183. *Clean Power Plan: State at a Glance: Idaho* EPA, (Aug. 3, 2015), <https://www3.epa.gov/airquality/cpptoolbox/idaho.pdf>.

184. See *id.*

185. See *id.*

is supplied by hydropower, wind, natural gas, biomass, geothermal, and coal fired generation.¹⁸⁶ In 2014, 82 percent of Idaho's net electricity generation came from renewable energy resources.¹⁸⁷ Hydroelectric power alone supplied 60 percent of Idaho's net electricity generation while its wind generation capability increased by 13 percent and provided 18 percent of its net electricity generation.¹⁸⁸

Although these statistics illustrate that Idaho is an environmentally friendly and self-sufficient electricity generating state, Idaho does import approximately 35 percent of its electricity from neighboring states.¹⁸⁹ This is primarily because Idaho has no coal-fired power plants within its borders and is beginning to develop natural gas; currently most of its natural gas supply is piped into the state from its neighboring states and Canada.¹⁹⁰

In a preexisting effort to reduce carbon dioxide emissions and reliance on coal power, Idaho has planned to reduce its coal fired electricity generation consumption by shutting down the coal power plants it co-owns in other states. For example, Idaho Power owns half of the North Valmy coal fired power plant and typically receives half of the plant's electricity generation.¹⁹¹ Both Idaho Power and North Valmy Energy, the other co-owner of the plant, have agreed to decommission the plant by the end of 2025.¹⁹² Idaho

186. *See id.*

187. *See* U.S. Energy Information Administration, *supra* note 142. Idaho typically is among the top ten states for renewable energy production, usually found between either the top ranked to the fifth top ranked positions depending on the factors considered in a study or analysis. *See id.*; *see also* *How Green Is Your State?* OLIVET NAZARENE UNIVERSITY (Nov. 5, 2015), <http://graduate.olivet.edu/news-events/news/how-green-your-state>.

188. *See* U.S. Energy Information Administration, *supra* note 142.

189. *See id.*; *see also* IDAHO STRATEGIC ENERGY ALLIANCE, IDAHO ENERGY PRIMER 2015 at 9, 35 (2015).

190. *See* U.S. Energy Information Administration, *supra* note 142.

191. Ken Miller, *Idaho Power's 2015 IRP Nears Completion*, SNAKE RIVER ALLIANCE (June 22, 2015), <http://snakeriveralliance.org/idaho-powers-2015-irp-nears-completion/>; *see generally* NV Energy, *North Valmy Generating Station*, NV ENERGY INC., https://www.nvenergy.com/company/energytopics/images/Valmy_Fact_Sheet.pdf (last updated April 2015) (North Valmy plant description).

192. Ken Miller, *Idaho Power's 2015 IRP Nears Completion*, SNAKE RIVER ALLIANCE (June 22, 2015), <http://snakeriveralliance.org/idaho-powers-2015-irp-nears-completion/>.

Power and Portland General Electric co-own the Boardman coal fired power plant and also plan to decommission the plant by the end of 2020.¹⁹³ Both of these coal-fired power plants shutting down in the future would amount to at least 525 megawatts of high emitting power displaced.¹⁹⁴ With a trajectory of Idaho power companies and the utilities investing in more renewable energy systems and energy efficiency programs,¹⁹⁵ which would reduce energy consumption and replace the heavy emitting energy supplies with low to zero emitting energy supplies, Idaho is on track to meet its citizens' energy demands while further reducing carbon dioxide emissions. Therefore, Idaho is on a great path, with its diverse electricity generation capabilities, to meet and even go beyond emissions reductions recommended by the EPA. Many other states could take note of Idaho's trajectory and investment strategies to gauge whether they are along a similar path of carbon dioxide emission reductions without the EPA's regulatory oversight through a federally implemented state plan.

2. The Downfall of Noncompliant States: A Push in the Right Direction

The EPA's Clean Power Plan does offer an option for those states that initially choose to be stubborn and non-compliant. The Plan provides that if states choose to decline to prepare and submit their own compliance plans to reduce carbon dioxide emissions, then the EPA will promulgate a federal plan for the affected power

193. See Ted Sickinger, *PGE Plan to Close Coal-Fired Boardman Power Plant by 2020 Could Set National Precedent*, THE OREGONIAN (Dec. 6, 2010), http://www.oregonlive.com/environment/index.ssf/2010/12/pge_plan_to_close_coal-fired_b.html.

194. Miller, *supra* note 192 (shutting down both coal fired power plants, North Valmy and Boardman which Idaho utilizes 260 megawatts and 275 megawatts from respectively, would add up to 535 megawatts of heavy emitting energy displaced).

195. See *id.* (this ultimately results in a win-win scenario for both utilities, power companies, and electricity consumers); see also IDAHO STRATEGIC ENERGY ALLIANCE, *supra* note 189, at 24–31, 35 (Idaho's investments in both renewable energy system development and integration, and energy efficiency programs help create jobs, reduce energy consumption, increase profits for both end use consumers and power companies, and reduce carbon dioxide emissions);

plants in that state.¹⁹⁶ However, the EPA does not have authority to impose sanctions on a state for failing to submit a plan.¹⁹⁷ Therefore, unless the states view the EPA's federal oversight over their electricity generating facilities that emit carbon dioxide to be a punishment in of itself, it appears as though the states are not facing any harsh punishments for failing to comply, like a hefty fine. The states also have the option to work with the EPA and implement certain aspects of the Plan themselves while leaving other aspects to the EPA to implement.¹⁹⁸ Also, the states that fail to comply with the Plan and find that they do not favor the EPA overseeing their affected power plants, have the option to prepare and adopt a state plan, which the EPA would have to approve, that could supplant the federal plan implemented by the EPA.¹⁹⁹ Therefore, a state could choose to be stubborn by not complying with the Plan and face no EPA imposed sanctions, but it will have to face a federally implemented plan created by the EPA or choose to step up and supplant it with a state plan of its own.

As a result, despite the states' frustrations with the perceived flexibility of the Clean Power Plan and their argument that the Plan is an unnecessary intrusion into their authoritative bounds in energy regulation, the EPA is not commandeering their authority to choose which electricity power plants to turn on and off. The states still maintain this choice despite the EPA's regulatory influence. The EPA's authority is essentially peppered with state regulatory authority to decide which electricity-generating facilities to use while ensuring that they are reducing carbon dioxide emissions and preventing the potential continuance of public and environmental neglect. Through the Plan, the EPA is attempting to promulgate a traditional cooperative federalism program with the purpose and goal of benefiting the greater good. Whether or not the states agree with how they individually get to that result— by cooperating with the EPA or running their own electricity regime in light of the carbon dioxide standards—is that states' own problem. In addition, with or without the Clean Power Plan in place, the EPA could choose to implement a progressive region by region market based emissions cap system, like the Region Greenhouse Gas

196. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,942, 64,987–88 (Oct. 23, 2015).

197. See *id.* at 64,942.

198. See *id.*

199. See *id.*

Initiative, that could provide the states with flexibility and benefits in meeting emission reductions. In the end, the EPA is just functioning as the regulatory parent the states sometimes need, despite their denial, so that states can continue to use their sovereign authority and power to ensure the peoples' health and welfare.

B. A World Without the Clean Power Plan: A Compromise Through Regional Market-Based Program

Given the Supreme Court's bold move in staying the Clean Power Plan, and the potential for the Court to find that the EPA is taking too big of a step without a clear congressional directive that justifies or guides its actions, it is necessary to consider the world without the Plan in action. Even without the Plan in effect, the states' ongoing trends provide reason to be optimistic about the overall goal of reducing carbon dioxide emissions.²⁰⁰ Numerous power companies and utilities have expected some form of governmental climate action for years now and have already made, and are continuing to make, efforts to get ahead of the curve by increasing their natural gas capacity, constructing and integrating more renewable energy generation facilities, and retiring coal power plants.²⁰¹

This ongoing trend is dynamically changing the electricity sector's generation portfolio, and benefiting the environment and public welfare by reducing carbon dioxide emissions. This movement can be primarily attributed to two factors: reduced costs in investing in renewable energy systems, like solar and wind, and low natural gas prices.²⁰² Thus far, looking at the sector's ongoing progress

200. See generally Inst. for Elec. Innovation, *Thought Leaders Speak Out: Key Trends Driving Change in the Electric Power Industry*, EDISON FOUNDATION (Dec. 2015), http://www.edisonfoundation.net/iei/Documents/IEI_KeyTrendsDrivingChange_FINAL.pdf.

201. See Gavin Bade, *Will the Clean Power Plan Actually Change Anything in the Power Sector?*, UTILITYDIVE (Aug. 7, 2015), <http://www.utilitydive.com/news/will-the-clean-power-plan-actually-change-anything-in-the-power-sector/403639/>.

202. See Michael Grunwald, *Hidden in Obama's New Climate Plan, A Whack at Red States*, POLITICO (Aug. 4, 2015), <http://www.politico.com/agenda/story/2015/08/hidden-in-obamas-new-climate-plan-a-whack-at-red-states-000188>; see also Robert Walton, *EEI: Utilities Moving from Coal, Toward Gas & Renewables Regardless of CPP Stay*, UTILITYDIVE (Feb.

with these trends in mind, utilities have made investments in natural gas and renewable energy generating systems that, “have cut carbon dioxide emissions 15-percent below 2005 levels” already.²⁰³ With natural gas prices as low as they are, utilities and power companies are encouraged to invest in natural gas fired electricity generation and construct more natural gas pipeline infrastructure.²⁰⁴ Since both the Production Tax Credit and the Investment Tax Credit have been extended through 2021 by Congress, wind and solar development are continuing to boom.²⁰⁵ The wind industry is thriving not only because of the Production Tax Credit, but also because wind’s installation costs have decreased by nearly 66 percent since 2009.²⁰⁶

In addition, and as previously mentioned, twenty-nine states already have and are implementing renewable portfolio standard programs which are further incentivizing renewable energy development and integration.²⁰⁷ Along with these standards and goals, states have also developed initiatives with energy efficiency programs that aim at reducing energy consumption, further reducing potential carbon dioxide emissions.²⁰⁸ For example, in the Pacific Northwest region, the Northwest Power and Conservation Council

12, 2016), <http://www.utilitydive.com/news/eei-utilities-moving-from-coal-toward-gas-renewables-regardless-of-cpp/413822/>.

203. *EEI to Wall Street: The Promise of Tomorrow*, EDISON ELECTRIC INSTITUTE (Feb. 10, 2016), <http://www.eei.org/resourcesandmedia/newsroom/Pages/Press%20Releases/EEI%20to%20Wall%20Street%20The%20Promise%20of%20Tomorrow.aspx> (statement made by Tom Kuhn).

204. See Robert Walton, *Why the Supreme Court Stay on The Clean Power Plan Means Nothing for Efficiency*, UTILITYDIVE (Feb. 17, 2016), <http://www.utilitydive.com/news/why-the-supreme-court-stay-on-the-clean-power-plan-means-nothing-for-efi/414000/>.

205. See Herman K. Trabish, *Powered by PTC, Wind Energy Expected to Keep Booming Despite Clean Power Plan Stay*, UTILITYDIVE (Feb. 17, 2016), <http://www.utilitydive.com/news/powered-by-ptc-wind-energy-expected-to-keep-booming-despite-clean-power-pl/413443/> (demand for cheap wind may be so great that utilities build out enough to meet CPP targets regardless of stay).

206. See *Officials Highlight Need for Stable Policy to Continue Growing Wind Energy*, AMERICAN WIND ENERGY ASSOCIATION (Aug. 10, 2015), <http://www.awea.org/MediaCenter/pressrelease.aspx?ItemNumber=7787>.

207. See generally DSIRE & U.S. DEPT. OF ENERGY, *supra* note 180.

208. See Walton, *supra* note 204.

has estimated that the region could meet twenty years' worth of demand growth through energy-efficient measures.²⁰⁹ In fact, the Pacific Northwest's regional energy load has only grown by an average of 0.4 percent annually due to investments in energy efficiency.²¹⁰ Thus, in a business as usual situation, as we currently have now with the stay on the Plan, it is apparent that numerous states have taken the initiative to transform their energy generation portfolios and reduce carbon dioxide emissions from the electricity sector. However, even with this progress there are certain states that could use some work or a push through guidance or regulation to reduce carbon dioxide emissions.²¹¹ Therefore, the EPA should consider other options, like regional market-based emission cap programs, that would be more effective for these stubborn high-emitting states.

The EPA should take an approach that would primarily rely on the market and the states themselves, while retaining some oversight, to reduce carbon dioxide emissions while transforming the electricity sector in ways the states see fit. This could be done by incorporating the ideals and lessons learned from the Regional Greenhouse Gas Initiative (RGGI) program, a cap and trade program initiated by ten states in 2009, and transforming it into a regional program throughout the country.²¹² Similar to the RGGI

209. See Carol Winkel, *Northwest Power Plan Supports Growth While Preserving Natural Resources: Improved energy efficiency, demand response, and natural gas generation are primary means to ensuring a reliable and economical power supply*, NW. POWER AND CONSERVATION COUNCIL (Feb. 10, 2016), [https://www.nwcouncil.org/news/blog/7th-pp-approved/?mkt_tok=3RkMMJWWfF9wsRogua3Kd%2B%2FhmjTEU5z17Ow-pUKSyIMI%2F0ER3fOvrPUfGjI4FS8ZhMq%2BTFAwTG5toziV8R7DNLM1wy8YQWhPh](https://www.nwcouncil.org/news/blog/7th-pp-approved/?mkt_tok=3RkMMJWWfF9wsRogua3Kd%2B%2FhmjTEU5z17Ow-pUKSyIMI%2F0ER3fOvrPUfGjI4FS8ZhMq%2BTFAwTG5toziV8R7DNLM1wy8YQWhPh;); see also *Seventh Power Plan*, NW. POWER AND CONSERVATION COUNCIL, (Feb. 25, 2016), <http://www.nwcouncil.org/energy/powerplan/7/plan/>.

210. Winkel, *supra* note 209.

211. See generally Application by 29 States & State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review, *West Virginia et al. v. EPA*, No. 16- (U.S. Jan. 26, 2016) (generally, the states that are challenging the rule are typically higher emitting states, like West Virginia, Texas, and Arkansas).

212. See generally PAUL J. HIBBARD, SUSAN F. TIERNEY, ANDREA M. OKIE, PAVEL G. DARLING, *THE ECONOMIC IMPACTS OF THE REGIONAL GREENHOUSE GAS INITIATIVE ON TEN NORTHEAST AND MID-ATLANTIC STATES*, ANALYSIS GROUP (Nov. 15, 2011), <https://lmscontent.embanet.com/VLS/ENV5226/Module6/EconomicImpactRGGIReport.pdf>.

program set up, the EPA could establish regional programs throughout the country with set carbon dioxide emission caps for every region. This way states could dynamically work together to achieve these emission caps more efficiently by pooling sources together and looking at emissions with a regional perspective.

Within each designated regional program area, the EPA could evaluate the current and projected carbon dioxide emission levels for the region, which the EPA has already done on a state by state level for the Clean Power Plan, and establish set emission caps that the states have to be within by a final deadline, which the EPA can set up. Then, after the EPA evaluates whether it would be more efficient to set up interim deadlines of every two or three years, the states could evaluate their current electricity-generating facilities and emission levels so that they could then buy carbon dioxide emission allowances.²¹³

This market-based system, modeled after the RGGI program, is similar to the already successful market-based system established by the EPA for nitrogen oxides and sulfur dioxide emissions, except that allowances would be purchased at a market-set price.²¹⁴ Putting a set cost on the emissions allowances is beneficial particularly in electricity markets because these costs can easily be rolled into the competitive wholesale markets for electricity or rate cases set by utilities.²¹⁵ These costs help reflect the costs of emitting carbon dioxide, while sending signals to market participants which, over time, could further encourage industries and power companies to invest in efficiency initiatives, renewable energy resources, or change operations to overall reduce carbon dioxide emissions.²¹⁶

The unique concept about the RGGI program, in comparison to other market-based schemes, is that the money spent by power generators to buy allowances, to comply with their emissions, gets funneled back to their respective state governments where the

213. *See id.* at 9 (at the end of interim deadlines, or generally deadlines set up within the program, the electric generating facilities must have obtained allowances equal to its carbon dioxide emissions).

214. *See id.*

215. *See id.* at 10.

216. *See id.*

state is free to spend the funds as it pleases.²¹⁷ Most of the states in the original RGGI program typically invested half of their funds into energy efficiency programs, which reduced energy consumption and carbon dioxide emissions while creating numerous jobs throughout the region.²¹⁸ This is a win-win scenario for the states since they are allowed to use these funds in various programs that may not involve the electricity sector.²¹⁹ For example, within the first three years of the RGGI's implementation, the RGGI produced an approximate economic benefit of \$1.6 billion, increased job years by approximate 16,000, and reduced payments to out of region providers of fossil fuels by a little over \$765 million.²²⁰ Although the RGGI program had some minor issues due to the set cap level's inadequacy, the EPA could prevent these issues, as well as others, by creating a program or regional group that consistently monitors emissions and emission reduction progress to assess whether caps need to be changed if regions are more effective than others.²²¹

The main benefits of the EPA implementing a regional market based emissions cap program for carbon dioxide emissions, like the RGGI program, is that it has already been done and proven successful, given some minor fixes and changes, and it provides the states with compensational benefits for their efforts in mitigating carbon dioxide emissions and transforming their energy generation portfolios.²²² West Virginia is a good example of a state that

217. *See id.*

218. *See* HIBBARD ET. AL., *supra* note 212, at 33–37; *see also* LUCAS BIFERA, CENTER FOR CLIMATE AND ENERGY SOLUTIONS, REGIONAL GREENHOUSE GAS INITIATIVE (RGGI), (Dec. 2013), <http://www.c2es.org/docUploads/rggi-brief-12-18-13-updated.pdf>.

219. For example, some states invested funds into educational programs and into the state government itself to reduce deficits or create jobs. *See* HIBBARD ET. AL., *supra* note 212, at 20.

220. *See id.* at 36.

221. *See* Mark Febrizio, *RGGI: A Faulty Model for “Successful” Cap-and-Trade*, INSTITUTE FOR ENERGY RESOURCE (Dec. 15, 2015), <http://instituteforenergyresearch.org/analysis/rggi-a-faulty-model-for-successful-cap-and-trade/>.

222. *See* HIBBARD ET. AL., *supra* note 212, at 36, 43–48.

needs this kind of help in reducing emissions and diversifying its energy portfolio.

West Virginia's net electricity generation in 2015 was comprised of coal fired power plants, about 94 percent specifically, with renewable energy resources contributing about 3.7 percent.²²³ With the state producing more electricity than it consumes, exporting about three-fourths of the coal it mines to other states,²²⁴ and coal reliance declining generally throughout the country, West Virginia has the potential to drastically transform its electricity sector to become more diverse. With a regional carbon emission cap market scheme in place, all of those coal fired power plant generators would have to buy allowances for every short ton of emissions they emit, which would create extra costs that would roll into consumer electricity rates. These higher rates for coal powered electricity would instigate customers and market participants to buy less of these electricity services, which would then cause a reduction in electricity production by coal-fired power plants.²²⁵ Meanwhile, the funds generated from the purchase of emission allowances would go to the state where the state could take and divvy up the funds to invest in natural gas powered electricity development, energy efficiency measures, renewable energy resources, and any other areas of investment that the state deems necessary.

Over time, as the state fluctuates from its original heavy reliance on coal and coal-fired power plants to diversifying its electricity generation resources through its compliance with the regional cap market scheme, the state will aid in the overall effort to reduce carbon dioxide emissions while being compensating for its efforts. Especially because the cap periodically lowers to further reduce overall regional carbon dioxide emissions, this would further instigate the state to use the funds, generated by the emission allowance proceeds, for investments in energy measures that would reduce carbon dioxide emissions while creating jobs and boosting the state's economy. Therefore, although West Virginia would need to change its electricity generation resource portfolio, if it does so wisely by using the state funds generated through the regional

223. *West Virginia State Profile and Energy Estimates*, U.S. ENERGY INFORMATION ADMINISTRATION, (last updated July 21, 2016), <http://www.eia.gov/state/analysis.cfm?sid=WV>.

224. *See id.*

225. *See* HIBBARD ET. AL., *supra* note 212, at 33–35.

market based emissions cap program, the state would produce enough electricity to meet its consumers' and citizens' needs and successfully reduce carbon dioxide emissions.

In the end, the EPA is within its regulatory bounds in promulgating carbon dioxide emission reduction goals within the Clean Power plan, but given that the Plan is expansive and extremely significant, which is further highlighted by the Supreme Court's unusual move in staying the Plan's promulgation,²²⁶ the Court may disagree with the EPA's vast endeavor of regulating carbon dioxide emissions in the Plan and invalidate it. If this were to happen, the EPA should utilize all of its research and data on state specific emission goals and start developing a rule that would create regional market based programs that aim at encouraging the reduction of carbon dioxide emissions while boosting state economies. This approach would essentially provide a win-win for the states and the EPA while also benefiting the environment by mitigating future climate change impacts. As stated by an EPA representative, after the Supreme Court issued its stay on the Plan, "you can't stay climate change and you can't stay climate action."²²⁷ Therefore, one way or another, the EPA will find a way to initiate and pursue progressive action in the face of climate change and lead this country towards a healthier and brighter future.

VI. CONCLUSION

This country can no longer deny the consequences of its actions. It cannot continue emitting harsh pollutants into the air just because the fuel supplies are cheap and come from long-utilized sources. The United States has come so far in environmental regulation, protecting human health, and conserving natural resources. It cannot take a step backward now.

Some states may want to maintain the status quo, but the longevity of that option is limited. Human actions have caused too

226. See generally Emily Holden, Elizabeth Harball, & Ellen M. Gilmer, *SCOTUS halts Clean Power Plan, stuns states planning carbon cuts*, E&E PUBLISHING (Feb. 10, 2016), <http://www.eenews.net/stories/1060032137>.

227. See *id.* (statement from Melissa Harrison, EPA Press Secretary).

many environmental disasters to stay on that path for long. Although the states would like the ultimate freedom to choose what electricity-generating plants they use, they must consider their citizens' health and welfare at the same time.

Despite the desire to operate efficient and cheap power plants, those harmful facilities are actually holding the states back from meeting their responsibilities. Climate change poses a “monumental threat” to the prosperity of the greatest number for the longest time.²²⁸ By working together to reduce carbon dioxide emissions and mitigate climate change, the states and the EPA can best serve the people. To ensure the greatest good for future generations, society must take responsibility for its actions—starting now.

228. Respondent EPA's Opposition to Motions to Stay Final Rule at 1, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Dec. 3, 2015) (noting that climate change poses a “monumental threat to Americans' health and welfare by causing [enduring] changes in [the] climate, resulting in an array of severe negative effects, including drought, disease, increasing weather events, and rising sea levels”); *see also* PINCHOT, *supra* note 1.