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Thirty years ago, *Chevron v. NRDC* set the standard for judicial deference to an agency's statutory interpretation. In that case, the Supreme Court upheld EPA's interpretation of Clean Air Act language. This month, *Chevron* headlined in yet another Supreme Court case to consider – and defer to – EPA's implementation of this statute. Citing *Chevron*, the *EME Homer City* Court wrote, "[w]e *routinely accord dispositive effect* to an agency's reasonable interpretation of ambiguous statutory language" and upheld EPA's method for tackling interstate air pollution.

Recent posts have discussed how *EME Homer City* may help EPA as it crafts greenhouse gas (GHG) rules for the existing power sector. I think EPA's latest Clean Air Act victory does more than that – it should put to rest arguments that EPA has no statutory authority to issue these rules in the first place. These arguments exploit a conflict in the 1990 Clean Air Act Amendments. However, EPA can reconcile the conflict in a way that authorizes it to act, based on several rules of statutory interpretation and the text of the Act. *Chevron* commands "dispositive effect" to any of these reasonable interpretations.

Some background: Existing power plants emit nearly 40% of greenhouse gas emissions in the U.S. Section 111 of the Clean Air Act – the New Source Performance Standards (NSPS) program – can address this pollution. This program is one of three established by Congress in 1970 to control air pollution from stationary sources:

- Section 108(a) directed EPA to list and set air quality standards for widespread "criteria" pollutants that could endanger public health or welfare.
- Section 112(b)(1)(A) directed EPA to list and regulate "hazardous air pollutants" (HAPs) (including pollutants that are carcinogenic or toxic).
- Section 111(d) directed EPA to initiate a process for controlling existing sources "for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under Section 108(a) or 112(b)(1)(A)".

There are six criteria pollutants and about 200 HAPs; Section 111(d) covers the rest. In essence, Section 111(d) was created as a backstop, to address pollution the Act did not otherwise target. Once EPA sets pollution standards for a category of *new* sources, EPA must establish guidelines for unregulated pollution from *existing* sources in that category. States then issue and implement enforceable standards.

In 1990, Congress remodeled the Clean Air Act. Congress created three new pollution reduction and permitting programs and revamped existing programs, including Section 112. Smaller changes were made, too; for instance, each chamber amended Section 111(d) to update its Section 112 cross-reference. Both struck "112(b)(1)(A)"and replaced it with different text:

- Under the House version, 111(d) rulemaking would proceed for "any air pollutant … not … emitted from a source category which is regulated under Section 112." While its meaning is disputed, this language could prohibit 111(d) regulation of any source regulated under Section 112 for different pollutants.
- As in the 1970 text, under the Senate version the 111(d) process would proceed for "any air pollutant . . . not included on a list published under . . . 112(b)".

These changes were not discussed in committee hearings, in floor debates, or in conference. Ultimately, both amendments to Section 111(d) were contained in the legislation signed by the first President Bush. The House Amendment is located in Section 108 of the Statutes at Large (under "Miscellaneous Guidance"); the Senate Amendment is found 107 pages later (under "Conforming Amendments").

The conflict presented itself to an obscure shop in Congress charged with incorporating the Statutes at Large – the law as passed by Congress – into the topically organized U.S. Code. A scribe encountered the House amendment first, struck "Section 112(b)(1)(A)" and added the House replacement language. The scribe then found it impossible to incorporate the Senate text. The U.S. Code notes this explicit and irreconcilable conflict.

More than two decades later, EPA is invoking Section 111(d) to set GHG guidelines for the existing fleet of power plants. Some argue that the 1990 House-originating amendment bars EPA from using 111(d) to target unregulated pollution from power plants, since EPA previously regulated power plant HAPs under Section 112. These arguments all but void Section 111(d), since nearly all major stationary sources are regulated under Section 112.

The arguments are also rather weak. Some only cite the U.S. Code. One argument acknowledging the Senate Amendment posits that the House language was "last in time" and acts to repeal the Senate version, because the House passed its version of the bill later in 1990. This logic ignores the conference bill containing both

amendments. Meanwhile, arguments conceding the Act is ambiguous ignore *Chevron* and proclaim only one acceptable way to interpret the conflict – predictably, in a way that bars EPA action. But no one may substitute her preferred construction of a statutory provision for an agency's reasonable interpretation.

Legislative language is often unclear, prodding courts to develop many interpretive rules. Several support reliance on the Senate amendment or accommodate both amendments in a way that gives Section 111(d) animating force and enables EPA to reach GHGs from existing power plants. These include the "last in point of arrangement" rule (the Senate amendment would govern because it follows the House version in the Statutes at Large); a rule that invalidates irreconcilable conflicts (Section 111(d) would revert to 1970 text); and the presumption against implied repeal (an interpretation would avoid gutting Section 111(d) with an amendment never discussed in the legislative record, characterized as "Miscellaneous Guidance," and contradicting a contemporaneous amendment that preserves the long-standing role of 111(d)).

Sometimes, courts opt (or defer to an agency's decision) to reconcile conflicting directives in a way that avoids conflict, or to rely on the directive that most clearly aligns with the rest of the text. In this case, textual changes made to Section 112 in 1990 mesh with the Senate amendment and with a reading of the House amendment that supports action under Section 111(d).

EPA rarely invoked Section 112 before 1990. EPA's reluctance stemmed from the program's design, which required EPA to set health-based limits for HAPs, and apply them equally to all sources. A strict, uniform standard could shut down entire industries. Therefore, in 1990, Congress directed EPA to list all major sources of HAPs, and identify limits based on what each category could achieve.

These changes would expand usage of Section 112. Yet Congress limited application of Section 112 *seven times* where it duplicated Clean Air Act regulation. Five limits prevent EPA from regulating *pollutants* under Section 112, when those pollutants are addressed under Section 111 and other programs. These limits mirror the 1970 language of 111(d) and the 1990 Senate amendment. Two limits delay 112 regulation of specific *sources* – power plants and incinerators – where other programs would "adequately control" their HAPs. Again, regulation under Section 111 is assumed. (In 2000, EPA determined it was "necessary and appropriate" to regulate power plants under Section 112 – without forfeiting Section 111(d) authority.) The Senate amendment fits naturally with the seven limits Congress

placed on Section 112. The House-originating text clashes, unless it is read to mean that EPA may not use 111(d) to regulate HAPs. (The contemporaneous change Congress made to the definition of "source" under Section 112 may support this interpretation as well.)

The odd wording of the House amendment to 111(d) makes more sense in its initial context. The original House bill proposed giving EPA discretion "not to list [any] source category or subcategory" under Section 112 if the source was "already adequately controlled under this Act or any other Federal statute or regulation." The original bill also included the House amendment to 111(d). Together, the provisions would have enabled EPA to forego regulation under 112 for particular sources, and instead use the NSPS program to limit all non-criteria pollutants, including HAPs.

The House Energy & Commerce Committee dropped the discretionary listing language from 112 without comment. However, the House amendment to Section 111(d) was left unchanged. It remains, therefore, a vestige of earlier drafting efforts.

I am convinced Congress did not seek to strip EPA of its 111(d) authority. These charges flow from text that is not clear. And yet, under *Chevron*, the Supreme Court will give "dispositive effect" to EPA's reasonable interpretation of the language. Here, EPA has several perfectly reasonable interpretations, supported by statutory interpretation rules and the Act itself, to justify regulating GHGs from the power sector.