

Clean Power Plan challengers have asked the D.C. Circuit to stay the rule pending litigation. Today, industry and environmental groups supporting EPA will file their oppositions to this request. The stay motions included the charge that EPA may not use Section 111(d) at all to curb pollution from existing power plants. [Dan Farber](#) and [I](#) have written about what this argument is, in previous *Legal Planet* blogs. But as the next round of legal arguments begin to fly, it's important to note what is not at issue here.

- This is not the IRS interpreting health care law. In [King v. Burwell](#), the Court ignored the IRS interpretation of “federal exchange” in the Affordable Care Act, in part because the IRS “has no expertise in crafting health insurance policy”. (The Court cited to *Gonzalez v. Oregon*, where it likewise would not defer to the Attorney General’s medical conclusions about drugs used in Oregon for assisted suicides.) Here, EPA is the expert agency entrusted for 40 years by Congress to interpret and implement the Clean Air Act.

IMPORTANT TO NOTE: The *King* Court agreed with the IRS interpretation of the Affordable Care Act, notwithstanding its withholding of deference.

- This is not EPA trying to work around the clearest of all statutory text, a number written directly into the Clean Air Act. In [UARG v. EPA](#), the Court would not defer to EPA’s policy decision to ignore a threshold number for regulating “major” sources under the Clean Air Act. EPA had argued that a higher number should be used to trigger permitting for carbon dioxide emissions, since sources emit this pollutant in much greater quantities than other pollutants. Here, EPA is interpreting far more ambiguous text – specifically, determining what is being “regulated” under Section 112 which may not also be regulated under other Clean Air Act programs.

IMPORTANT TO NOTE: The *UARG* Court read a slightly different limitation into the Act, enabling EPA to reach 97% of the sources it wished to permit for carbon pollution, without sweeping thousands of smaller sources into the program.

- This is not the FDA deciding to regulate tobacco under the Food, Drug, and Cosmetic Act, without any input from the Court. In [Brown & Williamson](#), the Court held that language in the FDCA foreclosed regulation of tobacco under this statute. Here, the Supreme Court has held that carbon dioxide and other greenhouse gases *are “pollutants” under the Clean Air Act*, and that EPA has a statutory obligation to apply the Clean Air Act to carbon pollution.

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- This is also not an agency reversing itself on three decades of “consistent and repeated statements that it lacked authority”. Yup, *Brown & Williamson* gets a two-fer. There, the Court described thirty-five years of FDA Congressional testimony and denials of petitions asking the agency to regulate tobacco. Here, EPA has consistently interpreted Section 111 to cover pollutants that remain unregulated even if the source is otherwise subject to Section 112. [NYU's Institute for Policy Integrity covered this issue](#) thoroughly in an amicus brief this year.
- This is not the Army Corps suddenly pursuing enforcement after “affirmatively misle[ading]” a company that its actions were legal. In [U.S. v. Pennsylvania Industrial Chemical Co.](#), a case that pre-dates *Chevron*, the Supreme Court reversed criminal penalties in a dumping case, after a defendant alleged that it fell victim to an abrupt change in Army Corps’ interpretation of the Rivers and Harbor Act. *Chevron* applies to changed interpretations. But “sudden or unexplained” changes may violate the Administrative Procedure Act or offend the constitutional right to due process. Here, the final Clean Power Plan notes that EPA “revised” its interpretation of 111(d). Challengers would be wrong to argue a lack of fair notice. EPA did not budge from its ultimate, long-standing interpretation that section 111(d) applies to pollutants that remain unregulated by other Clean Air Act programs. EPA has read 111(d) to apply in this instance – regulation of a non-HAP – to the same universe of regulated entities since the relevant amendment in 1990.

ALSO IMPORTANT TO NOTE: The Supreme Court has applied *Chevron* deference even when [agencies offered a new interpretation of statutory language](#), or [crafted an interpretation in response to litigation](#).

Industry challengers may refer to any or all of the cases I mention to support their arguments. Reliance on these cases is misplaced. The language in Section 111(d) is not a slam dunk for the agency. The provision is inartfully drafted and speaks of rushed legislating in the waning days of 1990. But EPA need not convince the D.C. Circuit that its reading of the provision is the *only* fair reading – only that its reading is, as Chief Justice Roberts put it in *King*, a “permissive reading” that is “compatible with the rest of the law.”