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In Defense of the Clean Power Plan: Why Greenhouse Gas Regulation Under Clean Air Act Section 111(d) Need Not, and Should Not, Stop at the Fenceline

Eric Anthony DeBellis*

In the summer of 2014, the Supreme Court heard a challenge to the Environmental Protection Agency’s first-ever Clean Air Act regulation of greenhouse gases from “major” stationary sources like power plants and factories. In Utility Air Regulatory Group v. Environmental Protection Agency, the Court struck down the agency’s special definition of “major” sources for greenhouse gases and removed its broader authority to require permits based solely on greenhouse gas emissions. The Court thus limited the agency’s jurisdiction to sources that already require permits for conventional air pollutants—a category accounting for nearly all emissions the agency sought to regulate. Hence, the case hardly affected the agency’s new permitting program, but the Court’s reasoning raised a concern that may have broader implications.

Writing for the majority, Justice Antonin Scalia voiced fears of regulatory overreach into the lives of common citizens engaged in innocuous behavior, proclaiming any regulation that could apply to owners of small, nonindustrial sources would face skepticism from the Court. These regulatory overreach concerns may arise again in a legal challenge to the agency’s largest greenhouse gas rule to date: a program to reduce energy sector emissions by 30 percent by 2030 known as the “Clean Power Plan.”

After the Court’s decision, many commentators have asked whether the Clean Power Plan’s approach of regulating states’ energy sectors as a whole, including operations that take place “beyond the fenceline” of individual plants, will survive judicial review. Indeed, much of the debate over the Clean
Power Plan’s legality has centered on one question: Does the Clean Air Act allow the Environmental Protection Agency to regulate beyond the fenceline? This Note disputes this characterization of the issue. Rather, the question that would come before the Court is not so much where the EPA may regulate, but whom. This Note asks whether the Clean Air Act authorizes the EPA to regulate the practices of the owners and operators of industrial sources of air pollution and makes the case for answering this jurisdictional question in the affirmative.

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INTRODUCTION

In 1827 French mathematician Joseph Fourier theorized certain gases in Earth’s atmosphere trapped heat.1 Scientists later confirmed this phenomenon and dubbed it the “greenhouse effect” because, like greenhouse windows, these gases trapped just enough heat to maintain temperatures suitable for life.2 Without its greenhouse gas (GHG) bubble, the Earth would be a cold, desolate rock in space.3 If the atmosphere’s GHG concentration rises too high, though,

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2. Id. This mechanism technically differs from how greenhouses regulate temperature, but the analogy, along with the term “greenhouse effect,” has stuck. M.D.H. Jones & Ann Henderson-Sellers, History of the Greenhouse Effect, 14 PROGRESS PHYSICAL GEOGRAPHY 1, 1 (1990).
3. See Jones & Henderson-Sellers, supra note 2, at 6 (stating that Earth’s average temperature would be about zero degrees Fahrenheit without GHGs).
the same greenhouse effect that protects life from extreme cold would overheat the planet, a destructive trend euphemistically called “global warming.”

In 1896 Swedish physicist Svante Arrhenius discovered carbon dioxide (CO\textsubscript{2}) emissions from burning charcoal increased ambient temperature, linking fossil fuel burning to a warmer planet. This observation did not concern Arrhenius, who believed a warmer climate would benefit mankind. Arrhenius was far ahead of his time, but today, the world burns fossil fuels on a scale beyond his imagination. A recent estimate set global GHG emissions at a record forty billion tons in 2014. If current trends continue, scientists forecast a two-degree Celsius increase from baseline average global temperatures, a widely used benchmark for catastrophic warming, within just thirty years.

Two degrees may not sound like a big difference, but increasing global average temperatures by just a few degrees can make the planet a drastically different place. To put this number in perspective, average temperatures in the tropics have risen only about two degrees Celsius total since the last Ice Age. Global average temperatures have increased only about six degrees Celsius in the fifteen thousand years since the last Ice Age, when over three thousand feet of ice covered Manhattan. Similarly, a two-degree Celsius increase in average global temperatures would drastically alter the balance of Earth’s climate.

Contrary to Arrhenius’s early expectations, a warmer planet would be less than hospitable to humans, let alone the rest of the biota. Scientists expect warming from unchecked GHG emissions in the coming years will increase sea levels, storm frequency and severity, species extinction, disease transmission, and drought severity and frequency, to name a few impacts.

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8. Fiona Harvey, IPCC: 30 Years to Climate Calamity if We Carry on Blowing the Carbon Budget, GUARDIAN (Sept. 27, 2013, 1:00 PM), http://www.theguardian.com/environment/2013/sep/27/ipcc-world-dangerous-climate-change.
For decades, there has been a scientific consensus that climate change is occurring, GHG emissions cause it, and the world needs to curb GHG emissions to fight it. Still, the American people and government alike have only recently begun efforts to reduce GHG emissions.\textsuperscript{17} Though the United States no longer emits the most GHGs of any country \textit{per year},\textsuperscript{18} its total CO\textsubscript{2} emissions to date triple the second-largest emitter’s.\textsuperscript{19} In light of this legacy, it is fitting that President Barack Obama brokered the Copenhagen Accord in 2009.\textsuperscript{20} Under this nonbinding agreement, the president pledged the United States would cut its GHG emissions to 17 percent below 2005 (historical peak) levels by 2020.\textsuperscript{21} After Copenhagen, climate change legislation became a priority for congressional Democrats, but with elections looming in an

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, MANAGING THE RISKS OF EXTREME WEATHER EVENTS AND DISASTERS TO ADVANCE CLIMATE CHANGE ADAPTATION (Christopher B. Field et al. eds., 2012), available at http://ipcc-wg2.gov/SREX/images/uploads/SREX-All_FINAL.pdf.
\item See, e.g., Chris D. Thomas et al., Extinction Risk from Climate Change, 427 NATURE 145 (2004).
\item Duncan Clark, Which Nations Are Most Responsible for Climate Change?, GUARDIAN (Apr. 21, 2011, 10:40 AM), http://www.theguardian.com/environment/2011/apr/21/countries-responsible-climate-change. The United States accounts for over 28 percent of historic GHG emissions. Id. The next-highest historic emitter, China, accounts for 9 percent. Id.
\item Id.
\end{enumerate}
\end{footnotesize}
economic recession, the Senate withdrew its bill.\textsuperscript{22} Congress has not taken up the issue since.\textsuperscript{23} Unable to secure the two-thirds Senate majority needed to ratify a binding treaty, President Obama currently is negotiating a nonbinding agreement for the 2015 United Nations summit in Paris.\textsuperscript{24} The White House is not standing idly by until Paris, though. The president signed an agreement with China in 2014 promising that the United States will emit 26 to 28 percent less carbon in 2025 than it did in 2005.\textsuperscript{25}

To push toward these goals, the Obama administration is aggressively regulating GHGs, testing the limits of its authority under the Clean Air Act (“CAA” or “the Act”).\textsuperscript{26} At first glance, the CAA might seem like a natural fit. GHGs are not conventional (i.e., toxic) pollutants, like mercury or lead, but the CAA applies to “air pollutants,” a category broadly defined to include any substance that enters the ambient air.\textsuperscript{27} CAA section 111 allows the U.S. Environmental Protection Agency (EPA) to regulate sources of any air pollutant it finds endangers public health or welfare.\textsuperscript{28} Transportation (27.3 percent), energy (32.8 percent), and industry (19.9 percent) collectively account for 80 percent of U.S. GHG emissions,\textsuperscript{29} and the Act allows the EPA to regulate each of these sectors.\textsuperscript{30} Title II covers motor vehicles,\textsuperscript{31} and the CAA’s stationary source provisions apply to large energy and industrial facilities.\textsuperscript{32} If only it were that simple.

\begin{itemize}
\item \textsuperscript{23} The closest Congress has come since was when Senators Bernie Sanders and Barbara Boxer cosponsored the Climate Protection Act of 2013, which would have amended the Clean Air Act (CAA) to include a (modified) carbon tax. See Lisa Hymas, Sanders and Boxer Introduce “Fee and Dividend” Climate Bill; Greens Tickled Pink, GRIST (Feb. 15, 2013), http://grist.org/climate-energy/sanders-and-boxer-introduce-fee-and-dividend-climate-bill-greens-tickled-pink. The bill was symbolic, standing no chance of passing the Senate, let alone the Republican-controlled House. \textit{Id.} As such, the bill was more a statement by its sponsors than congressional action.
\item \textsuperscript{25} Mark Landler, \textit{U.S. and China Reach Climate Accord After Months of Talks}, N.Y. TIMES (Nov. 11, 2014), http://www.nytimes.com/2014/11/12/world/asia/china-us-xi-obama-apec.html.
\item \textsuperscript{26} Justin Gillis & Henry Fountain, \textit{Trying to Reclaim Leadership on Climate Change}, N.Y. TIMES (June 1, 2014), http://www.nytimes.com/2014/06/02/us/politics/obama-tries-to-reclaim-leadership-on-climate-change.html.
\item \textsuperscript{27} Clean Air Act of 1970, 42 U.S.C. § 7602(g) (2012).
\item \textsuperscript{28} § 7411(b)(1)(A).
\item \textsuperscript{30} See \textit{Pollutants and Sources}, EPA, www.epa.gov/ttnatw01/pollsour.html (last updated Sept. 18, 2013) (stating the CAA covers “mobile sources (e.g., cars, trucks, buses) and stationary sources (e.g., factories, refineries, power plants),” among other source types).
\item \textsuperscript{31} CAA Title II’s “motor vehicle” definition includes all self-propelled vehicles designed for road transportation. § 7550(2).
\item \textsuperscript{32} §§ 7479(1), 7602(j), 7661(2)(B).\end{itemize}
Upon closer examination, the CAA’s shortcomings as a tool against climate change become apparent. In *Utility Air Regulatory Group v. EPA (UARG)*, the Supreme Court constrained one GHG regulation program, but reading *UARG* as undermining just one rule overlooks the case’s broader implications for GHG regulation under the CAA as a whole. Looking beyond the specific rule challenged in *UARG*, the decision reveals the Court’s concerns about the scope of the EPA’s jurisdiction under the CAA. *UARG* leaves the outer limits of the agency’s jurisdiction under the CAA ambiguous. A pending challenge to the EPA’s new “Clean Power Plan” likely will force the Court to resolve this ambiguity.

In enacting the Clean Power Plan, the EPA asserts authority to regulate GHG sources throughout each state’s energy sector collectively under the CAA. A legal challenge to the Clean Power Plan will test the limits of the agency’s jurisdiction under the Act. If the agency loses, the CAA’s framework may prove too rigid for this administration’s ambitious climate goals. The near-term future of GHG regulation in the United States hangs in the balance.

To explore *UARG’s* implications for the Clean Power Plan, this Note starts by examining the legal and political developments preceding *UARG*. Second, it explains the *UARG* decision, focusing on the Court’s regulatory overreach concerns that may be relevant to the Clean Power Plan. Third, it introduces the EPA’s newly unveiled Clean Power Plan, highlighting important jurisdictional questions the rule raises in the wake of *UARG*. Fourth, the Note presents how a court can resolve these jurisdictional questions to uphold the Clean Power Plan without enabling agency overreach. The Note concludes with a discussion of the public policy implications of the Court’s resolution of this jurisdictional ambiguity.

I. SETTING THE STAGE FOR *UARG*: THE BRIEF HISTORY OF U.S. GHG REGULATION

*UARG* is the latest in a series of EPA rule-making decisions and appeals that together delineate the agency’s power and responsibility to regulate GHGs under the CAA. In order to understand *UARG’s* implications, first one must consider the brief history of American climate change policy.

Although the United States is a signatory to the 1997 Kyoto Protocol and the aforementioned Copenhagen and U.S.-China agreements, Congress has never passed federal legislation addressing climate change. Nor can litigation compensate for the lack of climate change legislation, since the CAA

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33. President Bill Clinton signed the Kyoto Protocol, but the Senate has not ratified it. Guri Bang et al., *US Presidents and the Failure to Ratify Multilateral Environmental Agreements*, 12 CLIMATE POL’Y 755, 755 (2012).
34. *See supra* notes 20–21, 25 and accompanying text.
displaces federal common law tort suits seeking redress for harm caused by air pollutants.\textsuperscript{36} Several high-profile court decisions have shown any legal effort to force GHG emission regulation must fit within the CAA’s parameters.\textsuperscript{37} As the Ninth Circuit concluded in \textit{Native Village of Kivalina v. ExxonMobil}, “the solution to [alleged climate change victims’] dire circumstance must rest in the hands of the legislative and executive branches of our government.”\textsuperscript{38} Few expect Congress to pass much legislation at all, let alone a statute addressing climate change, in the coming years.\textsuperscript{39} This leaves the executive branch (i.e., the EPA) to tackle climate change, with the CAA as its only option to limit GHG emissions directly; and for years, the EPA refused to do so.

\textsuperscript{36} See \textit{Am. Elec. Power Co. v. Connecticut}, 131 S. Ct. 2527, 2532 (2011) (finding that the CAA displaces federal common law claims seeking injunctions limiting sources’ GHG emissions); \textit{Native Vill. of Kivalina v. ExxonMobil Corp.}, 696 F.3d 849, 853 (9th Cir. 2012) (finding that the CAA displaces federal common law claims seeking damages for harm caused by climate change); Douglas Kysar, \textit{What Climate Change Can Do About Tort Law}, 41 ENVTL. L. 1, 8–44 (2011) (explaining how duty, proximate cause, breach, causation, and harm elements block common law climate change suits in a section titled “Climate Change as the Anti-Tort”).

\textsuperscript{37} See \textit{Am. Elec. Power Co.}, 131 S. Ct. at 2532; \textit{Kivalina}, 696 F.3d at 853.

\textsuperscript{38} See 696 F.3d at 858. The \textit{Kivalina} court addressed only the federal common law, but the concurrence explains why, even if not preempted by the CAA, a similar claim under state common law presumably would fail for lack of standing. See id. at 867–69 (Pro, J., concurring). This standing problem is related to the inherent difficulty of proving climate change caused the plaintiffs’ injuries. See Kysar, supra note 36, at 29–41.

\textsuperscript{39} See, e.g., Michael J. Teter, \textit{Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction}, 88 NOTRE DAME L. REV. 2217 (2013); Ezra Klein, \textit{14 Reasons Why This Is The Worst Congress Ever}, WASH. POST WONKBLOG (July 13, 2012), http://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever/ (listing “not passing laws” as the first reason why the 112th Congress is the “worst Congress ever”). To be fair, it is not certain a more active Congress would legislate on climate change either. Historically, Congress has passed legislation to prevent or prepare for the recurrence of a high-profile environmental disaster by addressing its identified cause. The massive hazardous waste cleanup at Love Canal, New York, offers an illustration. While working on the site, EPA Regional Administrator Eckardt Beck penned a letter asking about “the missing link of liability” and who was going to “pick up the tab” for the next Love Canal. Eckardt C. Beck, \textit{The Love Canal Tragedy}, EPA, http://www2.epa.gov/aboutepa/love-canal-tragedy (last visited May 22, 2015). Beck was not the only one concerned. See, e.g., Andrew C. Revkin, \textit{Love Canal and Its Mixed Legacy}, N.Y. TIMES (Nov. 25, 2013), http://www.nytimes.com/2013/11/25/booming/love-canal-and-its-mixed-legacy.html (referring to Love Canal as the “galvanizing story” behind the push to regulate “toxic hot spots left behind by industrial activity”). The next year, Congress passed Superfund, the Comprehensive Environmental Response, Compensation, and Liability Act, to address these concerns. See 42 U.S.C. §§ 9601–9628 (2012). A lethal chemical release at Bhopal, India, revealed the need for industrial sites to disclose what hazardous chemicals they stored on-site to first responders and community members, so Congress passed the Emergency Procedures and Community Right-to-Know Act. See \textit{What is EPCRA?}, EPA, http://www2.epa.gov/epcra/what-epcra (last updated Jan. 28, 2015). Scientists cannot prove GHG emissions have caused any particular event, so there is no clear demonstration like what happened at Love Canal and Bhopal to demonstrate why Congress must respond. See Memorandum from Dale Hall, Dir., U.S. Fish & Wildlife Serv., to Regional Directors, Regions 1–8, Expectations for Consultations on Actions that Would Emit Greenhouse Gases 1–2 (May 14, 2008), available at http://www.fws.gov/policy/m0331.pdf (“The best scientific data available today do not allow us[,] to draw a causal connection between GHG emissions from a given facility and effects posed to [the environment], nor are there sufficient data to establish that such impacts are reasonably certain to occur.”). Climate change’s abstract, incremental mechanics make inciting citizens to demand congressional action problematic. See \textit{SWIM ET AL.}, supra note 17, at 33–44.
In response, states and interest groups challenged and succeeded in overturning the EPA’s refusal to consider whether GHG emissions from mobile sources posed a threat to public health and welfare. In Massachusetts v. EPA, the Supreme Court ordered the EPA to consider the health and welfare impacts of GHG emissions. The Court concluded, if GHG emissions posed a threat, CAA section 202(a) requires the EPA to prescribe GHG emissions standards for new vehicles. In response, the EPA made an endangerment finding and enacted GHG new mobile source rules (the “Tailpipe Rule”) as required.

Next, the EPA issued a statement interpreting the CAA as requiring the agency to enact stationary source rules for every pollutant it regulates from mobile sources. The EPA then promulgated stationary source rules for GHGs, as this interpretation required. Several industry groups and states brought a legal challenge against the Tailpipe Rule, the agency’s finding that enacting the Tailpipe Rule required it to also regulate GHG stationary sources, and the content of the stationary source rules.

In Coalition for Responsible Regulation v. EPA, the D.C. Circuit upheld the Tailpipe Rule and deferred to the EPA’s finding that regulating mobile sources meant the agency had to regulate stationary sources as well. The court did not reach legal challenges to the substance of the stationary source rules though, as it dismissed those claims on procedural grounds.

41. Id. at 533–35.
42. Id. at 533 (“If EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate emissions of the deleterious pollutant from new motor vehicles.”).
48. Id.
49. Id. at 149.
Supreme Court then revived the stationary source rule challenges on appeal under the name *Utility Air Regulatory Group v. EPA (UARG).*

II. THE UARG DECISION

In *UARG,* states and industry groups challenged the EPA’s rule requiring two types of CAA permits to construct or renovate stationary GHG sources like power plants and factories. Under the Prevention of Significant Deterioration (PSD) program, source operators need permits to construct or significantly modify facilities. PSD applies only where local pollution does not violate national ambient air quality standards (NAAQS) for the air pollutant in question. There are no NAAQS for GHGs, so PSD governs new and renovated GHG sources throughout the country. To comply with a PSD permit, a facility must implement best available control technology to limit emissions. Title V imposes emissions monitoring and reporting requirements specified in regulated facilities’ permits.

The Act requires PSD and Title V permits for all “major stationary sources,” defined as any stationary source capable of emitting more than 100 or 250 tons per year (tpy) of any air pollutant, depending on the type of source. This definition poses a problem for GHG regulation. As the EPA noted, typical emissions of CO₂, the most common GHG, are “‘orders of magnitude greater’ than those of conventional pollutants.” Thus, applying the definition literally would require the EPA to administer an impossible number of permits to cover every “major” source. Additionally, only the very largest GHG sources emit enough to have a discernible impact, making regulation of these minor sources a waste of limited resources. In sum, the EPA cannot possibly administer permits for every source emitting at least 100 or 250 CO₂ tpy, and most of these

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50. *UARG,* 134 S. Ct. 2427.
51. *Id.* at 2435–36.
53. § 7471. The stricter New Source Performance Standards program applies to sources in areas where air quality violates NAAQS. § 7411.
55. § 7475(a)(4).
60. *See Proposed Tailoring Rule,* supra note 59, at 55,309.
sources are not significant enough to warrant permitting. At the time when the EPA issued the proposed rule, permitting authorities administered 14,700 Title V permits in total.\(^6^1\) The program had been a drain on state budgets for years already.\(^6^2\) Applying the CAA’s 100/250 tpy threshold would require administering permits for about 6.1 million new sources, necessitating a 250-fold increase in labor hours devoted to Title V permits.\(^6^3\) The EPA concluded that applying the 100/250 tpy threshold to GHG sources would be “administratively infeasible” and “create undue costs for sources and impossible administrative burdens for permitting authorities.”\(^6^4\) No matter how much the agency and permitting authorities streamlined the process, permitting all of these insignificant sources would be impossible.\(^6^5\)

To solve this, the EPA adopted the Tailoring Rule, a multistep approach designed to focus permitting efforts on the largest GHG emitters.\(^6^6\) First, the EPA would require permits only from “anyway” sources, those that would need permits for other air pollutants anyway (Step 1 or the Anyway Rule).\(^6^7\) Second, the agency would also require permits for non-anyway sources capable of emitting at least 100,000 tpy CO\(_2\)-equivalent GHG emissions (Step 2).\(^6^8\) The EPA left Step 3 and beyond to be determined after the agency reviewed whether permitting authorities could streamline the process enough to make permitting more sources cost-effective.\(^6^9\)

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61. Id. at 55,316.
63. Proposed Tailoring Rule, supra note 59, at 55,316.
64. Final Tailoring Rule, Steps 1 and 2, supra note 45, at 31,516, 31,547.
65. See Proposed Tailoring Rule, Step 3, supra note 46, at 14,237 (concluding that, despite streamlining efforts, state permitting authorities lack resources to administer significantly more permits).
68. 40 C.F.R. § 71.2 (2011), invalidated by UARG, 134 S. Ct. 2427 (Title V Step 2); 40 C.F.R. § 52.21(b)(49) (2014), invalidated by UARG, 134 S. Ct. 2427 (PSD Step 2). The EPA defines “carbon dioxide equivalent emissions” as the amount of CO\(_2\) the source would have to emit to contribute to climate change as much as its total annual GHG emissions do. 40 C.F.R. § 70.2; Glossary of Climate Change Terms, supra note 4.
69. See 40 C.F.R. § 71.13 (2010), invalidated by UARG, 134 S. Ct. 2427 (Title V Step 3 and beyond); § 70.12, invalidated by UARG, 134 S. Ct. 2427 (PSD Step 3 and beyond).
Industry groups challenged the permitting program in *UARG*, alleging, first, the EPA could not apply PSD and Title V to GHG sources and, second, the Tailoring Rule contradicted the Act by ignoring the 100/250 tpy threshold.\(^70\) The Court upheld the agency’s authority to regulate stationary GHG sources under PSD and Title V\(^71\) but struck down the Tailoring Rule’s Step 2.\(^72\) The CAA explicitly states emission capacity exceeding 100 or 250 tpy triggers permitting requirements, and the Court would not allow the EPA to rewrite clear statutory language by setting its own numeric threshold.\(^73\) Losing the Tailoring Rule outright would have forced the EPA and state agencies to write an infeasible number of permits, but the Court avoided administrability concerns by not only upholding Step 1’s Anyway Rule but making it permanent.\(^74\)

The *UARG* Court found the EPA could, but did not have to, regulate stationary GHG sources under PSD and Title V.\(^75\) This meant the EPA did not have to regulate all stationary GHG sources capable of emitting 100/250 tpy,\(^76\) but could not regulate beyond the bounds it had established for itself in prior regulations.\(^77\) Thus the Supreme Court reversed the D.C. Circuit’s prior decision in part.\(^78\) The Court found the EPA’s broad interpretation of “any air pollutant” applied in its general, Act-wide use, but the EPA could not regulate beyond its own previous, narrower definition of “any air pollutant” for PSD and Title V purposes, which did not include GHGs.\(^79\) Simply put, the Court permitted “any air pollutant” to mean different things in different parts of the CAA.

In concluding “any air pollutant” has a separate, narrower meaning for PSD and Title V, the Court started by establishing such an outcome was possible.\(^80\) To demonstrate this, the Court cited *Environmental Defense Fund v. Duke Energy Corp.*,\(^81\) the classic example of when an agency may interpret the same terms differently within the same statute.\(^82\) Unsurprisingly, *Duke Energy* involved a vague term from the CAA as well.\(^83\) There, the Court allowed the EPA to define “modification” one way under PSD and another way for New

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71. *UARG*, 134 S. Ct. 2427 (affirming the EPA’s authority to regulate stationary GHG sources with several qualifications).
72. Id. at 2445–46.
73. Id.
74. See id. at 2440.
75. Id. at 2444.
76. See id.
77. See id. at 2439–41.
78. See id.
79. See id.
80. See id. at 2441.
82. See *UARG*, 134 S. Ct. at 2441.
83. See 549 U.S. at 565–66.
Source Performance Standards.\textsuperscript{84} The Court upheld both definitions because, despite being two parts of the same statute, PSD and New Source Performance Standards serve different purposes.\textsuperscript{85} Therefore, the same term could mean different things in different parts of the Act.\textsuperscript{86}

Moreover, as discussed above, the \textit{Massachusetts} decision established the Act-wide definition of “any air pollutant” includes “all airborne compounds of whatever stripe,” but the EPA has defined the term more narrowly under some CAA provisions, including PSD and Title V.\textsuperscript{87} Specifically, the EPA’s official definition of what emissions can trigger PSD permitting restricts “any air pollutant” to include only “regulated” air pollutants, those that the CAA explicitly states the EPA must regulate.\textsuperscript{88} The EPA also had applied this definition when implementing Title V in the past.\textsuperscript{89} Thus, the EPA previously had defined “any air pollutant” to exclude GHGs, making the agency’s addition of GHGs to “any air pollutant” a new interpretation subject to judicial review.\textsuperscript{90} This allowed the Court to deny the EPA authority to regulate sources under PSD and Title V solely based on GHG emissions if this constituted an unreasonable interpretation of the Act.\textsuperscript{91} The Court found the EPA’s inclusion of GHGs in “any air pollutant” under PSD and Title V, coupled with the mandatory 100/250 tpy permitting trigger, would require an absurd number of permits.\textsuperscript{92} The Court reasoned, without the Tailoring Rule, this interpretation would undermine the Act’s purpose by rendering the permitting programs unadministrable.\textsuperscript{93} Accordingly, the Court invalidated the EPA’s assertion of PSD and Title V permitting authority based on GHG emissions as an unreasonable construction of the Act.\textsuperscript{94}

The \textit{UARG} decision denied the EPA authority to permit non-anyway sources, making Step 1’s Anyway Rule permanent.\textsuperscript{95} As a result, the EPA cannot permit any facilities based solely on GHG emissions, even if the source emits GHGs quite heavily.\textsuperscript{96} This is not as concerning as it might first appear. As the Court explains, non-anyway sources capable of emitting over 100,000 tpy of CO\textsubscript{2} equivalent account for only 3 percent of the power sector’s GHG emissions.\textsuperscript{97} Hence, while the states and industry groups challenging the

\textsuperscript{84} Id. at 576.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 2439 (quoting Massachusetts v. EPA, 549 U.S. 497, 529 (2007)).
\textsuperscript{88} Id. at 2440.
\textsuperscript{89} Id.
\textsuperscript{90} See id.
\textsuperscript{91} See id.
\textsuperscript{92} Id. at 2442–43.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 2448–49.
\textsuperscript{96} Id. at 2439–40.
\textsuperscript{97} Id.
Tailoring Rule won in UARG, someone reading commentary on the decision might not have noticed. Most media coverage declared UARG a victory for the EPA, focusing on the Court’s approval of stationary source GHG regulation in principle and dismissing the Anyway Rule as irrelevant.98

The Anyway Rule makes little difference today, but only because non-anyway sources do not account for much of current total GHG emissions. Title V operating permits provide monitoring, reporting, and recordkeeping requirements in addition to the substantive air pollution standards that stem from other CAA provisions.99 PSD applies only to new (and modified) sources,100 so PSD permitting for GHG sources will only be as useful as it is applicable to the coming generations of sources. The Anyway Rule may be here to stay, but at the rate technologies change, large non-anyway sources could one day account for a substantial portion of GHG emissions. This poses the possibility that the Anyway Rule might prevent the EPA from regulating the same major GHG sources under PSD that it could have regulated under the Tailoring Rule approach. To determine if the Anyway Rule may become a more substantial obstacle to effective new GHG source regulation in the future, this Note evaluates whether the EPA ever could have meaningfully regulated non-anyway sources under PSD had the Tailoring Rule survived UARG.

A. Practical Barriers to the Tailoring Rule Approach

The EPA structured its Tailoring Rule for the long term, recognizing climate change policy will have to adapt to now-unforeseeable changes.101 The agency envisioned the Anyway Rule (Step 1) as a means to phase in new GHG source permitting, not a permanent restriction on the program’s scope.102 Right now, regulating non-anyway sources capable of emitting over 100,000 tpy of

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101. See Final Tailoring Rule, Steps 1 and 2, supra note 45, at 31,524.

102. See id. at 31,516.
CO₂-equivalent (Step 2) would be inconsequential, but the EPA did not devise Step 2 merely to regulate 3 percent more emissions than possible under Step 1. Rather, the EPA sought to establish authority to define the permitting program’s scope with its own numeric threshold. With discretion to set its own number, the EPA could lower this threshold and expand the program in the future. Once permitting authorities can afford to administer more permits, the agency could lower the permitting trigger threshold and regulate more sources, accounting for more GHG emissions.

In *UARG*, the Court denied the EPA this flexibility, creating two potential long-term concerns. First, as discussed, the EPA could have lowered the Tailoring Rule’s numeric threshold as regulating smaller sources became feasible, but the gaps in the Anyway Rule’s coverage are, for the time being, permanent. Second, the Anyway Rule exempts sources from GHG permit requirements based on conventional pollutant emissions, not GHG emissions, making GHG permitting effectiveness dependent on a correlation between conventional and GHG pollution.

In theory, these concerns help explain why the EPA included non-anyway source regulation in the Tailoring Rule, but the EPA’s own data suggests expanding the Tailoring Rule to non-anyway sources would provide too little climate benefit at too great an administrative cost. If the EPA needs to regulate more sources, permitting every source that can emit more than “X” tpy would not accomplish much. Before *UARG*, the EPA decided it would not reduce the threshold below 100,000 tpy for Step 3. The data the agency cited in support of this decision demonstrates the adjustable numeric threshold approach is fundamentally ill-suited for regulating so many sources. Cutting the threshold in half to 50,000 tpy would cover nearly twice as many sources but account for only 3 percent more of U.S. GHG emissions. The EPA saw these figures and decided against lowering the threshold for Step 3. The EPA and state permitting authorities have limited resources, and administering significantly more permits for sharply diminishing returns is cost ineffective. Perhaps the Supreme Court did the EPA a favor by limiting it to the Anyway Rule.

The data suggest the EPA did not stand to gain ground curbing climate change by adjusting its Tailoring Rule to cover progressively smaller non-

104. The EPA planned to lower its 100,000 tpy threshold in Step 3, once experience and potential future streamlining measures expanded permitting authorities’ permitting capacity. *Final Tailoring Rule, Steps 1 and 2, supra* note 45, at 31,524. In its Step 3 proposal, the EPA stated it was considering a threshold potentially as low as 50,000 tpy. *Proposed Tailoring Rule, Step 3, supra* note 46, at 14,235.
105. *See UARG*, 134 S. Ct. at 2449.
107. *See id.*
108. *Id.*
109. *Id.* at 14,238.
anyway sources.\textsuperscript{110} Granted, these data reflect only existing sources.\textsuperscript{111} It is possible the Anyway Rule could cause the EPA to lose authority over some sources, but for this to make a significant difference would require a wave of new facilities that emit GHGs heavily but cannot emit enough of any conventional pollutant to require a permit. Barring a sweeping green technology revolution slashing conventional pollution but not GHG emissions, losing authority to regulate major GHG sources is unlikely. For these reasons, the Anyway Rule will not be the permitting program’s undoing.

B. How UARG Illustrates the Court’s Opposition to Small-Source, Nonindustrial Source Regulation as Regulatory Overreach

The Court’s Tailoring Rule revisions will not make or break national climate change policy, but beneath the surface, the UARG decision speaks to more than just administrability. The majority’s justification for denying non-anyway jurisdiction in UARG reveals the Court’s broader concerns about the general scope of the EPA’s regulatory authority: even if permitting authorities could afford to permit every “major” GHG source, the Court would bar permitting for small, nonindustrial sources as exceeding the regulatory scope Congress intended under the CAA.

The Court first indicated its disfavor for broad regulatory authority in its response to proposed streamlining measures. The EPA considered several streamlining methods to enable permitting more, smaller sources, giving particular attention to general permitting.\textsuperscript{112} Typically, the agency issues specific permits to each individual source, but small GHG sources and permitting authorities alike would struggle with specific permitting’s administrative burdens.\textsuperscript{113} Rather than focus on an individual source, a general permit sets standards for an entire source category.\textsuperscript{114} General permits require less, if any, paperwork and oversight compared to specific permits.\textsuperscript{115} This comes at a cost. While general permits are much cheaper to administer, they do not provide for individual source monitoring, making enforcement problematic—if not impossible.\textsuperscript{116} The EPA left general permitting out of the final Clean Power Plan.\textsuperscript{117} Nonetheless, the possibility of streamlining the process enough to permit small sources, coupled with the EPA’s admission Congress intended the CAA to “focus[] on large industrial sources”\textsuperscript{118} elicited a pointed response from the Court: “[I]n any event, [streamlining] would [not]
address the more fundamental problem of EPA’s claiming regulatory authority over millions of small entities that . . . the Act does not seek to regulate.” 119

The Court went even further in its justification for denying the EPA authority to permit non-anyway sources, stating that regulating non-anyway sources would “bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.” 120

Here, the Court draws a line in the sand: the EPA may regulate GHG sources, 121 but it cannot regulate the types of sources that Congress did not envision it regulating when it passed the CAA. 122 Nonetheless, GHG emissions are so ubiquitous that the EPA eventually must regulate small, nonindustrial sources, and other unconventional sources, to stymie climate change. This underscores the long-term need for legislation explicitly granting the agency broader GHG regulation authority, but no such legislation is on the horizon. In fact, the current Congress disfavors existing GHG regulations, let alone a more expansive policy. 123 Until a future Congress passes such legislation, the EPA must work within what authority it has under the CAA in the wake of UARG. Accordingly, this Note examines how the Court’s fear of agency overreach may impact the farthest-reaching climate change regulation in American history: the Clean Power Plan.

III. JURISDICTIONAL CONCERNS FOR THE CLEAN POWER PLAN POST-UARG

On June 18, 2014, the EPA proposed the Clean Power Plan, a national program to regulate existing stationary GHG sources under CAA section 111(d). 124 The plan’s objective is to cut national power sector GHG emissions 30 percent below 2005 levels by 2030. 125 As CAA section 111(d) dictates, the

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120. Id. at 2444.
122. See supra notes 118–120 and accompanying text.
125. Id.
EPA proposed to implement the Clean Power Plan in three phases.\textsuperscript{126} First, the EPA publishes guideline documents setting emission standards and identifying the “best system of emission reduction” (BSER) that makes the 30 percent target attainable.\textsuperscript{127} Section 111(d) allows flexibility in defining this performance standard, so instead of capping gross emissions, the EPA set binding targets for each state’s CO\textsubscript{2} produced per megawatt hour of power generated.\textsuperscript{128} The EPA set a unique CO\textsubscript{2} efficiency goal for each state, based on each state’s power sector’s current CO\textsubscript{2} efficiency and capacity to improve.\textsuperscript{129} Second, each state sets source performance standards designed to achieve the state’s assigned emissions targets.\textsuperscript{130} Third, each state submits a section 111(d) plan for the EPA’s approval.\textsuperscript{131} If the state does not submit an approved plan in time, the EPA may impose its own plan on the state.\textsuperscript{132}

Regulating CO\textsubscript{2} under section 111(d) affords the EPA a wide array of options, but because the agency has invoked this provision so infrequently, its limitations have remained largely untested.\textsuperscript{133} With the enactment of the Clean Power Plan, a major test of the EPA’s legal authority under section 111(d) is coming soon. Twelve coal states sued the EPA, challenging the Clean Power Plan before the Administrative Procedure Act even allows challenges to agency rules.\textsuperscript{134} A federal judge promptly dismissed Nebraska’s case as premature.\textsuperscript{135} The other lawsuits met the same end soon thereafter, as the Administrative Procedure Act only allows judicial review of final agency rules.\textsuperscript{136} Once the EPA finalizes the Clean Power Plan though, the agency will have to defend it in court. Likely, challengers will target a controversial aspect of the EPA’s proposed BSER: “beyond the fenceline” measures.\textsuperscript{137}

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\begin{itemize}
\item \textsuperscript{127} See 40 C.F.R. § 60.22(b) (2014).
\item \textsuperscript{129} Id.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} § 7411(d)(2).
\item \textsuperscript{133} Tarr et al., supra note 126, at 7.
\item \textsuperscript{135} Jeremy P. Jacobs, Judge Rejects Neb.’s Challenge of EPA Power Plant Rules, GREENWIRE (Oct. 8, 2014), http://www.eenews.net/greenwire/2014/10/08/stories/1060007080 (referring to the rule’s “outside the fence” approach).
\item \textsuperscript{136} In re Murray Energy Corp., (D.C. Cir. 2015).
\end{itemize}
In its simplest and broadest construction, the term “beyond the fenceline” refers to everything outside the electricity-generating unit itself.\textsuperscript{138} Without further refinement, this would include measures ranging from improved plant substations to interstate cap-and-trade programs to energy efficiency in homes and office buildings.\textsuperscript{139} The EPA left its definition broad, affording states and sources flexibility in devising their compliance efforts,\textsuperscript{140} but the agency qualified the Clean Power Plan’s necessary scope in one way that may prove crucial: In response to commenters’ concerns the Clean Power Plan’s BSER required reductions outside the energy sector, the EPA clarified states can achieve their targets without any action beyond the control owners and operators.\textsuperscript{141} Therefore, the Clean Power Plan requires emission reduction efforts beyond electricity-generating units’ fencelines, but only within the energy sector.\textsuperscript{142} Whether this qualification can preserve the Clean Power Plan from judicial invalidation is a matter of interpretation.

\textbf{A. Interpreting BSER Under Clean Air Act Section 111(d)}

In \textit{UARG}, the Court interpreted the CAA’s PSD and Title V provisions in terms of both plain language\textsuperscript{143} and the EPA’s past interpretations of ambiguous language.\textsuperscript{144} In the likely event a legal challenge to the Clean Power Plan finds its way to the Supreme Court, the Court will likely find that section 111(d) and its accompanying regulations will not offer as much guidance.\textsuperscript{145} Plain statutory language and past agency interpretations likely will not be the most relevant limiting factor on the Clean Power Plan’s potential scope, but once again, the EPA is pushing the limits of the CAA as a whole. Given the breadth and ambiguity of section 111(d)’s language, the Court is unlikely to restrain the Clean Power Plan’s scope based on parsing words. Rather, the Court likely will allow the EPA to regulate GHG emissions under the Clean Power Plan to the outer jurisdictional limits Congress intended for the CAA as a whole.

\begin{itemize}
\item \textsuperscript{138} Tiffany Stecker, \textit{Regulations 101—A Primer on EPA’s Upcoming Power Plant Rule}, CLIMATEWIRE (May 30, 2014), www.eenews.net/climatewire/2014/05/30/stories/1060000435.
\item \textsuperscript{139} \textit{See id.}
\item \textsuperscript{140} \textit{See TARR ET AL., supra note 126, at 15 (“[T]he Agency [issues] guideline documents that define the best system of emission reduction. . . . [L]ess specificity on the part of the EPA [gives] states more flexibility to craft plans for satisfying section 111(d).”).}
\item \textsuperscript{141} Proposed Clean Power Plan, supra note 124, at 34,888–89.
\item \textsuperscript{142} \textit{See id.}
\item \textsuperscript{143} \textit{E.g., the 100/250 tpy permitting trigger threshold. See  Clean Air Act of 1970, 42 U.S.C. §§ 7602(j), 7661(2)(B) (2012).}
\item \textsuperscript{144} \textit{E.g., “any air pollutant” for PSD and Title V purposes. See supra notes 75–93 and accompanying text.}
\item \textsuperscript{145} \textit{See TARR ET AL., supra note 126, at 7 (explaining that much of section 111(d)’s language is ambiguous and that the EPA has seldom invoked or interpreted it).}
\end{itemize}
Legal challenges to the Clean Power Plan likely will involve the definition of “best system of emission reduction,” but framing the case as a debate over the meaning of “system” would ignore an important takeaway from UARG. Likely, the Court will not determine the Clean Power Plan’s jurisdictional limits based on any organic meaning of the word “system.” Rather, it likely will limit the EPA’s discretion in defining “system” within the outer limits of the CAA itself. Thus, a prudent challenge to the Clean Power Plan would focus not on whether the term “system” includes what the EPA incorporated into its BSER, but instead on whether Congress intended the CAA to authorize the types of beyond-the-fenceline measures necessary to comply with the Clean Power Plan. On these grounds, UARG raises the possibility the Court may find overreach and disallow beyond-the-fenceline regulation.

B. Beyond-the-Fenceline Measures As Potential Agency Overreach

In UARG, the Court denied the EPA non-anyway source permitting jurisdiction to prevent agency overreach into regulating small, nonindustrial sources, such as “retail stores, offices, apartment buildings, shopping centers, schools, and churches.” Justice Scalia’s opinion leaves unclear whether the number and size of these sources or their nonindustrial nature is what offends the boundaries of CAA jurisdiction. The Clean Power Plan does not attempt to regulate nonindustrial sources, but beyond-the-fenceline offsets could come from a vast number of small individual sources. This may prove problematic.

Generally, the CAA focuses on in-fenceline measures, but this distinction can hold back emissions reduction efforts because, often, the most cost-effective means to reduce emissions lie outside the regulated facilities themselves. The EPA attempts to work around this dogmatic distinction by regulating beyond the fenceline indirectly. The Clean Power Plan allows sources to meet their emissions targets by whatever means they choose, including beyond-the-fenceline offsets, to minimize costs. Such beyond-the-fenceline measures improve the Clean Power Plan’s cost-effectiveness—but they may also make the rule vulnerable to a legal challenge. Specifically, a challenger might argue the EPA’s attempt to regulate countless individual small

149. See Proposed Clean Power Plan, supra note 124, at 34,832 (“[T]he most cost-effective system of emission reduction for GHG emissions from the power sector under CAA section 111(d) entails . . . taking advantage of opportunities for lower-emitting generation and reduced electricity demand across the electricity system’s interconnecting network or grid.”).
sources in one sweeping rule under the guise of nominally voluntary “offsets” constitutes agency overreach, downplaying the fact that these sources would all be industrial in nature. The claim is best illustrated by example.

Suppose the owner of a hypothetical power plant (Plant) can afford to allocate $10 million\(^1\) to GHG emissions mitigation between 2015 and 2030. The EPA cannot enforce more stringent standards than sources can afford, making compliance costs a cap on how steep of reductions the EPA can require.\(^2\) Improving the Plant’s GHG emissions by 20 percent through a strictly in-fenceline approach would cost $10 million, making a 20 percent reduction the most the Plant can afford without going beyond the fence line. By incorporating measures beyond the fence line but within the Plant’s control, the Plant can make the same 20 percent emissions reduction for $8 million. Thus, by allowing beyond-the-fenceline offsets, the EPA would get the same emissions cuts while the Plant saves $2 million. Using off-site offsets this way would not raise concerns about regulating beyond the fenceline because the Plant could afford compliance through strictly on-site measures, making cost-saving off-site measures voluntary. This approach likely would not raise significant jurisdictional concerns, but the EPA’s Clean Power Plan goes a step further.

To illustrate how the Clean Power Plan treats beyond-the-fenceline offsets, suppose the EPA sets a stricter standard, requiring the Plant to cut emissions by 30 percent. Reducing emissions 30 percent on-site would cost $12 million—$2 million more than the Plant can afford. In order to comply, the Plant must take both on-site and off-site measures, costing $10 million total. This more stringent standard makes beyond-the-fenceline measures mandatory because the Plant cannot comply without them. This is a simplified (and more expensive, relative to plants’ budgets) version of how the EPA determined its state-by-state (and, by extension, source-by-source) targets under the Clean Power Plan. This approach is effective in getting plants to cut emissions as much as they can afford, but it raises a jurisdictional question: Can the EPA set emission standards under section 111(d) so low that sources must implement off-site measures to comply?

In short, the EPA set the Clean Power Plan’s targets assuming sources will adopt beyond-the-fenceline measures wherever cost-effective. Thus, the Clean Power Plan sets targets too low for sources to meet solely in-fenceline, effectively making beyond-the-fenceline measures mandatory. This is legally problematic because the UARG decision demonstrated the Court’s unwillingness to allow the EPA to regulate beyond the CAA’s intended

\(^{1}\) Ten million dollars is an arbitrary, round figure, not intended to reflect actual plants’ budgets. \(^{2}\) See Clean Air Act of 1970, 42 U.S.C. § 7411(b)(2) (2012) (explaining it is “not feasible to prescribe or enforce a standard of performance” if the standard is, among other things, economically or technologically impractical).
scope. As the Court declared in UARG, “When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ [the Court] typically greet[s] its announcement with a measure of skepticism.”

In UARG, the Court found small, nonindustrial GHG sources fell outside the EPA’s jurisdiction under not just PSD and Title V but the CAA as a whole. Even a narrow reading of UARG suggests the EPA will meet a “measure of skepticism” from the Court once again on beyond-the-fenceline jurisdiction.

The Court striking down the Clean Power Plan for mandating beyond-the-fenceline measures would not prohibit GHG regulation under CAA section 111(d) altogether, but it would undermine the EPA’s GHG emissions reduction efforts. The agency would have to loosen state targets to reflect a strictly in-fenceline BSER, leaving attainable emissions reductions off the table. Even if the EPA cannot require off-site measures, though, there is no reason the EPA cannot allow sources to meet GHG standards more cheaply by voluntary beyond-the-fenceline offsets. Likely, the Court would allow the EPA to credit states and sources for voluntary beyond-the-fenceline offsets—once the EPA establishes sources can afford to meet their targets without them (making off-site offsets truly voluntary). This outcome would not crush the Clean Power Plan outright, but it would be a win for industry, which would gain lower efficiency standards and compliance costs at the expense of progress against climate change.

If the EPA can distinguish a challenge to the Clean Power Plan from UARG, beyond-the-fenceline regulation need not die in court like non-anyway source permitting. UARG established the Court’s unwillingness to extend the EPA’s jurisdiction to include small, nonindustrial sources, but the Clean Power Plan does not purport to regulate nonindustrial sources. Depending on whether the Court believes Congress intended the CAA to apply to the energy sector broadly, this distinction may save the Clean Power Plan from suffering the same fate as the Tailoring Rule.

IV. DISTINGUISHING THE CLEAN POWER PLAN FROM UARG: WHY THE EPA’S AUTHORITY UNDER SECTION 111(D) NEED NOT GO BEYOND INDUSTRY AND MIGHT GO BEYOND THE FENCELINE

This Note is not the first attempt to apply the agency overreach concerns the Supreme Court articulated in UARG to the Clean Power Plan. Speculation as to the EPA’s jurisdiction beyond the fenceline under the CAA predates the

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154. Id. at 2443 (citation omitted).
155. See id. at 2444.
156. See id. at 2246.
UARG decision\textsuperscript{157} and has continued since.\textsuperscript{158} Commentators have picked apart UARG and its implications for the Clean Power Plan extensively, but the current conversation has glossed over a distinction that may decide a challenge to the Clean Power Plan’s much-debated “beyond the fenceline” mandates.

Thus far, the debate on the EPA’s beyond-the-fenceline jurisdiction under the CAA has focused on the in-fenceline/beyond the fenceline distinction.\textsuperscript{159} Some have acknowledged the difficulty of fenceline-drawing, preferring to characterize the distinction as a spectrum with greater liability risk “as regulatory design moves away from unit-specific compliance” rather than relying on a strict on-site/off-site binary.\textsuperscript{160} Still, the discussion equates the bounds of the EPA’s jurisdiction with geographic proximity to directly regulated facilities rather than the scope of the regulated industry.

\textit{UARG} did not contradict this proximity-based view, but the EPA may prefer an alternative explanation: In \textit{UARG}, the Court denied non-anyway jurisdiction not because it went beyond the geographic scope of conventional sources’ fencelines (as requiring off-site measures would) but because many non-anyway sources are nonindustrial. That is, the Court’s concern is not where to draw sources’ boundaries but how to protect nonindustrial source owners from being regulated like industry.

The EPA avoided regulating nonindustrial GHG sources under PSD and Title V by including the 100,000 tpy threshold in the Tailoring Rule,\textsuperscript{161} but the Court overturned this jurisdictional restriction for contradicting clear language in the CAA.\textsuperscript{162} Therefore, the Court’s last remaining option to ensure the EPA would not regulate homes, businesses, and the like was to deny non-anyway jurisdiction altogether.\textsuperscript{163} In a challenge to the Clean Power Plan, the Court would not have to contend with a contradiction of clear statutory language. Thus, the Court would have to roll back the Clean Power Plan only where it regulates types of sources Congress did not intend the Act to regulate. By this reasoning, the Court could uphold the Clean Power Plan’s GHG emission


\textsuperscript{159} See supra notes 137–142 and accompanying text.
\textsuperscript{160} TARR ET AL., supra note 126, at 16.
\textsuperscript{161} \textit{UARG}, 134 S. Ct. at 2453.
\textsuperscript{162} See supra note 73 and accompanying text.
\textsuperscript{163} See \textit{UARG}, 134 S. Ct. at 2446.
reduction targets, as the EPA based these targets on a BSER requiring no action outside each state’s energy sector.\textsuperscript{164}

The \textit{UARG} decision showed the Court’s unwillingness to authorize the EPA to regulate nonindustrial sites as sources under the CAA,\textsuperscript{165} but the Clean Power Plan does not require action outside of industry.\textsuperscript{166} In fact, to comply with the Clean Power Plan, states need not regulate beyond the energy sector.\textsuperscript{167} States may choose to reduce compliance costs further by implementing nonindustrial measures, but, unlike going beyond the fenceline, regulating outside of industry truly would be voluntary for states.\textsuperscript{168} A state’s authority to implement a given nonindustrial emissions reduction program is a separate matter to be assessed case-by-case, but this would not implicate the legality of the Clean Power Plan itself.\textsuperscript{169} The EPA’s decision to require only as drastic GHG emissions cuts as each state can achieve within its energy sector restricts the category of sources states would need to regulate to comply, narrowing the issue in a challenge to the Clean Power Plan’s scope. Thus, the Court may determine whether the Clean Power Plan exceeds the EPA’s jurisdiction by answering one narrow question: Does CAA section 111(d) authorize the EPA to require beyond-the-fenceline measures \textit{within the energy sector}?

No court has answered this question directly, but the \textit{UARG} decision suggests the Court might conclude the EPA does have broad authority to regulate the energy sector’s GHG emissions as a whole. In assessing Congress’s intended scope for the PSD and Title V programs, the Court quotes \textit{Alabama Power Co. v. Costle}, “Congress’s intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation’s air.”\textsuperscript{170} Here, the Court emphasized Congress’s intent to regulate industry, suggesting CAA jurisdiction may have more to do with whom the Clean Power Rule regulates than where.\textsuperscript{171} The EPA has regulated air pollution from the energy sector heavily since the CAA’s inception, so regulating the energy sector in general is not problematic. Regulating the whole energy sector under

\begin{itemize}
\item \textsuperscript{164} \textit{See supra} notes 127–132 and accompanying text.
\item \textsuperscript{165} \textit{See supra} notes 119–122 and accompanying text.
\item \textsuperscript{166} \textit{See supra} notes 127–132 and accompanying text.
\item \textsuperscript{167} \textit{See id.}
\item \textsuperscript{168} \textit{Cf. supra} Part II.B (illustrating the jurisdictional implications of the distinction between emissions reduction targets states can attain in-fenceline and those which states cannot attain without taking beyond-the-fenceline measures).
\item \textsuperscript{169} \textit{See TARR ET AL., supra} note 126, at 15 (“[A nonspecific approach to defining BSER] \ldots may limit judicial reversal to the EPA’s approval or denial of a state’s plan without undermining the entire rule.”).
\item \textsuperscript{170} \textit{Util. Air Regulatory Grp. v. EPA (UARG),} 134 S. Ct. 2427, 2453 (2014) (quoting Ala. Power Co. v. Costle, 636 F.2d 323, 353 (D.C. Cir. 1979)).
\item \textsuperscript{171} \textit{See id.}
\end{itemize}
one rule, though, would be novel,172 raising the last point of contention addressed here.

If the Court concludes the EPA has broad authority to regulate GHG emissions within the energy sector, the only question left would be whether the EPA can incorporate all of the GHG emissions reduction efforts it can require into one program. Congress intended CAA section 111(d) as a catchall provision, granting the EPA broad authority to implement measures best suited to curb emissions of unique air pollutants.173 GHGs are certainly air pollutants, and regulating all energy sector GHG emissions under one consolidated section 111(d) rule likely is the most effective means to curb GHG emissions.

CONCLUSION

Climate change is a stoppable force,174 but Scalian textualism is an unmoving object around which the EPA must navigate. UARG set the kind of arbitrary boundary American climate change policy eventually must reject in order to take the lead in the international fight against climate change. Absent explicit congressional authorization, the Supreme Court has resisted allowing the EPA to adapt to the unique challenge of climate change with as flexible and dynamic an approach as necessary.175 The Republican majorities in both houses have expressed no interest in passing legislation to further the EPA’s authority to combat climate change. In fact, Republican leadership has discussed legislation to dismantle current GHG regulations.176 Though congressional and State Republicans might be able to garner some concessions, an outright repeal is unlikely.177 Thus, until the American political system produces a Congress willing to address climate change directly through legislation, the EPA must carry on with what authority it can muster under the CAA.

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173. See Coral Davenport, Brothers Battle Climate Change on Two Fronts, N.Y. TIMES (May 10, 2014), http://www.nytimes.com/2014/05/11/us/brothers-work-different-angles-in-taking-on-climate-change.html?_r=0 (stating that Congress tasked section 111(d)’s author Robert Nordhaus with drafting “a provision giving the federal government the authority to regulate as-yet-unknown pollutants of the future”).


175. In Justice Scalia’s words, the Court is “not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery.” UARG, 134 S. Ct. at 2446. The Court’s tone in UARG is anything but conciliatory.

176. Massey, supra note 123; Volcovici, supra note 123.

177. See Massey, supra note 123.
Political rhetoric against GHG regulation has shifted from denying climate change’s existence to insisting substantial emissions reductions would be too costly. The EPA designed the Clean Power Plan with these cost concerns in mind. It consolidates the agency’s existing GHG regulations into one comprehensive, energy sector-wide rule not because the agency wants to exercise broad authority for its own sake but because a source-by-source approach would be inefficient. The Clean Power Plan effectively commits states to the president’s promise to China while providing states and sources flexibility to minimize compliance costs. As President Obama put it, the United States will need to implement all “available tools” to make good on this promise. This includes a Clean Power Plan incorporating beyond-the-fenceline regulation within the energy sector, which likely would not even be enough by itself. The EPA likely will have to enact additional GHG regulations, such as the new methane rule EPA Administrator Gina McCarthy currently is considering, to reach its goals.

An in-fenceline constraint on the Clean Power Plan would hinder progress by forcing the EPA to scale back its section 111(d) rule and then make up the difference by regulating each step of the energy production process one rule at a time. Each successive rule would have to go through drafting, notice, comment, response to comments, and revision. The Tailpipe Rule illustrates this point. The EPA proposed its PSD and Title V permitting rule for GHGs in


179. See Proposed Clean Power Plan, supra note 124, at 34,866 (finding GHG emission reduction benefits will far outweigh compliance costs. Later, adding that compliance cost projections are “likely overstated” because “additional flexibility available to states [will lead to] significantly smaller economic impacts.”).

180. The Clean Power Plan’s 30 percent national target leaves some room to spare, but states’ compliance records for other air quality standards suggest the EPA should not rest on its laurels, even if the Clean Power Plan does survive a legal challenge intact. For example, forty-six air quality areas populated by over one hundred and twenty million people still failed to meet the eight-hour ozone NAAQS in 2008, up from thirty-seven areas and just over one hundred million people in 1997. Summary Nonattainment Area Population Exposure Report, EPA (Jan. 30, 2015), http://www.epa.gov/oaqps001/greenbk/popexp.html.


182. See id.

183. See id.; DAVID MCCABE, CLEAN AIR TASK FORCE, WASTE NOT: COMMON SENSE WAYS TO REDUCE METHANE POLLUTION FROM THE OIL AND NATURAL GAS INDUSTRY 2–6 (2015), available at http://www.catf.us/resources/publications/files/WasteNot.pdf (concluding that the United States likely cannot reduce its GHG emissions sufficiently to comply with the 2014 agreement with China without the EPA regulating methane emissions from oil and gas operations); see also IETA’s Forrister Talks Next Steps for U.S.-China Agreement, EPA Emissions Plan, EETV (Nov. 17, 2014), http://www.eenews.net/tv/videos/1899 (“I don’t see how [the United States] would get [to the 26-to-28 percent GHG reduction target in its agreement with China] without the Clean Power Plan.”).

and the rule was stranded in court until 2014. Likewise, by the
time the courts resolve the Clean Power Plan’s legal uncertainties, it may be too
too late to start from scratch rule-by-rule and still comply with America’s
international commitments. If the courts strike down the Clean Power Plan after
five years of litigation, the EPA will have to start over in 2020. This would
leave the EPA only ten years to devise new rules to salvage what reductions it
can in hopes of complying with the Copenhagen and China agreements. Even
then, each successive GHG rule the EPA passes would raise its own lengthy
legal and political challenges. As Columbia Law Professor Michael Gerrard
puts it, “Litigation about the EPA’s rules is as certain as death and taxes.”

Battles in courtrooms and Congress would not be the only inefficiencies in
a segmented GHG regulation policy. A rule-by-rule approach would be
prohibitively rigid, leading to waste. Under the Clean Power Plan’s
statewide approach, states and sources have several options (offsets, source
averaging, and regional cap-and-trade, to name a few) to focus their efforts on
the most cost-effective means to reduce emissions. A piecemeal policy
where the EPA enacts a separate command-and-control rule for each stage of
various industrial processes would lack the Clean Power Plan’s flexibility and,
therefore, its cost-effectiveness. A series of separate, explicit mandates
would force sources into one uniform approach to emissions reduction even
when they can achieve the same results at less cost through more innovative
means. The EPA has its mission (the Copenhagen Accord, the agreement with
China, and the 2015 Paris Summit) and will do all it can to reach its goals, but
arbitrary distinctions like anyway/non-anyway and in-fenceline/beyond the
fenceline waste time, effort, and money.

Denying the EPA beyond-the-fenceline jurisdiction would limit what the
agency can achieve in regulating GHGs under the CAA. Until Congress lifts
this restriction, authorizing a comprehensive climate change policy through

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187. See Gerrard, supra note 157. Gerrard’s statement would have been more accurate (though it
would have lost some rhetorical punch) had he qualified it to include only major EPA rules. The
statement likely applies to GHG regulations, which states and industry groups have demonstrated a
commitment to fighting in court, but it no longer applies to EPA rules in general. Before 1990, 80
percent of EPA rules went to court, but more recent data suggests this is no longer the case. See Cary
Coglianese, Assessing Consensus: The Promise and Performance of Negotiated Rulemaking, 46 DUKE
L.J. 1255, 1287 (1997). In the years following the Negotiated Rulemaking Act of 1990 and its 1996
reauthorization, the challenge rate for EPA rules was only about 20 percent. Id. Regardless, challenges
to any major GHG rules the EPA promulgates in the coming years appear inevitable.
188. See Nathan Richardson, Playing Without Aces: Offsets and the Limits of Flexibility Under
Clean Air Act Climate Policy, 42 ENVTL. L. 735, 741–42 (2012) (arguing flexibility of standards is
“possibly more important than stringency” and “[o]ffsets . . . appear to be among the lowest-cost
opportunities for GHG reduction.”).
189. See TARR ET AL., supra note 126, at 7 (stating that compliance costs would limit the 111(d)
rule’s possible stringency).
190. See Meredith Fowlie et al., An Economic Perspective on the EPA’s Clean Power Plan, 346
SCIENCE 815, 816 (2014) (section titled “Will We Pay Too Much for Emissions Reductions?”).
new legislation, the United States will lag behind its potential. Repeated fights over jurisdiction would waste resources and time while the Copenhagen and China deadlines approach and pass. By upholding the Clean Power Plan, the Court can simplify the process, allowing the EPA to administer the first robust climate change policy in American history with needed flexibility. On review, the Court may very well strike down the Clean Power Plan’s emission targets as exceeding the intended scope of the CAA, but for the reasons discussed in this Note, the EPA’s authority to regulate GHGs need not, and should not, stop at the fenceline.

We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ese.elq@law.berkeley.edu. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org.