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Legal Analysis and Background on the EPA's Proposed Rules for Regulating Mercury Emissions from Electric Utilities

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Summary

Mercury is a hazardous air pollutant (HAP) that can pose a serious public health threat. In accordance with the authority provided by the Clean Air Act (CAA), the EPA is considering regulation of mercury emissions from electric steam generating units (electric utilities). Recently, the EPA proposed revising an earlier finding that regulation of such emissions was warranted under section 112 of the CAA, because the agency had failed to consider whether regulations promulgated under section 111 of the CAA would adequately address the health concerns associated with these emissions. The EPA now proposes regulation of electric utilities' mercury emissions under section 111 through the adoption of a national "cap-and-trade" program.

A potential challenge to the EPA proposal could grow out of the statutory basis for regulating electric utilities' mercury emissions under section 111. If the EPA implements the proposed revision and rule, it may argue that its interpretation should be upheld given (1) the arguably conflicting amendments made to section 111 in 1990 and (2) the deference shown by the courts to agency interpretations. Opponents may argue that the EPA's interpretation is unreasonable because the conflicting amendments do not represent a clear reversal of the previously explicit congressional intent to prohibit an HAP listed under section 112 from being regulated under section 111.

The EPA will also need to provide a substantive basis for revising its earlier findings and adopting any proposed rule for mercury regulation, as the agency is prohibited from executing its rulemaking authority in an arbitrary and capricious manner. Accordingly the EPA would need to provide a reasoned analysis for concluding that the public health threat posed by electric utilities' mercury emissions could be adequately addressed using section 111. The fact that the EPA previously concluded that regulation was warranted under section 112 may impose a heightened burden upon the EPA to prove that subsequent revisions do not violate CAA requirements.

Further, the agency may have difficulty "de-listing" electric utilities as a source for regulation under section 112, which may require the EPA demonstrate that these utilities are not a public health threat. The EPA may argue that this statutory requirement does not apply because the agency listed electric utilities for regulation only because it had previously failed to consider the possibility of regulating utilities under section 111. Opponents of "de-listing" may argue that reinterpretation of relevant CAA provisions should not be grounds to summarily rescind previous designations.

One potential obstacle to EPA regulation under section 111 may be a 1998 settlement agreement requiring the EPA to take "final action" on a proposed rule to regulate such emissions under section 112. Because this settlement decree was apparently not incorporated into a judicial order, however, it does not appear that the agreement could be used to restrict the EPA's rulemaking discretion.

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Legal Analysis and Background on the EPA's Proposed Rules for Regulating Mercury Emissions from Electric Utilities

Background

Rulemaking Background. Mercury has long been recognized as a hazardous air pollutant that can pose a significant threat to the public health. Indeed, the Environmental Protection Agency (EPA) has recognized mercury emissions from electric utility steam generating units (electric utilities) to be the “greatest concern to public health from the [utilities] industry.”¹ Accordingly, the EPA has recently sought to regulate such emissions pursuant to the authority provided by the Clean Air Act (CAA).²

At least two provisions arguably provide the EPA with authority to regulate mercury emissions from electric utilities. Section 112 of the CAA requires the EPA to establish technology-based emission standards for listed hazardous air pollutants (HAP), including mercury. Sources designated for regulation under section 112 are required to adopt maximum achievable control technologies (MACT) to reduce their hazardous emissions. Section 111, on the other hand, provides the EPA with the authority to regulate designated pollutants under a broader and looser standard than section 112. Under section 111, the EPA has authority to enact national “standards of performance” for sources of pollutants that the Administrator of the EPA (Administrator) concludes to pose a danger to the public health.³ What is at issue in the present situation is whether mercury from electric utilities must be regulated under 112 or whether the EPA may interpret the CAA to regulate such emissions under the more flexible rules of section 111.

The EPA is only permitted to regulate HAP emissions from electric utilities pursuant to section 112 if the Administrator determines that such regulation is appropriate and necessary. On December 14, 2000, the Administrator of the EPA concluded that, in accordance with section 112(n)(1)(A) of the CAA, the regulation

¹Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825 (Dec. 20, 2000) [*hereinafter* “December 2000 Regulatory Finding”] (quoting EPA, STUDY OF HAZARDOUS AIR POLLUTANT EMISSIONS FROM ELECTRIC GENERATING UNITS — FINAL REPORT TO CONGRESS (Feb. 1998)).

²42 U.S.C. §§ 7401 *et seq.*

³Section 111 requires the agency to (1) establish nationally uniform performance standards for designated air pollutants from categories of new industrial facilities and (2) require states to implement and enforce separate standards of performance for existing sources of designated air pollutants. 42 U.S.C. § 7411.

of mercury emissions from electric utilities was “appropriate and necessary,” and the Administrator therefore added these units to the list of source categories to be regulated under section 112.⁴

This regulatory finding had an additional implication relating to a 1998 legal settlement agreement between the EPA and the National Resources Defense Council (NRDC), which was made to avoid litigation over the agency’s regulation of mercury emissions from electric utilities. The agreement was a modification of an earlier settlement agreement between the EPA and NRDC, and provided that if the EPA found that regulation of mercury emissions from electric utilities was appropriate and necessary on or before December 15, 2000, the EPA would be required to “sign” a notice of proposed rulemaking to regulate such admissions, pursuant to section 112 of the CAA, by December 15, 2003.⁵ Further, the 1998 agreement required the EPA to take “final action” on the proposed rule by December 15, 2004.⁶ Because the EPA determined that regulation of mercury emissions was appropriate and necessary within the time period specified by the settlement agreement, pursuant to the agency’s above-mentioned December 2000 regulatory finding, the 1998 settlement agreement’s subsequent provisions were triggered.

On December 15, 2003, the EPA proposed to revise its December 2000 regulatory finding that the regulation of mercury emissions from electric utilities was “appropriate and necessary” under section 112.⁷ The EPA argued that regulations promulgated under section 111 of the CAA could effectively address the public health threat posed by mercury emissions, and that regulation under section 112 was therefore unnecessary.⁸ Further, the EPA proposed two alternative rules aimed at significantly reducing mercury emissions from electric utilities.⁹ One proposal would regulate mercury emissions under section 112 and require new and existing electric utilities to adopt MACT controls to reduce their mercury emissions. The EPA estimates that this proposal would reduce mercury emissions by 14 tons, or an estimated 29 percent, by the end of 2007.¹⁰ This proposal also fulfills the EPA’s

⁴*December 2000 Regulatory Finding, supra* note 1.

⁵*Natural Resources Defense Council v. EPA, Stipulation for Modification of Settlement Agreement*, No. 92-1415 (D.C. Cir. Nov. 17, 1998).

⁶*Id.*

⁷EPA, Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, Dec. 15, 2003, *available at* [<http://www.epa.gov/mercury/1880338.pdf>] [*hereinafter* “*Proposed Rule and Revision*”] (published in 69 Fed. Reg. 4652 (Jan. 30, 2004)).

⁸*See id.* at 39-40.

⁹A more detailed, substantive discussion of these proposals can be found in CRS Report RL31881: *Mercury Emissions to the Air: Regulatory and Legislative Proposals* (Feb. 10, 2004).

¹⁰*See* EPA, Fact Sheet, *EPA Proposes Options for Significantly Reducing Mercury Emissions from Electric Utilities*, Dec. 15, 2003, *available at* [<http://www.epa.gov/mercury/mercuryfact12-15final.pdf>].

obligation under the 1998 settlement agreement to propose a rule under section 112 for the regulation of electric utilities' mercury emissions by December 15, 2003.

The second proposed rule announced by the EPA would instead establish standards of performance for new and existing electric utilities under section 111 of the CAA. With limited exceptions, this proposal would establish performance standards for new sources which would be identical to the proposed MACT standards for units selling more than 25 megawatts of electrical output.¹¹ Both existing and new electric utilities would be regulated through the creation of a market-based "cap-and-trade" program,¹² which would "cap" overall mercury emissions and permit utilities to purchase emissions credits from cleaner-operating utilities. The proposal would be implemented in two phases. Pursuant to the first phase, due by 2010, a national cap for mercury emissions would be established at 34 tons.¹³ The second phase, due by 2018, would lower the mercury cap to 15 tons.¹⁴ Caps would also be set at the state level, with states having authority to determine how to control emissions from individual electric utilities.¹⁵ States would also be required to amend their respective State Implementation Plans ("SIPs"), used to verify compliance with the CAA, so as to describe how they would reduce mercury emissions to levels permitted under the cap. On February 24, 2004, the EPA proposed a model "cap-and-trade" program.¹⁶ States adopting the EPA's model program would have their SIP approved by the EPA automatically.¹⁷

The EPA is also co-proposing and soliciting comment on implementing a "cap-and-trade program" under section 112, similar to that being proposed under section 111 of the CAA.¹⁸ However, the EPA has discussed a "cap-and-trade" program primarily in reference to section 111(d), and this report will deal with the legality of regulating mercury emissions from electric utilities under that section.

On April 28, 2004, the EPA extended the public comment period concerning the proposed mercury regulations until June 29, 2004, two months longer than originally announced, and stated that it would push back final action in the rulemaking proceeding until March 15, 2005. Although this extension would appear to conflict with the EPA's legal settlement agreement with the NRDC requiring final agency action on a proposed mercury rule by December 15, 2004, the NRDC claimed

¹¹ *Proposed Rule and Revision*, *supra* note 7, at 193.

¹² A similar model program used to control the interstate transport of nitrogen oxides was adopted by all 21 states (and the District of Columbia) to which the rule applied.

¹³ *Id.* at 256.

¹⁴ *Id.* at 257.

¹⁵ *Id.* at 265-66.

¹⁶ Supplemental Notice for the Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units; Proposed Rule, 69 Fed. Reg. 12398 (signed Feb. 24, 2004).

¹⁷ See *Proposed Rule and Revision*, *supra* note 7, at 265-66.

¹⁸ *Id.* at 2, 51-52, 56.

prior to the extension that it had formally notified the EPA that it would agree to extend the settlement deadline until March 15 to allow the agency to extend the public comment period and undertake further analysis of the proposed rules' effect.¹⁹

Regulation of Electric Utilities under Section 112 of the CAA. Section 112 of the CAA was amended in 1990 to establish National Emissions Standards for Hazardous Air Pollutants (HAP). Pursuant to this section, the EPA is generally required to list categories and subcategories of “major sources” and certain “area sources” of 188 listed HAP, including mercury.²⁰ Upon listing a source category for HAP, the EPA must establish emission standards that require designated sources to install MACT that achieve “the maximum degree of reduction in emissions,” taking into consideration the costs of compliance and non-air quality health and environmental impacts.²¹ Standards for new sources of HAP “shall not be less stringent than the most stringent emissions level that is achieved in practice by the best controlled similar source.”²² Although standards promulgated for existing sources may be less stringent than those for new sources, they can be no less stringent than (1) the average emission limitation achieved by the best performing 12 percent of existing sources, if there are 30 or more sources in the category or subcategory or (2) the best performing 5 similar sources in categories or subcategories with less than 30 sources.²³

If a source category or subcategory is properly designated as being subject to emission standards promulgated under section 112, it can only be “de-listed” in limited circumstances pursuant to section 112(c)(9) of the CAA. For the EPA to “de-list” a listed source determined to emit HAP that may result in cancer in humans, a determination must be made that no source in the category emits HAP in such quantities as may cause a lifetime risk of cancer greater than one in one million to the individual in the population that is most exposed to such pollutants from the source.²⁴ In the case of a listed source determined to emit HAP that may result in non-cancerous adverse health effects in humans or adverse environmental effects, such as mercury, a determination must be made that (1) no source in the category emits HAP at a level exceeding that which is adequate to protect public health with an

¹⁹Press Release, Natural Resources Defense Council, NRDC Extends Deadline for Final Rule on Power Plant Pollution (Apr. 27, 2004), *available at* [<http://www.nrdc.org/media/pressreleases/040427.asp>].

²⁰ 42 U.S.C. § 7412(c)(1). A “major source” is any stationary source or group of stationary sources location within a contiguous area under common control that emits or has the potential to emit at least 10 tons per year of any HAP or 25 tons per year of any combination of HAP. 42 U.S.C. § 7412(a)(1). An “area source” is any stationary source of HAP that is not a major source. 42 U.S.C. § 7412(a)(2).

²¹42 U.S.C. § 7412(d)(2).

²²42 U.S.C. § 7412(d)(3).

²³*Id.*

²⁴42 U.S.C. § 7412(c)(9)(B)(i).

ample margin of safety and (2) no adverse environmental effects will result from the “de-listing” the source.²⁵

Electric utilities are regulated under a separate provision of section 112 than other potential sources of HAP. The 1990 CAA amendments required the EPA to study the hazards to public health reasonably anticipated to be caused by continuing HAP emissions from electric utilities.²⁶ On the basis of the study’s results, the EPA was required to regulate such utilities under section 112 if the Administrator found that such regulation was “appropriate and necessary” given the public health effects of the utilities’ HAP emissions.²⁷

Regulation under Section 111 of the CAA. Section 111 of the CAA provides for a somewhat looser and broader standard for regulation of pollutants than section 112. Section 111(b) requires the Administrator of the EPA to establish Federal “standards of performance” directly regulating *new* sources that the Administrator determines to either cause or contribute significantly to air pollution that may reasonably be anticipated to endanger public health or welfare.²⁸ With respect to *existing* sources, pursuant to section 111(d), each state must submit to the Administrator for approval an SIP that imposes “standards of performance” and provides for the implementation and enforcement of such standards for existing sources of pollutants.²⁹ Section 111(a)(1) defines a “standard of performance” as an emissions standard for air pollutants that “reflects the degree of emission limitation achievable through the application of the best system of emission reduction” that the Administrator determines has been adequately demonstrated, taking into account costs of achievement and non-air quality health and environmental impacts.³⁰

The precise relationship between sections 111 and 112 of the CAA, and whether the EPA has authority under section 111 to regulate sources of HAP listed under section 112, is not expressly clear from the sections’ language. Section 111(b) makes no mention of section 112. More problematic is the fact that while section 112 does expressly limit the EPA’s ability to regulate new sources of HAP under section 111(d), the breadth of this limitation is not entirely clear because of conflicting statutory language. Prior to the 1990 CAA amendments, the express language of section 111(d) prevented the EPA Administrator from establishing standards of performance pursuant to the section for any existing source of an emission listed under section 112.³¹ In amending the CAA in 1990, however, Congress simultaneously enacted two amendments to section 111(d) which are arguably conflicting. The amendment to section 111(d) introduced by the Senate and described as a “conforming amendment” provides that section 111(d) cannot be used

²⁵42 U.S.C. § 7412(c)(9)(B)(ii).

²⁶42 U.S.C. § 7412(n)(1).

²⁷42 U.S.C. § 7412(n)(1)(A).

²⁸42 U.S.C. § 7411(b).

²⁹42 U.S.C. § 7411(d).

³⁰42 U.S.C. § 7411(a)(1).

³¹See *Proposed Rule and Revision*, *supra* note 7, at 181.

to regulate an existing source for any pollutant listed under section 112(b).³² In contrast, the House amendment to section 111(d) only prevents the provision from being used to regulate air pollutants “emitted from a source category which is regulated under section 112.”³³

This difference in language may significantly alter the scope of section 111(d). Under the Senate amendment, the EPA could not regulate mercury emissions from electric utilities pursuant to section 111(d), because mercury is listed as an HAP under section 112(b). In contrast, under one interpretation of the House amendment, the EPA would be permitted to regulate mercury emissions from electric utilities pursuant to section 111(d) so long as the EPA had yet to promulgate regulations for HAP emissions by electric utilities under section 112.

It should be noted that while the Statutes at Large includes both the House and Senate amendments to section 111(d), the United States Code only reflects the language of the House amendment.³⁴ However, Title 42 of the U.S. Code, which contains the CAA, has yet to be codified into positive law.³⁵ When the language of the Statutes at Large conflicts with a corresponding section in the U.S. Code that has not been codified, the language of the Statutes at Large is controlling.³⁶

Legal Analysis

A decision by the EPA to regulate mercury emissions from electric utilities pursuant to section 111 is likely to raise three legal concerns. First, does the CAA in certain circumstances permit the EPA to regulate such emissions under section 111? Second, even if such authority exists, can the EPA revise its December 2000 regulatory finding and establish a national “cap-and-trade” program? Third, does the 1998 settlement agreement obligate the EPA to regulate mercury emissions from electric utilities pursuant to section 112 of the CAA? This section will provide analysis of these issues.

EPA Authority to Regulate Electric Utilities under Section 111 of the CAA. An agency’s authority to enact regulations is determined by the authority provided to it by statute. However, the scope of this authority is not always clear, raising questions as to the ability of an agency to act in a particular manner. Such is the case in the present situation, where the EPA is considering regulating mercury emissions from electric utilities under section 111 rather than section 112. Depending upon how these statutory provisions are interpreted, the EPA may be

³²Pub. Law 101-549, § 302(a) (Nov. 15, 1990).

³³Pub. Law 101-549, § 108(g) (Nov. 15, 1990).

³⁴42 U.S.C. § 7411(d)(1).

³⁵See *United States v. Ward*, 131 F.3d 335, 339-40 (3d. 1997).

³⁶See, e.g. *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 864 (1983); *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964); *Cheney R.R. Co., Inc. v. Railroad Ret. Bd.*, 50 F.3d 1071, 1076 (D.C. Cir. 1995).

either permitted or prohibited from instituting a “cap-and-trade” program for mercury emissions from electric utilities under section 111.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,³⁷ the Supreme Court announced the primary criteria the courts would use in reviewing a legal challenge to an agency’s interpretation of its statutory authority. Although *Chevron* has generally been the guiding standard that courts use to determine the permissibility of an agency’s interpretation of its statutory authority, recent Supreme Court cases have suggested that *Chevron* analysis may not always be the appropriate method with which to determine the permissibility of an agency’s interpretation. It is possible that the EPA’s interpretation of section 111(d) will not be subjected to *Chevron* analysis, but rather a different standard. Accordingly, this section will analyze the EPA’s interpretation of relevant provisions of the CAA under the framework of *Chevron* and, with respect to section 111(d), a potentially relevant non-*Chevron* standard.

Analysis of the EPA’s Interpretation of CAA sections 112 and 111 under Chevron. The *Chevron* case concerned the EPA’s implementation of the 1977 amendments to the CAA, which in relevant part required the establishment of a permit program regulating “new or modified major stationary sources” of air pollution in states that had failed to meet national air quality standards. In promulgating regulations for the permit program, the EPA interpreted the legislation’s use of the term “stationary source” so as to allow states to adopt a plant-wide definition of the term, meaning that a plant’s multiple emission sources could be considered within a single “bubble” for purposes of calculating emission rates and changes thereto. NRDC challenged this action, alleging that the EPA’s implementation of the term “stationary source” was an impermissible interpretation of the CAA amendments and was therefore contrary to law.

In resolving the legality of EPA’s interpretation of the CAA, the Court announced a two-prong test for determining the legitimacy of an agency’s interpretation of its statutory authority. The first prong of the *Chevron* test is “the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”³⁸ A court may attempt to ascertain congressional intent following “traditional tools of statutory construction.”³⁹ If congressional intent behind a statute is unclear, the second prong of the *Chevron* test is considered: “[W]hether the agency’s

³⁷467 U.S. 837 (1984).

³⁸*Id.* at 842-43.

³⁹*Id.* at 843 n.9. Although the Court did not note what these “traditional tools” were, it did look to the express language of the 1977 CAA amendments and the legislative history of relevant provisions of the CAA when applying the first prong of this test in *Chevron*. *See id.* at 851-53. Subsequently, the Supreme Court has held that a court’s determination of congressional intent “must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of...[significant] economic and political magnitude to an administrative agency.” *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

[interpretation] is based on a permissible construction of the statute.”⁴⁰ A reviewing court does not impose its own interpretation of the statute for that of the agency. Rather, it assesses whether the agency’s interpretation is a reasonable one.⁴¹ In making this assessment, the court gives deference to the agency’s interpretation.⁴²

The Supreme Court in *Chevron* noted that the district court had made a proper determination that the CAA was ambiguous as to the meaning of “stationary source,” because neither the express language of the Act nor the relevant legislative history contained any specific comment on the “bubble” concept or addressed whether a plant-wide definition of a “stationary source” would be permissible.⁴³ Accordingly, the Court in *Chevron* found that congressional intent could not be clearly determined and moved to the second prong of the test. Using this second prong, the Court determined in *Chevron* that the EPA’s implementation of the CAA relied on a reasonable interpretation of “stationary source,” and the Court therefore upheld the regulation.

The statutory interpretations that the EPA would rely upon to implement its proposed revision to its December 2000 regulatory finding and its proposed “cap-and-trade” program under section 111 might be subjected to legal challenges by opponents of these actions. If challenged, the EPA will almost certainly argue that the interpretations of sections 111 and 112 that form the legal basis behind the agency’s proposed revision and rule are legally valid under the *Chevron* test.

The first question that the EPA would likely need to address concerns the reinterpretation of section 112(n)(1)(A) that forms the basis for the revision of its December 2000 regulatory finding. Although the EPA initially found that regulation of electric utilities was both appropriate and necessary, it now concludes that while such regulation would be appropriate under section 112, it is not “necessary” because such power plants could be adequately regulated under section 111. Accordingly, the EPA argues, it does not have legal authority to regulate mercury emissions under section 112, because section 112(n)(1)(A) only permits such regulation when it is both appropriate *and* necessary.⁴⁴

If challenged, the EPA will likely be able to argue that its interpretation of section 112(n)(1)(A) fulfills the *Chevron* test. Indeed, the EPA might argue that its interpretation of section 112(n)(1)(A) is in accordance with express statutory language and there is no need for the court to even proceed to the second prong of *Chevron*.⁴⁵ Section 112(n)(1)(A) does not say that the EPA can regulate electric

⁴⁰*Chevron*, 467 U.S. at 843.

⁴¹*Id.* at 844.

⁴²*Id.*

⁴³*Id.*

⁴⁴*See Proposed Rule and Revision, supra* note 7, at 19.

⁴⁵This argument might be further bolstered by portions of the limited legislative history behind the 1990 amendments to the CAA. The EPA quotes Congressman Michael Oxley, (continued...)

utilities under section 112 if it finds such regulation to be *either* appropriate or necessary; rather, it permits such regulation only if the EPA finds such regulation to be “appropriate *and* necessary.”⁴⁶ Even assuming that a court finds that the congressional intent behind section 112(n)(1)(A) is ambiguous and proceeds to the second prong of the *Chevron* test, there does not appear to be any obvious basis to argue that the EPA’s interpretation of the phrase “appropriate and necessary” is unreasonable. Accordingly, the EPA has a strong argument that its interpretation of its statutory authority under section 112(n)(1)(A) is permissible, and that its December 2000 regulatory finding that electric utilities should be regulated under section 112 can be revised if the EPA no longer has reason to believe such regulation is both appropriate and necessary.

The second question of statutory interpretation likely to be raised, assuming that the EPA adopts the proposed “cap-and-trade” program under section 111, is whether HAP emissions from electric utilities can be regulated under that section. Assuming that the EPA’s interpretation of section 111 is challenged, there is reason to believe that a court could conclude that congressional intent is ambiguous as to whether HAP emissions from electric utilities can be regulated under section 111. As discussed previously, section 111(b) makes no reference to section 112, and section 111(d) contains apparently conflicting amendments that would either prohibit the EPA from regulating existing sources for HAP listed under section 112 or, alternatively, permit such regulation if the HAP source was not otherwise regulated under section 112.⁴⁷

It therefore appears that a court hearing a challenge to the EPA’s authority under section 111 to regulate mercury emissions from electric utilities could move to the second prong of *Chevron* analysis and assess whether the EPA’s interpretation of the section was reasonable. The EPA may argue that its interpretation is legally permissible because the Senate and House amendments represent conflicting congressional intent as to the scope of the EPA’s authority to regulate under section 111, and the EPA’s reinterpretation of section 111(d) harmonizes these conflicting amendments. The Supreme Court has previously recognized that when an agency interpretation of its statutory authority “represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, [the court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”⁴⁸

The EPA might argue that its interpretation of section 111 is a “reasonable accommodation” given the conflicting language of the amendments to section 111(d).

⁴⁵(...continued)

a member of the conference committee on the 1990 CAA amendments, as stating that Congress intended section 112 to regulate “only those units that...[the Administrator] determines — after taking into account compliance with all other provisions of the act...-have been demonstrated to cause a significant threat of serious adverse affects on public health.”*Id.* at 47.

⁴⁶42 U.S.C. § 7412(n)(1)(A) (emphasis added).

⁴⁷*See supra* pp. 4-5.

⁴⁸ *United States v. Shimer*, 367 U.S. 374, 383 (1961) (quoted by *Chevron*, 467 U.S. at 845).

Further, the EPA may argue that it is unlikely that Congress would have been opposed to such an accommodation, given that Congress's stated purpose in passing the CAA was "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare...."⁴⁹ Permitting the EPA to regulate HAP emissions from electric power plants exclusively under section 112 would limit such regulation only to circumstances where the imposition of section 112 MACT controls was "appropriate and necessary" for the public health. The EPA might argue that permitting the regulation of HAP from electric utilities under section 111 would enable the EPA to address public health concerns caused by such emissions even in situations where such concern would not be sufficient to warrant regulation under section 112.

On the other hand, opponents of the EPA's proposed "cap-and-trade" program might dispute the reasonableness of the EPA's interpretation of its statutory authority under section 111. They might argue that the fact that Congress chose to list specific HAP under section 112 indicated that Congress believed that these pollutants required stricter measures than those permitted under section 111, and the EPA is now acting contrary to this intent by attempting to regulate an HAP source under a less stringent standard than Congress desired.

Opponents may also note that prior to the 1990 Amendments, the explicit language of section 111(d) prevented it from being used to regulate existing sources of HAP listed under section 112, and the Senate amendment reflects this continued understanding. In the limited legislative history on the 1990 amendments to section 111(d) of the CAA, there does not appear to be any significant, specific discussion of the House amendment. Opponents of the EPA's "cap-and-trade" program might therefore argue that this indicates that Congress did not intend the amendment to permit the EPA to regulate HAP emissions under a different section of the CAA than it had previously. Further, CRS has been unable to find an example of the EPA acting pursuant to section 111(d) to regulate an existing source for an HAP listed under section 112. Given these factors, opponents of the EPA's proposed "cap-and-trade" program may argue that it is unreasonable for the EPA to interpret section 111 as permitting the regulation of sources of HAP listed under section 112.

The third question of statutory interpretation that may be raised is whether the language of section 111(d), which requires the EPA to establish standards of performance for existing sources that represent "the best system of emission reduction...which the Administrator determines has been adequately demonstrated,"⁵⁰ provides the EPA with authority to establish a "cap-and-trade" program for mercury emissions from electric utilities. Assuming for purposes of discussion that a reviewing court finds that section 111(d) can be used to regulate mercury emissions from electric utilities, a straightforward application of the *Chevron* test might suggest that the EPA could establish a "cap-and-trade" program for these emissions if the Administrator concluded that it was the "best system" for reducing such emissions.

⁴⁹42 U.S.C. § 7401(b)(1).

⁵⁰42 U.S.C. § 7411(a)(1) (defining the meaning of "standards of performance" as used under section 111(d)).

Alternative Analysis of the EPA’s Interpretation of section 111(d) Not Relying on Chevron. While application of the *Chevron* test has been the primary means for the courts to determine the legality of an agency’s statutory interpretation for almost two decades, recent Supreme Court cases indicate that the *Chevron* test may not always be the appropriate means to evaluate agency interpretations. In 2000, for example, the Court held that *Chevron* deference does not apply to interpretations contained in opinion letters, agency manuals, and similar informal issuances,⁵¹ though it stressed that *Chevron* deference “does apply to an agency interpretation contained in a regulation.”⁵² More relevant to the present case, the Court recognized in the same term that while *Chevron* deference is appropriate when a “statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps,”⁵³ in a limited number of cases “there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”⁵⁴

The issue of agency interpretation in the *Chevron* line of cases is arguably different from the issue concerning the EPA’s reinterpretation of section 111(d). The *Chevron* test may be understood to apply in instances where the scope of a congressional delegation of authority is ambiguous because the legislation at issue does not speak directly to the matter that the agency is attempting to regulate.⁵⁵ In the present case, however, Congress *did* speak directly to the question of whether the EPA could regulate mercury emissions from electric utilities under section 111, but did so in a manner that was self-contradicting. Accordingly, a court hearing a challenge to the EPA’s interpretation of section 111 may decide that *Chevron* is an inappropriate starting point for assessing the legitimacy of the agency’s interpretation.

Although it was decided prior to *Chevron*, the D.C. Circuit’s decision in *Citizens to Save Spencer County v. Environmental Protection Agency*⁵⁶ dealt with a situation very similar to the present case and might be used to resolve the legality of the EPA’s interpretation of section 111. The *Spencer County* case concerned the EPA’s implementation of conflicting congressional directives resulting from the 1977 CAA amendments. Whereas one provision of the amended CAA prohibited

⁵¹*Christenson v. Harris County*, 529 U.S. 576, 587 (2000).

⁵²*Id.* See also *United States v. Mead Corp.*, 533 U.S. 218 (2001) (holding that *Chevron* deference is typically appropriate only when evaluating agency actions having the force of law, and not when evaluating agency rulings that are only binding on the agency and/or a particular party).

⁵³*Brown & Williamson Tobacco Corp.*, 529 U.S. at 159 (2000).

⁵⁴*Id.*

⁵⁵See *id.* at 133 (“[I]f Congress has not specifically addressed the question, a reviewing court must respect the agency’s construction of the statute so long as it is permissible”) (internal citations omitted); *Auer v. Robbins*, 519 U.S. 452, 457 (1997) (“Because Congress has not directly spoken to the precise question at issue, we must sustain...[the agency’s] approach so long as it is based on a permissible construction of the statute”) (internal citations omitted).

⁵⁶600 F.2d 844 (D.C. Cir. 1979).

construction of any major pollution-emitting facility unless certain substantive requirements had been met, another provision suggested that less stringent construction requirements contained in state plans made pursuant to preexisting federal regulations remained in effect until revised state plans had been approved.⁵⁷ In regulations implementing the 1977 CAA amendments, the EPA pursued a “middle path” that attempted to harmonize these conflicting congressional directives.⁵⁸ In upholding the EPA’s regulations harmonizing the conflicting CAA provisions, the D.C. Circuit stated that it was “guided by the rule that the maximum possible effect should be afforded to all statutory provisions, and, whenever possible, none of those provisions rendered null or void.”⁵⁹ To appropriately harmonize conflicting provisions, the court declared that an agency should:

[L]ook for guidance to the statute as a whole and to consider the underlying goals and purposes of the legislature in enacting the statute, while avoiding unnecessary hardship or surprise to affected parties and remaining within the general statutory bounds prescribed. Only by this approach can legislative purposes and statutory instructions be given the greatest possible practical effect.⁶⁰

The *Spencer County* court concluded that if an agency acts “in a reasonable and responsible manner” in exercising the perhaps inadvertent discretion provided by conflicting statutory provisions, the result it reaches should be upheld.⁶¹ However, the court noted that it is ultimately the reviewing court’s responsibility “to determine whether the administering agency in the present case had authority to devise its ‘middle path,’ whether it pursued the appropriate procedural route in so doing, and whether its results are substantively reasonable.”⁶²

Opponents of the EPA’s reinterpretation of section 111 are likely to argue that the agency’s interpretation of the conflicting House and Senate amendments is not in accordance with the harmonization principle detailed in *Spencer County*. Opponents will likely argue that rather than attempting to harmonize the amendments, the EPA has instead chosen to exclusively adopt the House amendment permitting regulation under section 111(d) of emission sources not regulated under section 112, while ignoring the Senate amendment’s prohibition on the application of section 111(d) to regulate any HAP listed under section 112. Opponents would likely argue that to the extent that the amendments should be harmonized, it should be in a manner giving preference to the Senate amendment, because the Senate amendment reflects Congress’s longstanding intent to have HAP that are listed under

⁵⁷*Id.* at 851-54.

⁵⁸*See id.* at 859.

⁵⁹*Id.* at 870.

⁶⁰*Id.* at 871.

⁶¹*Id.* at 872.

⁶²*Citizens of Spencer County*, 600 F.2d at 873.

section 112 regulated exclusively under that provision, and nothing in the legislative history of the House amendment reveals an intent to reverse this position.⁶³

On the other hand, the EPA may counter that its reinterpretation of section 111 is in accordance with the harmonization principle detailed in *Spencer County* and gives an appropriate degree of preference to the Senate amendment. The EPA concedes that application of the Senate amendment alone would prevent the agency from using section 111 to regulate any HAP emission listed under section 112, including mercury emissions from electric utilities,⁶⁴ and that the Senate amendment “reflects the Senate’s intent to retain the pre-1990 approach of precluding regulation under CAA section 111(d) for any HAP that is listed under section 112(b).⁶⁵ The EPA notes, however, that a literal reading of the House amendment, which prohibits section 111(d) from applying to *any pollutant* “emitted from a source category which is regulated under section 112,” would prevent the EPA from regulating both HAP *and non-HAP* emissions from sources regulated under section 112, even though section 112 is only used to regulate HAP emissions.⁶⁶ The EPA therefore argues that its reinterpretation of section 111(d) gives some effect to both amendments:

First, [the reinterpretation] gives effect to the Senate’s desire to focus on HAP listed under section 112(b), rather than applying the section 111(d) exclusion to non-HAP emitted from a source category regulated under section 112, which a literal reading of the House amendment would do. Second, it gives effect to the House’s apparent desire to increase the scope of the EPA’s authority under section 111(d) and to avoid duplicative regulation of HAP for a particular source category.⁶⁷

The EPA alleges that its reinterpretation of section 111(d) is a reasonable one that gives more effect to the Senate amendment than to the House amendment; a preference the EPA deems appropriate because a literal reading of the House amendment “would be inconsistent with the general thrust of the 1990 [CAA] amendments.”⁶⁸ Using this analysis, the EPA might argue that its reinterpretation of section 111(d) is a reasonable effort to harmonize explicit, conflicting congressional directives in a manner that gives weight to the overall purpose behind the CAA, and

⁶³Opponents might also argue that the House amendment conflicts with the purposes behind the CAA, for reasons discussed at *supra* p. 10, and that the EPA should therefore ignore it for purposes of interpreting section 111(d) of the CAA. Both the D.C. Circuit and Supreme Court have recognized that, in rare circumstances, the plain meaning of a statute does not control its interpretation by the courts when “the literal application of [the] statute will produce a result demonstrably at odds with the intentions of its drafters.” *Environmental Defense Fund v. E.P.A.*, 82 F.3d 451, 468 (D.C. Cir. 1996) (*quoting* *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989)).

⁶⁴*Proposed Rule and Revision*, *supra* note 7 at 184-85.

⁶⁵*Id.* at 185.

⁶⁶*Id.*

⁶⁷*Id.* at 186.

⁶⁸*Id.*

that this harmonization effort accordingly should be upheld by a reviewing court under either *Chevron* or *Spencer County* analysis.

The EPA’s Discretion to Revise Previous Regulatory Findings and Institute a “Cap-and-Trade Program”. Although the EPA’s interpretation of its statutory authority might be legally permissible, this does not necessarily mean that every proposed regulation issued in accordance with this interpretation would be upheld by the courts. A court reviewing actions taken by the agency may find them to be unlawful if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁶⁹ By statute, the EPA is required to engage in a “notice-and-comment” rulemaking procedure concerning any proposed emission regulation under CAA sections 111 or 112, whereby the EPA must provide notice of the proposed action so that affected parties can comment on it.⁷⁰ Courts have generally required agencies that engage in “notice-and-comment” rulemaking to provide detailed explanations of final rules which respond to notable comments and arguments submitted by interested parties.⁷¹

In the present case, the EPA’s proposed “cap-and-trade” program and revision of its December 2000 regulatory finding are based on the premise that regulation under section 112 is not appropriate and necessary because the public health hazards of mercury emissions from electric utilities can be adequately addressed through regulation under section 111. Accordingly, the EPA has initiated a notice and comment rulemaking procedure in which interested parties are provided with the opportunity to comment on the proposed rule and regulatory revision prior to the EPA issuing a final decision. If the EPA ultimately decides to revise its December 2000 finding and implement a “cap-and-trade” program, it will likely need to adequately address the comments and data it receives during the notice and comment proceeding for its final action to be upheld by a reviewing court.

The fact that the EPA previously concluded in December 2000 that the regulation of mercury emissions from electric utilities was appropriate and necessary under section 112 might increase the agency’s burden in proving that its subsequent revisions are not arbitrary and capricious. The Supreme Court has long recognized that “regulatory agencies do not establish rules of conduct to last forever.”⁷² Changing circumstances and the availability of new information requires that an

⁶⁹42 U.S.C. § 7607(d)(9)(A).

⁷⁰See 42 U.S.C. §§ 7607(d)(1),(5)-(6).

⁷¹See, e.g., *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1217-19 (D.C. Cir. 1983) (setting aside an agency rule in part because the agency failed to consider several regulations suggested by commenters); *National Tour Brokers Ass’n v. U. S.*, 591 F.2d 896 (D.C. Cir. 1978) (recognizing that the purpose of comments is to enable an agency to consider and benefit from the expertise of commenters when making rules); *Automotive Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (requiring agencies to respond to significant issues raised in the rulemaking comments); see also 42 U.S.C. § 7607(d)(6)(B) (“The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period”).

⁷²*American Trucking Assoc. v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397 (1967).

agency “must be given ample latitude” to adapt and revise its rules and policies.⁷³ Nevertheless, there is a presumption that a “settled course of behavior embodies the agency’s informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress...[and there is] a presumption that those policies will be carried out best if the settled rule is adhered to.”⁷⁴

Accordingly, an agency changing its regulatory course by rescinding a previous rule is often required to supply “a reasoned analysis” for the change beyond that which might have been required when it did not act in the first instance.⁷⁵ In order to regulate mercury emissions under section 111 of the CAA rather than section 112, the EPA might need to overcome the presumption that the conclusions reached in its December 2000 regulatory finding were accurate.

A further potential obstacle to EPA regulation of mercury emissions from electric utilities under section 112 is the fact that the EPA’s earlier decision to list such emissions for regulation might thereby prevent their subsequent regulation under section 111. As discussed earlier, section 112(c)(9) requires that once an HAP source is listed for regulation under section 112, it cannot be “de-listed” unless new information essentially reveals that the source’s designated HAP emissions pose no public health threat.⁷⁶

The EPA argues that this requirement is inapposite in the present case, because electric utilities were listed for regulation under section 112 only because the EPA had failed to consider the possibility of regulating these sources under section 111.⁷⁷ The EPA analogizes this situation with other times when it has “de-listed” a source category without following the criteria of section 112(c)(9), after the agency had determined that it lacked a factual predicate for initially listing the category.⁷⁸ For example, in 2002 the EPA removed asphalt concrete manufacturers from the list of major sources to be regulated under section 112 after the agency concluded that these sources did not emit or have the potential to emit a sufficient amount of HAP to satisfy the statutory definition of a “major source.”⁷⁹

Opponents might argue, however, that reinterpretation of section 112 should not be grounds to summarily rescind previous designations that were based on an equally reasonable yet contrary interpretation of the statute. Opponents might also argue that it is inappropriate for the EPA to analogize instances where factual error was responsible for misdesignation to the present case, where there is no dispute over the

⁷³Motor Vehicle Assoc. of U.S., Inc. v. State Farm Mutual Auto. Insurance Co., 463 U.S. 29, 42 (1984).

⁷⁴*Id.* (quoting *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973)).

⁷⁵*Id.*

⁷⁶See *supra* p.3.

⁷⁷*Proposed Rule and Revision, supra* note 7 at 205-206.

⁷⁸*Id.*

⁷⁹*Id.*

public health threat posed by mercury emissions from electric utilities, but rather whether the EPA can interpret section 112 differently than it had previously.

Implications of the 1998 Settlement Agreement upon the Manner in which the EPA Can Regulate Electric Utilities. A legal settlement agreement is generally used to end or avoid litigation between parties, by obligating one or more of the parties to take a particular course of action. The remedy available when a settlement agreement is breached is dependant upon the nature of the agreement and its express provisions.⁸⁰ For a settlement agreement to act as controlling law that binds an agency to take a particular course of action with respect to rulemaking, it generally needs to be incorporated into a judicial order as a consent decree.⁸¹ If a settlement agreement between an agency and a private party concerning agency rulemaking has not been incorporated into a court order, the only remedy available to the non-breaching party might be to move for the original case to be reopened.⁸² In that case, “the agency is back in its presettlement position, and the agreement itself should not be seen as a significant limitation on the agency’s ability to change its mind.”⁸³

The 1998 settlement agreement between the EPA and NRDC was a modification of an earlier 1994 agreement between the two parties that was filed with the D.C. Circuit. According to the NRDC, however, neither the 1994 nor 1998 settlement agreement was incorporated into a judicial order. It therefore seems that even if it could be argued that the EPA would be in breach of the settlement agreement if it chose to regulate mercury emissions from electric utilities under section 111 rather than 112 of the CAA, the NRDC’s remedy might be limited to moving to reopen the case forming the underlying basis behind the breached agreement. Accordingly, it does not appear likely that the 1998 settlement agreement could be used to restrict the EPA’s rulemaking discretion.

⁸⁰ For a discussion of the diverse nature of settlement agreements and their potential effect on EPA rulemaking, see Jeffrey M. Gaba, *Informal Rulemaking by Settlement Agreement*, 73 GEO L.J. 1241 (1985).

⁸¹ A consent decree is a legal document approved by a court that formalizes an agreement between parties in a case so as to avoid further litigation. The consent decree itself is “an agreement that the parties desire and expect will be ... enforceable as ... a judicial decree that is subject to the rules generally applicable to other judgments and decrees.” *Frew v. Hawkins*, 2004 WL 57266 (U.S. Sup. Ct. Jan. 14, 2004) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992)). See FED. R. CIV. P. 54(a) (defining a “judgment” as including “a decree and any order from which an appeal lies”); *Gorsuch*, 718 F.2d at 1125 (declaring that a consent decree “must be treated ‘as a judicial act’”) (quoting *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932)).

⁸² See Gaba, *supra* note 80, at 1265 (Agency compliance with a settlement agreement not incorporated into a judicial order “would presumably only dissolve the stay and accelerate the underlying lawsuit”); *Natural Resources Defense Council, Inc. v. Reilly*, 781 F.Supp. 806, 807 (D.D.C. 1992) (discussing NRDC moving to reopen case against EPA after EPA breached settlement agreement not incorporated into a judicial order).

⁸³ Gaba, *supra* note 80, at 1265.