ABSTRACT

In June 2014, the U.S. Environmental Protection Agency issued a much-anticipated rule, the Clean Power Plan (“CPP”), for regulating carbon dioxide (“CO₂”) emissions from the nation’s existing fossil fuel-fired power plants. The CPP is vast in scope, and departs from past rulemakings by basing performance standards on emission reduction measures taken outside of the affected source category. Noting the interconnected nature of the electric grid, and that electricity generation from lower-carbon-emitting sources can displace generation from higher-emitting sources, and that energy efficiency measures can reduce the demand for electricity (and thereby reduce emissions), EPA asserts that a “grid-based” approach of source and non-source related actions is the “best system of emission reduction” that is “adequately demonstrated”—the standard EPA must meet under Section 111(d) of the Clean Air Act (“CAA”).

EPA relies heavily on its discretion to interpret and implement the CAA in advancing its grid-based approach to regulating power plants. A pair of U.S. Supreme Court decisions handed down in 2014, however, suggests different fates for the CPP on judicial review. One opinion could signal that EPA will be afforded substantial deference in how it implements CAA section 111(d), the other quite the opposite. This article provides an overview of the CPP, summarizes EPA’s legal justification of its grid-based approach, and discusses the potential implications of the two recent Supreme Court decisions for the rule.

I. Introduction

On June 2, 2014, the Environmental Protection Agency (“EPA”) announced the regulatory centerpiece of its climate action strategy, the so-called “Clean Power Plan” (“CPP”). The CPP leverages a rarely used provision of the Clean Air Act (“CAA”), section 111(d), to exact substantial reductions of carbon dioxide (“CO₂”) emissions from the nation’s fleet of existing fossil fuel-fired electric generating units (“EGUs”).

CAA section 111 requires EPA to establish standards of performance (also termed performance standards) for stationary sources of air pollutants. A source is subject to a performance standard if it is part of a category of sources that “causes, or contributes significantly to, air pollution

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1 Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Proposed Rule, 79 Fed. Reg. 34,830 (June 18, 2014). As of the date of this writing, the CPP is only a proposal. EPA set a comment deadline of October 16, 2014.
which may reasonably be anticipated to endanger public health or welfare.” Upon designating a source category, EPA must establish standards of performance for “new sources” in that category. Section 111(a) defines the term “standard of performance” to mean:

A standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

Once EPA establishes section 111(b) standards of performance for “new sources” in a source category—i.e., sources yet to be built or existing sources that undergo a “modification” or “reconstruction”—EPA is obligated under CAA section 111(d) to “prescribe regulations” for states to establish standards of performance for “existing sources” within the same source category. An “existing source” is any stationary source that is not a “new” source. EPA proposed section 111(b) new source performance standards for CO₂ emissions from fossil fuel-fired EGUs on January 8, 2014, triggering its existing source obligations under section 111(d). EPA, in turn, proposed the CPP on June 2, 2014.

The CPP is vast in scope. It would apply to all 3,000 existing fossil fuel-fired EGUs (affected sources) in the United States and prescribe state-specific rate-based emission standards (i.e., lbs. CO₂/MWh) that states must achieve by 2030. The rule also affects sources outside of the regulated source category, since EPA bases the proposed performance standards on reductions achievable by increasing renewable and nuclear generation, and measures that states can adopt to improve demand-side energy efficiency. EPA projects that the CPP will reduce CO₂ emissions from the power sector by approximately 30 percent by 2030 as compared with the total CO₂ emissions from affected sources in 2005.

EPA’s grid-wide approach is controversial and legally untested. Section 111 requires EPA to set standards of performance commensurate with the “best system of emission reduction” (“BSER”) that is “adequately demonstrated.” Traditionally, EPA has defined BSER as the level of reductions achievable at the unit level. Here, it asserts novel authority to reduce emissions from affected sources by effectively regulating the electric grid as a whole. If EPA’s BSER determination flounders legally, so too will the rule in its entirety.

Two recent Supreme Court decisions, both concerning the CAA, no doubt will loom large over the inevitable legal challenge of the CPP. The two decisions—EPA v. EME Homer City Generation, L.P. (“Homer City”) and Utility Air Regulatory Group v. EPA (“UARG”)—reflect divergent views on the level of deference the courts are likely to afford EPA’s interpretation of its CAA
section 111(d) authority. The Homer City majority was more willing to take a functional approach, deferring to agency expertise in making sense of technical statutory obligations. The UARG majority, by contrast, precluded deferential review, finding that on questions of major economic and political importance, the Court would require Congress to speak clearly if it intends to delegate to an agency broad powers. The CPP will likely rise or fall on which approach a reviewing court follows. A functional approach favors deference, while an emphasis on the scope of EPA’s asserted powers under the CPP—vast, indeed—could result in a finding that EPA has gone too far.

Below, this article summarizes the CPP and EPA’s legal justification of its grid-based approach, and discusses the potential implications of these two new recent Supreme Court decisions on the legal viability of the rule.

II. The Clean Power Plan Expands the Meaning of “Best System of Emission Reduction” to Include Sources Outside of the Designated Source Category

The driving force behind any section 111 performance standard is EPA’s determination of what constitutes the “best system of emission reduction ['BSER’]… adequately demonstrated” for the source category. The BSER standard is the legal underpinning for the “emission limitation [that is] achievable.” Without a legally defensible BSER, the emission standard with which affected sources must comply cannot survive judicial review.

Historically, EPA has interpreted BSER to mean the level of emission reductions achievable at the unit level, though recently EPA has allowed states and affected sources the option of complying with BSER on a source category-wide basis. For example, under the 2005 Clean Air Mercury Rule, EPA established unit-level performance standards but gave states the option of adopting an alternative allowance-based trading system for reducing mercury emissions from coal-fired EGUs. EPA similarly allowed for averaging of nitrogen oxide emissions under the large municipal waste combustors rule.

In the proposed CPP, however, EPA goes beyond its traditional approach, and instead defines BSER as reductions that can be achieved directly at the unit level as well as indirectly through regulatory actions across the entire electric grid. Specifically, EPA defines BSER to include CO₂ emission reductions that can be achieved through implementation of the following four “building blocks”:

- **Building Block 1:** Improving heat rates of existing coal-fired EGUs by 6%. This is the only building block that would achieve direct, unit-level reductions from sources within the regulated source category.

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11 Only two courts have jurisdiction to review the final CPP. Under CAA § 307, all petitions for review of nationally-applicable CAA regulations must be filed in the United States Courts of Appeals for the D.C. Circuit. 42 U.S.C. § 7607. D.C. Circuit rulings, of course, may be reviewed by the Supreme Court. Thus, when this article refers to “courts,” it means the D.C. Circuit and the Supreme Court.
13 Id. § 7411(a) (emphasis added).
15 See Emission Guidelines for Municipal Waste Combustor Metals, Acid Gases, Organics, and Nitrogen Oxides, 40 C.F.R. § 60.33b(d).
• **Building Block 2:** Substituting or displacing electric generation from coal- and oil-fired EGUs with generation from natural gas combined cycle (“NGCC”) units. EPA’s goal is to increase NGCC operating capacity to 70%.

• **Building Block 3:** Substituting or displacing electric generation from fossil fuel-fired EGUs with increased generation from renewable and nuclear facilities. EPA asserts that this could be achieved by implementing or strengthening state renewable portfolio standards, incentivizing such zero- and low-emitting power production through a carbon allowance trading program, or by imposing a hard cap on production or emissions from fossil fuel-fired sources, among other measures.

• **Building Block 4:** Implementing demand-side energy efficiency measures to achieve annual incremental savings of 1.5% off of “business as usual” electricity sales.

**III. EPA’s Legal Justification for Its BSER Determination**

On judicial review, EPA’s interpretation of the term “system” as extending beyond the affected source category will be assessed under the familiar *Chevron* deference standard. That standard, rooted in the 1984 case *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, requires courts to defer to reasonable agency interpretations of ambiguous statutory provisions. At Step 1 of the *Chevron* analysis, if Congress has “directly spoken to the precise question at issue, that is the end of the matter,” and the agency must give effect to Congress’s unambiguous intent. If, however, “the statute is silent or ambiguous with respect to the specific issue,” then the court proceeds to Step 2 of the analysis to determine if the agency reasonably interpreted the statute. If it did, then the Court “may not substitute its own construction of a statutory provision,” even if it finds that the agency, in the court’s opinion, has not chosen the best interpretation.

EPA asserts that Congress clearly and unambiguously intended “system” to have its “ordinary, everyday meaning,” as derived from the dictionary definition. The dictionary defines “system” broadly as “‘a set of things working together as parts of a mechanism or interconnecting network; a complex whole.’” Thus, according to EPA, the meaning of “system” is plainly expansive enough to “encompass[] virtually any ‘set of things’ that reduce emissions,” including beyond-the-source-category controls.

While EPA is correct that the ordinary meaning of undefined terms is the place to start in any statutory interpretation analysis, it is not the end of the inquiry at *Chevron* Step 1. Courts also look to statutory context, and on that front, EPA’s grid-based approach stands on shakier ground. The

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17 Id.
18 Id. at 843.
19 Id.; id. at 843 n.11.
20 Legal Memorandum at 36-37 (quoting Oxford dictionary of English (3rd ed.)).
21 Id. at 51.
23 See, e.g., *UARG*, 134 S. Ct. at 2442 (“[A]n agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference.”); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (“The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”); *Brown v. Garner*, 513 U.S. 115, 118 (1994) (“ambiguity is a creature not of definitional possibility but of statutory context”).
central, practical problem with EPA’s definition of “system” is that it divorces the basis for the emission standard—BSER—from the sources subjected to that standard—fossil fuel-fired EGUs. While Building Blocks 1 and 2 involve emissions reductions achieved at fossil fuel-fired EGUs only—i.e., affected sources—Blocks 3 and 4 require actions by entities other than affected sources.

If EPA can define “system” as broadly as it proposes, then whether the BSER standard is tethered directly to affected sources is of no moment. But that approach arguably elides the statutory context that undergirds section 111 as a whole. Section 111 is replete with phrases cabining EPA’s authority to set emission standards for (only) affected sources: EPA may set standards for “sources within such [listed source] category”24; EPA shall issue guidelines to states for “establish[ing] standards of performance for any existing source”25; and states must submit compliance plans “applying a standard of performance to any particular source.”26 EPA attempts to address this issue by pointing out that emission reductions or decreased electric demand happening anywhere on the electric grid ultimately affect all other generators who supply electricity to the grid. But even if EPA is correct that beyond-the-source-category measures result in emission reductions at affected sources, and so do not trespass beyond the source category, an agency cannot do “indirectly what it cannot do directly.”27 That is to say, EPA cannot regulate other things—e.g., the continued operation of an aging nuclear power plant or the construction of a new solar power facility—that only indirectly affect source category emissions.

Perhaps anticipating this legal weakness, EPA offers a multi-pronged defense of its proposed grid-based approach. EPA essentially argues that its interpretation of “system” does, in fact, focus only on source-level controls. As noted above, EPA first asserts that the interconnected nature of the grid means that source-level emission limitations can be achieved by the actions of non-affected sources. For example, new renewable generation (e.g., solar and wind) will result in reduced generation, and thus, reduced emissions, from existing, higher-emitting EGUs, thereby lowering the amount of CO2 released relative to the production of electricity. This, according to EPA, “effectively” means that beyond-the-source-category measures are, in fact, unit-level controls, because they “ultimately reduce emissions solely from regulated EGUs.”28

Individual EGUs are no doubt part of a greater interconnected electric system with other generators and end users, and thus EPA is correct that increased generation by sources outside of the source category can reduce emissions from affected units. But the agency’s logic proves too much and would effectively give EPA boundless authority to regulate provided it found some nexus back to an affected source.

EPA’s second defense of its grid-based approach decouples emission obligations from liability for noncompliance. EPA asserts that even if a court were to find that the emission standards “must apply directly to the affected sources and only to the affected sources,” any uncertainty goes only to the legal liability for achieving a standard, not the scope of BSER. Thus, even if achieving emission reductions at a coal-fired facility depends on, for example, reducing demand through demand-

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25 Id. § 7411(d)(1) (emphasis added).
26 Id. § 7411(d)(1)(B) (emphasis added).
28 Legal Memorandum at 79 n.63 (emphasis added) (quoting Nordhaus R., Gutherz I., “Regulation of CO2 Emissions from Existing Power Plants Under section 111(d) of the Clean Air Act: Program Design and Statutory Authority,” Environmental Law Reporter, 44: 10366, 10383 n.133 (May 2014)).
response energy efficiency programs (Building Block 4), “the affected sources would bear the legal liability for the entire amount of emission reduction requirements.” But this reasoning is disconnected from the text of section 111 defining BSER, which focuses on achievable and adequately demonstrated emission standards, not enforcement mechanisms. Accordingly, it does not explain the legal basis for rooting emission standards in beyond-the-source-category controls.

Third, EPA asserts that affected sources can undertake Building Blocks 2-4 themselves. For example, to achieve re-dispatch under Building Block 2, EPA argues that coal-fired EGUs could reduce generation, while NGCC units could increase generation. Under this theory, coal-fired EGUs could also construct Building Block 3 sources such as wind or solar facilities, or invest in Building Block 4 demand-side energy efficiency programs to further reduce generation and, therefore, cut emissions at their facilities. While it is conceivable that affected EGUs could do all these things and more, whether it is within their power to do so is distinct (like the previous rationale) from the operative question: whether a “system” of emission reduction under section 111 can lasso myriad beyond-the-source-category measures to achieve emission reductions at the source.

As a fallback position, EPA asserts that it can justify its proposed emission rates exclusively on Building Block 1 and reduced generation from fossil-fuel fired EGUs. Under this alternative theory, Building Blocks 2-4 “would not be components of the system of emission reduction, but instead would serve as bases for quantifying the reduction in emissions resulting from the reduction in generation at affected EGUs.” In other words, because of the fungible nature of the electric grid, measures taken under Building Blocks 2-4 could fill the void left by reduced generation at high emitting fossil fuel-fired EGUs. And because reduced generation at higher emitting facilities can be replaced by generation from lower emitting ones, reduced generation “may be accomplished in a manner that assures reliability of the electricity grid.”

Unlike its other legal defenses, the alternative approach appears to not venture beyond the affected source category, thus hewing closer to the contextual framework of section 111. Even so, it may be a bit too cute by half, relying on semantic distinctions to distinguish what is, substantively, the same BSER standard.

IV. Recent Supreme Court Jurisprudence Portends an Uncertain Fate For EPA’s Grid-Based Approach

The CPP invariably will be challenged; such is the fate of virtually any modern EPA CAA rulemaking. Whether EPA’s beyond-the-source-category, grid-systems-based approach survives judicial review will be adjudicated under the familiar Chevron agency deference standard discussed above. While the Chevron standard is universally accepted, application is, in part, a matter of perspective, particularly at the Supreme Court. The divergent views on the Court are illustrated by two CAA cases decided last term: EPA v. EME Homer City Generation, L.P. and Utility Air Regulatory Group v. EPA. These cases will no doubt play prominent roles in the judicial review of the CPP.

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29 Id. at 52-53.
30 Id. at 72.
31 Id. at 72-73.
32 Id. at 15, see also id. at 34, 43, 80.
33 Id. at 15.
34 Id. at 87.
35 Id. at 86.
In its April 2014 ruling in *EPA v. EME Homer City Generation, L.P.* (6-2), the Supreme Court deferred to EPA’s interpretation of its authority under the CAA in issuing statewide allocations for sulfur dioxide (“SO₂”) and nitrogen oxide (“NOₓ”) emissions from EGUs. *Homer City* concerned the legality of an EPA rule, the Cross State Air Pollution Rule (“CSAPR”), which implemented CAA section 110’s “Good Neighbor Provision.” That provision requires states to prohibit in-state sources from “emitting any air pollutant in amounts which will [] (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any … national primary or secondary ambient air quality standard.”

Under CSAPR, EPA calculated each state’s significant contribution to downwind nonattainment of the National Ambient Air Quality Standards (“NAAQS”) for ozone and particulate matter, and imposed federal implementation plans setting forth statewide emission “budgets” for SO₂ and NOₓ.

In calculating each state’s budget, EPA considered the cost per ton of emission reductions and the amount of SO₂ and NOₓ contributed by each state to downwind states. In effect, EPA used the cost per ton of emission reductions as a proxy, setting the maximum cost threshold high enough to eliminate significant contributions to all downwind states’ nonattainment, but low enough to avoid substantial over-compliance.

Reversing the D.C. Circuit’s vacatur of the rule, Justice Ginsburg, writing for a six-justice majority, upheld EPA’s consideration of cost in setting each state’s emissions budget, even though the statute nowhere provides for cost considerations. Instead, the statute prohibits states “from emitting any air pollutant in *amounts* which will … contribute significantly” to downwind nonattainment or interfere with maintenance of a NAAQS standard. Determining that the provision was silent on the methodology EPA should use to reduce such “amounts” of pollution, the Court assessed EPA’s use of cost at *Chevron* Step 2. Noting that the agency faced a difficult “task of choosing which among equal ‘amounts’ to eliminate,” the Court adopted a functional approach, focusing less on the statute’s text and more on the reasonableness of EPA’s methodology. The Court held that the “[a]gency has chosen, sensibly in our view, to reduce the amount easier, i.e., less costly, to eradicate, and nothing in the text of the Good Neighbor Provision precludes that choice.”

In dissent, Justice Scalia rejected EPA’s construction, and would have resolved the case against EPA at *Chevron* Step 1. Hewing closely to the statute’s text, he found that EPA (and the Court) erroneously read an ambiguity into the word “amounts.” In Justice Scalia’s view, Congress clearly and unambiguously “require[ed] reductions [] in proportion to the *amounts of pollutants* for which each upwind State is responsible, [not] on the basis of how cost-effectively each can decrease emissions.” Moreover, Justice Scalia determined that the “context of the entire provision” does not allow for any consideration of costs. Reading cost-benefit analysis into section 110 was akin to “‘alter[ing] the fundamental details of a regulatory scheme,’” which Congress does not do “in vague

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36 134 S. Ct. 1584.
38 *Homer City*, 134 S. Ct. at 1606-07. The marginal cost of each additional ton of emissions reduction increases. Thus, the higher the cost threshold, the more emissions would be required to be reduced. The lower the threshold, the fewer emissions would need to be reduced.
39 *Id.* at 1606-07.
40 *Id.* at 1607.
41 *Id.* at 1610 (Scalia, J., dissenting) (emphasis in original).
42 *Id.*
terms or ancillary provisions—it does not … hide elephants in mouseholes.” Justice Scalia would have “demanded a ‘textual commitment [by Congress] of authority to the EPA to consider costs’” to uphold EPA’s interpretation.44

Ultimately, Justice Ginsburg and the majority found room for deference because they viewed EPA’s action as determining the method for executing a statutory command, a task peculiarly fit to agency discretion. Justice Scalia, by contrast, trained his focus instead on the statutory text itself, finding that because it did not expressly delegate to EPA the authority to adopt the chosen method of implementation, EPA was without power to use it.

b. Utility Air Regulatory Group v. EPA

Not two months later, a five-justice majority rejected the EPA’s interpretation of its authority under another CAA provision. At issue in Utility Air Regulatory Group v. EPA (5-4) (“UARG”)45 was whether EPA permissibly interpreted the statute as requiring sources to obtain Prevention of Significant Deterioration (“PSD”) and Title V operating permits solely on the basis of greenhouse gas (“GHG”) emissions. EPA argued that its interpretation was compelled because the statute requires permits for “major sources” of “any air pollutant,” and GHGs are air pollutants under the CAA. EPA’s construction of the statute thereby vastly expanded the scope of sources subject to the agency’s permitting authority from approximately 15,000 to an estimated 6 million.46

Writing for the majority, Justice Scalia rejected EPA’s interpretation of the term “any air pollutant,” finding that it greatly expanded EPA’s regulatory authority beyond what Congress could have reasonably intended. This was despite the agency’s attempt to adjust statutory levels through a regulation designed to make fewer sources subject to GHG permitting actions.47 Applying a Chevron Step 1 analysis, the Court looked to statutory context, and found that in several other parts of the CAA, EPA had not deemed itself “compelled” to construe the term “any air pollutant” in such capacious terms: “EPA has routinely given [the term] a narrower, context-appropriate meaning,” rather than the Act-wide definition covering all regulated air pollutants.48 This, coupled with the administrative impracticability of regulating all sources of GHGs that emit at least 250 tons per year, led the Court to conclude that “[i]t is plain as day that the Act does not envision an elaborate, burdensome permitting process for major emitters of steam, oxygen, or other harmless airborne substances.”49

Having found the term “any air pollutant” ambiguous, the Court analyzed the reasonableness of EPA’s interpretation at Chevron Step 2. The Court rejected that interpretation on the independent basis that it would “bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”50 Because regulating GHGs would vastly in-

43 Id. at 1616 (Scalia, J., dissenting) (quoting Whitman v. American Trucking Ass’ns, 531 U.S. 457, 468 (2001))(emphasis added).
44 Id. (Scalia, J., dissenting) (quoting American Trucking, 531 U.S. at 468).
45 134 S Ct. 2427.
47 The “Tailoring Rule,” referenced supra, raised GHG permitting levels from 100 and 250 tons per year as provided within the CAA to 75,000 to 100,000 tons in an attempt to substantially reduce the number of sources subject to permitting on the basis of GHG emissions and to reduce the resulting burden on state permitting agencies.
48 Id. at 2439.
49 Id. at 2440, 2442.
50 Id. at 2444 (emphasis added).
crease the scope of EPA’s PSD and Title V authority, the Court was unwilling “to read into ambiguous statutory text” the “power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources.” Indeed, the Court determined that EPA’s actions “would have a profound effect on virtually every sector of the economy.” Confronted with a “transformative expansion in EPA’s regulatory authority,” the Court looked for “clear congressional authorization” of such power. Finding none, it rejected EPA’s regulation of GHGs under PSD and Title V as an arrogation of agency power that “the statute is not designed to grant.”

c. Implications for the Clean Power Plan

Proponents of the CPP and its grid-based approach likely will argue that EPA’s interpretation of the term “system” in setting BSER is analogous to EPA’s interpretation of “amounts” in Homer City. Neither term is defined in the statute, and both terms are somewhat ambiguous. Thus, at Chevron Step 2, a court might be inclined to defer to the agency’s reasonable construction of “system” as extending beyond the affected source category, even though the CAA does not expressly allow for it. Just as the Court in Homer City found that nothing “preclude[d]” EPA from considering costs, nothing in section 111 expressly prohibits the agency from rooting Building Blocks 3 and 4 of BSER in beyond-the-source-category controls. Moreover, as much as considering costs in setting emission standards was a “sensible” method of implementing an ambiguous statutory provision in Homer City, so too, proponents would argue, is accounting for the fungible nature of the electric grid in interpreting “system.” Under this functional approach, a court would look more at whether a grid-based BSER standard effectively reduces emissions from affected EGUs in a reasonable manner, and less at whether the statute’s text expressly authorizes control measures extending beyond those EGUs.

Opponents of the CPP, on the other hand, will find much to like in UARG. Both EPA’s interpretation of the term “any air pollutant” there and its interpretation of “system” here appear to work a dramatic expansion of EPA authority without clear congressional authorization. While EPA might not claim the power to regulate millions of new sources as it did in UARG, it asserts authority much broader than a context-based reading of section 111 seems to allow. Section 111 focuses on emission standards for affected sources only, while EPA’s proposal would effectively regulate the entire electric grid, while also relying on additional efforts to reduce the overall demand for electricity. Opponents would argue that this looks much like EPA’s claim to what the UARG Court deemed to be an “unheralded power to regulate a significant portion of the American economy” under PSD and Title V. Thus, while section 111 might not preclude a grid-based approach to BSER, the sheer scale of the CPP could be too great for the statute to bear. It might, in a manner of speaking, be the regulatory elephant trying to squeeze into a statutory mousehole.

V. Conclusion

Ultimately, EPA’s BSER determination will likely rise or fall on which approach a reviewing court follows. A functional approach in the mode of Homer City, one that views the building blocks as EPA’s policy choice in exercising its delegated authority under section 111, would maximize EPA’s chance of prevailing on judicial review. But a court could just as easily chafe at EPA’s at-

51 Id. (emphasis added).
52 Id. at 2436 (internal quotation marks omitted); see also id. at 2444 n.7.
53 Id. at 2444.
54 Id.
55 Homer City, 134 S. Ct. at 1607.
56 UARG, 134 S. Ct. at 2444.
tempts to extend its purview far beyond fossil fuel-fired EGUs as in *UARG*. By interpreting “system” as much broader than source-level controls, a court could conclude that EPA has wrenched BSER out of context, untethering it from the sources it purports to regulate.