Technology-Based? Cost Factoring in U.S. Environmental Standards

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TECHNOLOGY-BASED?
COST FACTORING IN U.S.
ENVIRONMENTAL STANDARDS

Jamison E. Colburn*

ABSTRACT

Environmental controls in the United States are often said to be “technology-based” because the polluter’s duties are determined by the available technology for controlling that pollution rather than by the social costs and benefits of doing so. Indeed, this is much of what distinguishes U.S. environmental law post-1970 from that which preceded it. But technology-based standards have in fact weighed the costs of controlling pollution in unique, often obscure ways, yielding an analysis that defies standardization and basic notions of transparency. Often lumped under an umbrella heading called “feasibility” analysis and justified on the grounds that it avoids many of the known pitfalls of cost-benefit analysis, the factoring of cost into technology assessments hands our Environmental Protection Agency a uniquely hard problem of prediction: the inducement of innovation. This Article traces the evolution of the practice to the state of the art today, offers several clarifications upon reflection, and suggests that cost estimation in technology-based standard setting is actually more likely to be a useful decision input than the orthodox cost-benefit balancing procedures. Most importantly, it is more likely to accurately assess the possibilities of inducing innovation — accuracy that is increasingly vital to meeting environmental challenges like climate change.

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INTRODUCTION

Pollution control standards in the U.S. are prototypically some function of the solutions that are “available” or “achievable,” not of how much pollution is optimal in balancing benefits and costs. This has long drawn economists’ ire because optimizing benefits and costs just sounds rational. Indeed, if the allure of the American approach has been its embodiment of a “best efforts” mandate to reduce pollution at manageable cost, it can diverge considerably from the broadest accounts of economic efficiency. The Clean Air Act (CAA) and Clean Water Act (CWA) together impose more than a dozen requirements that polluters control to the degree the U.S. Environmental Protection Agency (EPA) (or its delegate) finds achievable, and many other statutes add requirements as well. Variation is the norm, but the core feature of such “technology-based” standards is that they constrain independent of environmental benefit or of marginal cost—at least to a degree. This is what makes a pollution standard technology-based. Yet most of these mandates reach for solutions that are, in some sense, cost-available to the regulated parties—an indefinite qualification further complicating an already complex regulatory tool. Indeed, the intersection of cost and technology in these settings has been uniquely problematic given the dynamic properties of a mature economy. The question has long been whether or not such policies can improve the technologies of production and


4. See infra notes 54-149 and accompanying text.

5. See infra notes 51-53 and accompanying text.

6. See infra notes 178-207 and accompanying text.

consumption. Despite sustained and eclectic efforts, it has evaded rigorous answer.

Orthodox economics has long emphasized the importance of technological change to productivity gains. But the constant search for innovations maximizing profits—or minimizing costs—confounds straight-line thinking. The conventional methods have routinely over-estimated regulation costs—so much so that deeper questions surrounding their concept of cost are at least implicated. Indeed, several critiques have sustained widespread skepticism of those methods’ overall justification. Costs may necessarily be something to avoid, but which costs are worth avoiding has


11. In one noted ex post assessment of regulatory cost estimates, Harrington and colleagues found that costs were much more likely to be over- than under-estimated because most of the analyses studied “ignore[d] the possibility of technological innovation. . . . Technical change is, after all, notoriously difficult to forecast; all that can be said with confidence, based on historical experience, is that the cost of compliance will likely decline, but no one can say at what rate.” Winston Harrington et al., On the Accuracy of Regulatory Cost Estimates, 19 J. POL’Y ANALYSIS & MGMT. 297, 309 (2000). Cost over-estimations in regulatory impact analyses (RIAs) were first revealed by retrospective studies some two decades ago. See, e.g., Thomas O. McGarity & Ruth Ruttenberg, Counting the Cost of Health, Safety, and Environmental Regulation, 80 TEX. L. REV. 1997, 1998-99 (1998) (finding vast overestimation of costs in influential studies attributable to dubious assumptions about cost avoidance); Lisa Heinzerling, Regulatory Costs of Mythic Proportions, 107 YALE L.J. 1981, 1998 (1998) (same).

12. For a critical, full spectrum account of economics’ orthodoxy and its deepening methodological troubles, see TONY LAWSON, ECONOMICS AND REALITY (1997); TONY LAWSON, REORIENTING ECONOMICS (2003); see also MARK BLAUG, ECONOMIC THEORY IN RETROSPECT 1-8 (5th ed. 1997). “[T]he striking fact about the history of economics is how often economists have violated both their own and later methodological prescriptions.” Id. at 690. On the specific problem of a theory of cost, see Robert Cooter, The Cost of Coase, 11 J. LEGAL STUD. 1 (1982).

13. See infra notes 215-231 and accompanying text.


15. See Sinden, supra note 1, at 104-08 (noting there are many issues in assigning values, such as monetizing nonmarket goods and the declining value of money).
grown unremittingly contested in economics.\textsuperscript{16} In the view of many, innovation is a principal source of the uncertainty.\textsuperscript{17} Prevailing orthodoxy casts technological change as an autonomous function of time—immune to policy change. Yet costs in business are the enemy of profits. If they can be avoided by technical progress, that will be the firm’s pursuit.\textsuperscript{18} Thus, for as long as technology-based standards have been condemned for their inefficiencies, it has been conceded that they \textit{might} ultimately achieve superior cost minimization simply by inducing innovation.\textsuperscript{19} And as cost-benefit analysis has shouldered more duties in our administrative state, innovation’s role in cost factoring has become its foil.\textsuperscript{20}

The unfocused approach we have taken to this nexus has left too much to chance. Technology-based standard setting is as far from a theory of inducing innovation today as it was four decades ago.\textsuperscript{21} This article makes the case that technology-based standards, though still a bit of a muddle, can create clearer paths to consensus actions on long-lived, broad-scale environmental challenges like climate change. Were it finally to resolve some basic assumptions and methodological priors, induced cost-avoidance might be able to navigate the uncertainties mentioned above in ways far superior to orthodoxy cost-benefit analysis.\textsuperscript{22} Especially in bigger picture cost factoring, \textit{e.g.}, the social costs of carbon, this misapprehension of cost is becoming an urgent problem in the pursuit of environmental quality.\textsuperscript{23} Equilibrium model-

\begin{itemize}
\item \textbf{16.} See, \textit{e.g.}, Lee Anne Fennell, \textit{The Problem of Resource Access}, 126 \textit{Harv. L. Rev.} 1471, 1483-87 (2013).
\item \textbf{17.} See infra note 42 and accompanying text.
\item \textbf{18.} Pursuing, of course, is not the same thing as attaining. See infra notes 210-14 and accompanying text.
\item \textbf{19.} See, \textit{e.g.}, Note, \textit{Technology-Based}, supra note 3, at 799 (“It is conceivable that a pollution abatement program that is not cost-effective in the short run could produce least-cost long-term results by forcing the development of superior abatement technology, and thereby minimizing the aggregate long-term costs of compliance with environmental regulations.”); \textsc{Kneese & Schultze}, supra note 2, at 82 (“Over the long haul, perhaps the most important single criterion on which to judge environmental policies is the extent to which they spur new technology toward the efficient conservation of environmental quality.”).
\item \textbf{20.} See Timothy F. Malloy, \textit{Regulating by Incentives: Myths, Models, and Micromarkets}, 80 \textit{Tex. L. Rev.} 531, 547 (2002) (“Despite the attention given to innovation and regulation . . . there is surprisingly little empirical support for the proposition that either [pollution] trading or [conventional] regulation actually leads to continuous and systematic innovation.”).
\item \textbf{21.} To be sure, design, performance and goal standards all allocate freedoms differently and can make real differences in markets for innovation. Because the technology-based standards examined herein overwhelmingly take the form of performance standards, however, we contrast that form with other, more immediately market-facing tools like taxes and allowances.
\item \textbf{22.} See infra notes 277-99 and accompanying text.
\end{itemize}
ing of policy costs and benefits lacks even a modicum of accuracy if we cannot predict the direction or pace of technological innovations rearranging costs and benefits over whatever interval is in question.\footnote{24}

Part I argues that the economics of inducing innovation has failed to yield any general guidance regarding regulatory choice while Part II introduces what little legal doctrine governs our technology-based approach. Part III sets out the microeconomics of production and what we should be looking for in understanding cost-availability. Finally, Part IV uses two recent case studies to test some of the observations made in Parts II and III.

I. AN ECONOMICS OF INDUCING INNOVATION?

The economist John Hicks first hypothesized “induced innovation,” \textit{i.e.}, that “a change in the relative prices of the factors of production is itself a spur to invention, and to invention of a particular kind—directed to economizing the use of a factor which has become relatively expensive.”\footnote{25} Hicks spoke of labor costs. But scarcity—or, really, production constraints of any kind—can provide the inducement.\footnote{26} Orthodox economics views factors of production like labor and capital as fungible\footnote{27} and this has long complicated its very notion of cost.\footnote{28} Vital inputs like energy services sometimes fluctuate wildly in price to negligible overall effect.\footnote{29} Still, if innovation can be induced, the costs of regulation become a cryptic target. Since 2000, EPA’s

\footnote{24. Typically, probabilities are used to round out any model’s parameters—decisions that not even economists can agree make much sense. See Itzhak Gilboa et al., \textit{Probability and Uncertainty in Economic Modeling}, 22 J. Econ. Persp. 173 (2008); Martin L. Weitzman, \textit{On Modeling and Interpreting the Economics of Catastrophic Climate Change}, 91 Rev. Econ. & Stats. 1, 2-6 (2009). The more parameterized any cost estimation, the more likely it is to make internally contradictory assumptions about human behavior, markets, information flows, and, ultimately, about innovation itself. \textit{See infra} notes 226-28 and accompanying text.}

\footnote{25. \textit{John R. Hicks, The Theory of Wages} 124-25 (1932).}

\footnote{26. \textit{See, e.g., Julian L. Simon, The Ultimate Resource}(1981) (arguing that scarcity accesses the most vital of all resources—human ingenuity).}

\footnote{27. \textit{See R.H. Coase, The Institutional Structure of Production, 82 Amer. Econ. Rev. 713, 713-14} (1992). Note, though, that production factors are often not divisible or substitutable. \textit{See Nicholas Georgescu-Roegen, The Economics of Production, 60 Am. Econ. Rev. 1, 8-9} (1970); \textit{see infra} note 229 and accompanying text.}

\footnote{28. Depending on whether the focus is social utility and welfare, production/consumption functions, the theory of choice, or something else, economics’ concept of “cost” bears very different meanings. \textit{See I.M.D. Little, A Critique of Welfare Economics} (2d ed. 1957). The term “social cost” has long fared even worse. \textit{See Frank H. Knight, Some Fallacies in the Interpretation of Social Cost, 38 Q.J. Econ. 582, 584 (1924); Donald H. Regan, The Problem of Social Cost Revisited, 15 J.L. & Econ. 427 (1972); infra} note 165 and accompanying text.}

\footnote{29. \textit{See David Popp et al., Energy, the Environment, and Technological Change, in 2 Handbook on the Economics of Innovation} 873, 874, 883 (Bronwyn H. Hall & Nathan Rosenberg eds., 2010).}
own general guidance on “economic” analysis has acknowledged the dilemma that estimating the costs that will result from any regulation entails estimating future technical change.30 If firms can adjust their factors of production in response to external constraints, then the longer the time horizon in the estimate, the more likely it should include cost-avoidance efforts by affected firms.31 Even during the earliest work on technology-based standard setting, this influence on the market for innovation that the standard itself exerts was a serious issue.32 It has remained so ever since.33

Consider a hypothetical industry sector, X, comprised of three firms. One firm, A, is relatively diversified, having three lines of business, X, Y, and Z. A second firm, B, has only two of those business lines, X and Y. A third firm, C, is only in the business of X. Now suppose that, at prevailing prices, A’s two profitable lines of business are Y and Z but that it is losing money on X; that B’s only profitable business is X; and that C is just breaking even. (In some sense, B is outcompeting A and C (as to X).)

Assuming these firms comprise industry sector X and assuming the sector faces a new production constraint like a pollution control measure, any projection of the sector’s costs will be uncertain—perhaps deeply so. The economic orthodoxy assumes that innovation allowing X’s production by nonpolluting means minimizes “social” costs while regulation protecting those X is polluting merely transfers costs.34 A “static” analysis of the situation, though, does not even approximate an account of X as a competitive

30. Cf. U.S. EPA, EPA 240-R-00-003, GUIDELINES FOR PREPARING ECONOMIC ANALYSES 124-25 (2000) [hereinafter 2000 GUIDELINES], (acknowledging that “[b]enefit-cost models must predict what actions firms are likely to choose when attempting to comply with a new policy and what the compliance costs of those actions will be” but that those are likely to overestimate costs because firms can substitute away from the burdened production factors).
32. See Nicholas A. Ashford et al., Using Regulation to Change the Market for Innovation, 9 HARV. ENVTL. L. REV. 419, 420-22 (1985); KNEESE & SCHULTZE, supra note 2, at 82 (“Any attempt to specify the costs of reducing air and water pollution is handicapped by the need to make some assumptions about technology.”).
33. Cf. Adam M. Finkel, The Cost of Nothing Trumps the Value of Everything: The Failure of Regulatory Economics to Keep Pace with Improvements in Quantitative Risk Analysis, 4 Mich. J. Envtl. & ADMIN. L. 91, 119 (2014) (“[R]isks are elusive, but at least they are not capable of intentionally changing their size, whereas costs can increase or decrease strategically and perhaps even in response to being studied!”).
sector over time.\footnote[35]{See Coase, supra note 27, at 717-18 (observing that moving from a zero transaction cost world to the real world instantly highlights legal entitlements, transaction costs, extant industrial organization, and other distortions); Burton H. Klein, Dynamic Economics 20-24 (1977) (contrasting static and dynamic conceptions of efficiency); Herbert Hovenkamp, Rationality in Law & Economics, 60 Geo. Wash. L. Rev. 293, 306-09 (1992) (applying Coase’s hypotheses to bilateral monopoly contexts with results diverging from fictionalized accounts of perfectly competitive, equilibrating markets). EPA’s most recent manual steers its analysts to “partial” equilibrium analysis, i.e., the use of firms’ compliance costs as the principal determinant of a regulation’s “social costs,” over what it casts as the more onerous “general” equilibrium analysis whenever “the scope of a regulation is limited to a single sector, or to a small number of sectors.” See 2010 Guidelines, supra note 31, at § 8. Even that more limited form of inquiry should take account of cost avoidance, though.} Regulation adding costs to \(X\)’s production might spur (1) consolidation, e.g., \(A\) and \(C\) sellout to \(B\); (2) a market contraction, e.g., demand decreases from a price increase; (3) innovations reordering \(A\), \(B\), and/or \(C\)’s factors of production; (4) new entrants replacing the incumbents; or (5) some combination of the above. A law putting \(A\) out of the business, however, saves \(A\) its operating losses from \(X\).\footnote[37]{In this connection it is illustrative that standard cost-benefit analysis wavers over the characterization of job losses as costs or benefits. See Ann E. Ferris & Al McGartland, A Research Agenda for Improving the Treatment of Employment Impacts in Regulatory Impact Analysis, in Does Regulation Kill Jobs? 170, 170-72 (Cary Coglianese et al. eds., 2013).} A law compelling \(A\), \(B\), and \(C\) to buy a solution owned by \(D\) makes \(D\) profits.\footnote[38]{See Ashford et al., supra note 32, at 427. Profit should not exist in the world of equilibrium economics—even though it surely is what motivates real economic actors. See Weston, supra note 10, at 154 (calling profit a “nonfunctional” component of the standard theory); see infra notes 286-89 and accompanying text.} And a duty that is cheaper for \(C\) to fulfill than \(A\) and \(B\) could allow \(C\) to outcompete them. So which of the foregoing will actually minimize all “costs”? Which is more probable in context? Should the costs of producing \(X\) be considered on average or at the margin? When should we evaluate them and for what interval? How competitive is \(X\)? Can any of the incumbents pass along added costs through a price increase? Despite the prevalence of its own technology-based standard-setting duties and decades of experience with estimating costs, EPA’s generic guidance on “economic” analysis offers no insight into these questions. The vast majority of its
source literature is of the simple "cost-of-compliance" variety. The vagueness of the economic concept of cost, coupled with the deep uncertainties of inducing innovation, may explain EPA’s reticence. But this should no longer suffice in a climate where regulation’s costs loom so large.

The bulk of the work at this front has aimed to show that one type of regulatory tool or another is a better inducement to innovation and, thus, net social cost minimization. But if cost estimation is as dependent upon the time slices and contexts under study as suggested above, then necessarily there is some chance that any environmental control might be innovation-inducing, at least a priori. Consider three standard tools: Rule 1 prohibiting pollution above a set mass per unit of output; Rule 2 taxing

39. See William A. Pizer & Raymond Kopp, Calculating the Costs of Environmental Regulation, in 3 Handbook of Environmental Economics 1307, 1311-19 (Karl-Göran Måler & Jeffrey R. Vincent eds., 2005). EPA’s separation of “partial” equilibrium (wherein sectoral compliance costs are proxies for social costs) from “general” equilibrium approaches (wherein distortions like regulation are eventually assimilated into a wider economic equilibrium) is unalloyed to any indication of which is more likely correct in given circumstances. See 2010 Guidelines, supra note 31, at § 8.1. The source literature on which EPA relied noted that estimating technological change was the “most challenging” future work in estimating regulation’s costs and that, though much more common, “partial” equilibrium analyses are generally inferior to “general” equilibrium analysis. See Pizer & Kopp, supra note 39, at 1343-44. Pizer and Kopp dismiss the “engineering approach” described below as “problematic when applied on a broad scale.” Id. at 1312. Yet they also admit that partial equilibrium analysis is “wrong” when it misses “general equilibrium changes in output and prices and miss[es] potential welfare changes from altered production levels and distortions in other markets.” Id. at 1326.

40. Cf. Finkel, supra note 33, at 118-21 (describing a general problem, with EPA included, of a failure or refusal to report uncertainties in cost estimates); Cooter, supra note 12, at 20-24 (arguing that costs accrued from trading cannot be estimated accurately without first knowing the strategic nature of the situation).

41. See Nathaniel O. Keohane et al., The Choice of Regulatory Instruments in Environmental Policy, 22 Harv. Envtl. L. Rev. 313, 319-25, 347-62 (1998) (summarizing literature). In fact, neoclassical economics’ attention to environmental policy has remained anchored to a caricature of technology-forcing standards and the claim that they are not efficiency-maximizing.


43. See infra notes 54-149 and accompanying text.
pollution by masses discharged;\footnote{See William J. Baumol, On Taxation and the Control of Externalities, 62 AM. ECON. REV. 307 (1972).} and Rule 3 issuing tradeable pollution allowances to the polluting firms.\footnote{See J.H. Dales, Pollution, Property & Prices: An Essay in Policy-Making and Economics (1968).} Let us now assume $B$ is the least polluting incumbent. Any of these three tools could conceivably put one/all of the incumbents out of the $X$ business quickly or over time and that could change the dynamics considerably.\footnote{This is necessarily an empirical question. See generally Malloy, supra note 20, at 541-51. Where Pigovian taxes can easily fail to match incentives with their underlying purpose(s). See Peter A. Diamond, Consumption Externalities and Imperfect Corrective Pricing, 4 BELL J. ECON. & MGMT. SCI. 526 (1973) (proof demonstrating that corrective taxes often fail to improve welfare given real variabilities) changing what had been a social norm to what is, in effect, a “price” can dramatically alter the expected behaviors. See, e.g., Uri Gneezy & Aldo Rustichini, A Fine is a Price, 29 J. LEGAL STUD. 1 (2000).} (Even diversified firms are typically positioned to subsidize losing lines of business for only so long and upstart $E$ could always out-innovate \{A, B, C . . . \}.\footnote{Dales’ proposal of a tool like our Rule 3 has dominated the literature on inducing innovation in pollution control. See Daniel H. Cole, Pollution & Property: Comparing Ownership Institutions for Environmental Protection 130-53 (2002).} Rule 3 has remained the focus because, assuming $B$’s willingness to sell, $A$ and $C$ might compete for $B$’s excess allowances.\footnote{B could easily envision doing better with A and C going defunct. Or it might sell these rights to A or C’s neighbors. Finally, B might reserve these rights on the (mistaken) assumption that their value will increase over time. See, e.g., Steven C. Salop & David T. Scheffman, Raising Rivals’ Costs, 73 AM. ECON. REV. 267 (1983).} Rules 2 or 3 might induce $A$, $C$, or someone else to innovate, but so might Rule 1—and more directly. Indeed, any of the rules could, depending on omitted variables or contestable assumptions, prompt a search for new means of producing $X$ without the pollution.\footnote{See DRIESEN, supra note 7, at 193-201. Whether the search ultimately benefits regulated incumbents, their vendor(s), or an upstart competitor, the cost outcome is the same—unless (as is often done) asymmetric assumptions are made about the subject markets. See, e.g., Magat, supra note 42, at 18 (“To the extent that a regulatory agency mandates the widespread adoption of a new technology developed by a firm, the agency creates a widely-expanded market for that firm’s innovation. However, given the inherent difficulty in appropriating the benefits from new abatement technology . . . it is highly unlikely that this incentive to innovate could dominate the other disincentives for abatement technology innovation.”).} What will result in fact is too often unknowable \textit{a priori}.\footnote{In their defense of cost-benefit balancing in financial regulation, Posner and Weyl answer this indictment by acknowledging that \textit{all regulations} “have complex causal effects” and, thus, that all forms of cost estimation are in the same boat, roughly speaking. See Eric A. Posner & E. Glen Weyl, Cost-Benefit Analysis of Financial Regulations: A Response to Criticisms, 124 YALE L.J.F. 246, 251 (2015). Part IV argues that this may not be the case.} Part II introduces the technology-based approach to answering these questions beyond the \textit{a priori}.
II. TECHNOLOGY’S COST-AVAILABILITY: A UNIQUE QUESTION

A series of Supreme Court holdings construing the CAA and CWA have made it abundantly clear that how EPA may, must, or must not factor the cost of its standards into those standards is some function of ad hoc statutory interpretation as overseen by the judiciary and the Office of Management and Budget (OMB). The executive discretion embodied in these mandates (with others) has long invited various forms of cost-benefit balancing which, since the 1980s, has been carried out by EPA pursuant to a series of executive orders. Still, if all “costs” were equivalent before the law, technology’s cost-availability would be just another entry in an overall cost-benefit accounting. And that is assuredly not the law. This part summarizes what little legal doctrine has emerged distinguishing technology’s cost-availability from cost-benefit optimization. Section A raises the CAA’s key practices and Section B the CWA’s.

A. The Clean Air Act: Identifying Cost-Available Control Solutions

There is some reason to think that if cost is not expressly included in a CAA standard-setting provision where other factors are named, that it should be excluded from the decision-making. But in almost five decades, no generic principles have emerged by which the technological possibilities for targeted pollutants or their costs may or must be analyzed Act-wide.


55. See, e.g., Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015) (concluding that, under the circumstances and as to the exact language in CAA § 112(n)(1)(A), the choice of regulating only if “appropriate and necessary” must include some weighing of “cost”); see also Train
Of course, technological possibilities and cost have remained tightly linked in the CAA. The CAA, like the CWA, has often been called “technology forcing.” And the late tug-of-war on the Supreme Court over when costs may or must be factored into various CAA determinations has provoked a voluminous literature that too often conflates technology’s cost-availability with overall cost-minimization. While that tug-of-war remains unresolved, it seems unlikely to end in a mandate for plain efficiency maximization. Thus, a few basic points of departure stand out.

CAA standards demanding that pollution be abated to the degree the “available” or “achievable” technology permits include CAA § 111’s new source performance standards (NSPs), CAA § 112’s national emission standards for “hazardous air pollutants” (HAPs), CAA § 129’s solid waste incinerator standards, CAA’s § 165’s preconstruction requirements, CAA

v. Nat. Res. Def. Council, 421 U.S. 60, 90-91 (1975) (noting a lower court’s holding that denying variances was a way the CAA aimed to “force” the development of technology); Int’l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 629 (D.C. Cir. 1973) (noting that in finding a technology will be “available” when required EPA cannot engage in a “crystal ball” inquiry over sound projections that extant technology can be adopted at acceptable cost, can work, and can work reliably).

56. See Train, 421 U.S. at 91; see also D. Bruce La Pierre, Technology-Forcing and Federal Environmental Standards Protection Statutes, 62 IOWA L. REV. 771, 773-74 (1977); Note, Forcing Technology: The Clean Air Act Experience, 88 YALE L.J. 1713 (1979). Much of the “technology-forcing” talk of the 1970s was about the CAA’s ambient environmental quality goals.

57. See, e.g., EPA v. EME Homer City Gen., L.P. 134 S. Ct. 1584, 1606-07 (2014) (holding EPA may consider costs of abatement in determining which upwind states “contribute significantly” to downwind nonattainment); Michigan, 135 S. Ct. at 2707 (holding that EPA must afford “at least some attention to cost” in determining whether it is “appropriate and necessary” to regulate electricity generating boilers’ pollution).

58. See Michigan, 135 S. Ct. at 2707; EME Homer City, 134 S. Ct. at 1603-06; Massachusetts, 549 U.S. at 528-35.


60. EPA’s 2000 manual cites the executive orders on regulatory impact analysis (RIA) (among others) as their impetus, see 2000 GUIDELINES, supra note 30, at 5-7, and does not generally distinguish cost-availability analysis from cost evaluations required for RIAs. Id. OMB’s general guidance, Circular A-4, at least includes the generic disclaimer that “[w]hen a statute establishes a specific regulatory requirement and the agency is considering a more stringent standard, you should examine the benefits and cost of reasonable alternatives that reflect the range of the agency’s statutory discretion, including the specific statutory requirement.” See OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, § C (2003), https://www.whitehouse.gov/omb/circulars_a004_a-4.


64. See 42 U.S.C. § 7475(a).
§ 173's nonattainment permit requirements,65 CAA § 111(d)'s residual existing source standards,66 CAA § 202(a)(3)'s new motor vehicle standards,67 CAA § 211's reformulated gasoline standards for nonattainment areas,68 and CAA § 407(b)'s nitrogen oxides utility boiler controls.69 The practical accessibility of various input, process, and/or capital changes has yielded a tangled web of precedents construing these mandates.

Where cost is a choice factor, distinctions typically emerge between potential solutions based on their (perceived) practicality.70 Several common confusions usually follow not far behind. For a standard of performance to be practicable or cost-available it must somehow be within the financial reach of the targeted polluter(s). Cost-availability of this kind can be estimated with respect to a single firm, facility, or stack—or it can be estimated as to whole industrial sectors.71 What is cost-available on average across a whole sector obviously differs from that of a single facility or firm. Regardless of whether the fit is from site-to-solution or from sector-to-solution where site idiosyncrasies are ignored,72 cost avoidance remains the focal concern.73

65. See 42 U.S.C. §§ 7501(3), 7503(a). CAA § 172 also requires all implementation plans in nonattainment areas to require “reasonably available control technology” of all existing sources. Id. at § 7502(c)(1).
71. In our example above, an end-of-pipe widget at C’s X facility (which is just breaking even at prevailing prices) could be cost-unavailable while still being deemed cost-available when averaged across the whole sector {A, B, C . . . }.
72. See infra notes 132-35 and accompanying text.
73. For example, EPA’s approach to BACT reviews under CAA § 165(a)(2) has long taken the form of a “top-down method” wherein all possible control techniques are arrayed from most to least effective and assigned to the permit applicant based on an assessment of its financial and other capabilities. See John-Mark Stensvag, Preventing Significant Deterioration Under the Clean Air Act: The BACT Determination—Part I, 41 ENVT. L. REP. 11101, 11105.
In *Portland Cement Association v. Ruckelshaus*, the court construed the CAA’s notion of “available technology” which is “adequately demonstrated” in an NSPS to reach solutions reasonably projected to be available when the standard was to come into effect. One leading casebook called this the “margin for striving,” while also observing that later cases left little of that margin to EPA. Because EPA typically formats NSPSs by pollutant masses, the cost-availability of any conceivable solution can bear on whether the standard is “achievable.” This can mean amending inputs as readily as it can one’s process or capital. In its 2015 NSPS for greenhouse gas (GHG) emissions from electric utility generating units (EGUs), for

(2011). Eliminating as “technically infeasible” any option identified by this method has more to do with the applicant’s finances than any other consideration. See John-Mark Stensvaaq, *Preventing Significant Deterioration Under the Clean Air Act: The BACT Determination—Part II*, 42 Env't L. Rep. 10024, 10037 (2012).


75. *Id*. at 391-92. After remanding EPA’s standard for failing adequately to collect and analyze existing plant data, the panel reiterated its invitation to EPA that it approach “achievability” not by surveying extant industrial arrangements but rather by “extrapolations . . . and on testimony from experts and vendors made part of the record.” *Id*. at 402; see also *Essex Chem. Corp.*, 486 F.2d at 433. Yet, puzzlingly, the same court also held that “available,” “demonstrated” technology was concretely proven technology. *See Essex Chem. Corp.* at 433 (“An adequately demonstrated system is one which has been shown to be reasonably reliable, reasonably efficient, and which can reasonably be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way.”).


77. The CAA and CWA both allow standards to take multiple forms. See 42 U.S.C. § 7602(k) (defining emission limitation and standard to include “a requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard”); 33 U.S.C. § 1362(11) (defining effluent limitation to mean “any restriction established . . . on quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources . . . including schedules of compliance”).

78. *Cf.* Lignite Energy Council v. EPA, 198 F.3d 930, 933 (D.C. Cir. 1999) (calling industry’s argument that another input/process besides EPA’s focal metric for setting the standard was “self-defeating” because that technique’s availability might render use of EPA’s more expensive means unnecessary).

79. See, e.g., Nat’l Lime Ass’n v. EPA, 233 F.3d 625, 632-33 (D.C. Cir. 2000); Sierra Club v. Costle, 657 F.2d 298, 368-73 (D.C. Cir. 1981); *Essex Chem. Corp.*, 486 F.2d at 433. The courts have formulated the standard for weighing costs variously. See Lignite Energy, 198 F.3d at 933 (“exorbitant”); *Costle*, 657 F.2d at 383 (not “excessive” or “unreasonable”); New York v. Reilly, 969 F.2d 1147, 1150 (D.C. Cir. 1992) (“Because section 111 does not set forth the weight that should be assigned to [its] factors, we have granted the agency a great degree of discretion in balancing them.”).
example, EPA claimed that the courts had endorsed the use of an NSPS to advantage—or at least to not disadvantage—nascent technologies not yet widely “demonstrated” in the industry.80 Indeed, the original NSPS for coal-fired EGU (long featured in the mountains of literature touting “flexible” tools) permitted either fuel switching or add-on equipment as individual circumstances dictated.81 All the same, an NSPS can mean sectoral consolidation.82 NSPS ‘availability’ is sector-based83 and, once set, applies only to that sector.84

NSPSs were also where EPA first helped individual sources delay the applicability of a sectoral standard indefinitely if their facility updates did not result in new or increased emissions.85 Providing that safe harbor, EPA maintained, would encourage innovations inside existing facilities’ fence lines.86 Ironically enough, this very set of assumptions gave us the *Chevron*

80. *See Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510, 64,537-41 (2015) [hereinafter Final EGU NSPS], (citing Sierra Club v. Costle, 657 F.2d 298, 321 (D.C. Cir. 1981)). This argument entangled EPA in construing a definition of “standard of performance” which Congress twice amended, first to include and then to exclude a set percentage threshold of emission reductions (instead of set cost thresholds). *See id.* at 64537 & n.124. At issue in the EGU GHG NSPS was the “availability” of “carbon capture and sequestration technology.” *See infra* notes 252-71 and accompanying text. EPA estimated that its 1971 NSPS added an average of 15.8% in capital costs to the average plant and noted that the courts found that determination “reasonable.” *See Final EGU NSPS, 80 Fed. Reg. at 64,559-60.*


82. *Cf.* Lignite Energy Council, 198 F.3d at 935 (upholding EPA’s use of sector-wide estimate of efficiencies on the grounds that EPA was setting a sector-based standard). This will often entail EPA’s use of a sector’s “baseline” data as available. *See,* e.g., Nat’l Asphalt Pavement Ass’n v. Train, 539 F.2d 775, 784 (D.C. Cir. 1976) (rejecting industry’s argument that many facilities had installed control technology reducing their emissions after the 1967 study on which EPA relied as having “no merit” because EPA used the study to quantify the uncontrolled emissions in the sector).

83. *See Nat’l Asphalt,* 539 F.2d at 786 (noting intervenor firm’s claim that EPA’s focal “control technologies can be installed and operated at reasonable cost” and that many facilities were prepared to install them); *see also* Costle, 657 F.2d at 330.

84. *See* PPG Indus., Inc. v. Harrison, 660 F.2d 628, 633-37 (5th Cir. 1981) (NSPS for steam generating electric utility boilers not applicable to cogeneration “waste heat” boiler).

85. *See* ASARCO, Inc. v. EPA, 578 F.2d 319, 328-30 (D.C. Cir. 1978) (invalidating flexible “bubble concept” used to define “stationary source” and “modification” for purposes of NSPS applicability on grounds that NSPSs themselves must be set taking cost of technology into account and because the record did not prove that the flexibility would lead to greater improvements than broad applicability of NSPSs); New York v. EPA, 413 F.3d 3, 11-18 (D.C. Cir. 2005) (reviewing history of EPA’s definition of “stationary source” and “modification”).

doctrine and now leads routinely to 'arbitrariness' review, especially as to the record EPA compiles and the search it conducts. Its own core guidance document, the *Air Pollution Control Cost Manual*, teaches its personnel that some control equipment investments are so large that vendor data is meaningless even if obtained because the influences on "total capital investment" at some installations are so numerous and diverse that vendors must “design, fabricate, and construct each control according to the specific needs of the facility.”

Another set of sectoral standards, the “maximum achievable control technology” (MACT) standards for HAPs, consists firstly of “minimum stringency” primary standards. For new sources, these standards track the performance of the single best-controlled source in that category. For existing sources, they track an average of the best performing sources for which information can be obtained. Cost has become an excluded factor in setting these so-called “MACT floors.” Yet with those floors set, EPA then determines, taking cost and other factors into account, whether any better performance is “achievable” in that category (or subcategory) and, if

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88. See, e.g., New York v. Reilly, 969 F.2d 1147, 1150-54 (D.C. Cir. 1992); Nat'l Asphalt Pavement Ass'n v. Train, 539 F.2d 775, 786-87 (D.C. Cir. 1976); Nat. Res. Def. Council, Inc. v. EPA, 863 F.2d 1420, 1431 (9th Cir. 1988); Hooker Chem. & Plastics Corp. v. Train, 537 F.2d 620, 636 (2d Cir. 1976).
90. CAA § 112 MACT is unconventionally structured into two parallel provisions, § 112(d)(2) and § 112(d)(3), both of which pertain to new and existing sources, each of which defining its own type of stringency anchored in the notion of “achievable.” See 42 U.S.C. §§ 7412(d)(2)-(3); Cement Kiln Recycling Coal. v. EPA, 255 F.3d 855, 861 (D.C. Cir. 2001).
92. See Ass'n of Battery Recyclers, Inc. v. EPA, 716 F.3d 667, 673 (D.C. Cir. 2013); Nat'l Lime Ass'n, 233 F.3d at 640.
93. 42 U.S.C. § 7412(d)(2); Natl Ass'n for Surface Finishing v. EPA, 795 F.3d 1, 4-5 (D.C. Cir. 2015).
so, sets a “beyond-the-floor” secondary standard balancing costs against those other factors. 94

MACT’s compound approach has also been interpreted to mean achievable “under most adverse circumstances which can reasonably be expected to recur,” 95 a qualification that has complicated this already complex kind of standard still further. 96 The earliest judicial use of this hard luck gloss on achievability, International Harvester v. Ruckelshaus, 97 is remembered today for the judges’ “diffident” 98 reweighing of the evidence at the behest of incumbent firms crying foul that only one of them could meet EPA’s standard and then only in good conditions. 99 Today, EPA’s discretion to set the parameters of its search for solutions usually insulates this sort of inquiry from searching review. 100 (And firms calling an achievability finding into

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94. Nat. Res. Def. Council, Inc. v. EPA, 749 F.3d 1055, 1057 (D.C. Cir. 2014). If, “taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, [EPA] determines [superior performance] is achievable for new or existing sources in the category or subcategory to which such emission standard applies,” 42 U.S.C. § 7412(d)(2), EPA may set a more stringent limit beyond the “minimum stringency” MACT floor.

95. See Sierra Club v. EPA, 167 F.3d 658, 665 (D.C. Cir. 1999) (quoting Nat’l Lime Ass’n v. EPA, 627 F.2d 416, 431 n.46 (D.C. Cir. 1980)); see also Cement Kiln Recycling Coal. v. EPA, 255 F.3d 855, 859 (D.C. Cir. 2001). Sierra Club’s recourse to National Lime, a CAA § 111 new source performance standard challenge, ignored the fact that the two “achievability” thresholds functioned very differently in their respective standards. Cf. U.S. Sugar Corp. v. EPA, 830 F.3d 579, 606-10 (D.C. Cir. 2016) (distinguishing between what has been “achieved” and what is “achievable”). Nat’l Lime’s full account of CAA § 111 achievability was that “[t]he statutory standard is one of achievability, given costs. Some aspects of ‘achievability’ cannot be divorced from consideration of ‘costs.’ Typically one associates ‘costs’ with the capital requirements of new technology. However, certain ‘costs’ (e.g., frequent systemic shutdown to service emissions control systems or use of feedstock of a certain size or composition in order to meet the new emissions standards) are more intimately intertwined with ‘achievability’ than are the capital costs of new technology.


98. Judge Leventhal pled the panel’s “diffidence” over second-guessing EPA no fewer than four times in his International Harvester opinion. Leventhal claimed to be as “diffident” later that year rejecting EPA’s cement plant NSPS on the grounds that EPA had insufficiently investigated or analyzed prevailing conditions in reaching its achievability determination. See Portland Cement Ass’n v. EPA, 486 F.2d 375, 402 (D.C. Cir. 1973).


100. See, e.g., Nat’l Ass’n of Clean Water Agencies v. EPA, 734 F.3d 1115, 1131 (D.C. Cir. 2013) (“Although EPA would ideally set MACT floors by surveying all existing [sources] and identifying the best performing . . . with hard data, we have not required EPA to go that far, recognizing that ‘EPA typically has wide latitude in determining the extent of
question with their own inability to meet that standard rightly face strong headwinds in court.\textsuperscript{101} In the end, even those facing facility-specific technology-based constraints, like CAA § 165’s “best available control technology” (BACT) reviews, must sometimes accept that their own factors of production are the real obstacle.\textsuperscript{102}

\section*{B. The Clean Water Act: The Meanings of ‘Available’}

After \textit{Entergy Corp. v. Riverkeeper, Inc.},\textsuperscript{103} there is some reason to think that the CWA’s many different calls for “best” technologies at least \textit{permit} the weighing of a technology’s costs.\textsuperscript{104} But that is a far cry from inferring, given the Act’s many distinct references to technology’s availability for various industrial applications (or the vague notion of cost), that a “best” technology mandate reduces to simple efficiency maximization.\textsuperscript{105} The Supreme Court has made it too plain for too long that statutory factor balancing is not lightly to be converted into anything else\textsuperscript{106} for us to infer so much from \textit{Entergy}.\textsuperscript{107}

\begin{footnotesize}

\textsuperscript{102} \textit{Sierra Club v. EPA}, 499 F.3d 653, 657-78 (7th Cir. 2007) (considering a challenge to an EPA BACT review that did not mandate burning low sulfur coal because EPA thought it outside the scope of BACT and calling it a “borderline case” of agency arbitrariness); \textit{Alaska Dept. of Envtl. Conservation v. EPA}, 540 U.S. 461, 485-96 (2004) (affirming EPA interpretation of BACT review under CAA § 165 as encompassing a “top-down” methodology whereby the best performing techniques, equipment and process modifications are arrayed against the costs to the emitter and only eliminated from consideration if they are cost-prohibitive).

\textsuperscript{103} \textit{Entergy Corp. v. Riverkeeper, Inc.}, 556 U.S. 208 (2009).

\textsuperscript{104} See id. at 225-26 (holding that the term “best” technology does not necessarily mean the most efficient at producing some good no matter the cost); cf. \textit{Sierra Club v. Costle}, 657 F.2d 298, 325-26 (D.C. Cir. 1981) (interpreting the several factors expressly named in CAA § 111(a)(1) as specifying the meaning of “best” technology).

\textsuperscript{105} Cf. \textit{Entergy}, 556 U.S. at 237 (Stevens, J., dissenting) (“Unless costs are so high that the best technology is not ‘available,’ Congress has decided that they are outweighed by the benefits of minimizing adverse environmental impact.”).


\textsuperscript{107} Moreover, as the majority in \textit{Michigan v. EPA} made clear in construing a CAA provision that did not even mention the word “cost,” the Supreme Court’s notions of “cost”
CWA standards demanding that pollution be abated at least as much as the available technology accomplishes include CWA §§ 301 and 306’s “best practicable control technology currently available” (BPT),108 “best conventional pollutant control technology,” (BCT),109 “best available technology economically achievable” (BATEA)110 (for existing sources) and “best available demonstrated control technology” (BADT)111 (for new point source dischargers).112 It includes CWA § 307(a)’s toxic pollutant standards,113 CWA § 316(b)’s “best technology available” standards for cooling water intakes,114 and CWA § 402(p)’s “maximum extent practicable” standard for municipal and industrial stormwater discharge control.115

Early on, reviewing courts held that BPT for categories and classes of existing sources meant “the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category.”116 And although the search for prevailing technology often extended outside the United States,117 the cryptic boundaries of these sectors and the averaging and weighing costs are far more elastic than orthodox benefit-cost analysis has allowed. See Michigan v. EPA, 135 S. Ct. 2699, 2707-08 (2015).


112. Unlike the CAA, which consolidates review of such standard settings in one court (the D.C. Circuit), the CWA’s special statutory review provision allows any court of appeals to hear challenges to these technology-based standard settings. See 33 U.S.C. § 1369(b)(1).


116. Am. Meat Inst. v. EPA, 526 F.2d 442, 451 (7th Cir. 1975) (emphasis added) (quoting Sen. Edmund Muskie, in A Legislative History of Water Pollution Control Act Amends. of 1972, at 169-70 (1973)); see also Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 620, 632 (2d Cir. 1976); cf. Am. Frozen Food Inst. v. Train, 539 F.2d 107, 118-19 (D.C. Cir. 1976) (statutory factors for identifying “practicable” and “industrial category” including “the age of the plants, their size, the unit processes involved, and the cost of applying such controls” amount to a “limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources”).

117. See Am. Frozen Food, 539 F.2d at 132 (“Technology in the modern world knows few boundaries—the United States-Canada boundary perhaps least of all.”). On the searches EPA conducted, see Wesley A. Magat et al., Rules in the Making: A Statistical Analysis of Regulatory Agency Behavior 31-44 (1986). EPA was repeatedly challenged for finding (or inventing) a “model plant” at this step. See A. Myrick Freeman III, Technology-Based Effluent Standards: The U.S. Case, 16 Water Resources Res. 21, 24 (1980).
To be done continually challenged the enterprise even as this dimension rarely drew searching judicial scrutiny (either as a matter of arbitrariness or as to statutory interpretation).\textsuperscript{118} Some of this is owed to the fact that Congress itself scheduled the original industrial sectors to be governed by BADT standards,\textsuperscript{119} but deference has remained the norm.\textsuperscript{120}

The CWA’s factored determinations apply directly to effluent dischargers in the absence of applicable sectoral standards.\textsuperscript{121} And whether individual facilities’ or whole categories of dischargers’ changes to their factors of production or control equipment are at issue, the standard setting requires calculating the costs of those expected changes and determining the manageability thereof under given circumstances.\textsuperscript{122} At least one court developed its own distinctive theory of the CWA’s phased approach to this cost-availability and the search for the performance benchmarks.\textsuperscript{123} The courts of appeal divided, however, over whether BPT could require “internal altera-

\textsuperscript{118} From among “several thousand” effluent limitations pertaining to roughly forty industrial categories finalized by late 1977, La Pierre, supra note 56, at 808-09, the three dozen or so litigated to full judicial opinions concluded by then or in the years shortly following included no instances where a court reversed EPA’s decision to subcategorize or its refusal to do so.


\textsuperscript{120} See, e.g., Citizens Coal Council v. EPA, 447 F.3d 879, 890-94 (6th Cir. 2006) (reversing earlier panel opinion and affording broad deference to EPA to subcategorize the coal mining sector according to age and condition of mines used).

\textsuperscript{121} The practice, known as “best professional judgment” (BPJ) permitting, tailors to the facility, pollutants, and the available technology, balancing the applicable statutory factors for the effluent in question. See 40 C.F.R. § 125.3(a)(2)(B) (2016). EPA counsels permit writers to use methods “consistent with the statistical approach EPA has used to develop effluent guidelines,” including calculating maximum daily discharges “by multiplying the long-term average achievable by implementation of the model technology or process change by a daily variability factor determined from the statistical properties of a lognormal distribution.” U.S. EPA, NPDES PERMIT WRITERS’ MANUAL § 5.2.3.5 (Sept. 2010).

\textsuperscript{122} Cf. U.S. Steel Corp. v. Train, 556 F.2d 822, 843-46 (7th Cir. 1977) (testing the cost-availability of facility’s installation of recycling operation and finding no cost-prohibitive barriers thereto); BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 656-58 (1st Cir. 1979). In United States Steel, for example, EPA hired U.S. Steel’s own process engineer to compare its plant to other, similar integrated steel mills and concluded that the reengineering proposed was cost-available. See 556 F.2d at 842-46.

\textsuperscript{123} See Weyerhaeuser v. Costle, 590 F.2d 1011, 1044-47 (D.C. Cir. 1978) (finding that CWA § 304(b)(1)(B) required a focused balancing of “total cost” of expected improvements against effluent reductions achieved and that § 304(b)(2)(B) BATEA later “relaxed” that comparison to one of unweighted “consideration” of costs); cf. Ass’n of Pac. Fisheries v. EPA, 615 F.2d 794, 805-06 (9th Cir. 1980) (noting Weyerhaeuser’s interpretation of the CWA’s phased approach).
tions in production” as opposed to “end-of-pipe,” add-on solutions. 124 But with the CWA’s staged technology-based controls, the “average of the best”125 for BPT was contrasted with BATEA standards (staged to arise six years later) which were to require “a broader range of technological alternatives,’ including techniques ‘which exist in operation or which can be applied as a result of public and private research efforts.”126 BATEA solutions were to be based on the “best performer in any industrial category,”127 keeping focal emphasis on the boundedness of an industrial category but with less emphasis on cost-availability.128

It was gradually established in the cases that if inter-sectoral technology transfers could, to a reasonable projection, work in the target sector, they were “available” within the meaning of BATEA and BADT.129 To be sure, several highly integrated industries’ trade groups opposed their standards at every step,130 arguing that the adoption/diffusion of various technologies

124. See, e.g., FMC Corp. v. Train, 539 F.2d 973, 981 (4th Cir. 1976) (noting that “[i]n-process control measures may be required . . . if they are considered normal practice within the industry”); Tanners’ Council of Am., Inc. v. Train, 540 F.2d 1188, 1191 (4th Cir. 1976) (“[BPT] effluent standards are to rely primarily on end-of-manufacturing treatment facilities but may include control technologies within the process if these measures are considered normal practice within the industry.”); Am. Petroleum Inst. v. EPA, 540 F.2d 1023, 1033-34 (10th Cir. 1976) (recognizing disagreement among courts).
125. Kennecott Copper Corp. v. EPA, 612 F.2d 1232, 1242 (10th Cir. 1979).
127. Am. Meat Inst., 526 F.2d at 463; see also Am. Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1057 n.67 (3d Cir. 1975) (noting EPA was to be given the “capability and the mandate to press technology and economics” to achieve the pollution reductions attainable); CPC Int’l Inc. v. Train, 515 F.2d 1032, 1047 n.32 (8th Cir. 1975) (“available control technology” is not confined only to technology that is “in actual, routine use somewhere”).
128. See, e.g., Tex. Oil & Gas Ass’n v. EPA, 161 F.3d 923, 929-31 (5th Cir. 1998) (describing the subcategorization of the “coastal” oil/gas well sector and its transition from BPT to BAT standards); cf. Am. Iron & Steel Inst., 526 F.2d at 1059 (cost to be given even less weight in BADT for new sources than it is given for BATEA). On the BCT cost “test” that arose after EPA had settled the list of “conventional” pollutants and the standard solutions used for their removal. See supra note 109.
129. See Nat. Res. Def. Council v. EPA, 808 F.3d 556, 572-74 (2d Cir. 2015) (citing Kennecott v. EPA, 780 F.2d 445, 453 (4th Cir. 1986); Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 620, 636 (2d Cir. 1976)). EPA’s finding that some such retrofit was cost-available to the target facilities was also demanded by some courts. See, e.g., American Iron & Steel Inst. v. EPA, 568 F.2d 284, 299-300 (3d Cir. 1977); Am. Iron & Steel Inst., 526 F.2d at 1047-48.
130. See, e.g., BP Expl. & Oil, Inc. v. EPA, 66 F.3d 784, 790-91 (6th Cir. 1995) (detailing the several standards and ensuing litigation in the oil and gas production well sector, specifically regarding produced water discharges).
throughout their sectors was cost-prohibitive.\(^{131}\) Whether the costs of retrofits and/or capital replacement are too high, i.e., not “available” or “achievable,” has remained discretionary with EPA.\(^{132}\) But even BPT, even when set individually,\(^{133}\) could impose substantial costs on sources not meeting a performance norm observed in the industry.\(^{134}\) As the Fifth Circuit opined years after BPT was supposed to have been phased out, it was never expected to be “cheap” just for being the most cost-conscious of the CWA’s technology-based standards.\(^{135}\) Wherever a standard or “average” performance can be derived, the ensuing pressures exerted by that mark can be substantial.\(^{136}\) And as, for example, the offshore oil/gas drilling sector

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131. See, e.g., R.K. Clark, *Impact of Environmental Regulations on Drilling-Fluid Technology*, 46 *J. Petroleum Tech.* 804, 806-08 (1994) (describing the gradual substitution of water-based drilling fluids for more toxic and environmentally persistent predecessors); cf. *Tex. Oil & Gas Ass’n*, 161 F.3d at 930-33 (reviewing prolonged and litigious history of discharge standards from oil/gas wells in coastal waters); Nat. Res. Def. Council, Inc. v. EPA, 863 F.2d 1420, 1426-27 (9th Cir. 1988) (remanding EPA conclusion that it lacked needed evidence to require reinjection of produced water as “available technology” on the grounds that coastal operations in California and Alaska had proven reinjection was “technologically feasible” and the legislative history of CWA § 304 suggesting that “technologically feasible limitations” should be set as BATEA even without “precise cost figures”).

132. See *McCubbin*, *supra* note 53, at 11-29. For example, in its famous cluster rule for pulp and paper manufacturers, dioxin-reducing shifts in production—to chlorine-free bleaching processes—were resisted by the industry and its unions, chiefly with projections that such changes would close many more plants than a less stringent standard. See *William Boyd*, *The Slain Wood: Papermaking and its Environmental Consequences in the American South* 189-216 (2015). The EPA’s adoption of the less stringent standard was upheld against all challenges. *Nat’l Wildlife Fed’n* v. EPA, 286 F.3d 554 (D.C. Cir. 2002).

133. Often, technology-based effluent limitations have been set either before a categorical standard was finished or for sources lacking any applicable categorical effluent limitation guidelines. See, e.g., *Trs. for Alaska v. EPA*, 749 F.2d 549, 552-54 (9th Cir. 1984). Less often, EPA has issued “general permits” embodying such limits for dischargers in a given region. See, e.g., *Am. Petroleum Inst. v. EPA*, 787 F.2d 965, 970-71 (5th Cir. 1986).

134. See, e.g., *U.S. Steel Corp. v. Train*, 556 F.2d 822, 843-46 (7th Cir. 1977) (finding that BPT for integrated steel mill as use of a “recycling” system observed at other mills, including some of permittee’s mills).


136. See Driesen, *supra* note 7, at 85-91 (arguing that “radical qualitative innovation” can be sacrificed or crowded out by “least cost” pursuit of short term goals like marginal pollution reductions).
showed in the BATEA standards for “produced” water, pressures of the kind applied across areas with natural cost disadvantages can be disproportionate if competitive disparities are not somehow corrected. Thus could an ‘average of the best’ put someone out of business if they were not solvent enough to make the needed changes or fortunate enough to have capital amenable to the retrofit.

EPA’s new source standards (BADT), thought to be more stringent than BPT and BATEA, are typically limited in applicability to “greenfield” sites. This tends to increase the number of “old” facilities gaining competitive advantage from EPA’s actions. CWA § 316(b)’s unique focus

137. Produced water is “brought up from hydrocarbon-bearing strata with produced oil and gas [and includes] brines trapped with the oil and gas in the formation and possibly waters injected into the reservoir to increase productivity.” Michael O. Waguespack, Produced Waters in Coastal Louisiana, 3 Tul. Envtl. L.J. 7, 7 (1990).

138. Cf. id. at 16-21 (reporting data from coastal Louisiana production tending to show that produced water reinjection, though cost-available in Alaska and other coastal operations, was cost-unavailable to Louisiana wells because of legacy and other costs borne there); see Am. Petroleum Inst. v. EPA, 858 F.2d 261, 263-66 (5th Cir. 1988).

139. See Trs. for Alaska v. EPA, 749 F.2d 549, 554-60 (9th Cir. 1984) (challenge to EPA general permits for placer mines lacking “technology-based” BPT or BATEA standards, noting the plaintiffs’ allegation that settling ponds were BPT, and denying as moot miners’ challenge to such effluent limitations as a “taking” of their property in the form of their mining claims); Chem. Mfrs. Ass’n v. EPA, 870 F.2d 177, 203-64 (5th Cir. 1989) (considering and dismissing cost-availability and subcategorization objections to BPT, BATEA, BADT and pretreatment standards for chemicals sector); Citizens’ Coal Council v. EPA, 447 F.3d 879, 898-900 (6th Cir. 2006) (upholding EPA’s qualitative analysis of old versus new mine site utilization and stringency of standards intended to facilitate reuse of old mines); Nat’l Renderers Ass’n v. EPA, 541 F.2d 1281, 1290 (8th Cir. 1976) (speculating that EPA set BADT standard’s stringency lower than BATEA based on its estimate that “no new plants would be built”).

140. See Winston Harrington, Regulating Industrial Water Pollution in the United States 5 (2003). In one instance, where the BADT standard seemed to permit “higher levels of effluent” than the BATEA standard, a court remanded the new source standard for EPA’s explanation. See Nat’l Renderers Ass’n, 541 F.2d at 1289-90.

141. See 40 C.F.R. § 122.29(b)(1) (2016) (limiting the applicability of BADT standards at existing plants to complete reconstruction of existing units or the construction of wholly new, “substantially independent” facilities). EPA has occasionally adjusted the criteria used for determining ‘substantial independence’ in particular BADT standards. See, e.g., Nat’l Wildlife Fed’n v. EPA, 286 F.3d 554, 568-69 (D.C. Cir. 2002); see also Citizens Coal Council v. EPA, 447 F.3d 879, 898-900 (6th Cir. 2006) (upholding EPA’s qualitative analysis of old versus new mine site utilization and stringency of BADT standards intended to facilitate reuse of old mines); Nat’l Renderers Ass’n, 541 F.2d at 1290 (speculating that EPA set BADT standard’s stringency lower than BATEA based on its estimate that “no new plants would be built”).

on the withdrawal of water as an input factor and four-facet evaluation thereof (“location, design, construction and capacity”) are illustrative. For over a decade, EPA struggled to create a standard that did not disproportionately burden identifiable industry segments, locations, or vintages of capital—a struggle that prompted challenge after challenge. Of course, new or old, a facility withdrawing less water will reduce its impacts proportionately. Retrofitting existing facilities with new intake mechanisms tends to be much cheaper than retrofitting them to recirculate their process water or reuse gray water sources. EPA’s eventual allowance of capital-specific solutions at existing facilities stemmed from cost-effectiveness studies, detailed knowledge of the relevant facility profiles and careful testing of proven solutions. The water intakes rules highlight the key to cost-availability in the legal doctrine: it is rightly determined by the target polluters’ industrial organization and how the benchmark performances identified can

plant effect” is subject to considerable uncertainty, though. See infra notes 258-62 and accompanying text.

143. 33 U.S.C. § 1326(b).

144. One important caveat about the intakes rules is in order. Though EPA prepared a full cost-benefit analysis (pursuant to executive order and OMB’s insistence) in construing the CWA § 316(b) mandate—the issue litigated in Entergy—the final outcome of that analysis showed expected costs ($275-297 million) substantially outweighing benefits ($29-33 million) in the final rule. National Pollution Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300, 48,304 (2014) [hereinafter Revised Final Intakes Rule]. It therefore could not have been a decisive factor.


146. See Douglas A. Kysar, Fish Tales, in REFORMING REGULATORY IMPACT ANALYSIS 190, 192 (Winston Harrington et al. eds., 2009).

147. See Vincent C. Tidwell et al., Transitioning to Zero Freshwater Withdrawal in the US for Thermoelectric Generation, 131 APPLIED ENERGY 508, 513-14 (2014). “In 2005 thermoelectric power generation was the largest user of freshwater in the United States, withdrawing over 530 million cubic meters per day.” Id. at 509.

be met in their circumstances. Part III isolates these two facets of every technology-based standard and suggests why separate attention to each often yields so much more than the sum of the parts.

III. COST AVAILABILITY? FRONTIERS AND BOUNDARIES

As skeptics of technology-based standards have long argued, industrial sectors are not “natural kinds”: finding their boundaries is inescapably a matter of judgment. Industrial categories framed technology-based pollution standards in the U.S. even as the mass production economy waned and sectors grew increasingly fuzzy. An economy’s productivity broken into discrete sectors may be a macroeconomic sum, but it is given in increasingly microeconomic terms. Yet instead of setting conduct constraints through equilibrium theory’s algorithmic computation of prices and their resultant “social” costs and benefits, judging pollution abatements to be within financial reach in targeted sectors views “cost” not as a proxy for harm but rather as a motivational force. Indeed, given their relative successes compared to other cost-factoring methods, cost-availability determinations may be the better way to gauge real harms to an economy given the comparatively direct connections between induced innovation, cost avoidance, and ultimately economic adaptation. Diversified exchange economies may measure their aggregate productivity by their sectors—where competitors

149. Elements of this finding have been suggested by others before. See La Pierre, supra note 56, at 809-29; Note, Technology-Based, supra note 3, at 795-800; William F. Pedersen, Jr., Turning the Tide on Water Quality, 15 ECOLOGY L.Q. 69, 82-85 (1988); Wendy E. Wagner, The Triumph of Technology-Based Standards, 2000 U. ILL. L. REV. 83, 88-91; Driesen, supra note 7, at 110-22.


152. See generally ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH (2016). The so-called “integrated assessment models” (IAMs) used to forecast climate change damages all reduce welfare-equivalent consumption by sector-based multipliers. See Weitzman, supra note 24, at 16. This keeps the “social cost of carbon” (SCC) calculated from IAMs innately sensitized to sector-based growth projections.

153. Cf. Cooter, supra note 12 (developing and describing a bargaining model where opposing effective costs are used to encourage parties to bilateral transactions to deal effectively with one another); Malloy, supra note 20, at 551-86 (presenting a “scenario” analysis of innovation incentives in a multi-divisional chemical engineering firm and showing that “black box” theories of innovation firms ignore the paths costs and information actually travel).

154. Cf. Malloy, supra note 20, at 600 (finding that “tailored regulation” identifying firm-specific barriers to innovation can be much more accurate in the incentives it sets for cost minimization).
compete, production and consumption functions meet, and labor, capital, energy, and other factors combine to shape the goods and services delivering that economy’s standard of living. 155 But finding sectoral boundaries is no easy task. Section A draws out some connections between industrial organization and innovation while Section B highlights the problematic concept of “cost” in contemporary theories.

A. Industrial Organization: Innovation Pushed and Pulled

Although the induced innovation hypothesis has been notoriously hard to test econometrically, 156 a positive, monotonic relationship between firm size and spending on research and development (R&D) has for many years been one of the more robust findings. 157 Spending does not neatly correlate with output or outcomes, of course, something economists studying innovation have long known. 158 And if the economic landscape includes multiproduct (multi-sector) firms, like A and B in our earlier hypothetical, the fungibility of capital within such firms severs any causal relationship between market power and innovation. 159 Indeed, compared to “our understanding of the influence of industry-level variables, our understanding of the role of firm-level variables is more primitive still.” 160 Still, if every technology-based standard has involved EPA in identifying the industrial organ-

155. Compare SAMUELSON, supra note 34, at ch. 6 (observing that firms are needed to manage production efficiently and that they often take on similar structures and scales in industrial sectors), with RICHARD R. NELSON & SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 235-45 (1982) (presenting an informal model of economic growth as a selection process in which the more advanced, more capable firms employing better technology and techniques put less adapted firms out of business).

156. See Popp et al., supra note 29, at 880-81; Cohen, supra note 9, at 142.

157. See Cohen, supra note 9, at 193. “There is also reason to believe that the source of this relationship is the R&D cost-spreading incentive effects of firm size . . . The relationship between market structure and R&D remains, however, problematic.” Id. at 193-94. Larger firms’ cost-spreading and returns to scale have even featured in fairness arguments against technology-based standard setting. See, e.g., Amy Purvis & Joe Outlaw, What We Know About Technological Innovation to Achieve Environmental Compliance: Policy Issues for an Industrializing Animal Agriculture Sector, 77 AM. J. AGRIC. ECON. 1237, 1242 (1995).

158. See Cohen & Levin, supra note 9, at 1069.


160. Cohen, supra note 9, at 195.
ization underlying its targeted pollution and the benchmark solution(s) by which abatements will be mandated, then EPA should at least be looking for relationships that actually matter. This section identifies some preliminaries.

A technological frontier signifies what we can/cannot do whereas industry sectoral boundaries are defined by organizational and market dynamics. The former is often a work-in-progress,161 but the latter can be pure happenstance. Both are impermanent (if also inertial) yet nevertheless ground the technology-based approach. They frame the opportunities for competitive and other pressures to induce welfare-enhancing innovation, i.e., cost-avoidance.162 Being so impermanent, however, their analysts are oriented to sensitivities that most cost-benefit analyses obscure or ignore.163 This may explain the latter’s clear tendency to over-estimate regulation’s costs,164 but it also suggests that technology-based cost-availability evaluations may be substantially more useful for what they do and do not represent.165

161. See Rosenberg, supra note 9, at 104-19 (describing the “superficially paradoxical” tendency toward slowed technological diffusion during periods of rapid technological advance). Coal-fired boilers, for example, steadily improved in efficiencies from 1900 when it took almost 7 pounds of coal to generate a kilowatt hour of electricity to less than a pound to generate it in the 1960s. Id. at 65. Indeed, total efficiency improvements in coal mining, transport, combustion, electricity conversion and transmission from 1907-1957 were tenfold. Id. at 66. Predictive modeling of continued further progress here comes down to the proper accounting for opportunity costs of innovation production, treatment of knowledge spillovers and appropriability, and the empirical data (if any) available for parameterizing the key relationships. See Kenneth Gillingham et al., Modeling Endogenous Technological Change for Climate Policy Analysis, 30 Energy Econ. 2734 (2008). But from those factors there is good reason to doubt coal’s run will continue. See infra note 257 and accompanying text.

162. As Cohen found in his exhaustive literature review, the variables having at least some empirical support at the sectoral level include demand, appropriability, and the technological “opportunity conditions,” i.e., the sector’s baseline opportunities for technical advance. See Cohen, supra note 9, at 168-93.

163. See Finkel, supra note 33, at 125-54 (cataloguing various paths cost-benefit analysis takes to ignoring or mishandling cost uncertainties); Farber, supra note 51, at 99-108 (finding the timing of cost considerations when opposed to benefits uneven at EPA); cf. Livermore, supra note 31, at 627 (noting that the largest percentage of EPA economists is in the Office of the Administrator where their influence is concentrated, like a “mini-OMB” within EPA, at the end of rulemaking processes).

164. See supra note 11 and accompanying text.

165. Judging as acceptable any projected costs and where they will fall need not entail weighing them in opposition to benefit estimations. Indeed, as Knight argued in response to Pigou’s Economics of Welfare (decades before Coase), “[i]t is only when one commodity is given up in order that another may be produced by the use of the common and divertible productive energy that we ordinarily think of the variation of cost.” Knight, supra note 28 at 594 (emphasis added). Thus, to convert projected firm costs into “social” costs before they are even realized is to obscure the more “universal meaning” of cost as “the sacrifice of a value
So how ought the analyst to align the relevant comparisons? If technology-based standard setting hinges on knowing which firms or firm types are best suited to innovate, it is surely a muddle. But if it starts from definite descriptions of production, the discrete factors of that production, and verified performance leaders instead of a synthetic calculus derived more from algorithms than investigation, then the analyst cannot help but confront a fuller variety of costs in actual markets: the relevant tax distortions and/or vintage classes of capital, real trade-exposure or pressures to offshore, the market power, illiquidity, and/or insolvency of incumbents, innovations known to be on the horizon if not yet commercialized, learning-by-doing or other complementarities peculiar to the sector, and the kinds of processes, equipment, and professionals common therein. That analyst cannot help but confront the firm not as equilibrium theory’s static-state placeholder—or even its dynamic cypher—but rather as a live experiment in practical problem-solving. In that analyst’s world, innovations flow from the pull of demand, the push of supply, and much in between. In short, alternative.” Id. at 593. The use of cost in cost-availability stringency evaluations avoids at least that logical mistake. 166. The basic insight that individual firms’ costs of compliance can vary widely is commonplace. See, e.g., ALBERT L. NICHOLS, TARGETING ECONOMIC INCENTIVES FOR ENVIRONMENTAL PROTECTION 31 (1984). But it can motivate much more than a faith in Pigovian taxes or tradeable allowances. In the technology-based approach, it motivates EPA to become intimately familiar with particular firms and their operations. See, e.g., National Emissions Standards for Hazardous Air Pollutant Emissions: Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks; and Steel Pickling-HCI Process Facilities and Hydrochloric Acid Regeneration Plants, 77 Fed. Reg. 58,220, 58,222-223 (2012) [hereinafter Final Chromium Rule] (having found 188 large plants, 394 small plants, about 70 of which were in California, and the exact tools used to achieve observed performances in each). 167. Labor, capital, energy and other basic inputs may be decomposable—which often motivates the argument that taxes are preferable to rules as instruments of social cost minimization. That flexibility is curbed substantially, however, when a single sector at a discrete point in time becomes the focus. See infra notes 272-76 and accompanying text. 168. As we have noted throughout, performance standards capture abatements made by add-on equipment, process, and input changes alike. See supra note 21 accompanying text. 169. Cf. Jacques H. Dreze, (Uncertainty and) The Firm in General Equilibrium Theory, 95 ECON. J. 1, 1 (1985) (“The firm fits into general equilibrium theory as a balloon fits into an envelope: flattened out! Try with a blown-up balloon: the envelope may tear, or fly away: at best, it will be hard to seal and impossible to mail . . . Instead, burst the balloon flat, and everything becomes easy.”); Teece, supra note 159, at 686-89 (noting that many firms outsource their innovation and that the “innovation ecosystem” in which the firm exists exerts multiple, often conflicting influences on its choices). 170. As Bauman and colleagues showed with a formal model, it is only by assuming pollution abatements always take the form of end-of-pipe add-ons—rather than process or input changes—that the conventional wisdom can still hold pollution taxes and/or allowances (our Rule 2 and Rule 3) induce more innovation than performance standards (like Rule 1). See Bauman et al., supra note 42, at 511-17. If analysts make the conventional assumptions about
the analyst should look for relevant differences and similarities not through
the dogma of technical change and equilibrium but rather by bottom-up
descriptions of observable facts and realistic possibilities.171

A focus like this has embedded EPA in a world where trade is not
costless and so not necessarily efficient,172 where ‘path-dependence,’ in-
creasing returns, and network effects are often pronounced,173 where indi-
vidual firms’ capabilities and so-called sunk costs can be anchors,174 where
short-run profits not only exist but define economic life,175 and where the

abatement costs, e.g., innovation always lowers marginal abatement costs, they will expect—
perhaps incorrectly—that performance standards will generally be both under- and over-
controlling.

171. About all that can be said after decades of search on this front is that empirical tests
and rigorous modeling have mostly rejected the orthodox claim, see, e.g., Jacob Schmookler,
Economic Sources of Inventive Activity, 22 J. Econ. Hist. 1 (1962), that demand alone pulls
innovation. See, e.g., Daron Acemoglu et al., The Environment and Directed Technical Change,
102 Am. Econ. Rev. 131 (2012) (presenting a growth model where supply of the final good,
produced from substitutable clean or dirty inputs, can, barring exhaustion of the inputs, tend
toward environmental disaster without timely and appropriate policy intervention); Daron
Acemoglu, Directed] (noting orthodox model wherein technical innovation follows from mar-
ket signals and presenting an alternative model of technical change, its direction and pace
demonstrating that “equilibrium bias” can systematically advantage certain factors of produc-
tion once they get a head start on the competition). This ‘necessity paradox’ may even be
reason enough to reject equilibrium theory itself. See Nicholas Kaldor, The Irrelevance of
Equilibrium Economics, 82 Econ. J. 1237, 1245 (1972). What macroeconomic modelers face
instead amounts to methodological turmoil. See Andreas Löschel, Technological Change in

172. Cf. Klein, supra note 35, at 20-24 (arguing that only static analyses can presume
perfect information leading to rational assessments of trade possibilities); Nelson, supra note
methodological divide between general equilibrium theory and the newer institutional theo-
ries where information costs and other frictions predominate).

173. See Elhanan Helpman & Manuel Trajtenberg, Diffusion of General Purpose Technolo-
gies, in GENERAL PURPOSE TECHNOLOGIES AND ECONOMIC GROWTH 85 (Elhanan Helpman ed.,
1998); W. Brian Arthur, Increasing Returns and Path Dependence in the Economy 24-35

174. See David J. Teece et al., Dynamic Capabilities and Strategic Management, 18 Strate-
gic Mgmt. J. 509 (1997); Benjamin Klein & Kevin M. Murphy, Vertical Restraints as Contract
Enforcement Mechanisms, 31 J.L. & Econ. 265 (1988); Nelson, supra note 155, at 96-136;
Oliver E. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications (1975);
Herbert A. Simon, A Formal Theory of the Employment Relationship, 19 Econometrica 293,
302-05 (1951) (presenting a model wherein uncertainty brings more decisions within firm
boundaries than it pushes beyond them).

175. See Geoffrey T.F. Brooke, Uncertainty, Profit and Entrepreneurial Action: Frank
Knight’s Contribution Reconsidered, 32 J. Hist. Econ. Thought 221, 228-34 (2010) (arguing that
Knight’s theory of entrepreneurial profit grounded in subjective expectations is a major cri-
tique of equilibrium theory); see infra notes 287-90 and accompanying text.
availability and cost of capital diverge substantially from the ideal. Understanding cost-availability in that context means elevating inertial relationships over neoclassical dogmas. Doing so on a rolling basis is implicit in both facets of the task given the impermanence in those relations. Finally, it entails some measure of skepticism: to whatever extent EPA’s finding and sharing of practical solutions converts them into something of a ‘public good,’ incumbent firms may be biased against investing in the search for ways to meet or exceed expectations.\footnote{177}

For example, EPA set its CWA effluent standards by weighing the (1) inputs used, (2) outputs produced, (3) process(es) employed, (4) age and size of capital equipment/facilities, and (5) the pollutant/waste constituents generated.\footnote{178} Its effluent standards requiring the “best available” technology EPA could deem “economically achievable” often involved identifying a “model plant,” but it occasionally identified abatement solutions wholly foreign to the target sector where they were demonstrably transferable.\footnote{180} Transfers like this entail specific and detailed investigations. Mining operations’ effluents put EPA to predicting likely future metal prices—showing the sector’s expected solvency and liquidity and, thus, capacity to retrofit.\footnote{181} The investigation can even involve estimating the sector’s likely management of legacy costs,\footnote{182} a particularly problematic projection given the possibility of bankruptcy protections.\footnote{183} More common is the in-depth assessment of substituting one (cleaner) factor for another.\footnote{184}


\footnote{177.} Within-industry spillovers “reduce the incentive to engage in R&D, because a firm must share with its competitors the benefits of its investment.” Cohen, supra note 9, at 181; see also Cohen & Levin, supra note 9, at 1089. On the other hand, controversy rages still today over identifying the properly “public” goods which the market systematically underproduces.

\footnote{178.} See La Pierre, supra note 56, at 810-11 (describing how EPA categorized industrial sectors for the CWA’s BPT and BATEA standards); Magat et al., supra note 117, at 33.

\footnote{179.} See Freeman, supra note 117, at 24.

\footnote{180.} See, e.g., Kennecott v. EPA, 780 F.2d 445, 450-55 (4th Cir. 1985).

\footnote{181.} See, e.g., id. at 456-57; Rybachek v. EPA, 904 F.2d 1276, 1291 (9th Cir. 1990).


\footnote{183.} See infra notes 268-60 and accompanying text.

Perhaps most importantly, finding reachable solutions of the kind which are achievable (or “available”) while delaying their effective dates, allowing firms to devise their own least-cost approximations thereof, can synch regulatory and profit-making priorities, maximizing cost-avoidance opportunities.\(^{185}\) One BATEA standard (for pulp and paper making) which also simultaneously set MACT standards for a suite of related HAPs provoked multiple reactions from the incumbent firms which could never have been predicted \textit{ex ante}.\(^{186}\) The capital equipment of pulp and papermaking, notoriously long-lived and adaptable,\(^{187}\) drew these firms to shift product mixes\(^{188}\) and sell off or shutter marginal plants,\(^{189}\) yet also, in many cases, to adopt the benchmark solutions root and branch.\(^{190}\) This was cost-as-motivational-force at work: with the set performance standard as the permit constraint, pollutant reductions went almost exactly as expected\(^{191}\)—even as some firms’ “costs” became others’ profits in the ensuing shake-up.\(^{192}\)


185. To be sure, cost-benefit analysts prioritize delay in effective dates as a means of minimizing their "costs" for exactly this reason. See, e.g., \textit{Circular A-4}, supra note 60, at § C ("[A] regulation that provides sufficient lead time is likely to achieve its goals at a much lower overall cost than a regulation that is effectively immediately."). One of the chief tools Porter and van der Linde highlight in their account of firms’ capacities to offset regulatory costs is synchronizing performance standards with a target’s expected capital turnovers to maximize the incentive effects any given action can exert. See Porter & van der Linde, supra note 42, at 113. That will require more attention than just some arbitrary delay interval. For example, independent pressures to cut pollution might begin this process ahead of technology-based standard setting, thereby further improving cost-avoidance opportunities. See Wayne B. Gray & Ronald J. Shadbegian, \textit{Multimedia Pollution Regulation and Environmental Performance} 3-18 (2015) [hereinafter Gray & Shadbegian, Multimedia].


187. See Boyd, supra note 132, at 116-23
188. See Elrod & Malik, supra note 184, at 20.

190. See Final Cluster Rule, 63 Fed. Reg. at 18,517.
191. See, e.g., Gray & Shadbegian, Multimedia, supra note 185, at 17.
192. EPA was well aware that delaying implementation too long, e.g., five years, would simply defer the inevitable consolidation. See Final Cluster Rule, 63 Fed. Reg. at 18,550 (noting that a five-year delay would introduce greater uncertainties given the boom-bust
Finally, if outputs remain roughly constant while inputs, equipment, and/or processes shift (as happened, for example, in steel manufacturing with the advent of mini-mills and the electric arc furnace),\textsuperscript{193} benchmarking performances can present a unique challenge.\textsuperscript{194} Sub-categorization is always an option, but EPA can easily find itself an unwitting participant in a market struggle, politicizing its work and undermining its own authority.\textsuperscript{195} A version of this trap (among others) seems to have ensnared EPA’s “Clean Power Plan” (CPP)—a complex effort to spur states to reduce the “carbon intensity” of their wholesale electricity markets by way of their own preferred, cost-minimizing means.\textsuperscript{196} As Part IV shows, however,\textsuperscript{197} technology-based standard-setting must often, as the CPP did, align sectors on the basis of output notwithstanding diverging modes of production. EPA faces a choice in such cases over where to aim its signals: at the production factors, the control techniques, or some one-off synthesis of the two. EPA has often identified robust, adaptable solutions like selective catalytic reduction,\textsuperscript{198} electrostatic precipitation\textsuperscript{199} or, in the water context, settle/filtration tanking and lagooning,\textsuperscript{200} the incremental improvement of which can be facilitated by induced diffusion.\textsuperscript{201} Even these solutions can be tailored to input, cycle in pulp and paper markets without necessarily reducing any resulting costs of compliance. It was also aware that some plants, given their idiosyncrasies of location, were not amenable to retrofitting no matter the delay allowed. See Gray & Shadbegian, supra note 159, at 238.


\textsuperscript{194} Several of the inputs and wastes generated by an integrated steel mill, e.g., metallurgical coke, ore, and associated wastes, are no part of mini-mills. Hence EPA’s most recent BATEA for steel mills targeting effluent generated from coking drew challenge only from the coke/coal trade group. See American Coke & Coal Chems. Inst. v. EPA, 452 F.3d 930, 932 (D.C. Cir. 2006). Mini-mills have taken market share from integrated mills for over three decades—and promised to do so from the start. See U.S. EPA, EPA 310-R-95-005, \textit{Profile of the Iron and Steel Industry} 13 (1995); cf. PioRE & Sabel, supra note 151, at 208-11 (calling mini-mills a kind of “flexible specialization”). And although mini-mills still do not produce all of the goods integrated mills can, they are much less capital-intensive to open, to operate, and to idle awaiting demand. \textit{Profile of Iron and Steel Industry}, supra note 194, at 13-26.

\textsuperscript{195} See infra notes 275-76 and accompanying text.

\textsuperscript{196} See infra notes 249-71 and accompanying text.

\textsuperscript{197} See infra notes 261-70 and accompanying text.

\textsuperscript{198} See \textit{Air Pollution Cost Manual}, supra note 89, at § 4.2.

\textsuperscript{199} See id. at § 6.


\textsuperscript{201} If diffusion is weak, the key to its acceleration may be the very improvements that would stem from widespread adoption. See Popp et al., supra note 29, at 899-910. EPA originally believed this was the case with flue gas desulfurization (FGD) scrubbers for boil-
factor, process, geographic, or other kinds of variability, however. Holding all targets in a sample to the same standard can entail costs that cost-benefit hawks typically think are excess costs. But it is an empirical question whether such costs outweigh the (excess) costs of taxes, allowances (our Rules 2 and 3), or anything else. Moreover, without at least some of these “costs” burdening production, no social signal is sent calling up responsive, innovative adaptations. And without knowing all the possible adaptations, the analyst is simply prejudging which response(s) is the one worth inducing. Thus, given the uncertainty of the cost-minimization possibilities, sectoral boundaries and technological frontier estimates ordinarily should

ers, industrial furnaces, and steam electric power generating units. See Note, Forcing Technology, supra note 56, at 1722-24. Its efforts to that end were quickly submerged in a bitter political brawl over the economic winners and losers of that induced diffusion. See Ackerman & Hassler, supra note 81. Eventually, the CAA and EPA’s vintage-differentiation between “new” (FGD-required) and existing (not required) plants grew into a major disincentive to retire old equipment in favor of newer, more efficient—but also morestringently regulated—units. See Richard L. Revesz & Jack Lienke, Struggling for Air: Power Plants and the “War on Coal.”

202. Compare Small Refiner Lead Phase-down Task Force v. EPA, 705 F.2d 506, 525-37 (D.C. Cir. 1983) (reviewing EPA’s treatment of “small” refineries, their access to capital to acquire the needed equipment, and the reasonableness of the predictive model EPA employed), with Revised Final Intakes Rule, 79 Fed. Reg. at 48,339 (rejecting closed cycle cooling as nationwide “best technology available” for existing water withdrawals on grounds that land availability, expected energy penalties and consequent air emissions, and remaining useful plant life varied so substantially facility-by-facility). In one of the few truly longitudinal studies of energy efficiency improvements induced by energy prices, Newell and colleagues found a correlation, albeit one severely complicated by other factors and various indivisibilities, between the price of energy services and the energy efficiency of goods offered for sale. See Richard G. Newell et al., The Induced Innovation Hypothesis and Energy-Saving Technological Change, 114 Q.J. ECON, 941, 970-71 (1999).

203. See, e.g., Masur & Posner, supra note 150, at 682-83.

204. See supra notes 46-50 and accompanying text.

205. Cf. Porter & van der Linde, supra note 42, at 99 (“[R]egulation signals companies about likely resource inefficiencies and potential technological improvements.”); Acemoglu, Directed, supra note 171, at 783 (finding that irrespective of the elasticity of substitution between factors, an increase in the relative abundance of a factor creates some measure of technical change biased toward that factor); Baumol & Oates, supra note 42, at 61-63 (when costs of internalizing an externality are uncertain, the choice between Pigovian taxes and tradeable allowances is indeterminate). Of course, the precision of that signal hinges on several factors, chief among which are the format, applicability, and stringency of the standard set. See infra notes 292-293 and accompanying text.

206. Guesses like this are to be avoided on virtually any account of cost factoring. Compare Circular A-4, supra note 60, at 17, 27 (all cost estimates should be explicable, transparent, monetized where possible, and qualitatively rationalized if not), with Driessen, supra note 7, at 93-105 (arguing that markets are an example of good but not great adaptive efficiency for their sustaining diverse and constant experimentation pursuing innovation while opaque government decision-making are the opposite).
seek the best targets for any ensuing cost/signals. This is doubly important if we understand costs as the enemy of profits: to whatever extent a firm is experiencing costs it cannot avoid, that is one kind of profit opportunity or another. Section B shows how judgments of this kind are invariably aided by the “engineering” investigations technology-based standard setting entails—investigations that cost-benefit accounting too often foregoes.

B. Theory Versus (Realized) Costs

Resources for the Future and others have shown that ex ante evaluations continue to over-estimate the costs of complying with EPA standards compared to ex post ‘ground-truthing’ where it is done. The unpredictability of cost avoidance is an evident source of error. Even after-the-fact costs can be deeply uncertain. Firms strive to avoid costs, but quantifying their (expected) successes or failures has turned out to be an intractable problem. For example, some firms have been known to adopt solutions set out

207. See infra notes 249-51 and accompanying text.
208. Pizer & Kopp, supra note 39, at 1312.
210. See, e.g., Morgenstern, supra note 209, at 13. In Pigovian terms, the divergence between private and social costs—the “externality”—by itself explains neither the existence, scope, nor behavior of actual firms. See Carl J. Dahlman, The Problem of Externality, 22 J.L. & Econ. 141, 150-56 (1979). Some even argue that firms’ interaction with their own factors of production yields innovation that, in its rate, direction, and value is irremediably stochastic. See, e.g., Rosenberg, supra note 9, at 123. But if vertical integration—like production itself—is aimed at profit-making, it necessarily implies cost avoidance regardless of the sense in which costs are finally valued. Business strategists press this point instinctually. See, e.g., Porter, supra note 36, at 64 (“The behavior of a firm’s costs and its relative cost position stem from the value activities the firm performs in competing in an industry. A meaningful cost analysis, therefore, examines costs within these activities and not the costs of the firm as a whole.”).
211. For example, most of the efficiency gains made from the tradeable SO2 allowances created by the 1990 CAA amendments apparently stemmed from the spatial disparities between plants near low sulfur coal and those far from it. See Curtis Carlson et al., Sulfur Dioxide Control by Electric Utilities: What Are the Gains from Trade?, 108 J. Pol. Econ. 1292, 1320 (2000) (finding that spatial disparity explains most of the allowance trading that actually occurred). The relative magnitude of those gains compared to gains achieved under the 1970s NSPSs, however, has been questioned. See Margaret R. Taylor et al., Regulation as the Mother of Innovation: The Case of SO2 Control, 27 L. & Pol’Y 348 (2005) (arguing that most of the innovation in controlling SO2 emissions came before 1990).
212. See Pizer & Kopp, supra note 39, at 1342 (“Without a randomized experiment to understand the consequences of new regulation, it is impossible to speak confidently about the costs borne by firms.”).
in technology-based proposals—aiming to gain the early mover advantage—only to shift the technology baseline when EPA is finalizing the standard.213 Of course, this source of error plagues cost-availability judgments no more than it does cost-benefit balancing.214 The difference is that cost-availability evaluation may do better still.

Modern theories of the firm are more aptly described as theories of the boundaries of the firm—what firms optimize that markets do not.215 To view the median firm as existing just as it does in order to minimize both its exchange and production costs216 is to view industrial organization as a permanent disequilibrium.217 It raises the notorious distinction between “marginal” and “average” costs218—a quagmire in economic theory going back generations.219 But it does not much aid our sense of what will probably result from set production constraint(s) like our technology-based standards.220 Knowing that firms typically “learn by doing” and thereby turn production into its own means of cost avoidance does not quantify that

214. Cf. id. at 18,550 (noting EPA uncertainty in expected cost estimates, no matter how used). The difference, of course, is that benefits uncertainty will also detract from the standard’s confidence level.
215. See Robert Gibbons, Four Formalizable Theories of the Firm?, 58 J. ECON. BEHAV. & ORG. 200, 201-04 (2005) (tracing four distinct groups of theories explaining firm scale and scope and the incentives to integrate). Of course, if the long-run cost curves of the firms in a sector are horizontal, “the size of each firm is indeterminate.” Blaug, supra note 12, at 436. But if the size of each firm is indeterminate, so is the number of firms in each industry—thereby casting doubt on the large numbers property of “perfect competition.” Id.
218. “Instead of being differentiating in [the sense Adam Smith articulated] . . . an innovation may be integrating, in the sense that the new way of doing things—a new machine, say—performs in one step what had previously needed two or more steps.” Id. at 117 (emphasis in original).
219. See Blaug, supra note 12, at 586-95.
220. A variety of theories has long critiqued the neoclassical view of firms that they are merely profit-maximizing modes of production. See Oliver Hart, An Economist’s Perspective on the Theory of the Firm, 89 COLUM. L. REV. 1757, 1757-65 (1989).
effect. Nor does it provide usable boundaries within which the effect should be expected.

Still, this sort of microeconomics diverges dramatically from the orthodoxy that prices reliably balance supply and demand, that unprofitable competitors fail, and that technological progress is (relatively) constant. In the orthodox variants of cost-benefit analysis, setting a performance standard involves methodological circularities of one severity or another. If it is of the "general" equilibrium variety, the circularity comes from using prices to calculate utility functions in an exercise grounded in the conviction that markets do not accurately price utility. If it is some

221. But see Rosenberg, supra note 9, at 120-40 (arguing that many classes of capital equipment could be studied for their predictable 'learning by using' returns). Arrow is celebrated for being first to formalize shifting production functions from the very activity of production. See, e.g., Robert M. Solow, Learning from "Learning by Doing"; Lessons for Economic Growth (1997) (explaining the influence of Kenneth J. Arrow, The Economic Implications of Learning by Doing, 29 Rev. Econ. Stud. 155 (1962)) [hereinafter Solow, Learning]. But Arrow's results proved too much, so to speak, and implied that 'bounded learning by doing' is the only realistic possibility. See id. at 10-21.

222. See Solow, Learning, supra note 221, at 34-41 (explaining Arrow's model as a provocation, not a description of growth).

223. See Kaldor, supra note 171, at 1242-44. But see Coase, supra note 27, at 713-14 (calling both the traditional focus on price and the industrial organization tradition "blackboard economics" for their low evidence-to-theory ratios); cf. Barzel, supra note 172, at 11 ("In the [traditional] model, when equilibrium is disturbed a new equilibrium is instantaneously attained because, given zero transaction costs, the cost of adjustment is zero . . . commodities are made up of strictly identical specimens, people are fully informed regarding the exchanged commodities, the terms of trade are always perfectly clear, and trade is instantaneous.").


225. Cf. Elhanan Helpman & Manuel Trajtenberg, A Time to Sow and a Time to Reap: Growth Based on General Purpose Technologies, in General Purpose Technologies and Economic Growth 55 (Elhanan Helpman ed., 1998) (finding that "general purpose technologies" which become extremely pervasive and sustain continued improvements in performance do so by fostering complementarities within their user sectors and account for a disproportionate share of total economic growth over time).

226. It will also entail the risk of two dimensions of uncertainty: that of risk/benefit estimates and that of cost estimates. See Finkel, supra note 33, at 110.

227. See Mishan & Quah, supra note 34, at 87-93; cf. Matthew D. Adler & Eric A. Posner, New Foundations of Cost Benefit Analysis 161 (2006) (wrestling with the incompleteness of "overall welfare" given the limited range of goods encompassed); Littie, supra note 28, at 8-22 (struggling to find Pigou's or Marshall's theory of value and welfare consistent with their 'law of diminishing marginal utility' and concluding that their "positive economics" has no coherent concept of utility).
“partial” equilibrium exercise, it comes from assuming that a sector’s given,
including its pollution abatement opportunities, are independent of the
broader economy. Assessing a technical solution’s costs, and thus its cost-
availability, for a sector’s actual incumbent firms (or even a single, unique
establishment) sheds those circularities for the value judgment that the true
social harms to be avoided in regulation stem from production’s observed
indivisibilities like job losses, stranded capital, unique firm capabilities, and
other functions of scale or scope. Indeed, employment losses have often
counted among the strongest reasons against a strict efficiency criterion for
pollution standards. There is no algorithm that can solve for indivisibili-
ties. The inertia in technological frontier and/or sectoral boundary esti-
mates described above consists in these indivisibilities. Their discovery
typically comes in a bottom-up search focused more on messy, nonstandard
contexts than on long-challenged theorems or their calculus.

Part IV argues that, looking ahead, there is progress still to be made in
improving and broadening the mandate for such searches and specifically
for the use of cost-availability judgments over cost-benefit balancing for
some of our toughest environmental challenges.

IV. IMPROVED COST-AVAILABILITY, MAINSTREAMED

Our statutes’ unique approaches to weighing costs have long included,
implicitly or explicitly, the aim of inducing innovation to better minimize
all costs. As the first parts of this essay showed, though, the unpredict-

228. See Ian Steedman, Sraffian Interdependence and Partial Equilibrium Analysis, 12 CAM-
BRIDGE J. ECON. 85 (1988) (showing that Marshall’s partial equilibrium theory fails just from
the assumption of produced inputs).

229. Cf. Kaldor, supra note 171, at 1237 (arguing that equilibrium theory is “barren and
irrelevant as an apparatus of thought” in its failure to account for increasing returns or for
indivisibilities in production); Herbert E. Scarf, The Allocation of Resources in the Presence of
Indivisibilities, 8 J. ECON. PERSP. 111, 115 (1994). Such a value judgment is perfectly coherent
as a matter of first order ethics. See ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 210-
11 (1993) (arguing that some non-commodity values are “political goods” best secured
through democratic institutions of voice, equity and deliberation). Each of us experiences
our own life as indivisible in this sense even if we perhaps should not. See DERICK PARFIT,

230. See Driesen, Distributing, supra note 135, at 3; Masur & Posner, supra note 150, at
695-96; cf. Richard D. Morgenstern, Analysing the Employment Impacts of Regulation, in DOES
REGULATION KILL JOBS? 33, 37 (Cary Coglianese et al. eds., 2013) (finding in analysis of CAA
and CWA pollution abatement expenditure data that employment showed statistically insig-
nificant increase as expenditures rose).

231. See Scarf, supra note 229, at 116. That is, no algorithm exists to do so simply
through pricing. Scarf presents an alternative “neighborhood theory” of finding optimality.
See id. at 118-27.

232. See supra notes 39-41 and accompanying text.
ability of actual firms and innovation, coupled with the intractability of the economic concept of cost, has made inducing cost-saving innovations a rather uncertain enterprise. Of course, different policies' effects on innovation are literally all around us. Ironically, this nexus has become clearest in the media program vesting the most authority in EPA by its sheer scope and complexity: the CAA's MACT standards. Defining boundaries for either of our purposes—identifying a solution or evaluating its costs—has lately become a treacherous affair for MACT. On the one hand, "[t]hat different industries may be subject to different standards and that [EPA] need not bear the burden of explaining those differences is clear." On the other hand, the notion of an available (or ‘achievable’) benchmark presumes at least some degree of integrity in the comparison’s parameters. For example, in assessing the best performing facilities from a nationwide sample where all of the best performers were located in a single state, how should those leaders be counted against those (ostensible laggards) who faced no stringent local standards forcing their hand? Or in constructing a category of HAP emitters, many of whom would eventually face controls im-

233. See supra notes 48-50 and accompanying text.
234. “Hazardous air pollutants” (HAPs) include virtually all regulated air pollutants—the exceptions being the criteria pollutants, greenhouse gases, and ozone depleting substances—and § 112(a) regulates them at relatively low volumetric thresholds. See Martineau, supra note 91, at 230-35.

The importance of subcategorization cannot be underestimated. The way EPA subcategorizes, if it does at all, can significantly affect the floor determination for the source category, and thereby dramatically affect the ultimate MACT standard’s degree of stringency. If one sector of a particular industry segment has better pollution control equipment than another segment [sic] in the same source category, the highly controlled units will drive the floor determination and thus set a minimum standard for the rest of the source category.

236. Nat’l Lime Ass’n v. EPA, 627 F.2d 416, 447 n.108 (D.C. Cir. 1980). This has remained true in the MACT context. See, e.g., U.S. Sugar Corp. v. EPA, 830 F.3d 579, 656-57 (D.C. Cir. 2016) (deferring to EPA’s subcategorization of boilers by the fuel types used even though boilers were permitted to fuel-switch from year-to-year and change categories of controls as a result).
237. See Masur & Posner, supra note 150, at 682-83.
238. See Nat’l Ass’n for Surface Finishing v. EPA, 795 F.3d 1, 9 (D.C. Cir. 2015). California’s restrictions on electroplating finishers made them significantly better than their counterparts elsewhere. See Final Chromium Rule, 77 Fed. Reg. at 58,230-32. With that data in hand, once it re-opened the “beyond-the-floor” hexavalent chromium standard, EPA then found that the costs of mandating California’s stringent filtration standards outweighed the
posed by a separate but overlapping NSPS standard yet to be finished but who, when so governed by that NSPS would then drop out of the ‘MACT pool’ from which costs and technology were being counted,239 how should EPA count or average those performances? Or from a MACT pool of boilers and industrial furnaces of varying sizes, purposes, feedstocks, and pollution equipment, some of which controlled certain HAPs well but none of which controlled all HAPs well, should EPA set MACT floors pollutant by pollutant or by subcategorizing the sources?240

Each of the above discoveries indicates some kind of endogeneity or dependence. In the first instance, variations in state/local law made the sources of a sub-jurisdiction into noticeable outliers—yet performance leaders all the same.241 In the second instance, an accident of sequencing in two overlapping standards drew the boundaries of the performance average into question.242 Finally, in the last instance, the significance of pollution control efforts to the overall enterprise forced the standard setter into having to choose how to compare performances: by production factors or by control equipment?243 In all three, constructing the benchmark(s) highlighted the observed technical variations’ social drivers. As we have agreed throughout, technological frontiers and the possibilities for their extension have always turned to some degree on policy choices—not solely the invisible hand of accumulated or projected technical progress. But highlighting the degree to which the performances driving technology-based standard setting actually reflect underlying policies draws out the intentional influences (in one form or another) exerted on the direction and pace of technical change. It also foregrounds the judgments entailed in constructing the sectoral boundaries and technological frontiers being used. Section A contrasts two long-run

benefits of doing so nationally, and set the (cost-conscious) beyond-the-floor standards only after controlling for the California operations statistically. Id. at 58,225-28.

239. See Portland Cement Ass’n v. EPA, 665 F.3d 177, 184-86 (D.C. Cir. 2011); see also U.S. Sugar Corp., 830 F.3d at 593-94.

240. See U.S. Sugar Corp., 830 F.3d at 610-11; see also Sierra Club v. EPA, 167 F.3d 658, 669 (D.C. Cir. 1999).

241. See Final Chromium Rule, 77 Fed. Reg. at 58,231-32 (observing that California restrictions on chromium emissions are achieved with chromium plating and chromic acid anodizing facilities registering their observed performances at high cost). The related but distinct issue of using subnational jurisdictions’ permitted emissions levels as evidence of achievability rightly requires verifying the operation of actual sources within those jurisdictions. See Sierra Club v. EPA, 353 F.3d 976, 989 (D.C. Cir. 2004).

242. Logically, figuring the costs of a later-in-time standard (if not always its technological achievability) will turn on the practical impact upon covered sources of any earlier-in-time standard(s). See Portland Cement, 665 F.3d at 184-86; see also U.S. Sugar Corp., 830 F.3d at 593-94.

243. See also Sierra Club v. EPA, 479 F.3d 875, 880-81 (D.C. Cir. 2007); Cement Kiln Recycling Coal. v. EPA, 255 F.3d 855, 861-67 (D.C. Cir. 2001).
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case studies, the 2015 NSPS for electricity generating units (EGUs) and their greenhouse gases (GHGs) and EPA’s water intakes rules, to schematize these influences and the judgments they entail. Section B offers some general lessons for using technology-based standards to induce innovation.

A. The Relevance of Indivisibilities and Endogeneity

EPA often finds that production governed by a performance standard improves its efficiencies over time. 244 There may be no predicting these improvements. Indeed, it is often impossible to sort out the causes of observed efficiency gains after the fact. 245 But for what gains should technology-based standards aim? Detecting (or hypothesizing) endogeneity after the fact is a long way from confidently predicting innovations that will follow from one standard or another. We also concluded above that the real harms to be avoided in regulation typically stem from indivisibilities in production like job losses, stranded capital, etc., and that these all combine to form a kind of inertia to which the standard setting should be sensitive. 246 So-called “transition relief,” e.g., grandfathering, has been a stock response, although severe difficulties have attended that choice too. 247 Finally, if outputs remain roughly competitive while inputs, equipment, and/or processes are shifting, as has been the case in wholesale electricity markets, 248 one mode of production may become significantly disfavored simply for emitting the target pollutant(s). As already mentioned, these challenges intersected in the 2015 NSPS for GHGs from fossil fuel-fired EGUs.

As price increases shift a product’s cost/value ratio, they can eventually undermine the product itself. 249 In that case, keeping the product in the technological fold may become impossible as better ways of meeting de-

244. Cf. Final Chromium Rule, 77 Fed. Reg. at 58,231 (concluding that, the mere discovery in a technology review that some facilities using the benchmark solution(s) identified in an earlier MACT standard are doing better than expected is insufficient reason by itself to reopen that MACT standard).

245. See supra note 211 and accompanying text.

246. See supra notes 169-77 and accompanying text.


249. See, e.g., Newell et al., supra note 202 (tracing changes in consumer appliances market caused by fluctuating energy costs and the consumer preference changes that resulted); see also Elrod & Malik, supra note 184 (finding evidence that some product switching at the establishment level resulted from EPA’s cluster rule).
mand overtake it. To electricity generation, coal is a produced input and, in most technology-based standard setting, process and input changes have always been an option. As EPA found in its 2015 EGU NSPS, factor productivity can be so tied to costs that any constraint will decisively favor alternative inputs. Coal-fired EGUs attaining a certain combustion efficiency and capturing their GHG emissions would, according to best estimates, be undersold at wholesale rates by some existing nuclear and renewable producers and by most existing and future natural gas producers. The innovations shifting coal’s cost/value ratio may or may not have been independent of regulatory action (although to whatever extent coal’s other costs were “internalized” by regulation, it was at best a qualified independence). But an aggregate cost-benefit analysis could logically find negligible costs caused by the GHG constraint per se. Indeed, by EPA’s projections those same hypothetical future units would still be undersold by natural gas producers even without the GHG NSPS—especially with continued low growth in overall demand and subsidized renewable genera-

250. Partial equilibrium modeling of the sector is therefore “wrong” in Pizer and Kopp’s words, see supra note 39, at least to the extent that that input’s price is affected by demand. See Steedman, supra note 228.

251. In the CWA: See Waterkeeper All., Inc. v. EPA, 399 F.3d 486, 501-02 (2nd Cir. 2005); Citizens Coal Council v. EPA, 447 F.3d 879, 895 (6th Cir. 2006). In the CAA: See Sierra Club v. EPA, 353 F.3d 976, 988 (D.C. Cir. 2004) (reviewing and affirming EPA’s assumption that cleaner feedstocks would be substituted); Sierra Club v. EPA, 499 F.3d 653, 656 (7th Cir. 2007).

252. See Final EGU NSPS, 80 Fed. Reg. at 64,543-92. Coal’s many costs include various air pollutants (sulfur dioxide, nitrogen oxides, particulates, heavy metals and GHGs), Revész & Lienke, supra note 201, at 10-11, water pollutants (cooling water intakes’ impingement and entrainment, biocides, acidic and alkaline runoff, sediment, and fly ash) and substantial post-extraction landscape reclamation. See Patrick C. McGinley, From Pick and Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfields, 34 ENVTL. L. 21, 24-27 (2004).


254. See Final EGU NSPS, 80 Fed. Reg. at 64,628-32 (reviewing NSPS interactions with other regulatory requirements).

255. See id. at 64,563-64 (noting that EPA considered the costs of its NSPS at the national and the individual source level). That could be equally true for employment effects, as well. See Joseph E. Aldy & William A. Pizer, The Employment and Competitiveness Impacts of Power-Sector Regulations, in DOES REGULATION KILL JOBS? 70, 70 (Cary Coglianese et al. eds., 2013) (finding minimal gross and net employment impacts from various CAA air pollution control standards in US manufacturing sectors).
tion.\textsuperscript{256} Just the capital equipment costs to achieve state-of-the-art heat rate efficiencies was, as projected, too costly.\textsuperscript{257} Accounting for existing coal-fired EGUs’ grandfathering advantages,\textsuperscript{258} it seemed to EPA that technology and the shrinking demand for energy services were combining to cut new coal generation out of the market.\textsuperscript{259}

A finding of negligible aggregate expected costs (because the factor is expected to be outcompeted in any event) is not, however, a finding that the solution identified is cost available.\textsuperscript{260} Indeed, zero marginal profitability with that factor could imply the opposite. Yet firms constantly substitute inputs and physical capital as their cost/value ratios change, often doing so

\textsuperscript{256} Final EGU NSPS, 80 Fed. Reg. at 64,513. This led EPA to the conclusion that its final NSPS would cause “negligible CO\textsubscript{2} emission changes, quantified benefits, and costs by 2022...” Id. at 64,515. For cost-benefit purposes, that conclusion was decisive and EPA developed it fully in the RIA. See RIA for EGU NSPS, supra note 253, at § 4.1-4.5.5. Experience thus far, with the CPP stayed judicially, has borne out the projections. See Jack Fitzpatrick, Coal Plants Are Shutting Down, With or Without the Clean Power Plan, MORNING CONSULT (May 3, 2016) https://morningconsult.com/2016/05/03/coal-plants-shutting-without-clean-power-plan/.

\textsuperscript{257} See Final EGU NSPS, 80 Fed. Reg. at 64,515, 64,558-62 (LCOE of new integrated gasification combined cycle (IGCC) units versus alternatives not competitive with NGCC, competitive with some nuclear); International Energy Agency—Coal Industry Advisory Board, Power Generation from Coal: Measuring and Reporting Efficiency Performance and CO\textsubscript{2} Emissions (2010), [hereinafter Generation from Coal], https://www.iea.org/ciab/papers/power_generation_from_coal.pdf. The IEA found that global average efficiency rates for existing coal-fired generating stations was about 33.5% in 1971, had risen only to about 35.1% by 2007 and that new plants should be >40% efficient, but that capital stock turnover was unlikely without policy inducement. Id. at 57-61. Unlike its preceding century where coal combustion grew continuously more efficient, see supra note 161, coal’s present and projected future make it what business strategists call a “cost driver” for firms in the business of selling electricity wholesale. Id. at 45-56 (analyzing fuel variability, ash quality and quantity, carbon intensity, cooling water demands, and flue gas scrubbing as cost drivers in coal combustion).

\textsuperscript{258} According to Revesz and Lienke, if not for the vintage-differentiated standards advantaging “existing” coal-fired EGUs in their conventional pollutant emissions, most of the Nation’s existing coal-fired EGUs would probably have been shuttered by 2015 because of those emissions. See REVESZ & LIENKE, supra note 201, at 152-54.

\textsuperscript{259} See Final EGU NSPS, 80 Fed. Reg. at 64,524-25 (noting falling but stable natural gas prices and underlying technology, market distortions by policy interventions, growing supply of renewables, and continuing fall in demand relative to population growth).

only after first movers have shown the way. So EPA compared the projected costs of carbon capture plus state-of-the-art heat-rate efficiencies to the capital costs imposed by past NSPSs and concluded that the expected costs of partial carbon capture were “reasonable.” What constitutes “reasonableness” under this sector’s circumstances, though? According to a “broad consensus,” the sector is undergoing profound shifts along with the technologies of energy production and consumption. EPA’s investigations confirmed that firms in the wholesale electricity business could and likely will shift off of coal inputs, even for so-called base load demands, notwithstanding coal’s long predominance. It found that the

261. Technology-based performance standard setting utilizing a “model plant” operating in a commercial context—assuming some ‘hard luck’ is included in the assumptions—neutralizes arguments that ‘it cannot be done.’ But whether it can be done commercially under varied circumstances is the issue under both CAA and CWA practice. See supra notes 95-99, 122 and accompanying text. EPA met the ‘hard luck’ objections to its EGU NSPS’s carbon capture demonstration establishment at length in its rulemaking. See Final EGU NSPS, 80 Fed. Reg. at 64,556-73.

262. EPA’s model plant running a carbon capture system commercially was a retrofit of an existing coal-fired EGU. See Final EGU NSPS, 80 Fed. Reg. at 64,549.

263. See Achievability TSD, supra note 260, at 5; cf. Final EGU NSPS, 80 Fed. Reg. at 64,575 (“Much like carbon capture scrubbers today, the technology to capture and remove SO₂ from power plant flue gases was new to the industry and was not yet widely deployed at large coal-burning plants when the EPA first promulgated the 1971 [NSPS].”); id. at 64541 (citing Sierra Club v. Costle, 657 F.2d 298, 343 (D.C. Cir. 1981)). Given one of the model plant’s recorded start-up difficulties, EPA reduced the carbon intensity performance rate to reflect “partial” carbon capture averaged over a 12-month period. See id. at 64,549-50; 64,574.


265. See Thomas Covert et al., Will We Ever Stop Using Fossil Fuels?, 30 J. Econ. Persp. 117, 126-34 (2016).

266. See Final EGU NSPS, 80 Fed. Reg. at 64,515.

267. Base load is that quantity of supply constantly flowing, regardless of peaking demands. Until important problems with storage are solved, LCOE estimates for wind and solar will remain higher than those for natural gas, nuclear fission, and even some existing coal. See RIA For EGU NSPS, supra note 253, at 2-1—2-43; Covert, supra note 265, at 127-31. The increasing adaptability of natural gas combined cycle (NGCC) generation and that fuel’s superior GHG-to-megawatt ratio, however, is undermining coal’s position regardless of storage’s technological frontier.

268. See Final Rule—Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,796 (2015) [hereinafter CPP Final Rule] (noting a continual trend since 2000 of fossil fuel generation shifting from coal and oil to NGCC units). It is entirely consistent with the CAA as amended that coal-fired electricity generation could eventually end. Cf. REVESZ & LIENKE, supra note 201, at 88-111 (noting the progression of restrictions on coal that have followed from CAA implementation); Craig N. Oren, Struggling for Context: An Appraisal of “Struggling for Air”, 46 Env’t L. Rep. 10838, 10838 (2016) (“Concern about the effects of coal-fired power plants and efforts to control those effects go back at least 25 years, rather than being a ‘War on Coal’ launched by the Barack Obama Administration.”).
strongest firms in that market are those selecting the most advantageous generating, transmission, and distribution factors over the medium- to long-term. 269 Profits turned on their doing so. 270 If the advantages of the technology-based approach are to be pressed fully, “reasonableness” in this context should turn on the precision of the signals being sent throughout a sector as EPA finds it: every firm will be under competitive pressures of one sort or another, every firm will be engaged in at least some (incompletely) pragmatic problem-solving. 271

The instructive contrast is the water intakes rules. When EPA investigated the sectors utilizing cooling water withdrawn from surface waters of the United States, it found cost-available engineering solutions only for reducing impingement mortalities, i.e., at the intake, and used those to set an inclusive performance standard there. 272 But among the 1,000+ facilities covered by its standard, the costs and challenges of retrofitting to reuse water and/or switching to waterless factors (limiting so-called “entrainment” mortalities) varied considerably in both magnitude and technical scope. 273 Parts of the thermoelectric sector were particularly dependent on high-volume withdrawals, 274 i.e., those segments of it not yet converted to natural gas combined cycle (NGCC) generation. 275 The segments of the industry not switching to NGCC clearly had powerful motives given all of the pushes in that direction. Any reason to ignore those frictions, i.e., impose a dry cooling standard for the whole category, would have had to outweigh or

269. See RIA for EGU NSPS, supra note 253, at 2.2.1—2.3.2.
270. As EPA acknowledged in its CPP cost analysis, firms’ switching to NGCC or zero-emission renewables face important contractual and other indivisibilities at specified facilities and/or turnover rates. See CPP Final Rule, 80 Fed. Reg. at 64,795-802. This was a “transition cost” that benefit-cost analysts would have otherwise ignored. See Ferris & McGartland, supra note 37, at 176-77. CAA § 111(b)’s concern for cost availability kept the matter important. See CPP Final Rule, 80 Fed. Reg. at 64,721-36.
272. See Revised Final Intakes Rule, 79 Fed. Reg. at 48,340-41 (finding that modified traveling screens are the “best technology available” for reducing impingement mortality at existing units).
274. See id. at 48,356 (noting highly variable costs for retrofitting). “An entity that owns multiple facilities could be adversely affected because of the cumulative burden of [multiple costly retrofits].” Id. at 48,399.
to exclude them as a consideration. Section B shows how that tight a focus is the signature strength of technology-based standard setting.

**B. Pushing a Technological Frontier: Energy Services in Transition**

Costs and cost avoidance are hard to predict at a sectoral scale. The shift to NGCC, wind, and solar factors currently in progress in wholesale electricity markets might address GHG and water problems simultaneously. Indeed, a dry cooling standard in the intakes rules might have eased much of the thermoelectric sector’s vulnerabilities to drought—which have been a growing problem in several regions. But where the barriers hindering a fuller conversion to NGCC and/or renewables were to be found remained uncertain. In reality, energy services markets are among the most complex and least predictable in the world. The orthodox answer—modeling these uncertainties with various subjective probability parameters in some series of equilibrium algorithms—is a “conceptual, rather than practical” solution. The stock response when the probability estimates prove wrong is that they were provisional. But equilibrium theory’s indifference to hard problems of causation like energy demand elasticities leaves

276. GAO found from its consultation with experts in the thermoelectric sector that retrofitting existing facilities with dry cooling or recirculating cooling towers could be prohibitively expensive for several reasons. See GAO, supra note 275, at 44-45 (citing space availability, pressurized unit incompatibilities and other causes of cost anomalies at certain establishments).

277. The mix of NGCC-to-renewables phasing out coal is one particular endogeneity modelers agree might be considerable. See Gillingham et al., supra note 161, at 2736.

278. See Tidwell et al., supra note 147, at 515; cf. GAO, supra note 275, at 1 (noting water stress and drought as the principal justifications for the water withdrawal technology assessment).

279. See CPP Final Rule, 80 Fed. Reg. at 64,799-802. NGCC capacity’s GHG advantages are in the near- to medium term (phasing out coal), yet wind and solar accounted for roughly 70% of new capacity in 2015. Id.

280. See Steve Sorrell & John Dimitropoulos, The Rebound Effect: Microeconomic Definitions, Limitations and Extensions, 65 ECOLOGICAL ECONS. 636, 636-38 (2007). Many of the notorious feedback (or “rebound”) effects in energy markets where demand rises as technology improves efficiency—whether of the single commodity variety. See J. Daniel Khazzoom, Economic Implications of Mandated Efficiency in Standards for Household Appliances, 1 ENERGY J. 21 (1980), or the multiple commodity variety; Peter H.G. Berkhourt et al., Defining the Rebound Effect, 28 ENERGY POL’Y 425 (2000)—continue to evade rigorous quantification. Sorrell & Dimitropoulos, supra note 280, at 645 (conjecturing that such rebound effects are probably over-estimated).

281. Ferris & McGartland, supra note 37, at 173.

282. See Gilboa et al., supra note 24, at 175-77 (describing a Bayesian approach to probabilities in economic modeling).

its users to ignore the very observed “indivisibilities” and nonlinearities so crucial to finding real cost-avoidance opportunities.\textsuperscript{284} The technology-based approach views these discoveries as the basis of expectations that a standard’s costs can be minimized in actual markets. In the end, the vagueness of the economic concept of cost at least permits aiming for as much.\textsuperscript{285}

Before developing his noted theory of induced innovation,\textsuperscript{286} Sir John Hicks attempted to rehabilitate some nascent work on uncertainty and profit begun by Frank Knight and others.\textsuperscript{287} Hicks argued that profit’s place as a residual somewhere between (or beyond) wages and rents was a profound amendment to equilibrium theory so long as it was attributed not to the act of risk-taking—as Knight and others had argued—but rather to the profit-taker’s success in having navigated the practical exigencies of production in competitive markets.\textsuperscript{288} On this theory, profits are but the mirror image of costs in an economy that is constantly churning.\textsuperscript{289} Equilibrium modeling presupposes that we can track how our actions guide that churn. Yet we cannot—leaving a paradox of equilibrium economics to those cost-

\textsuperscript{284}. This may reflect cost-benefit’s use of “cost” as a proxy for harm. A proxy, no matter how well designed, is always just a proxy. Cf. Adler & Posner, supra note 227, at 160 (acknowledging that certain death is not an infinite utility loss merely because there must be an infinite willingness to pay to avoid it). But escaping the oversimplified theories of induced innovation and observing the disparities among industrial sectors combine to discredit the “notion of a smooth, convex, well-defined [curve] in most microeconomic theorizing in which the structure of relative factor prices yields a determinate solution to the choice of technique problem under all circumstances,” Rosenberg, supra note 9, at 233, a notion entrenched in cost-benefit orthodoxy.\textsuperscript{R}

\textsuperscript{285}. By definition, the useful life of physical capital eventually comes to an end. Thus, the CPP’s assumption that generation shifts among affected EGUs could eventually result in coal’s elimination—barring the use of GHG capture—need not have entailed shifting costs. Indeed, EPA’s projection of net employment gains from the CPP as monetizable “benefits,” see CPP Final Rule, 80 Fed. Reg. at 64,928-29, at least implied the assumption that averaging utilities was acceptable. See id. at 64,928 (concluding that employment losses in the electricity generating sector would be offset by employment gains elsewhere, especially demand-side energy efficiency).\textsuperscript{R}

\textsuperscript{286}. See supra notes 25-26 and accompanying text.\textsuperscript{R}

\textsuperscript{287}. See John R. Hicks, The Theory of Uncertainty and Profit, 32 Economica 170 (1931).\textsuperscript{R}

\textsuperscript{288}. See Hicks, supra note 287, 173-87. One can plausibly interpret Knight himself as having held a similar view. See Stephen F. LeRoy & Larry D. Singell, Jr., Knight on Risk and Uncertainty, 95 J. Pol. Econ. 394, 397-401, 405 (1987). Indeed, even Marshall—the father of partial equilibrium analyses—allowed that, over a long run control of production could yield unaccounted-for residuals to the most successful competitors. See Blaxx, supra note 12, at 354-55.\textsuperscript{R}

\textsuperscript{289}. Cf. Brooke, supra note 175, at 230 (Knight’s world was static because the sum of all payments to the owners of the factors of production plus entrepreneurial profits was constant whereas Hicks saw profit stemming from a dynamic economy where all of the above is churning); Bane, supra note 173, at 148 (noting that the “public domain” from which positive value commodity attributes may be captured and priced is in constant flux).\textsuperscript{R}
benefit champions who think it should calibrate our environmental standards for us. In reality, technological innovation is both the opportunity to profit and a cost of trying to do so. As Paul Romer put it,

instructions for working with raw materials are inherently different from other economic goods. Once the cost of creating a new set of instructions has been incurred, the instructions can be used over and over again at no additional cost. Developing new and better instructions is equivalent to incurring a fixed cost. This property is taken to be the defining characteristic of technology. 290

Technology in this light is both a fixed cost and a means of cost avoidance. Technological information like this can be costly to produce and/or process, and how costly it is at any given time depends upon the valence of the information and the ability of the agent to evaluate and use it. 291

The aim of prompting innovation as a consequence of cost avoidance points to those agents who are already succeeding somehow. Setting any technology-based standard involves discretionary judgments as to that standard’s (1) applicability, (2) format, and (3) stringency. 292 Most often the standard will traverse, implicitly or explicitly, the sources’ prevailing inputs, 293 processes or work practices, 294 and any physical capital (for either production or emissions control) 295 in each of these three facets. How real firms will adjust to the standard and to each other’s reactions—and thus what market shifts to anticipate—are all uncertain. Ex ante cost estimates are, for this reason and others, subject to severe confidence limits stemming from how quickly (and intentionally) the future can diverge from our projections of it. Experience with technology-based standard setting for new versus existing sources has not yielded much precise quantification of what the advantage (e.g., of grandfathering) is worth, 296 but it has generally confirmed the intuition that market behaviors are often patterned by what those making capital decisions anticipate from an overall regulatory cli-

291. Cohen, supra note 9, at 195.
292. See supra notes 77, 156-92 and accompanying text. This is not to say that technology-based standard setters will have been aware of these three dimensions (or the information needs they entail), see Adler et al., supra note 135, at 164-65, nor of the complementarities among them. See Revesz & Westfahl-Kong, supra note 247, at 1615-18 (finding that the provision of “transition relief” in vintage-differentiated performance standards and the stringency of those standards should be decided simultaneously).
293. See supra note 78 and accompanying text.
294. See supra notes 89 and accompanying text.
295. See supra notes 272-76 and accompanying text.
296. Cf. Stavins, supra note 142, at 49-56 (concluding that precise valuation of “existing source” status not possible from extant data)
mate.\textsuperscript{297} For all its complexity, the Obama Administration’s CPP was grounded in a bottom-up analysis of the costs to incumbent firms and electricity ratepayers of making cost-available adjustments to extant electricity generating portfolios, combined with the tools amenable to state use for lowering the costs of doing so in the aggregate.\textsuperscript{298} It reflected a technology-based approach to inducing and supporting innovation in one of our least predictable markets. The CAA linked the EGU NSPS to the CPP quite tightly: without it, EPA had no authority to call for CPP plans from participating states in the first place.\textsuperscript{299} As the political winds have turned against the CPP, analytical nuts and bolts within the CPP and EGU NSPS have been lost, perhaps for good. But the tactics honed in those rulemakings, like those used in the intakes rules and elsewhere, are not only still serviceable: they may represent our best hope for finding consensus actions against systemic problems like climate change.

\textbf{CONCLUSION}

Formal cost-benefit analysis has attracted a powerful following and a powerful critical literature. Understanding cost as a decision factor aligned against stringency in environmental performance standard setting views cost as a proxy for harm or damage to production. But mainstream economics has moved on from that understanding of this essential yet vague concept, as did the unique approach EPA has fashioned to evaluating the costs of its performance standards in real industrial sectors pursuant to the CAA, CWA, and similar statutes. EPA’s method, perhaps best characterized as induced cost avoidance, skips straight to what firms can be doing now and over the short- to medium-term to minimize all costs of production and consumption, whether priced or not. This uniquely American approach to pollution control holds within it a potential we cannot afford to ignore or consign to the past.

\textsuperscript{297}. See Revesz & Westfahl-Kong, supra note 247, at 1617 (finding that “sequential optimization” in performance standards can distort the relevant comparisons given firms’ own efforts to avoid costs); Gray & Shadbegian, supra note 159, at 254 (finding weak tendencies for existing pulp and paper plants to keep operating where a state’s relative regulatory stringency is low and expected to remain so); Aldy & Pizer, supra note 255, at 85 (finding that annual volatility in manufacturing sectors was likely much more influential than any regulatory costs the firms bore).

\textsuperscript{298}. See CPP Final Rule, 80 Fed. Reg. at 64,663-67. EPA’s “building block” approach to supporting that transition, (1) improving efficiencies at existing coal facilities, facilitating the switch (2) to NGCC units and (3) to zero-emitting renewable capacity, made use of performance standards quantified at the national, regional, and individual state levels. See id. at 64,563-82.

\textsuperscript{299}. See 42 U.S.C. § 7411(d)(1) (authorizing EPA to prescribe regulations for existing sources only if an NSPS would apply “if such existing source were a new source”).
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