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SABIN CENTER FOR CLIMATE CHANGE LAW

# The Supreme Court and the Clean Power Plan

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# Outline

- Clean Air Act, EPA Regulation and SCOTUS Background
- Section 111(b): NSPS for New Power Plants
- Section 111(d): NSPS for Existing Plants
- The Legal Debate about 111(d)

# Clean Air Act: Basic Breakdown

- Regulates by air pollutant type
  - Criteria
  - Hazardous
  - “Other”
- Regulates by source type
  - Mobile
  - Stationary
- Regulates by geography and compliance
  - Attainment areas
  - Nonattainment areas

# CAA shortcomings to control GHGs

- 1970 statute not designed for this problem
  - Designed for local or regional problems, not global problems
  - Numerical thresholds much too low
  - Poor fit with international mechanisms
- Performance and technology standards
  - Inefficient and inflexible
  - No clear carbon price signal
  - Transaction costs and delays
  - Primarily for pollution sources, not alternatives or consumption
- Designed for new sources; limited ability to address existing sources
- Does not cover land use changes
- No funds for adaptation, mitigation, low-income relief

# Clean Air Act Title II – Mobile Sources

- CAA Section 202 – Emission standards for new motor vehicles or new motor vehicle engines
  - (a)(1) – “The Administrator shall by regulation prescribe (and from time to time revise) ... standards applicable to the emission of **any air pollutant** from any class or classes of new motor vehicles ... which in his judgment cause, or **contribute to**, air pollution which may reasonably be anticipated to **endanger** public health or welfare.”

# Clean Air Act Definition

CAA Section 302(g) – “The term ‘air pollutant’ means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive ... substance or matter which is emitted into or otherwise enters the ambient air.”

*Massachusetts v. EPA*  
(2007)

Endangerment finding (2009)

Motor Vehicle  
Rule (2010)

New source performance  
standards

Prevention of Significant  
Deterioration Program (2010)

New fossil fuel plants: Federal  
standards

Anyway sources  
83% of  
emissions

Newly regulated sources  
3% of emissions

Existing fossil fuel plants:  
State plans

# *AEP v. Connecticut* (2011)

Question Presented – Whether plaintiff states, City of New York and private land trusts can maintain federal common law public nuisance claims against four power companies and TVA for their CO<sub>2</sub> emissions' contribution to climate change?

Relief sought – Injunction directing specific reductions of CO<sub>2</sub> emissions from these companies.

Holding – The CAA and EPA regulation it authorizes displace federal common law cause of action for public nuisance.



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	<b>New Source Performance Standards (NSPS)</b>	<b>New Source Review (NSR)</b>	<b>Prevention of Significant Deterioration (PSD)</b>
<b>Applicable standards</b>	Best system of emissions reduction adequately demonstrated (BSER)	Lowest achievable emissions rate (LAER)	Best available control technology (BACT)
<b>Applicability</b>	Everywhere	Nonattainment areas	Attainment areas
<b>Scope</b>	Nationwide	Facility-specific	Facility-specific
<b>Trigger</b>	New, reconstructed, modified facilities	New facilities or major modifications	New facilities or major modifications
<b>Standard set by</b>	U.S. EPA	States (usually)	States (usually)

# CAA Sections 160-169 -- Prevention of Significant Deterioration (PSD) of Air Quality

- 40 C.F.R. Sec. 52.21(b)(50) -- Applies to “regulated NSR pollutants”
  - “(i) Any pollutant for which a national ambient air quality standard has been promulgated...
  - (ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act..
  - (iv) Any pollutant that otherwise is subject to regulation under the Act...”

# CAA Sections 160-169 -- Prevention of Significant Deterioration (PSD) of Air Quality

- For attainment areas
  - CAA Sec. 169(1) -- “The term ‘major emitting facility’ means any of the following stationary sources of air pollutant which emit, or have the potential to emit, **one hundred tons per year** or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred fifty million British thermal units per hour heat input, ... Portland Cement plants, .... Such term also includes any other source with the potential to emit **two hundred and fifty tons per year** or more of any air pollutant.”

# Prevention of Significant Deterioration (PSD): Permitting Steps under the Tailoring Rule

EPA's 2010 "Tailoring Rule" phases in CAA permitting requirements for stationary sources of GHGs:

## **Step 1 - January 2, 2011 to June 30, 2011:**

Only sources already subject to PSD "anyway"

*New sources: 75,000 tons per year (tpy) of carbon dioxide equivalent (CO<sub>2</sub>e)*

*Modifications: 75,000 tpy CO<sub>2</sub>e*

## **Step 2 - July 1, 2011 to June 30, 2013:**

*Continue Step 1 sources plus other large GHG emission sources*

*New sources: 100,000 tpy CO<sub>2</sub>e*

*Modifications: 75,000 tpy CO<sub>2</sub>e*

## **Step 3 – Future Rulemaking:**

Evaluate whether additional sources of GHG emissions should also be subject to permitting req'mts., but the permitting threshold would be no lower than 50,000 tpy.

# Key Litigation Challenging EPA Regulation of Greenhouse Gases from Stationary sources

- *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012)
  - Upheld Tailpipe and Timing rules
  - Found CAA compels EPA interpretation
  - Denied standing to challenge Tailoring and Triggering rules
- Aff'd in part, rev'd in part in *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427 (2014)

# *UARG v. EPA* (2014)

## Question Presented

“Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.”

# *UARG v. EPA* (2014)

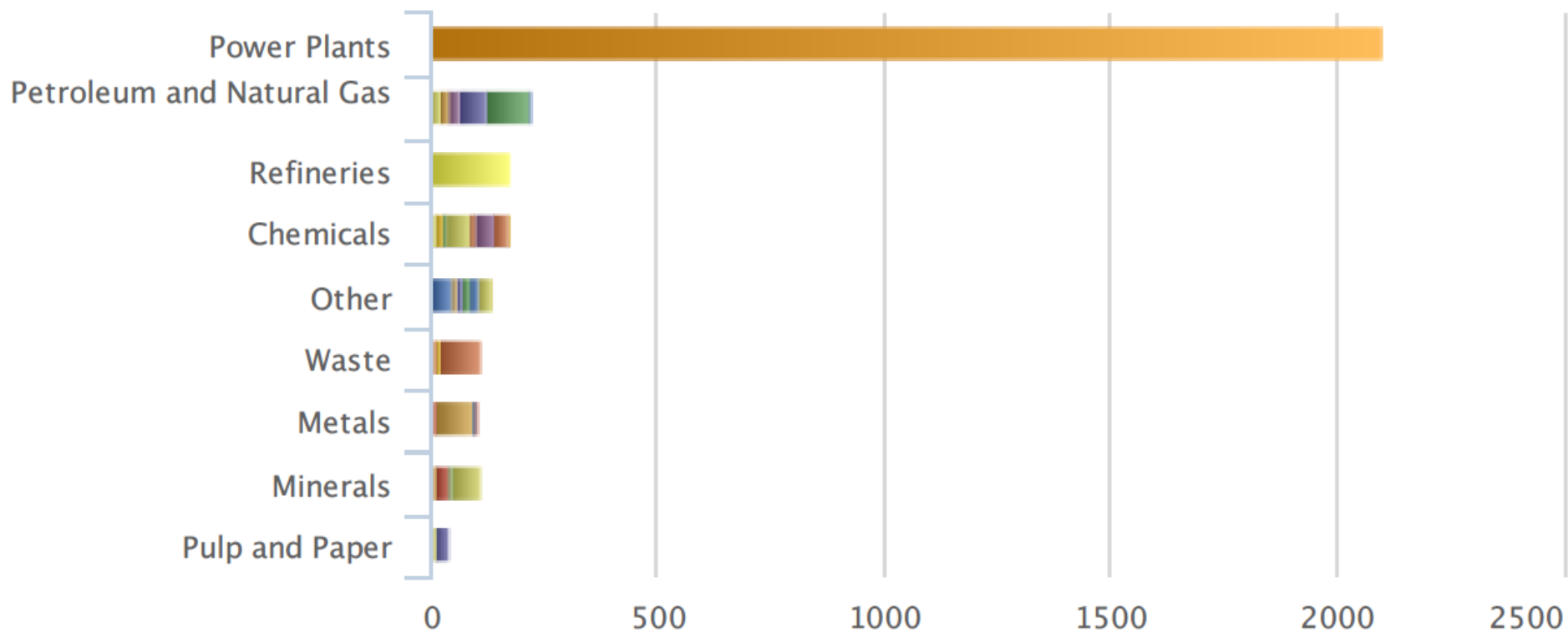
## Holding

Upholds EPA's interpretation that it has authority to regulate GHGs from "anyway" sources as reasonable

Rejects EPA's interpretation that it has authority to regulate GHGs from other large stationary sources not already covered under PSD or Title V programs



U.S. – Direct GHG Emissions of Selected Gases Reported by Sector/Subsector in Million Metric Tons of CO<sub>2</sub>e



Data reported to EPA as of 08/18/2014

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# CAA Section 111(b) -- Standards of performance for new stationary sources

- Sec. 111(b)(1)(A) -- “The Administrator shall ... publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.”
- Sec. 111(b)(1)(B) -- “[T]he Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within each category.”

# NSPS for New Power Plants

## CAA 111(b)

- April 13, 2012 – Initial EPA proposal
- September 20, 2013 – Revised EPA proposal
- Separate standards for natural gas and coal plants
- Coal plants would require carbon capture and sequestration
- Final rule expected Summer 2015
- Is anyone building new coal plants?

# Principal Legal Arguments Challenging Proposed 111(b) Rule

- *Las Brisas Energy Center LLC v. EPA*, D.C. Cir., No. 12-1248
  - Case dismissed (Dec. 2012) – EPA rule not final:
- *Nebraska v. EPA* (Dist. Of Neb.)
  - 2005 Energy Policy Act forbids pegging NSPS to CCS technology developed with federal assistance
  - CCS not adequately demonstrated
  - Case dismissed (Oct. 2014) – EPA rule not final

# Clean Air Act Section 111(d)

## (d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure **similar to that provided by section 110** of this title under which each State shall submit to the Administrator a plan which

(A) establishes standards of performance for any existing source for any air pollutant

(i) for which air quality criteria have not been issued or which is not included on a list published under section 108 (a) [*Senate version:* or 112(b)] [*House version:* or emitted from a source category which is regulated under section 112] but

(ii) to which a standard of performance under this section would apply if such existing source were a new source, and

(B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

# NSPS for Existing Power Plants

## CAA 111(d)

- EPA must act through states
- Schedule:
  - June 18, 2014 – EPA publishes proposal
  - November 4, 2014 – Supplemental proposal for Indian Country and US territories
  - Summer 2015
    - EPA to publish final guidelines
    - EPA to propose Federal Implementation Plan
  - Summer 2016
    - States submit SIPs
    - EPA imposes FIP
  - Summer 2017/2018: States with extensions due
  - Summer 2020: Compliance Period begins

# Proposed §111(d) Guidelines

- Overall: Reduce CO<sub>2</sub> emissions from affected 30% below 2005 levels
- Each state given an emission performance goal
- Each state must submit plan to meet that goal
- EPA will impose and implement plan if a state refuses to submit or submits inadequate plan



# Proposed Building Blocks for Establishing State Guidelines Based on BSER

- Heat rate improvements at affected EGUs
- Substitute generation from gas-fired EGUs for generation from coal-fired EGUs
- Substitute nuclear or renewable generation for generation from affected EGUs
- Use of demand-side energy efficiency that reduces generation from affected EGUs

# Principal Legal Arguments Challenging Proposed 111(d) Rules

- EPA cannot regulate existing EGUs because they are already regulated under hazardous air pollutant program (Senate v. House 1990 amendments)
- EPA cannot regulate beyond fence line
- EPA BSER determination unreasonable because it looks at beyond the fence line measures
- EPA is not the energy regulator

# Legal Challenges

- *Murray Energy Corp. v. EPA* (DC Cir.)
  - Actions filed in Summer 2014
  - Claims:
    - EPA illegally “initiated” rulemaking because it lacks authority to regulate GHGs under 111(d)
    - EPA regulates plants under Section 112 and so cannot regulate under 111(d) according to House amendment
      - Note: *Michigan v. EPA* (just argued) – challenging Sec. 112 standards
  - Defenses
    - EPA action not final
    - Senate amendment prohibits EPA from regulating same pollutants under 111(d) and 112, not same facility
  - Fully briefed and awaiting oral argument

# Legal Challenges

- *Murray Energy Corp. v. EPA*: Larry Tribe's Constitutional Arguments for Intervenor Peabody Energy
  - Process of creating and developing state plans and federal plans violates 10<sup>th</sup> Amendment
  - Burdens on coal plants are an unconstitutional taking b/c of “interference with investment-backed expectations”
  - “Singling out” coal plants violates Due Process
  - Interpretation expands EPA authority beyond statutory authorization
  - “Serious constitutional questions” = No *Chevron* deference

# Legal Challenges

- *Murray Energy Corp. v. EPA*: Responses to Prof. Tribe's Arguments
  - No 10<sup>th</sup> Amendment issue b/c Sec 111 plans analogous to Sec 110 SIPs/FIPs
    - CPP does not mandate any specific state action/preserves state flexibility
    - Same approach as taken throughout CAA
  - No taking b/c power plants still have (significant) value
    - Also: businesses not insulated from future regulation by takings clause
    - Also: takings -> compensation, not deregulation
  - No due process violation b/c ample process and plan does not require coal industry go out of business or bear undue costs
  - Interpretation does not expand authority b/c existing power plants already under EPA jurisdiction
  - *Chevron* deference warranted because interpretation is reasonable

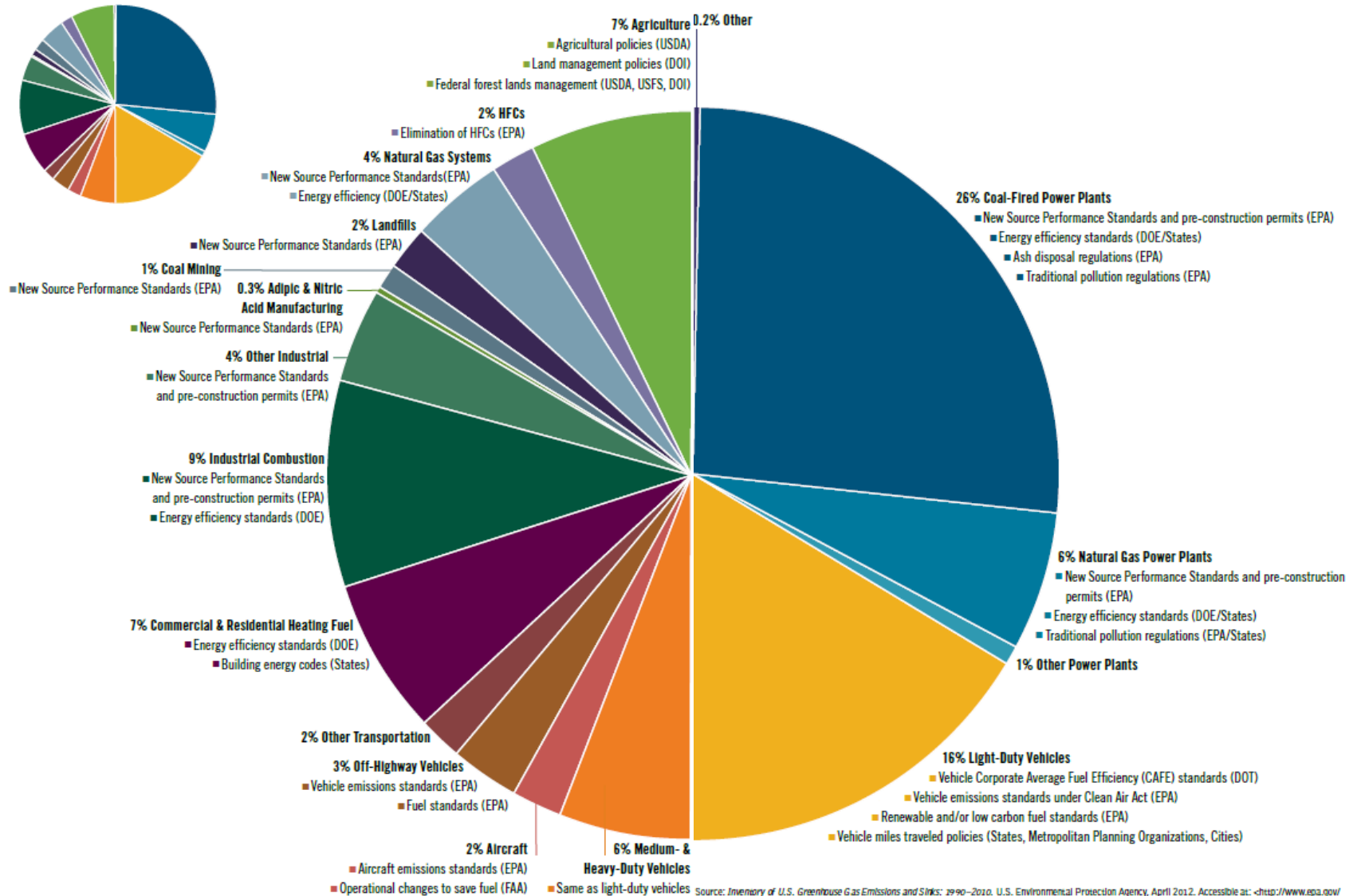
# Just Say No to “Just Say No”

- Sen. McConnell’s March 2015 Letter:
  - Relies on Prof. Tribe’s legal rhetoric
  - EPA “attempting to compel states to do more themselves” than EPA could do on its own
  - *UARG v. EPA* stands for proposition that EPA cannot expand its own authority
  - Impacts on low income families, workers and the coal industry
  - Deadlines imposed to force states to act before litigation resolves
  - Submission of plan tantamount to surrender of control to EPA

# Just Say No to “Just Say No”

- Why States Should Ignore It:
  - Prof. Tribe’s legal rhetoric lacks legal merit
  - Cedes control to federal government, who will directly regulate power plants in state
  - Ratepayers likely fare worse under FIP
  - Refusal now/Compliance later will lead to delays in extracting state from FIP
  - Loss of opportunity for compliance efficiency and informational benefits
  - No political backlash likely from compliance
  - Climate change is not going away – eventually energy system needs to transform

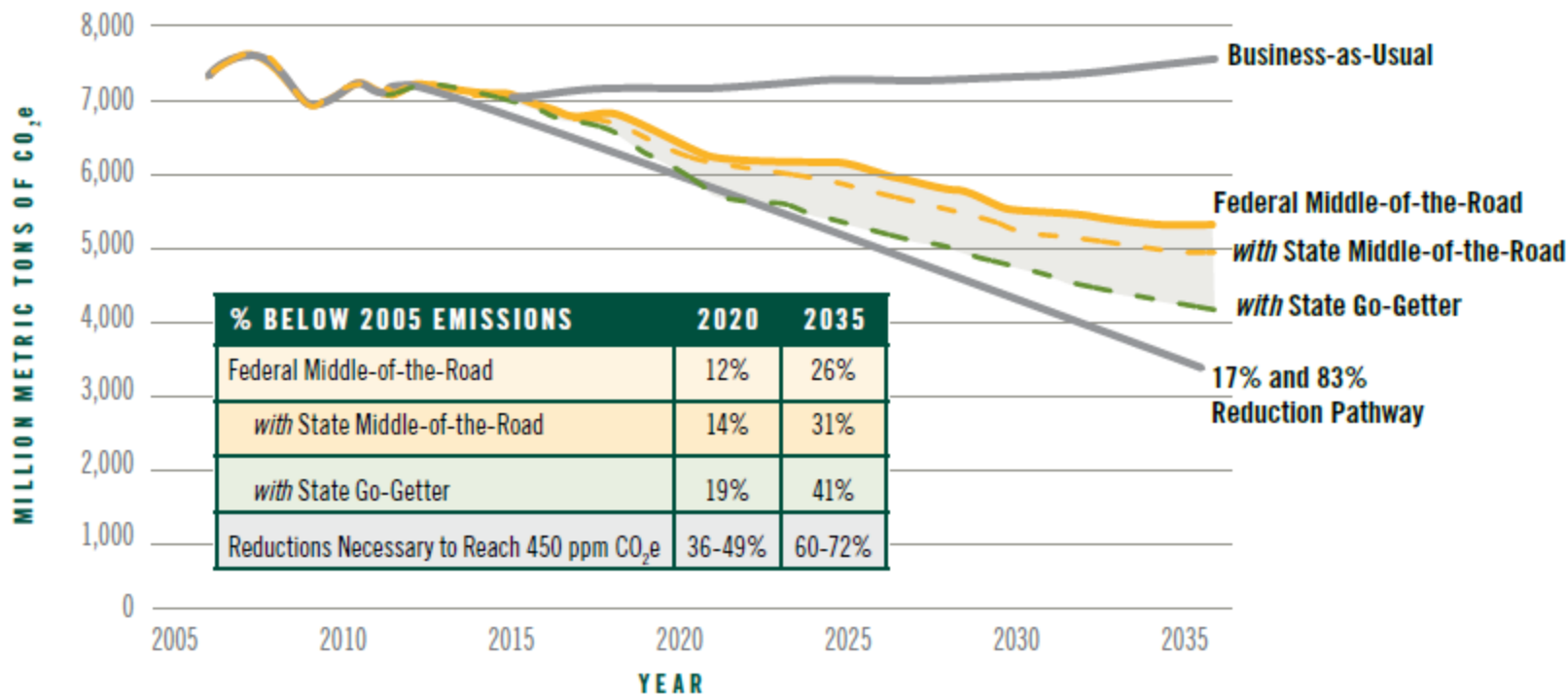
FIGURE 5 U.S. Greenhouse Gas Emissions by Sector and Corresponding Federal Authorities, 2010



Source: Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2010. U.S. Environmental Protection Agency, April 2012. Accessible at: <<http://www.epa.gov/climatechange/emissions/usinventoryreport.html>>; Clearing the Air on Shale Gas Emissions: Assessing and Reducing the Carbon Footprint of Natural Gas. James Bradbury, Michael Oberler, Laura Draucker, Wen Wang, and Amanda Stevens. World Resources Institute, Working Paper, forthcoming.



**FIGURE 2 Projected U.S Emissions with State Action Coupled with Middle-of-the-Road Federal Action**



Note: Due to modeling limitations, this figure depicts HFC consumption, which is generally thought to be equivalent to life-cycle emissions.



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