

NOT YET SCHEDULED FOR ORAL ARGUMENT

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**United States Court of Appeals  
for the District of Columbia Circuit**

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**No. 19-1140**

(Consolidated with 19-1165, 19-1166, 19-1173, 19-1175,  
19-1176, 19-1177, 19-1179, 19-1185, 19-1186, 19-1187, 19-1188)

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AMERICAN LUNG ASSOCIATION, *et al.*,

*Petitioners,*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Respondents.*

*On Petition for Review of Final Agency Action  
of the Environmental Protection Agency*

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**REPLY BRIEF FOR PETITIONER  
BIOGENIC CO2 COALITION**

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DAVID M. WILLIAMSON  
WILLIAMSON LAW + POLICY, PLLC  
1850 M Street NW, Suite 840  
Washington, DC 20036  
Tel.: (202) 256-6155  
Fax: (703) 519-0076  
maxwilliamson@williamsonlawpolicy.com

*Counsel for Petitioner  
Biogenic CO2 Coalition*

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## GLOSSARY

ACE Rule	Affordable Clean Energy Rule
BACT	Best Available Control Technology program
BSER	Best System of Emissions Reduction
CO <sub>2</sub>	Carbon dioxide
EPA	U.S. Environmental Protection Agency
JA	Joint Appendix
NSPS	New Source Performance Standard program

## SUMMARY OF ARGUMENT

1. EPA does not explain why Congress would foreclose consideration of climate science and “atypical” biogenic CO<sub>2</sub> where the use of biofuels results in net reductions of greenhouse gas.
2. No statutory text demands that all aspects of compliance measures such as biomass co-firing physically occur on-site.
3. No text forecloses accounting for off-site carbon capture net benefits that reduce on-site emissions.

## ARGUMENT

This case boils down to whether Congress prohibited the use of low-carbon biofuels as a compliance measure to meet greenhouse gas (carbon dioxide) limits under the Clean Air Act. EPA says yes because the term “application” in 42 U.S.C. §7411 means that emissions limits must be based on technology applied “to and at” a facility and therefore compliance measures are similarly constrained. EPA says its hands are tied, but these constraints are not evident in the statutory text. *Sierra Club v. Costle*, 657 F.2d 298, 319 (D.C. Cir. 1981) (finding no limit on EPA discretion under §7411 where “the text of the statute nowhere forbids a distinction”).

EPA never explains why Congress would have intended this outcome: Why would Congress foreclose the use of clean biofuels to reduce greenhouse gas

emissions? Why is EPA's selection of "best system" relevant to what compliance measures are used to meet emissions limits once they are set. Why is biomass co-firing used at a power plant not "application of a system" or "applied at and to" the facility? Adding to these unanswered questions, EPA's interpretation leads to the odd result that if the biofuel crops were grown at the power plant itself, presumably biomass co-firing would qualify as "applied at" the facility. EPA's interpretation is not plausible and cannot be correct where it leaves so many questions without satisfactory answers.

**I. EPA'S INTERPRETATION OF SECTION 111 FAILS TO CONSIDER THE UNIQUE NATURE AND SCIENCE OF BIOGENIC EMISSIONS**

EPA does not deny the scientific consensus that low-carbon biofuels reduce greenhouse gas pollution, at least to some extent, notwithstanding that the reductions start on the farm field rather than occurring solely at the power plant when the biofuels are used for energy. EPA Br. 248 (ECF#1847608) ("biomass co-firing has the potential to result in net CO<sub>2</sub> emission reductions").<sup>1</sup> In other contexts, EPA allows consideration of "offsite net carbon sequestration associated

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<sup>1</sup> EPA asserts that the benefits of using biofuels must be quantified through a "full lifecycle assessment." EPA Br. 249 n.67. How to quantify the benefits is not before the Court because it is not addressed in the ACE Rule and would properly be addressed in facility permitting or by a separate rulemaking.

with growth of the biomass feedstock” based on this same science, for example under the §7475 BACT program. 84 Fed. Reg. at 32,546 n.206 (JA\_\_).<sup>2</sup>

Yet EPA fails to give effect to these scientific principles when interpreting §7411 – in contravention of the Supreme Court’s instruction that carbon dioxide emissions are “atypical” pollutants for which a “context-appropriate” reading of Clean Air Act statutory language is necessary to ensure sensible implementation.

*Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 316, 320 (2014) (“*UARG*”).

Nothing in the ACE Rule or EPA’s brief reconciles its disqualification of biofuels as compliance measures at power plants with the acknowledged science that EPA itself uses to define greenhouse gas pollution as “elevated concentrations of greenhouse gases in the atmosphere.” 74 Fed. Reg. 66,496, 66,516 (Dec. 15, 2009) (JA\_\_).

While acknowledging the “net” benefits of biofuels, EPA Br. 248, EPA suggests that it has made “no final determinations” about the scientific treatment of biofuels and biogenic emissions. EPA Br. 256 n.69. But this statement in a litigation brief is inconsistent with EPA’s official policy which recognizes biofuel benefits in the BACT program, as well as Congress’ approach to rewarding the low-carbon nature of biofuels in the Renewable Fuel Standard under §7545(o) and Congress’ more recent directive to recognize the “carbon-neutrality” of biofuels.

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<sup>2</sup> EPA itself argues in the ACE Rule that the §7475 BACT program and §7411 NSPS program use the same “set of tools.” 84 Fed. Reg. at 32,525.



83 Fed. Reg. at 44,766 n.35 (JA\_\_). Regardless, in this case, EPA has justified its disqualification of biofuels not on the science, but on its statutory interpretation that compliance measures under §7411 must be “applied to and at” the regulated facility.

**II. EPA’S THEORY THAT COMPLIANCE MEASURES AND EMISSIONS REDUCTIONS MUST BE LOCATED PHYSICALLY WITHIN THE FENCELINE IS UNMOORED FROM THE STATUTORY LANGUAGE “APPLICATION”**

The problem with the ACE Rule is not just that it fails to consider the environmental benefits of low-carbon fuels, but that EPA incorrectly fancies itself compelled by the statute to disqualify biofuels. *Prill v. NLRB*, 755 F.2d 941, 942, 948 (D.C. Cir. 1985) (EPA must “exercise the full measure of administrative discretion granted to it by Congress” in a manner “free from its erroneous conception of the bounds of the law”). Importantly, the ACE Rule is not a policy choice for which EPA can demand deference; to the contrary, EPA has interpreted the Clean Air Act as compelling its decision by leaving “no interpretive room.” 84 Fed. Reg. at 32,532. Similarly, this is not a debate about how much credit to give to biofuels – the ACE Rule categorically disqualifies biofuels solely on the basis that they are not “applied” at the facility, and gives no consideration to the scientific fact that biofuels reduce pollution on a net basis by absorbing carbon when they are grown. It is enough for 7411(d) that biofuels are physically used “at” the facility or “put into use at the regulated” facility in the common

understanding, 84 Fed. Reg. at 32,523-24, even if grown off-site. At the very least, the statute does not foreclose this perspective.

**A. If EPA’s BSER Interpretation Is Flawed, So Is Its Compliance Measures Interpretation**

Other petitioners have laid bare the flaws in the government’s interpretation of §7411(d) as restricting BSER to technologies that are physically “applied to and at” facilities (*i.e.*, located inside the fenceline of the power plant itself). These briefs convincingly explain that while a standard of performance is established “*for* an existing source,” §7411(a), the agency re-writes the statutory language when asserting that systems must be “put into operation *at*” an existing source. State and Mun. Pet. Br. 46 (ECF#1838735) (citing 84 Fed. Reg. at 32,524); Power Co. Pet. Br. 8 (ECF#1838691). As those petitioners analogize, “a system ‘for’ a hotel to manage reservations can be handled off-site as well as ‘at’ the front desk.” *Id.* 48. If the Court decides that EPA’s BSER interpretation is impermissible, the Court necessarily must rule that the statute does not foreclose biofuels as a compliance measure, as EPA’s position relies on the same interpretative predicate.<sup>3</sup>

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<sup>3</sup> Although the Coalition does not challenge EPA’s decision to not select biomass co-firing as BSER, it never conceded that “the CAA requires the BSER to be applicable at the existing source itself” as EPA incorrectly states. EPA Br. 249.

**B. EPA's Requirement That Compliance Measures Be Physically Located At a Facility Does Not Flow From "Application" of BSER**

EPA admits that "Section 7411 does not require sources to adopt the 'best system'" and even admits that "[i]ndividual sources may apply other measures to meet the standard of performance." EPA Br. 22. Yet EPA implies into the definition of BSER a prohibition on using biomass co-firing as a compliance measure. But nothing in the statutory text speaks to compliance measures at all, much less any restriction on compliance measures.

EPA is correct that any prohibition of compliance measures "must start with the text of Section 7411(d)." EPA Br. 249. As EPA correctly paraphrases the statute, state plans under §7411(d) "establish[] a standard for emissions . . . for any . . . facility." EPA Br. 20. EPA insists that the "plain meaning" of the term application in the definition of "standard for emissions" (as paraphrased above) requires the BSER to occur entirely "at" a facility, EPA Br. 128, but the word "at" doesn't appear anywhere. EPA then says "at" necessarily "limits the BSER to those systems that can be put into operation *at*" a facility. 84 Fed. Reg. at 32,524. Then, as applied to compliance measures, EPA takes another leap and asserts that "at" actually means every aspect of a compliance measure must physically occur and be measurable solely within the facility fenceline. 84 Fed. Reg. at 32,558/1. This chain of inferences is fatally unmoored from the text.

*First*, the section of the statute from which EPA derives this interpretation addresses EPA's selection of BSER, not compliance measures. The only textual function of "application" is to define to the quantum of emissions reductions that results from "the application of" an adequately demonstrated emissions reduction system (*i.e.*, BSER). That quantum then becomes the floor for emissions standards in state implementation plans, but the text says nothing about compliance measures.

*Second*, the text says nothing about where a "best system" or compliance measures must be physically located, nor where emissions reductions occur (*see* Part II.C, *infra*); nor does the text say anything – one way or the other – about biomass, biogenic CO<sub>2</sub>, or lifecycle benefits. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020) (statutory meaning is derived from "words on the page"). The problem with EPA's interpretation is evident in its merits brief, where EPA argues that "BSER must be applicable to the existing source itself" and in the next paragraph leaps to the conclusion that "Section 7411(d) precludes EPA from adopting generation shifting" – a measure which EPA puts in the same category as biomass co-firing – "because it cannot be applied to an individual 'building, structure, facility, or installation.'" EPA Br. 237. EPA cites no statutory provision to support this logical leap other than the definition of "stationary source" in

§7411(a)(3), which (unremarkably) refers to “any building, structure, facility, or installation which emits or may emit any air pollutant.”

*Third*, EPA fails to identify any textual prohibition that forecloses use of biofuels (*i.e.*, biomass co-firing) as a compliance measure to meet emissions limits set by states based on BSER selected by EPA. Even if “through the application of” in §7411(a) could be transcribed as “capable of being applied to and at the source” as EPA contends, 84 Fed. Reg. at 32,555, a directive to set emissions limits achievable by on-site technologies is fundamentally different than Congress prohibiting regulated facilities from using biofuels to meet those numerical emissions limits once they are set. In short, setting BSER is not the same as barring compliance measures, even if the emissions reductions start off-site. EPA argues that “implementation and enforcement . . . should correspond with the approach used to set the standard in the first place,” EPA Br. 238, but again this supposed maxim is not supported by any citation to text, precedent or authority. *Contra Sierra Club*, 657 F.2d at 316-17 n.38 (under §7411, EPA must “allow sources of pollution to choose the control technology they will employ to meet emission standards”). To the contrary, even States need not adopt EPA’s selection of BSER as long as their performance standards “reflect[] the degree of emission limitation achievable through application of” BSER. §7411(a), (d). The only statutory requirement is that the facility “operate such source in violation of any

standard of performance.” §7411(e) (prohibited acts). For example, where emissions limits for a facility are based on BSER such as changing the blade path or upgrading an economizer (technologies identified in the ACE Rule), 84 Fed. Reg. at 32,537, the facility normally could chose to apply any compliance measure to achieve the same emissions reductions, EPA Br. 22, but EPA infers that §7411’s use of “application” forecloses biomass co-firing because it is not “applied to and at” the facility in every aspect. EPA Br. 248 (Congress “barred” EPA from recognizing low-carbon fuels). But biofuels are physically used on-site and therefore not the “measures *wholly* outside a particular source” to which EPA objects. EPA Br. 61 (emphasis added). In short, EPA’s discovery of all these supposed restrictions on compliance measures inside the textual phrase “through the application” is not grammatical analysis, but grammatical invention.

*Fourth*, even if EPA’s interpretation is correct, the use of biofuels is certainly a system used “at” a facility that has “source-specific characteristics” as EPA requires. EPA Br. 147. Biofuels are also a system that can be applied “at” a facility and applied “to” the problem of reducing pollution. EPA Br. 116 (“problem” can be the needed indirect object of “application”). Use of biofuels also meets any dictionary definition of “application.” EPA Br. 67.

*Fifth*, the agency failed to consider the contextual inconsistencies in its interpretation under basic statutory construction principles, *UARG*, 573 U.S. at

320. EPA did not reconcile §7411(b)(5)'s prohibition of requiring "any particular" compliance measure and §7411(a)(7)'s reference to pre-combustion fuel cleaning, both of which apply to new sources but are linked to existing sources through §7411(d)(1)'s "if such existing source were a new source." EPA also shrugs off the statutory text "best technological system" in these provisions as a "relic," EPA Br. 252, but §7411(g)(4)'s directive to update any performance standard that "no longer reflects the greatest degree of emission limitation achievable through application of the best technological system" implies that the term refers to BSER (which applies to both new and existing sources), as the wording is not used elsewhere in the statute in any meaningful way.

EPA's discussion of BACT and BSER is also fundamentally irreconcilable. EPA acknowledges that biofuels qualify as BACT under §7475, 84 Fed. Reg. at 32,546 n.206, and that BACT reflects emissions reductions "through application of . . . systems . . . including . . . clean fuels," EPA Br. 84, yet argues that §7411's nearly identical language compels a different result. Adding to the confusion, EPA's proposal expressed the criteria for compliance measures as "*implemented at the source*" rather than "applied to the source," *compare* 83 Fed. Reg. at 44,765/2 *with* 84 Fed. Reg. at 32,558/1, implying that EPA was giving compliance measures a broader reading than BSER. *Cf.* EPA Br. 73 n.21; *id.* at 115 (reading the term

“application” as “implementation” is “textual alchemy”); 84 Fed. Reg. at 32,526/3 (EPA rejection of reading “application” as if it instead read “implementation”).

**C. The Government’s Argument That Emissions Reductions Occur “At the Stack” Is Not In The Rule Nor Compelled By Its “Applied To” Theory**

Faced with the reality that biofuels are physically used “at” a source, the ACE Rule contends that that *emissions reductions* must also physically occur inside the fenceline – but in doing so EPA strays even further afield from its interpretive starting point: the word “application.” EPA asserts that §7411 requires that a power plant “actually reduce its emission rate” and identifies two criteria that compliance measures must meet: (1) that the measures “be applied to the source itself” and (2) that the measures be “measurable at the source.” 84 Fed. Reg. at 32,558/1. But these criteria appear nowhere in the text and are not compelled because “application of a system” in § 7411(a) does not necessarily apply to compliance measures and certainly does not necessitate that every aspect of a control measure be “applied to and at” a facility. EPA contends that “firing of biomass feedstock” is the “only [] action that EPA may review when determining whether the co-firing of biomass at a fossil-fuel source results in an emissions reduction.” EPA Br. 256. But nothing in the statute forecloses a more sensible interpretation that biomass firing be applied *at* the source (which it is) yet allowing



flexibility for EPA to consider how unique greenhouse gas emissions are viewed scientifically.

Even assuming the criteria in the Rule were valid, the government's brief now attempts to re-phrase the question as whether the "emissions reductions . . . were *realized at the stack*", EPA Br. 254 (emphasis in original) – notwithstanding EPA's long-standing recognition that scientifically "the specific location of emission reductions [is] unimportant." 80 Fed. Reg. 64,662, 64,725 (Oct. 23, 2015) (JA \_\_). Contrary to the government's new phrasing, neither the statute nor rule itself uses the wording "at the stack" as a limitation on where a compliance measures must be applied, which is quite different than the language actually used: "reduce its emissions rate" or "applied to the source." The Court should not consider this new rationale. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Moreover, EPA displays no consciousness of its shifting positions, which makes its interpretation capricious as well.

Regardless, biomass co-firing satisfies the criteria based on carbon science. Biofuels are physically "applied to the source itself" by being transported to and used at the power plant. Biofuels do actually reduce the power plant's emissions rate because, scientifically speaking, emissions at the stack are netted out by carbon reduction benefits achieved by growing the biofuels. And the amount of net greenhouse gas reduction is easily measurable at the facility by tracking the

tons of low-carbon biofuels used at the plant, calculating the associated CO<sub>2</sub> emissions, and deducting that amount from total stack emissions. This calculation yields both the net emissions from fossil fuels (*i.e.*, the amount of excess greenhouse gas pollution added to the atmosphere by fossil fuels) and the net pollution savings (*i.e.*, emissions reductions achieved by using biofuels).

Certainly, there is nothing in the text of the statute, or in EPA's criteria as written, that forecloses EPA from considering net off-site carbon reduction benefits. Even if the agency were inclined to ignore science and make a policy decision that off-site emissions reductions cannot be counted, it has not done so in this rule; rather, EPA asserts that its hands are tied by the statute's text. In now focusing on whether "a source avoids release of emissions through its stack," EPA Br. 258, the government's arguments are even further unmoored from the statutory text "application" and inconsistent with EPA's own secondary gloss requiring technology to be "applied at or to" a facility.

EPA adheres to its rigid exclusion of biomass co-firing notwithstanding the flexibility previously given to off-site coal washing under §7411. EPA Br. 257-58. As described in *Sierra Club*, EPA previously determined that coal washing was a system that could be "applied" to power plants to "comply" with a required percentage reduction in sulfur emissions "through the *application* of the best technological system of continuous emission reduction" – almost identical

language to §7411(d) – even though sulfur was washed out of the coal by off-site activities before the fuel was shipped to the plant. *Id.* at 657 F.2d at 357, 360, 368-73 (emphasis added). EPA responds that the emissions reductions “were realized *at the stack*” (again, wording that is not derived from the text) and “is easily distinguished from biomass co-firing.” EPA Br. 254 (emphasis in original). EPA misses the point that the Clean Air Act (at that time) required percentage reductions in sulfur through “application” of technologies, and although coal washing reduced emissions at the stack compared to burning unwashed coal, the technology that removed the sulfur was not itself applied inside the coal plant fence line.<sup>4</sup> Similarly, carbon capture and storage (CCS) moves CO<sub>2</sub> to off-site locations that are not “at” the facility, and the boiler’s emissions rate is not reduced unless these off-site reductions are counted on a net basis. EPA argues that the text “dictates” these disparate outcomes, EPA Br. 247, but the statute never ‘says’ the words “at and to”; never says the words “on site”; and never says net emissions can only be counted at the stack. Some flexibility is inherent in “application” as used in §7411, flexibility is particularly appropriate when considering atypical and

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<sup>4</sup> The example of coal washing also belies EPA’s concern about accounting for off-site carbon reductions. As described by Judge Wald, low-sulfur fuel suppliers provided certificates reporting data on “the quantity delivered . . . the heat content, and . . . the calculation of pretreatment credit.” *Sierra Club*, 657 F.2d at 372; see also EPA Br. 226 (carbon content of fuels can be measured at facility).

unique CO<sub>2</sub> emissions. Quite simply, there is no other pollutant scientifically like biogenic CO<sub>2</sub> which cycles through agricultural crops, lowers greenhouse gases when it is stored in crops, and then flows back to the atmosphere when it is subsequently used at a power plant.

### **III. EPA HAS NEVER PROPERLY REGULATED BIOGENIC EMISSIONS AND SHOULD NOT START IN THE ACE RULE**

The Coalition is not challenging EPA's 2009 or 2015 endangerment finding in this action. However, EPA describes the ACE Rule as "promulgated against the backdrop of EPA's 2015 endangerment finding," EPA Br. 217-18, yet omits to mention that the 2015 New Source Rule is being reviewed with respect to its treatment of biogenic emissions in No. 15-1480 pending before this Court. EPA Br. 168, 263.

Also concerning is the government's description of EPA's finding of elevated greenhouse gas levels as "a result of historical biogenic" emissions, EPA Br. 264 n.73 – tellingly, EPA cites nothing in the record to support this statement. In fact, no EPA endangerment finding has ever appropriately considered the difference between fossil fuel emissions and biogenic emissions, nor has EPA ever connected biogenic emissions from agricultural biofuels with harmful pollution which EPA defines as "elevated" levels of greenhouse gas above the natural pre-industrial baseline.

EPA is also incorrect that biogenic CO<sub>2</sub> emissions have been previously subject to “actual control” under its vehicle emissions rule (*i.e.*, “Tailpipe Rule”) or elsewhere. To the contrary, although EPA has often asserted that the Tailpipe Rule regulates biogenic emissions, the rule actually credited biofuel CO<sub>2</sub> emissions as carbon neutral for early vehicle model years. 75 Fed. Reg. 25,324, 25,432 (May 7, 2010) (“0.15 volumetric conversion factor . . . represents a ‘credit’ being provided” for biofuels). For later model years, the rule counted biogenic emissions but only because the benefits of biogenic emissions were “already” credited in the Renewable Fuel Program. 75 Fed. Reg. at 25,434 (“RFS2 rulemaking . . . addresses lifecycle emissions from ethanol and the upstream GHG benefits of E85 use are already captured by this program.”). Although EPA’s logic is unusual, the lack of actual control of biogenic emissions in the Tailpipe Rule means that biogenic emissions were never a “pollutant subject to regulation” and the ACE Rule is the first time that EPA has attempted to directly regulate biogenic emissions. *Cf.* 75 Fed. Reg. 31,514, 31,521 (June 3, 2010) (“a pollutant, such as a GHG, is ‘subject to regulation’ when it is subject to a [Clean Air Act] requirement establishing actual control of emissions”).

### CONCLUSION

The Court should grant the petition and remand for further proceedings consistent with the arguments above.

Respectfully submitted,

/s/ David M. Williamson

David M. Williamson

WILLIAMSON LAW + POLICY, PLLC

1850 M Street NW, Suite 840

Washington, DC 20036

(202) 256-6155

maxwilliamson@williamsonlawpolicy.com

*Counsel for Biogenic CO2 Coalition*

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**CERTIFICATE OF COMPLIANCE**

This response complies with the type-volume limit of this Court's order of January 31, 2020 (ECF#1826621) and revised scheduling order of March 23, 2020 (ECF#1834847) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this response contains 3,763 words.

This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this response has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

/s/ David M. Williamson  
David M. Williamson

July 30, 2020

**CERTIFICATE OF SERVICE**

I certify that on July 30, 2020, I caused to be filed a copy of this brief using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

/s/ David M. Williamson

David M. Williamson

July 30, 2020