

**ORAL ARGUMENT NOT YET SCHEDULED**

No. 19-1140 and consolidated cases

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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AMERICAN LUNG ASSOCIATION, *et al.*,

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Respondents.*

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On Petition for Review of Final Action by the  
United States Environmental Protection Agency

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**INITIAL REPLY BRIEF OF  
PUBLIC HEALTH AND ENVIRONMENTAL PETITIONERS**

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## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
GLOSSARY OF ABBREVIATIONS.....	vii
INTRODUCTION AND SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	3
I.    EPA’S RULE ARBITRARILY IGNORES SEVERE DANGERS TO PUBLIC HEALTH AND WELFARE.....	3
II.   EPA’S INTERPRETATION OF SECTION 111 IS NOT REASONABLE, LET ALONE MANDATORY.....	6
A.   EPA’s “Plain Language” Arguments Do Not Withstand Scrutiny.....	7
B.   Congress Was Not Required to Provide More Specific Legislative Authorization than Is Provided in Section 111. ....	11
III.  ACE CONTRAVENES THE STATUTE IN MULTIPLE ADDITIONAL WAYS.....	12
A.   Advisory Ranges of Heat-Rate Improvement Do Not Substitute for a Mandatory, Numerical Emission Limit. ....	13
B.   ACE Fails to Enforce the Statutory and Regulatory Limits on Variances.....	15
C.   Petitioners Have Preserved Their Challenges to EPA’s Failure to Set Binding Emissions Limits.....	17
IV.  EPA’S “BEST SYSTEM” DETERMINATION IS UNLAWFUL AND ARBITRARY.....	18
A.   EPA’s “Best System” Achieves Minimal Emission Reduction and Could Increase Harmful Pollution.....	18
B.   EPA Arbitrarily Rejected Systems That Would Achieve Greater Emission Reductions than Heat-Rate Improvements.....	20

1.	EPA Arbitrarily Rejected Co-Firing and Carbon Capture. ....	20
2.	EPA Arbitrarily Rejected Reduced Utilization. ....	23
V.	EPA’S DECISION TO DEREGULATE EXISTING GAS- AND OIL-FIRED PLANTS IS ARBITRARY, CAPRICIOUS, AND UNLAWFUL.....	24
VI.	EPA’S AMENDMENTS TO THE IMPLEMENTING REGULATIONS ARE ARBITRARY AND CAPRICIOUS .....	26
	CONCLUSION .....	27
	ADDENDUM A .....	30
	CERTIFICATE OF COMPLIANCE.....	31
	CERTIFICATE OF SERVICE.....	32

## TABLE OF AUTHORITIES

### Cases

<i>Am. Elec. Power Co. v. Connecticut</i> , 564 U.S. 410 (2011) .....	11
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997) .....	25
<i>California v. Bernhardt</i> , No. 4:18-cv-05712-YGR, 2020 WL 4001480 (N.D. Cal. July 15, 2020).....	5
<i>Clean Air Council v. Pruitt</i> , 862 F.3d 1 (D.C. Cir. 2017) .....	25
<i>County of Maui, Hawaii v. Hawaii Wildlife Fund</i> , 140 S. Ct. 1462 (2020) .....	9
<i>Encino Motorcars v. Navarro</i> , 136 S. Ct. 2117 (2016) .....	24
<i>EPA v. EME Homer City Generation, L.P.</i> , 572 U.S. 489 (2014) .....	4
<i>Essex Chemical Corp. v. Ruckelshaus</i> , 486 F.2d 427 (D.C. Cir. 1973) .....	3
<i>King v. Burwell</i> , 135 S. Ct. 2480 (2015) .....	4
<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007) .....	4, 12
<i>Michigan v. EPA</i> , 135 S. Ct. 2699 (2015) .....	4
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983) .....	22

<i>Natural Res. Def. Council v. Wheeler</i> , 955 F.3d 68 (D.C. Cir. 2020).....	25
<i>Philko Aviation, Inc. v. Shacket</i> , 462 U.S. 406 (1983) .....	8
<i>Portland Cement Ass’n v. Ruckelshaus</i> , 486 F.2d 375 (D.C. Cir. 1973) .....	20
<i>Portland Cement Ass’n v. EPA</i> , 665 F. 3d 177 (D.C. Cir. 2011) .....	25, 26
<i>Prill v. NLRB</i> , 755 F.2d 941 (D.C. Cir. 1985) .....	6
<i>Sierra Club v. Costle</i> , 657 F.2d 298 (D.C. Cir. 1981) .....	4, 11, 15
<i>United States v. Ross</i> , 848 F.3d 1129 (D.C. Cir. 2017) .....	6

### Statutes

33 U.S.C. §1316(a)(1) .....	9
42 U.S.C. §7411(a)(1) .....	12, 19
42 U.S.C. §7411(a)(3) .....	10
42 U.S.C. §7411(a)(5) .....	10
42 U.S.C. §7411(b)(1)(B) .....	15
42 U.S.C. §7411(b)(2).....	22
42 U.S.C. §7411(d)(1).....	7, 12, 13
42 U.S.C. §7411(d)(1)(A).....	16
42 U.S.C. §7411(d)(1)(B) .....	16

42 U.S.C. §7411(d)(2)(A) .....	13
42 U.S.C. §7413(a)(3) .....	10
42 U.S.C. §7475(a) .....	8
42 U.S.C. §7479(2)(A) .....	8
42 U.S.C. §7479(3) .....	9
42 U.S.C. §7602(k) .....	15, 18
42 U.S.C. §7602(l) .....	23

### **Code of Federal Regulations**

40 C.F.R. §60.21a(e) .....	10
40 C.F.R. §60.22a(b)(3) .....	15
40 C.F.R. §60.22a(b)(5) .....	12, 15, 22
40 C.F.R. §60.24a(c) .....	13, 16
40 C.F.R. §60.24a(e) .....	13, 16
40 C.F.R. §60.27a .....	13
40 C.F.R. §60.5740a(a)(1) .....	14
40 C.F.R. §60.5740a(a)(2)(i) .....	13, 14
40 C.F.R. §60.5740a(a)(2)(ii) .....	16
40 C.F.R. §60.5780a(a)(2) .....	23

### **Federal Register Notices**

40 Fed. Reg. 53,223 (Nov. 17, 1975) .....	12, 14
73 Fed. Reg. 34,072 (June 16, 2008) .....	25

83 Fed. Reg. 44,746 (Aug. 31, 2018).....26  
80 Fed. Reg. 64,662 (Oct. 23, 2015) .....2, 4, 10, 23  
84 Fed. Reg. 32,520 (July 8, 2019). ..... 14, 15, 21, 23, 26

**Legislative History**

S. Rep. No. 91-1196 (1970).....20



## GLOSSARY OF ABBREVIATIONS

ACE	Affordable Clean Energy Rule
CAA	Clean Air Act
CO <sub>2</sub>	Carbon dioxide
EPA	Environmental Protection Agency
JA	Joint Appendix
RTC	Response to Comments

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Environmental Protection Agency's ("EPA") response confirms that its repeal of the Clean Power Plan, its new "Affordable Clean Energy" rule ("ACE"), and its changes to the Section 111(d) implementing regulations (collectively "Rule") are unlawful.

EPA's central argument is that the Clean Air Act ("CAA" or "Act") does not permit the agency to designate the "best system of emission reduction" that includes the most widely-used and cost-effective means of reducing carbon dioxide ("CO<sub>2</sub>") from the nation's largest industrial source of climate pollution. Congress, however, placed no such limitation in the Act. The newest version of the agency's argument is inconsistent, unclear, and unpersuasive. The complex, shifting quality of EPA's grammatical and textual arguments belies the agency's claim that it has recently discovered the statute's unambiguous meaning.

Undermining EPA's attacks on the supposedly "radical" character of the Clean Power Plan, EPA Br. 5, the agency itself projects that the Plan's emissions targets will be met due to market trends alone and acknowledges that *all* pollution limits for power plants alter how much different plants operate. And, contrary to Respondents' histrionic claims that it would have transformatively expanded EPA's authority, the Clean Power Plan covered a class of large pollution sources subject to regulation for decades, and its "best system" reflected the primary means that power companies actually use to reduce CO<sub>2</sub> and other pollutants.

Further, EPA errs in claiming the Plan regulated entities outside the power plant source category. EPA Br. 35. The Plan placed no obligations on non-emitting power sources; it allowed them to create emission credits by increasing generation, reflecting reductions in pollution from the regulated CO<sub>2</sub>-emitting sources. In addition, under the mass-based compliance pathway states could place a simple, annual pollution limit on regulated sources without involving any other entities, *see, e.g.*, 80 Fed. Reg. 64,662, 64,754, 64,822-23 (Oct. 23, 2015).

In short, the Clean Power Plan's system was carried out by and at the regulated sources, achieving its emission reductions only at those sources. That the Plan employed a "best system of emission reduction" that reflected the regulated industry's operations and effectively reduced power plants' dangerous CO<sub>2</sub> pollution at reasonable cost should count in its favor, not against it.

EPA's defense of the toothless ACE rule is meritless. The agency fails to show how a mere list of potential heat-rate measures—which states can take or leave—meets EPA's obligation to set a mandatory emission limit. EPA's brief confirms that the agency disregarded the central statutory objective of emission reduction, and offers no satisfactory answer to record evidence that ACE will actually *increase* emissions in many states. It fails to justify ACE's arbitrary rejection of other, far more effective emissions-reduction measures, including those consistent with EPA's cramped understanding of its statutory authority.

EPA wrongly seeks to avoid judicial review of its arbitrary decision to repeal and not replace CO<sub>2</sub> emission standards for gas- and oil-fired power plants, and it has no defense for its failure to consider the health and environmental impacts of dramatically extended compliance deadlines in its amended framework regulations.

## ARGUMENT

### I. EPA'S RULE ARBITRARILY IGNORES SEVERE DANGERS TO PUBLIC HEALTH AND WELFARE

As we showed, EPA gave no discernable weight to the need to reduce power plants' dangerous CO<sub>2</sub> emissions, and ACE achieves virtually no reductions in those emissions. Pub. Health & Env. Pets. Br. ("Env. Br.") 5, 7-14. EPA does not contest these facts. Rather, it asserts with a shrug that the statute does not require, or even allow, the agency to take the magnitude of the public health and environmental hazards into account in this rulemaking. EPA Br. 142 n.39 ("[T]he constraints imposed by Section 7411 may mean there simply is not an effective [best system] applicable to a source."); *id.* at 216.<sup>1</sup> To the contrary, the statute *requires* EPA to consider the problem before it, namely the "amount of air pollution" reduced under a

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<sup>1</sup> In contrast to the case EPA cites, *Essex Chemical Corp. v. Ruckelshaus*, there is no claim here that the emissions reductions achievable from the chosen system would be outweighed by "counter-productive environmental effects." 486 F.2d 427, 438-39 & nn.40, 51 (D.C. Cir. 1973). Indeed, *Essex* affirms that EPA must consider real-world impacts on public health and the environment, which it failed to do here.

Section 111 rule, not just the costs of compliance. *Sierra Club v. Costle*, 657 F.2d 298, 326 (D.C. Cir. 1981); Env. Br. 7-8, 10-11, 26.

An agency cannot “interpret federal statutes to negate their own stated purposes.” *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) (internal citations omitted). A do-nothing rule for coal plants (and no CO<sub>2</sub> regulation for the nation’s vast gas and oil fleet) in the face of extreme danger to public health and welfare is hardly the work of a faithful “servant of the Clean Air Act.” EPA Br. 1.

EPA’s task under Section 111 is “emission reduction”—mitigation of dangers from harmful air pollution. To be sure, EPA cannot eliminate climate change “in one fell swoop,” *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007), or regulate without consideration of cost and other statutory constraints. But it surely cannot, as here, obstinately ignore the danger that prompts the need to regulate. The *facts* about the air pollution problem in question—the extent and urgency of public dangers, and the characteristics of the sources and pollutant—must inform EPA’s decision-making. *See* 80 Fed. Reg. at 64,665, 64,928-29, 64,932; *see also EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 497 (2014) (regulators must account for characteristics of the pollution problem before them).

Deciding whether a given level of pollution control effort is worthwhile requires a reasoned assessment of the danger and the concomitant benefits of control. *See* Env. Br. 7-8 (citing *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015)). Yet EPA’s brief confirms that the agency gave no meaningful consideration to this central aspect

of the problem. EPA abandoned a comprehensive, peer-reviewed measure of the social cost of carbon and replaced it with an improvised “interim” substitute that grossly underestimates the value of reducing CO<sub>2</sub> emissions. *See* Env. Br. 11-13; Greenstone Amicus Br. 6-30; *see also California v. Bernhardt*, No. 4:18-cv-05712-YGR, 2020 WL 4001480, at \*23-28 (N.D. Cal. July 15, 2020) (rejecting agency’s use of the related “interim” social cost of methane as arbitrary and capricious). EPA insists that these flaws are “irrelevant” because it claims not to have relied on the new approach—or *any* measure of benefits—in developing ACE. EPA Br. 218 n.60. This confirms, rather than excuses, the arbitrariness of EPA’s approach.

EPA’s Rule denies any obligation to consider benefits as well as costs or to address the urgent need to cut CO<sub>2</sub> emissions. *See* Env. Br. 2-4 & nn.1-3. In assessing potential systems, EPA failed to consider the benefits of regulation, effectively reading that indispensable factor out of the statute and relying exclusively on cost. *See, e.g.,* EPA Br. 202 (asserting, without considering emission or health impacts, that a “nearly 20%” increase in generation costs for individual coal plants from partial carbon capture would be excessive); *see also* Env. Br. 34-35.

EPA touts the emission reductions taking place due to market forces. EPA Br. 218-19. But even if those trends continue (which is uncertain), they will not come close to addressing the dangers to public health and welfare posed by the remaining emissions from power plants. Joint Best System Comments 10-11, JA\_\_\_; *see also* Env. Br. 3-4.

EPA claims to have discharged its duties to consider climate change by “not revis[ing]” its 2015 finding that power plants significantly contribute to the dangerous CO<sub>2</sub> concentrations driving climate change. EPA Br. 217-18. But that finding—which the government has only reinforced in subsequent proceedings and formal reports, Env. Br. 8-9 & nn.4-10—highlights the disconnect between the dangers EPA has acknowledged and its do-nothing response. EPA never explains how a rule that would achieve minimal (if any) emission reductions is reasonable in light of the statute’s demands and the record before the agency. *See* Env. Br. 7-14; Auffhammer *et al.* Amicus Br. 4-5, 13-20.

## **II. EPA’S INTERPRETATION OF SECTION 111 IS NOT REASONABLE, LET ALONE MANDATORY**

Congress designed Section 111(d) to cover a wide variety of source categories and pollutants, to address new pollution problems as they arise, and to harness improved pollution control methods—the “best” system of emission reduction—as they are developed. Despite pages and pages attacking the Clean Power Plan, EPA fails to substantiate the claim that the rule was precluded by statute. Because this mistake of law underlies both the Clean Power Plan repeal and ACE, both actions are unlawful. *See Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985); *United States v. Ross*, 848 F.3d 1129, 1135 (D.C. Cir. 2017).

### A. EPA's "Plain Language" Arguments Do Not Withstand Scrutiny.

EPA urges that the "plain language" of the statute unambiguously limits the "best system of emission reduction" to measures that can be "applied to" or "at" an individual existing source. EPA Br. 58. Although the Clean Power Plan would have met even this restrictive interpretation, *see* Clean Energy Ass'ns Op. Br. 9, EPA's argument fails.

If the statute's text were so plain, EPA would not have found it necessary to present a shifting array of asserted textual hooks for its interpretation. *See, e.g.*, Env. Br. 16. The principal textual argument presented in EPA's brief involves substituting portions of Section 111(a)(1), defining "standard of performance," in place of that term in the first sentence of Section 111(d). EPA Br. 2-3, 20-21, 56-59; EPA Addendum 1. Far from following the statute's unambiguous dictates, that exercise *rewrites* it.

Section 111(d)(1) requires that state plans establish "standards of performance for any existing source." 42 U.S.C. §7411(d)(1). The obvious meaning of this phrase, as we have demonstrated, is that the state plan must establish a standard of performance—an enforceable emission limit—for each existing source, leaving none unregulated. Env. Br. 17.

EPA, however, argues that "for any existing source" modifies "best system of emission reduction," instead of "standards of performance." *See* EPA Br. 56-57. To do this, EPA substitutes "standard of performance" in the first sentence of Section



111(d)(1) with *part* of its Section 111(a)(1) definition—omitting the 28 words that follow “best system of emission reduction.” *Compare* EPA Br. Addendum 1, *with* Addendum A, *infra* (showing deletions and substituting entire definition). EPA’s rewrite creates the illusion that the “system”—not the “standard”—must be “for” an existing source. But this mashup is not what Congress enacted. This fact is further illustrated by reading the words Congress wrote in Section 111(d) alongside their definitions, which dispels the illusion EPA seeks. For all its elaborate argumentation, *see, e.g.*, EPA Br. 56-62, EPA cannot change the fact that the phrase “for any existing source” modifies “standard,” not “system.”<sup>2</sup>

Statutory definitions are seldom written to fit syntactically into provisions in which the defined term is used.<sup>3</sup> “[M]echanically” substituting definitions can yield results that alter meaning in clearly unintended ways or are simply ungrammatical. *See Philko Aviation, Inc. v. Shackel*, 462 U.S. 406, 412 (1983) (“[W]e need not read the statutory definition mechanically into [the relevant section], since to do so would...defeat the purpose of the legislation. A statutory definition should not be

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<sup>2</sup> EPA’s brief sometimes recognizes that what is “for any existing source” and what applies “to any particular source” is the “standard of performance. *See* EPA Br. 61-61. At other points EPA seems to argue that “for any existing source” modifies “plans.” *See id.* at 65, 127-28.

<sup>3</sup> For example, splicing a CAA permitting program’s definition of “commenced,” 42 U.S.C. §7479(2)(A), into the provision requiring new sources to obtain a permit makes the program appear to apply only to sources constructed “within reasonable time...after August 7, 1977,” *id.* §7475(a), when the manifest purpose of the permitting provision is to cover all sources constructed any time after that date.

applied in such a manner.”). A cut-and-paste approach is particularly inapt when deployed to modify the meaning of the definition itself, as EPA attempts to do. The agency’s method would never get past a middle school grammar teacher.

If the statute *were* written the way EPA posits, *the Administrator* (not the state) would be responsible for selecting not only a “best system” for the category of sources, but also a unique “best system” for each individual source. That is not contemplated either by Section 111 or by EPA’s implementing regulations, and EPA has never done so.

EPA also asserts that the definition in Section 111(a)(1) plays a role that is “subsidiary” to “Section 7411’s actual regulatory programs.” EPA Br. 58-59. But Congress often includes central substantive and operative requirements within statutory definitions. *See, e.g., County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468-69 (2020) (Clean Water Act “use[s] specific definitional language to achieve” statute’s overall design).<sup>4</sup> Section 111(a)(1) sets forth the pivotal *federal* responsibility to establish the stringency of pollution-reduction targets applicable under the section’s two operative provisions, Section 111(b) and (d).

EPA insists that the “only coherent” and “natural reading” is that control measures must “be ‘for’ and act at the level of the *singular individual source*.” EPA Br.

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<sup>4</sup> 33 U.S.C. §1316(a)(1) (Clean Water Act definition of “standard of performance”); *id.* §7479(3) (CAA “best available control technology” definition, cited at EPA Br. 84-85).

42, 62 (emphasis added). But EPA’s own regulations—re-promulgated in this very rulemaking—state that the system is “for designated facilities,” plural. 40 C.F.R. §60.21a(e). And despite building its argument on the use of “source,” singular, in Section 111(d), EPA Br. 2, 4, 40, 60-62, EPA also asserts that even if the term were plural, it would not alter what is permitted under the Act. EPA Br. 63. EPA does not explain why a cornerstone of its new “plain language” argument does not, in fact, matter.

Finally, EPA argues that Petitioners have conflated “source” with its “owner or operator,” or with the power sector as a whole. EPA Br. 79 (Clean Power Plan “stretched the ‘bubble’ to *all* of an owner/operator’s ‘components’—no matter the ‘facility’ where installed”). Neither claim has merit. The Clean Power Plan required establishment of performance standards for individual power plants. *See* 80 Fed. Reg. at 64,715-16 (defining the “affected sources” subject to the rule as individual power plants). By defining “source” as a “building, structure, facility, or installation,” Section 111(a)(3) simply indicates the types of pollution-emitting entities subject to performance standards. 42 U.S.C. §7411(a)(3). Nothing in that definition precludes a system of emission reduction that allows the regulated source to comply through the use of emission credits. Moreover, as the agency concedes, EPA Br. 80, the owner/operator of a power plant is responsible for its compliance, *see* 42 U.S.C. §§7411(a)(5), 7413(a)(3), and for decades that has included the responsibility to acquire emission credits under rules that allow their use, *see* 80 Fed. Reg. at 64,773.

**B. Congress Was Not Required to Provide More Specific Legislative Authorization than Is Provided in Section 111.**

EPA and Respondent-Intervenors claim special clear statement rules should apply. This argument fails. *See* State Op. Br. 52-55; Admin. Law Profs Amicus Br. 9-30. Section 111(d) “speaks directly” to regulating CO<sub>2</sub> from existing power plants, and “Congress delegated to EPA the decision whether *and how* to regulate carbon-dioxide emissions from power plants.” *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2531, 2538 (2011) (“*AEP*”) (emphasis added). EPA’s choice of a system that is already in widespread use to reduce pollution does not require an additional “clear statement” from Congress.

Section 111 is no statutory mousehole. Congress enacted it to provide EPA with clear authority to regulate a variety of large national industries, and to change existing practices that harm public health and welfare and cause thousands of premature deaths and billions in economic costs. As intended by Congress, Section 111 rules usually have substantial impacts on regulated entities. *E.g.*, *Costle*, 657 F.2d at 314 (upholding 1979 regulations that imposed “tens of billions of dollars” of costs on the United States power sector). A weak rule, like ACE, also imposes significant social and economic consequences by leaving millions of people unprotected from serious hazards to health and welfare. Simply acting under Section 111 does not require an additional clear statement. Section 111 not only “speaks directly” to power plants’ CO<sub>2</sub> emissions, *AEP*, 131 S. Ct. at 2531; it does so in “broad language” that “reflects

an intentional effort to confer the flexibility to forestall...obsolescence,” *Massachusetts*, 549 U.S. at 532.

EPA’s authority over CO<sub>2</sub> emissions from power plants is cabined by the factors Congress set forth in Section 111(a)(1), including that the system be “adequately demonstrated,” achieve “emission reduction” from regulated sources, and consider “cost” and “energy requirements.” 42 U.S.C. §7411(a)(1). EPA now asserts that the statutory factors laid out by Congress in Section 111 fail to serve as “significant constraints.” EPA Br. 107. But it is not for the agency to second-guess Congress’s judgment, or to disguise its current policy preferences as statutory constraints.

### **III. ACE CONTRAVENES THE STATUTE IN MULTIPLE ADDITIONAL WAYS**

EPA fails to justify ACE’s other departures from the statute, including its lack of a required minimum emission limitation that state plans must meet. This foundational flaw is clear from the text and structure of Section 111(d) and its implementing regulations, which since 1975 have required the agency to issue an emission guideline for each category (and any appropriate subcategories) of existing sources, one that includes a quantitative emission limit reflecting application of the “best system.” 42 U.S.C. §7411(d)(1), 40 C.F.R. §60.22a(b)(5); *see also* 40 Fed. Reg. 53,223, 53,343 (Nov. 17, 1975).

States must then adopt plans that include performance standards for those sources that are “no less stringent than” EPA’s guideline, “except” where the state “demonstrates” for a “particular source” that specific factors make “a less stringent standard...significantly more reasonable.” 40 C.F.R. §60.24a(c), (e). Lastly, EPA must review and either approve or disapprove state plans based on their conformity to the emission guideline. 42 U.S.C. §7411(d)(1), (2)(A); 40 C.F.R. §60.27a.

ACE ignores this legally binding framework in multiple ways, treating the emission guideline as a functionally advisory document, with no substantive benchmark requirement for emission reductions in state plans. This is contrary to the statute and EPA’s own long-standing implementing regulations.

**A. Advisory Ranges of Heat-Rate Improvement Do Not Substitute for a Mandatory, Numerical Emission Limit.**

EPA asserts that ACE’s Table 1—which includes a range of heat-rate improvements for each “candidate technology”—meets the agency’s obligation to “identif[y] the degree of emission limitation achievable” through the “best system.” EPA Br. 222-25, 229-31. However, the statute and EPA’s regulations require the agency to establish a specific quantitative emission limit that state performance standards must achieve. Env. Br. 21-24. Table 1 identifies no discrete “degree of emission limitation achievable” and specifies no limit on any source’s emissions. *Id.* Table 1’s values are entirely optional: states need only “*evaluat[e]*” those ranges in their state plans, 40 C.F.R. §60.5740a(a)(2)(i) (emphasis added), and may “establish

standards of performance” that “reflect a value...that falls outside of [Table 1’s] ranges,” 84 Fed. Reg. 32,520, 32,538 (July 8, 2019). And states may incorporate as few or as many of the “candidate technologies” into their standards as they see fit. *See* 40 C.F.R. §60.5740a(a)(2)(i).

Without a mandatory quantitative emission limit, states are left without guidance on what standards of performance are required in a “satisfactory” state plan. EPA, moreover, has no substantive basis to determine whether state plans are “satisfactory” and to ensure that state-issued standards are “no less stringent” than the guideline. With no substantive benchmark for this determination, EPA’s review process becomes a meaningless box-checking exercise.

EPA insists that states must adhere to “rigorous standards” in developing their plans, EPA Br. 232, but the actual text of ACE belies this claim; it merely requires that states “evaluat[e] the Table 1 technologies and value ranges and “summar[ize]” how they determined each source’s standard of performance. 40 C.F.R. §60.5740a(a)(1), (2)(i). Nowhere does ACE require EPA to apply any clearly defined *substantive* criteria for plan approval. In fact, EPA says only that it “*may* reject” an inadequate or arbitrary state plan, EPA Br. 233 (emphasis added), not that it *must* do so. As the agency previously recognized, this “procedural” vision of emission guidelines would create “a gaping loophole in a statutory scheme otherwise designed to force meaningful action.” 40 Fed. Reg. at 53,343. This is not what Congress intended.

Furthermore, EPA does not respond to Petitioners' objection that Table 1 does not address *emissions*. The statute and implementing regulations require *emission* limitations. *See* 42 U.S.C. §§7411(b)(1)(B), 7602(k); 40 C.F.R. §60.22a(b)(3), (5). A power plant's heat-rate is not a surrogate for its hourly emissions rate, and improving its heat-rate does not guarantee a decrease in its total annual emissions. *See* Env. Br. 22-23. Nor does EPA address its own prior admission that the values in Table 1 for various heat-rate technologies cannot be added to one another and may, in fact, "mitigate" (undercut) one another. 84 Fed. Reg. at 32,554. Thus, EPA has not even "identified" the degree of heat-rate improvement achievable through its "best system," let alone established the mandatory emission limit.

EPA cites *Sierra Club v. Costle* to support issuing a range rather than specifying any discrete emission limit. EPA Br. 224-25. In *Costle*, however, each new power plant was subject to a specific, identifiable emission limitation that was calculated based on the sulfur content of the plant's fuel. 657 F.2d at 316. Relying on its authority to "distinguish among classes, types and sizes within [a] categor[y]," EPA created subcategories of plants based on the fuel they burned. *Id.* at 318. In ACE, however, EPA did not establish any subcategories, and Table 1 does not establish a discrete emission level for *any* plant.

#### **B. ACE Fails to Enforce the Statutory and Regulatory Limits on Variances.**

Nor does EPA justify the unlawful manner in which ACE employs Section 111(d)'s variance provision. While the statute permits states to issue individual



variances when “*applying* a standard of performance to any *particular* source,” states must first “*establish*” a generally applicable standard that is at least as stringent as EPA’s emission guideline. 42 U.S.C. §7411(d)(1)(A), (B) (emphasis added); *see* Env. Br. 24-25. That standard serves as the baseline from which states must “demonstrate” that a particular source merits different treatment. 40 C.F.R. §60.24a(e). As such, source-specific variances are “except[ions]” to the otherwise-applicable performance standards that must be “no less stringent” than the emission limit provided in EPA’s guideline. *Id.* §60.24a(c).

Ignoring these unambiguous requirements, ACE directs states to issue individually “tailored” standards of performance for each and every affected source. Instead of requiring the state to “demonstrate” the basis for “except[ions]” from the generally applicable performance standard, ACE asks the state only “to include a summary of the application of the relevant factors” it considered, untethered to any federal quantitative benchmark. 40 C.F.R. §60.5740a(a)(2)(ii). ACE likewise provides no substantive norm for EPA to apply when reviewing the plan to determine whether the state has met its burden of demonstrating the need for disparate treatment. EPA blandly asserts that Section 111(d)(2)(B) “permits States to deviate from EPA’s guidelines.” EPA Br. 234. This overlooks the glaring fact that ACE fails, in the first place, to establish a quantitative benchmark to deviate from. ACE thus provides EPA no meaningful basis either for confirming that state performance standards are “no

less stringent” than the federal emission guideline or for determining that states have adequately “demonstrate[d]” the need for a source-specific variance.

EPA further contends that states may establish their requirements in two steps—standards followed by variances—or in one hybrid step. EPA Br. 234-35. This only underscores the absence of a federal benchmark, without which it makes no difference whether states use one or two steps to specify individual sources’ obligations. States have a legal *obligation*, not merely “discretion,” *id.* at 235-36, to issue generally applicable performance standards that conform to EPA’s guideline, with variances permitted only as “except[i]ons.” And EPA has a legal obligation to hold state plans to these measures when determining if they are “satisfactory.” EPA cannot defend ACE’s deviation from these core legal requirements.

### **C. Petitioners Have Preserved Their Challenges to EPA’s Failure to Set Binding Emissions Limits.**

Contrary to EPA’s spurious argument, EPA Br. 227-29, Petitioners discussed these precise issues extensively in our rulemaking comments. *See, e.g.*, Joint Best System Comments 12, JA\_\_ (“A list of heat rate improvements of varying effectiveness—coupled with unfettered discretion for states to choose whether and how to apply those improvements—fails entirely to fulfill the Administrator’s duty under section 111....The Proposal contains no [emission] limit, which flatly violates section 111.”). There is no bar to litigating these claims.

#### IV. EPA'S "BEST SYSTEM" DETERMINATION IS UNLAWFUL AND ARBITRARY

EPA's "best system" achieves no meaningful pollution reductions, and the agency's efforts to defend it are meritless. EPA's rejection of far more effective alternatives was arbitrary and capricious.

##### A. EPA's "Best System" Achieves Minimal Emission Reduction and Could Increase Harmful Pollution.

As discussed, Env. Br. 28-31, ACE would trigger a "rebound effect": heat-rate improvements at power plants would increase their annual usage and prolong their operating lives, undercutting (and in many cases totally outweighing) the already-minuscule emission reductions that those improvements would achieve on a per-megawatt-hour basis. EPA responds by claiming that overall emissions are not relevant, distancing itself from its own factual record, and arguing that responsibility to set emission limits rests with the states. These responses fail.

EPA first claims that rather than requiring it to set a standard limiting emissions, the statute authorizes it to require only reductions in a source's emission *rate*. See EPA Br. 220-21. But that does not cure the arbitrariness of EPA's designation of a "best system" that the agency itself projects will lead to *increased* pollution at a substantial number of coal-fired power plants and could lead to more overall pollution from the source category than no regulation at all. Env. Br. 28-31. Moreover, as EPA recognizes, Section 302(k) permits the agency to limit the quantity of air pollution from a source and not just emission rates. 42 U.S.C. §7602(k)

(standard may limit “quantity, rate, or concentration of emissions of air pollutants”). EPA’s plea for an “extreme degree of deference,” EPA Br. 220, is unavailing. Any such leeway does not extend to rules that flout the Act by resulting in increased emissions, without any justification. This is particularly true considering EPA’s failure to justify rejecting alternative methods that would avoid emissions rebound altogether.

Second, EPA dismisses record evidence of the rebound effect as a “worst case” scenario, EPA Br. 221-22 & n.61 (citing proposed, not final, rule). However, the *only* compliance scenario modeled in the Rule demonstrates that ACE would increase emissions at about one-fifth of regulated plants, and total emissions would increase in 15 states. *See* Energy Modelers Amicus Br. 7-9. Further, EPA offers no basis for disregarding its *own* analysis of the proposed rule, which shows that greater heat-rate improvements could perversely lead to higher cumulative emissions over time. *Id.* at 11-13 (4.5 percent improvement results in higher cumulative CO<sub>2</sub> emissions than 2 percent when costs are equal).

Third, EPA denies its obligation to address this core problem with ACE, asserting that states have “discretion” to determine whether the rebound effect is “an issue.” EPA Br. 221-22. But under the statute, it is the *Administrator’s* responsibility to select a “best system” based upon the statutory factors. 42 U.S.C. §7411(a)(1). Even if EPA could punt this issue to the states (which it cannot), ACE does nothing to require states to even *consider* the potential for rebound, much less avoid it. EPA’s argument shirks its statutory responsibilities to select a “best system of emission

reduction” that actually reduces emissions, and to ensure that states adopt “satisfactory” plans mandating a minimum level of emission reductions specified in EPA guidelines.

**B. EPA Arbitrarily Rejected Systems That Would Achieve Greater Emission Reductions than Heat-Rate Improvements.**

EPA fails to justify its rejection of co-firing, carbon capture, and reduced utilization. Given that these measures could achieve far greater emission reduction than heat-rate improvements even while satisfying EPA’s strained “to or at” interpretation, the agency’s arbitrary rejection of these alternatives fatally undermines ACE.

1. EPA Arbitrarily Rejected Co-Firing and Carbon Capture.

EPA rejected gas co-firing as not “sufficiently available” primarily because “very few [sources] routinely used co-firing for the purpose of generating electricity.” EPA Br. 203, 210. Section 111 standards require sources to match the emissions performance of the *best* system of emission reduction that has been adequately demonstrated; the statute does not require that a technique already be in widespread use—or even be “in actual routine use somewhere”—in order to be the “best system.” *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973) (quoting S. Rep. No. 91-1196, 16 (1970)).

Furthermore, EPA failed to overcome record evidence that co-firing is already widespread and could be deployed further to reduce carbon pollution. The record

shows that 35 percent of coal plants co-fired natural gas in 2017. Env. Br. 31.<sup>5</sup> EPA responds that most of these plants use “only a small amount of natural gas,” EPA Br. 210, but ignores extensive record evidence that many such plants can increase their co-firing, and others could also adopt this measure, all at reasonable cost, Env. Br. 31-32. EPA speculates, without any record support, that it would be inefficient to redirect gas supplies from gas turbines to coal plants, EPA Br. 204, 210-11, but in neither the Rule nor its brief does the agency address the record documenting that there is adequate gas supply for both uses. *See* Env. Br. 35.<sup>6</sup>

In dismissing co-firing and carbon capture as too costly, EPA ignored contrary evidence submitted by commenters, did not assess industry-wide economic impacts, and failed to assess those technologies’ costs in light of the quantity of pollution they would reduce. *See* Env. Br. 33-34; *supra* Sec. I. For example, EPA cites the estimated per-mile cost of gas pipelines needed for co-firing, EPA Br. 210, but does not explain why this cost is infeasible or why it is unreasonable in light of the resulting significant CO<sub>2</sub> emission reductions.

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<sup>5</sup> Intervenors’ claim that Petitioners misstated the number of plant conversions from coal to gas, State & Industry Ints. ACE Br. 15, is simply mistaken. *See* Env. Br. 31; 84 Fed. Reg. at 32,546.

<sup>6</sup> Contrary to Respondent-Intervenors’ implication, EPA did not reject co-firing due to “reliability concerns.” State & Industry Ints. ACE Br. 17; *see* ACE RTC, ch. 4, 7-8, JA\_\_.

Even if it had demonstrated that these technologies could not be used universally (which we do not concede), EPA also arbitrarily refused to consider creating a subcategory of plants where they would be suitable. Nor did EPA require that states assess the applicability of these technologies on a source-by-source basis, as ACE already requires for heat-rate improvements. *See* Env. Br. 36. EPA's thin justification—that the system must be “broadly achievable across the country,” EPA Br. 211—is arbitrary and inconsistent with its recognition that its candidate heat-rate improvements are themselves not available at every power plant. Env. Br. 36.

EPA asserts the statute does not contemplate creating subcategories based on sources' ability to meet pollution limits, and suggests that subcategorization applies only to new sources. EPA Br. 213. But that is precisely what Section 111 contemplates, 42 U.S.C. §7411(b)(2), and what EPA's own Section 111(d) regulations—directed squarely at existing sources—prescribe, *see* 40 C.F.R. §60.22a(b)(5) (Administrator “may specify different degrees of emission limitation...for different sizes, types, and classes of designated facilities when costs of control, physical limitations, geographical location, or similar factors make subcategorization appropriate”). EPA's appeal to its discretion on whether to subcategorize does not free it from the requirement to “cogently explain why it has exercised its discretion in a given manner.” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 48 (1983).

2. EPA Arbitrarily Rejected Reduced Utilization.

EPA contends that reducing a source's utilization cannot be the basis for a "standard of performance" because it constitutes "non-performance." EPA Br. 152. As we have explained, however, the statute's reference to "performance" clearly pertains to *emissions* performance. Env. Br. 40. Moreover, decreased utilization satisfies the statutory factors by cost-effectively reducing emissions without reducing overall electricity supply, and it is already widely used in the power sector. 80 Fed. Reg. at 64,782.

A standard based on sustained levels of reduced utilization would also require "continuous emission reduction," *contra* EPA Br. 156 (citing 42 U.S.C. §7602(l)), and would not resemble measures, such as dispersion techniques and weather-dependent "intermittent controls," that Congress intended to forbid. Env. Br. 39-40. EPA claims that sources reducing their utilization could occasionally "produce at full capacity." EPA Br. 156. Even if that were so, a standard that permanently reduces CO<sub>2</sub> emissions over a defined compliance period requires continuous emission reduction. Env. Br. 39-40.

Finally, EPA denies (without analysis), EPA Br. 155-56, the contradiction we identified: that ACE itself allows sources to opt out of ACE through reduced generation. *See* 84 Fed. Reg. at 32,582 (40 C.F.R. §60.5780a(a)(2)). EPA described this in its response to comments as "functionally the same as applying standards and



complying via reduced utilization,” ACE RTC, ch. 2, 9, JA\_\_\_, and cannot now claim otherwise.

#### **V. EPA’S DECISION TO DEREGULATE EXISTING GAS- AND OIL-FIRED PLANTS IS ARBITRARY, CAPRICIOUS, AND UNLAWFUL**

In the Rule, EPA repealed all federal limits on CO<sub>2</sub> emissions from the nation’s existing gas- and oil-fired plants. Even assuming EPA’s fundamentally erroneous interpretation of “best system” were correct, EPA provides no valid basis for not replacing the prior Section 111(d) guidelines for these sources, given the agency’s clear statutory obligation to regulate existing sources in categories regulated under Section 111(b). *See* Env. Br. 40-41. This decision was arbitrary: EPA inexplicably ignored its own data and the data submitted by commenters, and failed to provide “reasoned responses” for disregarding it. Env. Br. 42-44. Further, in contrast with its repeal-and-replace approach for coal-fired plants, EPA’s decision to not replace the guidelines for gas- and oil-fired plants is revealingly inconsistent. Tellingly, EPA makes no effort to defend its arbitrary consideration of the record on the merits. *See* EPA Br. 158-161.

The agency affirmatively decided to leave the CO<sub>2</sub> emissions from these previously regulated plants uncontrolled indefinitely, a radical change in policy that requires “reasoned explanation.” *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016). In the Clean Power Plan, EPA determined that the serious dangers of climate change required regulation of the significant emissions from gas- and oil-fired power

plants. In the Rule, EPA failed to provide a reasoned explanation for departing from those earlier findings.

EPA attempts to shield its decision from this Court’s scrutiny by arguing—wrongly—that it has not taken a final agency action. Its decision to repeal and not replace guidelines for gas- and oil-fired plants is clearly a final, reviewable action with “legal consequences” that represents the “consummation” of its decision-making process. *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Even actions that temporarily “relieve[] regulated parties of liability they would otherwise face” carry “legal consequences.” *Clean Air Council v. Pruitt*, 862 F.3d 1, 6-8, (D.C. Cir. 2017)—a point with even greater force here, where EPA is forgoing regulation indefinitely.

That EPA *may* at some later date issue regulations for gas- and oil-fired plants is of no consequence. Even where EPA has expressed “a good-faith intent to engage in a rulemaking” in the future and to “gather the necessary input”—which it has not done in this case—rescinding its pre-existing guidelines without replacement still “marks the consummation of the agency’s decisionmaking about the governing framework unless and until it is superseded.” *NRDC v. Wheeler*, 955 F.3d 68, 80 (D.C. Cir. 2020). Accordingly, EPA’s decision to rescind the guidelines for gas- and oil-fired plants without replacement is a reviewable final action.

*Portland Cement Association v. EPA*, 665 F. 3d 177 (D.C. Cir. 2011), is inapposite. There, EPA had issued standards for other pollutants, but decided at proposal to address standards for greenhouse gases in a separate proceeding. *See* 73 Fed. Reg.

34,084. In the final rule, EPA committed “to collect additional information before proposing greenhouse emissions standards,” *Portland Cement*, 665 F. 3d at 193, in a future rulemaking (which never occurred). By contrast, here, EPA proposed the repeal of preexisting requirements for gas- and oil-fired plants’ CO<sub>2</sub> emissions; proposed that there were no heat-rate improvements that would qualify as the “best system” for those sources; solicited comment on that proposal, 83 Fed. Reg. at 44,761; received contrary data from commenters, Env. Br. 42-44; and made a final decision, contrary to abundant record evidence, not to issue guidelines for such units. EPA made no commitment to issue guidelines in the future nor offered any satisfactory explanation of why the data submitted by commenters was insufficient. 84 Fed. Reg. at 32,533.

The Court should reject EPA’s effort to convert *Portland Cement* into an all-purpose shield against judicial review any time the agency claims a lack of information to regulate. EPA’s decision to rescind the guidelines for gas- and oil-fired plants without replacement bears the classic indicia of finality and was based on a record that clearly lends itself to judicial review.

## **VI. EPA’S AMENDMENTS TO THE IMPLEMENTING REGULATIONS ARE ARBITRARY AND CAPRICIOUS**

Petitioners have not forfeited their objections to the revised Section 111(d) implementing regulation deadlines. As we argued, EPA entirely “failed to consider the public health impacts of these amendments”—an “important aspect of the

problem”—and its decision is therefore “arbitrary and capricious.” Env. Br. 10-11 & n.13.

Moreover, EPA’s claimed rationale for extending the deadlines was insufficient. *See* Joint Framework Comment 23-25, JA\_\_\_. There is no legal or logical reason that the Section 111(d) implementation regulations should provide the same timelines as apply to Section 110 plans. Section 111(d) plans, which cover just one source category, are inherently simpler than Section 110 plans, which cover the many different types of sources whose emissions must be reduced to meet an ambient air quality standard. *Id.* The cost to public health and welfare of delaying power sector CO<sub>2</sub> emission reductions—as well as all future reductions under other applications of Section 111(d)—requires a weighty justification, and EPA has not documented any problems caused by the current timelines, which are already adjustable where needed. This action is arbitrary.

## CONCLUSION

The petition for review should be granted. ACE and the revisions to the Section 111(d) implementing regulations should be vacated, and the proceeding should be remanded to EPA with instructions to discharge its statutory duties expeditiously.

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## ADDENDUM A

### Clean Air Act Section 111(d)(1), with Section 111(a)(1)'s Definition of "Standard of Performance" Substituted for that Phrase

#### **(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 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes ~~standards of performance~~ **standard[s] for emissions of air pollutants which reflect[s] the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated** 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 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a ~~standard of performance~~ **standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated** 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~~ **standard[s] for emissions of air pollutants which reflect[s] the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated**. Regulations of the Administrator under this paragraph shall permit the State in applying a ~~standard of performance~~ **standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated** 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.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the Court's order of January 31, 2020 (Doc. No. 1826621). According to the count of Microsoft Word, this brief contains 6,424 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

Dated: July 30, 2020

/s/ Melissa J. Lynch  
Melissa J. Lynch



**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of July, 2020, the foregoing Initial Reply Brief of Public Health and Environmental Petitioners has been served on all registered counsel through the Court's electronic filing system.

/s/ Melissa J. Lynch  
Melissa J. Lynch