ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1140 (and consolidated cases)

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

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

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

Respondents.

On Petition for Review of Final Agency Action of the United States Environmental Protection Agency
84 Fed. Reg. 32,520 (July 8, 2019)

PROOF REPLY BRIEF OF PETITIONERS CONSOLIDATED EDISON, INC., EXELON CORPORATION, NATIONAL GRID USA, NEW YORK POWER AUTHORITY, POWER COMPANIES CLIMATE COALITION, PUBLIC SERVICE ENTERPRISE GROUP INCORPORATED, AND SACRAMENTO MUNICIPAL UTILITY DISTRICT

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GLOSSARY

BACT	Best Available Control Technology
CO_2	Carbon Dioxide
EPA	U.S. Environmental Protection Agency
NSPS	New Source Performance Standards

SUMMARY OF ARGUMENT

To prevail in this case, EPA must demonstrate that section 111 is so clear and unambiguous that its new reading of the provision is the *only* possible one. It has not done so.

A standard can be established "for any existing source," irrespective of whether it is based upon measures at individual sources, generation shifting, or a combination thereof. This would remain true, even if EPA were correct – which it is not – that "application" of a "system of emission reduction" must have an indirect object and that object must be "any existing source." None of EPA's other textual arguments fare better.

Generation shifting is not, as EPA contends, a novel approach. Rather, it is the actual means by which the power sector has cost-effectively reduced its CO_2 emissions in recent years. Additionally, EPA has premised prior rules for the power sector under section 111(d) and other Clean Air Act provisions upon generation shifting and trading. Thus, EPA's contentions that generation shifting is a radical new approach and that trading is statutorily barred are demonstrably wrong.

Because the statute is susceptible to interpretations other than the narrow one adopted by EPA and because EPA makes no argument that

it offers a reasonable interpretation of an ambiguous statute, this Court should remand EPA's repeal and replacement of the Clean Power Plan to EPA to exercise the interpretive discretion Congress conferred under section 111.

ARGUMENT

I. EPA Can Only Prevail If Its Narrow Reading Is the Only Possible Reading of Section 111

The blizzard of arguments proffered by EPA and its supporters obscure what this case is about. It is *not* about whether the Clean Power Plan or EPA's current rule reflects a reasonable interpretation of section 111's broad and ambiguous text. Instead, it is about whether section 111's text is *so clear and unambiguous* that EPA's current interpretation is *the only permissible reading*. That view is the sole rationale for EPA's repeal and replacement of the Clean Power Plan and reflects an unabashed attempt to bar future Administrations from adopting any broader view. EPA's rule must accordingly be judged on that rationale alone. *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004) ("*PDK*").

Petitioners need not show that EPA's current reading is unreasonable to prevail – only that the statute is sufficiently ambiguous

to be susceptible to other interpretations. *PDK*, 362 F.3d at 796. Petitioners make that showing. EPA's 2016 defense of the Clean Power Plan proves as much, and none of EPA's newfound textual arguments to the contrary are persuasive. Because EPA premised the repeal and replacement of the Clean Power Plan entirely upon "its erroneous conception of the bounds of the law," this Court should remand the rule to EPA, so it can "exercise the full measure of administrative discretion granted to it by Congress." *Prill v. NLRB*, 755 F.2d 941, 942, 948 (D.C. Cir. 1985); *Transitional Hosps. Corp. of La., Inc. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000); *Peter Pan Bus Lines v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006); *Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678, 683 (D.C. Cir. 2010).

II. Section 111 Does Not Unambiguously Restrict the Best System of Emission Reduction to Measures Applied "At" or "To" Individual Facilities

Section 111(d) requires EPA to prescribe regulations establishing a procedure under which each State shall submit "a plan which . . . establishes standards of performance for any existing source" for certain air pollutants. 42 U.S.C. § 7411(d)(1). Section 111(a)(1) defines a standard of performance as "a standard for emissions of air pollutants

which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated." *Id.* § 7411(a)(1). Petitioners understand that these provisions must be read in tandem. However, EPA "takes a wrong interpretive turn," *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 328 (2014) ("*UARG*"), when it fabricates unambiguous limits on its authority in the intersection of these provisions.

Section 111(d)'s requirement that state plans establish standards of performance "for any existing source" is ambiguous. EPA argues that "any existing source" must refer to an individual source, because it does not instead refer to plural *sources*. EPA Br. at 238. But the Supreme Court has "repeatedly explained that the word 'any' has an expansive meaning." *Babb v. Wilkie*, 140 S.Ct. 1168, 1173 n.2 (2020) (internal citations omitted). "The standard dictionary definition of 'any' is '[s]ome, regardless of quantity or number.' American Heritage Dictionary 49 (def. 2) (1969)." *Id.* Another dictionary defines "any" as "one, some, or all indiscriminately of whatever quantity." *Any,* Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/any (last

visited July 28, 2020). Thus, the requirement to establish standards "for any existing source" may reasonably be read to mean that the plan must establish standards for all existing sources in the state, regardless of number. It does not unambiguously require that such standards must be limited to measures applied "at" or "to" each plant individually.

Similarly, EPA makes much of the fact that the next sentence of section 111(d) states that EPA shall permit the State in "applying *a* standard of performance," "to any *particular* source," to take into consideration "*the* remaining useful life of *the* existing source," and that all of these emphasized terms are singular. EPA Br. at 2. (emphasis added by EPA).

But this language is better read merely to allow State plans to include flexibility for individual units based on remaining useful life or other factors. Regardless of whether standards are based on measures applied at the individual source or other measures like generation shifting, this could be accomplished through variances for individual sources. Or it could be done, as it was in the Clean Power Plan, through flexible compliance obligations that can be satisfied through tradeable credits.

EPA's discussion of section 111(d)(2), which authorizes EPA to issue federal implementation plans, illustrates how contorted its arguments are. On one hand, EPA argues that section 111(d)(2)'s use of the plural phrase "remaining useful lives of the sources in the category of sources" underscores the significance of Congress's use of the singular "remaining useful life of the existing source" in section 111(d)(1). EPA Br. at 63. But EPA nevertheless argues that any federal plan under section 111(d)(2) is *also* limited to measures that can be applied at or to individual facilities. *Id*. EPA cannot have it both ways. Given Congress's clear intention that EPA's federal authority under section 111(d)(2) be coextensive with the States' obligations under section 111(d)(1), the plural reference in paragraph (d)(2) actually highlights the ambiguity in paragraph (d)(1).

EPA argues that "application" as used in section 111(a)(1) must have an indirect object, that the only possible one is to be found in section 111(d), and that performance standards must therefore reflect emission limitations achievable through application of the "best system" to "any existing source." EPA Br. at 114-115. Petitioners disagree, but even if EPA were correct it would not prevail.

Congress could have written the statute with an indirect object, by defining a standard of performance as reflecting the degree of emission reduction achievable *by an individual source* through application *to such individual source* of the best system of emission reduction that has been demonstrated. It did not do so.

If "application" must have an indirect object, that object could be emissions of air pollutants – a reasonable construction given the purpose of section 111. But, even if this Court were to read section 111(d) to require standards reflecting the degree of emission limitation achievable through "application of the best system" *to* [instead of "for"] "any existing source," EPA still cannot prevail. A standard based, for example, on a combination of heat-rate improvements and generation shifting can rightly be understood to "apply to" any existing source, with each source required to demonstrate compliance through onsite emission reductions, acquisition of emission reduction credits, or some combination thereof.

EPA's "best available control technology" ("BACT") argument also fails. EPA asserts that the section 111 cross-reference appearing in section 169's definition of BACT confirms that existing source standards

under section 111(d) must be limited to those systems that can be applied to an individual source. EPA Br. at 130.

However, EPA's Environmental Appeals Board, this Court, and other courts consistently have interpreted the cross-reference to encompass only *new source* performance standards ("NSPS") established pursuant to section 111(b). *See*, *e.g.*, *In re Columbia Gulf Transmission Co.*, PSD Appeal No. 88-11, 2 E.A.D. 824, 1989 WL 266361 at *2 n.3, *4 (EPA 1989) ("In no event shall application of 'best available control technology' result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 [*new source standards*] or 7412 [hazardous pollutant standards] of this title.") (brackets in original; emphasis added); *New York v. EPA*, 413 F.3d 3, 13 (D.C. Cir. 2005) (same); *United States v. Ameren Missouri*, 421 F. Supp. 3d 729, 754 (E.D. Mo. 2019) ("An applicable NSPS serves as a 'floor' for the emission limit established as BACT.").

The analogous definition for standards applicable to new and modified sources in areas designated "nonattainment" for ambient air quality standards – the "lowest achievable emission rate" – confirms this.

It provides that "[i]n no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under *applicable new source* standards of performance." 42 U.S.C. § 7501(3) (emphasis added); *New York*, 413 F.3d at 13 ("At a minimum, [lowest achievable emission rate] and BACT are as restrictive as NSPS.").

Even if EPA were correct that the section 169 cross-reference refers to *all* section 111 standards, and not just those for new sources, this would merely provide that application of BACT shall not allow emissions in excess of what would be authorized under an applicable section 111(b) or 111(d) standard. Thus, if BACT should require a technology-based standard of 1 ton per hour for a source, that would not allow the source to violate a standard established pursuant to section 111(d), which required it to surrender an allowance for each ton emitted. Assuming the source held 5,000 allowances for a given year, then it could emit no more than 5,000 tons that year, notwithstanding that 1 ton per hour multiplied by the total number of hours in a year equals 8,760. Section 169 therefore provides no support for EPA's view that section 111(d) unambiguously limits the best system to measures applied to an individual source.

III. Reliance on Generation Shifting Is Consistent with the Clean Air Act's Expansive Language and the Unique Context of Power Sector CO_2 Emissions

EPA and its supporters argue that Congress cannot have intended to give EPA authority to issue guidelines premised on generation shifting and that, if it had meant to do so, it would have said so more clearly. EPA Br. at 50; State and Industry Intervenors' Br. at 41. This argument fails.

Section 111 must be read in light of the characteristics of each source category and pollutant to which it is applied. To be sure, climate change and CO_2 emissions from power plants were not front of mind for Congress when it enacted section 111. But the Supreme Court has since decided that such emissions are clearly addressed by the Clean Air Act, and by section 111 in particular. *Massachusetts v. EPA,* 549 U.S. 497, 532 (2007); *Am. Elec. Power v. Connecticut*, 564 U.S. 410, 425 (2011) ("*AEP*").

It is of no consequence whether the members of Congress who enacted section 111 would have expected that the "best system" might include generation shifting. Just this year, in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), the Supreme Court cited Justice Scalia and Bryan Garner's *Reading Law: The Interpretation of Legal Texts 101* for the

proposition that "unexpected applications of broad language reflect only Congress's 'presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions.'" 140 S. Ct. at 1749. Congress's use of the broad term "best system of emission reduction" in section 111 encompasses much more than physical controls installed at an individual plant. EPA's stilted reading of this provision to exclude the actual, demonstrated system the power sector is using to reduce its emissions of CO_2 amounts to an ad hoc exception.

EPA and its supporters are mistaken to argue that Petitioners' interpretation of the word "system" would confer vast powers on EPA, thus hiding an elephant in a mousehole. EPA Br. at 145; State and Industry Intervenors' Br. at 24-26. Even if we assume that generation shifting is the elephant EPA claims, in *Bostock*, the Supreme Court rejected the "no-elephant-in-mouseholes canon" as a basis for constraining interpretation of the statutory text because Title VII was a major piece of federal civil rights legislation. 140 S.Ct. at 1753. Here, likewise, the Clean Air Act is a foundational environmental law, and the broad statutory term "system" produces the general coverage intended by Congress, "confer[ring] the flexibility necessary to forestall . . .

obsolescence." *Massachusetts*, 549 U.S. at 532. It can therefore easily bear the weight Petitioners place on it.

EPA's arguments also reflect a fundamental misunderstanding of the power sector. Generation shifting is not, as EPA contends, a "Rube-Goldberg" approach. EPA Br. at 89. Rather, it is *the* fundamental mechanism by which electricity supply and demand are balanced and the grid operates. *See* Grid Experts Amici Brief at 12-13. It is also the primary demonstrated system that all power companies are actually using to reduce CO_2 emissions cost-effectively. It would therefore be reasonable for EPA to interpret the "best system" which "has been adequately demonstrated" to include generation shifting. *See AEP*, 564 U.S. at 426 ("Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants").

Finally, EPA repeatedly characterizes generation shifting and emissions trading as "novel" under section 111. EPA Br. at 56, 70, 105. This is plainly false. EPA previously promulgated the Clean Air Mercury Rule for this specific sector under section 111(d), which EPA then read to "readily accommodate a cap-and-trade program" that it acknowledged would trigger "dispatch changes." 70 Fed. Reg. 28,606, 28,616-17, 28,619

(May 18, 2005) (vacated on other grounds); *see also* 40 C.F.R. § 60.33b(d)(2) (authorizing states to allow municipal waste combustors to engage in trading). The fact that none of the other very few section 111(d) guidelines "on the books" were premised upon generation shifting proves nothing, given the very different source categories and pollutants they addressed and the fact that four of those five guidelines were promulgated more than 40 years ago. EPA Br. at 241.

EPA has long relied on emissions trading and generation shifting as the basis of many other Clean Air Act programs for the power sector. For example, when EPA adopted the Cross-State Air Pollution Rule, it rejected "a direct control approach [that] would directly regulate individual sources by setting unit-level emission rate limits," because it would result in "fewer emission reductions and higher costs" than the selected trading remedy. 76 Fed. Reg. 48,208, 48,273 (Aug. 8, 2011). EPA specifically emphasized that compliance could be achieved through "increased dispatch of lower-emitting generation." 76 Fed. Reg. at 48,252.

In sum, generation shifting is not, as EPA would have it, a "radical new approach." EPA Br. at 5. It is how the electricity sector matches

supply and demand every day, has served as the basis for prior regulations addressing this sector under section 111(d), and is the actual system being used to reduce power-sector CO_2 emissions.

IV. The Statute Does Not Unambiguously Prohibit Trading or Averaging As a Means of Compliance

EPA's conclusion that section 111 unambiguously prohibits States from adopting trading as a means of compliance underscores how extreme and crabbed its reading of the statute is. Again, the question here is *not* whether EPA could reasonably adopt such a restriction, but rather whether section 111(d) clearly mandates it.

EPA's conjuring of this restriction requires it to omit key statutory text. According to EPA, "state plans must establish standards of performance—which by definition 'reflects . . . the application of the best system of emission reduction.'" 84 Fed. Reg. at 32,557 (emphasis omitted). The text omitted by EPA through use of the ellipsis provides that the standard must "reflect[] the *degree of emission limitation achievable through* the application of the best system . . . ." 42 U.S.C. § 7411(a)(1) (emphasis added). It need not reflect application of the best system itself. By relying upon this omission to fabricate "a legal

constraint . . . that is simply not there," *NARUC v. Interstate Commerce Comm'n*, 41 F.3d 721, 728 (D.C. Cir. 1994), EPA acted unlawfully.

In defense of its position, EPA pummels a straw man. Petitioners did not make the "breathtaking" argument that section 111(d) incorporated section 110 "as a whole." EPA Br. at 246. Rather, Petitioners argue that by requiring EPA to "establish a procedure similar to that provided by section [110] under which each State shall submit to the Administrator a plan," 42 U.S.C. § 7411(d), Congress intended section 111(d) guidelines to reflect section 110's cooperative federalist framework. Under this framework, EPA has long allowed states to utilize trading. The argument that section 111 *unambiguously* prohibits trading is untenable, given that EPA previously has allowed trading for this source category under section 111(d) itself and more broadly in state plans under section 110's "procedure."

EPA's conclusion that the statute plainly prohibits States from relying on trading is infected by the same "wrong interpretive turn" that led it to conclude that the best system must be limited to measures that can be applied at and to an individual power plant. *UARG*, 573 U.S. at 328. The statute mandates neither conclusion. The Court must therefore

remand to EPA to exercise the full range of discretion afforded by section 111, "free from its erroneous conception of the bounds of the law." *Prill*, 755 F.2d at 942.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32 of the Federal Rules of Appellate Procedure and the Circuit Rules of this Court, I hereby certify that the foregoing Brief of Petitioners Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Power Companies Climate Coalition, Public Service Enterprise Group Incorporated, and Sacramento Municipal Utility District complies with the type-volume limitations of the Court's January 31, 2020, Order (Document #1826621) because it contains 3,000 words as counted by the word-processing system used to prepare this brief.

/s/ Kevin Poloncarz
Kevin Poloncarz

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Kevin Poloncarz
Kevin Poloncarz